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No. 06-_____

IN THE
Supreme Court of the United States

SERGIO BANDA-ORTIZ,

Petitioner,

v.

ALBERTO R. GONZALES, UNITED STATES ATTORNEY
GENERAL,

Respondent.

**On Petition for a Writ of Certiorari
to the United States Court of Appeals
for the Fifth Circuit**

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether the United States Court of Appeals for the Fifth Circuit (now joined by the United States Court of Appeals for the Fourth Circuit) correctly held, in direct conflict with the United States Courts of Appeals for the Third, Eighth, Ninth, and Eleventh Circuits, that a timely-filed motion to reopen removal proceedings before the Board of Immigration Appeals does not toll an alien's previously-established voluntary-departure period, such that a grant of voluntary departure will virtually always require the forfeiture of an alien's statutory right to seek reopening of the removal proceedings.

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PETITION FOR A WRIT OF CERTIORARI

Sergio Banda-Ortiz respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Fifth Circuit.

OPINIONS BELOW

The decision of the Immigration Judge (“IJ”) (Pet. App. 28a-31a) and the orders of the Board of Immigration Appeals (“BIA”) (Pet. App. 25a-27a; 32a-33a) are unreported.

The divided opinion of the United States Court of Appeals for the Fifth Circuit is reported at 445 F.3d 387 (Pet. App. 8a-24a). The Fifth Circuit’s order denying rehearing and rehearing *en banc* and the accompanying dissent of Judge Smith, joined by Chief Judge Jones and Judges Benavides, Stewart, and Dennis from the denial are reported at 458 F.3d 367 (Pet. App. 6a-7a).

JURISDICTION

The opinion of the United States Court of Appeals for the Fifth Circuit was issued on March 28, 2006. Pet. App. 8a-24a. The Court of Appeals’ order and opinion denying Mr. Banda-Ortiz’s petition for rehearing *en banc* was issued on July 26, 2006. Pet. App. 6a-7a. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

STATUTORY AND REGULATORY PROVISIONS INVOLVED

The principal statutory provisions involved are 8 U.S.C. § 1229a and 8 U.S.C. § 1229c; the principal regulations involved are 8 C.F.R. § 1003.2 and 8 C.F.R. § 1240.26 and, all of which are set out in the Appendix to this petition. Pet. App. 1a-5a.

STATEMENT OF THE CASE

In several provisions of the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (“IIRIRA”), Pub. L. No. 104-208, 110 Stat. 3009 (1996) (amended by the REAL ID Act of 2005, Pub. L. No. 109-13, 119 Stat. 302

(2005)), Congress created statutory rights for aliens facing removal to seek authorization to depart this country voluntarily and also to move to reopen their removal proceedings in light of newly-obtained evidence. In many instances, an alien will seek to do both.

Until the decision of the Fifth Circuit's panel in this case, every federal court of appeals to address whether Congress intended to permit an alien to exercise both statutory rights, by tolling the usually very short voluntary-departure period while a motion to reopen is pending, held that federal law requires such tolling. Since the panel's decision, the Fourth Circuit has joined the Fifth Circuit in deepening the split on this issue. Thus, at present, four courts of appeals have held that a timely-filed motion to reopen removal proceedings before the BIA tolls an alien's previously-established voluntary-departure period, while two courts of appeals, including the Fifth Circuit, have reached the exact opposite conclusion. As explained by the dissent from the denial below of rehearing *en banc*, this circuit split is particularly troubling given that the Fifth Circuit has "one of the largest immigration dockets" and "the importance of uniformity of federal law and consistency in enforcement of immigration laws." Pet. App. 6a-7a.

A. Statutory Background

The interaction of several statutory and regulatory provisions is at issue in this case. Congress has provided that, rather than face removal, an alien may request to be allowed to depart voluntarily: "The Attorney General may permit an alien voluntarily to depart the United States at the alien's own expense." 8 U.S.C. § 1229c(a)(1). Under the currently-effective statute, such a voluntary-departure period is short in duration. "Permission to depart voluntarily under this subsection shall not be valid for a period exceeding 60 days." *Id.* § 1229c(b)(2). Moreover, failure to depart the country within the time allowed for voluntary departure

renders an alien ineligible for ten years for cancellation of removal. *Id.* § 1229c(d); *see also* 8 C.F.R. § 1240.26(a).

In another section of IIRIRA, Congress has also provided aliens with a statutory right to seek to reopen removal proceedings before the BIA: “An alien may file one motion to reopen proceedings.” 8 U.S.C. § 1229a(c)(6)(A). “[T]he motion to reopen shall be filed within 90 days of the date of entry of a final administrative order of removal.” *Id.* § 1229a(c)(7)(C)(i). The BIA’s implementing regulations further provide that if an alien leaves the country within the period allowed for voluntary departure, he forfeits any pending motion to reopen. *See* 8 C.F.R. § 1003.2(d).

B. Immigration Proceedings Below

Sergio Banda-Ortiz, a citizen of Mexico, entered the United States in 1989. Pet. App. 8a. More than a decade later, in March 2000, he was charged with removability under 8 U.S.C. § 1182(a)(6)(A)(i), as an alien present in the United States without having been admitted or paroled. Pet. App. 8a. Mr. Banda-Ortiz conceded removability but applied for cancellation of removal under 8 U.S.C. § 1229b(b)(1)(D), given the “exceptional and extremely unusual hardship” of separating him from his family, which includes his two children who are United States citizens. Pet. App. 8a. In the alternative, Mr. Banda-Ortiz requested voluntary departure under 8 U.S.C. § 1229c(b)(1)(D). Pet. App. 8a.

The IJ denied cancellation of removal, but granted Mr. Banda-Ortiz’s request for voluntary departure. Pet. App. 8a. The BIA affirmed and granted him thirty days to depart the country voluntarily. Pet. App. 8a-9a. Rather than departing immediately, Mr. Banda-Ortiz moved to reopen his removal proceedings to introduce substantial new evidence of hardship to his family that would result from his departure. Pet. App. 9a. The BIA granted the motion to reopen and remanded the case to the IJ for consideration of this new evidence. Pet. App. 9a. On remand, however, the IJ, *sua*

sponte, found that Mr. Banda-Ortiz was ineligible for cancellation of removal under 8 U.S.C. § 1229c(d) because he had failed to voluntarily depart the country during the 30-day period previously established by the BIA. Pet. App. 9a. The BIA subsequently affirmed the IJ's decision, and held that it had erred in initially granting the motion to reopen. Pet. App. 9a. Proceeding *pro se*, Mr. Banda-Ortiz filed a timely Petition for Review in the Court of Appeals for the Fifth Circuit.

C. The Panel Decision Below

On appeal, a divided panel of the Court of Appeals for the Fifth Circuit held that a timely-filed motion to reopen does not toll an alien's voluntary-departure period. The panel found that since "[v]oluntary departure is the result of an agreed-upon exchange of benefits between an alien and the Government," it is appropriate for the alien to incur the cost of forfeiting his right to move to reopen removal proceedings if he does not depart during a previously-established voluntary-departure period. Pet. App. 11a-12a. The panel also determined that it had no authority to extend the statutory "limits on the length" of voluntary departure periods, reasoning that "tolling would effectively extend the validity of [Mr. Banda-Ortiz's] voluntary departure period well beyond the sixty days that Congress has authorized" and that "a judicial extension of the period of voluntary departure" would conflict with federal regulations reposing the authority to change departure deadlines with the executive branch. Pet. App. 13a. The panel thus "decline[d] to read into 8 U.S.C. § 1129c(d) the requirement that the BIA automatically toll an alien's voluntary departure period during the pendency of a motion to reopen." Pet. App. 14a.

Judge Jerry E. Smith dissented, emphasizing that "the reasons offered by the majority cannot overcome the 'high hurdle' of preserving uniformity of the circuits," and noting the potential "mischief caused by [the] panel majority's decision." Pet. App. 15a; 23a. Judge Smith explained that

by refusing to “defer[] to the accumulated wisdom of our sister circuits,” Pet. App. 24a, the panel opinion conflicts with existing opinions of all other federal courts of appeals to have considered the issue. See *Kanivets v. Gonzales*, 424 F.3d 330 (3d Cir. 2005); *Sidikhouya v. Gonzales*, 407 F.3d 950 (8th Cir. 2005); *Azarte v. Ashcroft*, 394 F.3d 1278 (9th Cir. 2005). These courts have all held that tolling of the voluntary-departure period while a timely motion to reopen is pending is necessary to “avoid creating an incompatibility in the statutory scheme, to implement a workable procedure for motions to reopen in cases in which aliens are granted voluntary departure, and to effectuate the [congressional] purposes of the [relevant] statutory provisions.” *Azarte*, 394 F.3d at 1289.

Judge Smith thus embraced the approach taken by the other federal circuits at that point to have addressed the issue that tolling “accords with all of Congress’s objectives in IIRIRA. It preserves the right of all removable aliens to file a single, good-faith motion to reopen after a final adjudicative order of the BIA. It also allows aliens to seek voluntary departure without fear of surrendering other avenues of procedural relief.” Pet. App. 19a-20a. Judge Smith also noted that the rule adopted by the panel majority is “harsh” as it “operates to disadvantage those aliens whose good behavior has entitled them to the solicitude of the law of voluntary departure.” Pet. App. 18a.

D. The Fifth Circuit’s Denial of Rehearing *En Banc*

On April 17, 2006, represented by *pro bono* counsel, Mr. Banda-Ortiz moved for rehearing *en banc* of the panel’s decision. On April 20, 2006, the Fifth Circuit requested a response to the petition, which the Government filed on June 15, 2006.

On July 26, 2006, the Fifth Circuit denied the petition for rehearing and rehearing *en banc*. Pet. App. 6a-7a. Judge Smith, joined by Chief Judge Jones and Judges Benavides, Stewart, and Dennis, dissented. Pet. App. 6a-7a. The

dissent emphasized that the panel's decision created a split between the federal courts of appeals. "The panel was split, and at the time when the majority and dissenting opinions were filed, the only circuits to have considered the issue had ruled for the alien. While this case was pending on petition for rehearing en banc, yet another circuit joined that list. *See Ugokwe v. United States Attorney General*, [453 F.3d 1325 (11th Cir. 2006)]." Pet. App. 7a.

The dissent also observed that the circuit split is particularly troubling on this issue given that the Fifth Circuit has "one of the largest immigration dockets" and "the importance of 'uniformity of federal law and consistency in enforcement of immigration laws.'" Pet. App. 7a (quoting *Renteria-Gonzales v. INS*, 322 F.3d 804, 814 (5th Cir. 2002)).

Mr. Banda-Ortiz now petitions this Court for a writ of certiorari.

REASONS FOR GRANTING THE WRIT

The Court should grant the petition for three reasons:

First, the courts of appeals are split 4-2 on whether a timely-filed motion to reopen proceedings before the BIA tolls an alien's previously-established voluntary-departure period, with the majority holding that such tolling is required to give meaningful effect to all of the relevant provisions of the immigration laws. This Court's intervention is necessary to resolve the conflict among the courts of appeals.

Second, this case raises an important and recurring question of immigration law, an area of law that this Court has identified as in particular need of national uniformity. Indeed, the precise question in this case is of exceptional national importance—whether aliens will be treated uniformly with regard to their statutory rights to seek both voluntary departure and reopening of removal proceedings, or whether those aliens within the jurisdiction of two courts of appeals will be unable to avail themselves of the statutory

right to reopen and thus will be treated more harshly than aliens in the rest of the country.

Third, the erroneous decision below is inconsistent with the text of the relevant statutory provisions and is plainly contrary to congressional intent. Instead of harmonizing the relevant provisions of the immigration laws, the decision below erroneously renders certain of those provisions devoid of any meaningful effect.

I. THE COURTS OF APPEALS ARE DEEPLY SPLIT ON WHETHER A TIMELY FILED MOTION TO REOPEN TOLLS AN ALIEN'S VOLUNTARY-DEPARTURE PERIOD

This case presents this Court with a well-developed 4-2 conflict between the courts of appeals, which are now deeply split on whether a timely filed motion to reopen tolls an alien's voluntary-departure period. In well-reasoned and thorough opinions, four courts of appeals, the Third, Eighth, Ninth, and Eleventh Circuits, have held that federal law requires such tolling. *See Kanivets*, 424 F.3d 330; *Sidikhouya*, 407 F.3d 950; *Azarte*, 394 F.3d 1278; *Ugokwe v. United States Attorney General*, 453 F.3d 1325 (11th Cir. 2006).¹ On the other hand, the Fifth Circuit's panel majority as well as the Fourth Circuit have explicitly disagreed with these decisions. Pet. App. 6a-7a (emphasizing the then 4-1 split (now 4-2), in the courts of appeals); *Dekoladenu v. Gonzales*, 459 F.3d 500 (4th Cir. 2006). This 4-2 conflict is squarely presented and ripe for this Court's immediate resolution.

¹ The Seventh Circuit, without deciding the issue, has noted the depth of the current split and explained that "several of our sister circuits" have allowed tolling while a motion to reopen was pending. *Hadayat v. Gonzales*, 458 F.3d 659, 664 (7th Cir. 2006) (citing *Kanivets*, *Sidikhouya*, *Ugokwe*, and noting disagreement by *Banda-Ortiz*).

The Fifth Circuit's decision conflicts with the Ninth Circuit's decision in *Azarte*, 394 F.3d 1278. There, the Ninth Circuit exhaustively examined the history of motions to reopen, which allow aliens to present new information relevant to their immigration proceedings, and of the voluntary-departure procedure, which reduces deportation costs and provides aliens with a "mechanism . . . to leave the country without being subjected to the stigma or bars to future relief that are part of the sanction of deportation." *Id.* at 1283-84. In reviewing the statutory scheme "as a whole," the court concluded that failure to toll the voluntary-departure period while a motion to reopen is pending "deprives the motion to reopen provision of meaning by eliminating the availability of such motions to those granted voluntary departure." *Id.* at 1288. The court found that tolling, by contrast, "would effectuate both statutory provisions. IJs and the BIA could still grant voluntary-departure periods of up to 60 days only, but then, if that period were tolled, they would retain the authority Congress intended: to determine one non-frivolous motion to reopen." *Id.* Finally, the court found "absurd the proposition that Congress, while expressly codifying the tradition of motions to reopen, intended *sub silentio* to preclude their availability in a significant number of cases, likely a substantial majority." *Id.* at 1289; *see also Barroso v. Gonzales*, 429 F.3d 1195, 1205-06 (9th Cir. 2005) (reaffirming *Azarte* and holding that tolling is automatic even where an alien does not request a stay of removal).

The Fifth Circuit's decision also conflicts with the Eighth Circuit's decision in *Sidikhouya*, 407 F.3d 950, where the Eighth Circuit adopted the Ninth Circuit's decision in *Azarte*. There, the court agreed that without tolling, "the large class of aliens who are granted voluntary departure are functionally deprived of their statutory right to file a motion to reopen." 407 F.3d at 952. Thus, "[t]o give effect to both the voluntary departure and motion to reopen statutes," the Eighth Circuit adopted *Azarte*'s rule that "when a motion is

filed within the voluntary departure period,” it “is tolled during the time the BIA is considering the motion to reopen.” *Id.*

The Fifth Circuit’s decision also conflicts with the Third Circuit’s decision in *Kanivets*, 424 F.3d 330. There, the Third Circuit adopted the reasoning of the Ninth Circuit’s decision in *Azarte* and of the Eighth Circuit’s decision in *Sidikhouya*, and held that because *Kanivets* “timely filed his petition for reopening, the BIA should decide his motion to reopen on the merits.” *Id.* at 336. The court emphasized that any other interpretation creates a “Catch-22” situation and agreed with *Azarte* that it was “absurd to believe that Congress, in providing for petitions to reopen, would intend to preclude their adjudication by invocation of the voluntary departure limitation.” *Id.* at 334-35.

The Fifth Circuit’s decision also conflicts with the Eleventh Circuit’s recent decision in *Ugokwe*, 453 F.3d 1325. Deciding the case while the petition for rehearing *en banc* was pending in the Fifth Circuit, the Eleventh Circuit adopted “the rationale of Judge Smith and the Third, Eighth, and Ninth Circuits.” *Id.* at 1330. Explicitly disagreeing with the Fifth Circuit’s panel majority, the court explained that “[b]ecause *Ugokwe*’s case clearly involves both the voluntary departure and motion to reopen statutes, we cannot, as did the Fifth Circuit, exclusively focus on the voluntary departure standards and ignore the motion to reopen provisions.” *Id.* The Eleventh Circuit reasoned that the interpretation adopted by the BIA and the Fifth Circuit would place *Ugokwe* in an untenable position: “If the alien leaves during her voluntary departure period, she forfeits her motion to reopen . . . Yet, if she stays she would have then violated the voluntary departure period and therefore would be ineligible to obtain the relief sought in her motion to reopen.” *Id.* at 1331. Accordingly, the Eleventh Circuit concluded that such “interpretation creates an exception to Congress’s clearly stated language in 8 U.S.C. § 1229a(c)(7), which grants aliens the right to file one motion to reopen,

with no mention of an exception for those in a period of voluntary departure.” *Id.* Thus, “[t]o accept the BIA’s position here would deprive a petitioner in Ugokwe’s circumstance of all of the statutory rights granted to her by Congress.” *Id.*

The Fifth Circuit’s decision is, however, consistent with the recent decision of the Fourth Circuit in *Dekoladenu v. Gonzales*, 459 F.3d 500 (4th Cir. 2006). There, the Fourth Circuit held that the relevant statutory provisions “clear[ly and] explicitly limit the time allowed for voluntary departure and do not allow for judicial tolling of these limits.” *Id.* at 504. Disagreeing with the Ninth Circuit’s approach in *Azarte*, the court emphasized “the well-established canon of statutory construction that ‘a specific statutory provision controls a more general one.’” *Id.* at 505. The court noted that “[t]he voluntary departure provision applies to *certain* removable aliens, *i.e.*, those ‘not deportable under section 1227(a)(2)(A)(iii) or section 1227(a)(4)(B),’ while the motion to reopen provision applies to *all* aliens subject to removal.” *Id.* at 505-06. Thus, the court reasoned that the “apparent conflict” referenced in *Azarte* does not exist because “the more specific voluntary departure provision governs in those limited situations in which it applies.” *Id.* at 506. The court further explained that its interpretation “gives effect to both provisions” because “[a] motion to reopen remains available to all aliens, but an alien who requests voluntary departure will forfeit his right to a decision on his motion to reopen if the IJ grants his request.” *Id.* The court also defended the equities of its interpretation: “Because voluntary departure is a privilege that is only available to a subset of removable aliens, it is neither ‘absurd’ nor ‘nonsensical’ to require aliens who wish to reap the benefits of voluntary departure to give up their right to a resolution of a motion to reopen.” *Id.* The court also noted its concern that “the *Azarte* approach . . . would have the effect of rendering the time limits for voluntary departure meaningless.” *Id.*

In light of these cases, the conflict on this question is well-developed: Courts of appeals on both sides of the issue have carefully examined the relevant statutory provisions, and have engaged a variety of interpretive tools to ascertain the correct rule. They have also thoroughly scrutinized and responded to the reasoning of the courts and judges on the other side of the split. Nothing would be gained from further percolation in the lower courts. At this point, this Court's immediate intervention is necessary to restore national uniformity to the administration of the immigration laws and this case is an ideal vehicle for doing so.

II. THE QUESTION PRESENTED IS OF GREAT NATIONAL IMPORTANCE, AFFECTING THE UNIFORM ADMINISTRATION OF THE NATION'S IMMIGRATION LAWS AND AFFECTING A SUBSTANTIAL NUMBER OF IMMIGRATION CASES

The question presented involves a question of great national importance and affects a substantial number of immigration cases. That six courts of appeals have decided this question, and another has noted the split, *see* note 1, *supra*, within less than two years of the first opinion addressing the question (the Ninth Circuit's opinion in *Azarte*), confirms its present-day importance and recurrence. Accordingly, this Court's intervention is now necessary to resolve the split and to ensure that the immigration laws are uniformly administered throughout the United States. Moreover, the proposed immigration legislation that has been pending in Congress would not affect this case and does not diminish the importance or timeliness of the question presented.

A. Uniformity Is Imperative In Administering The Immigration Laws Throughout The Nation

This Court has made clear that the immigration laws governing access into the country as a whole should be uniformly interpreted and administered because of "the

Nation's need to speak with one voice in immigration matters." *Zadvydas v. Davis*, 533 U.S. 678, 700-01 (2001) (adopting, "for the sake of *uniform* administration in the federal courts," as "reasonable" a six-month period for detention of aliens under a final order of removal, following a 90-day statutory "removal period," after which they can challenge their detention) (emphasis added). This Court's "one voice" requirement recognizes that immigration policy affects our relations with other nations and thus it must, like other aspects of foreign policy, be exercised uniformly by the federal government. *Compare Am. Ins. Ass'n v. Garamendi*, 539 U.S. 396, 413-14 (2003) (noting "the concern for *uniformity* in this nation's dealings with foreign nations that animated the Constitution's allocation of the foreign relations power to the National Government in the first place") (emphasis added) (internal quotations omitted), *with* U.S. CONST. ART. I, § 8, cl. 4 ("The Congress shall have the power . . . to establish a *uniform* rule of Naturalization.") (emphasis added). As such, the federal courts of appeals have recognized that avoiding "circuit splits" is particularly critical in this area of the law given "the importance of uniformity of federal law and consistency in enforcement of immigration laws." Pet. App. 7a (quoting *Renteria-Gonzales v. INS*, 322 F.3d 804, 814 (5th Cir. 2002)); *see also Jaramillo v. INS*, 1 F.3d 1149, 1155 (11th Cir. 1993) (en banc) (avoiding a circuit split on an immigration issue and noting that "[n]ot only does our conclusion today help heal an intercircuit split, it also will help achieve nationwide uniformity in an area of the law where uniformity is particularly important").²

² *See also Aguirre v. INS*, 79 F.3d 315, 317 (2d Cir. 1996) (noting "the interests of nationwide uniformity [in the administration of immigration laws]"); *Gerbier v. Holmes*, 280 F.3d 297, 311 (3d Cir. 2002) (recognizing "the need for uniformity in the immigration context"); *Rosendo-Ramirez v. INS*, 32 F.3d 1085, 1091 (7th Cir. 1994) ("National

The circuit split created by this case potentially affects a significant percentage of all cases before the courts of appeals. As a preliminary matter, over the past several years “the U.S. Courts of Appeals have seen a dramatic increase in immigration cases. More people than ever before are petitioning the courts to review decisions of the Board of Immigration Appeals. . . . The result is that the courts of appeals are receiving about five times as many petitions for review today as they did before 2002.” John R.B. Palmer, *et al.*, *Why Are So Many People Challenging Board of Immigration Appeals Decisions in Federal Court? An Empirical Analysis of the Recent Surge in Petitions for Review*, 20 GEO. IMMIGR. L.J. 1, 3-4 (2005). In 2005 alone, appeals of BIA decisions “increased 14 percent to 12,349,” which made these cases nearly 2 percent of the entire caseload of the federal courts of appeals. *Judicial Business of the United States Courts 2005*, available at <http://www.uscourts.gov/judbus2005/front/judicialbusiness.pdf> (last visited Sept. 28, 2006).

In light of the split on the question presented by this case, the disuniform access that individual litigants will have to judicial resources is very significant. It is widely known, and was recognized by the several judges dissenting from denial of rehearing *en banc* in this case, that the Fifth Circuit and the Ninth Circuit, the leaders of the two sides of the split, handle a large percentage of immigration cases in the country. Pet. App. 7a (emphasizing that the Fifth Circuit has “one of the largest immigration dockets”); *see also* Marcia Coyle, “*Court Paralysis Warned if Federal Budget Frozen*,”

uniformity in the immigration and naturalization laws is paramount: rarely is the vision of a unitary nation so pronounced as in the laws that determine who may cross our national borders and who may become a citizen.”); *Cazarez-Gutierrez v. Ashcroft*, 382 F.3d 905, 910-11 (9th Cir. 2004) (relying on “the presumption that [immigration] laws should be interpreted to be nationally uniform”).

FULTON CTY. DAILY REP., Nov. 15, 2004 (identifying the Fifth and Ninth Circuits' "huge influx of immigration appeals" as one of the significant "caseload problems" facing our federal appellate courts).

The circuit split in this area of law is particularly troubling because, as Ninth Circuit Judge Carlos Bea, has noted, it will lead to "forum shopping." *Hearing Before the United States Senate Judiciary Comm. on the Judicial Review of Immigration Matters*, 109th Cong. 7-9 (2006) (observing the significantly more favorable legal regime toward aliens in the Ninth Circuit and noting that "[i]f I were representing one of my old clients, I would do everything in the world to have them given up and proceed in the 9th Circuit rather than in the 5th Circuit"). This result is antithetical to the goals of "one voice" in and uniform administration of our nation's immigration laws. *See Zadvydas*, 533 U.S. at 701.

B. Aliens Throughout The Country Should Enjoy The Same Statutory Rights

The question presented has wide-spread and serious consequences for a substantial number of aliens in the Fifth and Fourth Circuits, who will be unable to avail themselves of their statutory right to reopen and thus will be treated differently and more harshly than aliens in the rest of the country. *See* Pet. App. 6a (Smith, J., joined by Jones, C.J., Benavides, Stewart and Dennis, J.J., dissenting)] ("The question raised here . . . affects a large number of aliens in this circuit and elsewhere."). Such aliens have been placed in a "Scylla and Charybdis" dilemma, by making them select between foregoing voluntary departure entirely and seeking voluntary departure, which, if granted, would in most circumstances forfeit their rights to petition to reopen their immigration proceedings to seek cancellation of removal. Pet. App. 23a. Indeed, as Judge Smith noted, "one predictable consequence of today's decision . . . is that the immigration bar will hesitate before requesting voluntary departure because of the now-heightened risk that a

successful request will result in the automatic denial of all forms of discretionary relief.” Pet. App. 23a. But such reluctance would undercut the benefits of voluntary departure that the panel majority itself stressed, such as saving judicial and agency resources in ensuring deportation.

Thus, this Court’s review is warranted to establish uniformity in immigration laws throughout the United States and to ensure that immigrants in the Fifth and Fourth Circuits enjoy the same rights as immigrants in the rest of the country.

C. The Proposed Immigration Legislation Does Not Diminish The Importance Of The Question Presented

Before the Fifth Circuit, the Government relied upon the proposed immigration legislation as a reason to deny rehearing *en banc*. However, it is plain at this point that the proposed legislation does not affect the importance of the question presented both because it is unlikely that any immigration legislation will be enacted in the near future and because the proposed legislation would not immediately take effect and would have only prospective application.

First, it is unlikely that any immigration legislation will be passed in the near future. *See* David Nather, *GOP Sees Best in Stuffed Agenda*, CQ WEEKLY, Sept. 4, 2006, at 2300 (“An immigration overhaul is languishing . . . and there is little appetite for striking a deal before the election.”); Fred Hiat, *How to Save Immigration Reform*, WASH. POST, June 26, 2006, at A21 (“Any bill ‘comprehensive’ enough to satisfy the Senate is unlikely to pass muster in the House; anything draconian enough for the House can’t win 60 votes in the Senate.”). Further casting doubt on the likelihood of these bills becoming law, lawmakers have announced that “rather than having a conference with the Senate to negotiate compromise legislation, [Congress] would hold another round of hearings.” Dana Milbank, *It’s Time to Cut and Run From “Cut and Run,”* WASH. POST, June 21, 2006, at A2;

see also Jonathan Weisman and Shailagh Murray, *GOP Plans Hearings on Issue of Immigrants; Field Sessions May Delay Talks on Hill*, WASH. POST, June 21, 2006, at A1 (noting that lawmakers “have largely given up on passing a broad rewrite of the nation’s immigration laws this year”).

Second, the pending legislative proposals would not directly affect this case, and would not affect any of the thousands of pending cases implicated by the question presented or any cases that arise until well after compromise legislation were enacted. At present, there are differing immigration bills passed that would need to be resolved in a conference that has neither taken place nor been scheduled, and which contain language relevant to the question presented in this petition. *See* Comprehensive Immigration Reform Act of 2006, S. 2611, 109th Cong. (2006); Border Protection, Antiterrorism, and Illegal Immigration Control Act of 2005, H.R. 4437, 109th Cong. (2006). These bills contain provisions that would amend 8 U.S.C. § 1229c (governing voluntary departure) and set the timing for the legislation to take effect.

The substantive provision states as follows:

VOLUNTARY DEPARTURE PERIOD NOT AFFECTED- Except as expressly agreed to by the Secretary in writing in the exercise of the Secretary’s discretion before the expiration of the period allowed for voluntary departure, no motion, appeal, application, petition, or petition for review shall affect, reinstate, enjoin, delay, stay, or toll the alien’s obligation to depart from the United States during the period agreed to by the alien and the Secretary.

Notably, the “effective date” provision states that the legislation would not go into effect until 180 days *after* the bill’s enactment by Congress:

The amendments made by this section shall apply with respect to all orders granting voluntary departure under section 240B of the Immigration and Nationality Act (8 U.S.C. 1229c) made *on or after the date that is 180 days after the date of the enactment of this Act*.

S. 2611, 109th Cong., § 211(c)(1) (emphasis added); *see also* H.R. 4437, 109th Cong., § 208(d)(1).

Thus, while this proposed language is potentially relevant to future claims of tolling of an alien's voluntary-departure period, the legislation by its own terms would not affect this case or any other case where voluntary departure was granted before the enactment of the bill or during the 180-day period after its enactment. Federal statutes do not generally apply retroactively unless Congress "has expressly prescribed the statute's proper reach," *Martin v. Hadix*, 527 U.S. 343, 352 (1999) (quoting *Landgraf v. USI Film Prods.*, 511 U.S. 244, 280 (1994)). In light of the pending legislation's provision that it would not become effective until 180-days after its enactment, it is plain that it would not apply to this or the thousands of other pending cases affected by the question presented. *See, e.g.*, Pet. App. 8a (noting that Banda-Ortiz received his grant of voluntary departure on August 22, 2002).

III. THE FIFTH CIRCUIT'S DECISION IS PLAINLY WRONG BECAUSE IT CONFLICTS WITH BOTH THE LANGUAGE OF THE RELEVANT STATUTES AND WITH CONGRESSIONAL INTENT

A. The Decision Below Is Inconsistent With The Plain Language Of The Immigration Statutes

The decision below is inconsistent with the relevant statutory language. “The starting point for [the] interpretation of a statute is always its language.” *Cnty. for Creative Non-Violence v. Reid*, 490 U.S. 730, 739 (1989). “When interpreting a statute, the court will not look merely to a particular clause in which general words may be used, but will take in connection with it the whole statute . . . and the objects and policy of the law, . . . and give to it such a construction as will carry into execution the will of the Legislature.” *Kokoszka v. Belford*, 417 U.S. 642, 650 (1974) (internal quotation marks and citation omitted). Analysis of the statutory language demonstrates that the interpretation of the majority of the federal appellate courts to have considered the question presented is correct and that the interpretation of the Fifth Circuit below and the Fourth Circuit is erroneous.

First, the only interpretation that gives full meaning and effect to all of the relevant statutory provisions is one that requires tolling of the voluntary-departure period while a motion to reopen is pending. It has long been considered a “cardinal principle of statutory construction,” *Williams v. Taylor*, 529 U.S. 362, 404 (2000), that it is a court’s duty “to give effect, if possible, to every clause and word of a statute.” *Duncan v. Walker*, 533 U.S. 167, 174 (2001) (quoting *United States v. Menasche*, 348 U.S. 528, 538-39 (1955)). Thus, “[a] statute ought, upon the whole, to be so construed that, if it can be prevented, no clause, sentence, or word shall be superfluous, void or insignificant.” *United States v. Campos-Serrano*, 404 U.S. 293, 301 n.14 (1971);

see also Wash. Market Co. v. Hoffman, 101 U.S. 112, 115-16 (1879) (“As early as in Bacon’s Abridgment, sect. 2, it was said that ‘a statute ought, upon the whole, to be so construed that, if it can be prevented, no clause, sentence, or word shall be superfluous, void, or insignificant.’”). Accordingly, this Court is “reluctan[t] to treat statutory terms as surplusage” in any setting. *Babbitt v. Sweet Home Chapter*, 515 U.S. 687, 698 (1995); *see also Vimar Seguros y Reasuguros, S.A. v. M/V SKY REEFER*, 515 U.S. 528, 533 (1995) (“[W]hen two statutes are capable of co-existence . . . it is the duty of the courts, absent a clearly expressed congressional intention to the contrary, to regard each as effective.”) (internal quotation marks omitted).

The relevant statutory language here makes plain that aliens have the rights both to seek voluntary departure *and* to seek reopening of their immigration proceedings. On the one hand, “[t]he Attorney General may permit an alien voluntarily to depart the United States at the alien’s own expense” 8 U.S.C. § 1229c(a)(1). “Permission to depart voluntarily under this subsection shall not be valid for a period exceeding 60 days.” *Id.* § 1229c(b)(2). Failure to leave the country within the time allowed for voluntary departure renders an alien ineligible for ten years for cancellation of removal. *Id.* § 1229c(d); *see also* 8 C.F.R. § 1240.26(a). On the other hand, “[a]n alien may file one motion to reopen proceedings.” 8 U.S.C. § 1229a(c)(6)(A). “[T]he motion to reopen shall be filed within 90 days of the date of entry of a final administrative order of removal.” *Id.* § 1229a(c)(7)(C)(i). The BIA regulations state that if an alien leaves the country within the period allowed for voluntary departure, he forfeits any pending motion to reopen. *See* 8 C.F.R. § 1003.2(d).

The only plausible way to reconcile these provisions to preserve *both* statutory rights is to construe these provisions to require tolling of any applicable voluntary-departure period while an alien’s motion to reopen proceedings is pending. As Judge Smith recognized, only a tolling rule

“accords with all of Congress’s objectives in IIRIRA.” Pet. App. 19a. A tolling rule “would effectuate both statutory provisions. IJs and the BIA could still grant voluntary-departure periods of up to 60 days only, but then, if that period were tolled, they would retain the authority Congress intended: to determine one non-frivolous motion to reopen.” *Azarte*, 394 F.3d at 1288.

By contrast, the Fifth Circuit panel’s contrary ruling does not give effect to all of the relevant statutory provisions. “[A]n alien who does *not* leave the United States within his voluntary departure period is not eligible for an adjustment of status, but an alien who *does* leave the country within his voluntary departure period forfeits any pending motion to reconsider or reopen which the BIA has not yet decided.” *Barroso*, 429 F.3d at 1201 (emphasis in original). As a result, “[e]ither way, stay or go,” under the panel’s interpretation here, aliens would be “precluded from obtaining a ruling on the merits of their properly filed, timely motion to reopen.” *Azarte*, 394 F.3d at 1282; *Ugokwe*, 453 F.3d at 1331 (same). The Fifth Circuit’s panel’s decision is thus erroneous.

Second, an interpretation requiring tolling is necessary to comply with the canon of statutory construction that ambiguities in immigration statutes must be resolved “in favor of [an alien] because deportation is a drastic measure and at times the equivalent of banishment or exile To construe [a] statutory provision less generously to the alien might find support in logic. But since the stakes are considerable for the individual, we will not assume that Congress meant to trench on [an alien’s] freedom beyond that which is required by the narrowest of several possible meanings of the words used.” *Tan v. Phelan*, 333 U.S. 6, 10 (1948) (internal citation omitted). This canon has been repeatedly applied in this Court’s cases involving immigration laws. *See, e.g., INS v. St. Cyr*, 533 U.S. 289, 320 (2001) (noting that it is a “longstanding principle of statutory construction [that] any ambiguities in deportation

statutes [should be construed] in favor of the alien.”) (quoting *INS v. Cardoza-Fonseca*, 480 U.S. 421, 449 (1987)); *see also INS v. Errico*, 385 U.S. 214, 225 (1966) (“Even if there were some doubt as to the correct construction of the statute, the doubt should be resolved in favor of the alien.”); *Costello v. INS*, 376 U.S. 120, 128 (1964) (same).

In this case, the narrowest and most favorable reading of the statutory language is to permit aliens to meaningfully exercise their statutory rights both to seek voluntary departure *and* to seek reopening of their immigration proceedings. In contrast, the Fifth Circuit’s decision below would prevent “aliens from receiving decisions on their motions to reopen [and] would eliminate” in cases such as this “all possibility of redress if their circumstances changed,” *see Azarte*, 394 F.3d at 1289. Such an approach limits an alien’s freedom in severe ways and penalizes an alien who seeks to exercise fully the statutory rights explicitly granted by Congress. If Congress had intended such a harsh result, “it would have said so.” *Id.* The plain language of the relevant statutory provisions does not mandate that result, and the decision below has improperly required such a result in derogation of the pertinent rules of statutory construction.

Third, the contrary justifications of the Fifth Circuit below and the Fourth Circuit are unpersuasive. To begin with, the Fifth Circuit panel’s concern that tolling could be viewed as contrary to the statutory “limits on the length” of the “voluntary departure” period, Pet. App. 12a; *see also Dekoladenu*, 459 F.3d at 506 (expressing the same concern), is not valid. As Judge Smith noted, courts must “presume the availability of tolling against the government unless Congress provides otherwise.” Pet. App. 22a. Indeed, “[i]t is hornbook law that limitations periods are customarily subject to equitable tolling, unless tolling would be inconsistent with the text of the relevant statute. Congress must be presumed to draft limitations periods in light of this

background principle.” *Young v. United States*, 535 U.S. 43, 49-50 (2002). Therefore, tolling is not contrary to the statutory time limits on voluntary departure:

[T]olling does not *extend* the amount of time granted for voluntary departure. See BLACK’S LAW DICTIONARY (8th ed. 2004) (defining “toll” as “to stop the running of” a time period and an “extension” as “[a] period of additional time to take an action”). “A suspension of a voluntary departure period merely tolls the running of that period; it does not extend it.” *Bocova v. Gonzales*, 412 F.3d 257, 269 (1st Cir. 2005); see also *Desta[v. Ashcroft*, 365 F.3d 741, 747 (9th Cir. 2004)] (“[W]hile we are stopping the clock from running on the time petitioner has to depart voluntarily, we are not adding more time to that clock.”).

Barroso, 429 F.3d at 1206 (emphasis and alterations in original). Thus, the Fifth and the Fourth Circuits’ rejection of tolling, based solely on the statutory language providing a specific length of the voluntary-departure period, is legally incorrect.

Moreover, the Fourth Circuit’s reliance on the canon of statutory construction that “a specific statutory provision controls a more general one,” *Dekoladenu*, 459 F.3d at 505-06, is misplaced here for two reasons. To begin with, the specific-trumps-general canon does not apply unless two statutory provisions are actually in an “irreconcilable” conflict: “The courts are not at liberty to pick and choose among congressional enactments, and when two statutes are capable of co-existence, it is the duty of the courts, absent a clearly expressed congressional intention to the contrary, to regard each as effective.” *Morton v. Mancari*, 417 U.S. 535, 550-51 (1974). Thus, any “intention of the legislature to repeal [a prior provision] must be clear and manifest.” *Id.*

For example, in *Morton*, the Court found no conflict between an Indian-preference statute for Bureau of Indian Affairs hiring and the Equal Employment Opportunities Act (EEOA), which generally bans racial discrimination by the federal government. The Court held that, in light of “the history and purposes of the preference and the unique legal relationship between the Federal Government and tribal Indians,” “[a] provision aimed at furthering Indian self-government by according an employment preference within the BIA for qualified members of the governed group can readily co-exist with a general rule prohibiting employment discrimination on the basis of race.” *Id.* at 550.

Rather, a legislative act may be nullified where a conflict is plainly irreconcilable. Thus, in *Tennessee Valley Authority v. Hill*, 437 U.S. 153 (1978), the Court held that a construction of a dam would have led to “eradication” of an endangered species, the snail darter, and thus, the dam could not be completed in the face of the Endangered Species Act (“ESA”), which commands all federal agencies “to insure that actions authorized, funded, or carried out by them do not jeopardize the continued existence” of an endangered species or “result in the destruction or modification of habitat of such species.” *Id.* at 173. Because the ESA’s “language admit[ted] of no exception,” it was impossible “to regard each [statute] as effective.” *Id.* at 184, 190.

In this case, however, there is no conflict, let alone an “irreconcilable” one, between the “congressional enactments” addressing voluntary departure, 8 U.S.C. § 1229c(a)(1), and motions to reopen, 8 U.S.C. § 1229a(c)(6)(A). See *Morton*, 417 U.S. at 551. These provisions plainly govern *different* conduct in a way that may be reconciled. Voluntary departure procedures presuppose the finality of the determination of the alien’s status and establish a procedure for effectuating the departure. By contrast, provisions addressing reopening proceedings before the BIA set forth the options and procedures for *continuing litigation* over an alien’s

immigration status, and have nothing to do with departure. 8 U.S.C. § 1229a(c)(6)(A). Thus, the provisions address distinct subject matters and different stages of an alien's immigration proceedings. It is only through a BIA regulation, 8 C.F.R. § 1003.2(d), under which voluntary departure forfeits a motion to reopen, that any tension is created. This tension, moreover, is not a "conflict," because it can be easily reconciled by allowing tolling, as the majority of the courts of appeals have concluded. Accordingly, the Fourth Circuit, like the majority of circuits, should have sought to make the two statutory provisions "capable of co-existence," rather than creating an avoidable conflict and then "choosing" the more "specific" one as controlling. *See Morton*, 417 U.S. at 550.

Further, in any event, the specific-trumps-general canon applies only where two statutory provisions govern the same conduct or benefit, and one provision is in fact more specific than the other. For example, in *Morton*, the Court held that the statute granting an employment preference for Indians in the Bureau of Indian Affairs is more "specific" than the EEOA, which generally forbids racial discrimination in federal government employment. 417 U.S. at 550. The statute addressing BIA hiring of Indians is plainly narrower in scope than the EEOA, a statute "of general application," and covers conduct also regulated by the EEOA. *Id.* Therefore, the Court held that the more specific BIA-related statute governed instead of the general provisions of the EEOA. *Id.*³

³ *See also Guidry v. Sheet Metal Workers Nat'l Pension Fund*, 493 U.S. 365, 375-76 (1990) (ERISA's prohibition on pension benefit alienation is more specific than the Labor-Management Reporting and Disclosure Act's provision allowing a private right of action against union officers, who breached their fiduciary duties, to recover damages "or other appropriate relief for the benefit of the labor organization"); *Warren v. North Carolina Dep't of Human Res.*, 65 F.3d 385, 390 (4th

The Fourth Circuit decided that this canon of construction was applicable because the voluntary departure provision applies only to “*certain* removable aliens, *i.e.*, those ‘not deportable under Section 1227(a)(2)(A)(iii) or section 1227(a)(4)(B),’ while the motion to reopen provision applies to *all* aliens subject to removal.” *Dekoladenu*, 459 F.3d at 505-06. In the first place, the voluntary departure provision is not properly characterized as “more specific” than the motion to reopen provision merely because a subset of aliens are disqualified from seeking voluntary departure. More significantly, the Fourth Circuit’s reasoning misses the point of the canon of construction, which applies only to statutory provisions that govern the same conduct or benefit. As explained above, it is plain that the provisions addressing voluntary departure and motions to reopen do not govern the same conduct or benefit. The only interrelationship of those provisions has been created by BIA’s regulation that if an alien leaves the country during the voluntary departure period, he forfeits any pending motion to reopen. 8 C.F.R. § 1003.2(d). This one narrow and discrete point of intersection addresses only the *effect* of an action under one provision (voluntary departure) on the action taken pursuant to a provision (motion to reopen). Thus, these provisions are wholly unlike those in *Morton v. Mancari*, for example, where both statutes governed precisely the same conduct—preferential race hiring by the federal government, but did so at different levels of generality. Nor are the provisions in

Cir. 1995) (cited in *Dekoladenu*, 459 F.3d at 505) (a provision dealing “specifically” with valuation of automobiles is more specific than a provision on “inaccessible resources” due to liens for the purposes of an applicant’s household asset calculation); *Shawnee Tribe v. United States*, 405 F.3d 1121, 1129 (10th Cir. 2005) (cited in *Dekoladenu*, 459 F.3d at 505) (a statute giving discretion to the Secretary of the Army to dispose of a particular property in question in the case is more specific than the obligations imposed by the Property Act setting forth guidelines for property conveyances).

question anything like those in *Warren* and *Shawnee Tribe*, the two cases cited by the Fourth Circuit in *Dekoladenu*. See n.3, *supra*. In *Warren*, both provisions addressed valuation of household income; in *Shawnee Tribe*, both provisions addressed the conveyance of property; and in each case, the more “specific” provisions plainly covered subject matter that was a subset of the subject matter covered by the more general provision. In this case, there is no such overlap.

B. The Decision Below Creates Harsh Consequences Inconsistent With Congressional Intent, As Embodied In The Statutory Scheme

The Fifth Circuit’s decision is also erroneous because it creates harsh consequences by placing an alien in a Catch-22 situation, that Congress could not have intended in creating a statutory scheme allowing for *both* the right to seek voluntary departure and the right to move to reopen.

In asserting that “[v]oluntary departure is the result of an agreed-upon exchange of benefits between an alien and the Government,” the panel found it appropriate for the alien to incur the tremendous cost of forfeiting his right to move to reopen his immigration proceedings if he fails to leave the country by the end of his voluntary-departure period. Pet. App. 11a; *see also Dekoladenu*, 459 F.3d at 506 (calling voluntary departure “a benefit” “only available to a subset of removal aliens”). That period, however, as Judge Smith noted, “will often come too soon for the agency to consider [a motion to reopen] on the merits.” Pet. App. 17a; *see also Dekoladenu*, 459 F.3d at 504 (noting that “[a]s a practical matter, the BIA will rarely reach a decision on a motion to reopen before the end of the voluntary departure period. Thus most aliens who are granted voluntary departure have no meaningful ability to file a motion to reopen when they are seeking one of the forms of relief listed in § 1229c(d)”). But such a harsh approach makes no sense in light of the statutory scheme that provides aliens with both the right to seek voluntary departure to avoid forcible removal and the

right to move to reopen to avoid removal under any conditions.

As the Third, Eighth, Ninth, and Eleventh Circuits, as well as several judges of the Fifth Circuit, have recognized, “[t]o accept [the Fifth Circuit’s] position . . . would deprive a petitioner . . . of *all* of the statutory rights granted to [petitioner] by Congress.” *Ugokwe*, 453 F.3d at 1331 (emphasis added). Thus, imposing such a “Hobson’s choice on aliens facing removal” makes little sense given that Congress specifically codified a right to file a motion to reopen removal proceedings, including those resulting in the grant of a request for voluntary departure, within 90 days. Pet. App. 17a. There is no reason to believe that Congress would have codified such a right “if, in a substantial number of cases, the order of removal itself would result in the forfeiture of the motion.” Pet. App. 18a; *accord Sidikhouya*, 407 F.3d at 952 (an alien “must be afforded an opportunity to receive a ruling on the merits of his timely filed motion to reopen”); *Azarte*, 394 F.3d at 1288-89 (rejecting a contrary interpretation as “absurd”).

Indeed, the Department of Justice (“DOJ”) and BIA themselves have refused to adopt such a one-sided position. In issuing the currently-effective interim rule concerning “the effect of a motion or appeal to the Immigration Court, BIA, or a federal court on any period of voluntary departure already granted,” the DOJ stated:

the Department considered several options, but has not adopted a position The Department has identified three possible options: no tolling of any period of voluntary departure; tolling the voluntary period for any period that an appeal or motion is pending; or setting a brief, fixed period of voluntary departure (for example, 10 days) after an appeal or motion is resolved.

Inspection and Expedited Removal of Aliens; Detention and Removal of Aliens; Conduct of Removal Proceedings; Asylum Procedures, 62 Fed. Reg. 10312-1, 10326 (March 6, 1997). “As the interim rule makes clear, [the DOJ] considers automatic tolling to be a logical resolution to the question of the interrelationship between the statute’s motion to reopen/reconsider and voluntary departure provisions.” *Barroso*, 429 F.3d at 1205. Importantly, “two of the three approaches being considered by the agency contemplate that an alien *always* be allowed to remain in the country until after the motion to reconsider/reopen is decided.” *Id.* (emphasis in original); *see also Azarte*, 394 F.3d at 1299 n.21 (noting that “the interim rule promulgated by the Department of Justice has never been replaced by a final one”).

Accordingly, the panel’s decision is not only inconsistent with the language of the relevant statutes, but it also mandates an extremely harsh result that Congress could not have intended and that not even the DOJ and BIA have adopted.

CONCLUSION

The petition should be granted.

Respectfully submitted,

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