No. 19-442

In the Supreme Court of the United States

OTTO ANAEL PEREZ CASTILLO, PETITIONER

v.

WILLIAM P. BARR, ATTORNEY GENERAL

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

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QUESTION PRESENTED

Whether a court of appeals lacks jurisdiction to review a decision of the Board of Immigration Appeals finding an alien removable and denying an application for relief or protection from removal, but remanding for further consideration of voluntary departure, where the alien fails to file a petition for review within 30 days of the Board's decision denying relief or protection.

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OPINION BELOW

The opinion of the court of appeals (Pet. App. 1a-3a) is not published in the Federal Reporter but is reprinted at 752 Fed. Appx. 501.

JURISDICTION

The judgment of the court of appeals was entered on February 11, 2019. A petition for rehearing was denied on May 31, 2019 (Pet. App. 4a). On August 9, 2019, Justice Kagan extended the time within which to file a petition for a writ of certiorari to and including September 30, 2019, and the petition was filed on that date. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. a. Under the Immigration and Nationality Act (INA), 8 U.S.C. 1101 *et seq.*, a petition for review in a federal court of appeals is the "sole and exclusive means

for judicial review of an order of removal." 8 U.S.C. 1252(a)(5). The courts of appeals' jurisdiction to review such orders is limited to "final order[s] of removal." 8 U.S.C. 1252(a)(1). A removal order becomes "final" for purposes of judicial review upon either "a determination by the Board of Immigration Appeals affirming such order" or "the expiration of the period in which the alien is permitted to seek review of such order" by the Board. 8 U.S.C. 1101(a)(47)(B) (addressing finality of any "order of deportation"); see 8 C.F.R. 1003.39.

The INA authorizes a court of appeals to review a removal order only when the alien files a petition for review "not later than 30 days after the date of the final order of removal." 8 U.S.C. 1252(b)(1). That filing deadline is "mandatory and jurisdictional" and is not subject to equitable exceptions. *Stone* v. *INS*, 514 U.S. 386, 405 (1995) (citation omitted). Review of a final order of removal in the court of appeals encompasses both findings of removability and the denial of any relief or protection from removal sought in the removal proceeding. See *Foti* v. *INS*, 375 U.S. 217, 220-221, 232 (1963).

b. Petitioner entered the United States without inspection around 1987. See Pet. App. 23a; Administrative Record (A.R.) 52, 686, 956. In 2005, he was charged with removability as an alien present in the United States without being inspected or paroled. Pet. App. 21a-22a; A.R. 50-51, 956-957. In proceedings before the immigration judge, he conceded the charge of removability but sought asylum; statutory withholding of removal; protection under the regulations implementing Article 3 of the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (CAT), *adopted* Dec. 10, 1984, S. Treaty Doc. No.

20, 100th Cong., 2d Sess. 6-7 (1988), 1465 U.N.T.S. 114; cancellation of removal; and special rule cancellation under the Nicaraguan Adjustment and Central American Relief Act (NACARA), Pub. L. No. 105-100, Tit. II, 111 Stat. 2193. See Pet. App. 21a; A.R. 51, 70, 77-78. As an alternative, petitioner also filed an application for voluntary departure. Pet. App. 21a; A.R. 50, 70.

2. The immigration judge denied petitioner's applications for relief and protection, and ordered him removed. See Pet. App. 34a-35a; A.R. 50-65, 686-691. The immigration judge also denied voluntary departure because of a prior conviction. See Pet. App. 32a-34a; A.R. 62-63.

On August 8, 2013, the Board dismissed petitioner's appeal in part, but remanded to the immigration judge to reconsider voluntary departure. Pet. App. 11a-14a; see A.R. 13-14, 39-42. The Board affirmed the immigration judge's denial of asylum, Pet. App. 12a, statutory withholding of removal, *id.* at 12a-13a, and protection under the CAT regulations, *id.* at 13a. The Board observed that petitioner had not appealed the denial of cancellation of removal or special rule cancellation under NACARA. *Ibid.* As to voluntary departure, however, the Board found that although petitioner had not demonstrated the requisite five years of good moral character by virtue of his prior conviction at the time of the immigration judge's decision, he had now regained eligibility for voluntary departure. *Ibid.* Accordingly, the Board remanded for further proceedings to consider voluntary departure. *Id.* at 14a. Petitioner did not seek judicial review of the Board's decision.

On remand, the immigration judge granted petitioner's application for voluntary departure. See Pet. App. 7a; A.R. 1. Petitioner sought judicial review in

September 2014—within 30 days of the immigration judge's decision on voluntary departure, but more than a year after the Board's August 2013 decision affirming the denial of asylum, statutory withholding of removal, and protection under the CAT regulations.

3. The court of appeals dismissed the petition for review in an unpublished per curiam disposition. Pet. App. 1a-3a. The court explained that it lacked jurisdiction over the petition because under longstanding circuit precedent, "a [Board] decision affirming a finding of removability that remands to the [immigration judge] only 'to consider the petitioner's eligibility for voluntary departure' [i]s a final order of removal." *Id.* at 2a-3a (brackets and citation omitted). Accordingly, the court held that because petitioner had not filed his petition for review within 30 days of the Board's August 2013 decision, his petition was untimely. *Id.* at 3a.

Petitioner sought rehearing on the ground that in light of the remand to consider voluntary departure, the Board's August 2013 decision was not a final reviewable order. See C.A. Pet. for Reh'g 9-22. In its brief opposing rehearing, the government acknowledged that a bright-line rule treating as nonfinal all Board decisions remanding for any reason would provide consistency and avoid confusion, but also observed that there was no conflict in the court's decisions, and that its consistent precedent "over the course of two decades" provided "clear guidance" to aliens "on seeking judicial review in this narrow circumstance" when the Board remands for the sole purpose of considering voluntary departure. Gov't C.A. Resp. to Pet. for Reh'g 15; see *id.* at 9-16. The court of appeals denied rehearing, with no judge requesting a vote. Pet. App. 4a.

ARGUMENT

Petitioner renews his contention (Pet. 21-34) that the final reviewable order of removal in this case should be the immigration judge's September 2014 decision, rather than the August 2013 decision in which the Board upheld the denial of his applications for asylum, statutory withholding of removal, and protection under the CAT regulations. He further contends (Pet. 11-17) that the courts of appeals have taken conflicting approaches to when a Board decision becomes final for purposes of judicial review. As petitioner observes (Pet. 9-10, 19, 27, 29, 35), the government has taken the position, including in this case below, that an alien should be permitted to obtain review of a Board decision affirming his removability and denying protection from removal once all proceedings before the agency are complete.

Although several courts of appeals have adopted the government's position in cases involving remands to consider statutory withholding of removal or other forms of protection from removal, no court of appeals has done so in the distinct context of remands for the sole purpose of considering voluntary departure. Rather, the courts of appeals have unanimously held that a Board decision affirming an immigration judge's removal order and denying asylum or protection from removal, but remanding solely to consider voluntary departure, is a final order of removal from which the alien has 30 days to petition for review. That rule is easily followed and ensures that aliens, like petitioner, have a full and fair opportunity to seek review in the courts of appeals. It does not preclude the exercise of judicial discretion in appropriate cases to defer review of a removal order while issues concerning voluntary departure remain pending on remand, nor does it prevent the

Attorney General or the Board from adopting different rules governing such proceedings.

The uniform approach of the courts of appeals in the specific context of voluntary departure therefore does not merit this Court's review. This Court recently has denied petitions raising the issue. See *Singh* v. *Sessions*, 137 S. Ct. 2285 (2017) (No. 16-952); *Laurel-Abarca* v. *Sessions*, 137 S. Ct. 2285 (2017) (No. 16-837). The same result is warranted here.

1. Courts of appeals may review only a "final order of removal." 8 U.S.C. 1252(a)(1). An immigration judge's decision that an alien should be removed becomes final when the Board affirms the immigration judge's determination or when the time for administratively appealing that decision has expired. 8 U.S.C. 1101(a)(47)(B); see 8 C.F.R. 1003.39. The court of appeals' conclusion here that a Board decision affirming a finding of removability and denying statutory withholding of removal or other protection from removal is a "final order of removal" under Section 1252(a)(1), even if the Board remands for consideration of voluntary departure, does not warrant review. 8 U.S.C. 1252(a)(1).

a. When the Board remands a case to an immigration judge, the Board's decision ordinarily is not a "final" decision on the alien's removal. Unless the Board explicitly retains jurisdiction or otherwise limits the scope of its remand order, the immigration judge reacquires jurisdiction over the proceedings on remand and may consider new evidence or new requests for relief or protection. See *In re M-D-*, 24 I. & N. Dec. 138, 141 (B.I.A. 2007); see also *Fernandes* v. *Holder*, 619 F.3d 1069, 1074 (9th Cir. 2010). That is especially true in the case of a remand to consider various "impediments to removal" (such as asylum or statutory withholding of

removal) that must be cleared before "a final order of removal [i]s entered." *Lolong* v. *Gonzales*, 484 F.3d 1173, 1177-1178 (9th Cir. 2007) (en banc) (citation omitted); see *Abdisalan* v. *Holder*, 774 F.3d 517, 524 (9th Cir. 2015) (en banc) (concluding that "there is only one final order of removal per alien," and a removal determination cannot be considered "final" if the immigration judge is considering protection from removal on remand).

An immigration judge's ability to consider new claims on remand does not, however, authorize the judge to "relitigate issues that were previously considered and decided" by the Board. *In re Alcantara-Perez*, 23 I. & N. Dec. 882, 884 (B.I.A. 2006); see *M-D-*, 24 I. & N. Dec. at 141 (holding that an immigration judge may not reconsider the Board's decision on remand). As the Ninth Circuit has concluded, when the Board affirms a finding of removability and denies protection from removal, an immigration judge cannot "reconsider" those rulings on a remand for consideration of voluntary departure: the Board "ha[s] already adjudicated [the alien's] deportability" and, in most cases, "the only lingering question on remand [i]s *how*" the alien will leave the United States. *Pinto* v. *Holder*, 648 F.3d 976, 978-979 (2011) (emphasis added) (citing *Castrejon-Garcia* v. *INS*, 60 F.3d 1359, 1361-1362 (9th Cir. 1995)); cf. *Dada* v. *Mukasey*, 554 U.S. 1, 8, 11 (2008) (explaining that "[v]oluntary departure is a discretionary form of relief that allows certain favored aliens * * * to leave the country willingly" and thus "sidestep some of the penalties" associated with "involuntar[y] remov[al]").

Moreover, with exceptions not relevant here, cf. 8 U.S.C. 1252(a)(2)(D) (preserving judicial review of certain "constitutional claims or questions of law"),

courts of appeals generally lack jurisdiction to review voluntary departure decisions, see 8 U.S.C. 1229c(f) ("No court shall have jurisdiction over an appeal from denial of a request for an order of voluntary departure * * * nor shall any court order a stay of an alien's removal pending consideration of any claim with respect to voluntary departure."). For that reason, a Board decision affirming an order of removal, denying protection from removal, and remanding for consideration of voluntary departure is "effectively[] the *only* order that [a court] can review." *Pinto*, 648 F.3d at 980 (emphasis added); see *Rizo* v. *Lynch*, 810 F.3d 688, 691 (9th Cir. 2016) (holding that, in such a circumstance, "all substantive matters judicially reviewable by this court have been finalized," and "[t]he only pending matter concerns voluntary departure—itself a form of removal, the granting or denial of which we are powerless to review").

Here, the Board's August 2013 decision affirmed the immigration judge's finding of removability and upheld the denial of relief and protection from removal. See Pet. App. 11a-14a. That decision resolved every issue on which petitioner later sought review in the court of appeals. The Board remanded the case to the immigration judge for the sole purpose of providing petitioner with further information about voluntary departure and giving him another chance to apply for that relief only. *Id.* at 13a. On remand, the immigration judge would not have been empowered to revisit any aspect of the Board's August 2013 decision, and any decision on voluntary departure itself generally would not have been subject to judicial review. The court of appeals thus properly held that the Board's August 2013 decision was

the "final order of removal" within the meaning of 8 U.S.C. 1252(a)(1). Pet. App. 3a.

b. Petitioner argues (Pet. 23) that the court of appeals' decision is inconsistent with the ordinary meaning of the word "final." He contends (*ibid.*) that the INA contemplates only "one final order of removal" that cannot "become 'final' at multiple points in time." But the court of appeals has expressly agreed with that assertion, see *Abdisalan*, 774 F.3d at 524, and has concluded that its rule concerning voluntary departure remands is consistent with it, see *Rizo*, 810 F.3d at 692. Under the INA, only a "final order of removal" is judicially reviewable, 8 U.S.C. 1252(a)(1), and a removal order becomes "final" upon "a determination by the Board * * * affirming such order," 8 U.S.C. 1101(a)(47)(B)(i). A Board decision affirming an order of removal and remanding solely for a determination of voluntary departure is thus "final" because that decision is in effect the only one a court of appeals could review; any decision on remand regarding voluntary departure would be judicially unreviewable. See Pet. App. 2a-3a; *Pinto*, 648 F.3d at 980. The fact that "non-reviewable administrative matters regarding voluntary departure remain pending" therefore poses "no threat that the order of removal could become final at multiple points in time." *Rizo*, 810 F.3d at 692.

Petitioner likewise is incorrect to suggest (Pet. 7, 27-28) that the court of appeals' decision conflicts with 8 C.F.R. 1003.1(d)(7). That regulation states that "[t]he Board *may* return a case to * * * an immigration judge for such further action as may be appropriate, without entering a final decision on the merits of the case." *Ibid.* (emphasis added). Nothing in that regulation purports

to require the Board to refrain from entering a final decision whenever it remands to the immigration judge on the discrete issue of voluntary departure.

Petitioner's reliance (Pet. 28) on the Board's decisions in *In re E-L-H-*, 23 I. & N. Dec. 814 (B.I.A. 2005), and *Alcantara-Perez*, *supra*, similarly is misplaced. Although those decisions stated the general rule that a Board decision remanding a case to an immigration judge ordinarily is not a final decision, see *E-L-H-*, 23 I. & N. Dec. at 821-822; *Alcantara-Perez*, 23 I. & N. Dec. at 884-885, neither was in the specific context of a Board decision affirming a removal order and remanding for the sole purpose of considering voluntary departure.

Petitioner suggests (Pet. 23-24) that the court of appeals' decision is inconsistent with this Court's interpretation of "final agency action" under the Administrative Procedure Act (APA), 5 U.S.C. 704. But in contrast to the APA, which does not define "final agency action" and leaves the term to be judicially construed, see *Abbott Laboratories* v. *Gardner*, 387 U.S. 136, 149-150 (1967), the INA contains a relevant definition of when a removal order "shall become final." 8 U.S.C. 1101(a)(47)(B). Moreover, in determining whether an agency action is final under the APA, "[t]he core question is whether the agency has completed its decisionmaking process, and whether the result of that process is one that will directly affect the parties." *Franklin* v. *Massachusetts*, 505 U.S. 788, 797 (1992); see *Bennett* v. *Spear*, 520 U.S. 154, 177-178 (1997) (holding that agency action, to be final, "must mark the 'consummation' of the agency's decisionmaking process" and "must be one by which 'rights or obligations have been determined,' or from which 'legal consequences will flow'")

(citations omitted). A Board decision upholding an alien's removability and denying protection from removal, and remanding only to determine the manner in which he will leave the United States, is not inconsistent with those basic requirements.

Finally, petitioner contends (Pet. 28-34) that the court of appeals incorrectly assumed that a remand for the purpose of considering voluntary departure cannot encompass other issues and that a decision on voluntary departure is not subject to judicial review. Petitioner is correct that a remand for consideration of voluntary departure does not preclude the immigration judge from considering newly discovered evidence or other newly available claims for protection from removal. See *M-D-*, 24 I. & N. Dec. at 141. Petitioner also is correct (see Pet. 33-34) that, in limited circumstances, an alien may petition for judicial review of "constitutional claims or questions of law" related to a denial of voluntary departure. 8 U.S.C. 1252(a)(2)(D).

But petitioner is wrong to suggest that the Ninth Circuit's approach cannot be reconciled with either possibility. The Ninth Circuit has specifically acknowledged that constitutional or legal claims related to a denial of voluntary departure are reviewable. See *Corro-Barragan* v. *Holder*, 718 F.3d 1174, 1177 (2013). The availability of such review, however, does not call into question the finality of an earlier Board decision affirming a finding of removability and denying protection from removal. As explained, a voluntary departure order concerns *how* the alien will leave the United States, not *whether* he will do so. The possibility of judicial review of a distinct order denying voluntary departure in a rare case does not subject the alien to more than one

order concerning removability and protection from removal or suggest that "the order of removal could become final at multiple points in time." *Rizo*, 810 F.3d at 692.

As for the possibility that issues related to removability could be raised in the course of remand proceedings concerning voluntary departure, that would occur only if the new evidence or new grounds for contesting removal could not have been raised at an earlier stage of the proceedings. *M-D-*, 24 I. & N. Dec. at 141; see *Fernandes*, 619 F.3d at 1074. Petitioner cites only one case in which that has occurred following a remand for voluntary departure. See Pet. 31 (citing *In re M-A-S-*, 24 I. & N. Dec. 762, 764 (B.I.A. 2009)). Petitioner himself did not present any such newly discovered material evidence or other newly available claim for relief or protection from removal to the immigration judge on remand in this case. In the vast majority of cases, a remand for consideration of voluntary departure will not give rise to any further dispute concerning the alien's removability—just as it did not in this case. Cf. *Alcantara-Perez*, 23 I. & N. Dec. at 884 (explaining that an immigration judge's ability to consider new claims on remand does not permit the judge to "relitigate issues that were previously considered and decided" by the Board). Moreover, an immigration judge's ability to consider newly available evidence and claims on remand is based entirely on agency practice: the Board may limit the scope of remand proceedings by "retain[ing] jurisdiction and qualif[ying] or limit[ing] the scope of the remand to a specific purpose," or by "impos[ing] a different rule" in the exercise of its decisionmaking authority. *Fernandes*, 619 F.3d at 1074. Petitioner states no reason to alter the prevailing interpretation of the

INA's finality requirement because of an agency practice that is not required by statute or regulation and thus could change.

In any event, the possibility that a remand for consideration of voluntary departure could, in a rare case, give rise to another judicially reviewable order of removal or a reviewable issue related to voluntary departure does not suggest that the court of appeals erred. "Restricting appellate review to 'final decisions' prevents the debilitating effect on judicial administration caused by piecemeal appellate disposition of what is, in practical consequence, but a single controversy." *Eisen* v. *Carlisle & Jacquelin*, 417 U.S. 156, 170 (1974); see *Abdisalan*, 774 F.3d at 526 (same under INA). But that does not mean that separate petitions for review are never permitted. This Court has held, for example, that separate petitions for review are required when an alien challenges a Board decision concerning his removability and a subsequent decision on either a motion to reopen or a motion to reconsider. *Stone* v. *INS*, 514 U.S. 386, 393-395 (1995); see *id.* at 405 ("[A] deportation order is final, and reviewable, when issued. Its finality is not affected by the subsequent filing of a motion to reconsider."). If an immigration judge on remand considers new evidence or a new claim on a matter unrelated to voluntary departure, it would be functionally equivalent to a motion to reopen. See *M-D-*, 24 I. & N. Dec. at 141-142; *In re Coelho*, 20 I. & N. Dec. 464, 471-473 (B.I.A. 1992). The possibility of a second petition for review addressing a new issue of that sort would not be at odds with the overall operation of the framework for administrative and judicial review.

For these reasons, the possibility that a remand order to allow the immigration judge to consider voluntary departure could, in a rare case, result in another petition for review poses no risk of the sort of "debilitating effect on judicial administration" that finality rules are intended to prevent. *Eisen*, 417 U.S. at 170. In the great majority of cases in which the Board remands only for consideration of voluntary departure, its order represents the dispositive final agency decision on removability and protection from removal—just as it did in this case.

2. There is no conflict among the courts of appeals over whether a Board decision affirming an alien's removability, denying protection from removal, and remanding for consideration of voluntary departure is a final order of removal. This Court recently denied two petitions raising the question presented here. *Singh*, *supra* (No. 16-952); *Laurel-Abarca*, *supra* (No. 16-837). Petitioner does not identify any material change in the legal landscape since that time that would counsel in favor of review now.

a. The courts of appeals that have addressed the issue have unanimously concluded that a Board decision affirming an order of removal and remanding for the sole purpose of considering voluntary departure is final for purposes of judicial review. See *Alibasic* v. *Mukasey*, 547 F.3d 78, 83-84 (2d Cir. 2008); *Qingyun Li* v. *Holder*, 666 F.3d 147, 149-151 (4th Cir. 2011); *Holguin-Mendoza* v. *Lynch*, 835 F.3d 508, 509 (5th Cir. 2016) (per curiam); *Giraldo* v. *Holder*, 654 F.3d 609, 611-615 (6th Cir. 2011); *Almutairi* v. *Holder*, 722 F.3d 996, 1000-1002 (7th Cir. 2013); *Batubara* v. *Holder*, 733 F.3d 1040, 1041-1043 (10th Cir. 2013). The Eleventh

Circuit has reached the same result in a similar circumstance. See *Del Pilar* v. *United States Attorney General*, 326 F.3d 1154, 1157 (2003) (per curiam) (concluding that a Board decision resolving all issues related to removability and remanding to determine "the country to which [the alien] will be removed" "constitute[d] a final order of removal"). The First Circuit has not definitively resolved the issue, but it has assumed that such a decision is a final order of removal. See *Hakim* v. *Holder*, 611 F.3d 73, 79 (2010). No court of appeals has held, in a precedential opinion, that such a decision is *not* a final order of removal.

Petitioner contends (Pet. 12) that the "First, Fourth, and Sixth Circuits * * * will *not* hear an appeal from a voluntary departure remand order." To the extent petitioner concludes that those courts view Board decisions affirming removability and denying protection from removal, but remanding for consideration of voluntary departure, as nonfinal, that conclusion is incorrect. Those courts have merely "decline[d] to exercise th[eir] jurisdiction" to review such decisions "for prudential reasons" in some cases, opting instead to dismiss petitions for review "without prejudice" to renewal once voluntary departure proceedings are complete. *Giraldo*, 654 F.3d at 616, 618; see *Qingyun Li*, 666 F.3d at 153-154; *Hakim*, 611 F.3d at 79. Each of those courts has held or assumed, however, that such decisions are final and reviewable. See *Qingyun Li*, 666 F.3d at 149 (holding that a Board decision "denying relief from removal but remanding the case to the [immigration judge] to determine an alien's eligibility for voluntary departure is a final order of removal conferring jurisdiction"); *Giraldo*, 654 F.3d at 614-615 (same); see also *Hakim*, 611 F.3d at 79 & n.4 (noting that other circuits

have "held that a [Board] order denying relief from removal and remanding for consideration of voluntary departure is a final order of removal" and "[a]ssuming" the correctness of that rule).

The decision to defer judicial review for prudential reasons in those cases does not create a circuit conflict that warrants review. First, each of the cases on which petitioner relies involved an alien who filed a timely petition for review within 30 days of the initial Board decision finding the alien removable and denying protection from removal; none permits an alien to miss that filing deadline and seek judicial review only *after* the conclusion of the voluntary departure proceedings, as petitioner did here. In *Hih* v. *Lynch*, 812 F.3d 551 (2016), for example, the Sixth Circuit explained that the court was able to defer the exercise of its jurisdiction in *Giraldo* because it "had jurisdiction in the first place by virtue of the original timely petition for review." *Id.* at 555. But where, as here, an alien fails to file an initial petition for review, the court reasoned that "there has never been such jurisdiction" and thus nothing for the court to defer. *Ibid.* Petitioner's claim would thus fail even in the First, Fourth, and Sixth Circuits.

Second, none of the decisions on which petitioner relies *requires* the court of appeals to defer exercising its jurisdiction to consider a petition for review of a Board decision resolving issues of removability and remanding for consideration of voluntary departure. See, *e.g.*, *Hih*, 812 F.3d at 556 (rejecting argument that *Giraldo* "*requires* a dismissal without prejudice for prudential reasons; some discretion is inherent in the very idea of prudence"); *Perez-Vargas* v. *Gonzales*, 478 F.3d 191, 194-195 & n.4 (4th Cir. 2007) (reviewing Board decision on removability despite a pending remand "for the purpose

of determining whether [the alien] is entitled to voluntary departure"); *Saldarriaga* v. *Gonzales*, 402 F.3d 461, 465 n.2 (4th Cir. 2005) (same), cert. denied, 546 U.S. 1169 (2006). And to the extent the Fourth Circuit's decision in *Diaz-Mejia* v. *Holder*, 564 Fed. Appx. 730 (2014) (per curiam), suggests that such Board decisions are not final, see *id.* at 730 n.1, that unpublished and non-precedential disposition—which conflicts with published Fourth Circuit precedent, *e.g.*, *Qingyun Li*, 666 F.3d at 149-151—does not create a circuit conflict warranting this Court's review.

Third, although some courts have criticized the approach employed in *Giraldo*, *Hakim*, and *Qingyun Li*, see Pet. 13-14, that criticism reflects disagreement over the appropriate mechanism for deferring the exercise of a court's jurisdiction, not a dispute over whether a Board decision on removability is final notwithstanding the pendency of voluntary departure proceedings on remand (a point on which all the circuits agree) or even over whether the exercise of jurisdiction may be deferred. See *Almutairi*, 722 F.3d at 1002 (concluding that, rather than "dismiss[ing] a properly filed petition without prejudice and invit[ing] a later filing after the voluntary departure terms are sorted out," the proper procedure "is for the alien to file her petition for review within 30 days of a Board order resolving everything except voluntary departure, and then for this court to retain jurisdiction but to stay proceedings on the petition until voluntary departure has been resolved one way or the other"); see also *Hih*, 812 F.3d at 555 (acknowledging that, "in retrospect," the approach described in *Almutairi* may "have been a preferable way for the *Giraldo* court to rule"). Although petitioner failed to do so in this case, nothing prevents aliens in

future cases from petitioning for review and asking the court of appeals to defer action on the petition while the immigration court is considering voluntary departure on remand.

Petitioner further contends that "[t]he Second Circuit * * * has held that a noncitizen may petition from *either* a [Board] decision remanding for consideration of voluntary departure, * * * or 'wait to petition until the completion of removal proceedings on remand.'" Pet. 14 (citations omitted). But that court's summary order in *Xia Lin* v. *Sessions*, 698 Fed. Appx. 4 (2017), which suggested that an alien may "wait to petition [for judicial review] until the completion of removal proceedings on remand," *id.* at 5, is inconsistent with its published decision in *Alibasic*, which squarely "h[e]ld * * * that a [Board] order denying relief from removal and remanding for the sole purpose of considering voluntary departure is a final order of removal." 547 F.3d at 83-84. To the extent the unpublished disposition in *Xia Lin* creates an intra-circuit conflict, it does not warrant this Court's review.

Finally, the courts of appeals that have deferred exercising their jurisdiction in cases of this sort have largely done so to preserve the operation of 8 C.F.R. 1240.26(i), which provides that a grant of voluntary departure automatically terminates with the filing of a petition for review. See, *e.g.*, *Hakim*, 611 F.3d at 79 (concluding that "[t]he automatic termination provision * * * assumes a chronological order, i.e., that the grant of voluntary departure *precedes* the filing of a petition for judicial review"). Permitting an alien "to seek both voluntary departure and judicial review" would, according to those courts, "circumvent the regulation" and "deny[] the government the benefit of 'a prompt and

costless departure.'" *Ibid.* (citation omitted); see *Dada*, 554 U.S. at 20.

Contrary to petitioner's contention (Pet. 28), there is no tension between 8 C.F.R. 1240.26(i) and a requirement that an alien petition for review of a Board decision affirming a removal order before the resolution of voluntary departure on remand. Even when voluntary departure is automatically terminated by the filing of a petition for review, an alien is provided a 30-day grace period in which to depart without being "deemed to have departed under an order of removal." 8 C.F.R. 1240.26(i). If the petition for review precedes the grant of voluntary departure, the alien, once voluntary departure is granted, must depart while the petition is pending (assuming the petition is not resolved before the voluntary departure period expires) or incur the consequences of departing under a removal order. *Ibid.* In either circumstance, an alien must decide whether to honor the *quid pro quo* by departing voluntarily (and thereby avoiding the consequences of a removal order) or to remain in the United States until the petition for review is resolved while being subject to a removal order.

b. Petitioner further argues (Pet. 15-16) that review is warranted to resolve a circuit conflict over whether a Board decision that remands for background checks associated with a *grant* of statutory withholding of removal or other forms of protection from removal is a final reviewable order of removal. That issue is not presented in this case. Moreover, the courts of appeals have distinguished that situation from the one here, including on the ground that a remand for consideration of statutory withholding of removal or other protection from removal may affect whether an alien will be per-

mitted to remain in the United States, whereas a remand for consideration of voluntary departure will, in the normal course, simply affect the manner in which he departs. See *Rizo*, 810 F.3d at 691. No reason exists to review those issues in the context of this case.

3. In the proceedings below, the government argued that the "better application" of the court of appeals' en banc decision in *Abdisalan*, *supra*, "is that when the Board remands for any reason, including for an issue related to voluntary departure, the Board's decision is non-final for purposes of judicial review." Gov't C.A. Resp. to Pet. for Reh'g 3. The principal benefit of that bright-line rule, in the government's view, was that it would provide consistency across all types of proceedings and help avoid confusion over when an alien must petition for review. See *id.* at 11-12. But no court of appeals has accepted that view in the context of voluntary departure. To the contrary, as explained above, the courts that have considered the issue have uniformly distinguished voluntary departure remands from other proceedings. That consistent approach provides aliens with "sufficient guidance on when the appropriate steps must be taken to secure judicial review" in such cases. *Id.* at 15. That is especially true in petitioner's case: since at least 1995, the Ninth Circuit has required aliens to petition for review from Board decisions on removability notwithstanding the pendency of voluntary departure proceedings on remand, see *Castrejon-Garcia*, 60 F.3d at 1361-1362, and petitioner has provided no explanation for his failure to comply with that straightforward requirement. No reason exists to grant review in those circumstances.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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