No. 23-929

In the Supreme Court of the United States

HUGO ABISAI MONSALVO VELAZQUEZ, PETITIONER

v.

MERRICK B. GARLAND, ATTORNEY GENERAL

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

BRIEF FOR THE RESPONDENT IN OPPOSITION

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QUESTION PRESENTED

Whether the period permitted for voluntary departure at the end of removal proceedings may be extended when day 60 falls on a weekend or holiday, notwithstanding the statutory directive that "[p]ermission to depart voluntarily under this subsection shall not be valid for a period exceeding 60 days." 8 U.S.C. 1229c(b)(2).

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OPINIONS BELOW

The revised opinion of the court of appeals (Pet. App. 3a-17a) is reported at 88 F.4th 1301. The prior opinion of the court of appeals (Pet. App. l8a-32a) is reported at 82 F.4th 909. The decisions of the Board of Immigration Appeals (Pet. App. 33a-35a, 36a-38a, 39a-43a) and of the immigration court (Pet. App. 44a-60a, 61a-76a) are not reported.

JURISDICTION

The judgment of the court of appeals was entered on September 8, 2023. The court of appeals granted rehearing in part, withdrew its prior opinion, and entered a revised opinion on December 14, 2023 (Pet. App. 1a-2a). The petition for a writ of certiorari was filed on February 23, 2024. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. a. The Immigration and Nationality Act (INA), 8 U.S.C. 1101 *et seq.*, provides that a noncitizen who has been found removable in proceedings before an immigration judge (IJ) may in certain circumstances be granted authorization to depart the country voluntarily "in lieu of removal." 8 U.S.C. 1229c(b)(1); see 8 C.F.R. 1240.26 (2020); *Dada* v. *Mukasey*, 554 U.S. 1, 8 (2008).[1] To be eligible for voluntary departure at the conclusion of removal proceedings, the noncitizen must have been physically present for at least one year before service of the notice to appear; must have been a person of good moral character for at least five years immediately preceding the application for voluntary departure; must not be deportable for terrorist activities or have been convicted of an aggravated felony; and must "establish[] by clear and convincing evidence that [he or she] has the means to depart the United States and intends to do so." 8 U.S.C. 1229c(b)(1)(D).

When a noncitizen applies for, and the government grants, authorization for voluntary departure, they thereby "agree upon a *quid pro quo*" designed to benefit both sides. *Dada*, 554 U.S. at 11. The government benefits because the noncitizen's "agreement to leave voluntarily expedites the departure process and avoids the expense of deportation." *Ibid.* And the noncitizen benefits because "[h]e or she avoids extended detention pending completion of travel arrangements; is allowed to choose when to depart (subject to certain constraints); * * * can select the country of destination"; and is able to "sidestep some of the penalties attendant

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[1] This brief uses "noncitizen" as equivalent to the statutory term "alien." See *Barton* v. *Barr*, 590 U.S. 222, 226 n.2 (2020) (quoting 8 U.S.C. 1101(a)(3)).

to deportation," thereby "facilitat[ing] the possibility of readmission." *Ibid.*; see *id.* at 11-12 (explaining that a noncitizen who is "involuntarily removed from the United States is ineligible for readmission for a period of 5, 10, or 20 years, depending upon the circumstances of removal," while a noncitizen "who makes a timely departure under a grant of voluntary departure * * * is not subject to th[o]se restrictions"); see also 8 U.S.C. 1182(a)(9)(A)(i) and (ii).

In 1996, in order to ensure that the government actually receives the benefits that voluntary departure is intended to produce, "Congress curtailed the period of time during which an alien may remain in the United States pending voluntary departure." *Dada*, 554 U.S. at 9; see Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (IIRIRA), Pub. L. No. 104-208, Div. C, sec. 304(a)(3), § 240B(a)(3), 110 Stat. 3009-596 to -597. As relevant here, Congress provided that when a noncitizen receives authorization for voluntary departure at the conclusion of removal proceedings, that "[p]ermission to depart voluntarily * * * shall not be valid for a period exceeding 60 days." 8 U.S.C. 1229c(b)(2). The IJ or Board of Immigration Appeals (Board) have discretion to authorize a shorter period for voluntary departure, and in that circumstance an immigration official may later "extend the time to depart but only if the voluntary departure period is less than the statutory maximum in the first instance." *Dada*, 554 U.S. at 10. Thus, "[t]he voluntary departure period in no event may exceed 60 * * * days for [Section] 1229c(b) * * * departures." *Ibid.*; see 8 C.F.R. 1240.26(f) (2020) ("In no event can the total period of time, including any extension, exceed * * * 60 days as set forth in [8 U.S.C. 1229c].").

In general, a noncitizen who fails to depart within the voluntary-departure period is subject to involuntary removal and civil sanctions, including a ten-year period of ineligibility for cancellation of removal or adjustment of status and a penalty of between $1000 and $5000. 8 U.S.C. 1229c(d)(1); see *Dada*, 554 U.S. at 18; Pet. App. 7a, 11a.

b. The INA provides that a noncitizen who has been found removable in proceedings before an IJ or the Board may file a motion to reopen "within 90 days of the date of entry of [the] final administrative order of removal." 8 U.S.C. 1229a(c)(7)(C)(i). "A motion to reopen is a form of procedural relief that 'asks the Board to change its decision in light of newly discovered evidence or a change in circumstances since the hearing.'" *Dada*, 554 U.S. at 12 (citation omitted).

Although Congress added the statutory authorization for motions to reopen in Section 1229a(c)(7) as part of IIRIRA at the same time that it imposed the 60-day limit on the period for voluntary departure under Section 1229c(b), "[n]owhere in § 1229c(b) or § 1229a(c)(7) did Congress discuss the impact of the statutory right to file a motion to reopen on a voluntary departure agreement." *Dada*, 554 U.S. at 14-15. In the face of that silence, the Executive Branch and several courts of appeals initially determined "that, by requesting and obtaining permission to voluntarily depart, the alien knowingly surrenders the opportunity to seek reopening." *Id.* at 15; see, *e.g.*, *Banda-Ortiz* v. *Gonzales*, 445 F.3d 387, 389-391 (5th Cir. 2006); *Ngarurih* v. *Ashcroft*, 371 F.3d 182, 194 (4th Cir. 2004). Other courts of appeals concluded that a noncitizen who had sought voluntary departure retained the right to file a motion to reopen, and that the voluntary-departure period should be automatically tolled for as long as such a motion to reopen remained pending. See,

e.g., *Ugokwe* v. *United States Att'y Gen.*, 453 F.3d 1325, 1330-1331 (11th Cir. 2006); *Azarte* v. *Ashcroft*, 394 F.3d 1278, 1289 (9th Cir. 2005).

This Court rejected both of those positions in *Dada*. The Court found that there was no "statutory authority" to provide "automatic tolling of the voluntary departure period" based on the filing of a motion to reopen. 554 U.S. at 19. The Court explained that one of the "substantive burdens imposed upon the alien when selecting voluntary departure is the obligation to arrange for departure, and actually depart, within the 60-day period." *Ibid.* Accordingly, if a noncitizen "is permitted to stay in the United States past the departure date to wait out the adjudication of the motion to reopen, he or she cannot then demand the full benefits of voluntary departure." *Id.* at 19-20.

At the same time, the Court also concluded that it would be inconsistent with the broader statutory design to hold that a noncitizen who has agreed to depart voluntarily "is not entitled to pursue a motion to reopen." *Dada*, 554 U.S. at 16. At least in the absence of a statute or regulation that provides clear notice that the filing of an application for voluntary departure waives the right to file a motion to reopen, the Court held that the statute plainly "guarantees to each alien the right to file 'one motion to reopen proceedings under [Section 1229a].'" *Id.* at 15, 20 (citation omitted).

Accordingly, in order "to preserve the alien's right to pursue reopening while respecting the Government's interest in the *quid pro quo* of the voluntary departure arrangement," the Court adopted a third position. *Dada*, 554 U.S. at 19. It held that a noncitizen "must be permitted to withdraw, unilaterally, a voluntary departure request before expiration of the departure period."

Id. at 21. A noncitizen who did so could then "remain in the United States to pursue an administrative motion" to reopen without subjecting himself or herself to the civil sanctions that would otherwise follow from failing to depart during the voluntary-departure period. *Ibid.* But by withdrawing the voluntary-departure request, the noncitizen would "give[] up the possibility of readmission and become[] subject to the IJ's alternative order of removal," which could then be enforced "within 90 days, even if the motion to reopen ha[d] yet to be adjudicated," unless the noncitizen obtained a stay. *Ibid.*

c. The Court recognized in *Dada* that a "regulation might be adopted to resolve the dilemma [of how to reconcile the voluntary-departure and motion-to-reopen provisions of the INA] in a different manner." 554 U.S. at 20. Consistent with that recognition, the Executive Office for Immigration Review (EOIR) within the Department of Justice subsequently amended its regulations to address some of the concerns discussed in the Court's decision. See 73 Fed. Reg. 76,927, 76,929 (Dec. 18, 2008). Under the amended regulations, when a noncitizen who has been granted voluntary departure files a motion to reopen before the end of the voluntary-departure period, the grant of voluntary departure automatically terminates (without triggering the penalties for failure to depart) and the alternate order of removal takes effect immediately. 8 C.F.R. 1240.26(e)(1) (2020); see 8 C.F.R. 1240.26(i) (2020) (providing similar treatment for the filing of a petition for review in the court of appeals). But "[t]he filing of a motion to reopen * * * *after* the time allowed for voluntary departure has already expired does not in any way impact the period

of time allowed for voluntary departure." 8 C.F.R. 1240.26(e)(2) (2020) (emphasis added).[2]

2. a. Petitioner is a native and citizen of Mexico who unlawfully entered the United States in 2005. Pet. App. 4a. In 2011, the Department of Homeland Security (DHS) served on him a notice to appear that did not designate the time or place to appear in immigration court. *Ibid.* DHS later set the time and place for his immigration proceedings, and petitioner appeared and conceded his removability in 2013. See *ibid.*

Petitioner applied for withholding of removal under 8 U.S.C. 1231(b)(3) or the regulations implementing the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, *adopted* Dec. 10, 1984, S. Treaty Doc. No. 20, 100th Cong., 2d Sess. (1988), 1465 U.N.T.S. 113. See Pet. App. 4a-5a. In the alternative, petitioner sought voluntary departure. *Id.* at 5a. After a hearing on March 5, 2019, an IJ denied the applications for withholding of removal, *id.* at 49a-50a, but granted "post-conclusion" voluntary departure for a period of 60 days. *Id.* at 5a, 50a, 67a-70a. The IJ stated, both orally (Administrative Record (A.R.) 523) and in a written order (Pet. App. 70a), that the 60-day

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[2] In 2020, the Department of Justice adopted a final rule amending 8 C.F.R. 1240.26. See 85 Fed. Reg. 81,588 (Dec. 16, 2020). That rule went into effect on January 15, 2021, but its effective date was stayed shortly thereafter under 5 U.S.C. 705, and employees of the Department of Justice were enjoined from implementing it. See *Centro Legal de la Raza* v. *Executive Office for Immigration Review*, 524 F. Supp. 3d 919 (N.D. Cal. 2021); see also *Catholic Legal Immigration Network, Inc.* v. *Executive Office for Immigration Review*, No. 21-94, 2021 WL 3609986 (D.D.C. Apr. 4, 2021). This case has accordingly been litigated under the version of Section 1240.26 in effect immediately before the December 2020 amendments.

period would last "until May 6, 2019." *Id.* at 5a. A typewritten order issued the same day stated that petitioner was granted permission to depart voluntarily "on or before 60 calendar days from the date of service of the order." *Id.* at 5a, 67a (brackets and citation omitted). The order explained that if petitioner "fail[ed] to voluntarily depart the United States within the time frame specified or within any extensions granted by DHS," he would face a civil penalty of $3000 and "be[come] ineligible for a period of 10 years to receive cancellation of removal, adjustment of status, registry, voluntary departure, or a change in nonimmigrant status." *Id.* at 5a (citation omitted; first set of brackets in original).

Petitioner appealed the IJ's denial of withholding of removal. Pet. App. 5a. On October 12, 2021, the Board affirmed the IJ's decision and reinstated a 60-day voluntary-departure period. *Id.* at 42a-43a.

b. On Monday, December 13, 2021, 62 days after the Board's decision, petitioner filed a motion to reopen his proceedings so that he could apply for cancellation of removal. Pet. App. 6a; A.R. 23-30.

Under 8 U.S.C. 1229a(c)(7)(B), a motion to reopen must "state the new facts" that the movant intends to prove if reopening is granted. In an attempt to demonstrate new facts here, petitioner asserted that this Court's decision in *Niz-Chavez* v. *Garland*, 593 U.S. 155 (2021), in conjunction with the fact that he had been served a deficient notice to appear in 2011, established that he had accrued the ten years of continuous presence in the United States required for cancellation of removal for nonpermanent residents. Pet. App. 6a, 37a. Petitioner accordingly asked that the Board reopen the proceedings to allow him to apply for cancellation of removal, notwithstanding his previous failures to request

that relief either from the IJ or during his appeal to the Board. *Id.* at 37a.

The Board denied the motion to reopen on two independent grounds. Pet. App. 36a-38a. First, the Board found that petitioner had failed to identify new facts that could not have been raised at his original hearing. *Id.* at 37a-38a. It observed that "based on his October 15, 2005, entry date, [petitioner] already satisfied the 10 year period of continuous physical presence at the time of his previous hearing on March 5, 2019." *Id.* at 37a. "Therefore, the fact that [petitioner] satisfies the 10 year period of continuous physical presence is not a 'new fact' supported by 'new evidence' that was not available and could not have been discovered or presented at the previous hearing." *Ibid.* (quoting 8 U.S.C. 1229a(c)(7)(B)). The Board rejected petitioner's argument that under the governing law at the time of his earlier hearing, he would have been "deemed to have stopped accruing physical presence" from the date of his receipt of a deficient notice to appear in 2011, and therefore could not have satisfied the ten-year continuous-physical-presence requirement. *Ibid.* (citation omitted). The Board explained that this Court's decision in *Pereira* v. *Sessions*, 585 U.S. 198 (2018), which had already been decided at the time of petitioner's previous hearing, would have enabled petitioner to apply for cancellation of removal. Pet. App. 37a-38a. And it further observed that *Niz-Chavez*, on which petitioner relied, was issued before the Board's decision on appeal, yet petitioner failed to raise its potential effect with the Board. *Id.* at 38a.

Second, and independently, the Board found that petitioner was no longer eligible for cancellation of removal because he had failed to depart within the

voluntary-departure period. Pet. App. 38a. The Board explained that it had "reinstated the 60-day period of voluntary departure" on October 12, 2021, and thus that the "period of voluntary departure terminated on December 11, 2021," 60 days later. *Ibid.* Under Section 1229c(d), petitioner's failure to depart within that period rendered him "ineligible for certain forms of discretionary relief, including cancellation of removal." *Ibid.* And because petitioner did not file his motion to reopen until "December 13, 2021, after the 60-day period of voluntary departure expired," the motion had no effect on the applicability of those "civil penalties for failure to depart." *Ibid.*

c. Petitioner filed a motion to reconsider, challenging only the second basis for the Board's denial of his motion to reopen—*i.e.*, the Board's determination that he is ineligible for cancellation of removal because he failed to depart or withdraw his application for voluntary departure during the 60-day voluntary-departure period. See A.R. 7-9.[3] Petitioner argued that that determination was inconsistent with a policy manual published by EOIR, which states that "Saturdays, Sundays, and legal holidays are counted toward the computation of a deadline. If, however, a deadline date falls on a weekend or a legal holiday, the deadline is construed to fall on the next business day." A.R. 8 (citation omitted).

The Board denied petitioner's motion for reconsideration. Pet. App. 33a-35a. It explained that the provision of the policy manual "govern[s] filing of appeals, mo-

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[3] Petitioner acknowledged that he was asking the Board to reconsider just one of two independently sufficient reasons for denying his motion to reopen. He therefore explained that he "[wa]s not asking the Board to grant the Motion to Reopen, only to correct the [assertedly] mistaken portion of its decision." A.R. 9.

tions, or other documents with the Immigration Court or the Board, and do[es] not govern the voluntary departure period." *Id.* at 35a. Accordingly, the Board concluded that the manual provided no basis for extending petitioner's time for voluntary departure from December 11 to December 13, 2021. *Ibid.*

3. Within 30 days of the Board's denial of his motion for reconsideration, petitioner filed a petition for judicial review under 8 U.S.C. 1252(b)(1), in which he challenged only the Board's determination that he had failed to timely depart or withdraw his application for voluntary departure within the 60-day voluntary-departure period. Pet. App. 8a. The court of appeals denied the petition. *Id.* at 3a-17a.[4]

The court of appeals first held that it had jurisdiction to address petitioner's argument about compliance with the 60-day departure period. Pet. App. 9a-11a. The court acknowledged that because petitioner had not challenged the Board's other, independently sufficient ground for denying his motion to reopen, the court's decision on the petition for review "would not alter the outcome of [petitioner's] motion to reopen to apply for cancellation of removal." *Id.* at 10a. But the court concluded that its decision could nevertheless "conceivably result in effectual relief to [petitioner]" because the Board's "conclusion that he untimely moved to reopen in violation of the conditions of his departure" meant that petitioner "faces a monetary fine and ineligibility for future immigration relief." *Id.* at 10a-11a.

On the merits, the court of appeals agreed with the Board that petitioner's motion to reopen, filed 62 days

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[4] The panel made "non-substantive changes" to its original opinion on rehearing. Pet. App. 2a. For simplicity, this brief cites the revised opinion. The original opinion appears at Pet. App. 18a-32a.

after the Board's original decision, could not be "deemed to have been filed within the [60-day] statutory period." Pet. App. 12a; see *id.* at 12a-17a. The court explained that "construing a motion filed after the lapse of the voluntary departure period as 'timely' necessarily extends the time an alien has to depart, thus exceeding the scope of relief permitted by statute." *Id.* at 16a.

The court of appeals rejected petitioner's contention that it was necessary to extend the 60-day voluntary-departure period in some circumstances to avoid "introduc[ing] inconsistency" with EOIR practice manuals about how to calculate filing deadlines that would otherwise fall on a weekend or legal holiday. Pet. App. 12a. The court explained that calculating time periods "in one manner when filing appeals, motions, or other documents in immigration court or with the [Board,] and another when interpreting a maximum time period [for departure] designated by statute, makes sense." *Id.* at 13a. That is because the "restrictions that apply in the filing context—court or agency closures—do not prevent one from departing, by, for example, boarding a plane, or otherwise being transported to one's chosen destination." *Ibid.*

4. The court of appeals denied a petition for rehearing en banc, see Pet. App. 2a, with the panel issuing a revised opinion reflecting "non-substantive changes * * * that d[id] not affect the outcome," *ibid.*

ARGUMENT

Petitioner renews (Pet. 29-33) his contention that when a noncitizen's 60-day voluntary-departure period ends on a weekend or public holiday, a motion to reopen filed on the next business day is sufficient to avoid the statutory penalties for failure to depart during that period. The court of appeals correctly rejected that con-

tention, and petitioner overstates any conflict between its decision and those of the Ninth Circuit. Moreover, even if the question presented otherwise warranted the Court's review, this case would be a poor vehicle in which to address it. The petition for a writ of certiorari should be denied.

1. Because petitioner failed to depart the country or withdraw his voluntary-departure application within 60 days of the Board's October 12, 2021 decision, he is subject to the statutory penalties prescribed for noncitizens who fail to comply with their voluntary-departure commitment.

In 8 U.S.C. 1229c(b), Congress has provided that certain noncitizens may avoid being formally removed from the United States if they are given permission to depart voluntarily at the conclusion of removal proceedings. In doing so, however, Congress has specified that the departure must happen within a limited time period. As this Court explained in *Dada* v. *Mukasey*, 554 U.S. 1 (2008), "[Section] 1229c(b)(2) contains no ambiguity: The period within which the alien may depart voluntarily 'shall not be valid for a period exceeding 60 days.'" *Id.* at 15 (citation omitted). Here, the Board granted permission for petitioner's voluntary departure on October 12, 2021. Pet. App. 39a-43a. Under the unambiguous terms of the statute, therefore, the voluntary-departure period could extend to, but not beyond, December 11, 2021, which was 60 days after the Board's October 12, 2021 order. The Board granted the full 60-day period. See *id.* at 14a.

It is undisputed that petitioner did not depart by December 11, 2021. Although petitioner later filed a motion to reopen proceedings on December 13, 2021, the applicable regulations—which petitioner does not chal-

lenge—provide that "[t]he filing of a motion to reopen * * * after the time allowed for voluntary departure has already expired does not in any way impact the period of time allowed for voluntary departure." 8 C.F.R. 1240.26(e)(2) (2020). Accordingly, the court of appeals correctly recognized that petitioner is subject to the statutory consequences prescribed for those who are "permitted to depart voluntarily under" Section 1229c and yet "voluntarily fail[] to depart the United States within the time period specified." 8 U.S.C. 1229c(d)(1); see Pet. App. 11a-17a.

2. Petitioner's contrary contentions (Pet. 29-33) lack merit.

a. Petitioner primarily claims (Pet. 29) that the court of appeals' decision is "expressly foreclose[d]" by a different "longstanding regulation" about how to compute the time for taking various actions. See Pet. 29-30 (discussing 8 C.F.R. 1001.1(h)). That regulation states that:

> The term *day* when computing the period of time for taking any action provided in this chapter [(*i.e.*, Chapter V of Title 8 of the Code of Federal Regulations)] including the taking of an appeal, shall include Saturdays, Sundays, and legal holidays, except that when the last day of the period so computed falls on a Saturday, Sunday or legal holiday, the period shall run until the end of the next day which is not a Saturday, Sunday, nor a legal holiday.

8 C.F.R. 1001.1(h).

As an initial matter, petitioner forfeited any claim based on Section 1001.1(h) of the regulations by failing to raise such a claim before the Board or include it in his panel-stage briefing in the court of appeals. See A.R. 7-9; Pet. C.A. Br. 1-17; Pet. C.A. Reply Br. 1-21;

see also Pet. C.A. Reh'g Pet. 8 (observing that petitioner raised Section 1001.1(h) for the first time at oral argument).

In any event, petitioner's reliance on Section 1001.1(h) is misplaced. By its terms, that regulation applies only to "computing the period of time for taking any action provided *in this chapter*"—*i.e.*, time limits set by regulation. 8 C.F.R. 1001.1(h) (emphasis added). It does not purport to describe how to calculate time periods, like the one at issue here, that are established by statute.

If the regulation did otherwise, moreover, it would be unlawful in the circumstances of this case. The INA unambiguously states that when an executive-branch official grants a noncitizen authorization for voluntary departure, that authorization "shall not be valid for a period exceeding 60 days." 8 U.S.C. 1229c(b)(2). As this Court explained in *Dada*, that constraint on the period for voluntary departure is a "substantive limitation[]" that is "not subject to equitable tolling" by the courts. 554 U.S. at 19. Nor is there any "statutory authority" in the INA, *ibid.*, for the Executive Branch to overrule the 60-day statutory limit by adopting regulatory exceptions that would extend the voluntary-departure period to 61 or more days. See, *e.g.*, *SAS Inst. Inc.* v. *Iancu*, 584 U.S. 357, 363 (2018) ("Where a statute's language carries a plain meaning, the duty of an administrative agency is to follow its commands as written."). Indeed, the separate regulation that specifically addresses voluntary departure acknowledges as much, providing that "[i]n no event can the total period of time, including any extension, exceed * * * 60 days as set forth in [8 U.S.C. 1229c]." 8 C.F.R. 1240.26(f) (2020).

Petitioner's reliance (Pet. 30) on "[p]ractice manuals for both the immigration courts and the Board of Immigration Appeals" is flawed for similar reasons. Those practice manuals address how to compute a "filing deadline" established by an immigration court or the Board, *ibid.* (brackets and citation omitted), not how to compute the statutory deadline established by Congress for departing the country. As with the regulatory provision in Section 1001.1(h), the practice manuals could not extend the 60-day *statutory* maximum period for voluntary departure to 61 or more days when it ends on a weekend or holiday. Accordingly, they should not be read broadly in an attempt to achieve such a result.[5]

b. Petitioner additionally contends (Pet. 31) that his motion to reopen should be treated as if it were filed before the end of the voluntary-departure period pursuant to "an ancient tradition under which certain days are '*dies non juridicus*'—'*dies non*' for short—on which a party is not required to take acts of legal significance." That contention is incorrect.

"At common law Sunday was *dies non juridicus*, and no strictly judicial act could be performed upon that day." *Danville* v. *Brown*, 128 U.S. 503, 505 (1888); see Pet. 31-32 (collecting cases excluding Sundays and public holidays from the calculation of court deadlines).

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[5] Petitioner argues (Pet. 30 & n.5) that at an earlier stage of the proceedings, the IJ "appeared to understand the applicable rules" for filing deadlines to apply to the voluntary-departure period as well. Even assuming that petitioner's speculation is correct (the IJ offered no explanation for the specified date), the IJ's error in this case cannot alter the meaning of Section 1229c(b)(2), and petitioner forfeited any claim of reliance on that error by failing to raise it until his reply brief below. See Pet. App. 14a n.10 ("Given this argument was not presented to the [Board], or in [petitioner's] opening brief, it is waived.").

And as petitioner observes (Pet. 32), Congress and this Court have "codified [that practice] in various statutes and court rules" while extending it to include Saturdays and legal holidays as well. See, *e.g.*, 35 U.S.C. 21(b); Sup. Ct. R. 30.1; *D'Andrea* v. *Commissioner*, 263 F.2d 904, 905 (D.C. Cir. 1959) (discussing statutory deadline for filing petitions for redetermination of tax deficiencies with the Tax Court); *Reynolds* v. *Palen*, 20 Abb. N. Cas. 11, 12 (N.Y. Sup. Ct. 1887) (holding service of complaint timely under state statute treating Saturdays as half-holidays).

Petitioner offers no meaningful support, however, for his claim (Pet. 31) that one is never required to "take acts of legal significance" on a weekend or holiday. The reason that filing deadlines before courts and agencies are ordinarily extended to avoid weekends or holidays is that "court or agency closures" typically prevent filings on those days. Pet. App. 13a; see, *e.g.*, *Lamson* v. *Andrews*, 40 App. D.C. 39, 42 (1913) (reasoning that because an extension of a court-established Sunday deadline "could [not] be done on" that day, the court could therefore act on it on the next business day). The phrase *dies non juridicus* itself reflects that understanding: It literally means "a day not juridical," and refers to a "day exempt from court proceedings." *Black's Law Dictionary* 571 (11th ed. 2019). But as the court of appeals explained, the "restrictions that apply in the filing context * * * simply do[] not extend to" the context of voluntarily departing the United States in lieu of being removed. Pet. App. 13a. No court or agency closure prevented petitioner from departing the United States on December 11, 2021, just because that day was a Saturday.

Petitioner also cites (Pet. 32) this Court's decision in *Street* v. *United States*, 133 U.S. 299 (1890). But *Street* involved a statutory deadline for a governmental action (the mustering of excess officers out of the Army) that the Court presumed would not be taken on a Sunday. See *id.* at 306. Moreover, the Court did not hold that the statutory deadline had extended to the next business day; instead, it held that "the irregularity" in the government's procedure—*i.e.*, the government's failure to satisfy the statutory deadline—"is not such as vitiates the order," because statutory context made plain that "[t]he matter of time was not vital." *Id.* at 305. Here, in contrast, this Court has already recognized that Congress's 60-day limit on the time for voluntary departure is an important "substantive" constraint that cannot be extended for equitable reasons. *Dada*, 554 U.S. at 19.

Finally, petitioner points (Pet. 32) to early American cases holding that when a deadline for contract performance fell on a Sunday, performance could instead be "made on the succeeding day." *Avery* v. *Stewart*, 2 Conn. 69, 73 (1816) (opinion of Swift, C.J.). But the reason for that rule was that when a contractual deadline fell on a Sunday, to "perform the contract on the day it falls due * * * would be an unlawful act" under laws that prohibited the conduct of business on the Christian Sabbath. *Ibid.*; see *Horton* v. *Norwalk Tramway Co.*, 33 A. 914, 915 (Conn. 1895) (discussing early Connecticut statutes that "forbade * * * the transaction upon that day of any manner of secular business"); see also *Salter* v. *Burt*, 20 Wend. 205, 206-207 (N.Y. Sup. Ct. 1838) (following *Avery*, *supra*). Again, no such impediment prevents a noncitizen from departing the United States on a weekend or holiday. There is accord-

ingly no sound basis for reading a weekends-and-holidays exception into Section 1229c(b)(2)'s unambiguous 60-day limit on the period for voluntary departure.

3. Contrary to petitioner's claim (Pet. 21-29), the decision below does not implicate any conflict of authority warranting this Court's review.

Petitioner first points (Pet. 22-23) to the Ninth Circuit's decisions in *Barroso* v. *Gonzales*, 429 F.3d 1195 (2005), and *Salvador-Calleros* v. *Ashcroft*, 389 F.3d 959 (2004). But in both of those cases, the Board had granted only a 30-day voluntary-departure period, and extending the period to the next business day did not exceed the 60-day statutory limit. See *Barroso*, 429 F.3d at 1204; *Salvador-Calleros*, 389 F.3d at 964-965. The Ninth Circuit accordingly had no occasion in those cases to address the conflict with the statute that was the basis for the Tenth Circuit's decision in petitioner's case. See Pet. App. 16a.

A third decision, *Meza-Vallejos* v. *Holder*, 669 F.3d 920 (9th Cir. 2012), involved more-analogous facts. There, the Board had denied Meza-Vallejos's applications for relief and granted a voluntary departure period of "sixty days, through July 16, 2005—a Saturday." *Id.* at 922. On Monday, July 18, 2005, Meza-Vallejos filed a motion to reopen the denial of his applications for relief with the Board. *Ibid.* The Board denied the motion to reopen on the ground that it had been filed after the voluntary-departure period ended, *ibid.*, but the Ninth Circuit reversed, *id.* at 927.

The Ninth Circuit concluded that "there are only two solutions to the problem of a voluntary departure period that ends on a weekend: either shorten the period * * * or lengthen it." *Meza-Vallejos*, 669 F.3d at 927. The court acknowledged that it "is not unreasonable" to re-

quire "those in Meza-Vallejos's position [to] file their motions to reopen on the last business day of their voluntary departure period, even if that falls on the fifty-eighth or fifty-ninth day of that period." *Ibid.* But emphasizing that the Board "has not opined on this question in a precedential decision," *id.* at 926, the Ninth Circuit instead "h[e]ld that, where the last day of a period of voluntary departure falls on a day on which an immigrant cannot file a motion for affirmative relief with the [Board], that day does not count in the voluntary departure period if * * * the immigrant files [a motion to reopen] on the [next] available day," *id.* at 927.

As petitioner observes (Pet. 24), the decision below disagreed with that position. See Pet. App. 15a-16a. For at least three reasons, however, that shallow disagreement does not warrant this Court's review. First, if the Ninth Circuit addresses the question again, it may well conclude that the rule it adopted in *Meza-Vallejos* is inapplicable in cases governed by the regulations that were adopted in response to this Court's decision in *Dada*. As discussed above, see pp. 6-7, *supra*, those regulations expressly provide that "[t]he filing of a motion to reopen * * * after the time allowed for voluntary departure has already expired does not in any way impact the period of time allowed for voluntary departure." 8 C.F.R. 1240.26(e)(2) (2020). Because the motion to reopen in *Meza-Vallejos* had been filed before those regulations took effect, the *Meza-Vallejos* court did not address them. See 669 F.3d at 925 n.4 (finding related regulation codified at 8 C.F.R. 1240.26(e)(1) inapplicable because it "applies only *prospectively*"). The court therefore emphasized that, in the case before it, it lacked any authoritative agency guidance. See *id.* at

926 (noting the Board's unpublished opinion). In a case governed by the post-*Dada* regulations, therefore, the Ninth Circuit could agree that a motion to reopen filed after the 60th day of the voluntary-departure period "does not in any way impact" the computation of the voluntary-departure period. 8 C.F.R. 1240.26(e)(2) (2020).

Second, the en banc Ninth Circuit might choose to revisit the issue in light of the careful analysis in the decision below. Petitioner claims (Pet. 27) that that is unlikely because the Ninth Circuit "has continuously adhered to its view for nearly 20 years." But *Meza-Vallejos* is the only Ninth Circuit decision petitioner has identified that actually implicated the conflict with Section 1229c(b)(2)'s 60-day statutory limit.

Third, even if some shallow disagreement between the Ninth and Tenth Circuits persists, it is unlikely to have practical significance in a material number of cases. Petitioner has identified only two cases in which the statutory issue has arisen since the adoption of Section 1229c(b)(2) nearly 30 years ago. Indeed, because there is no mailbox rule for paper submissions—they are treated as filed only upon actual receipt by the immigration court or the Board—most noncitizens already "prepare and dispatch documents well in advance of [the] deadline to account for possible postal delays." Pet. App. 13a n.8. Even within the Ninth Circuit, therefore, it is unlikely that many noncitizens delay their filings with the Board until the very end of the 60-day voluntary-departure period.

4. Even if the question presented were otherwise worthy of this Court's review, this case would be a poor vehicle for such review.

a. As already discussed, see pp. 14-15, *supra*, petitioner's briefs before the Board and the Tenth Circuit panel failed even to cite 8 C.F.R. 1001.1(h), the regulation that he now claims (Pet. 29) "expressly forecloses the Tenth Circuit's holding." Accordingly, neither the Board nor the court of appeals addressed that regulation, and petitioner identifies no sound reason for this Court to be the first to address its import. See *Holland* v. *Florida*, 560 U.S. 631, 654 (2010) (noting this Court is one of "final review and not first view") (citation omitted).

b. In addition, the procedural posture of the case raises serious questions of statutory jurisdiction and Article III justiciability that could prevent the Court from reaching the merits.

With respect to statutory jurisdiction, petitioner invoked the court of appeals' jurisdiction under 8 U.S.C. 1252(b)(1), which allows review of a petition for review "filed not later than 30 days after the date of the final order of removal," *ibid.* See Pet. App. 4a. Petitioner did not seek review, however, of the Board's original October 12, 2021 decision affirming the IJ's finding of removability and denial of relief or protection from removal. See *id.* at 39a-43a. Nor did petitioner seek review of the Board's subsequent order denying his motion to reopen on two independent grounds. See *id.* at 36a-38a. Instead, petitioner sought review only of the Board's still-later order denying his motion to reconsider one of those two independent grounds for denying his motion to reopen. See *id.* at 33a-35a. And as the Board noted, *id.* at 34a, petitioner conceded that even if it were granted, his motion for reconsideration provided no basis for actually reopening his case or altering the Board's removal order; he "[wa]s not asking the Board

to grant the Motion to Reopen, only to correct the [assertedly] mistaken portion of its" opinion on that motion. A.R. 9. Before the Court could reach the merits in this case, therefore, it would need to address whether the grant of jurisdiction to review a "final order of removal," 8 U.S.C. 1252(b)(1), provides freestanding jurisdiction to review a subsequent order of the Board that had no effect on the noncitizen's immediate removability and would not have altered the Board's order of removal even if granted.

For related reasons, the unusual procedural history of this case also raises problems of Article III justiciability. Because petitioner does not dispute one of the two independently sufficient grounds for denying his motion to reopen, he conceded in the court below that "a decision * * * to grant his Petition [for review] would have no effect whatever on his Motion to Reopen or the underlying order of removal." Pet. C.A. Reply Br. 5. It follows that it is "impossible for the [C]ourt to grant 'any effectual relief whatever'" to petitioner in connection with the present removal proceedings. *Church of Scientology* v. *United States*, 506 U.S. 9, 12 (1992) (citation omitted). Regardless of how the Court viewed the question presented, the proper disposition would be to leave the Board's order of removal in place because it rested on an independently sufficient ground. Accordingly, "any opinion as to the" computation of the voluntary-departure period "would be advisory," and thus inconsistent with the case-or-controversy requirement of Article III. *City of Erie* v. *Pap's A.M.*, 529 U.S. 277, 287 (2000).

It makes no difference that computation of the voluntary-departure period could have implications in other proceedings concerning civil penalties or peti-

tioner's eligibility for future immigration relief. See Pet. App. 11a. The most that petitioner could obtain in *this* case is a judicial opinion agreeing with his view of the voluntary-departure period while upholding the Board's order on other grounds that petitioner does not challenge. "But 'redressability requires that the court be able to afford relief *through the exercise of its power*, not through the persuasive or even awe-inspiring effect of the opinion *explaining* the exercise of its power.'" *Haaland* v. *Brackeen*, 599 U.S. 255, 294 (2023) (quoting *Franklin* v. *Massachusetts*, 505 U.S. 788, 825 (1992) (Scalia, J., concurring in part and concurring in the judgment)) (brackets omitted). Because "petitioner[] can hope for nothing more than an opinion," he "cannot satisfy Article III." *Ibid.*

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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MAY 2024