No. 16-952

In the Supreme Court of the United States

SURINDER SINGH, PETITIONER

v.

JEFFERSON B. SESSIONS III, 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

JEFFREY B. WALL
Acting Solicitor General
Counsel of Record
CHAD A. READLER
Acting Assistant Attorney General
DONALD E. KEENER
JOHN W. BLAKELEY
PATRICK J. GLEN
Attorneys

Department of Justice
Washington, D.C. 20530-0001
SupremeCtBriefs@usdoj.gov
(202) 514-2217

QUESTION PRESENTED

Whether a court of appeals lacks jurisdiction to review a decision of the Board of Immigration Appeals (Board) finding an alien removable and denying an application for 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.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases:

Cases—Continued: Page

Treaty, statutes, and regulations:

Statutes and regulations—Continued: Page

In the Supreme Court of the United States

No. 16-952

SURINDER SINGH, PETITIONER

v.

JEFFERSON B. SESSIONS III, 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

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-8a) is reported at 835 F.3d 880. The decision of the Board of Immigration Appeals (Pet. App. 9a-11a) is unreported. The order of the immigration judge (Pet. App. 12a-13a) is unreported. Prior decisions of the Board of Immigration Appeals (Pet. App. 17a-22a) and the immigration judge (Pet. App. 23a-49a) are unreported.

JURISDICTION

The judgment of the court of appeals was entered on September 1, 2016. On November 21, 2016, Justice Kennedy extended the time within which to file a petition for a writ of certiorari to and including January 29, 2017. The petition for a writ of certiorari was filed on January 30, 2017 (Monday). The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. 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 either upon "a determination by the Board of Immigration Appeals [Board] 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) (addressing finality of any "order of deportation"); see 8 C.F.R. 1003.39.

The INA authorizes a court of appeals to review an order in removal proceedings 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 from removal. See *Foti* v. *INS*, 375 U.S. 217, 220-221, 232 (1963).

2. Petitioner is a native and citizen of India who was admitted to the United States in 2001 as a nonimmigrant visitor, with authorization to remain in the United States through December 3, 2001. Certified Administrative Record (A.R.) 866; Pet. App. 23a. In November 2001, petitioner filed an application for asylum. A.R. 827-838. In July 2007, the Department of Homeland Security referred petitioner's asylum

application to the immigration court and initiated removal proceedings against petitioner for having overstayed his visa. Pet. App. 23a-24a; see A.R. 827, 866-867.

Petitioner conceded his removability before the immigration judge and renewed his application for asylum. A.R. 188-189. Petitioner also sought withholding of removal under 8 U.S.C. 1231(b)(3) and protection from removal under 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. (1988), 1465 U.N.T.S. 85. See Pet. App. 4a, 18a, 48a. Petitioner's claims were based on alleged persecution and torture he suffered in India due to his support for a Sikh political party and the authorities' mistaken belief that he had provided support to Kashmiri militants. A.R. 836-838. Petitioner stated that he feared being "arrested and tortured again" if he returned to India. A.R. 836.

An immigration judge denied petitioner's requests for asylum and protection from removal following an evidentiary hearing. Pet. App. 23a-49a. The immigration judge noted that there were multiple inconsistencies between petitioner's asylum application, his testimony, and the other available evidence, including statements and testimony by some of petitioner's own witnesses, as well as significant discrepancies in the documentary evidence petitioner had provided. *Id.* at 33a-47a. The immigration judge concluded that petitioner's claim was not credible. *Id.* at 48a.

Nonetheless, the immigration judge granted petitioner 30 days in which to voluntarily depart from the United States, provided that he posted a $3500 bond.

Pet. App. 49a; see 8 U.S.C. 1229c(b)(1) (authorizing Attorney General to grant certain classes of removable aliens "voluntary departure in lieu of removal"); 8 U.S.C. 1229c(b)(3) (requiring alien granted voluntary departure to post a bond "in an amount necessary to ensure that the alien will depart, to be surrendered upon proof that the alien has departed the United States within the time specified"). The immigration judge ordered that, if petitioner did not voluntarily depart within 30 days, he automatically would become subject to "an alternate order of removal to India." Pet. App. 49a.

In June 2011, the Board dismissed petitioner's appeal. Pet. App. 17a-22a. The Board concluded that the immigration judge's adverse credibility finding was not clearly erroneous and foreclosed petitioner's eligibility for asylum, withholding of removal, and protection under the CAT. *Id.* at 18a-20a. The Board noted, however, that the immigration judge failed to advise petitioner of certain requirements related to his voluntary departure bond. *Id.* at 21a. The Board therefore remanded to the immigration judge for the limited purpose of advising petitioner of all necessary information "related to the grant of voluntary departure." *Id.* at 22a. Petitioner did not file a petition for review in the court of appeals.

3. On remand, the immigration judge reinstated the requirement that petitioner post a $3500 bond and authorized him to voluntarily depart within 60 days. Pet. App. 13a. The immigration judge also informed petitioner of the relevant requirements for voluntary departure, including that the Board would be unable to reinstate the voluntary departure period following an appeal unless petitioner proved to the Board that

he had posted the required bond. *Id.* at 15a-16a. The immigration judge declined to reconsider his earlier denial of asylum and other forms of protection from removal, noting that the Board's dismissal of petitioner's appeal on those grounds "was done after full consideration of the merits and must be viewed as the law of the case," and that, in any event, petitioner had not identified "any further evidence to be considered" or made "any request for some other form of relief." *Id.* at 12a, 13a.

Petitioner filed an appeal with the Board to "preserve" his ability to seek judicial review of the Board's June 2011 decision affirming the denial of asylum, withholding of removal, and protection under the CAT. A.R. 15. In November 2012, the Board summarily dismissed petitioner's appeal on the ground that it did not address the immigration judge's most recent order. Pet. App. 9a-11a. The Board also noted that, despite having been specifically advised of the need to provide the Board with timely proof that the voluntary departure bond had been posted, petitioner failed to do so. *Id.* at 11a & n.1. The Board therefore declined to reinstate petitioner's voluntary departure period, which had by then expired. *Ibid.*

4. a. The court of appeals denied a petition for review. Pet. App. 1a-8a. Petitioner challenged the Board's June 2011 decision affirming the denial of asylum, withholding of removal, and protection under the CAT, but not its November 2012 decision dismissing petitioner's appeal from the immigration judge's order concerning voluntary departure. See Pet. C.A. Br. 26-31. Petitioner acknowledged that he had not filed a petition for review within 30 days of the Board's June 2011 decision, but argued that the re-

moval order was not "final" until the proceedings concerning voluntary departure were complete. *Id.* at 16-21. The government responded that, under longstanding Ninth Circuit precedent, the relevant final order of removal was the Board's June 2011 decision, which the court of appeals lacked jurisdiction to review because petitioner failed to file a timely petition for review of that decision. Gov't C.A. Br. 35-38; see *id.* at 30-35 (citing, *inter alia*, *Pinto* v. *Holder*, 648 F.3d 976 (9th Cir. 2011); *Castrejon-Garcia* v. *INS*, 60 F.3d 1359 (9th Cir. 1995)).

b. While the petition for review was pending, the Ninth Circuit held in *Abdisalan* v. *Holder*, 774 F.3d 517 (2014) (en banc), that a Board decision denying asylum but remanding for further consideration of withholding of removal or other forms of protection from removal is not an appealable final order of removal. *Id.* at 523-526. The court declined, however, to "revisit [its] rule that the [Board]'s decision *is* a final order of removal when it remands for consideration of voluntary departure but denies all other forms of relief." *Id.* at 526 n.8 (emphasis added). A Ninth Circuit panel subsequently reaffirmed that rule, concluding that a remand from the Board "for further proceedings as to voluntary departure does not affect the finality of an otherwise final order of removal." *Rizo* v. *Lynch*, 810 F.3d 688, 692 (2016).

In light of *Abdisalan* (and shortly before the decision in *Rizo*), the court of appeals requested supplemental briefing on whether it should grant en banc review to reconsider its rule concerning voluntary departure remands. See Pet. App. 7a n.4. The government argued that en banc review was unwarranted. Gov't Supp. C.A. Br. 16-19. The government stated

that the "better rule" would be one that treated all remands the same for finality purposes and that deferred judicial review until all proceedings before the agency were complete. *Id.* at 2. The government noted that such a rule would have the benefit of avoiding piecemeal petitions in rare cases where newly available evidence or previously unavailable grounds for relief from removal were presented for the first time in voluntary departure proceedings and would have the "benefit of clarity for the immigration bar." *Id.* at 14; see *id.* at 13-15. Nonetheless, the government argued that en banc reconsideration was not warranted because (as *Rizo* concluded) the court's voluntary departure rule did not conflict with *Abdisalan* and gave aliens sufficient notice of when they must petition for review. *Id.* at 17-19.

c. The court of appeals dismissed the petition for review. Pet. App. 1a-8a. The court explained that, under Ninth Circuit precedent, a Board decision affirming the denial of asylum and protection from removal but remanding to the immigration judge for consideration of voluntary departure "is a final order of removal" because it is "the only order that we can review." *Id.* at 7a (quoting *Pinto*, 648 F.3d at 980). The court concluded, consistent with *Rizo*, that *Abdisalan* did not undermine that rule, and it noted that a majority of eligible judges had not voted to reconsider *Rizo* en banc. *Id.* at 7a n.4. Because petitioner did not file a timely petition for review of the Board's June 2011 decision affirming the denial of his applications for asylum and protection from removal, the court concluded that it lacked jurisdiction to review that decision. *Id.* at 8a.

ARGUMENT

Petitioner argues (Pet. 22-32) that the final reviewable order of removal in this case should be the Board's November 2012 decision, rather than the June 2011 decision in which the Board upheld the denial of his applications for asylum, withholding of removal, and protection under the CAT. He further contends (Pet. 12-19) that the courts of appeals have taken conflicting approaches to when a Board decision becomes final for purposes of judicial review. As petitioner notes (Pet. 11), 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 withholding of removal or other forms of protection from removal, no court of appeals has done so in the distinct context of remands for consideration of 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 for further consideration of 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 does not merit this Court's review. The petition for a writ of certiorari should be denied.[1]

1. Courts of appeals may only review 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 finding has expired. 8 U.S.C. 1101(a)(47)(B); see 8 C.F.R. 1003.39. The court of appeals' conclusion that a Board decision affirming a finding of removability and denying 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.

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. 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 withholding of removal) that must be cleared before "a final order of removal [i]s entered." *Lolong* v. *Gonzales*, 484 F.3d

[1] The same issue is presented in *Laurel-Abarca* v. *Sessions*, petition for cert. pending, No. 16-837 (filed Dec. 28, 2016).

1173, 1177-1178 (9th Cir. 2007) (en banc) (citation omitted); see *Abdisalan* v. *Holder*, 774 F.3d 517, 524 (9th Cir. 2014) (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 *In re 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) (quoting *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, courts of appeals typically 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.").[2] 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 [the 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").

In this case, the Board's June 2011 decision affirmed the immigration judge's finding of removability and upheld the denial of asylum and related protections from removal. See Pet. App. 17a-22a. 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 voluntarily depart. *Id.* at 12a-13a, 21a. The immigration judge was not empowered to revisit any aspect of the Board's June 2011 decision on remand, nor was the judge's decision on remand subject to judicial review. The court of appeals therefore concluded that the Board's June 2011 decision was a

---

[2] A limited exception to that rule exists for "constitutional claims or questions of law" related to a voluntary departure decision. 8 U.S.C. 1252(a)(2)(D); see *Corro-Barragan* v. *Holder*, 718 F.3d 1174, 1177 (9th Cir. 2013). That exception is not at issue here.

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

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 single 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; Pet. App. 7a n.4. Under the INA, a removal order becomes "final" upon "a determination by the Board * * * 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). The court of appeals reasoned that a Board decision affirming an order of removal and denying all requests for protection from removal is a "final" removal decision because it resolves "all substantive matters judicially reviewable by th[e] court." *Rizo*, 810 F.3d at 691. For that reason, the court concluded, a remand for consideration of the unrelated (and generally unreviewable) issue of voluntary departure poses "no threat that the order of removal could become final at multiple points in time." *Id.* at 692. The alien "[i]s subject to the single, final order of removal contemplated by Congress * * * even if non-reviewable administrative matters regarding voluntary departure remain pending." *Ibid.*[3]

---

[3] Petitioner contends (Pet. 26) that the court of appeals' decision also conflicts with a regulation, 8 C.F.R. 1003.1(d)(7), but that argument is unavailing. Section 1003.1(d)(7) states that "[t]he Board *may* return a case to * * * an immigration judge for such

Petitioner suggests (Pet. 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 Labs.* 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 a final agency action "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 and internal quotation marks omitted). A Board decision upholding an alien's removability, 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. 28-32) that the court of appeals incorrectly assumed that a remand for the purpose of considering voluntary departure

---

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.

cannot encompass other issues and that a decision on voluntary departure is not subject to judicial review. As the government explained below, see Gov't C.A. Supp. Br. 14, 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 *In re M-D-*, 24 I. & N. Dec. at 141. Petitioner is also correct that, in limited circumstances, an alien may petition for judicial review of "constitutional claims or questions of law" related to a voluntary departure decision. 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 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 concerning voluntary departure in rare cases 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 new evidence or new grounds for contesting removal arise that could not have been raised at an earlier stage of the proceedings. *In re 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. 25 n.8, 30 (citing *In re M-A-S-*, 24 I. & N. Dec. 762, 764 (B.I.A. 2009)). 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. See Pet. App. 12a-13a; cf. *In re 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 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 ad-

ministration 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 *In re M-D-*, 24 I. & N. Dec. at 141-142. The possibility of a second petition for review addressing those new issues would not be at odds with the overall operation of the framework for administrative and judicial review.

For these reasons, the possibility that a voluntary departure remand 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. a. 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. The courts of appeals that have addressed the issue have unanimously concluded that such a decision 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 Att'y Gen.*, 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.

b. Petitioner argues (Pet. 15) that the First, Fourth, and Sixth Circuits "will not hear an appeal" from a Board decision resolving issues of removability and remanding for consideration of voluntary departure, in conflict with the rule in other courts of appeals. That argument 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).[4]

Third, although some courts have criticized the approach employed in *Giraldo*, *Hakim*, and *Qingyun Li*, see Pet. 17, 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

---

[4] Petitioner cites (Pet. 33) a non-precedential Fourth Circuit decision in which a panel of that court concluded that an alien was required to await the outcome of a voluntary departure remand before petitioning for review from an earlier Board decision denying protection from removal. See *Diaz-Mejia* v. *Holder*, 564 Fed. Appx. 730, 730 n.1 (2014) (per curiam). That decision is inconsistent with precedential Fourth Circuit decisions, *e.g.*, *Qingyun Li*, 666 F.3d at 149-151, and would create no circuit conflict warranting this Court's review in any event.

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.

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.* (quoting *Dada*, 554 U.S. at 32-33).

Contrary to petitioner's contention (Pet. 26-27 & n.9), there is no tension between 8 C.F.R. 1240.26(i) and a requirement that an alien petition for review from a Board decision before the resolution of voluntary departure. 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.

c. Petitioner further argues (Pet. 12-14) that review is warranted to resolve a circuit conflict over whether a Board decision that remands for background checks associated with a *grant* of 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 withholding of removal or other protection from removal may affect whether an alien will be permitted 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 rule" in cases of this sort is one that treats a Board decision as final once all proceedings on remand (including voluntary departure proceedings) are complete. Gov't Supp. C.A. Br. 2. 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. But no court of appeals has accepted that view in the context of voluntary departure. To the contrary, 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 in order to secure judicial review" in such cases. *Id.* at 18-19. That is especially true in petitioner's case: since at least 1995, the court of appeals 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 these circumstances.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

JEFFREY B. WALL
Acting Solicitor General
CHAD A. READLER
Acting Assistant Attorney General
DONALD E. KEENER
JOHN W. BLAKELEY
PATRICK J. GLEN
Attorneys

MAY 2017