No. 06-1181

IN THE

Supreme Court of the United States

SAMSON TAIWO DADA,

Petitioner,

v.

MICHAEL B. MUKASEY,
ATTORNEY GENERAL,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

REPLY BRIEF FOR PETITIONER

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The statutory provisions governing motions to reopen and voluntary departure need to be reconciled. The Government reads the voluntary departure provision in isolation; this interpretation eliminates motions to reopen, a procedure that Congress made available to all aliens, for an arbitrary subset of the favored group of aliens granted voluntary departure. None of the various bases the Government supplies for its construction—the language of the provision, the legislative history, and assorted regulations—supports this incongruous result.

Tolling, by contrast, is consistent with the statute and offers a way to give meaning to both provisions, safeguarding motions to reopen for the favored aliens granted voluntary departure. Accordingly, this Court should interpret the statute to permit tolling of the voluntary departure period during the pendency of a motion to reopen. The Government's concerns about a tolling rule are misplaced. And it cannot avoid tolling by claiming deference to agency positions; there is no authoritative agency view on tolling that warrants deference. Indeed, any reading that would effectively deny a voluntary departure recipient the ability to seek reopening would be inconsistent with the statute.

The Government's arguments are further undercut by the Department of Justice's newly proposed rule, which offers an alternative to tolling that likewise harmonizes the two statutory provisions. Under the proposed rule, which would only apply prospectively, the filing of a motion to reopen would terminate the grant of voluntary departure, allowing the alien to await a decision on his motion to reopen without facing penalties. 72 Fed. Reg. 67,674, 67,679 (Nov. 30, 2007). Recognizing the important role of motions to reopen for aliens facing changed circumstances, the rule "ensures

that the alien is not subsequently penalized when such change in circumstances occurs." *Id.* Like tolling, this approach avoids the arbitrary and anomalous consequences of the Government's construction and, though it is not due deference, offers the Court an alternative interpretation of the statute.

ARGUMENT

I. THE GOVERNMENT'S CONSTRUCTION, UNDER WHICH A VOLUNTARY DEPARTURE RECIPIENT IS EFFECTIVELY DENIED A MOTION TO REOPEN, IS INCONSISTENT WITH THE STATUTE

A. The Government's Interpretation Improperly Focuses On The Voluntary Departure Provision In Isolation

Reading the voluntary departure provision in isolation, the Government erroneously argues (at 14-15, 19-20) that the language of the provision sets an absolute deadline that cannot be tolled. Yet this Court's precedent demonstrates that statutory provisions must be read in context and, furthermore, that a provision seemingly clear in isolation may become ambiguous in context.

In *Costello* v. *INS*, 376 U.S. 120 (1964), the Court considered the intersection of various immigration provisions and read the provisions together as a whole. In particular, although one of the provisions at issue was seemingly plain on its face, the Court concluded that the language was ambiguous when considered in relation to another provision, because the statute did not specify how the two provisions should interact. 376 U.S. at 128-129 (analyzing relation-back provision); *see also* Pet. Br. 17-18 & n.7. As in *Costello*, this Court should refuse to adopt a construction of one provision that would "render nugatory and meaningless for an entire class of aliens" the discretionary relief at issue.

376 U.S. at 132; *see also id.* at 127-128 (declining to adopt a construction that "would, with respect to an entire class of aliens, completely nullify a procedure so intrinsic a part of the legislative scheme").

That sufficient ambiguity to permit tolling exists in the statutory scheme was suggested by the Department itself. In 1997, when the Department first considered the interaction of the two provisions at issue here, it listed tolling as a possible solution. *See* 62 Fed. Reg. 10,312, 10,325-10,326 (Mar. 6, 1997).

This view was well founded: the voluntary departure provision is not phrased like other deadlines in the Immigration and Nationality Act (INA), but, rather, passively describes a "period" during which "[p]ermission to depart" remains "valid." 8 U.S.C. § 1229c(b)(2). Other deadlines in the INA, by contrast, require an affirmative act to take place within a set time period. *See* Pet. Br. 17 n.6.

B. The Government's Reading Relies On A Misunderstanding Of The Voluntary Departure Bargain

The Government also argues (at 13-16, 18, 28-30) that forfeiture of a motion to reopen is part of the quid pro quo between the Government and the alien. The Government, however, is mistaken about the benefits and burdens that accompany voluntary departure.

1. The Government suggests (at 18, 27, 33) that the Court should read the statute to eliminate motions to reopen for aliens granted voluntary departure because one of the key benefits to the Government of voluntary departure is the termination of all litigation with the alien. Yet it is undisputed that an alien who seeks voluntary departure at the conclusion of proceedings (such as Petitioner) is *not* required to waive other

appeals. As the Government acknowledges, such aliens can pursue appeals to the Board of Immigration Appeals (BIA) and can also file petitions for review with the courts of appeals. Gov't Br. 6, 8; *see also* 72 Fed. Reg. 67,674, 67,676 (Nov. 30, 2007) ("[u]nder the current regulations" such an alien "is still able to file an appeal to the Board"); *id.* at 67,678 (may file petition for review with court of appeals); C.A. App. 167 (Petitioner expressly "reserve[d] appeal"); Pet. Br. 24-27.[1] Because litigation is not concluded upon a grant of voluntary departure, this benefit to the Government is not part of the quid pro quo and cannot justify eliminating motions to reopen for these aliens.

2. Nor does the Government's concern with delay (at 33-34) support a conclusion that Congress intended waiver of motions to reopen as part of the quid pro quo. Motions to reopen are, in fact, decided relatively quickly. *See* American Immigration Law Foundation Amicus Br. 20-23 (motions to reopen generally decided by immigration judge and Board in fewer than 60 or 90 days, respectively); 8 C.F.R. § 1003.1(e)(5) (motions to reopen generally assigned to Board member who decided original appeal, which permits familiarity with the record); Pet. Br. 10 (Petitioner's motion to reopen decided in roughly two months). By contrast, petitions for review to the courts of appeals take much longer. *See* 72 Fed. Reg. at 67,681. Given the relative speed with which motions to reopen are decided, it makes little sense to conclude that Congress intended aliens to

[1] The courts of appeals that have refused to adopt a tolling rule have wrongly suggested than an alien who accepts voluntary departure must waive certain litigation rights. *See* Pet. Br. 25-26 & n.17.

be able to pursue all other appeals, but waive only their statutory right to seek reopening.

3. The Government mistakenly suggests (at 29) that the filing of a motion to reopen is inconsistent with the terms of the voluntary departure bargain because, under the statute, a voluntary departure applicant must have a current intent to depart. *See* 8 U.S.C. § 1229c(b)(1)(D). This argument, however, misapprehends the fundamental purpose of a motion to reopen, thereby ignoring the important role these motions play. Under the statute and regulations, a motion to reopen is limited to *changed circumstances*. Specifically, such motions are limited to "new facts," *id.* § 1229a(c)(7)(B), *i.e.*, "circumstances that have arisen subsequent to the hearing," 8 C.F.R. § 1003.2(c)(1).[2] By definition, then, an alien could not know about these facts and circumstances at the time he accepts voluntary departure. Indeed, the Department of Justice's proposed rule is premised on the fact that "an alien may request voluntary departure in good faith," but then be faced with changed circumstances that would trigger eligibility for a motion to reopen. 72 Fed. Reg. at 67,679.

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[2] For example, new facts might arise that relate to cancellation of removal. *See* 8 U.S.C. § 1229b(b)(1)(D); *Azarte* v. *Ashcroft*, 394 F.3d 1278, 1280-1281 (9th Cir. 2005) (alien's child diagnosed with mental disabilities that required intensive therapy). Or an alien's spouse may naturalize to become a citizen while the case is on direct appeal to the BIA, *see*, *e.g.*, *Chedad* v. *Gonzales*, 497 F.3d 57, 59 (1st Cir. 2007), which would make him immediately eligible for an adjustment of status to that of a lawful permanent resident, *see* 8 U.S.C. § 1255(a). These new facts can arise at any time after the immigration judge's initial decision, including while an appeal is pending before the Board. *See*, *e.g.*, 72 Fed. Reg. at 67,679.

C. The Government's Reliance On The Legislative Evolution Of Each Provision In Isolation Fails

The Government is also mistaken in its attempt to extract a congressional purpose to preclude tolling from the evolution of the motion to reopen and voluntary departure provisions. Gov't Br. 23-28, 33-34.

1. The Government asserts (at 33) that motions to reopen are "disfavor[ed]," and that Congress's action in 1996 reflected this disfavor. This argument, however, is undercut by the fact that Congress chose to codify motions to reopen in 1996. And, in doing so, Congress took care to provide contours to the right: permitting one motion to reopen, which raises new facts, to be filed within 90 days. 8 U.S.C. § 1229a(c)(7)(B), (C)(i). Congress took this action, moreover, after considering the issue for years, and only after the Attorney General found "no pattern of abuse." *See* Pet. Br. 3.

The support the Government offers for its argument that this newly codified and carefully defined right was disfavored consists of case law prior to 1996. Needless to say, these cases do not establish Congress's disfavor towards its subsequent, carefully codified right. These cases, moreover, date from a time when an alien was permitted to file multiple motions, and at any time. *See* Gov't Br. 33; *see also* Pet. Br. 3 n.1.

2. The Government's reliance (at 23-26) on the evolution of the voluntary departure provision also fails. While it is true that Congress placed time limits on voluntary departure in 1996, and eliminated an exception, these amendments do not speak to Congress's view on the interaction of the voluntary departure and motion to reopen provisions or the question of tolling. There is simply no indication that Congress considered this issue, and the Government does not suggest oth-

erwise. *See* Pet. Br. 19-20 & nn.9-10; *see also INS* v. *St. Cyr*, 533 U.S. 289, 320 n.44 (2001) (absence of consideration noteworthy given the "comprehensive character" of the legislative history of the Illegal Immigration Reform and Immigrant Responsibility Act (IIRIRA)).

3. The Government's related arguments (at 26) concerning the "essential purpose of IIRIRA's amendments to the voluntary departure provision"[3] fare no better. This Court has rejected reliance on generalized legislative purposes to answer a specific interpretative question. In *Costello*, for example, although "[t]he general legislative purpose underlying enactment of [the deportation provision at issue] was to broaden the provisions governing deportation," "reference to such a generalized purpose does little to promote resolution of the specific problem before us, of which there was absolutely no mention in the Committee Reports or other legislative materials." 376 U.S. at 125-126; *see also, e.g.*, *Bifulco* v. *United States*, 447 U.S. 381, 398-399 (1980).

Moreover, to the extent the Government seeks to rely on IIRIRA's overarching purpose, its description of that purpose is too narrow. As described in Petitioner's brief, one of Congress's primary concerns in passing IIRIRA was to enact reform with respect to criminal aliens, and Congress was particularly concerned about such aliens abusing motions to reopen. A no-tolling rule, then, would turn Congress's intent on its head, as criminal aliens would be entitled to a motion

[3] The Government quotes (at 26) *Stone* v. *INS*, 514 U.S. 386, 399 (1995), a case decided *before* IIRIRA's enactment, to support its articulation of IIRIRA's purpose with respect to voluntary departure.

to reopen—but the favored subset of aliens who receive voluntary departure would not. Pet. Br. 29-33.

Indeed, at least some aliens accused of terrorist activities are permitted to file motions to reopen, *see Daneshvar* v. *Ashcroft*, 355 F.3d 615, 626, 629 (6th Cir. 2004) (reversing BIA's denial of motion to reopen of alien found inadmissible for having engaged in terrorist activities); *see also Choub* v. *Gonzales*, 2007 WL 2316919, at *1-2 (9th Cir. Aug. 14, 2007) (noting that alien who provided "material support" to a terrorist organization "may seek relief by filing a motion to reopen with the BIA"); but, under the Government's view, those who have established "good moral character," 8 U.S.C. § 1229c(b)(1)(B), are not. This Court should reject such an anomalous result. *See Small* v. *United States*, 544 U.S. 385, 393 (2005).[4]

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[4] The Government's argument (at 32) that the "specific" (voluntary departure provision) governs the supposedly "general" (motion to reopen provision) and thus bars tolling is without merit. Unlike in the one case cited (at 32) by the Government, *Long Island Care at Home, Ltd.* v. *Coke*, 127 S. Ct. 2339 (2007), where the provisions concerned the same subject matter, the two provisions here plainly do not. *See Edmond* v. *United States*, 520 U.S. 651, 656-658 (1997) (canon inapplicable where two provisions dealt with separate issues—appointment and assignment of judges); *see also* Singer, 2B *Statutes and Statutory Construction* § 51.05 (6th ed. 2000). Nor is there any indication that Congress intended the voluntary departure provision "as a *limitation*" on the motion to reopen provision. *Varity Corp.* v. *Howe*, 516 U.S. 489, 511 (1996) (stating canon "has [been] understood … as a warning against applying a general provision when doing so would undermine limitations created by a more specific provision"; declining to apply the doctrine where there was no indication "that Congress intended the specific remedies … as a *limitation*" (emphasis in original)).

D. The Government's Construction Raises Serious Constitutional Concerns

The Government fails to address the due process and equal protection concerns raised by its statutory construction under which arbitrary government action eliminates congressionally-provided motions to reopen for a subset of aliens granted voluntary departure.

The Government asserts (at 49) that constitutional avoidance does not permit tolling because it would "subvert" congressional intent. There is no evidence, however, that Congress intended to eliminate motions to reopen for an arbitrary subset of aliens granted voluntary departure. *See* Part I.A-C *supra*.

The Government offers no other arguments relevant to Petitioner's liberty interest in remaining in this country—apparently conceding that such a liberty interest exists under the Due Process Clause, that it is protected by the motion to reopen, and that arbitrary deprivation of procedures safeguarding constitutionally protected interests is inconsistent with due process. Pet. Br. 39-42. These constitutional concerns, accordingly, favor an alternative construction of the statute, such as tolling, that preserves the procedures Congress made available to safeguard the alien's interest in remaining in this country.

With regard to Petitioner's separate argument based on his property interest in the motion to reopen itself, the Government appears to concede (at 50) that due process concerns could arise upon a showing of a "cognizable interest" in having the BIA resolve the timely-filed motion.[5] The Government, while blankly

[5] The Government's assertion (at 50) that the "Board *did* resolve petitioner's motion" is of no moment. This non-merits rejec-

insisting (at 50) that such an interest cannot lie, offers no explanation as to why arbitrary deprivation of the right of access to adjudicative proceedings provided by law does not suffice to raise a due process concern. Pet. Br. 42-46.[6]

The Government's only defense of the equal protection concerns arising from its construction is that Petitioner's own equal protection rights were not violated. Gov't Br. 50-51. This argument is misplaced:

> [W]hen deciding which of two plausible statutory constructions to adopt, a court must consider the necessary consequences of its choice. If one of them would raise a multitude of constitutional problems, the other should prevail—whether or not those constitutional problems pertain to the particular litigant[.]

Clark v. *Martinez*, 543 U.S. 371, 380-381 (2005). The Government offers no rational basis for the arbitrary treatment of aliens who timely file motions to reopen—even among those who file on the same day—that results from the Government's construction, under which

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tion based on the expiration of the voluntary departure period while the motion was pending does not satisfy due process. In *Logan* v. *Zimmerman Brush Co.*, 455 U.S. 422, 426-427 (1982), Logan's claim was similarly "resolved"—rejected because the commission had failed to meet certain procedural requirements.

[6] The Government properly recognizes (at 50) that Petitioner is not asserting a liberty or property interest in the grant of a motion to reopen. Rather, Petitioner's liberty interest is in remaining in this country, an interest protected by the motion to reopen. And his property interest is in the motion to reopen itself. The Government's suggestion (*id.*) that Petitioner cannot have a protected interest in a discretionary benefit conflates this distinction and is misplaced. *See* Pet. Br. 44 & n.34.

only some motions will be decided in time. *See* Pet. Br. 46-47.

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This Court should therefore read the provisions together as a coherent whole, and preserve a voluntary departure recipient's ability to seek reopening. A construction, such as the Government's, that eliminates this right for this favored group of aliens would be inconsistent with the statute.

II. Tolling Preserves A Voluntary Departure Recipient's Right To A Motion to Reopen And Is Consistent With The Statutory And Regulatory Scheme

Tolling the voluntary departure period while a motion to reopen is pending harmonizes the statutory provisions. Although the Government contends (at 21) that a tolling rule would be "extraordinary," the Department of Justice itself proposed tolling as one solution in 1997. *See* 62 Fed. Reg. at 10,325-10,326. In addition, four courts of appeals have agreed that tolling is appropriate. *See* Pet. Br. 9 (citing cases). And of the three courts that concluded that tolling does not apply, there were two dissenting opinions in favor of a tolling rule. *Id.*

In rejecting tolling, the Government cites three regulations and this Court's decision in *Stone*. None speaks to Petitioner's request that the voluntary departure period be tolled during the pendency of a motion to reopen, and then restarted once the agency issues a final decision.

A. The Agency's Regulations Do Not Speak To Tolling

The Government repeatedly invokes three regulations to argue that the regulatory scheme precludes

tolling. *See* Gov't Br. 10, 11, 19, 21, 31, 34, 40. The Government's insistence that these regulations provide the dispositive answer on tolling ignores the fact that all three were promulgated or revised as part of the same 1997 interim rule in which the Department suggested tolling. 62 Fed. Reg. at 10,325-10,326, 10,331, 10,372-10,373. Given that the wording of these regulations has remained virtually unchanged to this day, these same regulations cannot now preclude a tolling solution. Indeed, these regulations plainly do not speak to tolling the departure period.

1. *Extension Regulation Does Not Apply*. The Government argues (at 15, 21-22, 24) that Petitioner is seeking an impermissible "extension" of his voluntary departure period. *See* 8 C.F.R. § 1240.26(f). However, tolling, by its nature, does not extend the voluntary departure period but merely preserves the number of days in the period while the agency deliberates on an alien's motion to reopen.[7] The distinction between tolling and extensions is reflected in this Court's own certiorari practice, where a motion for rehearing filed with the court of appeals "*toll*[s] the start of the period in which a petition for certiorari must be sought," notwithstanding the fact that the deadline is "mandatory and jurisdictional" and this Court has "no authority to *extend* the period for filing except as Congress per-

[7] *See American Pipe & Constr. Co.* v. *Utah*, 414 U.S. 538, 556 (1974) (permitting tolling of statute of limitations notwithstanding petitioners' argument that "federal courts are powerless to extend the limitation period beyond the period set by Congress"); *see also Johnson* v. *Railway Express Agency, Inc.*, 421 U.S. 454, 473 n.2 (1975) (Marshall, J., concurring in part and dissenting in part) (noting "the common understanding that tolling entails a suspension rather than an extension of a period of limitations").

mits." *Missouri* v. *Jenkins* 495 U.S. 33, 45 (1990) (emphasis added).

2. *Reinstatement Regulation Does Not Apply*. The Government also suggests (at 44) that the agency's regulation limiting the "reinstatement" of voluntary departure in certain circumstances, 8 C.F.R. § 1240.26(h), precludes tolling. But Petitioner is not asking for a reinstatement of a departure period, but a suspension of the period while his motion is pending. Moreover, on its face, the regulation applies only to cases in which the BIA "grants" a motion to reopen during the voluntary departure window, and empowers the agency to give those aliens an entirely new departure period, up to the statutory maximum. By saying nothing about those motions left undecided during the voluntary departure window, the regulation is consistent with Petitioner's more modest request to suspend the departure clock while the agency considers his motion.

3. *"Stay of Deportation" Regulation Does Not Apply*. Finally, the Government argues (at 34, 40, 44) that 8 C.F.R. § 1003.2(f), entitled "Stay of deportation," is inconsistent with tolling the voluntary departure period. The title alone demonstrates the regulation's inapplicability. As the Government observes (at 34), the regulation provides that a motion to reopen does not "stay the *forced removal*"—deportation—"of an alien while that motion is being considered." (Emphasis in original.) Here, however, a deportation order is not being stayed because there was no such order in effect. *See* 8 U.S.C. § 1101(a)(47) (defining "order of deportation").

As the regulations specify, a final order of deportation does not become effective until after an alien overstays the voluntary departure period. Under the regu-

lations, an immigration judge who grants voluntary departure "shall also enter an *alternate* order o[f] removal." 8 C.F.R. § 1240.26(d) (emphasis added). Assuming the alien abides by certain conditions, this alternate order remains inactive during the voluntary departure period and only "become[s] final" upon the "overstay of any voluntary departure period granted or reinstated by the Board or the Attorney General." *Id.* § 1241.1(f); Gov't Br. 6.[8] Thus, the stay regulation does not apply for the simple reason that it pertains to final orders of deportation—which are distinct from a voluntary departure order, and which do not go into effect until after an alien overstays the voluntary departure period.[9]

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[8] *See also* 8 C.F.R. § 1241.7 (alien who departs "before the expiration of the voluntary departure period granted in connection with an alternate order of deportation or removal shall not be considered to be … deported or removed"); *id.* § 1240.26(c)(3) (if alien fails to post required bond, "the voluntary departure order shall vacate automatically and the alternate order of removal *will take effect* on the following day" (emphasis added)).

[9] The Government's citation (at 7-8) to 8 U.S.C. § 1229c(f) is also inapposite. That provision states that no "court [shall] order a stay of an alien's removal pending consideration of any claim with respect to voluntary departure." 8 U.S.C. § 1229c(f). As the provision speaks only to court-ordered stays of removal while an alien's case is on petition for review, it has no bearing on the tolling of a voluntary departure period during the pendency of a motion to reopen before the BIA.

The Government also states that, under its reading of the statutory scheme, a court of appeals lacks authority to stay a voluntary departure period pending review. As the Government concedes, however, eight of the nine courts of appeals to have considered this question have rejected the Government's view. Gov't Br. 35-36 & n.15. The Government further argues (at 36) that none of the courts of appeals has concluded that filing a petition for review

B. *Stone* Does Not Preclude Tolling

The Government (at 38-40) also relies heavily on this Court's decision in *Stone* v. *INS*, 514 U.S. 386 (1995), to argue for a no-tolling rule. But, as the Government admits (at 38), *Stone* was a limited exception to the "normal tolling rule," 514 U.S. at 398, *i.e.*, that motions to reopen or reconsider toll the time for seeking judicial review. *Id.* at 397-398; *see also* Pet. Br. 34-38. In *Stone*, the Court focused its analysis on a particular statutory provision in the INA and found that Congress intended to craft an "explicit exception" to the tolling rule in the "particular context" at issue in that case. 514 U.S. at 397-398.

Moreover, *Stone* involved a jurisdictional deadline, which, like other jurisdictional provisions, "must be construed with strict fidelity to [its] terms." 514 U.S. at 405. By contrast, no such jurisdictional time bar is implicated by Petitioner's tolling request. And *Stone* involved a final order of deportation, raising the question whether a motion to reopen can render a final order "nonfinal"; a voluntary departure grant, however, is not a final order of deportation, and the alternate order of deportation does not take effect until *after* an alien overstays the voluntary departure period. 8 C.F.R. § 1241.1(f); *see also* Pet. Br. 36-37.

To the extent that *Stone* bears on the tolling question in Petitioner's case, however, one of the rationales

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"*automatically* triggers such a stay." Yet there is one fundamental distinction between petitions for review and motions to reopen: an alien may pursue a petition for review from abroad, *see* Pet. Br. 28 n.19, but, once an alien leaves the country, a motion to reopen is deemed withdrawn, 8 C.F.R. § 1003.2(d). Thus, an automatic stay is not required to preserve an alien's ability to pursue a petition for review.

of the decision supports tolling. As in *Stone*, the Court should adopt a construction that would not force aliens to make a "Hobson's choice." 514 U.S. at 398-399 ("This choice is one Congress might not have wished to impose on the alien."); *see also* Pet. Br. 21-22.[10]

III. THE DEPARTMENT OF JUSTICE'S PROPOSED RULE PROVIDES AN ALTERNATIVE TO TOLLING THAT UNDERCUTS THE GOVERNMENT'S ARGUMENTS AND OFFERS THE COURT ANOTHER POSSIBLE CONSTRUCTION OF THE STATUTE

The Department's proposed rule, which implicitly acknowledges the need to reconcile the two statutory provisions, reinforces many of Petitioner's arguments. Unlike the Government's construction, but like a tolling rule, the solution offered by the proposed rule safeguards motions to reopen for aliens granted voluntary departure. The proposed rule thus provides the Court with an alternative interpretation to tolling—one similarly consistent with the statute—that could be used to resolve this case.

A. The Proposed Rule Reveals The Shortcomings In The Government's Arguments

After neglecting to take a position on the issue for more than a decade, the Department of Justice proposed regulations last month to address the interaction

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[10] The Government spends several pages (at 20-23) refuting an argument for traditional "equitable tolling." As explained in Petitioner's Brief (at 37 n.30, 49), even if this case does not fall squarely under this Court's equitable tolling jurisprudence, this Court has drawn on equitable tolling principles to adopt a uniform tolling rule to solve a statutory incongruity that had produced a "loophole." *Young* v. *United States*, 535 U.S. 43, 46-47, 50-51 (2002); *cf. American Pipe*, 414 U.S. at 554; *Burnett* v. *New York Cent. R.R. Co.*, 380 U.S. 424, 434-436 (1965).

of the two statutory provisions. 72 Fed. Reg. at 67,679. The proposed rule harmonizes the two provisions and proposes a solution going forward. Several features of this proposal demonstrate the problems with the Government's analysis of the statute.

The Department proposed that "permission to depart voluntarily … will terminate if the alien files a motion to reopen or reconsider the final administrative order." 72 Fed. Reg. at 67,679. As a result, an alien who had previously been granted voluntary departure would be able to file a motion to reopen and, like other aliens, await a ruling on that motion. The Department explained that its proposed rule is "intended to allow an opportunity for aliens who have been granted voluntary departure to be able to pursue administrative motions [including motions to reopen] without risking the imposition of the voluntary departure penalties." *Id.*

This proposal calls into question many of the Government's arguments. *First*, the proposed rule, like the tolling rule, seeks to protect an alien's "opportunity … to pursue administrative motions" after a grant of voluntary departure. 72 Fed. Reg. at 67,679. Thus, the Department apparently rejects the Government's view that Congress intended that the voluntary departure bargain requires the forfeiture of motions to reopen.

Second, the proposed rule reflects the important role of motions to reopen, including for those aliens who have accepted voluntary departure. It "recognizes that although an alien may request voluntary departure in good faith before an immigration judge, the alien's circumstances may change while an appeal is pending before the Board." 72 Fed. Reg. at 67,679. As a result, the proposal "ensures that the alien is not subsequently penalized when such change in circumstances occurs" and permits the alien to await a ruling on his motion to

reopen. *Id.*; *see also id.* (listing examples of relevant new facts that could develop).[11]

Third, under the proposed rule, a voluntary departure grant would "automatically terminate[]" once an alien filed a motion to reopen. 72 Fed. Reg. at 67,679, 67,682, 67,683. Notwithstanding the fact that the Government strenuously objects to a rule that would turn on an alien's "*unilateral* act" (at 18 (emphasis in original); *see also*, *e.g.*, *id.* 21, 22, 24, 33, 46-47, 49), the proposed rule does exactly that.

Fourth, the Department reaffirms that an alien who accepts voluntary departure at the conclusion of proceedings is *not* required to waive appeals. *E.g.*, 72 Fed. Reg. at 67,676 ("[u]nder the current regulations, as well as under [the] proposed rule," such an alien "is still able to file an appeal to the Board and present any arguments with respect to the merits of the alien's removability and eligibility for any form of relief or protection from removal"); *id.* at 67,678.[12]

Fifth, the proposed rule essentially eliminates the Government's concern (at 18) that a tolling rule would "invite strategic behavior by aliens seeking to extend their unlawful stay in the United States as long as pos-

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[11] The Department also explained that notwithstanding this Court's earlier view that motions to reopen are disfavored, Congress has since "provided that aliens may file a motion to reopen or motion to reconsider." 72 Fed. Reg. at 67,679.

[12] The proposal also recognizes the importance of notifying aliens of the consequences of accepting voluntary departure. *See* 72 Fed. Reg. at 67,682 ("To ensure that aliens are aware of the consequences of filing a motion to reopen or reconsider prior to the expiration of voluntary departure, … the alien will be advised that an order of voluntary departure shall be automatically terminated upon filing a motion to reopen or reconsider[.]").

sible." Such concerns, overstated even before the proposed rule,[13] are eliminated in the future: If the Department's proposed rule goes into effect in anything close to its current form, a decision by this Court permitting tolling will affect cases *already* in the pipeline and will not create any risks going forward.

B. The Solution Provided In The Proposed Rule Offers An Alternative Means To Resolve This Case

Tolling and the solution provided for in the proposed rule are alternative interpretations of the statute that harmonize the provisions in a way so as not to eliminate the motion to reopen for aliens granted voluntary departure. Both interpretations thus avoid the untenable reading that the Government sets forth in its brief.

Even if this Court does not adopt a tolling rule, it should reject the Government's construction of the statute. Instead, this Court can interpret the statute consistent with the solution in the proposed rule: to permit an alien granted voluntary departure to withdraw the voluntary departure request and instead be subject to a final order of removal. Such an alien would be placed in the same position as other aliens (such as criminal aliens and others who are not eligible for voluntary departure) and could await a ruling on his motion to reopen without being subject to additional penalties.

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[13] *See* Part I.C.1 *supra* (noting that Attorney General found "no pattern of abuse" before 1996 and that Congress defined the contours of the right in 1996); *see also* Part I.B.2 *supra* (noting adjudication periods for motions to reopen).

Petitioner agrees with the Government that the solution in the proposed rule reflects a permissible construction of the statute. *See* 72 Fed. Reg. at 67,679 ("[t]he voluntary departure statute does not unambiguously provide that permission to depart voluntarily is irrevocable once granted"). Indeed, Petitioner actually requested this relief.[14]

Notwithstanding that the prospective proposed rule is not binding in the instant case, the Court may consider the Department's solution and interpret the statute consistent with it. *Cf. Wisconsin Dep't of Health & Family Servs.* v. *Blumer*, 534 U.S. 473, 496-497 (2002) (adopting interpretation that was consistent with agency's "recently proposed rule"). Accordingly, if this Court declines to adopt a tolling rule, it should deem Petitioner's voluntary departure grant withdrawn, such that he would be subject to a final order of removal instead.

IV. THERE IS NO AGENCY POSITION ON TOLLING THAT WARRANTS DEFERENCE

On the question of tolling, the Government offers an inchoate claim to administrative deference, apparently pursuant to the principles of *Chevron U.S.A. Inc.*

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[14] Petitioner raised this issue at every stage of the proceeding. C.A. App. 9-10, Pet. App. 3 (seeking to withdraw voluntary departure request, and instead be subject to a final order of removal, when filing motion to reopen with the BIA); Pet. App. 2 (Fifth Circuit); Pet. 15; Pet. Br. 50 ("In the alternative, Petitioner should be permitted to withdraw his request for voluntary departure and, instead, be subject to a final order of removal.").

The proposed rule would not require that an alien specifically request such relief (as Petitioner did); rather, the voluntary departure grant would terminate automatically. *See, e.g.,* 72 Fed. Reg. at 67,679.

v. *Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984). *See, e.g.*, Gov't Br. 41 (referencing *Chevron* deference). These arguments for deference are unavailing; there is no agency view on tolling to which the Court must defer.

As an initial matter, the Government's invocation of *Chevron* seems dubious. It offers *Chevron* deference as a fallback argument—but where such deference applies, it is because "*Chevron* deference [is] owed to administrative practice in applying a statute" because "Congress delegated authority to the agency." *United States* v. *Mead Corp.*, 533 U.S. 218, 226 (2001). Accordingly, parties seeking such deference generally center their case around the *Chevron* framework. And yet, the Government did not mention deference of any sort in its briefs below, and only now invokes *Chevron* on page 41 of its brief as a peripheral argument it views as "not necessary" to resolve the case. Gov't Br. 40-41. Nor has the Government consistently invoked *Chevron* in other cases raising the tolling issue, even arguing that the tolling question should be "reviewed *de novo*." Resp. Br. 13, *Dekoladenu* v. *Gonzales*, Nos. 04-2164 & 05-1737 (4th Cir. Sept. 19, 2005).[15]

The Government's apparent hesitance regarding *Chevron* is sensible; there is no authoritative agency view on the tolling question to which the Court might defer. The Government concedes (at 43) that there is no precedential BIA decision addressing the question in this case. And none of the bases identified by the Gov-

[15] *See also* Resp. Br., *Azarte* v. *Ashcroft*, No. 02-73947 (9th Cir. Dec. 1, 2003) (no reference to deference); Resp. Br., *Ugokwe* v. *U.S. Attorney General*, No. 05-15237 (11th Cir. Dec. 19, 2005) (making no argument for deference to an agency interpretation).

ernment (at 40) for the purported "longstanding position" of the agency on tolling—not the pre-IIRIRA BIA decision in *Shaar*, not the 1997 regulations, and not the analysis of tolling in the preamble to the newly proposed rule—merits deference. But even if these positions did warrant deference, the Court ought to reject these views, as they constitute an unreasonable interpretation of the statute. *See* Part I *supra*.

A. The BIA's Decision In *Shaar* Does Not Warrant Deference

Addressing different statutory and regulatory provisions from those at issue in this case, the BIA determined, in a 7-5 decision, that the timely filing of a motion to reopen did not toll an alien's voluntary departure period. *Matter of Shaar*, 21 I. & N. Dec. 541, 546-549 (BIA 1996). Because it construes different statutory provisions, *Shaar* does not merit any deference in this case.

1. *Shaar* involved a different statutory scheme—the statute at issue here had not yet been enacted. Critically, the conflict between the statutory provisions on which Petitioner's arguments for tolling are based did not exist in *Shaar*. And, conversely, the key rationales that might justify the no-tolling rule in *Shaar* are absent under current law.

As the BIA mentioned, an alien who filed a motion to reopen during his voluntary departure period was not "without recourse" because he could seek an extension, the duration of which was not capped at that time. 21 I. & N. Dec. at 548 (citing 8 C.F.R. § 244.2 (1995)). The length of the voluntary departure periods themselves were likewise not constrained by statute. *See* 8 U.S.C. §§ 1252b(e)(2), 1254(e) (1994) (revised and recodified at 8 U.S.C. § 1229c in 1996). The unlimited base and extension periods for voluntary departure left

a longer window for the agency to resolve the motion to reopen. For example, Shaar himself had an eight-month voluntary departure period that was further extended by almost six months. 21 I. & N. Dec. at 542. Additionally, motions to reopen at that time were merely products of regulation receiving little or no protection. *See id.* at 547; *see also* 8 C.F.R. §§ 3.2, 3.8 (1994). And, the statute offered additional flexibility, providing for an exception to the applicable penalties for overstaying the voluntary departure period because of "exceptional circumstances." *See* 8 U.S.C. § 1252b(e)(2)(A) (1994) (repealed by IIRIRA in 1996).[16]

The changes effected by IIRIRA render *Shaar* irrelevant.[17] Even the First Circuit, which rejected tolling, emphasized that "[o]ur decision does not in any way turn on *Shaar*" and noted its "likely infirmity." *Chedad* v. *Gonzales*, 497 F.3d 57, 64 (1st Cir. 2007); *cf. Public Citizen, Inc.* v. *HHS*, 332 F.3d 654, 659 (D.C.

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[16] The substantial statutory changes and the lack of any evidence of Congress's awareness of *Shaar* eliminate any argument that Congress ratified *Shaar*. *See Bragdon* v. *Abbott*, 524 U.S. 624, 645 (1998) (finding ratification evident where legislation included "repetition of the same language" previously interpreted); *Brown* v. *Gardner*, 513 U.S. 115, 121 (1994) (where "there is no … evidence to suggest that Congress was even aware of the [agency's] interpretive position[,] we consider … re-enactment to be without significance" (internal quotation marks omitted)).

[17] *See Franklin* v. *Massachusetts*, 505 U.S. 788, 822 (1992) (Stevens, J., concurring in part and concurring in the judgment, joined by Blackmun, Kennedy, and Souter, JJ.) ("If the justification for [an agency's] decision no longer obtain[s], the refusal to reconsider would be quite capricious[]" because "[i]nertia cannot supply the necessary rationality" for an agency's ratification of prior policy in the face of changed circumstances (internal quotation marks omitted)).

Cir. 2003) (rejecting *Chevron* deference where the "only potentially relevant regulations … were promulgated before [the relevant statute] was enacted").

2. The Government (at 43-44) seeks to reinvigorate *Shaar* by asserting that the BIA has "continued to apply the rule announced in *Shaar*." However, the Government concedes (at 43) that the BIA has not issued a "precedential" decision on the tolling question since *Shaar*. Instead, the Board has issued non-precedential decisions, such as the single-member decision in this case, that reject tolling in particular cases. Such decisions, however, do not change the fact that *Shaar* did not interpret the relevant statutory provisions. Nor do they warrant *Chevron* deference of their own accord. *Mead* made clear that *Chevron* deference is only due where Congress has delegated authority "to make rules carrying the force of law, and … the agency interpretation claiming deference was promulgated in the exercise of that authority." 533 U.S. at 226-227. Non-precedential BIA decisions—including all single-member decisions and three-member decisions not designated precedential, *see* 8 C.F.R. § 1003.1(e)(6)(ii), (g)—are not promulgated "in the exercise" of the BIA's authority "to make rules carrying the force of law."

3. The Government's invocation of *Chevron* deference based on *Shaar* is particularly peculiar because it represents an about-face in its understanding of *Shaar* and the BIA's use of *Shaar*. In *Banda-Ortiz*, the first Fifth Circuit case to reject tolling, the Government argued that "the Board's decision in *Matter of Shaar* does not control the result in this case." Resp. Br. 20 n.7, *Banda-Ortiz* v. *Gonzales*, No. 04-61100 (5th Cir. May 9, 2005). And in its brief to the Third Circuit in *Kanivets*, in which Kanivets was arguing that *Shaar* was not controlling, the Government acknowledged

that "the Board said that *Matter of Shaar* does not control Kanivets' case because it involved a different statutory scheme." Resp. Br. 7, *Kanivets* v. *Gonzales*, Nos. 03-3569 & 03-4187 (3d Cir. Jan. 16, 2004).

B. The 1997 Regulations Provide No Basis For *Chevron* Deference

The Government argues (at 44) that the no-tolling rule "accords with the interim rule that the Attorney General promulgated to implement IIRIRA on March 6, 1997." Any argument for deference to this rule is misplaced because it expressly left open the tolling question. The Department had "considered several options [regarding the effect of a motion to reopen on a voluntary departure period], but *has not adopted any position* or modified the interim rule." 62 Fed. Reg. at 10,326 (emphasis added).[18] The Department promised to address this question in a "final rule." *Id.* Both the Department and the Government's Brief in Opposition acknowledge that "no final rule directly addressing those issues has been published." 72 Fed. Reg. at 67,677; *see also* Opp. 14-15 & n.5 (arguing that new regulations would soon resolve the question presented). This statement implicitly concedes that the 1997 regulations do not resolve the tolling question.

C. The Analysis Of The Tolling Question In The Preamble To The Newly Proposed Rule Does Not Warrant *Chevron* Deference

The Government (at 48) seizes on the discussion of tolling in the newly "proposed rule's introductory text" and suggests that this discussion warrants *Chevron*

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[18] By declining to "adopt[] any position," 62 Fed. Reg. at 10,326, the rules plainly did not take any position on *Shaar*.

deference. The sole authority the Government cites for deference to a proposed rule preamble is *Smiley* v. *Citibank (S.D.), N.A.*, 517 U.S. 735 (1996). Nothing in *Smiley*, however, supports *Chevron* deference for a proposed rule, much less a preamble to a proposed rule.

When *Smiley* noted that the Court should not "ignore the agency's current authoritative pronouncement of what the statute means," it was referring to "a full-dress regulation, issued by the Comptroller himself and adopted pursuant to the notice-and-comment procedures of the Administrative Procedure Act designed to assure due deliberation." 517 U.S. at 741, 744 n.3. Analysis in a proposed rule's preamble is in every pertinent way not an "authoritative pronouncement"—it does not have the force of law, has not been subject to a deliberative process such as notice and comment, and is subject to revision, or rejection, by the agency.

Indeed, this Court has never deferred to a preamble in a proposed rule. Under *Mead*, the nascent status of this sort of agency view precludes *Chevron* deference, which is due only when Congress has delegated authority "to make rules carrying the force of law, and … the agency interpretation claiming deference was promulgated in the exercise of that authority." *Mead*, 533 U.S. at 226-227. Unlike the final rule in *Smiley*, neither the preamble to a proposed rule nor the proposal itself carries the force of law. *See Commodity Futures Trading Comm'n* v. *Schor*, 478 U.S. 833, 845 (1986) ("It goes without saying that a proposed regulation does not represent an agency's considered interpretation of its statute and that an agency is entitled to consider alternative interpretations before settling on the view it considers most sound.").

Accordingly, the purported "longstanding practice" of the BIA does not warrant *Chevron* deference based

on *Shaar*, the 1997 regulations, or the preamble to the proposed rule.[19]

CONCLUSION

The judgment of the Fifth Circuit should be reversed.

[19] Even *Skidmore* deference has limited relevance to the tolling question here and is not expressly sought by the Government. Under *Skidmore*, a court "follow[s] an agency's rule only to the extent it is persuasive." *Gonzales* v. *Oregon*, 546 U.S. 243, 269 (2006). For the reasons explained in Part I, *supra*, however, a no-tolling rule, like any rule that does not permit the voluntary departure and motion to reopen provisions to coexist, is contrary to the language of the statute. Indeed, for the same reason, even if *Chevron* deference were to apply, the agency's construction would fail as an unreasonable interpretation of the statute.

Respectfully submitted.

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