No. 06-1181

In the Supreme Court of the United States

SAMSON TAIWO DADA, PETITIONER

v.

MICHAEL B. MUKASEY, ATTORNEY GENERAL

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

BRIEF FOR THE RESPONDENT

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QUESTION PRESENTED

As formulated by the Court, the question presented is: "Whether the filing of a motion to reopen removal proceedings automatically tolls the period within which an alien must depart the United States under an order granting voluntary departure."

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1-2) is not published in the *Federal Reporter* but is reprinted in 207 Fed. Appx. 425. The decisions of the Board of Immigration Appeals (Pet. App. 3-4, 5-6) and the immigration judge (Pet. App. 7-9) are unreported.

JURISDICTION

The judgment of the court of appeals was entered on November 28, 2006. The petition for a writ of certiorari was filed on February 26, 2007, and granted on September 25, 2007. The jurisdiction of this Court rests on 28 U.S.C. 1254(1).

STATUTORY AND REGULATORY PROVISIONS INVOLVED

The pertinent statutory and regulatory provisions are set forth in the appendix to this brief. App., *infra*, 1a-21a.

STATEMENT

This case concerns the interaction of provisions of the Immigration and Nationality Act (INA or Act), 8 U.S.C. 1101 *et seq.*, and implementing regulations that govern the removal of aliens from the United States, grant the Attorney General discretion to allow an alien voluntarily to depart the United States in lieu of being removed, and provide for an alien to file a motion to reopen a final order of removal. Specifically, the question presented is whether the filing by an alien of a motion to reopen his removal proceedings automatically tolls the congressionally determined period during which the alien must depart the United States under an order granting voluntary departure.

1. The INA governs the conduct of removal proceedings for aliens who are unlawfully in this country. Aliens who are found to be removable may be eligible for a variety of forms of discretionary relief, including asylum, cancellation of removal, and adjustment of status. 8 U.S.C. 1158, 1229b, and 1255 (2000 & Supp. V 2005). An alien who is ordered removed is subject to a bar to admission to the United States, the length of which varies according to the circumstances of the alien's case. 8 U.S.C. 1182(a)(9)(A)(i) and (ii) (establishing inadmissibility periods for aliens who have been "ordered removed" or "departed the United States while an order

of removal was outstanding").[1] In addition, an alien who reenters or attempts to reenter the United States after having been removed is subject to criminal prosecution. 8 U.S.C. 1326.

2. a. The INA provides that the Attorney General "may permit" certain removable aliens "voluntarily to depart the United States at the alien's own expense" in lieu of being removed. 8 U.S.C. 1229c(a)(1) and (b)(1).[2] The INA further provides that the Attorney General "may by regulation limit eligibility for voluntary departure * * * for any class or classes of aliens." 8 U.S.C. 1229c(e).[3] Aliens who are granted voluntary departure and comply with its terms avoid the period of inadmissibility that would otherwise result from departure following entry of an order of removal. 8 C.F.R. 1241.7 ("an

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[1] The inadmissibility period is generally five years if the removal order was entered upon the alien's arrival, or at the end of removal proceedings initiated upon the alien's arrival. 8 U.S.C. 1182(a)(9)(A)(i); see 8 U.S.C. 1225(b)(1)(A). For all other removed aliens, the inadmissibility period is generally ten years. 8 U.S.C. 1182(a)(9)(A)(ii). For all aliens, the inadmissibility period is 20 years "in the case of a second or subsequent removal or at any time in the case of an alien convicted of an aggravated felony." 8 U.S.C. 1182(a)(9)(A)(i) and (ii). These periods of inadmissibility may be waived. 8 U.S.C. 1182(a)(9)(A)(iii); see *Fernandez-Vargas* v. *Gonzales*, 126 S. Ct. 2422, 2433 n.11 (2006).

[2] By operation of the Homeland Security Act of 2002, Pub. L. No. 107-296, the Secretary of Homeland Security has authority to grant voluntary departure before the commencement of removal proceedings. §§ 402(3), 441, 442, 1512(d), 116 Stat. 2178, 2192, 2193, 2310; see 8 C.F.R. 240.25 (Department of Homeland Security's voluntary departure rules). For ease of reference, and because this case involves a grant of voluntary departure made at the conclusion of removal proceedings, this brief will speak of the Attorney General's authority to grant voluntary departure.

[3] Section 1229c(e) also provides that "[n]o court may review any regulation issued" pursuant to that authorization. 8 U.S.C. 1229c(e).

alien who departed before the expiration of [a] voluntary departure period * * * shall not be considered to [have been] deported or removed"). Voluntary departure also permits aliens "to choose their own destination points, to put their affairs in order without fear of being taken into custody at any time, [and] to avoid the stigma * * * associated with forced removals." *Lopez-Chavez* v. *Ashcroft*, 383 F.3d 650, 651 (7th Cir. 2004).

The requirements for obtaining voluntary departure vary depending on whether an alien seeks it *before* or *at the conclusion of* removal proceedings. In the former situation, the only statutory preconditions are that the alien must not be removable by reason of an aggravated felony conviction or on security or terrorism grounds. 8 U.S.C. 1229c(a)(1). By regulation, an alien who seeks pre-final-order voluntary departure must "[m]ake[] such request prior to or at the master calendar hearing at which the case is initially calendared for a merits hearing," and an immigration judge (IJ) may grant voluntary departure only if the alien concedes removability, makes no additional request for relief (or withdraws any such request previously filed), and "[w]aive[s] appeal of all issues." 8 C.F.R. 1240.26(b)(1)(i). An alien who requests voluntary departure at the conclusion of removal proceedings faces additional requirements. Such an alien must satisfy the statutory preconditions applicable for a pre-hearing grant of voluntary departure, and must also have "been physically present in the United States for a period of at least one year immediately preceding the date the notice to appear was served," have been "a person of good moral character for at least 5 years," and have "established by clear and convincing evidence that [he] has the means to depart the United States and intends to do so." 8 U.S.C. 1229c(b)(1).

b. The INA and the Attorney General's regulations contain a number of provisions designed to ensure that aliens who have been granted the privilege of voluntary departure actually depart in a timely fashion. The Act strictly limits the period for which a grant of voluntary departure may last. For aliens who are granted that privilege before the conclusion of removal proceedings, "permission to depart voluntarily * * * shall not be valid for a period exceeding 120 days." 8 U.S.C. 1229c(a)(2)(A). The time limit is even shorter for aliens granted voluntary departure at the conclusion of removal proceedings: "Permission to depart voluntarily * * * shall not be valid for a period exceeding 60 days." 8 U.S.C. 1229c(b)(2). Those statutory time limits are outer limits. The IJ or Board of Immigration Appeals (BIA or Board) can specify a shorter period. The regulations further provide that "[a]uthority to extend the time within which to depart voluntarily specified initially by an immigration judge or the Board is only within the jurisdiction of" certain specified officials of the Department of Homeland Security (DHS). 8 C.F.R. 1240.26(f). The regulations expressly provide, however, that "[i]n no event can the total period of time, including an extension, exceed 120 days or 60 days as set forth in [8 U.S.C. 1229c]." *Ibid.*

The INA also provides that aliens who request voluntary departure at the conclusion of their removal proceedings "shall be required to post a voluntary departure bond." 8 U.S.C. 1229c(b)(3); see 8 U.S.C. 1229c(a)(3) (stating that the Attorney General "may require" such a bond from aliens granted voluntary departure prior to the conclusion of removal proceedings). The bond must be "in an amount necessary to ensure that the alien will depart" and may be returned only

"upon proof that the alien has departed the United States within the time specified." 8 U.S.C. 1229c(b)(3).

c. The INA and the Attorney General's regulations also impose a number of consequences if a removable alien who is granted voluntary departure fails to depart within the authorized time. First, such an alien forfeits any bond he was required to post as a condition to being granted voluntary departure.

Second, an IJ who grants voluntary departure must "also enter an alternate order [of] removal." 8 C.F.R. 1240.26(d). If the alien does not file a timely administrative appeal with the BIA—which must be filed within 30 days of the IJ's decision, 8 C.F.R. 1003.38(b)—the IJ's alternate order of removal "become[s] final" "upon overstay of the voluntary departure period" provided in the IJ's order. 8 C.F.R. 1241.1(f). If a timely appeal is filed and the Board finds the alien removable, it may "reinstate[]" the voluntary departure period granted by the IJ or "grant[]" such a period itself if the IJ has not done so. *Ibid.* Again, the alternate removal order becomes final "upon overstay of the voluntary departure period" granted or reinstated by the Board. *Ibid.*; accord 8 U.S.C. 1101(a)(47)(B) (a deportation order "shall become final upon the earlier of—(i) a determination by the Board of Immigration Appeals affirming such order; or (ii) the expiration of the period in which the alien is permitted to seek review of such order by the [BIA]."). Whether ordered by the IJ or the BIA, if the voluntary departure period expires and the alternate order of removal becomes final, the alien is subject to a period of inadmissibility after he departs or is removed from the United States and to criminal prosecution if he seeks to reenter. See pp. 2-3 & note 1, *supra*.

Third, the INA imposes additional consequences on an alien who "voluntarily fails to depart the United States within the time period specified." 8 U.S.C. 1229c(d)(1) (Supp. V 2005).[4] In addition to being subject to a civil fine of between $1000 and $5000, such an alien is rendered "ineligible, for a period of 10 years," to receive certain forms of discretionary relief, including cancellation of removal, adjustment of status, and a subsequent grant of voluntary departure. 8 U.S.C. 1229c(d)(1)(A) and (B) (Supp. V 2005).[5] The INA specifically requires that "[t]he order permitting an alien to depart voluntarily shall inform the alien of the penalties under this subsection." 8 U.S.C. 1229c(d)(3) (Supp. V 2005).

d. Finally, the INA contains a number of provisions addressing judicial review of voluntary departure orders and the alternate orders of removal that accompany them. Section 1229c(f) provides that "[n]o court shall have jurisdiction over an appeal from denial of a request

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[4] After the BIA's grant of voluntary departure in this case, Congress enacted the Violence Against Women and Department of Justice Reauthorization Act of 2005 (Amendment), Pub. L. No. 109-162, 119 Stat. 2960. Section 812 of the Amendment, 119 Stat. 3057, amended 8 U.S.C. 1229c(d) by subdividing it into three subparts, one of which (subsection (d)(2)) contains a new exception to the statutory penalties for failure to depart within the time specified for certain battered spouses and children. Because the petition for a writ of certiorari, the brief in opposition, and petitioner's brief on the merits all cite the post-Amendment version of Section 1229c(d), this brief does so as well. Both the pre- and post-Amendment versions are reproduced in the appendix to this brief. App., *infra*, 12a-13a (post-Amendment); 14a (pre-Amendment).

[5] An alien who overstays a period of voluntary departure is not, however, rendered ineligible for asylum under 8 U.S.C. 1158 (2000 & Supp. V 2005) or withholding of removal under 8 U.S.C. 1231(b)(3).

for an order of voluntary departure." 8 U.S.C. 1229c(f). That same provision also bars a court from "order[ing] a stay of an alien's removal pending consideration of any claim with respect to voluntary departure." *Ibid.* Compare 8 U.S.C. 1252(b)(3) (authorizing reviewing court to "stay removal" pending decision on petition for judicial review). In 1996, Congress repealed a provision that had barred courts from reviewing final deportation orders of aliens who had departed from the United States. Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (IIRIRA), Pub. L. No. 104-208, § 306(b), 110 Stat. 3009-612 (repealing 8 U.S.C. 1105a(c) (1994)); *Stone* v. *INS*, 514 U.S. 386, 399 (1995). As a result, under current practice, an alien can voluntarily depart the United States without forfeiting his ability to obtain judicial review of the underlying alternate removal order. *Ngarurih* v. *Ashcroft*, 371 F.3d 182, 192 (4th Cir. 2004).

3. The INA and the Attorney General's regulations provide for the filing of a motion to reopen proceedings after a final decision has been rendered by an IJ or the Board. 8 U.S.C. 1229a(c)(7)(B) (Supp. V 2005); 8 C.F.R. 1003.23(b)(3) (IJ); 8 C.F.R. 1003.2(c) (BIA). The purpose of a motion to reopen is to present "new facts" that may bear on an alien's eligibility for relief. 8 U.S.C. 1229a(c)(7)(B) (Supp. V 2005); see 8 C.F.R. 1003.2(c)(1) (stating that motions to reopen filed with the BIA must identify evidence that "could not have been discovered or presented at the former hearing" or seek discretionary relief "on the basis of circumstances that have arisen subsequent to the hearing"). An alien "may file one motion to reopen." 8 U.S.C. 1229a(c)(7)(A) (Supp. V 2005). And, subject to three specifically enumerated exceptions that are inapplicable here, 8 U.S.C. 1229a(c)(7)(C)(ii)-(iv) (Supp. V 2005), any motion to reopen "shall be filed

within 90 days of the date of entry of a final administrative order of removal," 8 U.S.C. 1229a(c)(7)(C)(i) (Supp. V 2005). Those statutory limitations are essentially the same as limitations that had been adopted by the Attorney General by regulation five months earlier. 61 Fed. Reg. 18,905 (1996), adopting 8 C.F.R. 3.2(b)(2).[6]

The INA establishes no standards for granting a motion to reopen. The regulations state that "[t]he decision to grant or deny a motion to reopen * * * is within the discretion of the Board" and that it may "deny a motion to reopen even if the party moving has made out a *prima facie* case for relief." 8 C.F.R. 1003.2(a); see *INS* v. *Phinpathya*, 464 U.S. 183, 188 n.6 (1984) (whether to grant a motion to reopen "is entirely within the BIA's discretion"). Among other restrictions, an alien who departs the United States may not file a motion to reopen "subsequent to his or her departure," and an alien's departure "after the filing of a motion to reopen * * * shall constitute a withdrawal of such motion." 8 C.F.R. 1003.2(d).

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[6] Before 1990, motions to reopen were governed entirely by regulation. See 8 C.F.R. 3.2 (1989). In 1990, Congress directed the Attorney General to place limits on the number of motions to reopen an alien could file, specify a maximum time period for filing such motions, and submit a report concerning "abuses associated with the failure of aliens to consolidate requests for discretionary relief before immigration judges at the first hearing on the merits." Immigration Act of 1990, Pub. L. No. 101-649, § 545(c) and (d), 104 Stat. 5065, 5066. Regulations implementing those directives were proposed in 1994, 59 Fed. Reg. 29,386, and again in 1995, 60 Fed. Reg. 24,574 (extending the filing period from 20 days to 90 days), and were promulgated in final form on April 29, 1996, 61 Fed. Reg. 18,900. On September 30, 1996, Congress enacted the present statutory time and number limits on motions to reopen. IIRIRA § 304(a), 110 Stat. 3009-593.

The regulations further provide that, with certain enumerated exceptions inapplicable here, "the filing of a motion to reopen * * * shall not stay the execution of any decision made in the case." 8 C.F.R. 1003.2(f). With particular respect to voluntary departure, the regulations state if either the IJ or the BIA grants reopening, either may then "reinstate" an otherwise expired voluntary departure period, but only "if reopening was granted prior to the expiration of the original period of voluntary departure." 8 C.F.R. 1240.26(h). Upon such a reinstatement, "[i]n no event can the total period of time, including any extensions, exceed" the statutory 120-day and 60-day limitations. *Ibid.*

4. a. Petitioner is a citizen of Nigeria who entered the United States as a non-immigrant visitor in April 1998. Pet. App. 7. Petitioner remained in the United States beyond the authorized period, which expired on August 31, 1998. *Ibid.*

In 1999, petitioner married a United States citizen, who filed an I-130 (immediate relative) visa petition on his behalf. Pet. App. 8; Admin. R. 55 (A.R.). On February 7, 2003, the Immigration and Naturalization Service (INS) denied the visa petition, deeming it abandoned because petitioner's wife had failed to submit required documentation. A.R. 176.

On January 4, 2004, DHS charged petitioner with being removable. Pet. App. 7-8. On March 17, 2004, petitioner's wife filed a second immediate relative visa petition. A.R. 169. On May 13, 2004, the IJ granted petitioner's request for a continuance to permit his attorney to prepare for the removal hearing. Pet. App. 8.

On September 8, 2004, a hearing was held before an IJ. A.R. 162-168 (transcript of hearing); Pet. App. 7-9 (oral decision by IJ). After petitioner "concede[d]

removability," the IJ found "that the charge [was] sustained" and that petitioner was "removable as charged." A.R. 163. Petitioner requested a further continuance to permit resolution of his wife's second I-130 visa petition. A.R. 163-164. The government opposed that request, noting that petitioner "has had sufficient opportunity * * * to pursue a previous I-130." A.R. 164. In the alternative, petitioner "ask[ed] for voluntary departure at the conclusion of [the] proceeding," and stated under oath that he "would * * * leave voluntarily" if that request were granted. A.R. 165-166. The IJ denied petitioner's motion for a continuance, but granted his "request for voluntary departure." Pet. App. 8-9. As required by 8 C.F.R. 1240.26(d), the IJ's decision further provided that if petitioner did not depart within the time allowed, "the voluntary departure order will become an order of removal" and petitioner would be removed to Nigeria. Pet. App. 9. The IJ also informed petitioner that if he "fail[ed] to depart on or before the voluntary departure date," he would "become ineligible [for] * * * cancellation of removal, adjustment of status, and voluntary departure." A.R. 166-167.

Petitioner filed an administrative appeal to the BIA, which rendered the IJ's order non-final and therefore suspended the voluntary departure period and the alternate order of removal pending appeal. 8 U.S.C. 1101(a)(47)(B)(i) (order "become[s] final" upon affirmance by the BIA or expiration of time for seeking BIA review); 8 U.S.C. 1229c(b)(1) (authorizing the Attorney General to permit voluntary departure "at the conclusion of a [removal] proceeding under section 1229a"). On November 4, 2005, the BIA affirmed the IJ's decision. Pet. App. 5-6. "Pursuant to the Immigration Judge's order," the Board stated that petitioner

would be "permitted to voluntarily depart from the United States * * * within 30 days from the date of this order or any extension beyond that time as may be granted by [DHS]." *Id.* at 5. The BIA's order further provided that if petitioner "fail[ed] to depart the United States within the time period specified, or any extensions granted by the DHS," he would be subject to a civil penalty and would "be ineligible for a period of 10 years for any further relief" under various provisions of the Act, specifically including those authorizing adjustment of status and voluntary departure. *Id.* at 5-6 (citing, *inter alia*, Sections 240A, 240B, and 245 of the INA (8 U.S.C. 1229b, 1229c, and 1255)).

The 30-day voluntary departure period specified in the BIA's order was scheduled to expire on December 4, 2005, a Sunday. Petitioner did not seek an extension of that period from DHS.[7] Nor did he depart. Instead, on Friday, December 2, 2005, petitioner filed a motion with the BIA asking it to reopen his removal proceedings and remand his case to the IJ to permit him to seek adjustment of status based on his wife's pending I-130 visa petition. A.R. 3; see A.R. 8-21. In his motion to reopen, petitioner purported to "withdraw his request for voluntary departure" and "instead accept[] an order of deportation." A.R. 10.

On February 8, 2006, the Board denied petitioner's motion to reopen. Pet. App. 3-4. The BIA explained that, under 8 U.S.C. 1229c(d) (Supp. V 2005), "an alien who fails to depart following a grant of voluntary departure * * * is statutorily barred from applying for certain forms of discretionary relief." Pet. App. 3-4. As a

[7] Given the 60-day statutory cap on a period of voluntary departure allowed at the conclusion of removal proceedings, 8 U.S.C. 1229c(b)(2), any such extension would have been limited to an additional 30 days.

result, because petitioner "remain[ed] in the United States after the scheduled date of departure," he was ineligible for adjustment of status. *Id.* at 4.

b. The court of appeals affirmed in an unpublished, per curiam opinion. Pet. App. 1-2. Citing its decision in *Banda-Ortiz* v. *Gonzales*, 445 F.3d 387 (5th Cir. 2006), cert. denied, 127 S. Ct. 1874 (2007), the court held that the "BIA's interpretation of the applicable statutes rendering [petitioner] ineligible [for adjustment of status] was reasonable,"[8] and that petitioner had "failed to show that the BIA abused its discretion by denying his motion to reopen." Pet. App. 2.

In *Banda-Ortiz*, the Fifth Circuit "declin[ed] to read into 8 U.S.C. § 1229c(d) the requirement that the BIA automatically toll an alien's voluntary departure period during the pendency of a motion to reopen." 445 F.3d at 391. The court described the grant of voluntary departure as "the result of an agreed-upon exchange of benefits between an alien and the [g]overnment," under which the alien "gain[s] access to the numerous benefits that voluntary departure provides" in exchange for a representation that he will make "a quick departure at no cost to the government." *Id.* at 389-390. "But if the alien does not depart promptly, so that the [government] becomes involved in further and more costly procedures by his attempts to continue his illegal stay here," it reasoned, "the original benefit to the [government] is lost." *Id.* at 390 (quoting *Ballenilla-Gonzalez* v. *INS*, 546 F.2d 515, 521 (2d Cir. 1976), cert. denied, 434 U.S. 819 (1977)). The court also determined that a contrary rule

[8] The court of appeals also concluded that "[t]he IJ did not abuse its discretion by denying [petitioner's] request for a continuance" during the original removal proceedings. Pet. App. 2. Petitioner does not seek review of that holding here. Pet. i.

would be "in tension with, if not opposed to," the congressionally imposed limits "on the length of and authority to extend voluntary departure." *Ibid.* While acknowledging that Congress has "authorized aliens to file a motion to reopen, and did not exclude aliens who elect voluntary departure from its application," the court determined that "[t]he BIA has reasonably interpreted the governing statutes * * * to permit the filing and resolution of a motion to reopen, so long as it does not interfere with the agreed upon voluntary departure date or the Government's interest in the finality of an alien's voluntary departure." *Id.* at 391 (citation omitted).

SUMMARY OF ARGUMENT

The filing of a motion to reopen removal proceedings does not automatically suspend an alien's obligation to depart from the United States within the time specified in an order granting voluntary departure. Voluntary departure is an agreed-upon method of resolving removal proceedings that provides tangible benefits to both aliens and the government. Petitioner's approach would subvert that exchange by permitting every alien granted voluntary departure the unilateral ability to alter its substantive terms, and result in routine violation of congressionally imposed limits on grants of voluntary departure.

A. Congress has expressly directed that, at the conclusion of removal proceedings, "[p]ermission to depart voluntarily * * * shall not be valid for a period exceeding 60 days," 8 U.S.C. 1229c(b)(2), and regulations carefully limit how, and to what extent, an initial period of voluntary departure period may be extended. Petitioner's proposal would also disrupt other aspects of the statutory scheme, including two provisions that are trig-

gered based on whether an alien departs within "the time specified," 8 U.S.C. 1229c(b)(3), or "the time period specified," 8 U.S.C. 1229c(d)(1) (Supp. V 2005). The issue here does not truly involve "tolling" at all. Moreover, the statutory time limit on permission to depart voluntarily is a substantive limitation on the availability of a congressionally created privilege, not a limitations period designed to encourage aliens to assert legal claims in a timely fashion. What petitioner is actually seeking is an automatic *suspension* or *extension* of the time during which his permission to depart voluntarily remained valid and a *stay* of the alternate order of removal that would otherwise have become final upon its expiration. While those are the consequences of appeal to the BIA, once the BIA has ruled, the INA and implementing regulations make clear that neither consequence flows from the filing of a motion to reopen.

B. The statutory history of Section 1229c confirms that Congress did not intend for the filing of a motion to reopen to extend a voluntary departure period. Since 1990, Congress has repeatedly acted to limit the Attorney General's authority in granting voluntary departure, impose mandatory consequences for an alien's failure to depart within the time specified, and narrow exceptions to such limitations and consequences. That history certainly reveals no intent to disturb the BIA's pre-IIRIRA conclusion that the filing of a motion to reopen does not immunize an alien from the consequences of failing to depart within the time specified in an order granting voluntary departure.

C. There is no conflict between the provisions governing voluntary departure and those governing motions to reopen. Having volunteered for a discretionary benefit based on representations that he "has the means to

depart the United States and intends to do so," 8 U.S.C. 1229c(b)(1)(D), an alien must abide by voluntary departure's terms, including the requirement that he depart within the time specified. Although that obligation may often limit an alien's opportunity to obtain some other form of discretionary relief via a motion to reopen, it is a commonplace that a party's choice to seek one remedy may sometimes foreclose his ability to obtain another. In addition, the argument that an alien's statutory option to file a single motion to reopen overrides the strict statutory limits on the duration of a period of voluntary departure is inconsistent with the disfavor with which motions to reopen are viewed. The provision providing for a single motion to reopen was designed to *limit* motions to reopen, not to give such motions an exalted status that would trump other statutory limits. Such an automatic stay via a motion to reopen would also be inconsistent with the fact that the filing of a petition for judicial review does not by its own force extend a period of voluntary departure.

D. Although resort to principles of deference is unnecessary to uphold the BIA's conclusion in this case, the Attorney General's longstanding interpretation of the INA provides further reason for rejecting petitioner's proposed construction. In 1996, the BIA concluded, in a precedential en banc decision, that the filing of a motion to reopen removal proceedings neither extends the time for voluntary departure nor immunizes an alien from the consequences of failing to depart within the time specified. Neither subsequent legislation nor subsequent regulations indicate any intent to disturb that holding, and the BIA has continued to apply it. That practice is consistent with provisions in the post-1996 regulations stating that the filing of a motion

to reopen does not stay the execution of *any* decision made in a given case, and that permit an IJ or the BIA to reinstate a voluntary departure period, but only if a motion to reopen was *granted* before the expiration of the voluntary departure period. Finally, the Attorney General has recently provided a detailed explanation of why his "interpretation of the [INA] and the existing regulations is that the filing of a motion to reconsider or reopen * * * does not automatically toll the voluntary departure period." 72 Fed. Reg. 67,678 (2007).

E. The Attorney General's interpretation of the statute and regulations creates no constitutional difficulties. Petitioner does not claim that he had a constitutionally cognizable interest in the *granting* of his motion to reopen, and the decision whether to reopen proceedings "is entirely within BIA's discretion," *INS* v. *Phinpathya*, 464 U.S. 183, 188 n.6 (1984). Nor does the BIA's decision give rise to any equal protection concerns: Petitioner is not a member of a suspect class, and it is entirely rational to treat aliens who seek and then violate the terms of a grant of voluntary departure differently from those who were ineligible for, or did not seek, such relief.

ARGUMENT

THE FILING OF A MOTION TO REOPEN REMOVAL PROCEEDINGS DOES NOT EXCUSE AN ALIEN'S FAILURE TO DEPART WITHIN THE TIME SPECIFIED IN AN ORDER GRANTING VOLUNTARY DEPARTURE

The INA grants the Attorney General discretion to allow an alien to depart the United States voluntarily and at his own expense, in lieu of being ordered removed and physically deported by the government. Because that means of departing is "voluntary" on the alien's part and discretionary with the Attorney General, voluntary departure represents an agreed-upon method of definitively resolving removal proceedings. In appropriate situations, voluntary departure provides tangible benefits to both sides: The alien gains the ability to control the circumstances of his departure and exemption from a statutory bar that would otherwise inhibit his return, and the government is spared further time and effort in effectuating the alien's removal. But even though voluntary departure reflects an *agreed-upon* resolution of removal issues, and is subject to a strict statutory time limit, petitioner contends that an alien may automatically extend the period within which to depart through the *unilateral* act of filing a motion to reopen the proceedings. Such a regime would subvert Congress's carefully crafted rules governing voluntary departure, and invite strategic behavior by aliens seeking to extend their unlawful stay in the United States as long as possible.

A. The Text Of Section 1229c Expressly Limits How Long A Discretionary Grant Of Voluntary Departure May Last

The INA provides that the Attorney General "may permit an alien voluntarily to depart the United States" at the conclusion of removal proceedings if certain conditions are met. 8 U.S.C. 1229c(b)(1); see 8 C.F.R. 1240.26(c)(1). The terms of Section 1229c and the regulations that implement it demonstrate that the filing of a motion to reopen neither extends the time during which permission to depart voluntarily remains valid, nor immunizes the alien from the consequences of failing to depart within the specified time.

Most obviously, petitioner's proposed rule would result in widespread and routine violation of Congress's express directive that "[p]ermission to depart voluntarily * * * shall not be valid for a period exceeding 60 days. 8 U.S.C. 1229c(b)(2). It would also be contrary to the regulations' express provision that any "exten[sion of] the time within which to depart voluntarily specified initially by an immigration judge or the Board" requires an affirmative act by specified DHS officials, and that even then the total time allowed may not exceed the statutory 60-day maximum. 8 C.F.R. 1240.26(f).

Petitioner's proposed rule would disrupt other aspects of the statutory scheme as well. In two different provisions, Congress has prescribed consequences that will attach if the alien does not depart the United States within "the time specified," 8 U.S.C. 1229c(b)(3) (alien's ability to obtain return of voluntary departure bond), or "the time period specified," 8 U.S.C. 1229c(d)(1) (Supp. V 2005) (consequences for "voluntarily fail[ing] to depart"). The words "time specified" and "time period

specified" clearly refer to the period of voluntary departure set forth in the order granting or extending it. Neither subsection contains any express exceptions, and neither can reasonably be read to contemplate unstated exceptions. Indeed, Congress's use of the definite article—*i.e.*, "*the* time specified"—underscores Congress's evident intent that the period may not be extended in an open-ended fashion that is impossible to calculate *ex ante*.

Seeking to resist—and, indeed, capitalize on—the clarity of the statutory language, petitioner asserts (Br. 18 n.6) that "[t]olling, by its very nature, becomes relevant because of seemingly inflexible time limits and thus arises in the context of language that, on its face, would appear to preclude it." That ambitious effort to benefit from the clarity with which the relevant language appears to foreclose his argument is unavailing.

Most fundamentally, this case does not involve "tolling" as it is traditionally understood. The concept of "tolling" pertains to suspension of the otherwise-applicable time within which a person may assert legal claims or rights before the relevant tribunal. *Young* v. *United States*, 535 U.S. 43, 49-50 (2002). The 60-day cap is not "a limitations period" of that sort. *Id.* at 47. A removable alien has no *right* to voluntary departure to begin with. See, *e.g.*, *Garcia-Mateo* v. *Keisler*, 503 F.3d 698, 700 (8th Cir. 2007); *Patel* v. *Gonzales*, 470 F.3d 216, 220 (6th Cir. 2006); *Tovar-Landin* v. *Ashcroft*, 361 F.3d 1164, 1167 (9th Cir. 2004). And, in any event, petitioner had already been granted permission to depart voluntarily, so the 60-day period did not operate as a period within which he could seek that relief from the BIA. Rather, the 60-day period in Section 1229c(b)(2) was one of the "substantive limitations," *United States* v.

Brockamp, 519 U.S. 347, 352 (1997), on the permission he was granted. See 8 U.S.C. 1229c(b)(2) ("Permission to depart voluntarily * * * shall not be valid for a period exceeding 60 days.").

What petitioner actually claims therefore is an extension—indeed, an *automatic* and *unilateral* extension—of one of the statutory terms of the substantive immigration relief he was granted as a matter of discretion, see *Alimi* v. *Ashcroft*, 391 F.3d 888, 891 (7th Cir. 2004), and a resulting *stay* of the alternate order of removal that would otherwise have become final upon expiration of the voluntary departure period, 8 C.F.R. 1241.1(f). Once the issue is properly framed, it is clear that it would be extraordinary for one party's unilateral act of filing a motion to reopen an already concluded proceeding to trigger an automatic alteration of the substantive terms of a benefit the other party had conferred as a matter of grace, as well as an automatic stay in the moving party's favor of adverse consequences that would otherwise follow as a matter of law. While such a substantive alteration could be provided by statute, such an alteration of the terms of the bargain outlined in the statute is something well beyond an application of ordinary principles of equitable tolling.

To the extent that the proposed analogy to equitable tolling sheds any useful light, moreover, the analogy cuts strongly against petitioner's position. First, equitable tolling principles typically apply to statutes of limitations for filing a claim in the first instance. But whether or not equitable considerations might influence enforcement of deadlines for seeking relief as an initial matter, the situation changes when someone has sought relief and either been denied it or granted it subject to certain limitations. In those circumstances, the onus on the

party seeking additional relief is generally to comply with strictly-enforced time limits and affirmatively seek and obtain interim relief.

More broadly, whether equitable tolling of a limitations period is available under a given statutory scheme is ultimately a matter of legislative intent. *Brockamp*, 519 U.S. at 350. As demonstrated above, permitting an alien unilaterally to extend the statutory period during which permission to depart voluntarily remains valid—or permitting a reviewing court to impose such a rule on the Attorney General—would be "fundamentally inconsistent" with both the specific text and the statutory scheme of Section 1229c. *Lampf, Pleva, Lipkind, Prupis & Petigrow* v. *Gilbertson*, 501 U.S. 350, 363 (1991); see *United States* v. *Beggerly*, 524 U.S. 38, 48 (1998) ("Equitable tolling is not permissible where it is inconsistent with the text of the relevant statute."); see also pp. 23-28, *infra* (explaining that the manner in which Section 1229c has evolved confirms that Congress did not intend to allow permission to depart voluntarily to extend beyond the time specified).

In addition, petitioner's position is fundamentally inconsistent with the very nature of equitable tolling. Courts have "typically extended equitable relief only sparingly." *Irwin* v. *Department of Veterans Affairs*, 498 U.S. 89, 96 (1990). Petitioner's approach, in contrast, would confer upon every alien who has been granted voluntary departure for a limited period an entitlement to obtain an extension of that period, and thus make "tolling" the rule rather than the exception.

Finally, even where tolling of a limitations period is permitted at all, it will be invoked only to enable a party to exercise the rights governed by that period—and only if the party who seeks tolling demonstrates "(1) that he

has been pursuing his rights diligently, and (2) that some extraordinary circumstance stood in his way," *Pace* v. *DiGuglielmo*, 544 U.S. 408, 418 (2005). Here, petitioner makes no claim that he was "pursuing * * * diligently" all available means to depart the United States voluntarily within the 60 days allowed, but that some "extraordinary circumstance stood in his way" of doing so." *Ibid.*[9] To the contrary, petitioner decided that he did not want to depart the United States voluntarily after all, at least not under the 30-day deadline on which the grant of permission in his particular case was conditioned. The fact that petitioner decided to pursue another course by filing a motion to reopen, but at the same time wanted to keep his option open to depart voluntarily later on if that option failed, is scarcely comparable to the compelling equitable circumstances in which tolling of a true statute of limitations has been allowed.

B. The Statutory History Of The INA's Voluntary Departure Provisions Confirms That Congress Did Not Intend For The Filing Of A Motion To Reopen To Excuse An Alien's Failure To Depart Within The Prescribed Period

Until 1990, decisions about whether and for how long to grant voluntary departure were left largely to the discretion of the Attorney General and those acting on his behalf. Since then, Congress has repeatedly acted to limit the Attorney General's authority in granting and extending periods of voluntary departure, to impose mandatory consequences for an alien's failure to depart within the time specified, and to narrow the exceptions

[9] At one time, the INA excused an alien who failed to depart in the time specified if the failure to do so was "because of exceptional circumstances." 8 U.S.C. 1252b(e)(2)(A) (Supp. III 1991). That provision was deleted in 1996. See p. 24, *infra*.

to such limitations and consequences. That statutory history is irreconcilable with petitioner's assertion that Congress intended to permit any alien who has previously been granted voluntary departure to obtain a unilateral extension of unspecified duration and immunity from the consequences that would otherwise flow from his failure to depart within the time specified.

1. In the Immigration Act of 1990, Pub. L. No. 101-649, 104 Stat. 5064 (1990 Act), Congress imposed a five-year period of ineligibility for certain enumerated forms of discretionary relief for "any alien allowed to depart voluntarily * * * who remain[ed] in the United States after the scheduled date of departure." § 545, 104 Stat. 5064 (8 U.S.C. 1252b(e)(2)(A) (Supp. III 1991)). That provision, however, contained an exception for any alien whose failure to depart within the specified time was "because of exceptional circumstances." *Ibid.*

In 1996, IIRIRA imposed substantial new restrictions on voluntary departure. First, Congress established strict limits on how long the permission to depart voluntarily remains valid, including the 60-day limit now applicable to grants made at the conclusion of removal proceedings. Pub. L. No. 104-208, § 304(a)(3), 110 Stat. 3009-596, 3009-597 (8 U.S.C. 1229c(a)(2) and (b)(2) (Supp. II 1996)).[10] Second, IIRIRA eliminated the "exceptional circumstances" exception, § 308(b)(6), 110 Stat. 3009-615; increased the ineligibility period from

[10] In Section 2 of the International Patient Act of 2000, Pub. L. No. 106-406, 114 Stat. 1755-1757 (8 U.S.C. 1229c(a)(2)(B)), Congress established a three-year pilot program that permitted the Attorney General to waive the 120-day limit on grants of voluntary departure made before the conclusion of removal proceedings in certain cases where an otherwise removable alien was receiving medical treatment in the United States. That program expired in 2003. *Ibid.*

five to ten years for an alien who "fails voluntarily to depart the United States within the time period specified," § 304(a)(3), 110 Stat. 3009-597 (8 U.S.C. 1229c(d)); and mandated a civil penalty of between $1000 and $5000 for an alien who fails to depart within the time specified, *ibid.* Finally, Congress enacted specific prohibitions on judicial review of voluntary departure orders, declaring that "[n]o court shall have jurisdiction" over either "any judgment regarding the granting of relief under [the voluntary departure provision]," § 306(a)(2), 110 Stat. 3009-607 (8 U.S.C. 1252(a)(2)(B)(i)), or "an appeal from denial of a request for an order of voluntary departure," § 304(a)(3), 110 Stat. 3009-597 (8 U.S.C. 1229c(f)). And Congress also specifically provided: "[N]or shall any court order a stay of an alien's removal pending consideration of any claim with respect to voluntary departure." *Ibid.*

On January 5, 2006, Congress enacted the Violence Against Women and Department of Justice Reauthorization Act of 2005, Pub. L. No. 109-162, 119 Stat. 2960. In that legislation, Congress reorganized Section 1229c(d) and carved out a new exception to its restrictions on relief for certain battered spouses or children who can demonstrate that "extreme cruelty or battery was at least one central reason for the alien's overstaying the grant of voluntary departure." § 812, 119 Stat. 3057 (8 U.S.C. 1229c(d)(2) (Supp V 2005)). But no other exception has been enacted.

2. The manner in which Section 1229c has evolved is significant for three reasons. First, the simultaneous adoption of strict time limits on periods of voluntary departure and stringent prohibitions of judicial review of decisions refusing to grant such relief and judicial stays of removal pending consideration of a request for

voluntary departure demonstrate that Congress did not intend for courts to invoke judicially-crafted tolling notions to impose extensions of the period allowed by Congress and the Attorney General.

Second, Congress's creation (in 1990), repeal (in 1996), and then creation (in 2006) of carefully drawn exceptions to the increasingly strict consequences for an alien who fails to depart within the specified period show that Congress did not intend for courts to excuse an alien's failure to depart within "the time period specified" (8 U.S.C. 1229c(d)(1) (Supp. V 2005)) whenever an alien files a motion to reopen already concluded removal proceedings. See *TRW Inc.* v. *Andrews*, 534 U.S. 19, 28 (2001) ("Where Congress explicitly enumerates certain exceptions to a general prohibition, additional exceptions are not to be implied, in the absence of evidence of a contrary legislative intent.") (internal quotation marks and citation omitted).

Third, and "[f]rom an even more fundamental standpoint, the policies of the tolling rule [that petitioner proposes] are at odds with Congress' policy in adopting" substantial restrictions on grants of voluntary departure and enhanced consequences for an alien's failure to comply with its terms. *Stone* v. *INS*, 514 U.S. 386, 399 (1995); see *id.* at 397 ("When Congress acts to amend a statute, we presume it intends its amendment to have real and substantial effect."). As with the portion of the INA that this Court construed in *Stone*, see p. 35, *infra*, the essential purpose of IIRIRA's amendments to the voluntary departure provisions was "to abbreviate the [removal] process . . . in order to frustrate certain practices . . . whereby persons subject to deportation were forestalling departure by dilatory tactics." *Stone*, 514 U.S. at 399 (quoting *Foti* v. *INS*, 375 U.S. 217, 224

(1963)). Adoption of petitioner's proposal would seriously frustrate those purposes by permitting any alien who has already promised to depart the United States within a limited and specified time to obtain an automatic extension simply by filing a motion to reopen the very removal proceedings that the grant of voluntary departure was intended to conclude.

Petitioner insists (Br. 19) that "there is no indication that Congress even considered the tolling question at issue here" when it enacted IIRIRA. Even if that assertion is true, it favors the government, not petitioner. In July 1996, two-and-a-half months before IIRIRA was enacted, 110 Stat. 3009-546, the BIA issued an en banc precedential decision holding that the filing of a motion to reopen neither tolls the running of a previously granted voluntary departure period, nor excuses an alien who fails to depart within the specified time from the consequences prescribed by law. *In re Shaar*, 21 I. & N. Dec. 541, 547-548 (B.I.A. 1996), petition for review denied, 141 F.3d 953 (9th Cir. 1998). The Board described the contrary position as "find[ing] no support in the federal regulations or prior case law," *id.* at 547, and it quoted its own 1985 statement that "the mere filing of a motion to reopen * * * does not allow the alien to remain in the United States pending the decision on his * * * motion," *id.* at 548 (quoting *In re Tuakoi*, 19 I. & N. Dec. 341, 349 (B.I.A. 1985)). Congress is "presume[d]" to have been aware of the Board's longstanding and recently reiterated view when it enacted IIRIRA. *Stone*, 514 U.S. at 398. Accordingly, the fact that neither the statutory text nor any legislative history identified by petitioner even remotely suggests an intent to disturb *Shaar*'s construction of pre-IIRIRA law further undercuts petitioner's position. This is all

the more so given that the entire thrust of IIRIRA's provisions regarding voluntary departure was to *limit* the availability of that form of relief and to make the consequences an alien's failure to comply with the requirements of voluntary departure *more*, not less, strict. See pp. 24-25, *supra*.

C. There Is No Conflict Between The Restrictions On Permission To Depart Voluntarily And The Provisions Allowing The Filing Of Motions To Reopen

The centerpiece of petitioner's argument—and that of the courts of appeals that have held that the mere act of filing a motion to reopen automatically extends the statutory period during which permission to depart voluntarily remains valid—is that such a rule is necessary in order to prevent an asserted conflict between the provisions governing voluntary departure and those addressing motions to reopen. Pet. Br. 12-23; *Ugokwe* v. *United States Att'y Gen.*, 453 F.3d 1325, 1330-1331 (11th Cir. 2006); *Sidikhouya* v. *Gonzales*, 407 F.3d 950, 953 (8th Cir. 2005); *Azarte* v. *Ashcroft*, 394 F.3d 1278, 1289 (9th Cir. 2005). The BIA, the argument goes, will not ordinarily have resolved a motion to reopen before the voluntary departure period expires. As a result, aliens who have been granted voluntary departure but still wish to file a motion to reopen will face a choice between departing the country and losing their ability to obtain adjudication of their motion to reopen, see 8 C.F.R. 1003.2(d) (providing that an alien who departs the United States may not file a motion to reopen "subsequent to his or her departure," and that departure "after the filing of a motion to reopen * * * shall constitute a withdrawal of such motion"), or remaining in the

country and suffering the consequences of failing to depart within the time specified.

These arguments all suffer from the same fundamental flaw: They ignore the fact that voluntary departure is *entirely voluntary*. An IJ may not grant voluntary departure unless the alien requests it. 8 C.F.R. 1240.26(b)(1)(i)(A) (grants of voluntary departure prior to the conclusion of removal proceedings); 1240.26(c)(1)(iv) (at the conclusion of removal proceedings). In addition, an alien (like petitioner) who requests voluntary departure at the conclusion of removal proceedings must "establish[] by clear and convincing evidence that the alien has the means to depart the United States *and intends to do so*," 8 U.S.C. 1229c(b)(1)(D) (emphasis added). If an alien who is eligible for a grant of voluntary departure concludes that it may prove adverse to his interests, he may simply decline to seek voluntary departure in the first place.

Having elected to seek voluntary departure, however, such an alien must "take[] all the benefits and all the burdens of the statute together." *Ngarurih* v. *Ashcroft*, 371 F.3d 182, 194 (4th Cir. 2004). Among the benefits are the ability to choose the date and manner of departing the country, avoidance of the stigma that may accompany forced removal, and exemption from the inadmissibility period that would otherwise accompany a departure from the United States after entry of an order of removal. 8 U.S.C. 1182(a)(9)(A); see pp. 2-3 & note 1, *supra*.[11] Among the burdens are the creation of

[11] Petitioner suggests (Br. 29 n.20) that the exemption from the inadmissibility period contained in Section 1182(a)(9)(A) is often not a meaningful benefit because "a large number of aliens granted voluntary departure" will still be rendered inadmissible for ten years under a different provision of the INA, 8 U.S.C. 1182(a)(9)(B)(i)(II). That

an enforceable legal obligation "to depart the United States within the time period specified," 8 U.S.C. 1229c(d)(1) (Supp. V 2005), backed up by penalties if the alien fails to do so, 8 U.S.C. 1229c(b)(3) (forfeiture of voluntary departure bond); 8 U.S.C. 1229c(d)(1) (Supp. V 2005) (civil penalty of between $1000 and $5000 and ten-year period of ineligibility for certain forms of discretionary relief).

It is true that, as a practical matter, an alien's decision to seek voluntary departure at the conclusion of removal proceedings may limit—and in some cases foreclose—his ability to obtain reopening of those proceedings at a later date. But the same thing is true under petitioner's proposed approach, and it is unsurprising and unproblematic in any event.

The INA mandates no minimum period for a grant of voluntary departure, and it specifically instructs that one issued at the conclusion of removal proceedings "shall not be valid for a period exceeding 60 days." 8 U.S.C. 1229c(b)(2). At the same time, the INA provides that an alien "may file one motion to reopen proceedings," 8 U.S.C. 1229a(c)(7)(A) (Supp. V 2005), and that, outside specified circumstances not present here, such a motion "shall be filed within 90 days of * * *

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generally applicable restriction, however—which applies to any alien who was unlawfully present in the United States for one year or more—may be waived in situations where an alien can demonstrate that refusal of admission "would result in extreme hardship to the citizen or lawfully resident spouse or parent of such alien." 8 U.S.C. 1182(a)(9)(B)(v). In addition, even an alien who would not be eligible for such relief may reasonably conclude that the other benefits of voluntary departure—including the ability to put his affairs in order and depart on terms of his own choosing—may justify incurring the obligations that accompany such a grant. An alien who makes a different judgment remains free not to seek voluntary departure.

entry of a final administrative order of removal," 8 U.S.C. 1229a(c)(7)(C)(i) (Supp. V 2005). If "all aliens" truly have "the right to file a motion to reopen" (Pet. Br. 12) in the strong sense petitioner advocates, that right would presumably encompass the entire 90-day period that Congress allowed as a statutory maximum.[12] Yet petitioner makes no argument that a motion to reopen that is filed *after* the expiration of a voluntary departure period—which may not exceed 60 days and can be much shorter—yet still *before* the expiration of the current 90-day period for seeking reopening, protects the alien from the consequences of not departing within the time specified in the voluntary departure order. And the regulations specifically provide that it does not do so. 8 C.F.R. 1240.26(h). Thus, even under petitioner's proposal, there would be many situations in which an alien's decision to seek voluntary departure would limit his ability to obtain reopening at a later date.

Nor is that result surprising. First, nothing in the provisions allowing motions to reopen to be filed confers any new substantive rights on aliens, or dictates how such a motion will be acted upon, and whether to grant reopening remains entirely within the discretion of the Attorney General, even if the alien makes a prima facie case for relief. See p. 9, *supra*. Moreover, nothing in the provisions allowing the filing of motions for the discretionary relief of reopening remotely suggests that the normal operation of *other* provisions of the INA and

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[12] Although the Act imposes an outer limit of 90 days on the time within which a motion to reopen must be filed, it does not in terms prevent the Attorney General from allowing only a shorter period. Nor does the INA prevent the Attorney General from issuing regulations that foreclose relief in certain categories of cases, even if a motion is timely. See *Lopez* v. *Davis*, 531 U.S. 230 (2000).

implementing regulations, such as those governing voluntary departure, were to be affected in any way or that enforcement of the Board's order or other matters affecting the alien were to be brought to a standstill while the BIA considered a motion to reopen. The statutory provisions addressing motions to reopen simply provide that, subject to certain exceptions inapplicable here, "[a]n alien may file one motion to reopen" and that any such motion "shall be filed within 90 days of the date of entry of a final administrative order of removal." 8 U.S.C. 1229a(c)(7)(A) and (C)(i) (Supp. V 2005). Those provisions simply put in statutory form regulations that had been proposed in 1995 and adopted by the Attorney General five months before the enactment of IIRIRA in 1996 in order to place outer *limits* on the motion-to-reopen process. See note 6, *supra.*

Second, basic principles of statutory construction teach that "normally the specific governs the general," *Long Island Care at Home, Ltd.* v. *Coke*, 127 S. Ct. 2339, 2348 (2007), and that a party's choice to seek one form of relief may sometimes limit his ability to obtain another. The provisions allowing the filing of motions to reopen as a procedural matter apply to all aliens who are subject to a removal order. In contrast, the statutory limitation on the time during which the substantive relief of permission to depart voluntary remains valid is more "specific" because it applies only to that subcategory of removable aliens—which has ranged between 10% and 18% in recent years[13]—who seek and are granted that discretionary form of relief. Recognizing that the more specific limitation on voluntary departure

[13] Executive Office for Immigration Review, U.S. Dep't of Justice, *FY 2006 Statistical Year Book* Q1 (Feb. 2007) <http://www.usdoj.gov/eoir/statspub/ fy06syb.pdf>.

must control in situations where it applies permits both sets of restrictions—those governing voluntary departure and those governing motions to reopen—to have effect. See *Dekoladenu* v. *Gonzales*, 459 F.3d 500, 505-506 (4th Cir. 2006), petition for cert. pending, No. 06-1285 (Mar. 22, 2007). A contrary conclusion would permit the voluntary departure restriction to be rendered inoperative in every case based on the unilateral actions of the very aliens whom Congress directed would be subject to severe consequences for failing to depart within the specified time.

Third, petitioner's automatic tolling argument is fundamentally inconsistent with the "disfavor[]" in which motions to reopen are held. *INS* v. *Doherty*, 502 U.S. 314, 323 (1992); accord *INS* v. *Abudu*, 485 U.S. 94, 107 (1988). As this Court has explained, "every delay [in removal proceedings] works to the advantage of the deportable alien who wishes merely to remain in the United States," *Doherty*, 502 U.S. 323, and "[o]ne illegally present in the United States * * * already has a substantial incentive to prolong litigation in order to delay physical deportation for as long as possible," *INS* v. *Rios-Pineda*, 471 U.S. 444, 450 (1985). These concerns are reflected in Congress's enactment of provisions in 1990 and 1996 to place strict limitations on the time within which motions to reopen may be filed. See p. 9 & note 6, *supra*. The text and purposes of the INA's voluntary departure provisions are entirely consistent with these limitations on motions to reopen: A key reason for conferring "substantial benefits" on aliens granted voluntary departure is to "provide[] an incentive to depart without dragging out the process and without requiring the agency and courts to devote resources to the matter." *Alimi*, 391 F.3d at 892. Peti-

tioner's proposed "tolling" rule therefore would not only be inconsistent with the Act's substantive limitations on permission to depart voluntarily, but also undermine the integrity of the removal process by giving *every* alien who is granted voluntary departure a powerful incentive to file a motion to reopen, whether or not he has any plausible claim for relief, in order to maximize the time he may remain in the United States. That result would also be particularly odd given the fact that the regulations expressly provide that the filing of a motion to reopen does *not*, outside narrowly specified circumstances, even stay the *forced removal* of an alien while that motion is being considered. See 8 C.F.R. 1003.2(f).[14]

The facts of this case well illustrate how petitioner's proposed rule would invite efforts to manipulate the voluntary departure process. Petitioner's United States citizen wife filed her second I-130 immediate relative visa petition two-and-a-half months *after* the initiation of removal proceedings against petitioner. After obtaining a nearly four-month continuance to enable his attorney to prepare for a removal hearing, petitioner sought another continuance. After the IJ denied that request, petitioner conceded removability and requested and was granted voluntary departure. Petitioner then appealed to the BIA, which affirmed the IJ's decision and allowed him 30 days to depart voluntary. Instead of departing, however, petitioner filed a motion to reopen his removal proceedings on the final work day before his voluntary

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[14] The regulations create exceptions for situations in which a removal order was entered *in absentia*. 8 C.F.R. 1003.2(f) (citing 8 C.F.R. 1003.23(b)(4)(ii) and (iii)(A)). Since January 5, 2006, the INA has provided that the filing of a motion to reopen by certain battered spouses and children also stays removal. 8 U.S.C. 1229a(c)(7)(C)(iv) (Supp. V 2005).

departure period was scheduled to expire, seeking precisely the same relief that the IJ and the BIA had already denied—further time for his wife's I-130 petition to be considered by DHS as a predicate for his later applying for adjustment of status—and purporting to "withdraw[]" his own previous request for voluntary departure. See pp. 10-12, *supra*. The latter feature of his motion indicates that petitioner was aware of the consequences of non-compliance with the voluntary departure order that he himself had sought and obtained based on a representation that he intended to depart the country if it were granted.

Fourth, the conclusion that the mere filing of a motion to reopen neither stays entry of the alternate order of removal nor excuses an alien from the consequences of failing to depart within the time specified in a voluntary departure order is consistent with the law's treatment of analogous orders. As this Court explained in *Stone*, because of the particular nature of the INA's judicial review provisions, which contemplate separate petitions for review of a final removal order and the denial of a motion to reopen, see 8 U.S.C. 1252(b)(6), "[t]he closest analogy" to a motion for discretionary reopening or reconsideration of the final decision in a completed removal proceeding "is the motion for relief from judgment under Federal Rule of Civil Procedure 60(b)." *Stone*, 514 U.S. at 401. But it is black letter law that the filing of a Rule 60(b) motion more than 10 days after judgment "does not affect the finality of a judgment *or suspend its operation*"; rather, a suspension or stay requires an affirmative order by the court entered "[i]n its discretion and on such conditions * * * as are proper." Fed. R. Civ. P. 60(b), 62(b) (emphasis added); see *Stone*, 514 U.S. at 401-403. In addition, although most courts

of appeals to have considered the question have concluded that they have the authority to stay the running of a voluntary departure period[15]—a conclusion that is itself difficult to square with the statutory limitation on that substantive relief and the foreclosure of judicial review of issues concerning voluntary departure—*none* has held that the mere filing of a petition for judicial review *automatically* triggers such a stay. Indeed, the filing of a petition for review does not automatically stay even the physical removal of the alien. 8 U.S.C. 1252(b)(3)(B) ("Service of the petition [for review] on the officer or employee does not stay the removal of an alien pending the court's decision on the petition, unless the court orders otherwise."). That latter provision, too, represents a marked departure from pre-IIRIRA law—a departure intended to expedite the removal of aliens. Under pre-IIRIRA law, the service of a petition for review *did* automatically stay the alien's removal unless the reviewing court directed that it *did not* (or the alien was an aggravated felon). *Stone*, 514 U.S. 398 (citing 8 U.S.C. 1105a(a)(3) (1994)).[16]

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[15] *Bocova* v. *Gonzales*, 412 F.3d 257, 266 (1st Cir. 2005); *Thapa* v. *Gonzales*, 460 F.3d 323, 325 (2d Cir. 2006); *Obale* v. *Attorney Gen.*, 453 F.3d 151, 157 (3d Cir. 2006); *Vidal* v. *Gonzales*, 491 F.3d 250, 252 (5th Cir. 2007); *Nwakanma* v. *Ashcroft*, 352 F.3d 325, 327 (6th Cir. 2003); *Lopez-Chavez* v. *Ashcroft*, 383 F.3d 650, 654 (7th Cir. 2004); *Rife* v. *Ashcroft*, 374 F.3d 606, 615-616 (8th Cir. 2004); *El Himri* v. *Ashcroft*, 344 F.3d 1261, 1262 (9th Cir. 2003). But see *Ngarurih*, 371 F.3d at 194 (courts of appeals lack authority to stay expiration of a voluntary departure period).

[16] Nor does it matter that, post-IIRIRA, a court may continue to exercise jurisdiction over a petition for review notwithstanding an alien's departure from the country, IIRIRA § 306(b), 110 Stat. 3009-612 (repealing 8 U.S.C. 1105a(c) (1994)), whereas the Attorney General has provided by regulation that an alien's departure "shall constitute a

Petitioner is correct (Br. 34-38) that the seeking of further relief from an initial tribunal often suspends the period for seeking review by a higher one. But the precept that a timely filed motion to reopen or reconsider renders the underlying judgment "nonfinal *for purposes of appeal*," is based on an assessment of the most effective way to allocate resources between different tribunals. *United States* v. *Dieter*, 429 U.S. 6, 8 (1976) (per curiam) (emphasis added); see *ibid.* (stating that a contrary rule would "prolong[] litigation and unnecessarily burden[]" reviewing tribunals, "since plenary consideration of an issue by an appellate court ordinarily requires more time than is required for disposition by a trial court of a petition for rehearing"). What is more relevant here is that it is well-settled that the filing of motion for relief from judgment with the district court does not automatically suspend the force or execution of the judgment in the absence of an order of that court.[17]

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withdrawal" of any previously filed motion to reopen and preclude the filing of a new one. 8 C.F.R. 1003.2(d) (BIA), 1003.23(b)(1) (IJ). Although that regulation has "been the subject of litigation" (Pet. Br. 21 n.11), petitioner did not challenge it below and does not challenge it before this Court, and the regulation's validity is not fairly encompassed within the question presented. And, as already explained, an alien who wishes to leave open the option to obtain full consideration of a motion to reopen need only decline to seek voluntary departure in the first place.

[17] Petitioner's extensive reliance on *Costello* v. *INS*, 376 U.S. 120 (1964) (Br. 14-21), is misplaced. *Costello* did not involve time periods or tolling, and the petitioner in that case was not asserting an entitlement based on a unilateral act of his own. In addition, although petitioner attempts to gloss over the fact (Br. 15), the Court began its opinion in *Costello* with a several-page explanation of why the text of the relevant provision (former 8 U.S.C. 1251(a)(4) (1964)), as well as its legislative history, was ambiguous about whether it permitted deportation "only of one who was an alien at the time of his convictions." *Costello*, 376

More fundamentally, however, petitioner's argument based on *Dieter* and similar decisions cannot be squared with this Court's decision in *Stone*. There, the Court held that an order of the BIA is final when entered and that the period for filing a petition for review runs from that date, notwithstanding the filing of a motion to reconsider (or, here, to reopen). The Court recognized the general rule in the administrative law context that the filing of a motion to reopen or reconsider with the agency renders the decision non-final for purposes of judicial review, but it held that that rule is inapplicable to final deportation orders under the INA. 514 U.S. at 392-393, 405. See generally *id.* at 393-401.[18]

U.S. at 122; see *id.* at 122-126. Having identified that statutory ambiguity, the Court resolved it in large measure based on the conclusion that one of two otherwise equally plausible interpretations would have rendered another provision, former 8 U.S.C. 1252(b) (1964), "a dead letter" as applied to certain aliens. *Costello*, 376 U.S. at 127. Here, in contrast, the question is not whether petitioner is removable, but the intersection of *discretionary* forms of relief. Moreover, the text of the voluntary departure provision imposes clear limits on who may grant voluntary departure and how long the period may last (Part A, *supra*); the statutory history demonstrates that Congress did not intend for courts to make additional exceptions to those restrictions (Part B, *supra*); and adoption of petitioner's proposed tolling rule would make the congressionally mandated limits on voluntary departure a dead letter with respect to any alien who files a motion to reopen (Part C, *supra*).

[18] Petitioner's attempted comparison between administrative appeals to the BIA and the filing of a motion to reopen (Br. 18-19, 37-40) misses the mark. Although the Board has recently reaffirmed its pre-IIRIRA holding in *In re Chouliaris*, 16 I. & N. Dec. 168 (B.I.A. 1977), that "the timely filing of an appeal * * * tolls the running of the time authorized by the Immigration Judge for voluntary departure," *In re A-M-*, 23 I. & N. Dec. 737, 743 (B.I.A. 2005), the statutory and regulatory provisions relied upon in *In re A-M-* make clear that it is more accurate

There is another respect as well in which *Stone* strongly reinforces the conclusion that the filing of a motion to reopen does not automatically toll the running of the voluntary departure period, or permit an alien to disregard his undertaking to depart within the time allowed. In reaching the conclusion that a final order of deportation remains final notwithstanding the filing of a motion to reopen, and that the time for filing a petition for judicial review of that order therefore is not tolled by the filing of a motion for reconsideration, the Court pointed out that it was the longstanding position of the Attorney General, "a view we presume Congress understood when it amended the Act in 1990," that the filing of a motion for reconsideration (or reopening) does not serve to stay the deportation order. *Stone*, 514 U.S. at 398 (citing 8 C.F.R. 3.8 (1977)). Similarly, here it must be presumed that Congress again understood that same rule when it enacted IIRIRA, which included both a

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to say that the filing of a timely appeal prevents the IJ's order—including the grant of voluntary departure—from becoming final in the first place. *Ibid.* (citing 8 U.S.C. 1101(a)(47)(B)(i), which states that, in cases where an administrative appeal is filed, an IJ order "become[s] final upon * * * a determination by the [BIA] affirming such order," and 8 C.F.R. 1241.1(f), which provides that if an alien files a timely appeal, "the [IJ's] order shall become final upon an order of removal by the Board * * *, or upon overstay of any voluntary departure period granted or reinstated by the Board"). In contrast, a motion to reopen removal proceedings is, by definition, filed *after* the underlying order has become final. Equally important, the statutory and regulatory provisions depriving an IJ decision that has been appealed of finality are the kind of provisions one would expect to see if petitioner's view of the effect of filing a motion to reopen were correct. Petitioner effectively asserts that the filing of a motion to reopen renders the Board's decision non-final. But, as this Court squarely held in *Stone*, that is not the consequence of a motion to reopen under the INA.

reenactment of the judicial review provisions at issue in *Stone*, see 8 U.S.C. 1252, and the enactment of statutory provisions addressing voluntary departure and reopening at issue in this case. That presumption of Congress's understanding is all the more compelling given this Court's intervening decision in *Stone* highlighting the Attorney General's longstanding position. The current regulations continue to embody the rule that a motion to reopen does not stay execution of the removal order, see 8 C.F.R. 1003.2(f), and petitioner does not question its validity. Because a provision in the BIA's final order that allows voluntary departure is simply an alternative to the formal removal order set forth in the same BIA decision, it follows from that regulation that the voluntary departure requirement of the BIA's decision is likewise not stayed or tolled by the filing of a motion to reopen.

D. The Agency's Longstanding Position That The Filing Of A Motion To Reopen Does Not Suspend The Time For Voluntary Departure Warrants Deference

1. The Attorney General and his designate the BIA have long taken the position that the filing of a motion to reopen removal proceedings does not automatically suspend the running of a voluntary departure period previously granted by an IJ or the Board. Although resort to principles of deference is not necessary to sustain the Attorney General's position here, that longstanding position provides strong additional support for rejecting petitioner's tolling proposal, especially in light of the express statutory conferral of authority on the Attorney General to interpret the Act and issue regulations to carry out his authority, see 8 U.S.C. 1103(a)(1) and (3); the vesting in him of discretion with respect to

the granting of *both* voluntary departure and reopening; and the Attorney General's and the BIA's extensive experience in administering the INA.

Subject to certain statutory limits on eligibility, Congress has provided that "[t]he Attorney General *may* permit" certain removable aliens "voluntarily to depart the United States at the alien's own expense." 8 U.S.C. 1229c(a)(1) and (b)(1) (emphasis added). The INA further provides that "[t]he Attorney General may by regulation limit eligibility for voluntary departure * * * for any class or classes of aliens," and that "[n]o court may review any regulation issued under this subsection." 8 U.S.C. 1229c(e). The Attorney General, in turn, has by regulation authorized the BIA, "through precedent decisions, [to] provide clear and uniform guidance to the Service, the immigration judges, and the general public on the proper interpretation and administration of the Act and its implementing regulations." 8 C.F.R. 1003.1(d)(1). This Court has held "that principles of *Chevron* deference are applicable to this statutory scheme," and "that the BIA should be accorded *Chevron* deference as it gives ambiguous statutory terms 'concrete meaning through a process of case-by-case adjudication.'" *INS* v. *Aguirre-Aguirre*, 526 U.S. 415, 424-425 (1999) (quoting *INS* v. *Cardoza-Fonseca*, 480 U.S. 421, 448 (1987)).

As noted above and by this Court in *Stone*, "it has been the longstanding view of the INS * * * that a motion for reconsideration does not serve to stay [a] deportation order." 514 U.S. at 398 (citing 8 C.F.R. 3.8 (1977)). As a corollary to that rule, it likewise has been the Board's longstanding view—both pre- and post-IIRIRA—that the filing of a motion to reopen removal proceedings neither extends the time during which an

alien's permission to depart voluntarily in lieu of removal remains valid, nor immunizes such an alien from the consequences of failing to depart within the time specified.

In 1996, shortly before IIRIRA's enactment, the BIA issued an en banc precedential opinion concluding that "the expiration of the period of voluntary departure while a motion to reopen is pending renders" an alien subject to the penalties that attach upon overstay of a voluntary departure period. *Shaar*, 21 I. & N. Dec. at 542, 549. Under the voluntary departure provisions as they existed at the time of *Shaar*, those penalties were applicable to any alien "who remain[ed] in the United States after the scheduled date of departure, other than because of exceptional circumstances." 8 U.S.C. 1252b(e)(2)(A) (1994). The term "exceptional circumstances," in turn, was defined as meaning "exceptional circumstances (such as serious illness of the alien or death of an immediate relative of the alien, but not including less compelling circumstances) beyond the control of the alien." 8 U.S.C. 1252b(f)(2) (1994).

Shaar's holding had two parts. First, the Board determined that neither "the mere filing of a motion to reopen" nor an IJ's "failure to adjudicate [such a] motion prior to the expiration of [a] voluntary departure period" constituted "an 'exceptional circumstance'" that would excuse an alien's failure to depart under the pre-IIRIRA provision of the INA discussed above (at pp. 24), which has since been repealed. 21 I. & N. Dec. at 544. Although the BIA stated that "[i]t may well be true that many aliens accept voluntary departure with the hope of actually remaining here and qualifying for permanent relief from deportation," it viewed Congress's 1990 enactment of a five-year ineligibility period for

aliens who fail to depart within the time specified as reflecting "an unstated but clear disapproval of that practice" and an "expect[ation] that an alien who is given voluntary departure will actually leave the United States in accordance with that grant of relief." *Id.* at 546.

Second, *Shaar* considered and squarely rejected the argument "that the filing of a nonfrivolous motion to reopen prior to the expiration of a period of voluntary departure tolls expiration of the period of voluntary departure." 21 I. & N. Dec. at 546. The Board described that view as "find[ing] no support in the federal regulations or prior case law and fail[ing] to acknowledge the disfavor with which motions to reopen have long been viewed." *Id.* at 547. The BIA specifically distinguished administrative appeals of an IJ's decision from motions to reopen, noting that whereas federal regulations "mandate an automatic stay of execution of an Immigration Judge's initial decision while an appeal is pending with the Board, an automatic stay is not available to an alien filing a motion to reopen." *Id.* at 548 (citing 8 C.F.R. 3.6(b), 3.8(a) (1995)). As a result, the Board determined that the regulations "contemplate that an alien who has been granted voluntary departure may have to depart the United States while a motion is pending." *Ibid.* In addition, the Board emphasized that such aliens are "not completely without remedy," because an alien whose voluntary departure period is about to expire "may seek an extension of this period from the district director." *Ibid.* (citing 8 C.F.R. 244.2 (1995)).

The Board has not issued another precedential decision on the same question since IIRIRA's enactment. It has, however, continued to apply the rule announced in *Shaar*, as demonstrated by its decision in this case and

other similar decisions that have reached the courts of appeals.

The BIA's consistent practice accords with the interim rule that the Attorney General promulgated to implement IIRIRA on March 6, 1997. 62 Fed. Reg. 10,312. Those regulations do not state that the conclusion reached by the Board in *Shaar* was incorrect or to be superseded. To the contrary, they continue to provide that the filing of a motion to reopen or reconsider "shall not stay the execution of any decision made in the case" and that "[e]xecution of such decision shall proceed unless a stay of execution is specifically granted by" the Board or the IJ. 8 C.F.R. 1003.2(f). The regulations also expressly permit the reinstatement of voluntary departure in the context of motions to reopen, but *only* in situations where the motion was not only *filed* but also *granted* before the expiration of the period allowed for voluntary departure. 8 C.F.R. 240.26 (1997) ("An immigration judge or the Board may reinstate voluntary departure in a removal proceeding that has been reopened * * * if reopening was granted prior to the expiration of the original period of voluntary departure.") (now codified at 8 C.F.R. 1240.26(h)). The clear import of this provision is that the mere *filing* of a motion to reopen does not suspend the running of a voluntary departure period.

Petitioner cites (Br. 18) a passage in the preamble to the interim rule stating that "several commenters [had] requested clarification regarding the effect" of various filings—"a motion or appeal to the Immigration Court, BIA, or a federal court"—"on any period of voluntary departure already granted." 62 Fed. Reg. at 10,325. Although "the Department considered several options," including "no tolling of any period of voluntary depar-

ture; tolling the voluntary departure period for any period that an appeal or motion is pending; or setting a brief, fixed period of voluntary departure * * * after any appeal or motion is resolved," the interim rule stated that the Department "ha[d] not adopted any position or modified the interim rule," and it "solicit[ed] additional public comments on these or other possible approaches." *Id.* at 10,326.

Because that statement in the 1997 rulemaking merely sought public comments about the possible application of tolling in three different contexts, it scarcely reflects a determination by the Department that a rule of *automatic* tolling would be appropriate in the specific context of reopening, much less that the Act *compels* it. Tellingly, moreover, the Department's pre- and post-IIRIRA practice has remained consistent with respect to all three types of filings referred to in the preamble passage quoted above: administrative appeals of an IJ decision to the BIA, petitions for judicial review, and motions to reopen or reconsider. The BIA's view was and continues to be that the filing of a timely appeal to the BIA prevents the IJ's decision from becoming final, 8 C.F.R. 1241.1(f); *In re A-M-*, 23 I. & N. Dec. 737, 743 (B.I.A. 2005), and for that reason the period of voluntary departure does not begin to run until after the BIA enters its final decision. In contrast, the government's position was and continues to be that the filing of a petition for review with a court of appeals does not by itself suspend the running of a voluntary departure period, a position which no court of appeals has disagreed. See pp. 35-36, *supra*. And the Board's view was (*Shaar*, 21 I. & N. Dec. at 542, 549) and continues to be (Pet. App. 3-4; pp. 43-44, *supra*) that an alien's unilateral act of filing a motion to reopen removal proceedings neither

extends the time for voluntary departure nor excuses the alien's failure to depart within the time specified. Post-IIRIRA, as before, that remains at the very least a reasonable interpretation of the Act and its implementing regulations.

Nor can it reasonably be maintained that "the rationales that underlay *Shaar* are no longer applicable after IIRIRA." *Azarte* v. *Ashcroft*, 394 F.3d 1278, 1286 (9th Cir. 2005). Although it is true that an alien's ability to file a motion to reopen made its first appearance in the United States Code in 1996 when Congress provided that "[a]n alien may file *one* motion to reopen," 8 U.S.C. 1229a(c)(6)(A) (now 8 U.S.C. 1229a(c)(7)(A) (Supp. V 2005)) (emphasis added), the regulations in effect at the time of *Shaar* expressly authorized motions to reopen as well, see 21 I. & N. Dec. at 547 (citing 8 C.F.R. 3.2 (1995)). And it requires an enormous, and completely unwarranted, logical leap to conclude that because "neither the pre-IIRIRA statute on voluntary departure nor the pre-IIRIRA regulation on motions to reopen had any time limits,"[19] and "the voluntary departure periods that were initially granted were much more generous pre-IIRIRA," *Azarte*, 394 F.3d at 1286-1287, see Pet. Br. 20 n.10, the enactment of IIRIRA now *compels* the very tolling rule that the en banc BIA rejected in *Shaar*. Neither petitioner nor the courts of appeals that have endorsed the position he urges have pointed to anything in the text of the Act or its legislative history that remotely suggests such a dramatic reversal. To the contrary, a rule of automatic extension of the voluntary departure period upon an alien's unilateral act of filing a motion to reopen would flatly contradict the statutory

[19] But see p. 9 & note 6, *supra*.

directive that "[p]ermission to depart voluntarily shall not be valid for a period exceeding 60 days." 8 U.S.C. 1229c(b)(2).

2. As the government noted in its brief in opposition (at 14), the Department of Justice has determined that it will promulgate regulations to address directly the effect of an alien's filing of a motion to reopen on a previous grant of voluntary departure. On November 30, 2007, the Attorney General issued a proposed rule addressing a number of issues related to voluntary departure. 72 Fed. Reg. at 67,674. The proposed rule would, *inter alia*, expressly provide that an alien's filing of a motion to reopen or reconsider with the Board "prior to the expiration of the voluntary departure period will have the effect of automatically terminating the grant of voluntary departure." *Ibid.* As a result, an alien who previously had agreed to depart voluntarily within the time specified in the BIA's order, and thereby to forgo any further dispute over his continued presence in this country, would be given the opportunity to withdraw from that agreement, file a motion to reopen in an effort to obtain the ability to remain, and avoid the penalties for overstaying his voluntary departure period if he chose to remain in the country until the BIA or the court ruled. Of course, the alien would then be subject to removal under the alternate order of removal in the BIA's order (and the attendant consequences of removal) unless he obtained a stay of removal pending further review from the BIA or the court. Similarly, the filing of a petition for review with a court of appeals would also have the effect of terminating the permission to depart voluntarily. *Ibid.*

The proposed rule would "app[ly] prospectively only, that is, only with respect to immigration judge orders

issued on or after the effective date of the final rule that grant a period of voluntary departure." 72 Fed. Reg. at 67,682. But the proposed rule's introductory text also contains a detailed explanation of why the Attorney General's "interpretation of the [INA] and *the existing regulations* is that the filing of a motion to reconsider or reopen * * * does not automatically toll the voluntary departure period." *Id.* at 67,678 (emphasis added); see *id.* at 67,676-67,678. As the proposed rule explains, "current judicial precedents in some circuits * * * bea[r] little resemblance to the statutory mandate that the alien who requests and is granted voluntary departure at the conclusion of removal proceedings is expected to depart voluntarily no more than 60 days after the administrative order becomes final," *id.* at 67,677, and "[t]his result is * * * contrary to the clear congressional intent to limit the period of time allowed under the voluntary departure provisions, which before the 1996 amendments had allowed aliens to remain in the United States for many months or even years under grants of voluntary departure," *id.* at 67,678. Thus, even if the Court were to conclude that there previously was "no clear agency guidance," "it would be absurd to ignore the agency's current authoritative pronouncement of what the statute means," particularly in light of the fact that the views set forth in the preamble to the proposed rule explain the course that the BIA has been following for years rather than "replac[ing] a prior agency interpretation." *Smiley* v. *Citibank (S.D.) N.A.*, 517 U.S. 735, 744 n.3 (1996).

E. The Constitutional Avoidance Canon Provides No Warrant For A Different Conclusion

Although petitioner raises no direct constitutional claim, he asserts that the conclusion that the mere filing of a motion to reopen removal proceedings does not extend the time within which a discretionary grant of voluntary departure remains valid would raise "serious constitutional doubts." Pet. Br. 38 (quoting *Clark* v. *Martinez*, 543 U.S. 371, 380-382 (2005)). That assertion is without merit.

The constitutional avoidance canon is "a means of giving effect to congressional intent, not of subverting it." *Clark*, 543 U.S. at 382. It "is not a license for the judiciary to rewrite language enacted by the legislature," *Salinas* v. *United States*, 522 U.S. 52, 59-60 (1997) (quoting *United States* v. *Albertini*, 472 U.S. 675, 680 (1985)), and it "does not give a court the prerogative to ignore the legislative will," *CFTC* v. *Schor*, 478 U.S. 833, 841 (1986). As explained previously, the text (Part A, *supra*) and statutory history (Part B, *supra*) of the voluntary departure statute clearly refute the proposition that Congress intended for the restrictions on granting, and the consequences for failing to comply with the terms of, that form of discretionary relief to be subject to evasion based on an alien's unilateral act of filing a motion to reopen removal proceedings. That conclusion is fully consistent with the statutory and regulatory provisions governing motions to reopen (Part C, *supra*), and it also represents the considered and consistent view of the Executive Branch officials charged with implementing the INA in general and voluntary departure in particular (Part D, *supra*).

Petitioner's arguments about the constitutionality of the Act and regulations as construed and applied by the Attorney General are unfounded in any event. Petitioner does not assert that he had a liberty or property interest in the granting of his motion to reopen. Nor could he. The granting of such a motion "is entirely within the BIA's discretion," *INS* v. *Phinpathya*, 464 U.S. 183, 188 n.6 (1984), see p. 9, *supra*, and the ultimate relief petitioner sought to obtain by filing a motion to reopen was adjustment of status, relief that is itself discretionary with the Attorney General. 8 U.S.C. 1255(a). A person's "unilateral hope" of securing a discretionary benefit cannot create a constitutionally cognizable interest in obtaining it. *Connecticut Bd. of Pardons* v. *Dumschat*, 452 U.S. 458, 465 (1981).

Petitioner also contends (Br. 42-46) that he had a constitutionally protected "property" interest in having the BIA resolve his motion to reopen. But the Board *did* resolve petitioner's motion: It denied the motion on the ground that petitioner's overstay of his voluntary departure period had rendered him statutorily ineligible for the form of relief that he had indicated that he would be seeking if the motion to reopen were granted. Pet. App. 4. Accordingly, for any due process claim to have substance, petitioner would need to establish that he had a constitutionally cognizable interest in either (1) having the BIA resolve a motion that was filed on a Friday before the expiration of his voluntary departure period two days later, or (2) obtaining a unilateral extension of the voluntary departure period that he himself requested from the IJ. Simply to state either proposition is to refute it.

Nor does the BIA's decision in this case give rise to any equal protection questions. Petitioner does not

claim to be a member of a suspect class, so any conceivable classification must survive only rational basis review. The date on which petitioner filed his motion to reopen was entirely of his own choosing, and petitioner cites no example of a situation where an alien who previously sought and was granted voluntary departure was able to obtain adjudication of a motion to reopen within a two-day period. Pet. Br. 22-23 & nn.13-14 (listing periods ranging from 23 days to more than 6 months). And, as explained previously, the pertinent distinction between certain "criminal aliens" and "favored aliens" like petitioner (*id.* at 29) is that only the latter are permitted, but not required, to seek the benefits and accept the burdens that accompany a grant of voluntary departure. Petitioner has not alleged that he was inadequately warned of the consequences of overstaying his voluntary departure period, and requiring him to bear the consequences of his choice to seek voluntary departure and his failure to comply with its terms raises no constitutional concerns.[20]

[20] Nor is there any merit to petitioner's assertion (Br. 49) that "the Court should toll the voluntary departure period in this case," even if it does not hold that the INA requires tolling as a general matter. For the reasons already explained, the INA simply does not provide that an alien's filing of a motion to reopen automatically extends the period in which a grant of voluntary departure remains valid, and that has been the Attorney General's position for many years.

CONCLUSION

The judgment of the court of appeals should be affirmed.

Respectfully submitted.

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APPENDIX

1. 8 U.S.C. 1101 provides in pertinent part:

Definitions

* * * * *

(47)(A) The term "order of deportation" means the order of the special inquiry officer, or other such administrative officer to whom the Attorney General has delegated the responsibility for determining whether an alien is deportable, concluding that the alien is deportable or ordering deportation.

(B) The order described under subparagraph (A) shall become final upon the earlier of—

(i) a determination by the Board of Immigration Appeals affirming such order; or

(ii) the expiration of the period in which the alien is permitted to seek review of such order by the Board of Immigration Appeals.

* * * * *

2. 8 U.S.C. 1182 provides in pertinent part:

Inadmissible aliens

(a) Classes of aliens ineligible for visas or admission

Except as otherwise provided in this chapter, aliens who are inadmissible under the following paragraphs are ineligible to receive visas and ineligible to be admitted to the United States:

* * * * *

(9) Aliens previously removed

(A) Certain aliens previously removed

(i) Arriving aliens

Any alien who has been ordered removed under section 1225(b)(1) of this title or at the end of proceedings under section 1229a of this title initiated upon the alien's arrival in the United States and who again seeks admission within 5 years of the date of such removal (or within 20 years in the case of a second or subsequent removal or at any time in the case of an alien convicted of an aggravated felony) is inadmissible.

(ii) Other aliens

Any alien not described in clause (i) who—

(I) has been ordered removed under section 1229a of this title or any other provision of law, or

(II) departed the United States while an order of removal was outstanding,

and who seeks admission within 10 years of the date of such alien's departure or removal (or within 20 years of such date in the case of a second or subsequent removal or at any time in the case of an alien convicted of an aggravated felony) is inadmissible.

(iii) Exception

Clauses (i) and (ii) shall not apply to an alien seeking admission within a period if, prior to the date of the alien's reembarkation at a place outside the United States or attempt to be admitted

from foreign contiguous territory, the Attorney General has consented to the alien's reapplying for admission.

(B) Aliens unlawfully present

(i) In general

Any alien (other than an alien lawfully admitted for permanent residence) who—

(I) was unlawfully present in the United States for a period of more than 180 days but less than 1 year, voluntarily departed the United States (whether or not pursuant to section 1254a(e) of this title) prior to the commencement of proceedings under section 1225(b)(1) or section 1229(a) of this title, and again seeks admission within 3 years of the date of such alien's departure or removal, or

(II) has been unlawfully present in the United States for one year or more, and who again seeks admission within 10 years of the date of such alien's departure or removal from the United States, is inadmissible.

* * * * *

(iv) Tolling for good cause

In the case of an alien who—

(I) has been lawfully admitted or paroled into the United States,

(II) has filed a nonfrivolous application for a change or extension of status before the date of

expiration of the period of stay authorized by the Attorney General, and

(III) has not been employed without authorization in the United States before or during the pendency of such application.

the calculation of the period of time specified in clause (i)(I) shall be tolled during the pendency of such application, but not to exceed 120 days.

(v) Waiver

The Attorney General has sole discretion to waive clause (i) in the case of an immigrant who is the spouse or son or daughter of a United States citizen or of an alien lawfully admitted for permanent residence, if it is established to the satisfaction of the Attorney General that the refusal of admission to such immigrant alien would result in extreme hardship to the citizen or lawfully resident spouse or parent of such alien. No court shall have jurisdiction to review a decision or action by the Attorney General regarding a waiver under this clause.

* * * * *

3. 8 U.S.C. 1229a (2000 & Supp. V 2005) provides in part:

Removal proceedings

* * * * *

(c) Decision and burden of proof

* * * * *

(7) Motions to reopen

(A) In general

An alien may file one motion to reopen proceedings under this section, except that this limitation shall not apply so as to prevent the filing of one motion to reopen described in subparagraph (C)(iv).

(B) Contents

The motion to reopen shall state the new facts that will be proven at a hearing to be held if the motion is granted, and shall be supported by affidavits or other evidentiary material.

(C) Deadline

(i) In general

Except as provided in this subparagraph, the motion to reopen shall be filed within 90 days of the date of entry of a final administrative order of removal.

(ii) Asylum

There is no time limit on the filing of a motion to reopen if the basis of the motion is to apply for

relief under sections[1] 1158 or 1231(b)(3) of this title and is based on changed country conditions arising in the country of nationality or the country to which removal has been ordered, if such evidence is material and was not available and would not have been discovered or presented at the previous proceeding.

(iii) Failure to appear

The filing of a motion to reopen an order entered pursuant to subsection (b)(5) of this section is subject to the deadline specified in subparagraph (C) of such subsection.

(iv) Special rule for battered spouses, children, and parents

Any limitations under this section on the deadlines for filing such motions shall not apply—

(I) If the basis for the motion is to apply for relief under clause (iii) or (iv) of section 1154(a)(1)(A) of this title, clause (ii) or (iii) of section 1154(a)(1)(B) of this title,,[1] section 1229b(b) of this title, or section 1254(a)(3) of this title (as in effect on March 31, 1997);

(II) if the motion is accompanied by a cancellation of removal application to be filed with the Attorney General or by a copy of the self-petition that has been or will be filed with the Immigration and Naturalization Service upon the granting of the motion to reopen;

---

[1] So in original

[1] So in original. A closing parenthesis probably should appear.

(III) if the motion to reopen is filed within 1 year of the entry of the final order of removal, except that the Attorney General may, in the Attorney General's discretion, waive this time limitation in the case of the alien who demonstrates extraordinary circumstances or extreme hardship to the alien's child; and

(IV) if the alien is physically present in the United States at the time of filing the motion.

The filing of a motion to reopen under this clause shall only stay the removal of a qualified alien (as defined in section 1641(c)(1)(B) of this title[2] pending the final disposition of the motion, including exhaustion of all appeals if the motion establishes that the alien is a qualified alien.

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[2] So in original. A closing parenthesis probably should appear.

4. 8 U.S.C. 1229c (2000 & Supp. V 2005) provides:

Voluntary departure

(a) Certain conditions

(1) In general

The Attorney General may permit an alien voluntarily to depart the United States at the alien's own expense under this subsection, in lieu of being subject to proceedings under section 1229a of this title or prior to the completion of such proceedings, if the alien is not deportable under section 1227(a)(2)(A)(iii) or section 1227(a)(4)(B) of this title.

(2) Period

(A) In general

Subject to subparagraph (B), permission to depart voluntarily under this subsection shall not be valid for a period exceeding 120 days.

(B) Three-year pilot program waiver

During the period October 1, 2000, through September 30, 2003, and subject to subparagraphs (C) and (D)(ii), the Attorney General may, in the discretion of the Attorney General for humanitarian purposes, waive application of subparagraph (A) in the case of an alien—

(i) who was admitted to the United States as a nonimmigrant visitor (described in section 1101(a)(15)(B) of this title) under the provisions of the visa waiver pilot program established pursuant to section 1187 of this title, seeks the waiver for the purpose of continuing to receive

medical treatment in the United States from a physician associated with a health care facility, and submits to the Attorney General—

(I) a detailed diagnosis statement from the physician, which includes the treatment being sought and the expected time period the alien will be required to remain in the United States;

(II) a statement from the health care facility containing an assurance that the alien's treatment is not being paid through any Federal or State public health assistance, that the alien's account has no outstanding balance, and that such facility will notify the Service when the alien is released or treatment is terminated; and

(III) evidence of financial ability to support the alien's day-to-day expenses while in the United States (including the expenses of any family member described in clause (ii)) and evidence that any such alien or family member is not receiving any form of public assistance; or

(ii) who—

(I) is a spouse, parent, brother, sister, son, daughter, or other family member of a principal alien described in clause (i); and

(II) entered the United States accompanying, and with the same status as, such principal alien.

(C) Waiver limitations

(i) Waivers under subparagraph (B) may be granted only upon a request submitted by a Service district office to Service headquarters.

(ii) Not more than 300 waivers may be granted for any fiscal year for a principal alien under subparagraph (B)(i).

(iii)(I) Except as provided in subclause (II), in the case of each principal alien described in subparagraph (B)(i) not more than one adult may be granted a waiver under subparagraph (B)(ii).

(II) Not more than two adults may be granted a waiver under subparagraph (b)(ii) in a case in which—

(aa) the principal alien described in subparagraph (B)(i) is a dependent under the age of 18; or

(bb) one such adult is age 55 or older or is physically handicapped.

(D) Report to Congress; suspension of waiver authority

(i) Not later than March 30 of each year, the Commissioner shall submit to the Congress an annual report regarding all waivers granted under subparagraph (B) during the preceding fiscal year.

(ii) Notwithstanding any other provision of law, the authority of the Attorney General under subparagraph (B) shall be suspended during any period

in which an annual report under clause (i) is past due and has not been submitted.

(3) Bond

The Attorney General may require an alien permitted to depart voluntarily under this subsection to post a voluntary departure bond, to be surrendered upon proof that the alien has departed the United States within the time specified.

(4) Treatment of aliens arriving in the United States

In the case of an alien who is arriving in the United States and with respect to whom proceedings under section 1229a of this title are (or would otherwise be) initiated at the time of such alien's arrival, paragraph (1) shall not apply. Nothing in this paragraph shall be construed as preventing such an alien from withdrawing the application for admission in accordance with section 1225(a)(4) of this title.

(b) At conclusion of proceedings

(1) In general

The Attorney General may permit an alien voluntarily to depart the United States at the alien's own expense if, at the conclusion of a proceeding under section 1229a of this title, the immigration judge enters an order granting voluntary departure in lieu of removal and finds that—

(A) the alien has been physically present in the United States for a period of at least one year immediately preceding the date the notice to appear was served under section 1229(a) of this title;

(B) the alien is, and has been, a person of good moral character for at least 5 years immediately preceding the alien's application for voluntary departure;

(C) the alien is not deportable under section 1227(a)(2)(A)(iii) or section 1227(a)(4) of this title; and

(D) the alien has established by clear and convincing evidence that the alien has the means to depart the United States and intends to do so.

(2) Period

Permission to depart voluntarily under this subsection shall not be valid for a period exceeding 60 days.

(3) Bond

An alien permitted to depart voluntarily under this subsection shall be required to post a voluntary departure 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.

(c) Aliens not eligible

The Attorney General shall not permit an alien to depart voluntarily under this section if the alien was previously permitted to so depart after having been found inadmissible under section 1182(a)(6)(A) of this title.

(d) Civil penalty for failure to depart

(1) In general

Subject to paragraph (2), if an alien is permitted to depart voluntarily under this section and voluntarily

fails to depart the United States within the time period specified, the alien—

(A) shall be subject to a civil penalty of not less than $1,000 and not more than $5,000; and

(B) shall be ineligible, for a period of 10 years, to receive any further relief under this section and sections 1229b, 1255, 1258, and 1259 of this title.

(2) Application of VAWA protections

The restrictions on relief under paragraph (1) shall not apply to relief under section 1229b or 1255 of this title on the basis of a petition filed by a VAWA self-petitioner, or a petition filed under section 1229b(b)(2) of this title, or under section 1254(a)(3) of this title (as in effect prior to March 31, 1997), if the extreme cruelty or battery was at least one central reason for the alien's overstaying the grant of voluntary departure.

(3) Notice of penalties

The order permitting an alien to depart voluntarily shall inform the alien of the penalties under this subsection.

(e) Additional conditions

The Attorney General may by regulation limit eligibility for voluntary departure under this section for any class or classes of aliens. No court may review any regulation issued under this subsection.

(f) Judicial review

No court shall have jurisdiction over an appeal from denial of a request for an order of voluntary departure

under subsection (b) of this section, nor shall any court order a stay of an alien's removal pending consideration of any claim with respect to voluntary departure.

5. 8 U.S.C. 1229c (2000) provided in pertinent part:

Voluntary departure

* * * * *

(d) Civil penalty for failure to depart

If an alien is permitted to depart voluntarily under this section and fails voluntarily to depart the United States within the time period specified, the alien shall be subject to a civil penalty of not less than $1,000 and not more than $5,000, and be ineligible for a period of 10 years for any further relief under this section and sections 1229b, 1255, 1258, and 1259 of this title. The order permitting the alien to depart voluntarily shall inform the alien of the penalties under this subsection.

6. 8 U.S.C. 1252b (Supp. I 1991) provided in pertinent part:

Deportation procedures

* * * * *

(e) Limitation on discretionary relief for failure to appear

* * * * *

(2) Voluntary departure

(A) In general

Subject to subparagraph (B), any alien allowed to depart voluntarily under section 1254(e)(1) of this title or who has agreed to depart voluntarily at his own expense under section 1252(b)(1) of this title who remains in the United States after the scheduled date of departure, other than because of exceptional circumstances, shall not be eligible for relief described in paragraph (5) for a period of 5 years after the scheduled date of departure or the date of unlawful reentry, respectively.

* * * * *

(5) Relief covered

The relief described in this paragraph is—

(A) relief under section 1182(c) of this title,

(B) voluntary departure under section 1252(b)(1) of this title,

(C) suspension of deportation or voluntary departure under section 1254 of this title, and

(D) adjustment or change of status under section 1255, 1258, or 1259 of this title.

(f) Definitions

In this section:

* * * * *

(2) The term "exceptional circumstances" refers to exceptional circumstances (such as serious illness of the alien or death of an immediate relative of the alien, but not including less compelling circumstances) beyond the control of the alien.

7. 8 C.F.R. 1003.2 provides in part:

Reopening or reconsideration before the Board of Immigration Appeals.

(a) *General.* The Board may at any time reopen or reconsider on its own motion any case in which it has rendered a decision. A request to reopen or reconsider any case in which a decision has been made by the Board, which request is made by the Service, or by the party affected by the decision, must be in the form of a written motion to the Board. The decision to grant or deny a motion to reopen or reconsider is within the discretion of the Board, subject to the restrictions of this section. The Board has discretion to deny a motion to reopen even if the party moving has made out a prima facie case for relief.

* * * * *

(c) *Motion to reopen.* (1) A motion to reopen proceedings shall state the new facts that will be proven at a hearing to be held if the motion is granted and shall be supported by affidavits or other evidentiary material. A motion to reopen proceedings for the purpose of submitting an application for relief must be accompanied by the appropriate application for relief and all supporting documentation. A motion to reopen proceedings shall not be granted unless it appears to the Board that evidence sought to be offered is material and was not available and could not have been discovered or presented at the former hearing; nor shall any motion to reopen for the purpose of affording the alien an opportunity to apply for any form of discretionary relief be granted if it appears that the alien's right to apply for such relief was fully explained to him or her and an opportunity to apply

therefore was afforded at the former hearing, unless the relief is sought on the basis of circumstances that have arisen subsequent to the hearing. Subject to the other requirements and restrictions of this section, and notwithstanding the provisions in § 1001.1(p) of this chapter, a motion to reopen proceedings for consideration or further consideration of an application for relief under section 212(C) of the Act (8 U.S.C. 1182(c) may be granted if the alien demonstrates that he or she was statutorily eligible for such relief prior to the entry of the administratively final order of deportation.

* * * * *

(d) *Departure, deportation, or removal.* A motion to reopen or a motion to reconsider shall not be made by or on behalf of a person who is the subject of exclusion, deportation, or removal proceedings subsequent to his or her departure from the United States. Any departure from the United States, including the deportation or removal of a person who is the subject of exclusion, deportation, or removal proceedings, occurring after the filing of a motion to reopen or a motion to reconsider, shall constitute a withdrawal of such motion.

* * * * *

(f) *Stay of deportation.* Except where a motion is filed pursuant to the provisions of §§ 1003.23(b)(4)(ii) and 1003.23(b)(4)(iii)(A), the filing of a motion to reopen or a motion to reconsider shall not stay the execution of any decision made in the case. Execution of such decision shall proceed unless a stay of execution is specifically granted by the Board, the Immigration Judge, or an authorized officer of the Service.

8. 8 C.F.R. 1240.26 provides in part:

Volutary departure—authority of the Executive Office for Immigration Review.

* * * * *

(d) *Alternate order of removal.* Upon granting a request made for voluntary departure either prior to the completion of proceedings or at the conclusion of proceedings, the immigration judge shall also enter an alternate order or removal.

* * * * *

(f) *Extension of time to depart.* Authority to extend the time within which to depart voluntarily specified initially by an immigration judge or the Board is only within the jurisdiction of the district director, the Deputy Executive Associate Commissioner for Detention and Removal, or the Director of the Office of Juvenile Affairs. An immigration judge or the Board may reinstate voluntary departure in a removal proceeding that has been reopened for a purpose other than solely making an application for voluntarily departure if reopening was granted prior to the expiration of the original period of voluntary departure. In no event can the total period of time, including any extension, exceed 120 days or 60 days as set forth in section 240B of the Act.

* * * * *

(h) *Reinstatement of voluntary departure.* An immigration judge or the Board may reinstate voluntary departure in a removal proceeding that has been reopened for a purpose other than solely making application for voluntary departure, if reopening was granted prior to the expiration of the original period of voluntary depar-

ture. In no event can the total period of time, including any extension, exceed 120 days or 60 days as set forth in section 240B of the Act and paragraph (a) of this section.

9. 8 C.F.R. § 1241.1 provides:

Final order of removal.

An order of removal made by the immigration judge at the conclusion of proceedings under section 240 of the Act shall become final:

(a) Upon dismissal of an appeal by the Board of Immigration Appeals;

(b) Upon waiver of appeal by the respondent;

(c) Upon expiration of the time allotted for an appeal if the respondent does not file an appeal within that time;

(d) If certified to the Board or Attorney General, upon the date of the subsequent decision ordering removal;

(e) If an immigration judge orders an alien removed in the alien's absence, immediately upon entry of such order; or

10. 8 C.F.R. 3.2 (1995) provided:

Reopening or reconsideration.

The Board may on its own motion reopen or reconsider any case in which it has rendered a decision. Reopening or reconsideration of any case in which a decision has been made by the Board, whether requested by the commissioner or any other duly authorized officer of

the Service, or by the party affected by the decision, shall be only upon written motion to the Board. Motions to reopen in deportation proceedings shall not be granted unless it appears to the Board that evidence sought to be offered is material and was not available and could not have been discovered or presented at the former hearing; nor shall any motion to reopen for the purpose of affording the alien an opportunity to apply for any form of discretionary relief be granted if it appears that the alien's right to apply for such relief be granted if it appears that the alien's right to apply for such relief was fully explained to him and an opportunity to apply therefore was afforded him at the former hearing unless the relief is sought on the basis of circumstances which have arisen subsequent to the hearing. A motion to reopen or a motion to reconsider shall not be made by or in behalf of a person who is the subject of deportation proceedings subsequent to his departure from the United States. Any departure from the United States of a person who is the subject of deportation proceeding occurring after making a motion to reopen or a motion to reconsider shall constitute a withdrawal of such a motion. For the purpose of this section, any final decision made by the commissioner prior to the effective date of the Act with respect to any case within the classes of cases enumerated in § 3.1(b)(1),(2),(3),(4) or (5) shall be regarded as a decision of the Board.