

Supreme Court, U.S.
FILED

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No. OFFICE OF THE CLERK

In the Supreme Court of the United States

VLADIMIR IOURI AND VERA YURIY,

Petitioners,

v.

ALBERTO GONZALES,
ATTORNEY GENERAL OF THE UNITED STATES,

Respondent.

**On Petition for a Writ of Certiorari to the
United States Court of Appeals for the Second Circuit**

PETITION FOR A WRIT OF CERTIORARI

DAN KAHAN
*Yale Law School
Supreme Court Clinic
127 Wall Street
New Haven, CT 06511
(203) 432-4800*

IRINA KOGAN
*2612 Avenue Y
Brooklyn, NY 11235
(718) 621-5970*

CHARLES A. ROTHFELD
Counsel of Record
ANDREW J. PINCUS
*Mayer, Brown, Rowe &
Maw LLP
1909 K Street, NW
Washington, DC 20006
(202) 263-3000*

Counsel for Petitioner

QUESTION PRESENTED

Orders of removal often include periods of voluntary departure that permit aliens to leave the country on their own terms. Voluntary departure saves the government the cost of expelling an alien from the country, while allowing the alien to leave for a destination of his or her choosing and to avoid various penalties associated with forced deportation. After exhausting administrative remedies, an alien who has been adjudicated removable may petition for judicial review in the federal courts of appeals. Filing a petition for review does not automatically stay either deportation or voluntary departure, however. An alien must move the court for such relief.

Against this background, the question presented is:

Whether the Second Circuit erred by holding, in express disagreement with the rule applied by the Sixth, Eighth, and Ninth Circuits, that a motion to stay deportation does not necessarily also include a request to stay the running of the voluntary departure period.

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The modified opinion of the court of appeals (App., *infra*, 1a-22a) is reported at 487 F.3d 76. The court's original opinion (App., *infra*, 23a-41a), prior to modification on petition for rehearing, is reported at 464 F.3d 172.

JURISDICTION

The Court of Appeals issued its initial opinion on September 11, 2006. Petitioner sought rehearing on October 10, 2006. The Court of Appeals denied rehearing and issued a modified opinion on May 24, 2007. The jurisdiction of this Court rests on 28 U.S.C. § 1254(1).

STATUTORY & REGULATORY PROVISIONS INVOLVED

Section 240B of the Immigration and Nationality Act of 1952, 8 U.S.C. § 1229c(b)(1), provides in relevant part: “[t]he 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 240, the immigration judge enters an order granting voluntary departure * * *.”

Section 304 of the Illegal Immigrant Reform and Immigrant Responsibility Act of 1996, 8 U.S.C. § 1252(b)(3)(B), provides in relevant part: “[s]ervice of the petition 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.”

8 C.F.R. § 1240.26(d) provides in relevant part: “[u]pon granting a request made for voluntary departure * * * the immigration judge shall also enter an alternate order of removal.”

8 C.F.R. § 1241.1(f) provides in relevant part: “[An order of deportation] shall become final * * * upon overstay of the voluntary departure period * * *.”

STATEMENT

This case presents a question of immigration law that has deeply divided the courts of appeals. Expressly rejecting the rule applied by the Sixth, Eighth, and Ninth Circuits, the Second Circuit instead joined the First and Seventh Circuits in holding that a motion filed under Section 304 of the Illegal Immigrant Reform and Immigrant Responsibility Act of 1996 (IIRIRA), 8 U.S.C. § 1252(b)(3)(B), to “stay the removal of an alien” does not also include a motion to stay the time accorded the alien to depart the country voluntarily. That holding has significant practical consequences for affected aliens: the determination that aliens failed to seek a stay of their voluntary departure period subjects them to a range of harsh penalties, including ineligibility for adjustment of status.

This conflict of authority is producing bizarre inconsistencies in the administration of the national immigration system. As a result of the divergent approaches taken by the courts of appeals, an alien in the Sixth, Eighth, and Ninth Circuits may obtain adjustment of status and remain lawfully in the United States while an identically situated alien in the First, Second, and Seventh Circuits will be expelled from the country. If petitioners here—an elderly, law-abiding married couple—lived in Cleveland, St. Louis, or Los Angeles, they would be lawful permanent residents of the United States; because they reside instead in New York, they are subject to deportation.

This sort of divergent application of federal immigration law is intolerable. Because the Second Circuit’s rule also encourages wasteful litigation, is inconsistent with federal immigration policy, leads to profoundly inequitable results, and cannot be squared with the approach taken by this Court to the interpretation of questions of immigration law, further review is warranted.

1. Statutory Background. When an immigration judge (IJ) orders the removal of an alien, the order often includes a

period of voluntary departure. See Immigration and Nationality Act (INA) § 240B, 8 U.S.C. § 1229c; see also 8 C.F.R. § 1240.26.¹ This alternative to forced removal is an important and frequently invoked element of federal immigration policy: the Department of Justice made voluntary departure available to more than 22,000 aliens in 2006. See U.S. Department of Justice, Executive Office for Immigration Review, *FY 2006 Statistical Year Book*, tbl. 14 (Feb. 2007), available online at <http://www.usdoj.gov/eoir/statspub/fy06syb.pdf>. In addition to saving the government the cost of removal proceedings and transportation expenses, voluntary departure allows the alien to avoid various penalties associated with forced removal. See 8 U.S.C. § 1182(a)(9)(A)(ii). Aliens may appeal an IJ's removal order or offer of voluntary departure to the Board of Immigration Appeals (BIA). See 8 C.F.R. § 1003.1. If the BIA rules against the alien on appeal, he or she may petition for judicial review in a federal court of appeals. 8 U.S.C. § 1252.

Stiff penalties apply if an alien is granted voluntary departure but remains in the country past the running of the departure period. First, the order of voluntary departure automatically converts into an order of removal. 8 C.F.R. § 1241.1(f). In addition to incurring all the penalties associated with removal, aliens who overstay the voluntary departure period must pay a fine of at least \$1,000 and as much as \$5,000. 8 U.S.C. § 1229c(d). The alien also becomes ineligible for an administrative adjustment of their immigration status for a term of ten years. *Ibid.*

¹ Prior to the enactment of IIRIRA, the process of expelling an alien from the country was termed "deportation"; IIRIRA recharacterizes the process as "removal." Although actions seeking expulsion of aliens that were initiated prior to enactment of IIRIRA are still termed "deportation proceedings," these differences in terminology have no substantive implications for the question presented here.

Against this general background, two statutory provisions are particularly relevant to this case. First, prior to 1996, filing a petition for review before a court of appeals automatically stayed both deportation and the running of the period for voluntary departure. See 8 U.S.C. § 1105a(a)(3)(b) (1994) (superseded by Pub. L. No. 104-208, 110 Stat. 3009-546 (1996)) (automatic stay of deportation upon petition for review); *Contreras-Aragon v. INS*, 852 F.2d 1088, 1091 (9th Cir. 1988) (en banc) (holding that the INA required automatic stay of voluntary departure); *Foti v. INS*, 308 F.2d 779, 784 (2d Cir. 1962) (acknowledging automatic stay of voluntary departure along with automatic stay of deportation). In 1996, however, Congress enacted IIRIRA, a comprehensive revision of the immigration laws. Among many other things, the law provides that filing a petition for review no longer *automatically* stays removal—instead, an alien must seek a stay. IIRIRA Section 304, 8 U.S.C. § 1252(b)(3)(B).

Although the law is silent as to judicial stays of voluntary departure, the courts of appeals have almost unanimously concluded that they have the power to stay voluntary departure pending review of an order of removal. See *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 General*, 453 F.3d 151, 157 (3rd 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, 615-16 (8th Cir. 2004); *El Himri v. Ashcroft*, 344 F.3d 1261, 1262 (9th Cir. 2003). Only the Fourth Circuit holds that it lacks the power to stay voluntary departure. See *Ngarurih v. Ashcroft*, 371 F.3d 182, 194 (4th Cir. 2004).

Second, while this case was pending, Congress again revised the immigration laws. Of particular relevance here, the REAL ID Act of 2005, Pub. L. 109-13, § 106(d), 119 Stat. 231, 311 (2005), eliminated a jurisdiction-stripping provision of the IIRIRA. Prior to the REAL ID Act, compelled removal

of the alien from the country—but not voluntary departure—stripped the court of jurisdiction to continue hearing an alien’s appeal. This rule was repealed by the REAL ID Act, so that an alien’s forced departure no longer strips the appellate court of jurisdiction to decide the alien’s petition for review. As a result, there is no material distinction in the function served by staying removal and staying voluntary departure; stays of both sorts allow the alien to remain in the country and to preserve the status quo during the pendency of judicial review.

2. Immigration Proceedings. Petitioners Vladimir Iouri and Vera Yuriy are a married couple in their late sixties. They are natives of the former Soviet Union and citizens of the now independent Ukraine. App., *infra*, 4a. Petitioner Iouri entered the United States in April 1993 as a non-immigrant visitor. *Id.* at 5a. Petitioner Yuriy followed her husband to the United States in August 1993, also as a non-immigrant visitor. *Ibid.* Immediately following their entry into the United States petitioners sought asylum, with petitioner Iouri claiming that he had been persecuted because of his membership in the Ukraine Orthodox Church and expressing a fear of future persecution should he be returned to Ukraine. *Id.* at 5a-6a. The IJ found petitioners’ claims not credible and denied asylum relief, but granted petitioners’ request for voluntary departure. *Id.* at 7a.

The BIA summarily affirmed the IJ’s decision on November 27, 2002, granting petitioners a new voluntary departure period lasting until December 27, 2002. Prior to the expiration of the voluntary departure period, petitioners sought a stay of deportation from the Second Circuit on December 26, 2002, filing their petitions for review on December 26 and 27, 2002. *Id.* at 8a.²

² The Second Circuit treated the stay as granted. The Second Circuit’s Clerk’s Office informs us that, upon the filing of an unopposed motion to stay deportation in these circumstances, the U.S.

Around the same time, on November 25, 2002, the Immigration and Naturalization Service approved “immediate relative” petitions filed on petitioners’ behalf by their only child, a daughter who is a United States citizen. App., *infra*, 8a. These petitions made petitioners eligible for lawful permanent residence. In January 2003, petitioners accordingly filed a motion before the BIA seeking to reopen proceedings so that they could apply for administrative adjustment of their status on the basis of the approved immediate relative petitions. The BIA denied their motion because, in its view, petitioners had overstayed their voluntary departure period and therefore were statutorily barred from receiving adjustment of status under 8 U.S.C. § 1229c(d). *Ibid.* Petitioners filed additional petitions for review before the Second Circuit to challenge that ruling.

3. The Second Circuit’s Decision. The court below denied both sets of petitions. App., *infra*, 1a-22a. After rejecting the challenge to the denial of asylum, the court affirmed the BIA’s conclusion that petitioners were ineligible for adjustment of status because they had overstayed their voluntary departure period. The court held that “an alien who wishes to stay the period for voluntary departure must explicitly ask for such a stay,” reasoning that a request to stay voluntary departure was not subsumed within the motion to stay deportation that petitioners *did* file. *Id.* at 15a.

In its initial opinion (App., *infra*, 23a-41a), the court—failing to recognize that the jurisdiction-stripping provision of IIRIRA had been repealed—placed substantial reliance on the section of IIRIRA providing that removal, but not voluntary departure, eliminates a court’s jurisdiction to resolve an appeal from a decision of the BIA. Believing that “[deporta-

Attorney’s Office and the Department of Homeland Security will refrain from deporting the alien until the court’s review is complete.

tion] strips this Court of jurisdiction to hear [petitioners'] petition for review" (App., *infra*, 35a), the court concluded:

The relief sought by a stay of deportation * * * is different from that sought by a stay of voluntary departure. Whereas a stay of deportation is aimed at preserving the court's jurisdiction, a stay of the voluntary departure period is a way for the alien to extend the benefits of the privilege of voluntary departure beyond the date the alien was initially afforded.

Id. at 36a. Given these perceived differences in the two forms of relief, the court declined to "construe [petitioners'] stay of deportation automatically to include a stay of the period for voluntary departure." *Id.* at 37a.

Because the REAL ID Act of 2005 had repealed the jurisdiction-stripping provision of IIRIRA that underlay the Second Circuit's decision, petitioners sought rehearing. The court denied the petition. It did issue an amended opinion that deleted its erroneous statutory analysis, but insisted without explanation that "[n]otwithstanding the repeal of the IIRIRA transitional rules," stays of removal and stays of voluntary departure "continue to differ in both their practical and equitable respects." App., *infra*, 18a n.8. Thus, the court reiterated, "an alien who wishes to stay the period for voluntary departure must explicitly ask for such a stay." *Id.* at 15a. In reaching this conclusion, the Second circuit expressly "disagree[d]" with the approach of the Eighth and Ninth Circuits, which (the Second Circuit acknowledged) "have held that where an alien files a motion to stay removal before the period for voluntary departure expires, such a motion should be construed as including a motion to stay the voluntary departure period." *Id.* at 15a. Instead, the Second Circuit aligned itself with the First and Seventh Circuits, "both of which have held that an alien who wishes to stay the period for voluntary departure must explicitly ask for such a stay." *Ibid.*

While denying relief, the court below observed that “we are sympathetic to the position Petitioners find themselves in.” App., *infra*, 20a. The court noted that both are “in their mid-to-late 60’s and have been in the United States for more than a decade, without event. Their only child is a United States citizen, and the ‘immediate relative’ petitions she submitted on her parents’ behalf have already been approved.” *Id.* at 22a. Moreover, the court added, “it appears that any delay on Petitioners’ part may be attributable to counsel’s failure to recommend that they seek to extend their voluntary departure period before overstaying that period, an omission that thereby made them ineligible for adjustment of their status based on approved ‘immediate relative’ petitions.” *Ibid.* The court nevertheless concluded that petitioners’ failure expressly to seek a stay of voluntary departure was fatal to their position.

Following the Second Circuit’s issuance of its modified opinion, petitioners moved the court of appeals to stay its mandate pending this Court’s consideration of the present petition for certiorari, noting that the conflict in the circuits would make the petition a substantial one. Over the government’s objection, the court granted petitioners’ motion.

REASONS FOR GRANTING THE PETITION

This case squarely presents a recurring and frequently litigated question of immigration law that has deeply divided the courts of appeals. In direct conflict with decisions of the Sixth, Eighth, and Ninth Circuits but in accord with holdings of the First and Seventh, the Second Circuit ruled that a motion to stay of deportation should not be understood also to request a stay of voluntary departure.

Review by this Court is essential. The decision below is producing intolerable inconsistency in the administration of the national immigration system. The practical result of the divergent views among the lower courts with respect to the question presented is that aliens situated identically to petitioners will be *expelled from the country* in some circuits and

granted permanent lawful residence in others, with these radically divergent outcomes turning on nothing more than the location of their appeals.

In addition, wholly apart from deepening the conflict among the circuits, the position adopted by the Second Circuit in this case is interfering with the fair and efficient administration of the law. There is *never* any situation in which an alien seeking to stay removal pending resolution of a petition for judicial review will not also desire to stay expiration of a voluntary departure order. Forcing aliens to distinguish their request for the latter from their request for the former will thus serve no practical purpose. But precisely because it serves no purpose that would likely occur to a petitioning alien, such a requirement creates a predictable litigation trap. This trap, moreover, will ultimately inhibit finality in immigration proceedings and generate substantial *additional* work for immigration authorities and courts: when aliens' counsel fails to file two express motions, as here, aliens may pursue claims for ineffective assistance of counsel (see *Desta v. Ashcroft*, 365 F.3d 741, 748 (9th Cir. 2004)), thereby delaying their removal and effectively reopening their cases. The net effect of the Second Circuit's rule will therefore simultaneously be to "impede access to the courts in [often] meritorious cases," while undermining "Congress's deliberate effort * * * to relieve the courts from the need to * * * devote their scarce judicial resources" to the immigration docket. *Kenyeres v. Ashcroft*, 538 U.S. 1301, 1305 (2003) (Kennedy, J., in chambers) (noting the "significant" importance of questions over when and how to issue judicial stays in immigration cases). Such a result should not be tolerated.

Obviously, the First and Seventh Circuits, and now the Second, have concluded that there are reasons why aliens should be required to individuate their requests for stays of removal and of deportation. We agree with the position of the Sixth, Eighth, and Ninth Circuits that those reasons—if they have any validity at all—are insufficient to outweigh the

wasteful and unfair consequences of such a rule. But whatever the correct outcome on the merits, it is clear that the conflict on this issue should be settled one way or other. The petition for a writ of certiorari therefore should be granted.

I. THE COURTS OF APPEALS ARE DIVIDED OVER WHETHER A MOTION TO STAY REMOVAL CONTAINS A REQUEST TO STAY VOLUNTARY DEPARTURE.

As the Second Circuit itself acknowledged, the decision below deepens a conflict among the courts of appeals over whether a motion to stay deportation, filed before the time to depart voluntarily has run, also should be understood to include a request to stay voluntary departure. See App., *infra*, 15a. As a result of this split, aliens across the country are receiving dramatically disparate treatment in the application of the immigration laws by the courts of appeals. “Given the significant nature of the issue and the acknowledged disagreement among the lower courts” (*Kenyeres*, 538 U.S. at 1305 (Kennedy, J., in chambers)), this Court’s review is necessary to restore uniformity to the administration of the Nation’s immigration system.

A. The Second Circuit’s Holding That A Motion To Stay Removal Does Not Also Include A Motion To Stay Voluntary Departure Directly Conflicts With Decisions From The Sixth, Eighth, And Ninth Circuits.

1. The Second Circuit concluded in this case that a stay of deportation does not “include a stay of the period for voluntary departure,” so that “an alien who wishes to stay the period for voluntary departure must explicitly ask for such a stay.” App., *infra*, 18a, 15a. Two other courts of appeals have reached the same conclusion. See *Alimi v. Ashcroft*, 391 F.3d 888, 892-93 (7th Cir. 2004) (holding that a “stay of removal [does not] also extend [] the time for voluntary departure” because to hold otherwise “would be incompatible with the structure of § 1229c;” hence “a stay of removal and extra

time for voluntary departure [must be] treated as distinct subjects that must be separately addressed”); *Bocova v. Gonzales*, 412 F.3d 257, 268-70 (1st Cir. 2005) (because “there may be cases in which an alien is entitled to a stay of removal but not a stay of voluntary departure,” “an alien must ask explicitly for a stay of voluntary departure; a motion that prays only for a stay of removal will not suffice”).

As the Second Circuit recognized in expressly “disagree[ing]” with their holdings (App., *infra*, 15a), three other courts of appeals have reached the opposite conclusion, holding that a motion to stay deportation also necessarily contains a request to stay the period for voluntary departure. See *Macotaj v. Gonzales*, 412 F.3d 704 (6th Cir. 2005), *modified on pet. for reh’g*, 424 F.3d 464 (6th Cir. 2005); *Rife v. Ashcroft*, 374 F.3d 606 (8th Cir. 2004); *Desta v. Ashcroft*, 365 F.3d 741 (9th Cir. 2004).³

In *Desta v. Ashcroft*, the Ninth Circuit considered a case in which, as here, the petitioner had filed a motion to stay removal within the time set for departure. Although the motion did not expressly request a stay of voluntary departure, the Ninth Circuit held that a “motion to stay removal, filed before the * * * voluntary departure period ha[s] expired,” is sufficient to preserve the court’s “power * * * to stay voluntary departure.” 365 F.3d at 745. The court went on to conclude that “the same substantive standards govern motions to stay removal and motions to stay voluntary departure,” and hence “if the standard to stay removal is satisfied, the stan-

³ The Fourth Circuit’s decision that courts lack the authority ever to stay voluntary departure (*Ngarurih v. Ashcroft*, 371 F.3d 182, 194 (4th Cir. 2004)) is also relevant to the conflict here, insofar as it is at odds with the decisions from the Sixth, Eighth, and Ninth Circuits holding that they will stay voluntary departure upon a motion to stay removal. Granting review of the question presented here will necessarily also resolve this additional jurisdictional question on which the Fourth Circuit disagrees with the First, Second, Sixth, Seventh, Eighth, and Ninth Circuits.

standard to stay voluntary departure is necessarily satisfied.” *Id.* at 748 (citations omitted). Thus, in direct conflict with the ruling below, the Ninth Circuit held:

where an alien files a motion to stay removal before the period of voluntary departure expires, *we will construe the motion to stay removal as including a timely motion to stay voluntary departure. In granting a motion to stay removal * * * the court will also be staying the time remaining for the alien to depart voluntarily.*

Id. at 479 (emphasis added).

In *Rife v. Ashcroft*, the Eighth Circuit also considered a situation in which the petitioners had “filed a motion to stay removal before their voluntary departure period expired,” but had “fail[ed] to file a motion expressly seeking a stay of their voluntary departure period.” 374 F.3d at 616. That court concluded that “a motion to stay voluntary departure complements and in many cases may be ancillary to a motion to stay removal pending judicial review.” *Ibid.* (citing *Desta*, 365 F.3d at 749). Thus, although the Eighth Circuit (unlike the Ninth) believed that there may be “cases where the equities relevant to the two types of stay will balance differently,” it nevertheless held that, if “the alien files a motion to stay removal before the period of voluntary departure expires, *we will deem the grant of that motion to include a stay of the voluntary departure period.*” *Ibid.* (emphasis added). Because the Second Circuit treated the stay of deportation here as granted, the outcomes in *Rife* and this case are irreconcilable.

Finally, in *Macotaj v. Gonzales*, which presented the same material facts, the Sixth Circuit endorsed the Ninth Circuit’s analysis. It held:

“the same substantive standards govern motions to stay removal and motions to stay voluntary departure. Thus, if the standard to stay removal is satisfied, the

standard to stay voluntary departure is necessarily satisfied. * * * A motion to stay voluntary departure is thus in many ways ‘ancillary’ to a motion to stay removal, and *it is reasonable to construe a motion to stay removal to include a request to stay voluntary departure.*”

Macotaj, 424 F.3d at 467 (emphasis added) (quoting *Desta*, 365 F.3d at 748). The Second Circuit’s decision cannot be reconciled with this holding.

This conflict in the circuits is deep, settled, and widely acknowledged; “[t]he courts on each side of the split have considered the contrary opinions of their sister Circuits and have adhered to their own expressed views.” *Kenyeres*, 538 U.S. at 1305 (Kennedy, J., in chambers). Thus, the First Circuit noted that the Seventh “has rejected” the approach of the Eighth and Ninth Circuits, and has aligned itself with the Seventh. *Bocova*, 412 F.3d at 268. See also *Alimi*, 391 F.3d at 892 (the Ninth Circuit’s decision in *Desta* “does not persuade us”). The Sixth Circuit, in rejoinder, expressly rejected the position of the First and Seventh Circuits, seeing “no practical justification for [their] rationales.” *Macotaj*, 424 F.3d at 467 n.1.⁴ Such disarray demands this Court’s attention.

⁴ Indeed, there are conflicts within the conflicts. The First Circuit, while agreeing with the Seventh that an express motion to stay voluntary departure is required, has rejected the Seventh Circuit’s imposition of an exhaustion requirement mandating that the alien first seek an administrative stay of voluntary departure. *Bocova*, 412 F.3d at 269. On the other side of the coin, the Sixth and Ninth Circuits have held that *every* stay of deportation will stay voluntary departure, while the Eighth Circuit has suggested that the equities may balance differently as to the two types of relief. As the Seventh Circuit put it, early in the life of the conflict, “[o]ne court has” held that “stay of removal [gives aliens] an extension [of voluntary departure] automatically,” “[a]nother has rejected [that position],” “[s]till a third has split the difference, holding that a stay of re-

2. Each court implicated by the split in this case squarely decided the question presented on materially identical facts. The Second Circuit below nevertheless suggested that the decisions of the Eighth and Ninth Circuits might be distinguished on the ground that “their prior case law had given petitioners reason to believe that they need not file a motion for a stay of voluntary departure” (App., *infra*, 20a), while that concern is “absent here.” *Id.* at 21a. We note that the Second Circuit made no attempt to distinguish the Sixth Circuit’s conflicting decision on this ground. But the asserted distinction is, in any event, insubstantial.

First, the Eighth and Ninth Circuits’ decisions rested upon a concern for the burdensome costs to both petitioners and the courts that would be imposed by a holding that a motion to stay removal does not also include a motion to stay voluntary departure (see, e.g., *Desta*, 365 F.3d at 748), and on the nature of an order of removal as itself including the “complimentary” order to depart voluntarily (see, e.g., *Rife*, 374 F.3d at 616). The Eighth and Ninth Circuits (and the Sixth, as well) thus announced blanket rules that would apply in all cases—including cases arising in the future, where issues of notice could not be present—holding on legal, and not case-specific, grounds that motions to stay removal would be treated as also seeking to stay voluntary departure. The Second Circuit’s ruling cannot be reconciled with these holdings on any theory.⁵

removal does not automatically extend the time for voluntary departure but adding that the court may elect to treat the one as accomplishing the other,” and “[y]et another [the Fourth Circuit] has held that appellate courts can never add to the time available for voluntary departure.” *Alimi*, 391 F.3d at 891. Since that writing, four more circuits have weighed in.

⁵ In fact, the Eighth and Ninth Circuits’ brief references to prior Circuit case law were case-specific observations that addressed the equities of actually *issuing* stays, and were irrelevant to the courts’

Moreover, Second Circuit precedent does not support the court of appeals' suggestion that petitioners in this case *were* on notice that they had to file a separate motion. The court stated that in *Ballenilla-Gonzalez v. INS*, 546 F.2d 515 (2d Cir. 1976), it had "expressed approval for procedures" that permitted appellate review to go forward "without prejudice to voluntary departure." App., *infra*, 21a. But *Ballenilla-Gonzalez* is an inapposite case that addressed the question whether the court should automatically *reinstate* an expired period of voluntary departure when a petitioner files a *petition for review* (not a stay application) *after* the time to depart has expired. The court there merely noted that the petitioner in that case had not "follow[ed] the procedure of filing a petition for review within the 30-day period fixed by the Board for voluntary departure." 546 F.2d at 521. The court never addressed whether the petitioners in *Ballenilla-Gonzalez* should have filed a separate motion to stay voluntary departure. Such a vague reference to unspecified "procedures" relating to an entirely different question could not possibly have put petitioners here on notice that the court would refuse to regard a *timely* motion to stay removal as also requesting a stay of voluntary departure.

In fact, pre-IIRIRA case law from the Second Circuit implied that a petition for review *did* trigger an automatic stay

conclusion that a motion to stay deportation necessarily includes a motion to stay voluntary departure. See *Desta*, 365 F.3d at 749 (noting that the case did not involve "ineffective assistance of counsel" because "[b]ased on the prior state of the law, Desta (and his counsel) would have been justified in thinking that the period of voluntary departure would be automatically stayed"); *Rife*, 374 F.3d at 616 (noting that approving a stay was "particularly appropriate in this case" because "past practice" may have given the petitioners "reason to believe that the stay of removal included a stay of their voluntary departure period as well"). Neither of these case-specific observations was relevant to either court's underlying reasoning for its broad holding regarding the significance of a motion to stay removal.

of both deportation and voluntary departure, just as in the Eighth and Ninth Circuits. See *Foti v. INS*, 308 F.2d 779, 784 (2d Cir. 1962) (noting that “[a]fter an automatic stay and ultimate adverse decision by [the court],” a deportee still has the option to depart voluntarily). As a matter of plain statutory law, moreover, “[u]nlike motions to stay removal, which [are] explicitly required by IIRIRA, [there is] no such provision for requiring an affirmative request to stay voluntary departure.” *Desta*, 365 F.3d at 749. Thus no underlying facts or characteristics of any of the First, Second, Sixth, Seventh, Eighth, or Ninth Circuits’ holdings distinguish one from the others, except the legal conclusions they reach. This Court should grant review to resolve this manifest conflict of authority.

B. The Capriciousness In The Administration Of National Immigration Laws Resulting From The Split At Issue Here Should Not Be Tolerated.

1. The practical result of the divergent views among the lower courts with respect to the question presented is that aliens like petitioners will be expelled from the country in some circuits and granted permanent lawful residence in others. Here, for example, if petitioners had been able to file their appeal and stay requests in the Sixth, Eighth, or Ninth Circuit, the court would have construed the stay of removal as a concurrent stay of voluntary departure. As a result, petitioners would still have been eligible for administrative relief when they moved the BIA to reopen their case, and they would now be lawful permanent residents pursuant to their daughter’s immediate relative petition. Instead, petitioners had the misfortune of petitioning for review in the Second Circuit. See 8 U.S.C. § 1252(b)(2). On the basis of no more than their location, petitioners now face the “harsh measure” of deportation. *INS v. Cardoza-Fonseca*, 480 U.S. 421, 459 (1987).

This sort of outcome is not uncommon. The petitioners in *Alimi*, for example, faced precisely the same situation. If they

had been able to file for review in the Sixth, Eighth, or Ninth Circuits and been granted a stay of removal, “today [they] would be lawful permanent residents” based on their family member’s “application[s] for immediate-family visas.” *Alimi*, 391 F.3d at 892. Instead, the Alimis were adjudicated removable because they filed their petition for review in the Seventh Circuit.

Aliens without ongoing proceedings before the BIA are also receiving drastically disparate treatment because of the conflict at issue in this case. Already at least three other petitioners in the Second Circuit have faced the harsh consequences of the holding below. See *Tedjo v. Gonzales*, 214 Fed. App’x. 69, 73 (2d Cir. 2007) (holding that petitioner “waived [voluntary departure] by failing to file a [separate] motion for a stay of the voluntary departure order” (citing the instant case)); *Hayat v. Gonzales*, 205 Fed. App’x. 904 (2d Cir. 2006) (same); *Xiao Feng Huang v. INS*, 204 Fed. App’x. 99 (2d Cir. 2006) (same). These aliens are now liable for a \$5,000 fine and are ineligible for administrative relief for the next decade. 8 U.S.C. § 1229c(d). They also have been or will be forcibly removed (see 8 C.F.R. § 1241.1(f)) and are now ineligible for readmission under any circumstance to the United States for the next ten years. See 8 U.S.C. § 1182(a)(9)(A)(ii). But if any of these aliens had instead been located in the Sixth, Eighth, or Ninth Circuits, they would have been permitted to depart voluntarily for a destination of their choosing. 8 C.F.R. § 1240.26. They also would have been able to seek reentry to the United States or to obtain administrative relief immediately.

2. While any conflict among the courts of appeals on a matter of federal law or procedure is a matter for concern, certiorari review is particularly appropriate where a split of authority results in such disparate outcomes in the administration of the nation’s immigration laws. The Constitution requires Congress to implement a “uniform rule of naturalization.” U.S. Const. Art. I, § 8, cl. 4; see also *Graham v.*

Richardson, 403 U.S. 365, 382 (1971) (acknowledging that the Naturalization Clause imposes an “explicit constitutional requirement of uniformity” in the execution of “laws on the subject of citizenship”); *Henderson v. Mayor of New York*, 92 U.S. 259, 273 (1875) (“It is * * * clear that the matter of [immigration laws] ought to be, the subject of a uniform system or plan. The laws which govern the right to land passengers in the United States from other countries ought to be the same in New York, Boston, New Orleans, and San Francisco.”); Michael J. Wishnie, *Laboratories of Bigotry? Devolution of the Immigration Power, Equal Protection, and Federalism*, 76 N.Y.U. L. Rev. 493, 537 (2001) (arguing that the Constitution permits “exercise[] [of the immigration power] only in a manner that is geographically consistent across the nation”). The divergence in the lower courts’ resolution of the question presented here is plainly generating drastic variation in the administration of the Nation’s immigration laws. In such circumstances, this Court’s intervention is warranted.

II. THIS CASE PRESENTS AN ISSUE OF GREAT PRACTICAL IMPORTANCE.

This lack of uniformity involves a matter of substantial importance, and the resolution of the question presented will have systematic consequences for the administration of the national immigration system. See *Kenyeres*, 538 U.S. at 1305 (noting the “significant nature” of a circuit split over the standard for granting a judicial stay of deportation). The conflict among the lower courts is producing substantial disparities in the treatment of aliens in a common factual circumstance that arises with great frequency.

1. The factual scenario that underlies the dispute at issue in this case occurs frequently throughout the Nation. Last year nearly 12,000 aliens commenced petitions to review orders of removal in the federal courts. See *2006 Judicial Business of the United States Courts*, tbl. B-3, available online at <http://www.uscourts.gov/judbus2006/completejudicialbusine>

ss.pdf. Almost half of those cases (5,862) were filed in the Ninth Circuit; more than one fifth (2,640) were filed in the Second Circuit. *Ibid.* As we have noted, approximately 10% of all removal orders in 2006 (over 22,000) permitted voluntarily departure. See U.S. Department of Justice, Executive Office of Immigration Review, *FY 2006 Statistical Year Book*, tbl. 14 (Feb. 2007), available online at <http://www.usdoj.gov/eoir/statspub/fy06syb.pdf>. On the whole in 2006, the federal courts of appeals considered more than 1,100 petitions to review removal orders that included voluntary departure. *Ibid.* The issue presented here could arise in all such cases. *Cf. Desta*, 365 F.3d at 749 (noting that if it had not decided that a stay of removal also stays voluntary departure, “hundreds of aliens [would be] unable to take advantage of the voluntary departure that had been granted by the IJ and BIA” (emphasis added)).

This prospect is not theoretical. Under the rule announced in *Desta*, for example, the Ninth Circuit regularly stays voluntary departure without an express motion. See, e.g., *Flores v. Gonzales*, No. 07-71291, 2007 WL 2162693 (9th Cir. July 27, 2007) (applying *Desta* to grant a stay of voluntary departure upon a single motion to stay removal); *Cardenas v. Gonzales*, No. 07-71090, 2007 WL 2162668 (9th Cir. July 27, 2007) (same); *Garcia v. Gonzales*, No. 07-70728, 2007 WL 2162639 (9th Cir. July 27, 2007) (same); *Neri v. Gonzales*, No. 07-70571, 2007 WL 2162484 (9th Cir. July 27, 2007) (same); *Romero v. Gonzales*, No. 04-71296, 2007 WL 2161640 (9th Cir. July 27, 2007) (same); *Larios v. Gonzales*, No. 07-70447, 2007 WL 2162364 (9th Cir. July 27, 2007) (same).

Even in the Second Circuit, where aliens are now directed to file separate motions, many petitioners will face severe prejudice without ever having had an opportunity (however chimerical) to act on the rule promulgated below. Aliens who filed for review prior to resolution of the instant case cannot now seek to comply with the Second Circuit’s requirement

that they file a separate motion to stay voluntary departure. Here, for instance, petitioners filed for review on December 26 and 27, 2002. Their case was not finally resolved until May 24, 2007, more than four years later. Such protracted litigation is not uncommon in the immigration context, where resolution of petitions to review removal orders often takes as long as three or four years. See, e.g., *Romero v. Gonzales*, No. 04-71296, 2007 WL 2161640 (9th Cir. July 27, 2007) (petition filed Mar. 22, 2004, over three years before the disposition of the petition); *Xiao Feng Huang v. INS*, 204 Fed. App'x. 99 (2d Cir. 2006) (petition filed Mar. 3, 2003, over three years before the disposition of the petition). Review by this Court is warranted where, as here, “a considerable number of suits are pending in the lower courts which will turn on resolution of * * * [the] conflict among the circuits as to [the question presented].” *Massachusetts Trustees v. United States*, 377 U.S. 235, 237 (1964).

2. Moreover, resolution of the question presented is important “for both substantive and procedural reasons.” *Alimi*, 391 F.3d at 892. Courts on each side of the dispute in this case agree that the question presented here has significant implications both for enforcement of federal immigration law and for sound judicial management.

The Sixth, Eighth and Ninth Circuits have expressed concern that the approach taken by the First, Second, and Seventh Circuits will undermine the goals of voluntary departure. If petitioners are required to depart “while they petition for review * * * they may not be able to return to this country even if they are eventually successful on the merits of their petitions”—since, “[b]y definition, aliens seeking asylum contend that they are subject to persecution when they return to their own countries, where they risk further harm, potentially including imprisonment or even death.” *Desta*, 365 F.3d at 748. The Sixth, Eighth, and Ninth Circuits accordingly have found that it “serves the purposes of our asylum law, as well as the interests of justice, to construe motions to

stay removal as including motions to stay voluntary departure.” *Ibid.* The First, Second, and Seventh Circuits, by contrast, premised their holdings on a different understanding of federal immigration law and policy, reasoning that voluntary departure is intended 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. These courts also have opined that the government and courts will be placed at a disadvantage if aliens do not *expressly* seek a stay of voluntary departure because those responding to the stay application may not be aware that this relief is being sought.

We believe that the Sixth, Eighth, and Ninth Circuits have the better of this argument. One way or the other, however, resolution of this conflict is necessary to best achieve the goals of the federal voluntary departure program and to achieve proper balance in the resolution of stay applications.

III. THE SECOND CIRCUIT’S DECISION IS WRONG.

The significance of the conflict in the courts of appeals itself warrants review of the decision below by this Court. It should be added, however, that the decision below is incorrect. It (1) ignores the reality that voluntary departure and deportation are different facets of a single order, (2) will inhibit finality in immigration proceedings and generate substantial additional work for an already strained court system, and (3) is inconsistent with this Court’s precedent.

A. Because Voluntary Departure And Removal Are Complementary Facets Of The Same Administrative Order, There Is No Point To Requiring An Individual Statement Of The Desire To Stay Both.

There is no practical reason from any standpoint to require differentiating an alien’s motion to stay removal from his or her motion to stay voluntary departure. From an alien’s point of view, there would never be any reason to distinguish the requests, because any alien who is granted voluntary de-

parture and seeks to stay removal pending judicial review will *inevitably* want also to stay voluntary departure.

Nor could there be any point in distinguishing motions to stay voluntary departure and removal from a reviewing court's point of view. As the First Circuit itself has recognized, voluntary departure and removal are complimentary facets of the same administrative order. See *Bocova*, 412 F.3d at 267 (“[O]rders of removal and grants of voluntary departure are entered as alternate orders that comprise different facets of a single ukase.” (citing 8 C.F.R. § 1240.26(d)). See also *Desta*, 365 F.3d at 748 (describing “[a] motion to stay voluntary departure [as] ‘ancillary’ to a motion to stay removal”); *Macotaj*, 424 F.3d at 467 (same); *Rife*, 374 F.3d at 616 (describing voluntary departure as “complement[ary]” and “ancillary” to removal). As a consequence, there is every reason for a court to expect that a stay of one would stay the other.

Agencies involved in administering the immigration system also treat voluntary departure and removal as integrated. When an immigration judge issues an order for voluntary departure, he or she includes an “alternate order [of] removal.” 8 C.F.R. § 1240.26(d). And when “an immigration judge issues an alternate order of removal in connection with a grant of voluntary departure, [the removal order] shall become final [only] * * * upon overstay of any voluntary departure period * * *.” 8 C.F.R. § 1241.1(f). The Department of Justice therefore acknowledges that “[v]oluntary departure is considered a form of removal.” U.S. Department of Justice, Executive Office of Immigration Review, *supra*, at Q1. A motion to stay removal filed during the period for voluntary departure is therefore *directed at the voluntary departure order*—which is, at the time, the only order that operates upon the alien. Concluding that a motion to stay the order of removal also includes a motion to stay the period of voluntary departure therefore finds logical support in the relevant statutes

and regulations; the object of the motion to stay is, at the time of filing, actually the order to depart voluntarily.

A contrary conclusion, moreover, rests on an absurd premise. If a motion to stay removal is thought not also to seek a stay of voluntary departure, the court must believe that an alien who does not file a separate motion to stay voluntary departure is either (a) electing to suffer the substantial “penalties attached to forfeiting a grant of voluntary departure: a considerable fine and a 10-year prohibition on ‘any further relief under this section and sections 240A, 245, 248, and 249,’” even if the appeal ultimately is successful (*Desta*, 365 F.3d at 746-47 (quoting *Zazueta-Carrillo v. Ashcroft*, 322 F.3d 1166, 1177 (9th Cir. 2003) (Berzon, J., concurring))); or (b) planning to depart while his or her litigation to gain the right to remain in the country is pending, even though “[a]n alien’s departure in these circumstances could in effect void the asylum appeal, because the alien might not be able to return to the United States if he or she successfully petitioned for relief through judicial review.” *Ibid.* (quoting the same). It is inconceivable that any alien would make either such choice.⁶

⁶ Requiring an alien to depart to avoid the imposition of penalties during the pendency of an appeal is particularly troubling given the high error rate within the immigration system. Judge Posner noted in a recent opinion that the Seventh Circuit had “reversed the Board of Immigration Appeals in whole or part in a staggering 40 percent of the 136 petitions to review * * * on the merits” over the prior year. *Benslimane v. Gonzales*, 430 F.3d 828, 829 (7th Cir. 2005). He concluded that “the adjudication of [immigration] cases at the administrative level has fallen below the minimum standards of legal justice.” *Id.* at 830. Similar judicial criticism of immigration adjudications is voluminous. For a small sampling, see *Ssali v. Gonzales*, 424 F.3d 556, 563 (7th Cir. 2005) (“this very significant mistake suggests that the Board was not aware of the most basic facts of [the petitioner’s] case”); *Sosnovskaia v. Gonzales*, 421 F.3d 589, 594 (7th Cir. 2005) (“[T]he procedure that the [immigration judge] employed in this case is an affront to [petitioner’s]

In rejecting petitioners' argument, the court below, as well as the circuits with which it agreed, relied largely on the rationale that "the Government deserves prompt notice of precisely what relief a petitioner seeks" because stays of removal and voluntary departure seek different types of relief and "the equities involved in the two types of stays may also differ." App., *infra*, 18a & n.8. See *Bocova*, 412 F.3d at 267; *Alimi*, 391 F.3 at 892. But given the reality that no rational alien would seek to stay removal but not voluntary departure, there can be no serious prospect of confusion about the alien's request on the part of the government or the court. As the Sixth Circuit put it: "It is, of course, important that courts understand what relief litigants are seeking. At the same time, the possibility of misunderstanding in this immigration setting strikes us as minimal." *Macotaj*, 424 F.3d at 467 n.1. Nor, for that matter, has any court offered an explanation of how or illustration of when the equities might balance differently as to a stay of removal on the one hand and a stay of voluntary departure on the other. The distinction identified by the court below therefore is wholly illusory.⁷

right to be heard."); *Wang v. Attorney General*, 423 F.3d 260, 269 (3d Cir. 2005) ("[T]he tone, the tenor, the disparagement, and the sarcasm of the [immigration judge] seem more appropriate to a court television show than a federal court proceeding."); *Fiadjoe v. Attorney General*, 411 F.3d 135, 154-55 (3d Cir. 2005) (finding that the immigration judge's "hostile" and "extraordinarily abusive" conduct toward the petitioner "by itself would require a rejection of his credibility finding"); *Lopez-Umanzor v. Gonzales*, 405 F.3d 1049, 1054 (9th Cir. 2005) ("[T]he [immigration judge's] assessment of Petitioner's credibility was skewed by prejudgment, personal speculation, bias, and conjecture."); *Korytnyuk v. Ashcroft*, 396 F.3d 272, 292 (3d Cir. 2005) ("[I]t is the [immigration judge's] conclusion, not [petitioner's] testimony, that strains credulity.") (quotations omitted).

⁷ Judge Easterbrook's opinion for the Seventh Circuit in *Alimi* also reasoned that "[t]he United States offers benefits for *voluntary* de-

B. The Availability Of An Ineffective Assistance Of Counsel Claim Means That The Second Circuit's Rule Adds Great Inefficiency To the Resolution Of Immigration Cases.

In addition to ignoring the nature of orders of deportation and removal, the Second Circuit's rule actually will increase the burden on courts by leading aliens to pursue claims for ineffective assistance of counsel. Such claims are available in immigration proceedings, as the Second Circuit itself has recognized. See, e.g., *Iavorski v. INS*, 232 F.3d 124, 128 (2d Cir. 2000). When an alien has representation, the attorney must provide competent counsel. *Ibid.* The Second Circuit has further noted that “[i]neffective assistance of counsel in * * * a deportation case occurs when * * * ‘(1) competent counsel would have acted otherwise,’ and (2) ‘[the alien] was prejudiced by [] counsel’s performance.’” *Id.* at 128-29 (citations omitted). Surely under the rule promulgated below in this case, competent counsel will file a motion to stay voluntary departure; if they do not, the alien will be prejudiced. See *Desta*, 365 F.3d 748 (“By failing to protect an alien’s ability to depart voluntarily, an attorney would be severely prejudicing his client.”)

The availability of an ineffective assistance of counsel claim will increase the court’s work load in cases like this

parture; an alien cannot resist to the bitter end and still claim those benefits.” 391 F.3d at 892 (emphasis in original). This rationale, however, would seem to be an argument for not allowing stay of voluntary departure *at all*; if such stays are permissible, the Seventh Circuit’s view provides no basis for differentiating stays of removal and of voluntary departure. In any event, as the Sixth Circuit observed, “it hardly seems unfair to allow a petitioner to seek judicial review of a possibly erroneous administrative decision and still take advantage of a benefit that was granted by the immigration judge (the right of voluntary departure) and actually renewed by the BIA on the petitioner’s appeal to the agency.” *Macotaj*, 424 F.3d at 467 n.1.

one: courts will have to adjudicate such claims if and when counsel fail to file a separate motion to stay voluntary departure. See, e.g., *Iavorski*, 232 F.3d at 127; see also *Qeraxhiu v. Gonzales*, 206 Fed. App'x. 476 (6th Cir. 2006) (petitioner filed a motion to reopen before the BIA claiming ineffective assistance of counsel; subsequently filed a petition for review of the BIA decision denying the motion). In response to the rule adopted by the Second Circuit in this case, numerous such claims may be filed each year. See *Desta*, 365 F.3d at 749 (noting that if it had not decided that a stay of deportation also stays voluntary departure, “hundreds of aliens” would be prejudiced each year).

In addition, the availability of an ineffective assistance claim provides an end-run around the Second Circuit’s resolution of the question presented here. The Second Circuit has previously held that where an alien is prejudiced by ineffective assistance of counsel in an immigration case, the court will equitably toll the filing deadline for a motion, rendering the omitted motion timely filed. *Iavorski*, 232 F.3d at 127 (equitably tolling to time to file a motion to reopen on the basis of ineffective assistance). If successful in their ineffective assistance claim, then, aliens whose counsel fail expressly to seek a stay of voluntary departure could ultimately obtain the same relief as is now available in the Sixth, Eighth, and Ninth Circuits—but only after substantial additional litigation. The rule promulgated below therefore threatens to load the courts’ dockets with substantial additional work, possibly for no practical benefit at all.

C. The Decision Below Offends This Court’s Command To Resolve Ambiguities In Favor Of Aliens.

Finally, the Second Circuit’s holding plainly resolves the ambiguity at issue in this case against aliens, departing from this Court’s “longstanding principle of construing any lingering ambiguities in deportation statutes in favor of the alien.” *INS v. St. Cyr*, 533 U.S. 289, 320 (2001) (quoting *INS v. Cardoza-Fonseca*, 480 U.S. 421, 449 (1987)). See,

e.g., *Barroso v. Gonzales*, 429 F.3d 1195, 1204-05 (9th Cir. 2005) (concluding that a “timely filing of a motion to reopen or reconsider [before the BIA] automatically tolls the voluntary departure period” on the ground that it accords with the “principle of construing any lingering ambiguities in deportation statutes in favor of the alien” (quoting *St. Cyr*, 533 U.S. at 320 (quoting *Cardoza-Fonseca*, 480 U.S. at 449))).

The rule that courts must construe ambiguities in favor of aliens is based on the recognition that imposing a “forfeiture [of] residence in this country” is a “drastic measure and at times equivalent to banishment of exile.” *Fong Haw Tan v. Phelan*, 333 U.S. 6, 10 (1948). See also *Cardoza-Fonseca*, 480 U.S. at 449 (describing removal as “always a harsh measure”). Although stricter readings of immigration rules “might find support in logic,” courts should “not assume that Congress meant to trench on [aliens’] freedom beyond that which is required by the narrowest” understanding of the law. *Ibid*; see also *INS v. Errico*, 385 U.S. 214, 225 (1966) (same); *Costello v. INS*, 376 U.S. 120, 128 (1964) (same). Here, although no express statutory or regulatory provision dictated its result, the Second Circuit applied a rule that causes aliens “substantial prejudice * * * through no fault of their own.” *Desta*, 365 F.3d at 749. In contrast, the approach taken by the Sixth, Eighth, and Ninth Circuits resolves the ambiguity in the aliens’ favor, while also causing only “incidental [and “relatively minimal”] prejudice * * * to the government.” *Ibid*. The court below erred when it rejected the holdings of those courts of appeals.

CONCLUSION

The petition for a writ of certiorari should be granted.
Respectfully submitted.

DAN KAHAN
*Yale Law School
Supreme Court Clinic
127 Wall Street
New Haven, CT 06511
(203) 432-4800*

CHARLES A. ROTHFELD
Counsel of Record
ANDREW J. PINCUS
*Mayer, Brown, Rowe &
Maw LLP
1909 K Street, NW
Washington, DC 20006
(202) 263-3000*

IRINA KOGAN
*2612 Avenue Y
Brooklyn, NY 11235
(718) 621-5970*

Counsel for Petitioner

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