No. 06-1181

IN THE

Supreme Court of the United States

SAMSON TAIWO DADA,

Petitioner,

v.

ALBERTO GONZALES,
UNITED STATES ATTORNEY GENERAL,

Respondent.

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

REPLY BRIEF IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI

RAED GONZALEZ
QUAN, BURDETTE & PEREZ, P.C.
5177 Richmond Avenue
Suite 800
Houston, Texas 77056
(713) 625-9225

SETH P. WAXMAN
CHRISTOPHER J. MEADE
Counsel of Record
ANNE K. SMALL
ELOISE PASACHOFF
WILMER CUTLER PICKERING
HALE AND DORR LLP
1875 Pennsylvania Ave., N.W.
Washington, D.C. 20006
(202) 663-6000

Blank Page

TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES

TABLE OF AUTHORITIES—Continued

STATUTES AND REGULATIONS

LEGISLATIVE MATERIALS

TABLE OF AUTHORITIES—Continued

Page(s)

OTHER AUTHORITIES

This petition presents an important question concerning the nation's immigration laws on which there is a square—and growing—conflict among the courts of appeals: whether a timely-filed motion to reopen removal proceedings, 8 U.S.C. § 1229a(c)(7), tolls the period of voluntary departure, 8 U.S.C. § 1229c. In fact, since the Government filed its Opposition, the conflict has deepened to a 4-3 split. *See Chedad* v. *Gonzales*, No. 05-2782, 2007 U.S. App. LEXIS 18185 (1st Cir. July 31, 2007); *see also id.* at *25 (Lipez, J., dissenting).

The Government does not dispute the existence of a conflict or the importance of the issue. Rather, the Government simply argues that the question may someday be resolved through regulations or legislation. Such a possibility, however, does not obviate the need for this Court's immediate review. Any regulations on this issue are a mere possibility, and the Government has not identified any steps taken toward the development or issuance of pertinent rules. And even if regulations will ultimately address this issue, these regulations will likely not take effect for years. In the meantime, tens of thousands of aliens will face differing treatment depending on which circuit happens to decide their case. The prospect of legislation resolving this conflict is even less likely. Indeed, the immigration bills that the Government cites, which offered the prospect of "[c]omprehensive immigration reform," have been abandoned.

The pressing need for this Court's review is apparent from the Court's own docket. In addition to this petition, there are two other petitions for certiorari pending that raise the same question. *See Dekoladenu* v. *Gonzales*, *petition for cert. pending*, No. 06-1285 (filed Mar. 22, 2007); *Moorani* v. *Gonzales*, *petition for cert. pending*, No. 06-610 (filed Oct. 31, 2006). The Court should, however, grant the petition in this case: this petition presents an appropriate vehicle for resolving the question, as there are no apparent obstacles to the Court's review and the case directly implicates the circuit split. *See generally* Part III *infra*.

ARGUMENT

I. THE GOVERNMENT DOES NOT DISPUTE THE CIRCUIT SPLIT ON THIS ISSUE, WHICH HAS RECENTLY DEEPENED

As the Government recognizes (Opp. 14), the courts of appeals are squarely divided on whether a timely motion to reopen tolls the voluntary departure period. Seven courts of appeals, including the First Circuit late last month, have weighed in on this issue, creating a 4-3 split. *Compare Ugokwe* v. *U.S. Att'y Gen.*, 453 F.3d 1325 (11th Cir. 2006) (filing a timely motion to reopen removal proceedings tolls the voluntary departure period); *Kanivets* v. *Gonzales*, 424 F.3d 330 (3d Cir. 2005) (same); *Sidikhouya* v. *Gonzales*, 407 F.3d 950 (8th Cir. 2005) (same); *Azarte* v. *Ashcroft*, 394 F.3d 1278 (9th Cir. 2005) (same), *with Chedad* v. *Gonzales*, No. 05-2782, 2007 U.S. App. LEXIS 18185 (1st Cir. July 31, 2007) (a timely motion to reopen does not toll the voluntary departure period); *Dekoladenu* v. *Gonzales*, 459 F.3d 500 (4th Cir. 2006) (same); *Banda-Ortiz* v. *Gonzales*, 445 F.3d 387 (5th Cir. 2006) (same), *cert. denied*, 127 S. Ct. 1874.

The dispute over the issue is not limited to disagreement among the circuits. Two of the three opinions holding that a motion to reopen does not toll the voluntary departure period were accompanied by a dissent on this issue. *Chedad*, 2007 U.S. App. LEXIS 18185, at *25 (Lipez, J., dissenting); *Banda-Ortiz*, 445 F.3d at 391 (Smith, J., dissenting). The third opinion so holding was accompanied by a concurrence objecting to the broad approach of the majority. *Dekoladenu*, 459 F.3d at 509 n.* (Gregory, J., concurring). And in *Banda-Ortiz*, five judges of the Fifth Circuit dissented from the denial of rehearing en banc. *Banda-Ortiz* v. *Gonzales*, 458 F.3d 367, 368 (5th Cir. 2006) (Smith, J., dissenting from denial of rehearing en banc) (joined by Jones, C.J., and Benavides, Stewart, and Dennis, J.J.).

II. THE MERE PROSPECT OF REGULATIONS OR LEGISLATION RESOLVING THE TOLLING QUESTION DOES NOT SUPPORT A DENIAL OF THE PETITION FOR CERTIORARI

The Government's only argument for denying the petition for certiorari is that the tolling question may—at some unspecified point in the future—be resolved either through regulations or legislation. Relevant regulations, however, are a mere possibility and, regardless, do not eliminate the need for this Court's review. The possibility of legislation is even more remote.

1. The Government states that the Department of Justice "has determined that it will promulgate regulations" on this issue. Opp. 14. The Government, however, has offered no timeframe within which the Department expects to act, no details of any actions taken to draft or promulgate such regulations, and no description of particular provisions that would purportedly resolve this question. Nor has it indicated any steps taken since it first made this representation nearly six months ago. *Moorani* Opp. 19.

Moreover, despite the Department of Justice's current intentions, it may decide, in the end, not to issue regulations on this topic. In fact, this is precisely what occurred a decade ago: In 1997, the Department stated that it would issue regulations on the tolling question after notice and comment, 62 Fed. Reg. 10,312, 10,325-10,326 (Mar. 6, 1997), but, as the Government acknowledges, no such regulations were ever issued, Opp. 15 n.5.

In any event, even if regulations will ultimately address the tolling question, it will be years before any rule takes effect. One recent study found that the average time between proposal and finalization of a rule was 322 days. *See* S. Shapiro, *Two Months in the Life of the Regulatory State*, 30 Admin. & Reg. L. News 12, 15 (Spring 2005). For rules issued after public comment—which the Department specifically stated that it wished to solicit when it previously considered issuing such regulations, 62 Fed. Reg. 10,312, 10,326—the average time was 423 days. Shapiro, *supra*, at 15; *see also* S. Breyer et al., *Administrative Law and Regu-*

latory Policy: Problems, Text, and Cases 565 (2006) (concluding that, for one agency (the EPA), the average time between notice of a proposed rule and promulgation of a final rule is 16 months). And these time periods do not take account of the time needed to draft the rule. A 1993 report estimates that 12-18 months are needed to develop a draft rule, with another 12-18 months allotted for the rule to issue in final form. *See Improving Regulatory Systems*, Accompanying Report Of The National Performance Review, Office of the Vice President (1993) (executive summary).

In the meantime, the effects of the split in the courts of appeals will be widely felt because the question arises in many cases and carries consequences even more broadly.[1] Over the course of the last five years, immigration judges granted voluntary departure in well over 100,000 cases, which constituted between 10% and close to 20% of all removal decisions each year. *See* U.S. Department of Justice Executive Office for Immigration Review *FY 2006 Statistical Year Book* Q1 (Feb. 2007) (*FY 2006 Statistical Year Book*). Over 22,000 individuals were granted voluntary departure in 2006 alone. *Id.*[2]

The tolling question is potentially relevant to any of the thousands of aliens granted voluntary departure each year

---

[1] Of course, the effects of the current confusion will likely continue even after any such potential regulations are issued, as the regulations will presumably operate prospectively only. *See, e.g., Bowen* v. *Georgetown Univ. Hosp.*, 488 U.S. 204, 208 (1988) ("[A] statutory grant of legislative rulemaking authority will not, as a general matter, be understood to encompass the power to promulgate retroactive rules unless that power is conveyed by Congress in express terms."); *see also id.* at 216 (Scalia, J., concurring) (concluding that the definition of "rule" in Administrative Procedure Act, 5 U.S.C. § 551(4), requires that "rules have legal consequences only for the future"). There is no suggestion of retrospective application in the statutory provisions. 8 U.S.C. §§ 1103(a)(3), 1103(g)(2), 1229c(e).

[2] During this same five year period, the BIA adjudicated approximately 45,000 motions to reopen and more than 12,000 additional appeals from the decisions of immigration judges on motions to reopen. *FY 2006 Statistical Year Book* T2.

as it can affect the decision whether to attempt to reopen proceedings. And, because the tolling question affects the opportunity to reopen proceedings, the no-tolling rule of several circuits and the uncertainty in others may create a disincentive for aliens to move for voluntary departure, thereby undercutting the value of this mechanism that permits immigration judges "to quickly and efficiently dispose of numerous cases on their docket." *In re Arguelles-Campos*, 22 I. & N. Dec. 811, 817 (BIA 1999). A review of circuit court decisions confirms the frequency with which the tolling question arises.[3]

In light of the conflicting authority and uncertainty faced by aliens in removal proceedings, this Court should grant review in this case to bring needed uniformity to this

---

[3] In addition to *Moorani* v. *Gonzales*, 182 Fed. Appx. 352 (5th Cir. May 26, 2006), *Dekoladenu*, and the other cases cited as part of the circuit split, there are many more court of appeals decisions addressing this issue. *See, e.g.*, *Cabrera-Benavidez* v. *Gonzales*, No. 06-60641, 2007 WL 1579979 (5th Cir. May 31, 2007); *Moti* v. *Gonzales*, 212 Fed. Appx. 277 (5th Cir. Dec. 19, 2006); *Abbas* v. *Gonzales*, 208 Fed. Appx. 337 (5th Cir. Dec. 7, 2006); *Tapia-Soriano* v. *Gonzales*, 201 Fed. Appx. 461 (9th Cir. Sept. 11, 2006); *Ali* v. *Gonzales*, 196 Fed. Appx. 314 (5th Cir. Aug. 28, 2006); *Garcia-Herrera* v. *Gonzales*, 168 Fed. Appx. 762 (9th Cir. Feb. 13, 2006); *Castro* v. *Gonzales*, 197 Fed. Appx. 583 (9th Cir. Feb. 7, 2006); *Atilano-Garcia* v. *Gonzales*, 159 Fed. Appx. 773 (9th Cir. Dec. 19, 2005); *Guerrero-Acosta* v. *Gonzales*, Nos. 03-71098 & 03-74576, 2005 U.S. App. LEXIS 17398 (9th Cir. Aug. 12, 2005); *Peraza-Penuelas* v. *Gonzales*, 136 Fed. Appx. 999 (9th Cir. June 30, 2005); *Williams* v. *Gonzales*, 127 Fed. Appx. 700 (5th Cir. Apr. 4, 2005); *Flores-Contreras* v. *Gonzales*, 127 Fed. Appx. 910 (9th Cir. Apr. 1, 2005); *Gamez* v. *Ashcroft*, 104 Fed. Appx. 118 (9th Cir. July 27, 2004); *see also Barroso* v. *Gonzales*, 429 F.3d 1195 (9th Cir. 2005) (extending tolling rule to motions to reconsider); *Ortiz* v. *Gonzales*, No. 06-60643, 2007 WL 1579976 (5th Cir. May 31, 2007); *Chowdhury* v. *Gonzales*, 187 Fed. Appx. 417 (5th Cir. June 29, 2006); *Khan* v. *Gonzales*, 184 Fed. Appx. 424 (5th Cir. June 8, 2006). At least two other circuits have been presented with the question but disposed of the matter on other grounds. *Martinez-Espino* v. *Gonzales*, 205 Fed. Appx. 421, 423-424 (6th Cir. Dec. 14, 2006) (discussing circuit split but finding motion to reopen untimely); *Hadayat* v. *Gonzales*, 458 F.3d 659, 664 (7th Cir. 2006) (discussing circuit split on tolling voluntary departure period in context of motion for reconsideration).

important question. *Cf. Zadvydas* v. *Davis*, 533 U.S. 678, 700-701 (2001) (recognizing the importance of "uniform administration [of immigration law] in the federal courts").

2. Legislation resolving the tolling question is a hypothetical possibility that does not warrant a denial of this petition.

The Government asserted in its Opposition that legislation pending at the time "would definitively resolve the tolling issue on a prospective basis" as part of "[c]omprehensive immigration reform." Opp. 15 (citing S. 2611, 109th Cong., 2d Sess. § 211(a)(3) (2006); H.R. 4437, 109th Cong., 1st Sess. § 208(b)(1) (2005)). Both S. 2611 and H.R. 4437, however, faced ample opposition and ultimately failed. *See, e.g.*, Pear & Hulse, *Immigrant Bill Dies in Senate*, N.Y. Times, June 29, 2007, at A1.

Even if relevant legislative proposals are introduced, a grant of certiorari is nonetheless appropriate. There is no reason to presume that any subsequent legislative initiatives will avoid a similar fate, or that any final legislation would resolve the particular question at issue here. Moreover, the Government has routinely filed petitions of certiorari, and this Court has granted review, in the face of pending legislation, including legislation that is far along in the legislative process. *See, e.g.*, *Gonzales* v. *Duenas-Alvarez*, No. 05-1629, Pet. Reply 10 n.8, 2006 WL 2581844 (Sept. 6, 2006) (noting that no conference committee had been convened, although bills had been passed by both Houses, and "thus it remains uncertain whether legislation addressing the question presented in this case will be passed"), *cert. granted*, 127 S. Ct. 35 (Sept. 26, 2006).[4]

---

[4] *See also Commissioner of Internal Revenue* v. *Banks*, No. 03-892, Pet. Reply 9, 2004 WL 530980 (Mar. 11, 2004) (arguing that "pending legislation ... does not remove the need for this Court's review" because "the legislation has merely been proposed, and it is far from clear that it will ever be enacted into law, much less enacted soon enough to reduce the need for this Court's review"), *cert. granted*, 124 S. Ct. 1712 (Mar. 29, 2004); *United States* v. *Florida Bd. of Regents*, No. 98-796, Pet. Reply 4,

III. THE COURT SHOULD GRANT REVIEW IN THIS PARTICULAR CASE AS THE TOLLING QUESTION IS SQUARELY PRESENTED AND THERE ARE NO OBSTACLES TO THIS COURT'S REVIEW

In this case, the tolling question is squarely before the Court. Petitioner filed a motion to reopen his removal proceedings prior to the expiration of his voluntary departure period in an attempt to obtain an adjustment of status. Pet. 11; Opp. 6; Admin. Record 8-21. Subsequently, the BIA denied this motion on the ground that Petitioner had failed to depart during the voluntary departure period. Pet. App. 3-4. The Fifth Circuit, relying on its previous decision in *Banda-Ortiz*, affirmed. Pet. App. 1-2. And Petitioner now seeks review of that question—whether he is subject to penalties because he failed to depart within the voluntary departure period or, rather, whether the filing of the motion to reopen tolled the voluntary departure period. Pet. i (Question Presented #2). If the Court grants review in this case, there are no apparent obstacles that will prevent resolution of this important question.

Moorani, however, has a complicated procedural history that may pose vehicle problems. *See, e.g.*, *Moorani* Pet. Questions Presented #1 & #3. As the *Moorani* Petition indicates, the basis for the agency's decision was not clear, and the Fifth Circuit "assume[d]" the basis of the agency's decision. *Moorani* Pet. App. 4 n.7; *see also Moorani* Pet. 24-26; *id.* Question Presented #3. As a result, it is unclear whether the agency decided the question presented for review. *See Moorani* Pet. Question Presented #3; *see generally SEC* v. *Chenery*, 318 U.S. 80, 87 (1943) ("The grounds upon which an administrative order must be judged are those upon which the record discloses that its action was based."). Additionally, the Fifth Circuit's opinion in *Moorani* raises a question about the agency's jurisdiction at the time the agency issued

---

1998 WL 34080927 (Dec. 30, 1998) ("There is no sound basis for permitting a deep circuit conflict concerning important federal legislation to persist pending a purely hypothetical legislative response."), *cert. granted sub nom. Kimel* v. *Florida Bd. of Regents*, 119 S. Ct. 901 (Jan. 25, 1999).

the ambiguous decision at issue. *Moorani* Pet. App. 5 (holding that, even prior to the administrative decision at issue in the petition, "the agency lacked any further jurisdiction over Moorani's case"); *see also Moorani* Pet. Question Presented #1.

CONCLUSION

For the foregoing reasons, as well as those contained in the Petition for Certiorari, the petition should be granted.

Respectfully submitted.

RAED GONZALEZ
QUAN, BURDETTE & PEREZ, P.C.
5177 Richmond Avenue
Suite 800
Houston, Texas 77056
(713) 625-9225

SETH P. WAXMAN
CHRISTOPHER J. MEADE
Counsel of Record
ANNE K. SMALL
ELOISE PASACHOFF
WILMER CUTLER PICKERING HALE AND DORR LLP
1875 Pennsylvania Ave., N.W.
Washington, D.C. 20006
(202) 663-6000

AUGUST 2007