No. _____

IN THE

Supreme Court of the United States

SURINDER SINGH,

Petitioner,

v.

SALLY Q. YATES, ACTING ATTORNEY GENERAL,

Respondent.

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

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether a decision of the Board of Immigration Appeals denying certain forms of relief but remanding to the Immigration Judge for further proceedings is not yet a "final order of removal" for purposes of judicial review.

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INTRODUCTION

The Immigration and Nationality Act (INA), 8 U.S.C. § 1101 *et seq.*, confers jurisdiction on the courts of appeals to review only "final order[s] of removal." *Id.* § 1252(a)(1). A petition for review must be filed within 30 days of the date of the final order. *Id.* § 1252(b)(1). This time limit is "mandatory and jurisdictional," *Stone v. INS*, 514 U.S. 386, 405 (1995), meaning "[t]he point at which a removal order becomes final is critical for the purposes of timely petitioning for judicial review," *Ortiz-Alfaro v. Holder*, 694 F.3d 955, 958 (9th Cir. 2012).

A stark division of authority among the circuits exists as to whether, and under what circumstances, a Board of Immigration Appeals (Board or BIA) decision that denies some form of relief but remands to an Immigration Judge (IJ) for further proceedings is a final order of removal for purposes of judicial review. This case squarely presents that issue. Petitioner Surinder Singh fled persecution in his native India and sought asylum in the United States. The BIA denied his asylum request, but remanded his case to an IJ for further proceedings. Singh then waited until post-remand proceedings were complete before timely petitioning for review from the order of removal that finally concluded his removal proceedings. The Court of Appeals dismissed Singh's petition, however, holding that the BIA's earlier remand order was the "final order of removal" from which he had only 30 days to petition for review. As a result, the Court refused to hear the merits of Singh's claim.

Whether such a remand order is deemed "final" for purposes of judicial review currently varies depending on the circuit in which the case is heard. In the context of BIA decisions remanding for mandated background and security checks, for example, several circuits have articulated a broad rule that no "final order of removal" exists until the remanded proceedings have concluded. *See Ponce-Osorio v. Johnson*, 824 F.3d 502, 506 (5th Cir. 2016); *Abdisalan v. Holder*, 774 F.3d 517, 520 (9th Cir. 2014) (en banc), *as amended* (Jan. 6, 2015); *Goromou v. Holder*, 721 F.3d 569, 575, 576 n.6 (8th Cir. 2013). The Seventh Circuit, by contrast, treats these remand orders as final orders. *Viracacha v. Mukasey*, 518 F.3d 511, 513 (7th Cir. 2008). And the Third Circuit appears to apply a case-by-case test for finality. *See Yusupov v. Attorney General*, 518 F.3d 185, 196 & n.19 (3d Cir. 2008).

Further deepening this clear conflict, the circuits have taken widely divergent approaches in determining the circumstances in which remands for other matters are final orders of removal. Where the BIA remands for consideration of issues relating to voluntary departure, for example, (as it did in this case) a number of circuits consider the BIA's remand order to be a final order of removal, subject to immediate judicial review. *See, e.g.*, *Alibasic v. Mukasey*, 547 F.3d 78, 83 (2d Cir. 2008); *Batubara v. Holder*, 733 F.3d 1040, 1042-43 (10th Cir. 2013). Three circuits, however, have declined for prudential reasons to exercise jurisdiction over those decisions. *See Hakim v. Holder*, 611 F.3d 73, 79 (1st Cir. 2010); *Li v. Holder*, 666 F.3d 147, 151-54 (4th Cir. 2011); *Giraldo v. Holder*, 654 F.3d 609, 616-18 (6th Cir. 2011). And two other circuits have expressly rejected that "prudential" approach.

See Almutairi v. Holder, 722 F.3d 996, 1002 (7th Cir. 2013); *Pinto v. Holder*, 648 F.3d 976, 985 (9th Cir. 2011).

As the government's own immigration litigators have written (in their personal capacities), the "inter-circuit conflicts" on this finality question "mean[ ] that a petition for review deemed timely in one circuit may be considered premature or untimely in a different circuit." Jesi J. Carlson, Patrick J. Glen & Kohsei Ugumori, *Finality and Judicial Review under the Immigration and Nationality Act: A Jurisprudential Review and Proposal for Reform*, 49 U. Mich. J.L. Reform 635, 637 (2016). These conflicts have sown confusion among the courts, the immigration bar, and noncitizens themselves—over 40% of whom are not represented by counsel during removal proceedings. *See* U.S. Dep't of Justice, Executive Office for Immigration Review, *FY 2015 Statistics Yearbook* (April 2016).

This Court has recognized a particular need for uniform national rules in the immigration context. *See, e.g.*, *Zadvydas v. Davis*, 533 U.S. 678, 700-01 (2001). But without this Court's intervention, the lack of a single, coherent answer to the finality question will continue to sow "unnecessary confusion as to the timeliness of petitions for review and [the courts of appeals'] jurisdiction to entertain them," *Abdisalan*, 774 F.3d at 520. That confusion not only wastes judicial resources, but also serves to deprive noncitizens of judicial review: A noncitizen who reasonably waits until removal proceedings are complete before petitioning for judicial review (like Singh did here) will—

at least in some circuits—learn that the courts considered an earlier BIA decision to be the "final order of removal," meaning the time within which to file a petition has long since elapsed.

The confusion and conflicts among the circuits are entrenched, and this case is an ideal vehicle for resolving this important, recurring question. This Court should therefore grant certiorari and adopt a clear, bright-line rule that no final order of removal exists until the agency has completed its decisionmaking process. That rule would comport with the common meaning of "final"; the statutory text; relevant regulations; and the agency's own interpretive decisions. It also would avoid unnecessary piecemeal litigation; allow the agency to complete its proceedings without premature interference from the courts; and provide noncitizens with essential, clear guidance about the proper time in which to file a petition for review. Significantly, the Department of Justice agrees with this bright-line rule for finality—indeed, it argued as much in this very case.

OPINIONS AND ORDERS BELOW

The opinion of the Court of Appeals is reported at 835 F.3d 880. The decisions of the BIA (Pet. App. 9a-11a & 17a-22a) and the orders of the IJ (Pet. App. 12a-16a & 23a-49a) are unreported.

JURISDICTION

The judgment of the Court of Appeals was entered on September 1, 2016. On November 21, 2016, Justice

Kennedy extended the time within which to file a petition for a writ of certiorari to and including January 29, 2017. *See* Sup. Ct. R. 30.1 (When the last day of the period is a Sunday, "the period shall extend until the end of the next day."). The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

STATUTORY AND REGULATORY PROVISIONS

The pertinent statutory and regulatory provisions are reproduced in full at Pet. App. 50a-68a.

STATEMENT OF THE CASE

1. a. The Department of Homeland Security initiates administrative removal proceedings, which determine the removability of a noncitizen and whether the noncitizen is eligible for any form of relief from removal. A removal proceeding begins with the filing of a Notice to Appear in immigration court, charging the noncitizen with being subject to removal. *See* 8 C.F.R. § 1239.1. Hearings are scheduled before an IJ, where the noncitizen may contest or concede removability as charged and pursue any form of relief for which he may be eligible under the INA. *See* 8 U.S.C. § 1229a.

Among the more commonly sought forms of relief from removal are asylum, *see* 8 U.S.C. § 1158, withholding of removal, *see id.* § 1231(b)(3), and deferral of removal under the Convention Against Torture (CAT), *see* 8 C.F.R. §§ 208.16(c)(3), 208.17. Each allows the noncitizen to continue to reside in the United States, at least temporarily. Often, a noncitizen will

seek all three types of relief, and, in the alternative, request voluntary departure. *See Abdisalan*, 774 F.3d at 521.

Voluntary departure, as the name implies, is a form of relief from removal that permits a noncitizen to depart the country voluntarily, rather than being removed. 8 U.S.C. § 1229c. As this Court has explained, voluntary departure represents a "*quid pro quo*" agreement between the noncitizen and the government. *Dada v. Mukasey*, 554 U.S. 1, 11 (2008). The noncitizen's "agreement to leave voluntarily expedites the departure process" and allows the government to "avoid[ ] the expense of deportation." *Id.* In return, the noncitizen is able to avoid pre-removal detention, select his or her country of destination, and, importantly, avoid the harsh collateral consequences that accompany removal. *Id.* at 11-12; *see* 8 U.S.C. §§ 1182(a)(9), 1326.

At the conclusion of the hearings, the IJ issues a decision on removability and relief from removal. *See* 8 U.S.C. § 1229a(c)(1)(A), (c)(4). Either party may then, within 30 days, file an administrative appeal with the BIA, which "function[s] as an appellate body charged with the review of [the IJ's decisions]." 8 C.F.R. § 1003.1(d)(1).

b. Once the agency has issued "a final order of removal," the noncitizen may petition for judicial review of that order in the appropriate federal court of appeals. 8 U.S.C. § 1252(a)(1), (a)(5). That petition "must be filed not later than 30 days after the date of the final order of removal." *Id.* § 1252(b)(1). This time limit is "mandatory and jurisdictional." *Stone*, 514

U.S. at 405. As a result, the "point at which a removal order becomes final is critical for the purposes of timely petitioning for judicial review." *Ortiz-Alfaro*, 694 F.3d at 958.

The INA does not define "final order of removal." It does, however, define "order of deportation" and the circumstances in which such an order becomes final.[1] The courts of appeals have uniformly recognized that this definition applies to final orders of removal. *See, e.g.*, *Abdisalan*, 774 F.3d at 523; *Viracacha*, 518 F.3d at 513. Under the INA, then, an order of removal is "the order" of the IJ "concluding that the alien is [removable] or ordering [removal]." 8 U.S.C. § 1101(a)(47)(A). That order becomes final upon either the BIA's affirmance of the order or "the expiration of the period in which the alien is permitted to seek review" with the BIA. *Id.* § 1101(a)(47)(B).

c. Where the IJ denies relief and the BIA affirms the IJ's order in its entirety, that decision is unquestionably a "final order of removal." The BIA may, however, affirm the IJ's denial of certain forms of relief while remanding to the IJ for further proceedings on others. When the BIA remands a case, the IJ "reacquires jurisdiction over the proceedings." *In re M-D-*, 24 I. & N. Dec. 138, 141 (BIA 2007). The BIA has "traditionally … treated" remands as "effective for all purposes," meaning the scope of the remand is limited

[1] The Illegal Immigration Reform and Immigrant Responsibility Act of 1996 changed the INA's terminology from "deportation" to "removal," *see Calcano-Martínez v. INS*, 533 U.S. 348, 350 n.1 (2001), but Congress has not amended the INA's relevant definitional section to reflect this change.

only by what the BIA finally decided on appeal. *Id.* In other words, while the parties on remand cannot relitigate issues the BIA has already decided, the IJ is free to hear new evidence and consider additional forms of relief.

The Executive Office for Immigration Review's regulation establishing the parameters of the Board's powers, 8 C.F.R. § 1003.1(d), unequivocally provides that the Board's remand orders are not final orders of removal. The regulation empowers the BIA to "return a case to ... an immigration judge for such further action as may be appropriate." *Id.* § 1003.1(d)(7). But this authorization to remand to the IJ is limited to situations where the BIA returns the case "without entering a final decision on the merits." *Id.* Accordingly, decisions of the BIA addressing the nature and scope of its remand orders have stated in no uncertain terms that "a Board decision remanding a case to an Immigration Judge for further consideration of an issue is not a final decision." *In re E-L-H-*, 23 I. & N. Dec. 814, 821-22 (BIA 2005).

2. a. Petitioner Surinder Singh is a native and citizen of India. He entered the United States in June 2001 as a nonimmigrant visitor, with authorization to remain for six months. In November 2001, Singh applied for asylum. In 2007, an asylum officer referred Singh's application to an IJ. The following month, the government initiated removal proceedings against him.

In December 2008, Singh appeared before an IJ. He conceded removability for having overstayed his visa, but sought asylum on the grounds that he had

suffered past persecution at the hands of the Indian police—persecution he reasonably feared would continue if he were forced to return to India. *See* Pet. App. 31a-32a. Singh testified that he had on two occasions sustained serious injuries after being detained and badly beaten by police because of his Sikh religion and his connections to Sikh political groups. *See id.* In May 2009, the IJ denied Singh's requests for asylum, withholding of removal, and CAT relief, but granted his request for voluntary departure. Pet. App. 48a-49a.

b. Singh appealed to the BIA. In June 2011, the Board affirmed the IJ's denial of asylum, withholding of removal, and CAT relief, relying on an adverse credibility finding underlying the IJ's decision. Pet. App. 18a-20a. The Board concluded, however, that there was insufficient evidence that the IJ had properly advised Singh of certain conditions relating to voluntary departure—e.g., the requirement that he post a $3500 bond within five business days. Pet. App. 20a-21a. The Board therefore remanded to the IJ for further proceedings. Pet. App. 22a.

On remand, the IJ noted that there was "no suggestion of further evidence to be considered," nor any request by Singh "for some other form of relief" beyond those which had already been denied. Pet. App. 13a. The IJ therefore simply advised Singh of the conditions of his voluntary departure and issued a written order granting Singh voluntary departure with a new departure date. Pet. App. 12a-13a. The IJ also issued an alternative order of removal, which would become effective if Singh failed to comply with those conditions. *Id.*

Singh again appealed to the BIA. On November 29, 2012, the BIA dismissed this second appeal. Pet. App. 9a-11a. The BIA refused to reinstate Singh's voluntary departure on the ground that he had missed by two days the deadline to submit proof of payment of his voluntary departure bond.[2] Pet. App. 10a-11a & n.1. Instead, the BIA ordered Singh removed to India under the IJ's alternative order. With his removal proceedings finally complete, and his alternative order of removal now in effect, Singh, on December 20, 2012, timely filed a petition for review in the Ninth Circuit.

3. a. On appeal, the Ninth Circuit recognized that "some tension" existed in the court's recent case law addressing the finality of BIA remand orders. The court's en banc decision in *Abdisalan* had held that "[w]hen the BIA remands to the IJ for any reason, no final order of removal exists until all administrative proceedings have concluded," 774 F.3d at 526. Prior cases, however, had held that BIA decisions remanding for consideration of voluntary departure are final orders of removal. Pet. App. 7a n.4 (citing *Pinto v. Holder*, 648 F.3d 976, 985 (9th Cir. 2011)).

The panel *sua sponte* ordered supplemental briefing on whether Singh's case should initially be heard en banc "to overrule that prior precedent in light of

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[2] The filing of an appeal with the BIA automatically stays the execution of the IJ's order. 8 C.F.R. § 1003.6(a). It does not, however, automatically toll a grant of voluntary departure. Rather, the BIA ordinarily will reinstate the voluntary departure period at the conclusion of proceedings on appeal. *See* 8 C.F.R. § 1240.26(c)(3)(ii).

the reasoning and holding of *Abdisalan*." *Id.* While that briefing was pending, another three-judge panel decided *Rizo v. Lynch*, 810 F.3d 688 (9th Cir. 2016), which held that the prior precedent "remains the law of the Circuit." *Id.* at 691.

In the ensuing supplemental briefs, both Singh and the U.S. Department of Justice agreed that *Rizo* was wrongly decided. The government argued "that the better rule, post-*Abdisalan*, is that a remand *for any purpose* renders the Board decision non-final for purposes of judicial review." Supplemental Brief for Respondent at 2, *Singh v. Lynch*, No. 12-74163, Dkt. 45 (9th Cir. Jan. 21, 2016) (hereinafter "DOJ Supp. Br.").

b. Ultimately, however, the three-judge panel in this case concluded it was "bound to apply" the court's prior precedent.[3] Pet. App. 7a-8a & n.4. Under that precedent, the "final order of removal" from which Singh should have petitioned for review was the BIA's July 2011 remand order. *See Pinto*, 648 F.3d at 985. Because the 30-day deadline for seeking judicial review of that order had long since passed, the panel held that it lacked jurisdiction over Singh's petition. Pet. App. 8a.

As a result, unless this Court grants certiorari and reverses, Singh will face "immediate removal" to a country in which he fears for his life, Pet. App. 8a,

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[3] The panel reached this conclusion after a member of the court requested a vote on whether to rehear *Rizo* en banc, but a majority of judges did not vote in favor of rehearing. *See* Pet. App. 7a n.4

without a court ever having even considered the merits of his asylum claim.

REASONS FOR GRANTING THE WRIT

I. The Question Presented Has Divided The Courts Of Appeals.

The courts of appeals are squarely divided as to whether, and under what circumstances, a BIA decision that remands to the IJ for further proceedings is a "final order of removal" that triggers the 30-day jurisdictional window within which a noncitizen must petition for judicial review. The "inter-circuit conflicts" on this question "mean[ ] that a petition for review deemed timely in one circuit may be considered premature or untimely in a different circuit." Carlson et al., *Finality and Judicial Review*, 49 U. Mich. J.L. Reform at 637. As a result of this confusion, at least some noncitizens "will lose their opportunity to seek judicial review" of the agency's life-altering—indeed, in some cases life-or-death—decisions. *Id.* at 637-38. Especially given the harsh consequences that attend removal, "no misunderstanding about finality should prevent an alien from obtaining judicial review of an order of removal," *id.* at 671 (emphasis omitted).

One common basis for the BIA to remand to the IJ is for completion of required background and security checks.[4] In the context of such remand orders, the

[4] The agency must complete current background checks—i.e., identity, law enforcement, or security investigations—before granting a noncitizen certain forms of relief from removal. 8 C.F.R. §§ 1003.47, 1003.1(d)(6)(i).

Fifth, Eighth, and Ninth Circuits have held that BIA decisions remanding for that purpose are not "final orders of removal." *See Ponce-Osorio v. Johnson*, 824 F.3d 502, 506 (5th Cir. 2016); *Goromou v. Holder*, 721 F.3d 569, 575, 576 n.6 (8th Cir. 2013); *Abdisalan*, 774 F.3d at 520. The Third and Seventh Circuits, by contrast, have found similar remand orders to be final orders of removal for purposes of judicial review. *See, e.g.*, *Yusupov v. Attorney General*, 518 F.3d 185, 196 (3d Cir. 2008); *Viracacha v. Mukasey*, 518 F.3d 511, 513 (7th Cir. 2008).

The divergent results of this jurisdictional disagreement could not be more fundamental. In some circuits a noncitizen *cannot* petition for review from the BIA remand order. Rather, the noncitizen must wait until the remanded proceedings are complete before seeking judicial review from the "final order" that concludes those proceedings. In other circuits, however, a noncitizen *must* petition for review from the BIA remand order. And if the noncitizen waits until the remanded proceedings are complete (as petitioner did here), he will have lost any opportunity for judicial review of the merits of his claims.

In *Abdisalan v. Holder*, the Ninth Circuit, at both the noncitizen's and the government's urging, granted en banc review in an attempt to bring much-needed clarity to the question of when BIA remand orders are subject to court review. Noting that its "sister circuits have … reached divergent holdings on this issue," 774 F.3d at 522 & n.4 (citing, e.g., *Viracacha*, 518 F.3d at 513; *Goromou*, 721 F.3d at 576 n.6), the court, sitting en banc, held that "[w]hen the BIA remands to the IJ for any reason, no final order of removal exists until

all administrative proceedings have concluded." *Id.* at 526.

The Fifth Circuit has since followed the Ninth Circuit's lead. "Agree[ing] with *Abdisalan*," the court adopted a "bright-line rule that, when the BIA decides some issues but remands for background and security checks," its decision is not final for purposes of judicial review. *Ponce-Osorio*, 824 F.3d at 507. In so holding, the court acknowledged that its finality rule "conflicts with decisions of the Third and Seventh Circuits." *Id.* at 506-07 & n.9.

The courts of appeals have precipitated still more confusion in addressing the finality of BIA orders remanding to the IJ for other purposes, such as in the context presented here of a remand to address issues related to voluntary departure. Just as with remands for background checks, remands for consideration of voluntary departure generally permit the noncitizen to raise, and the IJ to consider, any additional grounds for relief. *See Matter of Patel*, 16 I. & N. Dec. 600, 601 (BIA 1978); *Matter of M-A-S-*, 24 I. & N. Dec. 762, 764 (BIA 2009); *see also* pp. 29-31, *infra*. Consequently, there is no reasoned basis to treat the finality of these remand orders differently from any other decision in which the BIA remands to the IJ for consideration of some other issue. Yet, the circuits' approaches to finality have further diverged in this context as well.

At least five circuits, including the Fifth and Ninth Circuits (in tension with those courts' approaches to the finality of other BIA remand orders),

treat BIA orders remanding for consideration of voluntary departure as final orders for purposes of judicial review. *See, e.g.*, *Alibasic v. Mukasey*, 547 F.3d 78, 83 (2d Cir. 2008); *Holguin-Mendoza v. Lynch*, 835 F.3d 508, 509 (5th Cir. 2016); *Almutairi v. Holder*, 722 F.3d 996, 1002 (7th Cir. 2013); *Rizo v. Lynch*, 810 F.3d 688 (9th Cir. 2016); *Batubara v. Holder*, 733 F.3d 1040, 1042-43 (10th Cir. 2013). At least one of these courts so holds even where the BIA's remand order expressly instructs the IJ to consider "any available relief" in addition to voluntary departure. *See Alibasic*, 547 F.3d at 84 n.5.

The First, Fourth, and Sixth Circuits, however, will not hear an appeal from a voluntary departure remand order. *See Hakim v. Holder*, 611 F.3d 73, 79 (1st Cir. 2010); *Li v. Holder*, 666 F.3d 147, 151-54 (4th Cir. 2011); *Giraldo v. Holder*, 654 F.3d 609, 616-18 (6th Cir. 2011); *see also Diaz-Mejia v. Holder*, 564 F. App'x 730, 730 & n.1 (4th Cir. 2014) (BIA remand for consideration of voluntary departure is "not a final order of removal"). In *Hakim*, the First Circuit acknowledged that decisions of its sister circuits had concluded that such remand orders are final orders of removal, but noted that those matters had been decided before this Court's ruling in *Dada v. Mukasey* and the subsequent amendment to the regulation governing voluntary departure.[5] *See Hakim*, 611 F.3d at

[5] In *Dada*, this Court stressed the importance of reading the INA to "respect[ ] the Government's interest in the *quid pro quo* of the voluntary departure arrangement." 554 U.S. at 19; *see* p. 6, *supra*. The Attorney General subsequently amended the voluntary departure regulation, seeking to preserve that *quid pro quo* by, among other things, providing that a grant of voluntary departure automatically terminates upon the filing of a petition

78 (citing 8 C.F.R. § 1240(i)). The First Circuit held that even if it "[a]ssum[ed] arguendo that [it] ha[d] before [it] a final order of removal," it would decline to exercise jurisdiction "for prudential reasons." *Id.* at 79.

The First Circuit explained that, as amended, the regulation "assumes a chronological order, i.e., that the grant of voluntary departure *precedes* the filing of a petition for judicial review." *Hakim*, 611 F.3d at 79. To exercise jurisdiction over the petition for review, filed before the IJ had determined his eligibility for voluntary departure, would "circumvent the regulation" by allowing the noncitizen "to seek both voluntary departure and judicial review, thus hindering judicial economy and denying the government the benefit of 'a prompt and costless departure.'" *Id.* (quoting *Dada*, 554 U.S. at 20).

Under the First Circuit's approach, once the IJ has made the determination about eligibility for voluntary departure on remand, the noncitizen would then have the option either to stay in the country and petition for review of his asylum and withholding of removal claims, or, if granted voluntary departure, to comply with the relevant departure provisions, *id.,* and "pursue judicial review … after [he] ha[d] departed," 73 Fed. Reg. 76,932.

The Fourth and Sixth Circuits have similarly declined on prudential grounds to exercise jurisdiction

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for review filed before the noncitizen departs. 8 C.F.R. § 1240.26(i); *see* 73 Fed. Reg. 76,929, 76,932.

over BIA decisions remanding for consideration of voluntary departure, *see Li*, 666 F.3d at 151-54; *Giraldo*, 654 F.3d at 618, while allowing the noncitizen to seek judicial review once the remanded proceedings concluded.[6]

The Seventh and Ninth Circuits have sharply criticized this approach to voluntary departure remands. *See Almutairi*, 722 F.3d at 1000; *Pinto v. Holder*, 648 F.3d 996, 985 (9th Cir. 2011). In those courts' view, "[e]ither an order resolving everything except voluntary departure is final and ripe for a petition for review, or it is not." *Almutairi*, 722 F.3d at 1000. And if the order is final, "the alien not only can, but must, file the petition for review within 30 days of the Board's decision." *Id.*; *see Pinto*, 648 F.3d at 985 (criticizing the First Circuit in *Hakim* as having "ignored the 30-day deadline for petitioning for review of final orders"). Tacitly recognizing that the appropriate time for judicial review is after the conclusion of proceedings on remand, however, the Seventh Circuit has suggested that "the proper approach" is for noncitizens to file a petition for review from the BIA's remand order, but for the court to then "stay proceedings on the petition until voluntary departure has

[6] The Sixth Circuit created yet another layer of confusion, however, when it recently held that it lacked jurisdiction over a petition for review filed after the completion of such remanded voluntary departure proceedings. *See Hih v. Lynch*, 812 F.3d 551, 552 (6th Cir. 2016). Taken together, *Giraldo and Hih* effectively require a noncitizen in situations like Singh's here to file *two* separate petitions for review—first, a petition for review from the BIA's remand order (which will be dismissed without prejudice pursuant to *Giraldo*) and then a second, duplicative petition once the proceedings on remand are complete.

been resolved one way or the other." *Almutairi*, 722 F.3d at 1002.

Further compounding the confusion, the Fourth Circuit has since declined to apply its "prudential" approach, instead simply holding that a remand for voluntary departure is "*not* a final order of removal," where the remand order also allows for the IJ's consideration of other forms of relief. *Diaz-Mejia*, 564 F. App'x at 730; *Diaz-Mejia v. Holder*, No. 12-2198, Dkt. 15 (4th Cir. Jan. 2, 2013) (unpublished order) (dismissing for jurisdictional, rather than prudential, reasons where BIA remanded for "consideration of voluntary departure and any other relief for which [the petitioner] may be eligible"). In so holding, however, the court further exacerbated the already intractable division of authority among the circuits: That holding is in direct conflict with the Second Circuit's decision in *Alibasic*. *See* p. 15, *supra*. And, as discussed below (at 29-31), virtually any voluntary departure remand permits the noncitizen to raise, and the IJ to reach, other issues and forms of relief. So there is no logical reason to distinguish between remand orders based on whether they include such express language.

Despite the manifest need for a clear, uniform rule for finality, noncitizens are currently presented with anything but. The result of all this confusion is that noncitizens are instead faced with an impossible quagmire. Whether a BIA order remanding to the IJ for further proceedings is considered a "final order of removal" that starts the 30-day jurisdictional clock for seeking judicial review depends not only on the circuit in which the petition is filed, but also on the purpose

of the remand and even the specific phrasing of the BIA's order. The lack of a single, coherent answer to the question of finality thus "creat[es] unnecessary confusion as to the timeliness of petitions for review and [the courts of appeals'] jurisdiction to entertain them." *Abdisalan*, 774 F.3d at 520.

II. The Question Presented Is Recurring And Important.

As demonstrated by the divisions of authority described above, the finality of BIA decisions remanding to an IJ for further proceedings has confounded the courts of appeals. "The implications [of that confusion] are profound." Carlson et al., *Finality and Judicial Review*, 49 U. Mich. J.L. Reform at 635. Because the point at which a removal order becomes final is critical for purposes of timely petitioning for judicial review, "the end result of this confusion is the very real possibility that aliens will lose their opportunity to seek judicial review." *Id.* at 637.

For noncitizens in removal proceedings, the stakes could hardly be higher. They face the prospect of being forced from the country they call home—leaving behind friends, family, and loved ones—and being deported to a country where they may, as is the case here, fear imprisonment, torture, and even death. *See Padilla v. Kentucky*, 559 U.S. 356, 360 (2010) (deportation is a "drastic measure" with "harsh consequences"); *Bridges v. Wixon*, 326 U.S. 135, 154 (1945) ("[D]eportation may result in the loss of all that makes life worth living." (internal quotation marks omitted)). Judicial review of these life-altering agency decisions is "a key backstop to the efficient and just

operation of immigration law." Carlson et al., *Finality and Judicial Review*, 49 U. Mich. J.L. Reform at 638; *see Benslimane v. Gonzales*, 430 F.3d 828, 829-30 (7th Cir. 2005) (Posner, J.) (noting the Seventh Circuit reversed the BIA in a "staggering" 40% of petitions reviewed that year, because "adjudication of these cases at the administrative level has fallen below the minimum standards of legal justice"). This Court has thus repeatedly stressed the "presumption favoring interpretations of statutes to allow judicial review of administrative action" in the immigration context. *Kucana v. Holder*, 558 U.S. 233, 251 (2010) (internal quotation marks and alteration omitted); *see also INS v. St. Cyr*, 533 U.S. 289, 298-99 (2001) (same).

The government acknowledged in this very case that a straightforward interpretation of the INA—that any remand to an IJ renders the BIA's decision non-final—"has the tremendous benefit of clarity for the immigration bar." DOJ Supp. Br. at 14-15. That rule provides the same benefit for noncitizens themselves, many of whom appear pro se—often with little understanding of this country's legal system, let alone the intricacies and nuances of its immigration laws. *See* 73 Fed. Reg. 76,930 (noting the Department of Justice's "concern[ ]" about the potential for "confusion and unnecessary complexity" in voluntary departure proceedings, and that this is "especially true for the many pro se aliens who appear before [IJ]s").

A broad, uniform rule for finality is clear enough for a layperson to follow and understand: The time to seek judicial review does not begin until all administrative removal proceedings are concluded. At that time, the noncitizen can file a petition for review from

the resulting final order and have the court review "all decisions made during and incident to the administrative proceeding[s]." *Foti v. INS*, 375 U.S. 217, 229 (1963); *see also INS v. Chadha*, 462 U.S. 919, 938 (1983) (judicial review of "final order of deportation" encompasses "all matters on which the validity of the final order is contingent").

By contrast, "any step away from [that] broad rule" forces noncitizens to choose between (1) petitioning immediately from the Board's remand order, thereby "run[ning] the risk of the Court concluding that it is not final because proceedings remain ongoing"; (2) "wait[ing] to petition when proceedings have concluded, only to be told that the earlier Board decision was the relevant final agency decision"; or (3) "simply petition[ing] helter-skelter [to] protect the opportunity to obtain judicial review over the adverse agency decision." DOJ Supp. Br. at 15. The inefficiencies that result from such confusion benefit no one.

The importance of the question presented in this case is underscored by the frequency with which it arises. The BIA handles thousands of appeals every year, *see* Executive Office for Immigration Review, *FY 2015 Statistics Yearbook* at R2, many of which include remands for various purposes. And petitions for review of BIA decisions consistently make up more than 10% of the courts of appeals' overall caseload.[7] In the last ten years alone, the recurring issue of the finality of BIA remand orders has arisen countless times.

[7] U.S. Courts of Appeals, *Judicial Business*, Table B-3 (Sept. 30, 2015), http://www.uscourts.gov/statistics/table/b-3/judicial-business/2015/09/30.

(This petition cites more than a dozen such cases, as just a small representative sample.) These numbers may further mushroom under the new Administration, which has pledged to immediately deport up to three million undocumented immigrants, *see* Julie Hirschfeld Davis and Julia Preston, *Trump's Deportation Pledge Could Require Raids and Huge Federal Force*, N.Y. Times, Nov. 15, 2016, at A15; *see also* Executive Order: Enhancing Public Safety in the Interior of the United States (Jan. 25, 2017), 2017 WL 359825. Such a dramatic increase in the number of removal proceedings will only heighten the need for clarity about when an order of removal becomes "final"—both to maximize judicial efficiency and to protect noncitizens' ability to obtain judicial review.

Granting certiorari in this case would allow the Court to provide the lower courts with much-needed, timely guidance on this recurring and increasingly consequential question of national importance.

III. The Ninth Circuit Erred In Holding That The BIA's Remand For Further Proceedings Was A "Final Order Of Removal."

This Court can—and should—resolve the divisions of authority within the circuits by announcing a bright-line rule for the finality of Board decisions that remand to an IJ for further proceedings of any kind. A rule that no "final order of removal" exists until the remanded proceedings are complete is the only rule that is consistent with the applicable statutory and regulatory text, and with the common understanding of finality and this Court's teachings about finality

and judicial efficiency in related contexts. Significantly, the Department of Justice has stated its express agreement with this bright-line finality rule in this very case. *See* DOJ Supp. Br. at 14-15.

A. The Decision Below Contravenes The Ordinary Meaning Of "Final" And This Court's Teachings In Related Contexts.

"'Final' commonly means '[m]arking the last stage of a process; leaving nothing to be looked for or expected; ultimate.'" *Abdisalan*, 774 F.3d at 524 (quoting 5 Oxford English Dictionary 920 (2d ed. 1989)). "In the legal context, the term 'final' refers to an order 'ending a court action or proceeding leaving nothing further to be determined by the court or to be done except the administrative execution of the court's finding.'" *Id.* (quoting Webster's Third New Int'l Dictionary 851 (2002)).

The statutory text indicates that Congress intended the term "final order of removal" to conform to this common understanding of "final." The INA's definition repeatedly references "the"—rather an "a"—final order, suggesting that Congress contemplated only one single final order of removal (and one corresponding petition for review) at the completion of removal proceedings. *See id.* at 523; 8 U.S.C. § 1101(a)(47). And it would make little practical sense for a single order of removal to become "final" at multiple points in time, as that would virtually guarantee the need for piecemeal reviews of the agency's removal proceedings.

Interpreting "final order of removal" to include BIA decisions remanding to the IJ for further proceedings also runs contrary to this Court's approach to finality in related contexts. In the context of judicial review under the Administrative Procedure Act, 5 U.S.C. § 704, for example, this Court has interpreted "final agency action" as requiring that the agency's action "mark the consummation of the agency's decisionmaking process," and be an action "by which rights or obligations have been determined, or from which legal consequences will flow." *Bennett v. Spear*, 520 U.S. 154, 177-78 (1997) (internal quotation marks omitted). In that similar context, the "core question" for finality is "whether the agency has completed its decisionmaking process, and whether the result of that process is one that will directly affect the parties." *Franklin v. Massachusetts*, 505 U.S. 788, 797 (1992). But when (as here) the BIA remands to the IJ for further proceedings, the agency clearly has not completed its decisionmaking process. Nor—for the reasons described more fully below (at 28-32)—have the rights or obligations of the noncitizen seeking relief from removal been conclusively determined. That occurs only once the administrative proceedings are complete.

This Court has also highlighted the importance of "pragmatic considerations" in determining what constitutes "final agency action." *F.T.C. v. Standard Oil Co. of Cal.*, 449 U.S. 232, 240 (1980). In the situation presented here, all pragmatic considerations counsel against treating BIA remand decisions as final orders of removal. Doing so causes unnecessary "interference with the proper functioning of the agency" and places

a needless additional burden on the courts. *See Standard Oil*, 449 U.S. at 242. It also "leads to piecemeal review which at the least is inefficient and upon completion of the agency process might prove to have been unnecessary." *Id.*; *see also McKart v. United States*, 395 U.S. 185, 194 (1969) (recognizing that "it is generally more efficient for the administrative process to go forward without interruption," so "courts ordinarily should not interfere with an agency until it has completed its action"). Particularly because IJs typically may consider new evidence and new applications for relief when a case is remanded from the BIA, *see* pp. 29-31 *infra*, the proceedings on remand may trigger additional appeals, or even culminate in a grant of relief that makes judicial review unnecessary.[8] *See Wade v. F.C.C.*, 986 F.2d 1433, 1434 (D.C. Cir. 1993) (per curiam) (noting "[t]he danger of wasted judicial effort that attends the simultaneous exercise of judicial and agency jurisdiction").

The government agrees. It argued below that the rule Singh seeks—i.e., when the Board remands to the IJ for further proceedings, no "final order of removal" exists until the remanded proceedings have concluded—is not only "consistent with the statutory

[8] As an example, in *Matter of M-A-S-*, 24 I. & N. Dec. 762 (BIA 2009), the BIA affirmed an IJ's determination that a noncitizen was removable for failing to maintain the conditions of his student visa, but remanded to the IJ for consideration of voluntary departure. *Id.* at 763. On remand, the noncitizen applied for asylum, withholding of removal, and protection under the CAT. *Id.* The IJ "properly found that he was not foreclosed from considering the [noncitizen]'s claims." *Id.* at 764. Had the IJ granted the noncitizen's asylum application, the noncitizen would have had no reason to seek review of the IJ's initial removal order.

… framework," but also "comport[s] with the concept of 'final agency action' under the Administrative Procedure Act, and better promote[s] judicial efficiency." DOJ Supp. Br. at 9. And the government has consistently taken this position in other cases as well. *See, e.g.*, *Almutairi*, 722 F.3d at 1000 (identifying three cases involving voluntary departure remands in which "the government had asserted that there was no final, reviewable decision for the court of appeals because of the Board's remand").

B. The Decision Below Disregards The Regulatory Framework Governing BIA Remand Orders.

Administrative regulations and BIA interpretive decisions provide further support for the rule that a remand to the IJ renders a BIA decision non-final for purposes of judicial review. First and foremost, the regulation setting forth the "Powers of the Board," 8 C.F.R. § 1003.1(d), unequivocally provides that BIA remand orders are not "final orders of removal." That regulation authorizes the BIA to "return a case to ... an immigration judge for such further action as may be appropriate." *Id.* § 1003.1(d)(7). But under this regulation, the BIA is only empowered to do so "*without entering a final decision on the merits*." *Id.* (emphasis added).

Similarly, the regulation governing voluntary departure, 8 C.F.R. § 1240.26, supports a conclusion that remands for consideration of voluntary departure are not final orders for purposes of judicial review. As the First Circuit explained in *Hakim*, that "regulation assumes a chronological order, i.e., that

the grant of voluntary departure *precedes* the filing of a petition for judicial review." 611 F.3d at 78-79 (citing 8 C.F.R. § 1240.26(i)).[9]

In addition, BIA decisions discussing the nature and scope of its remand orders to the IJ make clear that the Board itself does not consider these orders to be final. *See, e.g.*, *In re E-L-H-*, 23 I. & N. Dec. at 821-

[9] A bright-line rule that BIA remand orders are not "final orders of removal" also accords with the regulation designed to preserve the *quid pro quo* of voluntary departure. *See Dada*, 554 U.S. at 11. That rule would prevent the circumvention that concerned the courts in *Pinto* and *Hakim* (among other cases), whereby a noncitizen is able to obtain voluntary departure after petitioning for judicial review. However, a noncitizen is not meaningfully worse off under a bright-line finality rule. Under that rule, noncitizens who obtain voluntary departure on remand can either (1) voluntarily depart, and then petition for review from outside the country while retaining the benefits of voluntary departure, *see* 73 Fed. Reg. 76,932; or (2) petition for review without first departing, thus canceling the grant of voluntary departure. 8 C.F.R. § 1240.26(i). If, however, a noncitizen is able to circumvent the regulation by petitioning for review from the BIA's remand order before the IJ subsequently grants voluntary departure on remand, the noncitizen would be put to essentially the same choice: either (1) voluntarily depart while the earlier petition is still pending in the courts, and then pursue that petition from outside the country; or (2) remain in the country and face the consequences of failing to voluntarily depart. In practice, then, a noncitizen may generally be better off under the bright-line finality rule—both because that rule provides much-needed clarity and because the noncitizen's petition for review need not be filed until a later date, when all remanded administrative proceedings have concluded. *See INS v. Doherty*, 502 U.S. 314, 323 (1992) ("[A]s a general matter, every delay works to the advantage of the deportable alien who wishes merely to remain in the United States.").

22 ("[A] Board decision remanding a case to an Immigration Judge for further consideration of an issue is not a final decision."); *In re Alcantara-Perez*, 23 I. & N. Dec. 882, 885 (BIA 2006) (An order remanding the case for background checks is "not a final decision"; the IJ's order on remand is "the final administrative order in the case."). In other words, the BIA has itself determined that an order of removal becomes final only after the completion of the proceedings on remand, and not before.

Here, too, the government agrees. It argued below (as it has long argued in similar cases) that a bright-line finality rule—in which "a remand for any purpose renders the Board decision non-final for purposes of judicial review"—is "consistent with the … regulatory framework concerning finality and the agency's interpretations of that framework." DOJ Supp. Br. at 9.

C. The Decision Below Rests On Faulty Premises.

The decision below reached the wrong result because the three-judge panel was "bound to apply" circuit precedent that rested on two interrelated, erroneous premises. Pet. App. 7a-8a & n.4. The other courts of appeals that mistakenly treat BIA orders remanding for further proceedings as final orders of removal have also relied on those same defective underpinnings.

First, some courts have reasoned that a BIA decision remanding to the IJ for voluntary departure proceedings has "definitively adjudicate[d]" the noncitizen's "eligibility for discretionary relief," so

that "the only lingering question on remand is how [the noncitizen] will leave." *Pinto*, 648 F.3d at 986; *see also, e.g.*, *Almutairi*, 722 F.3d at 1001. But voluntary departure is itself a valuable form of discretionary relief from removal that carries with it significant benefits to noncitizens. *See Dada*, 554 U.S. at 11-12; *see also* 8 U.S.C. § 1229c(b)(1) (describing voluntary departure as being "in lieu of removal").

And even setting aside the important distinction between removal and voluntary departure, these courts are mistaken that all that is "up in the air" on a remand for consideration of voluntary departure is "the manner of [the noncitizen's] exit." *Almutairi*, 722 F.3d at 1001. On the contrary, the BIA has long made clear that, when it remands to the IJ for further proceedings, "the remand is effective for the stated purpose and for consideration of *any and all matters* which the [IJ] deems appropriate in the exercise of his administrative discretion or which are brought to his attention in compliance with the appropriate regulations." *Matter of Patel*, 16 I. & N. Dec. 600, 601 (BIA 1978) (emphasis added); *see also, e.g.*, *In re M-D-*, 24 I. & N. Dec. at 141-42.

Based on these Board decisions, the courts of appeals have properly recognized that where the Board's order states a purpose for the remand (like consideration of voluntary departure) but does not expressly limit the remand to that purpose, the IJ has discretion to consider other matters. *See, e.g., Johnson v. Ashcroft*, 286 F.3d 696, 703 (3d Cir. 2002) (remand for consideration of a CAT claim did not limit the IJ's jurisdiction to consider noncitizen's claim for asylum); *Fernandes v. Holder*, 619 F.3d 1069, 1074

(9th Cir. 2010) ("An articulated purpose for the remand, without any express limit on scope, is not sufficient to limit the remand" to only that articulated purpose.); *Cano-Saldarriaga v. Holder*, 729 F.3d 25, 28 n.2 (1st Cir. 2013) (similar). Thus, a very real possibility exists that when the BIA remands for a stated purpose like voluntary departure, the proceedings on remand will involve much more than simply determining "the manner of [the noncitizen's] exit." *Almutairi*, 722 F.3d at 1001.

Cano-Saldarriaga illustrates the point. There, an IJ granted the petitioner's application for cancellation of removal. On appeal, the BIA reversed and "remanded the case to the IJ for entry of an order of removal and designation of a country of removal." 729 F.3d at 26. On remand, the petitioner applied for asylum, withholding of removal, and CAT relief. *Id.* at 28. The First Circuit held that "[t]he IJ considered these new claims on remand in the fair exercise of her discretion." *Id.* (citing *Matter of Patel,* 16 I. & N. Dec. at 601). The same holds true with remands for other purposes, including voluntary departure. *See, e.g.*, *Matter of M-A-S-*, 24 I. & N. Dec. 762, 764 (BIA 2009) (following remand of record for consideration of voluntary departure, IJ appropriately considered respondent's new applications for asylum, withholding of removal, and CAT protection).

The possibility that proceedings on remand will affect the ultimate outcome of the case—and therefore lead to confusion and piecemeal review if the initial remand order is treated as a "final order of removal"—also exists when the BIA remands for background

checks. In that scenario, the relevant regulations require the IJ to consider the results of those background checks in determining the noncitizen's eligibility for relief. 8 C.F.R. § 1003.47(h). And where background checks "reveal[ ] new information relevant to the original grant of relief," the IJ is "permitted to examine the case in a different light." *In re Alcantara-Perez*, 23 I. & N. Dec. at 884.

Thus, when the BIA remands for voluntary departure, background checks, or some other specified purpose, the proceedings on remand are *not* necessarily limited to consideration of those particular issues. Indeed, here, while the BIA remanded to the IJ with instructions to provide "advisals" relating to the IJ's grant of voluntary departure, the IJ was prepared to consider "further evidence," or a request "for some other form of relief" had Singh raised such a request on remand. *See* Pet. App. 13a.

Second, several courts have mistakenly suggested that the BIA's decision remanding to the IJ for voluntary departure proceedings is the "final order of removal" because, when the BIA remands for consideration of voluntary departure, "all substantive matters judicially reviewable by [a] court have been finalized," and courts are "powerless to review" the subsequent voluntary departure determination. *Rizo*, 810 F.3d at 691. These courts base that suggestion on the notion that, under the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (IIRIRA), an IJ's determination about eligibility for voluntary departure is not judicially reviewable. *See, e.g.*, *Rizo*, 810 F.3d at 691 (citing 8 U.S.C. § 1229c(f)); *Almutairi*, 722 F.3d at 1001.

Even setting aside the fact that a noncitizen might raise new—and unquestionably reviewable—issues during the proceedings on remand, those courts are also wrong that an IJ's decision whether to grant voluntary departure is itself unreviewable. In focusing on IIRIRA, these courts entirely overlook the later-enacted REAL ID Act of 2005, which "restored appellate jurisdiction over questions of law in denials of discretionary relief, including voluntary departure under § 1229c." *Corro-Barragan v. Holder*, 718 F.3d 1175, 1176 (9th Cir. 2013). Indeed, the courts of appeals have uniformly recognized that they retain jurisdiction to entertain certain legal challenges related to voluntary departure proceedings. *See, e.g.*, *id.* at 1176-77 (asserting "appellate jurisdiction over constitutional claims or questions of law in challenges to denials of voluntary departure"); *Bachynskyy v. Holder*, 668 F.3d 412, 416-17 (7th Cir. 2012) (same); *Garcia v. Holder*, 584 F.3d 1288, 1289 n.2 (10th Cir. 2009) (same); *see also Ademo v. Lynch*, 795 F.3d 823, 832 (8th Cir. 2015) (exercising jurisdiction to review BIA's failure to address petitioner's arguments that the IJ incorrectly denied his application for voluntary departure). Thus, even if the BIA were to expressly limit the IJ's jurisdiction on remand, it is simply not the case that an IJ's determination about whether a noncitizen is entitled to voluntary departure is never subject to judicial review. Accordingly, only by treating these remand orders as non-final can a court avoid the prospect of inefficient, piecemeal appellate review.

IV. This Case Is An Ideal Vehicle To Address And Resolve The Question Presented.

The question presented is dispositive in this case. The sole basis for the Ninth Circuit's dismissal was that, under its prior precedent, the BIA's earlier remand to the IJ was the "final order of removal" from which Singh was required to petition for review within 30 days in order to obtain judicial review.[10] If the Ninth Circuit instead had properly held that there was no judicially reviewable "final order of removal" until the remanded proceedings had concluded, Singh's petition for review would have been timely—and the merits of his claims would have been heard.

Indeed, the merits of Singh's petition likely would have been heard in the Fourth Circuit. *See Diaz-Mejia*, 564 F. App'x at 730 n.1. It also may have been deemed timely in the First and Eighth Circuits. *See Hakim*, 611 F.3d at 79; *Goromou*, 721 F.3d at 576 n.6. But Singh's petition would have been dismissed in the Second, Seventh, and Tenth Circuits. *See Alibasic*, 547 F.3d at 83; *Almutairi*, 722 F.3d at 1001; *Batubara*, 733 F.3d at 1041-42.

Moreover, this case is a particularly good vehicle to address the question because it would allow the

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[10] That the Ninth Circuit panel ordered supplemental briefing to address this question—and then dismissed without oral argument only after an en banc call failed in *Rizo v. Lynch*, 810 F.3d 688 (9th Cir. 2016)—further demonstrates that the question is directly presented and dispositive in this case. The failed en banc call in *Rizo* also illustrates that there is little prospect that the courts of appeals will resolve the confusion without this Court's intervention.

Court to address the full breadth of the current intra-circuit conflict as to the finality of BIA remand orders. The disagreement and confusion within the courts of appeals extend beyond the context of voluntary departure to remands for background checks as well. But, as discussed above (at 28-32), there is no principled basis to distinguish between those two subsets of BIA remands: The reasoning in one context applies with equal force in the other. And in response to the Ninth Circuit's supplemental briefing order in this case, the parties below addressed the finality of BIA remand orders in both contexts.

The Court should therefore take this opportunity to clarify, as the government itself argued in its supplemental brief below, "that a remand *for any purpose* renders the Board decision non-final for purposes of judicial review." DOJ Supp. Br. at 2.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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January 30, 2017

APPENDIX A

FOR PUBLICATION

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

SURINDER SINGH,
Petitioner,

v.

LORETTA E. LYNCH,
Attorney General,
Respondent.

No. 12-74163

Agency No.
A079-579-046

OPINION

On Petition for Review of an Order of the
Board of Immigration Appeals

Submission Deferred February 3, 2016
Resubmitted September 1, 2016*
Seattle, Washington

Filed September 1, 2016

Before: Alex Kozinski, Diarmuid F. O'Scannlain, and Ronald M. Gould, Circuit Judges.

Per Curiam Opinion

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* The panel unanimously concludes this case is suitable for decision without oral argument. *See* Fed. R. App. P. 34(a)(2).

SUMMARY**

Immigration

The panel held that it lacked jurisdiction to review a petition for review of a Board of Immigration Appeals' decision following remand to an immigration judge for voluntary departure advisals.

In petitioner's first appeal to the Board, the Board affirmed the IJ's denial of asylum, withholding of removal, and Convention Against Torture relief, but remanded to the IJ for voluntary departure advisals. Petitioner did not file a petition for review within 30 days of that Board decision.

On remand, the IJ again granted voluntary departure with an alternate order of removal. Petitioner again appealed the IJ's decision to the Board, but did not allege that the IJ had made errors of law or fact on remand. The Board summarily dismissed petitioner's second appeal, declined to reinstate voluntary departure, and ordered petitioner removed. Petitioner then filed a timely petition for review of that decision.

Applying *Rizo v. Lynch*, 810 F.3d 688 (9th Cir. 2016), the panel held that the Board's decision remanding for further proceedings as to voluntary departure did not affect the finality of an otherwise-

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** This summary constitutes no part of the opinion of the court. It has been prepared by court staff for the convenience of the reader.

final order of removal, and the IJ's decision as to the merits of petitioner's claims for relief became unreviewable upon expiration of the 30 day period to petition for review to this court. Because petitioner did not file a petition for review within that 30 day window, the panel held that it lacked jurisdiction over the petition.

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OPINION

PER CURIAM:

We must decide whether we have jurisdiction over a petition for review of a Board of Immigration Appeals decision remanding to the Immigration Judge solely for voluntary departure proceedings.

I

On May 5, 2009, an Immigration Judge (IJ) denied Indian citizen Surinder Singh's applications

for asylum, withholding of removal, and protection under the Convention Against Torture (CAT). The IJ granted Singh voluntary departure with an alternate order of removal to India. Singh appealed the IJ's decision to the Board of Immigration Appeals (BIA). On June 22, 2011, the BIA affirmed the denial of asylum, withholding of removal, and CAT relief, but remanded the case to the IJ "to provide all advisals required upon granting voluntary departure."[1] Singh did not file a petition to this court for review of the BIA order within 30 days of the June 2011 decision.

On remand, the IJ gave Singh the required advisals and again granted voluntary departure with an alternate order of removal to India. Singh again appealed the IJ's decision to the BIA; he did not allege that the IJ had made errors of law or fact on remand. On November 29, 2012, the BIA summarily dismissed Singh's second appeal, declined to reinstate voluntary departure, and ordered Singh removed to India pursuant to the IJ's alternate order. On December 20, 2012, Singh timely filed this petition for review.

II

Our jurisdiction to review a deportation decision is limited to a "final order of removal." 8 U.S.C. §§ 1252(a)(1), (b)(9); *Viloria v. Lynch*, 808 F.3d

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[1] An IJ who grants voluntary departure is required to advise an alien that he must, within 30 days of filing an appeal with the BIA, submit sufficient proof that he has posted a voluntary departure bond with the Department of Homeland Security. *See* 8 C.F.R. § 1240.26(c)(3), (3)(ii).

764, 767 (9th Cir. 2015); *Alcala v. Holder*, 563 F.3d 1009, 1016 (9th Cir. 2009). A petition for review "must be filed not later than 30 days after the date of the final order of removal." 8 U.S.C. § 1252(b)(1); *Stone v. I.N.S.*, 514 U.S. 386, 405 (1995). This deadline is "mandatory and jurisdictional." *Magtanong v. Gonzales*, 494 F.3d 1190, 1191 (9th Cir. 2007) (per curiam). "A mandatory and jurisdictional rule cannot be forfeited or waived, and courts lack the authority to create equitable exceptions to such a rule." *Id.* (citation omitted).

A

The text of the Immigration and Nationality Act (INA) "does not explicitly define the term 'final order of removal.'" *Shaboyan v. Holder*, 652 F.3d 988, 990 (9th Cir. 2011) (per curiam). However, INA § 101(a)(47), 8 U.S.C. § 1101(a)(47), "does define the term 'order of deportation' and establishes when such an order becomes final." *Shaboyan*, 652 F.3d at 990; *see* Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA), Pub. L. No. 104-132, § 440, 110 Stat. 1214.[2]

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[2] We have explained that, in this context, "the terms 'deportable' and 'deportation' can be used interchangeably with the terms 'removable' and 'removal,' respectively." *Lolong v. Gonzales*, 484 F.3d 1173, 1177 n.2 (9th Cir. 2007) (en banc); *see* Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (IIRIRA), Pub. L. No. 104-208, § 309(d)(2), 110 Stat. 3009 ("[A]ny reference in law to an order of removal shall be deemed to include a reference to an order of exclusion and deportation or an order of deportation.")

The INA defines the term "order of deportation" as "the order of the [IJ[3]] …concluding that the alien is deportable or ordering deportation." 8 U.S.C. § 1101(a)(47)(A).

> 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.

Id. § 1101(a)(47)(B). The statute does not define "affirming such order."

When the BIA affirms in full the IJ's order of removal, that decision obviously constitutes "a determination by the [BIA] affirming such order," and is thus a final order of removal. *See Abdisalan v. Holder*, 774 F.3d 517, 521 (9th Cir. 2014) (en banc). However, when the BIA does not affirm in full, but rather affirms in part and remands, finality is less clear. In such a case, is the BIA "affirming" the IJ's

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[3] The statute uses the term "special inquiry officer." 8 U.S.C. § 1101(a)(47)(A). Regulations "in effect at the time Congress passed 8 U.S.C. § 1101(a)(47) defined 'immigration judge' to mean a 'special inquiry officer and may be used interchangeably with the term special inquiry officer wherever it appears in this chapter.'" *Molina-Camacho v. Ashcroft*, 393 F.3d 937, 940 (9th Cir. 2004) (citing 8 C.F.R. § 1.1(*l*) (1996)), *overruled on other grounds by Lolong*, 484 F.3d 1175.

order of removal? The statutory text does not provide a clear answer.

B

This question is not one of first impression for our court. Under *Pinto v. Holder*, "the BIA's decision denying asylum, withholding of removal, and CAT protection but remanding to the IJ for voluntary departure proceedings is a final order of removal … and, effectively, the only order that we can review." 648 F.3d 976, 980 (9th Cir. 2011).[4] Because the BIA's

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[4] After *Pinto* was decided, an en banc panel of our court issued *Abdisalan*. *Abdisalan* concluded that, "[w]hen the BIA remands to the IJ for any reason, no final order of removal exists until all administrative proceedings have concluded." 774 F.3d at 526. However, we explicitly declined to address remands for voluntary departure and did not overrule *Pinto*. *See id.* at 526 n.8 ("Under the facts of this case, we need not revisit our rule that the BIA's decision is a final order of removal when it remands for consideration of voluntary departure but denies all other forms of relief.").

Recognizing that *Abdisalan's* broadly stated conclusion created some tension with *Pinto*, we ordered supplemental briefing on whether *Pinto* should be overruled in light of the reasoning and holding of *Abdisalan*. While that briefing was pending, another three-judge panel decided *Rizo v. Lynch*, 810 F.3d 688 (9th Cir. 2016). *Rizo* concluded that "*Pinto* remains the law of the Circuit." *Id*. at 691. Consequently, the *Rizo* panel determined that a "BIA remand for further proceedings as to voluntary departure does not affect the finality of an otherwise-final order of removal." *Id*. at 692. We directed the parties to address *Rizo* in their supplemental briefs. Both the government and Singh argued that *Rizo* was wrongly decided. A judge requested a vote on whether to rehear *Rizo* en banc, but a majority of nonrecused active judges did not vote in favor of

June 2011 decision remanding solely for voluntary departure proceedings is a "final order of removal," the IJ's order became unreviewable on July 23, 2011 upon expiration of the 30 day period to petition for review to this court. In light of *Pinto* and consistent with the Sixth and Tenth Circuits, we must conclude that we lack jurisdiction over Singh's current petition. *See Hih v. Lynch*, 812 F.3d 551, 554 (6th Cir. 2016); *Batubara v. Holder*, 733 F.3d 1040, 1042-43 (10th Cir. 2013).

Under the circumstances, Singh remains subject to immediate removal to India.

DISMISSED.

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rehearing en banc. *Rizo* and *Pinto* thus remain law of the circuit, and our three-judge panel is bound to apply them faithfully.

APPENDIX B

U.S. DEPARTMENT OF JUSTICE Executive Office for Immigration Review	Decision of the Board of Immigration Appeals
Falls Church, Virginia 22041	
File: A079-579-046 – Seattle, WA	Date: NOV 29 2012

In re: SURINDER SINGH

IN REMOVAL PROCEEDINGS

APPEAL

ON BEHALF OF RESPONDENT: Bart Klein, Esquire

APPLICATION: Voluntary departure

This case was last before us on June 22, 2011, when we dismissed the respondent's appeal regarding the denial of asylum, withholding of removal, and protection under the Convention Against Torture. We remanded the case solely for the Immigration Judge to provide the voluntary departure advisals, which the Immigration Judge did in a decision dated July 11, 2011. The respondent now appeals that July 11, 2011, decision. The Department of Homeland

Security did not respond to the appeal. The appeal will be summarily dismissed.

The respondent's appeal notes that the Board previously decided the issues in its decision dated June 22, 2011, and declares that he is preserving appeal for the United States Court of Appeals for the Ninth Circuit. He does not identify specific errors of law or fact in the Immigration Judge's decision. *See* 8 C.F.R. § 1003.3(b). The respondent's statement on appeal does not meaningfully challenge the Immigration Judge's decision and as a result, requires that this Board speculate regarding the respondent's reasons for believing that the Immigration Judge made a factual or legal error in his case. Accordingly, the respondent's appeal is summarily dismissed under 8 C.F.R. § 1003.1(d)(2)(i)(A). *See Matter of Lodge*, 19 I&N Dec. 500 (BIA 1987); *Matter of Valencia*, 19 I&N Dec. 354 (BIA 1986); *Matter of Holguin*, 13 I&N Dec. 423 (BIA 1969); *see also Rojas-Garcia v. Ashcroft*, 339 F.3d 814, 820-21 (9th Cir. 2003) (approving summary dismissal where this Board was "left to reconstruct the IJ proceedings, infer factual error without knowledge of what precise error is complained of, and build the legal analysis from only general statements of legal conclusion").

The Immigration Judge granted the respondent a 60-day voluntary departure period, conditioned upon the posting of $3,500.00 bond. Effective January 20, 2009, pursuant to 8 C.F.R. §1240.26(c)(3)(ii), an alien granted voluntary departure shall, within 30 days of filing an appeal with the Board, submit sufficient proof that the

required voluntary departure bond was posted with the Department of Homeland Security, and if the alien does not provide timely proof to the Board, the Board will not reinstate the period of voluntary departure in its final order. The record confirms that the Immigration Judge provided the respondent with the required regulatory advisals. *See Matter of Gamero*, 25 I&N Dec. 164 (BIA 2010). However, the record before the Board does not indicate that the respondent submitted timely proof of having paid the voluntary departure bond.[1] Therefore, the voluntary departure period will not be reinstated, and the respondent will be removed from the United States to India, pursuant to the Immigration Judge's alternate order.

Accordingly, the following order will be entered.

ORDER: The appeal is summarily dismissed.

/s/
FOR THE BOARD

[1] The respondent filed the Notice of Appeal on August 5, 2011. The 30-day period in which to file the proof of bond payment ended on Tuesday, September 6, 2011. The record indicates that the respondent mailed the proof of bond payment on September 8, 2011, which was received on September 12, 2011. It is therefore untimely. Under the regulations, this untimely filing prevents reinstatement of the voluntary departure period. *See* 8 C.F.R. § 1240.26(c)(3)(ii).

APPENDIX C

UNITED STATES DEPARTMENT OF JUSTICE
EXECUTIVE OFFICE FOR IMMIGRATION REVIEW
IMMIGRATION COURT
SEATTLE, WASHINGTON

In the matter of: Date July 11, 2011

Surinder Singh File Number A 79 579 046

Respondent IN REMOVAL PROCEEDINGS

Judge Kenneth Josephson

CHARGE: Overstay

APPLICATION: Asylum

ON BEHALF OF RESPONDENT ON BEHALF OF DHS

ORDER OF THE IMMIGRATION JUDGE

On May 5, 2009, I entered a written decision denying asylum and related relief. I provided voluntary departure. On June 22, 2011, the Board remanded on the basis that I had not provided the specific voluntary departure advisals. The Board's decision notes that the appeal was "dismissed" with regard to the substantive relief which had been requested. This was done after full consideration of the merits and must be viewed as the law of the case.

While the case was on appeal, there was no suggestion of any further evidence to be considered or any request for some other form of relief. Per the Board's order, respondent is again given voluntary departure, this time to Sept. 9, 2011, again upon posting of a $3,500 voluntary departure bond, with again an alternate order of removal to India. The attached voluntary departure advisals are incorporated herein by reference as is the previous written decision. I take note that no one has seen fit to enter a new entry of appearance on behalf of this respondent, so the clerk is asked to send a courtesy copy of this order to attorney Klein who last represented him.

/s/
Kenneth Josephson
Immigration Judge

NOTICE TO RESPONDENTS
GRANTED VOLUNTARY DEPARTURE

You have been granted the privilege of voluntarily departing from the United States of America. The Court advises you that, if you fail to voluntarily depart the United States within the time period specified, a removal order will automatically be entered against you. Pursuant to section 240B(d) of the Immigration and Nationality Act, you will also be subject to the following penalties:

1. You will be subject to a civil penalty of not less than $1,000 and not more than $5,000; and
2. You will be ineligible, for a period of 10 years, to receive cancellation of removal, adjustment of status, registry, voluntary departure, or a change of nonimmigrant status.

The Court further advises you that:

[ ] **You have been granted pre-conclusion voluntary departure.**

I. If you file a motion to reopen or reconsider during the voluntary departure period, the grant of voluntary departure will be terminated automatically, the alternate order of removal will take effect immediately, and the penalties for failure to depart voluntarily under section 240B(d) of the

Act will not apply. 8 C.F.R. § 1240.26(b)(3)(iii).

2. There is a civil monetary penalty if you fail to depart within the voluntary departure period. In accordance with the regulation, the Court has set the presumptive amount of $3,000 (or ____ instead of the presumptive amount). 8 C.F.R. § 1240.26(j).

[X] **You have been granted post-conclusion voluntary departure.**

1. If the Court set any additional conditions, you were advised of them, and were given an opportunity to accept or decline them. As you have accepted them, you must comply with the additional conditions. 8 C.F.R. § 1240.26(c)(3).

2. The Court set a specific bond amount. You were advised of the bond amount, and were given an opportunity to accept or decline it. As you have accepted it, you have a duty to post that bond with the Department of Homeland Security, Immigration and Customs Enforcement, Field Office Director within 5 business days of the Court's order granting voluntary departure. 8 C.F.R. § 1240.26(c)(3)(i).

3. If you have reserved your right to appeal, then you have the absolute right to appeal the decision. If you do appeal, you must provide to the Board of Immigration Appeals, within 30 days of filing an appeal, sufficient proof of having posted the voluntary departure bond. The Board will not reinstate the voluntary departure period in its final order if you do not submit timely proof to the Board that the voluntary departure bond has been posted. 8 C.F.R. § 1240.26(c)(3)(ii).

4. If you do not appeal and instead file a motion to reopen or reconsider during the voluntary departure period, the period allowed for voluntary departure will not be stayed, tolled, or extended, the grant of voluntary departure will be terminated automatically, the alternate order of removal will take effect immediately, and the penalties for failure to depart voluntarily under section 240B(d) of the Act will not apply. 8 C.F.R. §§ 1240.26(c)(3)(iii),(c),(1).

5. There is a civil monetary penalty if you fail to depart within the voluntary departure period. In accordance with the regulation, the Court has set the presumptive amount of $3,000 (or _____ instead of the presumptive amount). 8 C.F.R. § 1240.26(j).

APPENDIX D

U.S. DEPARTMENT OF JUSTICE
Executive Office for Immigration Review

Falls Church, Virginia 22041

Decision of the Board of Immigration Appeals

File: A079-579-046 – Seattle, WA

Date: JUN 22 2011

In re: SURINDER SINGH

IN REMOVAL PROCEEDINGS

APPEAL

ON BEHALF OF RESPONDENT: Bart Klein, Esquire

ON BEHALF OF DHS: Jonathan M. Love
Assistant Chief Counsel

CHARGE:

Notice: Sec. 237(a)(1)(B), I&N Act [8.U.S.C. § 1227(a)(1)(B)] – In United States in violation of law

APPLICATION: Asylum; withholding of removal; Convention Against Torture

The respondent, a native and citizen of India, appeals the Immigration Judge's May 5, 2009, written decision denying his applications for asylum and

withholding of removal under sections 208 and 241(b)(3) of the Immigration and Nationality Act, 8 U.S.C. §§ 1158 and 1231(b)(3), and for protection under the Convention Against Torture, 8 C.F.R. §§ 1208.16-.18 (2009). The appeal will be dismissed.

Despite the respondent's contentions on appeal, we find the Immigration Judge's decision denying his applications for relief under the Act based upon his adverse credibility determination to be amply supported by the record, and affirm for the reasons stated therein (I.J. at 5-12). *See* C.F.R. § 1003.1(d) (clearly erroneous standard). Initially, we note that the respondent's application is not subject to the provisions of the REAL ID Act by virtue of its filing date. *See Matter of S-B-*, 24 I&N Dec. 42 (BIA 2006). Further, the Immigration Judge's adverse credibility determination provides specific, cogent reasons that go to the heart of the respondent's claim for relief and protection. *Id. See Li v. Ashcroft*, 378 F.3d 959, 964 (9th Cir. 2004) (adverse credibility finding upheld "so long as one of the identified grounds is supported by substantial evidence and goes to the heart of [the petitioner's] claim of persecution.") (internal quotation and citation omitted); *see also de leon-Barrios v. INS*, 116 F.3d 391, 393-94 (9th Cir. 1997) (holding that the Board correctly determined that the Immigration Judge's adverse credibility finding was supported by discrepancies involving the heart of the applicant's claim).

In support of the adverse credibility determination, the Immigration Judge found

inconsistencies between the respondent's testimony and his asylum statement, internal testimonial inconsistencies, and, most significantly, inconsistencies between the respondent's testimony regarding the extent of his claimed physical injuries and the testimony of his medical expert and with the medical documentation submitted in support of his claim (I.J. at 5-8). For example, the respondent's statement indicates that after his second detention "my shoulders and right ankle were broken" (Declaration at 3). During cross-examination he further expanded on this statement, stating that his right ankle and left shoulder were broken. However, as noted by the Immigration Judge, the credibility of the respondent's claim that he suffered significant physical injuries is undercut by the fact the medical documentation and testimony of his expert either contradict, or do not substantiate the type of injuries claimed by the respondent (I.J. at 5-7; Exh. 2 at 27, 28, 83-92).

Further supporting the Immigration Judge's adverse credibility finding is a significant omission in the respondent's asylum statement regarding an event central to his claim (I.J. at 8-9). On cross-examination, for the first time, the respondent testified that inquiries continued to be made about him by the authorities, that his family "get harassed," and "then the village counsel goes and release them by paying money" (Tr. at 82). He further testified that his brother and father were arrested in 2004, and his children "stopped" (Tr. at 82-83). On appeal the respondent attempts to downplay the omission of this event from his written application and earlier testimony, stating that he was not present during this

incident, and that it was not his "dramatic event" (Respondent's Brief at 13). However, we find the respondent's explanation for the omission of these significant events affecting his immediate family inadequate given his testimony that the apparent reason his family was harassed was that the police continued to inquire about the respondent. *See Alvarez-Santos v. INS*, 332 F.3d 1245, 1254 (9th Cir. 2003). The respondent has offered no explanations on appeal that would persuade us the Immigration Judge's credibility finding was erroneous. Accordingly, the denial of asylum and withholding of removal under the Act is affirmed.

Further, because the central evidence of a threat to the respondent depended on his credibility, the adverse credibility determination in this case necessarily precludes success on his claim for Convention Against Torture relief, to the extent all claims were predicated on the same key facts. Separately, there is no evidence in the record that the respondent faces a clear probability of torture at the instigation of, or with the consent or acquiescence of, current government officials or persons acting in an official capacity. 8 C.F.R. § 1208.18(a)(7).

The Immigration Judge granted the respondent a 60-day voluntary departure period, conditioned upon the posting of a voluntary departure bond in the amount of $3,500 to the Department of Homeland Security within five business days from the date of the order (I.J. at 12). Effective January 20, 2009, pursuant to 8 C.F.R. § 1240.26(c)(3)(ii), an alien granted voluntary departure shall, within 30 days of filing an appeal with the Board, submit sufficient

proof that the required voluntary departure bond was posted with the Department of Homeland Security, and if the alien does not provide timely proof to the Board, the Board will not reinstate the period of voluntary departure in its final order.

The record does not reflect that the respondent submitted timely proof of having paid the voluntary departure bond. However, it does not appear from the record that the Immigration Judge advised the respondent of the obligation under 8 C.F.R. § 1240.26(c)(3)(ii) to submit sufficient proof of having posted the required voluntary departure bond within 30 days of filing a Notice of Appeal with the Board. Nor does it appear that the Immigration Judge advised the respondent that the regulations preclude the Board from reinstating voluntary departure when the respondent has not provided the required proof of posting. *See* 8 C.F.R. § 1240.26(c)(3); *Matter of Gamero*, 25 I&N Dec. 164 (BIA 2010). Accordingly, we will remand the record to the Immigration Judge to provide all advisals required upon granting voluntary departure, including, but not limited to, the obligation to timely post the specified bond with the Immigration and Customs Enforcement Field Office Director and the consequences of failing to timely submit sufficient proof of such posting to the Board if an appeal is filed.

The following orders will be entered.

ORDER: The appeal is dismissed.

FURTHER ORDER: The record is remanded for advisals related to the grant of voluntary departure.

/s/
FOR THE BOARD

APPENDIX E

UNITED STATES DEPARTMENT OF JUSTICE
EXECUTIVE OFFICE FOR IMMIGRATION REVIEW
IMMIGRATION COURT
SEATTLE, WASHINGTON

In the Matter of:	Date	May 5, 2009
Surinder SINGH	File Number	A79-579-046
Respondent	IN REMOVAL PROCEEDINGS	

Judge Kenneth Josephson

CHARGES: Remained for time longer than permitted

APPLICATIONS: I-589 Relief

ON BEHALF OF RESPONDENT	ON BEHALF OF DHS
Tom Youngjohn, Esq.	Jonathan Love, Esq.

ORDER OF THE IMMIGRATION JUDGE

I. Introduction and Procedural History

The respondent is a native and citizen of India. He entered the United States as a B-2 non-immigrant visitor on June 4, 2001 and timely filed an application for asylum on November 5, 2001. His application was

referred to this court on July 17, 2007. Respondent was placed in removal proceedings by the filing of his NTA on August 15, 2007. This is exhibit 1.

Respondent's referred asylum packet included a declaration by respondent, photocopies from his Indian passport, photocopies of birth certificates with translations for Respondent and various family members, copies of photographs, four affidavits from family and friends in India, a marriage certificate, and a copy of a medical report from the Muhajan Nursing Home in India. On January 6, 2009, I received Respondent's Pre-Hearing Statement with supporting documents, including an expert statement, copies of Respondent's Indian drivers licenses, letters from his U.S. doctor Dr. Joel Flipe, M.D., identity documents, a copy of the referral notice, and additional copies of the letter, affidavits, and certificates contained in his original asylum packet. I received a supplemental Pre-Hearing Statement on March 24, 2009, which contained copies of FOIA-obtained documents issued by USCIS relating to Respondent's asylum application. After the close of proceedings, Respondent filed a motion to supplement the record with a statement made by Dr. Joel Felipe intended to augment the testimony that Dr. Felipe provided at Respondent's merits hearing on April 22, 2009. All of respondent's submissions have designated as composite exhibit 2.

Department of State information about India is exhibit 3.

I received a Pre-Hearing Statement from the Government on January 9, 2009, with supporting documents including country conditions information, asylum interview notes, and conviction records. The DHS submission is composite exhibit 4.

The Government filed a brief regarding credibility on April 21, 2009 and voiced its written opposition to Respondent's motion to supplement the record on April 27, 2009.

It was agreed that if the asylum officer would be called to testify in this case that the officer would state that the notes of record were taken in good faith but in no way form a verbatim or actual record of question and answer. *See Singh v. Gonzales*, 403 F.3d 1081 (9th Cir. 2005) (The asylum adjudicator's assessment to refer and/or the notes cannot be deemed a "reliable" basis to ground an adverse credibility determination.)

This case has involved three merits hearings in which the Respondent, his expert Professor Paul R. Brass, and Dr. Joel Felipe testified in support of Respondent's application. Respondent provided direct testimony on January 20, 2009. The hearing was continued and Respondent was cross-examined by the Government on February 23, 2009. At this same hearing, testimony was taken from the respondent's expert witness on conditions in India, Paul R. Brass. The hearing was again continued until April 22, 2009, at which time Dr. Joel Felipe testified on his examinations of the respondent which was offered with regard to the respondent being, in fact,

significantly injured as the result of claimed violence at the hands of the Indian police.

Following the February 25 hearing, I issued a minute order explicitly notifying the parties of my belief that this case turns on the issue of credibility as a result of inconsistencies between Respondent's testimony and the medical reports regarding the extent of his injuries. On March 25, 2009, I issued a second minute order asking for Mr. Youngjohn's cooperation in securing Dr. Felipe for testimony so that he may help explain these inconsistencies. I also stated my impression that the evidence in this case does not support finding that Respondent poses a national security risk. Pursuant to these minute orders, the parties were placed on notice of what I feel constitute the central issues in this case.

II. National Security Bar

DHS has argued that Respondent is ineligible for asylum under the terrorist or national security bar of INA § 208(b)(2)(A)(iv) & (v). In its pre-hearing statement, the Government asserts that (1) Respondent "acknowledges transporting members and arms, albeit under alleged duress," for Lashkar-e Toiba ("LT"), which was designated a foreign terrorist organization on December 5, 2001 and which had committed acts of terrorism prior to that date, and that (2) Respondent "claims his trucks were used to transport local leaders of Akali Dal Mann for 'demonstrations' [but] this is questionable in light of the fact that the respondent told the asylum officer he was not even a member of such group, but rather just

a supporter." I find no merit to the Government's suggestion on either basis.

First, to the contrary of the Government's contention, nowhere in the record does Respondent acknowledge transporting members and arms of LT. Rather, Respondent asserts that he was kidnaped by members of this group and that he was blindfolded while the members commandeered his truck. There is no objective indication of the purpose for which they used his truck. Respondent certainly cannot be held to have provided material support to a terrorist organization or to pose a threat to national security in circumstances where the members of a terrorist organization blindfolded him and took his truck for unknown reasons. The evidence simply does not meet the standards articulated by the Ninth Circuit or Board. *Malkandi v. Mukasey*, 544 F.3d 1029, 1037 (9th Cir. 2008) ("the alien must actually 'pose a serious danger' to U.S. security"); let alone the much lower standard set forth by the Attorney General in *Matter of A-H-*, 23 I&N Dec. 774 (AG 2005).

Second, the Respondent told the asylum officer that he belonged to the political organization Akali Dal Mann. He stated that he was a supporter, that he gave them money, transported people and party workers, and that he voted in support thereof. The Government does not assert that Akali Dal Mann is a terrorist organization, but rather simply states that Respondent's claim of transporting members of Akali Dal Mann is "questionable." Unlike the Government, I do not find Respondent's claim of transporting party members "questionable" merely because he states

that he is a supporter, rather than member. More to the point, I do not see how this suggestion by the Government relates to the terrorist or national security bars to asylum. The Government seems to argue that Respondent *did not* transport party members, which would in effect nullify any contention of material support. I simply do not find that the Government's dubiousness of Respondent's activity as a transporter for Akali Dal Mann relates to the terrorism or national security bars to asylum, but because the Government has placed this argument in the "Material Support Bar" section of its brief, I address it here. In sum, the record simply does not suffice to establish that the Respondent is barred from seeking asylum under the terrorist and national security bar.

The Respondent applied for asylum on November 5, 2001. His interview was conducted on November 29, 2001. On December 22, 2002, an asylum officer signed a Quality Assurance Referral Sheet indicating that the case may raise issues regarding national security and terrorism and hence, in fact, should not be granted. Yet this case was not referred to the Immigration Court until July 17, 2007 and removal proceedings were not initiated until August 15, 2007. Respondent submitted evidence, obtained through the FOIA, that the then INS was prepared to grant him asylum in 2001 or 2002, but for its concern that respondent might have been involved with terrorists-the LT. I consider it a dereliction of duty for an executive agency component of this government such a short time after the terrorist attacks of Sept. 11, 2001, to have taken such a

lethargic approach to the case of an individual that it supposedly believed posed a national security threat to this country. Notwithstanding my displeasure at how INS/DHS has handled this case before it was referred to the Immigration court, I now adjudicate this case under de novo review. *Kaur v. INS*, 237 F.3d 1098 (9th Cir. 2001) *See also*, *Martinez v. Holder*, 557 F.3d 1059 (9th Cir. 2009) (upholding a denial of asylum on credibility grounds, notwithstanding an asylum adjudicator's willingness to accept the story and initially grant the case.)

II. Credibility and Merits

This is a pre-REAL ID Act case and therefore the pre-REAL ID Act standards apply to my determination of Respondent's credibility. Before proceeding to my discussion of credibility, I must begin with the matter of Respondent's post-hearings motion to supplement the record. Despite my extreme displeasure with the filing of this motion after the record had been closed, and my strong exception to the threatening undertone of the motion, I will grant the motion and accept Dr. Felipe's statement into the record. I do so because his statement does not change my analysis or ultimate conclusion in this case. After all, this case had been reset four times by explicit agreement of counsel to take testimony. There were other pre-hearing conferences, indeed there had been a further setting of April 1 which had also been continued, and at the last hearing of April 22, I repeatedly inquired if either side had anything further that they wished to present and I was told that there was no such further evidence. *Matter of*

Compean, 24 I&N Dec. 710, 729 (AG 2009) ("it is important to recognize that there is a strong public interest in the expeditiousness and finality of removal proceedings …".)

I find that the April 24 "motion to supplement record" to apparently pursue still further evidentiary hearings threatens to further delay these already-protracted proceedings when such is "based upon [counsel's] own ineffective assistance" in choosing to waive questioning of Dr. Felipe in order to "stupidly try [] to curry the favor of the Immigration Judge by keeping the time to a minimum." *See* Motion to Supplement Record at 1, 2. Mr. Youngjohn waived his examination of Dr. Felipe on his own accord, and this was after three full evidentiary hearings when I had been told at master calendar of Dec. 2, 2008, that all that would be needed was the evidentiary hearing as scheduled for Jan. 20, 2009. At the close of cross-examination, I asked Mr. Youngjohn twice whether he had any questions for Dr. Felipe. I gave Mr. Youngjohn several minutes in which to decide, and Mr. Youngjohn chose simply to "thank the doctor for his time." The Supreme Court has recognized the difference between a "deliberate tactical decision," which does not support a motion to reopen, and ineffective assistance of counsel. *U.S v. Doherty*, 502 U.S. 314, 323 (1992). In *Doherty*, the Court found that a "deliberate tactical decision" to withdraw the respondent's application for asylum, even if such decision prejudiced the respondent, did not constitute ineffective assistance of counsel. Here, Mr. Youngjohn made the "deliberate tactical decision" to waive direct and re-direct. His purported reason—an attempt to

curry my favor by keeping the time to a minimum—is unfounded and shows extremely poor judgment, but it still evidences a strategic decision that would not support a motion to reopen. Moreover, Dr. Felipe's supplemental statement attached to the motion is neither new nor undiscoverable evidence, and indeed Mr. Youngjohn had been on notice for at least two months that Dr. Felipe's testimony was necessary to assist in my credibility determination. To say the least, if lawyer Youngjohn is indeed pursuing an ineffective assistance of counsel claim against himself he has certainly not complied with the *Compean* requirements. I further point out that I accepted any and all documents as offered by lawyer Youngjohn including the medical report from Dr. Felipe as filed on April 21 - the day before hearing when counsel had agreed at the close of the hearing of Feb. 23 that it would be filed one week before the next hearing. Nevertheless, I accept the supplemental evidence into the record because, as I previously mentioned, such evidence does not change my ultimate conclusion in this case.

Having dispensed with the preliminary matter of Respondent's motion, I now turn to the issue of Respondent's credibility. Respondent claims asylum based on two alleged incidents of persecution committed by the Indian Police. The first incident, which occurred in 1999, transpired when Respondent was using his truck to drive supporters of the political party Akali Dal Mann to a rally in remembrance of the destruction of the Golden Temple. Respondent asserts that the police stopped his truck, escorted him and his passengers to the Jalandhar police station,

and proceeded to hang Respondent by his feet from the ceiling and beat him to unconsciousness. The second incident, which occurred in 2000, arose after Respondent was kidnaped by members of Lashkar-e Toiba while transporting goods between Kashmir and Punjab. Respondent asserts that he was found blindfolded in his truck by Indian security forces following a roadside skirmish with the LT kidnapers and that he was taken to the nearest police station. There, the police learned from the Jalandhar police of Respondent's previous arrest and Respondent was again tied by his feet to the ceiling and severely beaten, this time for suspicion of assisting Akali Dal Mann and the LT in opposition to the Indian government.

During the proceedings, it became apparent that Respondent's testimony regarding the extent of his injuries was inconsistent with the medical reports, and indeed the testimony, from Dr. Felipe, as well as with other evidence of record. As a result, I became concerned with the veracity of Respondent's testimony, and consequently with his claim of persecution. This specter of doubt regarding Respondent's credibility has been exacerbated by two additional problems: Respondent's sudden and uncorroborated assertion that his brother and father were arrested in 2004 as a result of Respondent's situation in India, and the highly suspicious similarities in the nearly identical affidavits purportedly written by Respondent's family and friends in support of his claim. Because I cannot reconcile these matters under Ninth Circuit law, I conclude that Respondent cannot be deemed a

credible witness for himself. As previously noted in my minute order, I am keenly aware of the Ninth Circuit credibility standards in pre-REAL ID Act cases such as this one. In an effort to provide "specific, cogent reasons that bear a legitimate nexus to the [credibility] finding," I will attempt to explain in some detail below the basis for my adverse credibility determination. *Aguilera-Cota v. INS*, 914 F.2d 1375 (9th Cir. 1990).

First, the inconsistencies regarding the extent of Respondent's injuries are extremely problematic. In his declaration, Respondent stated that after the first alleged incident, "my body was swollen and my face was bleeding." *See* Declaration at 2. He further declared simply that "after my release, I took medical treatment." *Id.* During direct examination, Respondent repeated that after the first incident, his whole body was in bruises but added that he had "some stitches on his face." Regarding the second incident, Respondent stated in his declaration that "during this beating my shoulders and right ankle were broken." *See* Declaration at 3. During direct examination, Respondent stated that he couldn't walk because of the torture, that his right foot and left shoulder were swollen, and that his whole body was bruised. In cross-examination, Respondent testified consistently that his right ankle and left shoulder were swollen, but added that the doctor had treated his arm with plaster—presumably some sort of cast. He further expanded that his foot and shoulder were "broken" rather than merely swollen. The asylum interview notes submitted to the record discuss only the second incident, where Respondent stated that

the police broke his right ankle and left shoulder and that the doctor "tied" his shoulder. *See* Government Pre-Hearing Statement at 7.

While there are certainly some minor discrepancies, or more accurately omissions, in Respondent's description of his injuries between his declaration, the two sets of testimony, and the asylum interview notes, what I find most significant is the fact that Respondent apparently complained of varying types of injuries in his visits with Dr. Felipe—with several of these visits occurring during the pendency of his hearing—and that the tests performed by Dr. Felipe do not demonstrate the injuries complained of by Respondent. For example, Dr. Felipe's report dated April 8, 2008 states that the Respondent "reports chronic pain to his left shoulder, cheeks, and lower extremities on a daily basis." While Dr. Felipe found some tenderness on various parts of Respondent's body, as well as a "prominent transverse scar noted over the forehead," he found that there is "no clavicle deformity," that the "range of motion is full," and that the "ankle has full range of motion with minimal tenderness …and no laxity to the ankle joint." *See* Respondent's Pre-Hearing Statement at 89. He concluded that he could "not note any visible deformities consistent with a poorly healed fracture. If there were any fractures, they appeared to have healed well." *Id.* at 90. In a letter dated April 18, 2008 Dr. Felipe wrote that Respondent reported fractures of the left shoulder, clavicle, AC joint, and cheeks. *Id.* at 28. Dr. Felipe again noted that "there is no obvious deformity" to these areas, but indicated that "an Xray would help

objectify the extent" of the injury. *Id.* On February 21, 2009—after Respondent had completed direct testimony but before cross-examination—Dr. Felipe reported that Respondent noted injuries to the back, sides and top of his skull and check, that he "may have possibly sustained an untreated fracture to the left collar bone and shoulder" and that he "reports pain to his lower back where he was bludgeoned in both instances." *See* Respondent's unmarked submission. Dr. Felipe concluded that "there must have been sustained fractures which probably healed improperly." *Id.* At the referral of Dr. Felipe, Respondent underwent X-rays of his shoulder, ankle, and skull on March 3, 2009. The report found no evidence of shoulder, ankle or skull fracture. *See* Respondent's Pre-Hearing Statement at 92, 85, 86. On April 13, 2009, Dr. Felipe confirmed in writing that the X-rays indicated no evidence of fractures but stated that these results did not rule out the possibility that Respondent may have sustained other significant injuries that did not medically translate to "fractures." *Id.* at 83. On cross-examination, Dr. Felipe admitted that there are serious inconsistencies regarding Respondent's medical information.

Despite Dr. Felipe's concern in the post-hearing submission that he was unable to fully articulate his findings regarding Respondent's injuries, I find that much of the information contained in this supplemental statement simply reiterates what he already reported in his April 16, 2009 letter. Furthermore, the statement does not definitively clarify the issue of Respondent's injuries, considering his use of phrases like "it would be incorrect to say"

and "it is unclear." *See* Respondent's Pre-Hearing Statement at 97, 98. I also find more confusion in the fact that Dr. Felipe notes that "the history of wearing a cast coincides with the patient's ankle x-ray," but the only other reference to a cast in the record appears to be in relation to Respondent's *shoulder* injury. Accordingly, I find the record in regard to Respondent's purported injuries to be muddled at best. The most direct and contemporaneous report of Respondent's injuries, the letter from his doctor in India, is extremely non-specific and notes only that Respondent suffered "multiple injuries and bruises all over the body" and a "contusion over the brow" from the first incident and that he suffered "swollen" body parts, had "marks all over his body" and was "unable to walk" after the second incident. *See* Respondent's Pre-Hearing Statement at 27. While the doctor notes that Respondent was "given treatment" and received "proper medical aid," he does not mention the application of a cast. Nor is there any indication in the record that Respondent returned to this or any doctor for removal of a cast.

The Ninth Circuit has held inconsistencies between testimonial and documentary evidence to be a proper basis for an adverse credibility finding." *Goel v. Gonzales*, 490 F.3d 735, 739 (9th Cir. 2007) (upholding adverse credibility finding where petitioner's testimony "was at odds with his own documentary evidence as to the nature of the persecution"). To support an adverse credibility determination, "discrepancies must go to the heart of the asylum claim." *Malhi v. INS*, 336 F.3d 989, 992-93 (9th Cir. 2003) (upholding adverse credibility

determination in case regarding Sikh persecution claim). Inconsistencies regarding the extent of an applicant's injuries purportedly suffered during acts of persecution go to the heart of the claim and may be a proper basis for finding adverse credibility. *Desta v. Ashcroft*, 365 F.3d 741, 745 (9th Cir. 2004) (upholding adverse credibility determination based on material inconsistencies relating to physical injury); *Singh-Kaur v. INS*, 183 F.3d 1147, 1152 (9th Cir. 1999) (an inconsistency regarding physical injury was upheld where the petitioner emphasized a physical injury to his hand that was inconsistent with the Immigration Judge's observation of the injury). Pursuant to such law, I find that the lack of clarity regarding Respondent's purported injuries raises grave concerns regarding Respondent's credibility.

Respondent attempted to explain the inconsistencies on the basis of memory loss. However, on the documents in the record and the testimony presented, I cannot find objective evidence of any such memory loss sufficient to explain or excuse the lack of clarity regarding Respondent's injuries. The first mention of memory loss arose during re-direct of Respondent at the February 23 hearing, when Mr. Youngjohn, in a likely effort to rehabilitate his client after the Government's attack on the Respondent's credibility regarding his injuries, asked Respondent about his "memory problems," to which Respondent answered that he sometimes forgets what he writes or says within hours. Although the medical reports from Dr. Felipe mention a possible diagnosis of post traumatic stress disorder ("PTSD") dating as early as April 8, 2008, there is no mention of "memory loss"

until the report dated March 7, 2009—two weeks after Respondent's re-direct. This report states that Respondent's translator "reports that the family had begun to notice a waxing and waning memory. The patient had become extremely forgetful following his injuries." *See* Respondent Pre-Hearing Statement at 87. However, the Government questioned Dr. Felipe extensively about Respondent's claimed memory loss, and Dr. Felipe confirmed that there is no objective evidence of memory loss other than what Respondent's unidentified translator mentioned in that visit. Dr. Felipe noted, both in his March 7 report and in testimony, that his preliminary neurological exam was "unremarkable" and revealed normal results. Moreover, the additional neurological testing ordered by Dr. Felipe and conducted by Dr. Trivendi revealed that Respondent's "memory loss is mild and is not severely affecting his ability to work and perform his daily activities." *Id.* at 83. Dr. Trivelvi "did not find any gross neurologic findings on physical exam that would raise concerns of severe brain injury." *Id.* Dr. Triveldi believed that the headaches complained of by Respondent "were tension type headaches." *Id.*

In addition, with regard to Respondent's possible post traumatic stress disorder, no such diagnosis was ever definitively made. In his February 21, 2009 report—the most recent report mentioning post traumatic stress disorder—Dr. Felipe notes that Respondent has "possible posttraumatic stress disorder" but notes that he was "not able to send him to a psychiatrist to have further testing done." *Id.* at 88. He explained that "to establish a definitive

diagnosis of Post Traumatic Stress Disorder would require a psychological evaluation detailing extensive interviewing and written tests." *Id.* at unidentified page (Dr. Felipe letter dated February 21, 2009). Dr. Felipe confirmed in testimony that Respondent did not consult with a psychiatrist or other specialist who could accurately diagnose post traumatic stress disorder. I do note that Dr. Felipe appeared to do an "about-face" under extensive questioning by the Government by suddenly stating that he "will go on the record and say that Respondent has post traumatic stress disorder." However, I give such testimony very little weight given his previous testimony that a PTSD diagnosis requires specialized testing, for which Dr. Felipe is not qualified, and given his written record that Respondent would need to see a specialist in order to establish post traumatic stress disorder. Therefore, I cannot find that any of Respondent's claims that he suffers from memory loss or post traumatic stress disorder are sufficiently supported by the record to explain the inconsistencies regarding the extent of his injuries.

I also note that the testimony of Respondent's expert, Professor Brass, is of limited use in clarifying these or any other inconsistencies. Professor Brass confirmed during his testimony that the basis of his opinion rested solely in his reading of the documents provided by the Respondent: Respondent's declaration, the medical records from Dr. Felipe, the affidavits from family and friends, and the packet of information contained with the asylum application. Professor Brass neither met Respondent nor even spoke to him on the phone. I must say that from his

testimony, Professor Brass appeared to be barely familiar with the case. At first he thought it was the case of another person, also an Indian Sikh, on whose case he had previously worked. When asked which documents he had based his opinions on, Professor Brass could not remember but rather had to look for the documents on his computer—a search which took so long that I had to temporarily adjourn the taking of his testimony to afford him sufficient time. More than an hour later, his testimony was resumed. Then when asked various questions by the Government regarding Respondent's injuries, Professor Brass could not answer any questions without first reading through the written documents. Indeed, he answered many of the Government's questions regarding Respondent's injuries by simply reading verbatim from the reports. He routinely confused the Indian doctor's report with the reports from Dr. Felipe. As a result, Professor Brass's contribution to this case is of little value to my determination of Respondent's claim.

However, the opacity as to Respondent's injuries is not the only basis on which I ultimately conclude that Respondent is not credible. On cross-examination, Respondent testified, for the first time, that the village council continues to pay money to the police on behalf of Respondent and that his brother and father were arrested and his children stopped by the police following his departure. He testified that the last time this happened was four to five years ago, in 2004. Respondent neglected to amend his asylum application to reflect these events. Nor did he mention these events in his direct testimony. Nor is there any

other evidence in the record to corroborate this story. When the Government asked why there is no other mention in the record of these incidents, Respondent replied "it was never asked" and then "it is hard to get my father to go to the police station, he is in a wheel chair" and "I didn't think it was important because [my brother] didn't live with me." When the Government pointed out that Respondent submitted an affidavit from a distant family member, Mohinder Singh, in 2006 and asked why no such affidavit was submitted by his brother, father, or children, Respondent replied "because [Mohinder] took care of me."

While omissions "are often not a sufficient basis for discrediting later testimony" an adverse credibility finding based on a major inconsistency involving a "last-minute, uncorroborated story" may be proper. *Alvarez-Santos v. INS*, 332 F.3d 1245, 1254 (9th Cir. 2003) (upholding an adverse credibility finding because "it is simply not believable that an applicant for asylum would fail to remember, and thus to include in either of his two asylum applications *or* his principal testimony, a dramatic incident...."). Furthermore, where the trier of fact "has reason to question the applicant's credibility, and the applicant fails to produce non-duplicative, material, easily available corroborating evidence and provides no credible explanation for such failure, an adverse credibility finding" is proper. *Sidhu v. INS*, 220 F.3d 1085, 1090, 1092 (9th Cir. 2000) ("corroborating evidence is often scarce in asylum proceedings, but where it is easily available, no rational legal regime would discourage applicants

from bringing it to the attention of the trier of fact"); *Chebchoub v. INS*, 257 F.3d 1038, 1044 (9th Cir. 2001) (upholding adverse credibility determination where corroboration was easily available); *Unuakhaulu v. Gonzales*, 204 F.3d 931, 938 (9th Cir. 2004) (same). Here, Respondent testified for the first time on cross-examination regarding dramatic events directly related to his asylum claim and in particular to his fear of future persecution. However, with the exception of the references to "harassment" in Respondent's declaration and affidavits, covered more fully below, I can find no mention of the arrests and stops of his father, brother and children anywhere in the record. Respondent's credibility is already at issue, and Respondent was on notice that I had concerns regarding his credibility at least as early as my February 2009 minute order. Respondent testified on cross-examination that he received all of the affidavits that he submitted with his original application via fax from his family in India. He also testified that he received the 2006 affidavit by hand from a friend who was traveling from India. He testified that his wife's brother obtained his driver's licences from the authorities in India and "sent" them to Respondent in the United States. Finally, he testified that he heard about the arrests with his brother and father "because they told him about it," which suggests that he remains in contact with his family. Under these circumstances, which show a continued and frequent communication between Respondent and his family in India, it is reasonable to expect the Respondent to provide corroborating evidence of this purported abuse of his family members.

"The IJ must provide a petitioner with a reasonable opportunity to offer an explanation of any perceived inconsistencies that form the basis of a denial of asylum." *Soto-Olarte v. Holder* 555 F.3d 1089, 1091-92 (9th Cir. 2009) (internal citations omitted). Respondent's explanation as to why he failed to provide corroboration of this testimony is at once non-responsive, vague, and simply insufficient. The Ninth Circuit has suggested that inconsistencies that can be viewed as an attempt "to enhance claims of persecution" may be a proper basis for a finding of adverse credibility. *Hoque v. Ashcroft*, 367 F.3d 1190, 1195, 1196 (9th Cir. 2004) (overturning adverse credibility determination but suggesting its willingness to uphold the adverse credibility determination "had the [discrepency] aided petitioner's asylum application in some way") (citing *Shah v. INS*, 220 F.3d 1062, 1068 (9th Cir. 2000). Furthermore, "[i]f the trier of fact either does not believe the applicant or does not know what to believe, the applicant's failure to corroborate his testimony can be fatal to his asylum application." *Chebchoub v. INS*, 257 F.3d 1038, 1042 (9th Cir. 2001)(upholding adverse credibility determination where corroboration was easily available); *Sidhu v. INS*, 220 F.3d 1085, 1090 (9th Cir. 2000) (same). I find that Respondent's sudden, uncorroborated testimony regarding the recent arrests of his family members, which is wholly absent from anywhere else in the record, raises additional grave concerns regarding Respondent's veracity.

Finally, I take serious issue with the affidavits purportedly written by family and friends that were

submitted with Respondent's asylum application. There are four affidavits submitted with his application: one with letter head reading Shiromani Akali Dal; one from his father, Tam Singh; one from a friend of the family, Pal Singh; and one from Sampanch G.B. Noorpur Chata, written on foreign letterhead. I first note that Respondent's declaration is dated October 21, 2001. The affidavits which have legible dates are dated November 12, 2001 (Tam Singh and Pal Singh) and November 20, 2001 (Sampanch G.B. Noorpur Chata). It is significant that Respondent's supporting affidavits were written shortly after Respondent's declaration because they all contain a remarkable similarity in the scope of the information provided and the structure of the information relayed. Indeed, they all contain certain identical phrases. It is particularly striking that not one of the affidavits contains any separate or additional relevant information that would suggest independent knowledge of the events described.

For example, Respondent writes in his declaration "first they took our fingerprints and pictures and then they got our names and addresses. Then we were separated into different groups and they started transporting people to different places but I was locked up in a cell …." *See* Respondent's declaration at 1. The Shiromani Akali Dal affidavit states "Although others were released but [Respondent] kept for overnight and was tortured." *See* Respondent Pre-Hearing Statement at 36. The Tam Singh affidavit states "after noting their names and addresses and after obtaining their fingerprints, the police took all the other people to different places

but my son was locked up in a cell." *See* Respondent Pre-Hearing Statement at 38 ¶ 3. The Pal Singh affidavit states "However the other people were released by the police after taking their fingerprints and addresses but he was kept in custody …." *See* Respondent Pre-Hearing Statement at 34 ¶ 3. The Sampanch G.B. Noorpur Chata affidavit states "[a]lthough others were released after taking their fingerprints and address but he was kept for overnight in custody …." See Respondent Pre-Hearing Statement at 40.

As another example, Respondent declares, "…they asked everything and due to my bad condition they informed my family." *See* Respondent's declaration at 3. Shiromani Akali Dal writes "[d]ue to his bad condition police informed his family members …." *See* Respondent Pre-Hearing Statement at 37. Tara Singh writes "[t]he police informed us due to his bad condition." *See* Respondent Pre-Hearing Statement at 38 ¶ 5. Pal Singh writes "the local police informed his family members because of his bad condition …." *See* Respondent Pre-Hearing Statement at 34 ¶ 5. Sampanch G.B. Noorpur Chata writes "the police informed his family members due to his bad condition." *See* Respondent Pre-Hearing Statement at 40.

Similarly, Respondent declared that "[i]n my absence when I did not report to the police station the police started harassing my family and asked a lot of questions." *See* Respondent's declaration at 3. Shiromani Akali Dal writes "[i]n his absence police remained harassing his family members." *See*

Respondent Pre-Hearing Statement at 37. Tam Singh writes "[p]olice remained harassing us in his absence." *See* Respondent Pre-Hearing Statement at 38 ¶ 6. Pal Singh writes "[p]olice remained harassing his family members." *See* Respondent Pre-Hearing Statement at 34 ¶ 6. Sampanch G.B. Noorpur Chata writes "[p]olice remained harassing his family members." *See* Respondent Pre-Hearing Statement at 40. None of the affidavits elaborate on what this purported "harassment" entailed.

The last example that I will note, but certainly not the last example evident in the affidavits, is that three affiants wrote that Respondent's family "paid huge amount for his release" or "paid huge amount as bribe for his release" or "secured his release by paying a huge amount as bribe to the police." *See* Respondent Pre-Hearing Statement at 37, 34 ¶ 3, 40.

The Government specifically asked Respondent about the recurrent use of the phrase "paid huge amount" and Respondent was unable to provide an adequate explanation. In response to the Government pointing out some of the other similarities such as similar font and type face and the fact that the affidavits seem to have been prepared on the same day, Respondent replied "I asked them to send it so they went and got them prepared. It's just like if you go to the court or the complex and you get it done in one day." While I find that such response addresses the similarity in dates of the affidavits, it is far from sufficient to explain the other striking similarities. As a result of the patently identical nature of the affidavits and Respondent's own

declaration, I find the content of the affidavits to be dubious at best and their value to be minimal in supporting Respondent's claim of persecution. The Second Circuit has found such basis for adverse credibility to be proper. *Singh v. BIA*, 438 F.3d 145 (2nd Cir. 2006) (upholding adverse credibility finding based in part on "the nearly identical language in the written affidavits allegedly provided by different people in India in support of [petitioner's] application"). The Ninth Circuit has analogously upheld an Immigration Judge's suspiciousness of a respondent's testimony "because of its lack of specificity concerning matters outside the ambit of [a] newspaper article." *Singh-Kaur v. INS*, 183 F.3d 1147, 1153 (9th Cir. 1999) (quoting the IJ's statement that "virtually all of the details given in petitioner's testimony also appeared in the newspaper article which he presented [as corroboration]. Normally, the Court would see this as a positive factor in support of Petitioner's claim. On the other hand, Petitioner did not give many details which were not contained in the article.").

This circuit has mandated that the Immigration Judge consider a respondent's testimony "in light of all the evidence presented." *Kaur v. Gonzales*, 418 F.3d F.3d 1061, 1066 (9th Cir. 2005). A judge is not expected to "abandon [his] common sense in favor of rules of general application." *Id.* An adverse credibility determination is proper where the cumulative evidence indicates lack of truthfulness. *Singh-Kaur v. INS*, 183 F.3d 1147, 1152 (9th Cir. 1999) ("Taken together, the inconsistencies to which the IJ points are sufficiently material to permit her to

question Petitioner's credibility"); *Rivera v. Mukasey*, 508 F.3d 1271, 1275 (9th Cir. 2007) ("These inconsistencies, particularly when viewed cumulatively, deprive [petitioner's] claim of the requisite ring of truth"); *Kaur v. Gonzales*, 418 F.3d at 1066 ("If the inconsistencies [are] accompanied by *other indications of dishonesty*" an IJ's adverse credibility determination might be justified) (emphasis in original). Given the utter obfuscation of the extent of Respondent's injuries, from which I cannot derive an inkling of the truth; in addition to Respondent's sudden testimony about major events that go to the heart of his claim—the arrests of his father and brother and stops of his children—during cross-examination without any corroboration in the record; and the highly dubious nature of Respondent's supporting affidavits, I find there to be too great a pall of suspicion over Respondent's veracity to extract credibility. Therefore, I deny Respondent's claims of asylum, withholding of removal, and protection under the Convention Against Torture on adverse credibility grounds.

ORDERS

IT IS HEREBY ORDERED that the respondent's motion to supplement record is GRANTED.

IT IS FURTHER ORDERED that the respondent's application for I-589 relief is DENIED.

IT IS FURTHER ORDERED that the respondent's application for withholding of removal is DENIED.

IT IS FURTHER ORDERED that the respondent's application for withholding of removal under the Convention Against Torture is DENIED.

IT IS FURTHER ORDERED that the respondent be granted voluntary departure by July 5, 2009, upon posting of a $3,500 voluntary departure bond, with an alternate order of removal to India. That is the country I designate, since respondent declined to designate any country of removal. I set the statutory presumptive amount of $3,000 as a penalty for respondent should he not comply with the voluntary departure directives.

Date: May 5, 2009

/s/
Kenneth Josephson
Immigration Judge

APPENDIX F

8 U.S.C. § 1101

Definitions

(a) As used in this chapter—

***

(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.

***

8 U.S.C. § 1229a.

Removal proceedings

(a) Proceeding

(1) In general

An immigration judge shall conduct proceedings for deciding the inadmissibility or deportability of an alien.

(2) Charges

An alien placed in proceedings under this section may be charged with any applicable ground of inadmissibility under section 1182(a) of this title or any applicable ground of deportability under section 1227(a) of this title.

(3) Exclusive procedures

Unless otherwise specified in this chapter, a proceeding under this section shall be the sole and exclusive procedure for determining whether an alien may be admitted to the United States or, if the alien has been so admitted, removed from the United States. Nothing in this section shall affect proceedings conducted pursuant to section 1228 of this title.

***

(c) Decision and burden of proof

***

(4) Applications for relief from removal

(A) In general

An alien applying for relief or protection from removal has the burden of proof to establish that the alien–

(i) satisfies the applicable eligibility requirements; and

(ii) with respect to any form of relief that is granted in the exercise of discretion, that the alien merits a favorable exercise of discretion.

***

8 U.S.C. § 1229c

Voluntary departure

***

(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.

***

8 U.S.C. § 1252

Judicial review of orders of removal

(a) Applicable provisions

(1) General orders of removal

Judicial review of a final order of removal (other than an order of removal without a hearing pursuant to section 1225(b)(1) of this title) is governed only by chapter 158 of Title 28, except as provided in subsection (b) of this section and except that the court may not order the taking of additional evidence under section 2347(c) of such title.

***

(b) Requirements for review of orders of removal

With respect to review of an order of removal under subsection (a)(1) of this section, the following requirements apply:

(1) Deadline

The petition for review must be filed not later than 30 days after the date of the final order of removal.

(2) Venue and forms

The petition for review shall be filed with the court of appeals for the judicial circuit in which the immigration judge completed the proceedings. The record and briefs do not have to be printed. The court of appeals shall review the proceeding on a typewritten record and on typewritten briefs.

APPENDIX G

8 C.F.R. § 1003.1

Organization, jurisdiction, and powers of the Board of Immigration Appeals

***

(d) Powers of the Board—

(1) Generally. The Board shall function as an appellate body charged with the review of those administrative adjudications under the Act that the Attorney General may by regulation assign to it. The Board shall resolve the questions before it in a manner that is timely, impartial, and consistent with the Act and regulations. In addition, the Board, through precedent decisions, shall 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.

(i) The Board shall be governed by the provisions and limitations prescribed by applicable law, regulations, and procedures, and by decisions of the Attorney General (through review of a decision of the Board, by written order, or by determination and ruling pursuant to section 103 of the Act).

(ii) Subject to these governing standards, Board members shall exercise their independent judgment and discretion in considering and determining the cases coming before the Board, and a panel or Board member to whom a case is assigned may take any action consistent with their authorities under the Act and the regulations as is appropriate and necessary for the disposition of the case.

***

(6) Identity, law enforcement, or security investigations or examinations.

(i) The Board shall not issue a decision affirming or granting to an alien an immigration status, relief or protection from removal, or other immigration benefit, as provided in 8 CFR 1003.47(b), that requires completion of identity, law enforcement, or security investigations or examinations if:

(A) Identity, law enforcement, or security investigations or examinations have not been completed during the proceedings;

(B) DHS reports to the Board that the results of prior identity, law

enforcement, or security investigations or examinations are no longer current under the standards established by DHS and must be updated; or

(C) Identity, law enforcement, or security investigations or examinations have uncovered new information bearing on the merits of the alien's application for relief.

(ii) Except as provided in paragraph (d)(6)(iv) of this section, if identity, law enforcement, or security investigations or examinations have not been completed or DHS reports that the results of prior investigations or examinations are no longer current under the standards established by DHS, then the Board will determine the best means to facilitate the final disposition of the case, as follows:

(A) The Board may issue an order remanding the case to the immigration judge with instructions to allow DHS to complete or update the appropriate identity, law enforcement, or security investigations or examinations pursuant to § 1003.47; or

(B) The Board may provide notice to both parties that in order to complete adjudication of the appeal the case is being placed on hold until such time as all identity, law enforcement, or security investigations or examinations are completed or updated and the results have been reported to the Board.

(iii) In any case placed on hold under paragraph (d)(6)(ii)(B) of this section, DHS shall report to the Board promptly when the identity, law enforcement, or security investigations or examinations have been completed or updated. If DHS obtains relevant information as a result of the identity, law enforcement, or security investigations or examinations, or if the applicant fails to comply with necessary procedures for collecting biometrics or other biographical information, DHS may move to remand the record to the immigration judge for consideration of whether, in view of the new information or the alien's failure to comply, the immigration relief should be denied, either on grounds of eligibility or, where applicable, as a matter of discretion.

(iv) The Board is not required to remand or hold a case pursuant to paragraph

(d)(6)(ii) of this paragraph if the Board decides to dismiss the respondent's appeal or deny the relief sought.

(v) The immigration relief described in 8 CFR 1003.47(b) and granted by the Board shall take effect as provided in 8 CFR 1003.47(i).

(7) Finality of decision. The decision of the Board shall be final except in those cases reviewed by the Attorney General in accordance with paragraph (h) of this section. The Board may return a case to the Service or an immigration judge for such further action as may be appropriate, without entering a final decision on the merits of the case.

***

8 C.F.R. § 1003.47

Identity, law enforcement, or security investigations or examinations relating to applications for immigration relief, protection, or restriction on removal.

(a) In general. The procedures of this section are applicable to any application for immigration relief, protection, or restriction on removal that is subject to the conduct of identity, law enforcement, or security investigations or examinations as described in paragraph (b) of this section, in order to ensure that DHS has completed the appropriate identity, law

enforcement, or security investigations or examinations before the adjudication of the application.

(b) Covered applications. The requirements of this section apply to the granting of any form of immigration relief in immigration proceedings which permits the alien to reside in the United States, including but not limited to the following forms of relief, protection, or restriction on removal to the extent they are within the authority of an immigration judge or the Board to grant:

(1) Asylum under section 208 of the Act.

(2) Adjustment of status to that of a lawful permanent resident under sections 209 or 245 of the Act, or any other provision of law.

(3) Waiver of inadmissibility or deportability under sections 209(c), 212, or 237 of the Act, or any provision of law.

(4) Permanent resident status on a conditional basis or removal of the conditional basis of permanent resident status under sections 216 or 216A of the Act, or any other provision of law.

(5) Cancellation of removal or suspension of deportation under section 240A or former section 244 of the Act, or any other provision of law.

(6) Relief from removal under former section 212(c) of the Act.

(7) Withholding of removal under section 241(b)(3) of the Act or under the Convention Against Torture.

(8) Registry under section 249 of the Act.

(9) Conditional grants relating to the above, such as for applications seeking asylum pursuant to section 207(a)(5) of the Act or cancellation of removal in light of section 240A(e) of the Act.

***

(h) Adjudication upon remand from the Board. In any case remanded pursuant to 8 CFR 1003.1(d)(6), the immigration judge shall consider the results of the identity, law enforcement, or security investigations or examinations subject to the provisions of this section. If new information is presented, the immigration judge may hold a further hearing if necessary to consider any legal or factual issues, including issues relating to credibility, if relevant. The immigration judge shall then enter an order granting or denying the immigration relief sought.

***

8 C.F.R. § 1240.26

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

(a) Eligibility: general. An alien previously granted voluntary departure under section 240B of the Act, including by the Service under § 240.25, and who fails to depart voluntarily within the time specified, shall thereafter be ineligible, for a period of ten years, for voluntary departure or for relief under sections 240A, 245, 248, and 249 of the Act.

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(c) At the conclusion of the removal proceedings—

(1) Required findings. An immigration judge may grant voluntary departure at the conclusion of the removal proceedings under section 240B(b) of the Act, if he or she finds that:

(i) The alien has been physically present in the United States for period of at least one year preceding the date the Notice to Appear was served under section 239(a) of the Act;

(ii) The alien is, and has been, a person of good moral character for at least five years immediately preceding the application;

(iii) The alien has not been convicted of a crime described in section 101(a)(43) of the Act and is not deportable under section 237(a)(4); and

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

(2) Travel documentation. Except as otherwise provided in paragraph (b)(3) of this section, the clear and convincing evidence of the means to depart shall include in all cases presentation by the alien of a passport or other travel documentation sufficient to assure lawful entry into the country to which the alien is departing. The Service shall have full opportunity to inspect and photocopy the documentation, and to challenge its authenticity or sufficiency before voluntary departure is granted.

(3) Conditions. The immigration judge may impose such conditions as he or she deems necessary to ensure the alien's timely departure from the United States. The immigration judge shall advise the alien of the conditions set forth in this paragraph (c)(3)(i)-(iii). If the immigration judge imposes conditions beyond those specifically enumerated below, the immigration judge shall advise the alien of such conditions before granting voluntary departure. Upon the conditions being set forth, the alien shall be

provided the opportunity to accept the grant of voluntary departure or decline voluntary departure if he or she is unwilling to accept the amount of the bond or other conditions. In all cases under section 240B(b) of the Act:

> (i) The alien shall be required to post a voluntary departure bond, in an amount necessary to ensure that the alien departs within the time specified, but in no case less than $500. Before granting voluntary departure, the immigration judge shall advise the alien of the specific amount of the bond to be set and the duty to post the bond with the ICE Field Office Director within 5 business days of the immigration judge's order granting voluntary departure.
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> (ii) An alien who has been granted voluntary departure shall, within 30 days of filing of an appeal with the Board, submit sufficient proof of having posted the required voluntary departure bond. If the alien does not provide timely proof to the Board that the required voluntary departure bond has been posted with DHS, the Board will not reinstate the period of voluntary departure in its final order.
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> (iii) Upon granting voluntary departure, the immigration judge shall advise the alien that if the alien files a post-order

motion to reopen or reconsider during the period allowed for voluntary departure, the grant of voluntary departure shall terminate automatically and the alternate order of removal will take effect immediately.

(iv) The automatic termination of an order of voluntary departure and the effectiveness of the alternative order of removal shall not impact, in any way, the date that the order of the immigration judge or the Board became administratively final, as determined under the provisions of the applicable regulations in this chapter.

(v) If, after posting the voluntary departure bond the alien satisfies the condition of the bond by departing the United States prior to the expiration of the period granted for voluntary departure, the alien may apply to the ICE Field Office Director for the bond to be canceled, upon submission of proof of the alien's timely departure by such methods as the ICE Field Office Director may prescribe.

(vi) The voluntary departure bond may be canceled by such methods as the ICE Field Office Director may prescribe if the alien is subsequently successful in overturning or remanding the

immigration judge's decision regarding removability.

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(i) Effect of filing a petition for review. If, prior to departing the United States, the alien files a petition for review pursuant to section 242 of the Act (8 U.S.C. 1252) or any other judicial challenge to the administratively final order, any grant of voluntary departure shall terminate automatically upon the filing of the petition or other judicial challenge and the alternate order of removal entered pursuant to paragraph (d) of this section shall immediately take effect, except that an alien granted the privilege of voluntary departure under 8 CFR 1240.26(c) will not be deemed to have departed under an order of removal if the alien departs the United States no later than 30 days following the filing of a petition for review, provides to DHS such evidence of his or her departure as the ICE Field Office Director may require, and provides evidence DHS deems sufficient that he or she remains outside of the United States. The Board shall advise the alien of the condition provided in this paragraph in writing if it reinstates the immigration judge's grant of voluntary departure. The automatic termination of a grant of voluntary departure and the effectiveness of the alternative order of removal shall not affect, in any way, the date that the order of the immigration judge or the Board became administratively final, as determined under the provisions of the applicable regulations in this chapter. Since the grant of voluntary departure is terminated by the filing of the petition for review, the

alien will be subject to the alternate order of removal, but the penalties for failure to depart voluntarily under section 240B(d) of the Act shall not apply to an alien who files a petition for review, and who remains in the United States while the petition for review is pending.