No. 06-1181

IN THE

Supreme Court of the United States

SAMSON TAIWO DADA,

Petitioner,

v.

MICHAEL B. MUKASEY,
ATTORNEY GENERAL,

Respondent.

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

SUPPLEMENTAL REPLY BRIEF FOR PETITIONER

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The Government's supplemental brief obscures the fact that this case presents a question of statutory interpretation. Although the Government presents assorted arguments against permitting withdrawal, it does not, and cannot, contest that permitting withdrawal from voluntary departure, effective upon an alien's request, is consistent with the statute. Indeed, the Department of Justice's own proposed rule is predicated upon, and favors, such a construction.

The arguments that the Government presents against withdrawal—centered on the proposed rule, current agency practice, and the agency's exercise of discretion—are either irrelevant to the statutory interpretation question at issue or underscore that withdrawal is consistent with the statute. These arguments, moreover, fail to offer support for the Government's reading—a construction of the statute that would leave the availability of motions to reopen subject to chance.

ARGUMENT

1. The Government fails in its attempt to show that the proposed rule supports its position against withdrawal.

The Government ignores the central feature of the proposed rule: the rule would give "the alien an opportunity to *withdraw from the arrangement* into which he or she effectively entered … at the time of seeking or accepting voluntary departure." 72 Fed. Reg. 67,674, 67,679 (Nov. 30, 2007) (emphasis added). Such withdrawal would be "automatic"—effective immediately upon an alien's filing of a motion to reopen (*i.e.*, it would not require any agency action). *Id.* The proposed rule thus presupposes that permitting an alien to "forgo voluntary departure and instead to elect to challenge the

final order through a motion to reopen," *id.*, is consistent with the statute.

Sidestepping the necessary implication of the proposed rule, the Government nonetheless contends (at 9) that the rule supports its view. The Government argues that the proposed rule "alter[s] the up-front 'quid pro quo'" of voluntary departure, and deduces that this change means that, under current practice, acceptance of voluntary departure requires forfeiture of a motion to reopen. *Id.* But the Government's current view of the bargain does not resolve the relevant question. Rather, the question is whether the statute itself imposes the version of the quid pro quo reflected in the Government's current argument. The proposed rule makes clear that, in the Department's view, the statute does not do so.[1]

2. The Government's reliance on current agency practice is similarly misplaced, as this practice also underscores that withdrawal upon request is consistent with the statute.

The Government states (at 5-6) that aliens may withdraw from voluntary departure while an appeal is pending before the BIA. The Government cites no statute, regulation, or precedential BIA decision in support of this position: the only authority is a single, non-precedential decision in which the BIA granted a withdrawal request made during an alien's appeal. *Matter of Lopez Vazquez*, 2007 WL 2588534 (BIA Aug.

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[1] The Government also invokes (at 4) contract law to argue that withdrawal would constitute repudiation of the quid pro quo, subjecting the alien to corresponding penalties. This argument, however, assumes that the bargain does not include a withdrawal option, and therefore begs the question posed by the Court.

17, 2007).[2] The Government suggests (at 5-6) that this (unannounced) practice of withdrawal on appeal suffices to eliminate the option of withdrawal following an appeal; new facts, it argues, are unlikely to arise in the short period following a BIA order. But the statute itself provides that an alien is permitted to file one motion to reopen, presenting new facts, *after* the BIA has ruled. 8 U.S.C. § 1229a(c)(7).

Far from showing that the statute cannot or should not be read to permit automatic withdrawal, the case cited by the Government reinforces the permissibility of withdrawal.[3] Moreover, it also indicates that withdrawal upon request is permissible: according to the Government (at 5), the agency will grant an alien's withdrawal request in all cases, "absent a mistake" by the Board.

The Government's argument highlights the oddity of its position in this litigation. It contends that an alien can automatically withdraw from voluntary departure during the potentially lengthy period during which his case is on appeal—a fourteen-month period in the present case. *See* Gov't Supp. Br. 5. The problem,

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[2] Counterbalancing the Government's single case is *Matter of Davis*, which permitted a withdrawal request that was submitted with a timely motion to reopen. *Matter of Davis*, No. A76-832-166 (BIA Mar. 3, 2006) (unpublished) ("*Davis* 2006 Order"). Withdrawal was permitted notwithstanding that Davis's "initial [visa] petition was denied based on a finding of marriage fraud" and that the motion to reopen related to a "second petition based on that same marriage." *Id.*

[3] The lack of other authority underscores that Petitioner's failure to seek withdrawal pending appeal cannot be held against him. At the time that Petitioner sought reopening, by contrast, all of the circuits to have considered the question had construed the statute to permit tolling. *See* Pet. Br. 10, 50.

the Government suggests, is permitting an additional short period of time for withdrawal during the voluntary departure period after the BIA rules—28 days in this case. *See id.* 3 (stating that Petitioner should not be permitted to "defer[] the final order of removal for 28 days"). It is unclear why these extra 28 days are such a cause for concern. The Department is apparently unconcerned, given that the proposed rule would permit withdrawal after the BIA rules. And, indeed, this short additional period for withdrawal is all that would be needed to safeguard motions to reopen for voluntary departure recipients. *See* 8 U.S.C. § 1229a(c)(7).[4]

3. Raising the specter of intrusion into agency discretion, the Government argues (at 4-6) that permitting withdrawal would require the agency first to grant the motion to reopen. The Government has it backwards: withdrawal permits an alien to pursue a motion to reopen, thereby leaving the agency to exercise its discretion, not the other way around.

The Government does not cite any authority for the notion that withdrawal is contingent on the agency

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[4] The Government argues (at 1-2 & n.2) that requests for withdrawal are rare and attributes that to the courts of appeals' practice of granting stays during the adjudication of petitions for review (*i.e.*, judicial review of the BIA's determination). The frequency of withdrawal requests, however, is irrelevant. More importantly, the suggestion that withdrawal is somehow unnecessary because of stays pending judicial review is misplaced. The issue here is obtaining a decision on a motion to reopen from the BIA; such motions are based on new facts and changed circumstances, factors that are not considered during judicial review. And voluntary departure recipients cannot obtain a stay of the departure period for the purpose of pursuing reopening. *See* Pet. Reply Br. 13-14.

granting a motion to reopen. In fact, the Department's proposed rule is to the contrary: it permits an alien to withdraw automatically from voluntary departure, in order to pursue a motion to reopen. *See* 72 Fed. Reg. at 67,679. *Matter of Davis* is also inconsistent with the Government's view. *See Davis* 2006 Order (permitting alien's request to withdraw from voluntary departure and denying the motion to reopen on the merits).[5]

A construction of the statute that permits withdrawal thus in no way intrudes upon the agency's discretion to grant or deny a motion to reopen. In fact, it allows the agency to exercise its discretion in each particular case.

4. The Government attempts to avoid a decision in this case by pointing to newfound ambiguity in the BIA decision that supposedly warrants a remand for clarification. The nature of the purported ambiguity is unclear; the Government appears to be suggesting that rather than denying reopening on the grounds that Petitioner had overstayed the voluntary departure period, the BIA may have actually either (a) rejected the motion for reopening on the merits or (b) rejected the request for withdrawal, finding it similarly unwarranted. Gov't Supp. Br. 6-8.[6] The arguments for ambiguity—and remand for clarification—fail.

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[5] Nor is Petitioner seeking to alter the agency's "final order." When Petitioner was granted voluntary departure, an "alternate order o[f] removal" was entered, 8 C.F.R. § 1240.26(d); *see also* C.A. App. 122, 161; rather than altering a final order, withdrawal would simply cause the alternate order of removal to go into effect.

[6] Although the Government notes (at 1 n.1) that the I-130 petition filed by Petitioner's wife was recently denied, this denial is irrelevant to the questions in this case. As an initial matter, the regulations provide for a right of appeal, 8 C.F.R. § 204.2(a)(3), and

The BIA plainly did not address the merits of the motion to reopen, refusing to consider it because Petitioner had overstayed the voluntary departure period. The Board's order states: "[A]n alien who fails to depart following a grant of voluntary departure ... is statutorily barred from applying for certain forms of discretionary relief.... Therefore, because the respondent has remained in the United States after the scheduled date of departure, the respondent is now statutorily ineligible for the relief sought. Accordingly, the motion to reopen is denied." C.A. App. 2.[7] The Government concedes that "the BIA's decision is perhaps best read as denying" relief because the overstay of the voluntary departure period rendered him statutorily ineligible. Gov't Supp. Br. 8.[8]

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such denials are routinely vacated on appeal. *See, e.g.*, *Matter of Hurtado*, 2007 WL 4182269 (BIA Oct. 16, 2007) (remanding for further proceedings where the record underlying the district director's decision did not support a finding of a sham marriage); *Matter of Games*, 2007 WL 2197518 (BIA June 29, 2007) (same); *Matter of Abdelwahab*, 2007 WL 1492274 (BIA May 16, 2007) (same). The merits of Petitioner's arguments in support of reopening, moreover, are beside the point; the merits have never been considered by the BIA. *See also* n.7 *infra*.

[7] Because the agency did not rule on the merits of the motion to reopen, the Government's suggestion (at 7-8) that, had the agency addressed the merits, it would have denied the motion, is irrelevant. *See SEC* v. *Chenery Corp.*, 332 U.S. 194, 196 (1947); *cf. United States ex rel. Accardi* v. *Shaughnessy*, 347 U.S. 260, 266 (1954) (where regulations provide for the exercise of BIA discretion, the alien is entitled to have the BIA "exercise its own judgment").

[8] The Government's suggestion that the BIA may have considered the merits of the motion to reopen is further undermined by the Government's own approach to this case. The grant of certiorari on the tolling question, and the subsequent request for

This language similarly precludes any argument that the BIA addressed the withdrawal request on the merits. Moreover, even if it did, that would not resolve this case. If withdrawal is treated as requiring agency approval (rather than effective upon request), it leaves the alien in the same unworkable bind as the Government's litigation position. The withdrawal request, and motions to reopen in turn, would be subject to the timing of agency decision-making. *See* Pet. Supp. Br. 6.

5. Finally, the Government argues (at 10) that this Court should leave the reconciliation of the statutory provisions to the agency. The present statutory interpretation question is before this Court, however, because the agency did not exercise its delegated authority to address the issue. And now that the agency has considered the question, it has proposed regulations that (prospectively) safeguard motions to reopen for voluntary departure recipients. This Court should interpret the statute to avoid the Government's current view, which renders motions to reopen subject to chance and is inconsistent with the statute. Instead, the Court should construe the statute to preserve motions to reopen for voluntary departure recipients, through either a tolling or withdrawal construction.

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briefing on withdrawal, are predicated on the BIA's refusal to exercise its discretion on the merits. If the BIA decision could be read to provide the discretionary resolution that Petitioner seeks, one would have expected the Government to point that out when opposing a grant of the petition for certiorari. *Cf.* S. Ct. R. 15.2.

CONCLUSION

The judgment of the Fifth Circuit should be reversed.

Respectfully submitted.

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