No. 16-952

IN THE

Supreme Court of the United States

SURINDER SINGH,

Petitioner,

v.

JEFFERSON B. SESSIONS III, ATTORNEY GENERAL,

Respondent.

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

REPLY IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI

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ARGUMENT

This case presents the question whether a Board of Immigration Appeals (BIA) order denying certain forms of relief but remanding to an Immigration Judge (IJ) for further proceedings qualifies, under 8 U.S.C. § 1101(a)(47), as a "final order of removal" for purposes of judicial review. *See* 8 U.S.C. § 1252(a). That critical jurisdictional question has confounded the courts of appeals, resulting in a stark division of authority that sows confusion among both the immigration bar and noncitizens.

The government does not dispute that the Ninth Circuit decision is wrongly decided. It asserts, however, that the courts of appeals have adopted a uniform approach in the precise context in which this case arises—a remand relating to the grant of voluntary departure—and therefore certiorari is not warranted. That argument cannot withstand scrutiny. First, there is no sound basis to distinguish among subsets of BIA remand orders. When the BIA remands for further proceedings—whatever the stated purpose for the remand—the noncitizen typically may present new evidence and raise new claims. And the nature of the inquiry conducted by the IJ on remand in the voluntary departure context (for example, looking for disqualifying crimes and verifying good moral character) is in many respects the same as in BIA remands for further proceedings in other contexts. Section 1101(a)(47), which defines the circumstances in which an order of removal becomes final, must be read consistently as to all such BIA remands. Second, even

in the artificially narrow context of BIA remands relating to voluntary departure, the courts of appeals' rulings are far from uniform.

This Court should grant the petition and adopt a clear, consistent reading of § 1101(a)(47)—that BIA remand orders are not final orders for purposes of judicial review.

I. This Court's Intervention Is Needed To Resolve The Current Confusion Over Whether BIA Remand Orders Are Final Orders For Purposes of Judicial Review.

1. The current state of the law is nonsensical and confusing. The BIA regularly denies certain forms of relief but remands the case to the IJ for further proceedings. Today, whether such an order is final for purposes of judicial review depends not only on the circuit in which the petition for review is filed, but also on the BIA's stated purpose for the remand. That makes no sense. Irrespective of the stated purpose for the remand, the legal question is the same: Is the remand a final order of removal under 8 U.S.C. § 1101(a)(47).

The government openly acknowledges the circuit split on the question presented. BIO 8. The government has also acknowledged the need for a uniform rule: It has consistently argued for a clear, across-the-board finality rule—that BIA orders remanding for further proceedings, *whatever the purpose of the remand*, are not final orders. Indeed, it argued for that rule in the present case. *See* Supplemental Brief

for Respondent at 13, *Singh v. Lynch*, No. 12-74163, Dkt. 45 (9th Cir. Jan. 21, 2016) ("DOJ Supp. Br.").

The government now suggests, however, that remands for voluntary departure can be viewed as "distinct" from—and more limited than—remands for other purposes, such that the courts of appeals are justified in taking a different approach to the finality of these remand orders. *See* BIO 8-9. That position cannot withstand scrutiny.

a. First and foremost, as explained in the petition (Pet. 7-8) and as the government acknowledges (BIO 14), even where the BIA states a specific purpose for the remand, the remand is "effective for all purposes," meaning that, on remand, the noncitizen is free to present new evidence and raise new grounds for relief.[1]

The government contends (BIO 15) that noncitizens only rarely seek to raise new matters on remand. But how often noncitizens take advantage of the broad scope of the BIA's remand orders is immaterial. The point is that the BIA's order returning the case to the IJ for further proceedings generally leaves open the possibility of new claims and new evidence. *See,*

[1] The government asserts (BIO 11) that the IJ in this case was not free to consider other forms of relief on remand. That is wrong. Although the BIA *subsequently* characterized its earlier remand as being for the "sole purpose" of voluntary departure, the BIA decision remanding the case did not expressly limit the IJ's jurisdiction on remand. The IJ thus properly recognized that he would have been free to consider new evidence or further claims of relief, had Singh so requested. Pet. App. 13a; *see In re M-D-*, 24 I. & N. Dec. 138, 141 (BIA 2007).

e.g., *Cano-Saldarriaga v. Holder*, 729 F.3d 25, 27 n.2 (1st Cir. 2013); *Matter of M-A-S-*, 24 I. & N. Dec. 762, 764 (BIA 2009). As a result, there is no telling, at the point the BIA remands the case, what course the proceedings will follow on remand. And there is thus no sound reason to treat one remand order as final and another as non-final based on the BIA's stated purpose for the remand.

b. Further illustrating the folly in basing the finality of the remand order on the stated purpose of the remand, the actual tasks the IJ needs to perform on remand are often the same regardless of the context in which the remand arises. When deciding on remand whether to grant voluntary departure, for example, an IJ must determine, among other things, whether the noncitizen is barred from that relief by a conviction for an aggravated felony. 8 U.S.C. § 1229c(b)(1)(C). The same is true for a remand where the IJ is considering cancellation of removal. 8 U.S.C. § 1229b.[2]

Likewise, on remand for consideration of voluntary departure, an IJ must determine whether the individual has been "a person of good moral character for at least [the past] 5 years," 8 U.S.C. § 1229c(b)(1)(B). In the context of a remand relating

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[2] In remands in other contexts, too, the IJ engages in similar inquiries. Many forms of relief from removal often cannot be granted without a final update of the noncitizen's criminal record. *See* 8 C.F.R. § 1003.47. If, on remand, that update reveals a new criminal conviction, the IJ must then assess whether that conviction bars relief. *Id.* § 1003.47(h).

to cancellation of removal, the IJ similarly must assess, among other things, whether the petitioner is a "person of good moral character." *Id.* § 1229b.

Though the IJ's tasks on remand may be identical, the circuits' approaches to whether the remand order is a final order of removal are all over the map. If the BIA remands for a determination whether to allow the noncitizen to avoid removal by voluntary departure, several courts would say that remand order is the final order of removal from which the noncitizen *must* seek judicial review. Several other courts, however, would dismiss a petition for review filed from that order—saying that the court should decline to exercise its jurisdiction until after proceedings on remand have concluded. *See* pp. 7-8, *infra*. By contrast, if the IJ is tasked on remand with *the very same analysis* but the remand is in the context of deciding the noncitizen's eligibility for cancellation of removal or withholding of removal, no court would consider the remand order a "final order of removal."[3] And if the same task arises in the context of a remand for completion of background checks to update a noncitizen's criminal record and confirm his or her eligibility for relief, the courts are sharply split. *See* Pet. 13-14.

c. The government's attempt to argue voluntary departure-related remands are different because they do not affect removability is without merit. As noted above, on remand, the noncitizen can present new evidence and raise new claims for relief. So, no remand

[3] *See, e.g.*, *Chupina v. Holder*, 570 F.3d 99, 103 (2d Cir. 2009); *Tongco-Andrade v. Holder*, 596 F. App'x 585, 586 (9th Cir. 2015).

is truly limited to only issues relating to eligibility for voluntary departure.

In any event, in the majority of removal proceedings removability is not at issue. Typically, the noncitizen concedes removability at the outset and seeks relief from removal. *See* U.S. Dep't of Justice, Exec. Office for Immigration Review, *Immigration Court Process in the United States* (2005), 2005 WL 3541986. If granted, that relief—whether it be, for example, withholding of removal, CAT relief, or voluntary departure—does not alter the noncitizen's remov*ability*. Each of those forms of relief presupposes that the noncitizen is removable.[4]

Thus, the key distinction relied upon by the government does not hold water. When the BIA remands to the IJ for further proceedings—whether the stated purpose of the remand is consideration of voluntary departure, withholding of removal, or for some other form of relief from removal—the relevant question under § 1101(a)(47) is whether the BIA has *affirmed* the IJ's order of removal. *See* Pet. 7. And the government cannot dispute that a remand for voluntary departure no more affirms that order than does a remand for background checks related to withholding of removal or CAT relief.

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[4] *Chupina*, 570 F.3d at 104-05; *Viracacha v. Mukasey*, 518 F.3d 511, 514 (7th Cir. 2008); *see Almutairi v. Holder*, 722 F.3d 996, 1001 (7th Cir. 2013) ("[T]he 'final' order might do no more than establish that the alien is removable; it need not … order immediate removal."); *Lazo v. Gonzales*, 462 F.3d 53, 55 (2d Cir. 2006) (similar).

d. Nor is it correct that voluntary departure is "distinct" from other forms of relief in a way that is material to the question of the finality of the BIA's remand order. *See* BIO 8-9. While different in kind, voluntary departure is itself an "impediment" to removal. And, as this Court has recognized, voluntary departure provides meaningful and important relief from coercive removal and the legal consequences thereof. *Dada v. Mukasey*, 554 U.S. 1, 11-12 (2008).

2. The government is also wrong that the courts of appeals have adopted a uniform approach to voluntary departure remands. *See Hounmenou v. Holder*, 691 F.3d 967, 970 n.1 (8th Cir. 2012) ("Other courts have addressed this issue, reaching various results."). Several courts of appeals will *only* hear a petition for review filed from the BIA's remand order, *see, e.g.*, *Alibasic v. Mukasey*, 547 F.3d 78, 83 (2d Cir. 2008); *Rizo v. Lynch*, 810 F.3d 688 (9th Cir. 2016), while several others have *refused* to consider a petition filed from such an order. *See, e.g.*, *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).[5]

The Fourth Circuit has added to the confusion by holding that a remand for consideration of voluntary departure is not a final order for purposes of judicial

[5] The government argues that none of the decisions declining, for prudential reasons, to exercise jurisdiction "*requires* the court of appeals to defer exercising jurisdiction." BIO 19. But it is telling that *not one* of these courts has in fact exercised jurisdiction over such a petition since *Hakim*, *Li*, and *Giraldo* were decided.

review—at least where, as here, the BIA expressly leaves open the possibility of further proceedings on remand. *Diaz-Mejia v. Holder*, 564 F. App'x 730, 730 & n.1 (4th Cir. 2014).[6]

And the Eighth Circuit—at the government's urging—has adopted a broad rule that where "proceedings remain[] pending before the agency" because "the BIA ha[s] remanded to the IJ for administrative purposes[,] the BIA's order [i]s not a final order as required to provide the [court of appeals] with jurisdiction." *Goromou v. Holder*, 721 F.3d 569, 576 n.6 (8th Cir. 2013). Though issued in the context of a remand for background checks, the *Goromou* decision is not limited to remands for that purpose. The decision speaks to BIA remands for *any* "administrative purpose[]," and therefore encompasses remands for consideration of voluntary departure.

Thus, even under the government's myopic construction of the question presented, the confusion and nonsensical results under the current case law still warrant this Court's review.

II. The Government Does Not Dispute That The Court Of Appeals Erred.

There is a dog that never barks in the government's opposition. Not once does the government say

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[6] The government argues (BIO 19 n.4) that *Diaz-Mejia* is inconsistent with *Li*. But *Diaz-Mejia* cited *Li* and distinguished it on the ground that, in the case before it, the BIA had remanded for "consideration of voluntary departure and any other relief for which [the petitioner] may be eligible." Order, *Diaz-Mejia v. Holder*, No. 12-2198, Dkt. 15 (4th Cir. Jan. 2, 2013).

the decision below is correct in holding that the remand in this case was an immediately appealable order. That is no accident. The government has consistently argued in the courts of appeals that BIA remands in all contexts—including for voluntary departure—are *not* final orders of removal. Indeed, the government so argued in this very case, contending that the Ninth Circuit's decision treating such remand orders as final orders of removal are "[i]ncorrectly [d]ecided." DOJ Supp. Br. 16.

1. The government suggests (BIO 11) that treating voluntary departure remands as final orders of removal will not lead to piecemeal review because the remand order is effectively the only order the court can review. But the government argued below that this same reasoning rests on a "faulty legal premise." DOJ Supp. Br. 13.

There, the government correctly observed that because the IJ is empowered to "address new matters on remand beyond voluntary departure," "remanded proceedings *do* have the potential to affect the claims raised on the petition for review, and may either defeat those claims entirely … or give rise to additional claims of error." *Id.* at 14. And, as this Court has recognized, "[b]ifurcation of judicial review of [removal] proceedings is not only inconvenient; it is clearly undesirable" and thus should be avoided unless it is "the

necessary result from a fair interpretation of the pertinent statutory language." *Foti v. INS*, 375 U.S. 217, 232 (1963).[7]

Accordingly, the government is wrong when it now says (BIO 16) that the BIA's remand order "represents the dispositive final agency decision on removability and protection from removal," and equally wrong that the prospect of judicial review following the proceedings on remand "does not subject the alien to more than one order concerning removability and protection for removal," BIO 14. First, as explained above, BIA remand orders for other purposes are no less the final agency decision on remov*ability*. *See* pp. 6-7, *supra*. Second, voluntary departure is itself an important form of protection from removal. *Dada*, 554 U.S. at 11-12. Third, while the discretionary decision whether to grant voluntary departure is itself unreviewable, courts regularly review issues arising from the agency's voluntary departure determination. *See, e.g.*, *Arias-Minaya v. Holder*, 779 F.3d 49, 53-54 (1st Cir. 2015); *Corro-Barragan v. Holder*, 718 F.3d 1174, 1177-79 (9th Cir. 2013); *Bachynskyy v. Holder*, 668 F.3d 412, 416-17 (7th Cir. 2012).

2. The government suggests that review is unwarranted because the agency could possibly change its

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[7] Moreover, if the government is suggesting that unless the remand order is treated as a final order of removal there will be no order from which the noncitizen can seek judicial review, that is wrong, too. Once proceedings on remand are complete, the court of appeals can review "all determinations made during and incident to the administrative proceeding[s]" in a single petition filed from that now-final order. *See Foti*, 375 U.S. at 229.

practices with respect to the scope of its remand orders. BIO 15. But the BIA has properly recognized that "a [BIA] decision remanding a case to an [IJ] 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). And even if the BIA were empowered to remand a case to the IJ while at the same time entering a final order of removal, the agency should not have to deviate from its chosen approach to remands based on faulty and inconsistent appellate rulings.

The government further contends that the *quid pro quo* of voluntary departure is preserved regardless of whether courts adhere to the sequencing on which the voluntary departure regulations are premised, BIO 20. But the government has successfully argued the opposite in the courts of appeals. In *Li*, for example, the government convinced the Fourth Circuit to dismiss the petition because to exercise jurisdiction would be "inconsistent with the scheme envisioned by *Dada* and the [voluntary departure] regulation." *Li*, 666 F.3d at 151.

3. Finally, the government is simply wrong when it argues (BIO 8, 22) that the case law currently sets out a rule that is "easily followed" and provides "sufficient guidance" to noncitizens. To the contrary, as the American Immigration Lawyers Association has recently explained, "[a]s things stand, case law interpreting the finality of a [BIA] order denying one immigration benefit and remanding for consideration of another exists in disarray." Brief of Amicus Curiae American Immigration Lawyers Association in Support of Petitioner at 2, *Abdisalan v. Holder*, No. 10-

73215 (9th Cir. Oct 31, 2013). The government's assertion is also belied by its own arguments: In the Ninth Circuit, it argued that a uniform, across-the-board rule for finality would have the "tremendous benefit of clarity," while "any step away from [that] broad rule" creates unnecessary confusion. DOJ Supp. Br. at 14-15.

The upshot of the current confusion and uncertainty is that not even experienced immigration attorneys—let alone *pro se* noncitizens—can easily determine whether the courts of appeals will treat a BIA remand order as the final order of removal for purposes of judicial review. The answer to that question currently 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. This Court's review is necessary to provide a single, coherent answer to this important question.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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