CASE NO. 09-106

IN THE
SUPREME COURT OF THE UNITED STATES

ISAAC PEDERNERA,
Petitioner,

vs.

ERIC H. HOLDER, JR.,
UNITED STATES ATTORNEY GENERAL,
Respondent.

On Petition for a Writ of Certiorari
To the United States Court of Appeals
For the Eleventh Circuit

REPLY FOR THE PETITIONER

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REPLY BRIEF FOR THE PETITIONER

The Government devotes most of its Response to matters that have no bearing on the simple statutory interpretation question presented in this Petition: when does the time to seek judicial review of an order of removal begin to run under 8 U.S.C §1252(b)(1)?

In the Response, the Government acknowledges that Mr. Pedernera's petition for review of the order of removal rendered against him is governed by §1252(b)(1). *See* Resp. at 1-2; *see also* Pet. App. at 21a. The Government also acknowledges that the circuit courts are in conflict as to whether the time to seek review of a removal order under §1252(b)(1) begins to run on the date the order is rendered or on the date the Government complies with its obligation to serve the order on the immigrant ordered removed. *See* Resp. at 9 n.4. Yet, the Government contends that this case is not the "proper vehicle" to resolve this long standing conflict. *See id.* This contention is based on three fallacies, each of which is debunked below.

1. The Government first argues that this Petition is "factbound" because there is a dispute as to when Mr. Pedernera received notice of the order of removal rendered against him. *See id.* at 7-8. That contention is belied by the record.

It is undisputed that the Government did not provide notice that a final order of removal had been rendered against Mr. Pedernera until 43 days after the order was signed. Certainly, the Government did not aver below, and has not now averred in its Response, that it ever served the order of removal on Mr. Pedernera prior to that time.

The Government relies on Mr. Pedernera's statement that he was asked on January 17, 2009 to consent to his deportation – which he declined to do - and that he was directed to tell his wife to provide his passport. *See* Resp. at 8. But Mr. Pedernera was never told that a removal order had already been rendered against him, much less given a copy of such order. That the Government apparently sought Mr. Pedernera's consent to removal is a far cry from notifying him that an order of removal had already been rendered.

More importantly, the Eleventh Circuit's order is not premised on this tortured reading of Mr. Pedernera's undisputed declaration. Rather, the Eleventh Circuit's order of dismissal is based on the pure legal conclusion that under §1252(b)(1), a "March 20, 2009, petition for review is untimely to review" an order of removal rendered on "January 8, 2009." *See* Pet. App. at 1a. The order reflects the Eleventh Circuit's narrow interpretation of §1252(b)(1) – an interpretation rejected by at least six other circuit courts.

Contrary to the Government's first argument, then, this Petition presents a unique opportunity to resolve the conflict the Government acknowledges exists about the period to seek review under §1252(b)(1).[1]

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[1] The Government correctly points out that §1252(b)(1) must be construed with strict fidelity to its "terms." *See* Resp. at 7 (*citing Stone v. I.N.S.*, 514 U.S. 386, 405 (1995)). This Petition, however, asks this Court to settle the circuit split over the interpretation of those "terms," namely whether the "date of the final order of removal" means the date the Government rendered the order or the date the Government complied with its obligation to serve the order on the individual ordered removed.

2. The Government's second argument is that unlike the cases cited in the Petition to demonstrate the circuit conflict, this case involves a removal order rendered by Immigration and Customs Enforcement ("ICE") and not a removal order issued by the Board of Immigration Appeals ("BIA"). *See* Resp. at 8-9. But this is a distinction without a difference.

As the Government acknowledges, a request for judicial review of an order of removal is governed by §1252(b)(1), irrespective of whether such order was rendered by ICE or by the BIA. *See* Resp. at 1-2; *see also* Pet. App. at 21a. There is no difference with respect to the period to seek review of a final order of removal, regardless of which Government agency issues it.

Notably, none of the cases cited in the Petition rely on any factor or circumstance unique to a BIA proceeding. These cases are premised on the principle that the review period of §1252(b)(1) would be illusory if the Government were not required to comply with its obligation to serve a final order of removal on the immigrant ordered removed. *See* Pet. at 13-16.

That principle, which arises from fundamental due process, applies to any petition for review governed by §1252(b)(1).

An immigrant who does not receive notice of an order of removal entered against him by ICE is in the same shoes as an immigrant who does not receive notice of a final order of removal by the BIA. Both agencies are required to serve a final order of removal on the immigrant ordered removed. *See* 8.C.F.R. 1003.1(f); 8 C.F.R. 103.5a(c). And, a petition for review of either must be filed within the 30 day period prescribed by §1252(b)(1). As such, decisions construing the right to seek review of removal orders issued by the BIA apply equally to the right to seek review of orders issued by ICE.[2]

If this Court agrees with the First, Second, Third, Fifth, Sixth, and Ninth Circuits and holds that the review period of §1252(b)(1) commences when the Government complies with

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[2] Notably, the Government did not hesitate to cite case law involving removal orders issued by the BIA in its jurisdictional brief in the Eleventh Circuit. *See* Pet. App. at 22a n.3 (*citing Dakane v. U.S. Att'y Gen.*, 399 F.3d 1269, 1272 n.3 (11th Cir. 2005)).

its obligation to serve the order of removal on the immigrant ordered removed, that ruling will apply with equal force to petitions seeking the review of final orders of removal issued by the BIA or ICE.

Accordingly, this case is ideal for resolving the long standing conflict about the review period of §1252(b)(1).

3. In its third objection to the Petition, the Government argues hat Mr. Pedernera was not entitled to a hearing before removal because he purportedly waived his right to contest removal.

This is a remarkable proposition since Mr. Pedernera has a constitutional right to due process before removal,[3] and the Government

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[3] An immigrant's right to due process before removal has been repeatedly upheld by this Court. *See Zadvydas v. Davis*, 533 U.S. 2491, 2500-01 (2001); *Reno v. Flores*, 50 U.S. 292, 306 (1993); *Yamataya v. Fisher*, 189 U.S. 86, 101 (1903); *see also Mathews v. Diaz*, 426 U.S. 67, 77 (1976); *Kwong Hai Chew v. Colding*, 344 U.S. 590, 596-598 (1953); *Yick Wo v. Hopkins*, 118 U.S. 356, 369 (1886).

never presented any evidence that Mr. Pedernera ever waived his due process rights.

In its Response, the Government relies on the Visa Waiver Program's general requirement that entrants sign a waiver of rights to represent that Mr. Pedernera did so, and cites an unsigned proof of entry form the Government submitted below. *See* Resp. at 10. The Government, however, has never produced any waiver form purportedly signed by Mr. Pedernera. Neither the Certified Administrative Record cited throughout the Response nor any of the Government's filings in this case contains any evidence that Mr. Pedernera waived his due process rights.

The Government has apparently taken the position in another case that a Visa Waiver Immigrant who waives his right to contest removal cannot argue that he did not knowingly and voluntarily execute the waiver. *See* Resp. at 10. That argument has no bearing in this case, however, because the Government has not presented any evidence that Mr. Pedernera waived his due process rights. In the absence of proof of a waiver, Mr. Pedernera has the right,

as any other immigrant, to contest his removal. *See* p. 7 n.3 *supra.* The Government cannot deny Mr. Pedernera his day in court on the mere assumption that he affirmatively waived these fundamental due process rights.[4] Nor does the possibility that the Government may try to prove waiver in the future make this case less appropriate to resolve the conflict about the commencement of the §1252(b)(1) review period.

The Government also suggests that Mr. Pedernera does not have any liberty interest in his underlying claim for adjustment of status based on marriage to a U.S. citizen because such relief is discretionary. But this argument misses the mark. The constitutionally protected interests at stake in this case are the right of every immigrant to have notice of a final removal

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[4] The Eleventh Circuit has explicitly refused to assume that an immigrant has waived his right to contest removal based merely on his admission through the Visa Waiver Program, in the absence of evidence of the purported waiver. *See e.g., Mokarram v. U.S. Att'y Gen.*, 2009 WL 511500, *2-4 (March 2, 2009). Yet, the Government was able to deport Mr. Pedernera – without ever having to satisfy its burden - and avoid judicial review because of the Eleventh Circuit's interpretation of §1252(b)(1).

order and the right to a hearing before removal. Irrespective of whether the adjustment of status is ultimately a form of discretionary relief, the Government cannot deprive Mr. Pedernera of his constitutional right to present evidence of his eligibility for this relief before summarily separating him from his U.S. citizen wife and family. The Government's discretionary authority arises only after Mr. Pedernera has been afforded a hearing. *See Patel v. Ashcroft*, 375 F.3d 693, 697 (8th Cir. 2004) (reasoning that the principle that an immigrant does not have vested rights in discretionary relief "refers to the [immigration judge's] ultimate discretionary decision to accord or deny the status after examining the merits of an eligible alien's application ... that would occur after the BIA remands the case to the IJ, who has the exclusive jurisdiction to decide the adjustment of status application."); *Bull v. I.N.S.*, 790 F.2d 869, 870-73 (11th Cir. 1986) (vacating order of removal to allow consideration of discretionary adjustment of status based on marriage to U.S. citizen). The Government has the discretion to ultimately grant or deny Mr. Pedernera's request

for adjustment of status. But it must give Mr. Pedernera an opportunity to be heard before it exercises that discretion.[5]

CONCLUSION

This Court should take the opportunity presented by this case to bring uniformity to the period to seek review of an order of removal under §1252(b)(1). Contrary to the Government's argument, this case, with its undisputed set of facts, is the ideal and proper vehicle for the resolution of this long standing conflict. Accordingly, the Court should grant the Petition.

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[5] The Government suggests in passing that this Court's review would not make any material difference in Mr. Pedernera's case. *See* Resp. at 7. This argument fails because, as the Government recognizes in another section of its Response, the order of removal prevents Mr. Pedernera from adjusting his immigration status – which he could otherwise do based on his marriage to a U.S. citizen - for ten years. *See* Resp. at 11 n.5

Respectfully submitted,

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