No. 23-929

IN THE
Supreme Court of the United States

HUGO ABISAÍ MONSALVO VELÁZQUEZ,

Petitioner,

v.

MERRICK B. GARLAND, ATTORNEY GENERAL

Respondent.

On Petition for a Writ of Certiorari to the
United States Court of Appeals for the Tenth Circuit

REPLY BRIEF FOR PETITIONER

HENRY D. HOLLITHRON
HOLLITHRON
ADVOCATES, P.C.
4155 East Jewell Avenue
Suite 1004
Denver, CO 80222

GERARD J. CEDRONE
Counsel of Record
DAVID J. ZIMMER
JONATHAN E. RANKIN
GOODWIN PROCTER LLP
100 Northern Avenue
Boston, MA 02210
gcedrone@goodwinlaw.com
(617) 570-1849

Counsel for Petitioner

June 3, 2024

TABLE OF CONTENTS

Introduction 1

Argument 3

A. The undisputed split will not resolve without this Court's intervention. 3

B. The question presented is important. 5

C. This case is a suitable vehicle. 7

D. The government, like the Tenth Circuit, is wrong on the merits. 10

Conclusion 12

TABLE OF AUTHORITIES

Cases:

Matter of Anselmo,
20 I. & N. Dec. 25 (BIA 1989) 3

Barroso v. *Gonzales*,
429 F.3d 1195 (9th Cir. 2005) 5

Dep't of Educ. v. *Brown*,
600 U.S. 551 (2023) 8

Lexmark Int'l, Inc. v. *Static Control Components, Inc.*,
572 U.S. 118 (2014) 10

Malley v. *Briggs*,
475 U.S. 335 (1986) 10

Meza-Vallejos v. *Holder*,
669 F.3d 920 (9th Cir. 2012) 3, 5, 6, 7

Salvador-Calleros v. *Ashcroft*,
389 F.3d 959 (9th Cir. 2004) 5

TransUnion LLC v. *Ramirez*,
594 U.S. 413 (2021) 8

Yee v. *City of Escondido*,
503 U.S. 519 (1992) 2, 9

Statutes:

8 U.S.C. §1229c(b)(2) 2, 10, 11, 12

8 U.S.C. §1229c(d)(1)(A) 8

8 U.S.C. §1252(a)(1) 9

8 U.S.C. §1252(b) 8

8 U.S.C. §1252(b)(6) 9

Regulations:

8 C.F.R. §1001.1(h) 9, 10, 12

8 C.F.R. §1240.26(e)(2) 4

73 Fed. Reg. 76,927 (Dec. 18, 2008) 4

Rules:

Fed. R. Civ. P. 6(a) 12

INTRODUCTION

The government acknowledges a disagreement between two circuits on the question presented. That split leaves noncitizens throughout the country confused about an issue as basic as the deadline for voluntary departure—a deadline that, when missed, leads to serious immigration consequences. The Court should end the uncertainty.

Unable to deny a split, the government suggests that the Ninth Circuit might reconsider its position. That almost surely will not happen. Because immigration courts follow Ninth Circuit precedent in cases arising in that jurisdiction, and because the government cannot seek review of BIA decisions in noncitizens' favor, the question presented is unlikely to reach the Ninth Circuit again. And even if it does, this issue has been settled there—correctly—for years. The government's rank speculation that the Ninth Circuit might change course is no reason to ignore the current confusion about the voluntary-departure deadline.

The government's insistence that the split is "shallow" misses the point. Before the decision below, noncitizens and IJs followed the Ninth Circuit's approach to weekend and holiday voluntary-departure deadlines, because Ninth Circuit precedent was the only word on the subject. Indeed, the immigration judge *in this case* appeared to follow the Ninth Circuit's rule. *See* Pet. 30. The Tenth Circuit's decision introduces confusion in every other circuit.

The government's jurisdictional and forfeiture objections are not serious. Its argument that petitioner failed to cite a particular regulation until the oral ar-

gument and rehearing petition below ignores the distinction between efforts to press a new "claim" in this Court (which are improper) and efforts to muster additional support for an existing claim (which are routine). *See Yee* v. *City of Escondido*, 503 U.S. 519, 534-535 (1992). The Tenth Circuit also issued its revised opinion *after* petitioner's rehearing petition, meaning it had a full opportunity to address the regulation. The government's argument that petitioner lacks standing, meanwhile, borders on frivolous. If petitioner loses this case, he is (to quote the government) "subject to [certain] statutory consequences." Opp. 14. Those consequences include a mandatory fine of at least $1,000. Petitioner's challenge thus presents a textbook example of an Article III controversy.

The government spends substantial time previewing its position on the merits, but its arguments are unpersuasive. Its central contention is that §1229c(b)(2) does not contain any express exceptions to the 60-day deadline. But courts routinely interpret similar statutes—with similarly unqualified language—to incorporate traditional rules for weekend and holiday deadlines. Congress drafted §1229c(b)(2) against that backdrop. And even if the government's merits arguments were right, this Court's intervention is still necessary, because the Tenth Circuit's decision creates confusion about the voluntary-departure deadline in most of the country.

The Court should grant the petition.

ARGUMENT

A. The undisputed split will not resolve without this Court's intervention.

Lower courts disagree about the voluntary-departure deadline for noncitizens in petitioner's position. The Ninth Circuit holds that when a voluntary-departure period "technically expires on a weekend or holiday, and an immigrant files a motion that would affect his request for voluntary departure on the next business day, such period legally expires on that next business day." *Meza-Vallejos* v. *Holder*, 669 F.3d 920, 921 (2012). The Tenth Circuit, by contrast, concluded that this period does not carry over to the next business day. Pet. App. 15a-16a. In every other circuit, no one knows what the deadline is.

The government does not dispute this conflict: it candidly acknowledges a "disagreement." Opp. 20-21. It instead argues that the Ninth Circuit might reconsider its position in light of either "post-*Dada* regulations" or the decision below. For at least two reasons, however, the government's speculation that the Ninth Circuit might change position is unfounded.

First, the Ninth Circuit likely will not have a chance to address this issue again. The BIA follows a court of appeals' precedent in cases arising in that circuit. *See Matter of Anselmo*, 20 I. & N. Dec. 25, 31 (BIA 1989). In any case in the Ninth Circuit, therefore, the BIA will deem a post-decision motion like Mr. Monsalvo's to be timely and will proceed to consider it on the merits. If the Board grants the motion, the case is at an end because the government cannot seek review of adverse BIA decisions. And if the Board de-

nies the motion on the merits and the noncitizen petitions for review, the *Chenery* doctrine will bar the government from raising timeliness as an alternative ground for affirmance. Either way, the timeliness determination will not reach the court of appeals.

Second, even if the Ninth Circuit found an opportunity to weigh in on the timeliness question, neither the government's "post-*Dada* regulations" nor the decision below is likely to lead to a different outcome. DOJ promulgated the regulations that the government cites on December 18, 2008—*i.e.*, they have been on the books for more than fifteen years. *See* Opp. 21 (citing 73 Fed. Reg. 76,927). These stale regulations will not prompt the Ninth Circuit to change its longstanding position. The regulations also do not speak to the question presented. Under 8 C.F.R. §1240.26(e)(2), a motion filed "after the time allowed for voluntary departure has already expired does not in any way impact the period of time allowed for voluntary departure." That language sheds no light on the split, which concerns how to go about calculating when the voluntary-departure period "has . . . expired" in the first place. Nor will the supposedly "careful analysis in the decision below" (Opp. 21) cause the Ninth Circuit to rethink its position. The Tenth Circuit did not rely on any reasoning that the Ninth Circuit did not already have an opportunity to consider, and its decision is wrong in any event (*see infra*, pp. 10-12).

At bottom, the government offers no grounds, other than rank speculation, to suggest that the conflict might resolve itself absent this Court's interven-

tion. And speculation about what *might* happen provides no basis for ignoring a circuit split—and the accompanying confusion—that exists *right now*.[1]

B. The question presented is important.

The government argues (at 21) that the split "is unlikely to have practical significance in a material number of cases." That blasé response underestimates the number of noncitizens this issue affects and the extent to which it matters. A finding that a noncitizen missed his or her voluntary-departure deadline comes with serious consequences, including monetary penalties and ineligibility for future relief or readmission. *See* Pet. 25-26. The thousands of individuals facing those potential consequences deserve a clear answer about the deadlines for avoiding them.

1. The government first suggests (at 21-22) that the split is not important because it is "shallow." That argument misunderstands the history and impact of the circuit conflict.

Until the decision below, the question presented had appeared settled for more than a decade. The Ninth Circuit grappled with issues surrounding weekend and holiday voluntary-departure deadlines in a series of decisions in 2004, 2005, and 2012. *See* Pet. 22-24. As even the government concedes (Opp. 19),

---

[1] The government argues (at 19) that the Ninth Circuit's decisions in *Salvador-Calleros* v. *Ashcroft*, 389 F.3d 959 (2004), and *Barroso* v. *Gonzales*, 429 F.3d 1195 (2005), are not part of the split. But the government concedes a conflict with *Meza-Vallejos* (Opp. 19), and that decision saw itself as following directly from *Salvador-Calleros* and *Barroso*. *See Meza-Vallejos*, 669 F.3d at 926-927. Regardless, even if the split were limited to *Meza-Vallejos*, the Ninth Circuit has held its position since 2012.

the last decision in that trio, *Meza-Vallejos*, squarely answered the question presented here. Since at least 2012, therefore, noncitizens and IJs have been able to follow the Ninth Circuit's uncontested guidance when confronting a 60-day voluntary-departure deadline that falls on a weekend or holiday. Indeed, the IJ *in this case* appeared to follow the Ninth Circuit's rule (before the BIA took a different view). *See* Pet. 30. When the agency follows the Ninth Circuit's rule, the issue will never reach the court of appeals (*see supra*, p. 3), so it is unsurprising not to see a large number of published appellate decisions grappling with once issue since the Ninth Circuit resolved it in 2012.

The fact that only two circuits have addressed this issue does not undermine the need for this Court's review—quite the contrary, it is why such review is important. In all but two circuits, noncitizens and their attorneys must hazard a guess about whether their jurisdictions will follow the Ninth Circuit's longstanding rule or adopt the Tenth Circuit's new position. The widespread lack of guidance on a question as fundamental as the deadline for avoiding severe immigration consequences is untenable. Nor is there any benefit to further percolation: the Ninth and Tenth Circuits have thoroughly articulated the issues on both sides of the split.

2. The government next suggests the split is unimportant because "most noncitizens already 'prepare and dispatch documents well in advance of [the] deadline.'" Opp. 21 (quoting Pet. App. 13a n. 8) (alteration in original). But the government's empirical claim is dubious, and its factual premise does not support its conclusion.

The government offers no support for its contention that "most" noncitizens file early. The source it cites—a footnote in the decision below—does not actually make that empirical claim. And there are good reasons to doubt the government's guesswork. Overnight shipping and in-person filing windows in immigration courts make it easy for noncitizens and attorneys to file on or near the filing deadline. This case is a ready example: petitioner's attorney dispatched his motion on Friday, December 10, through FedEx's priority overnight service, which guaranteed delivery by 11:30 a.m. on Monday, December 13 (which he understood to be the deadline based on *Meza-Vallejos*). A.R. 384. The government has no basis for suggesting that cases like this are not typical.

More broadly, the government's suggestion that noncitizens can simply file early is no reason for this Court to let the uncertainty persist. Litigants—and especially the often-unrepresented litigants in immigration proceedings—are entitled to understand the deadlines that apply to them.

3. Finally, the government minimizes the qualitative significance of the problem at hand. Even if this issue only affected a modest number of noncitizens, the consequences for those noncitizens would still be dramatic. *See* Pet. 25-26; *supra*, p. 5. The government does not dispute that the Court can easily eliminate any uncertainty: in deciding whether petitioner's filing was timely, the Court will provide a bright-line rule for the public to follow.

C. This case is a suitable vehicle.

1. Petitioner plainly has standing (*contra* Opp. 23-24) because he has suffered a concrete injury that is

traceable to the BIA's decision and redressable in this Court. *See Dep't of Educ.* v. *Brown*, 600 U.S. 551, 561 (2023). The BIA concluded that "the period of voluntary departure in [Mr. Monsalvo]'s case expired on Saturday, December 11, 2021." Pet. App. 35a. As a result, Mr. Monsalvo is subject to certain statutory consequences, including a mandatory minimum fine of $1,000. 8 U.S.C. §1229c(d)(1)(A); *see TransUnion LLC* v. *Ramirez*, 594 U.S. 413, 425 (2021) (monetary injuries are "obvious" examples of "traditional tangible harms"); Opp. 14 (acknowledging that "petitioner is subject to the statutory consequences"). The fact that the government has not yet *collected* any fine (Opp. 23-24) is of no moment. The statute speaks in mandatory terms: a noncitizen "*shall be* subject" to a minimum civil penalty. If Mr. Monsalvo loses, he will face that penalty; if he prevails, the factual predicate for the penalty is eliminated. Those circumstances create a live dispute for this Court to resolve.

2. The government likewise fails to identify any statutory jurisdictional impediment. It questions (at 22-23) whether the Tenth Circuit had jurisdiction under §1252(b) because petitioner sought review more than 30 days after the final order of removal. But petitioner is not seeking review of the removal order; he is seeking review of a separate motion to reconsider that does not affect the validity of the final order. The government identifies no case in which any court has questioned statutory jurisdiction where—as here—the noncitizen filed a petition for review within 30 days of the denial of the motion to reconsider.

To the contrary, it is clear that courts have jurisdiction in those circumstances. Although review of denial of a motion for reconsideration is "consolidated

with review of the [final] order," it is still a distinct proceeding with a separate jurisdictional foundation. §1252(b)(6) (contemplating "review . . . of a motion to reopen or reconsider"); *see* Gov't C.A. Br. 2 (acknowledging that §1252(a)(1) "confers . . . jurisdiction on the courts of appeals to review . . . the Board's denial of a motion to reconsider"). Mr. Monsalvo timely invoked that source of jurisdiction.

3. The government's argument that petitioner "forfeited any claim based on [8 C.F.R. §1001.1(h)] by failing to raise such a claim before the Board or include it in his panel-stage briefing" (Opp. 14) misunderstands petitioner's reliance on §1001.1(h) and the doctrine of waiver.

Mr. Monsalvo has consistently advanced the same argument throughout this litigation: a voluntary-departure deadline that falls on a Saturday is extended to the next business day. That is not a "claim based on" §1001.1(h) (Opp. 14); it is an argument that draws support from many authorities, of which §1001.1(h) is merely one example. *See* Pet. 31-33 (citing case law, statutes, rules and regulations, agency guidance, and historical tradition). Forfeiture doctrines do not prevent Mr. Monsalvo from citing §1001.1(h) as additional support for the argument he has made all along. *See Yee*, 503 U.S. at 534-535 ("Petitioners' arguments . . . are not separate *claims*. They are, rather, separate *arguments* in support of a single claim[.]").[2]

Nor does petitioner's reference to §1001.1(h) raise any prudential concerns. In the proceedings below,

---

[2] For the same reason, the government is wrong to suggest (at 16 n. 5) that petitioner "forfeited" an observation about the IJ's understanding of the statute.

Mr. Monsalvo cited §1001.1(h) both at oral argument and in his rehearing petition, and the government's rehearing opposition addressed the regulation head-on (without raising forfeiture). *See* Gov't C.A. Opp. to Pet. for Reh'g at 11-12. And the Tenth Circuit issued its revised opinion—the operative decision—after the parties joined issue on the effect of §1001.1(h) in their rehearing briefing. *See* Pet. App. 1a.

D. The government, like the Tenth Circuit, is wrong on the merits.

The government spends most of its brief previewing its merits argument. Opp. 12-19. Those arguments provide no reason to maintain the current uncertainty regarding the voluntary-departure deadline, and they are wrong in any event.

1. The government's principal contention (*e.g.*, at 13) is that §1229c(b)(2) establishes a 60-day departure period without any express exceptions. But because Congress legislates against the backdrop of historical tradition and settled understandings, courts routinely read facially unqualified statutes to incorporate common-law limitations unless there is a specific textual indication to the contrary. *E.g.*, *Lexmark Int'l, Inc.* v. *Static Control Components, Inc.*, 572 U.S. 118, 129, 132 (2014) (construing Lanham Act to incorporate zone-of-interests and proximate-cause limitations even though statute allows suit by "any person"); *Malley* v. *Briggs*, 475 U.S. 335, 339 (1986) (explaining that, even though §1983 "on its face admits of no immunities," it must be read "in harmony with general principles of tort immunities and defenses").

The same principle applies here. As petitioner explained (at 31-33), there is a long tradition of construing deadlines that land on weekends and holidays as falling on the next business day. Nothing in §1229c(b)(2) abrogates that principle, so it is presumptively incorporated into the statute. In other words, the fact that the statute says "60 days" without any further explanation *undermines* the government's position.

2. The government is unable to meaningfully dispute the long historical tradition on which petitioner relies. *See* Pet. 31-33. So it instead attacks a straw man, treating petitioner as having argued "that one is *never* required to 'take acts of legal significance' on a weekend or holiday." Opp. 17 (emphasis added).

That is not petitioner's contention. Instead, the petition explained (at 33) that the long-settled understanding that weekend and holiday deadlines are treated as falling on the next business day informs the meaning of §1229c(b)(2) *absent a contrary indication of congressional intent*. Because there is nothing in the text, structure, or history of §1229c(b)(2) to suggest that Congress derogated from that background norm, the statute presumptively incorporates it.

3. The government also argues (at 17) that any historical exception for deadlines falling on weekends or holidays does not apply here because those exceptions are motivated by "court or agency closures." But the very next page of the government's brief gives up the ghost, making clear that other considerations that remain relevant (including, for instance, religious accommodations, *see* Opp. 18) motivated these rules, too.

Tellingly, the norms surrounding weekend and holiday deadlines have persisted into the e-filing era, when physical court closures do not prevent litigants from complying with weekend or holiday deadlines. Pet. 28. Indeed, the government identifies *no* example where a weekend deadline is not presumed to extend to the next business day despite the availability of e-filing. The persistence of these rules shows that something more is at work.

3. Finally, the government is unable to negate the force of §1001.1(h). The government argues (at 15) that it would be "unlawful" for §1001.1(h) to "purport to describe how to calculate time periods" in §1229c(b)(2) because the statute uses unqualified language to establish a "substantive" limitation. That assumes—incorrectly—that the statute does not incorporate background principles regarding the extension of weekend deadlines.

The government's argument also proves too much. Virtually *all* statutes of limitations establish substantive rules using seemingly unambiguous terms. But no one disputes, for example, that the weekend-and-holiday rule embodied in Federal Rule of Civil Procedure 6(a) lawfully provides a framework for applying those facially unqualified statutes. Thus, the government is asking this Court either to upend settled expectations across numerous statutory contexts or to create a *sui generis* rule for the voluntary-departure context only.

CONCLUSION

The Court should grant the petition.

Respectfully submitted.

HENRY D. HOLLITHRON
HOLLITHRON
ADVOCATES, P.C.
4155 East Jewell Avenue
Suite 1004
Denver, CO 80222

GERARD J. CEDRONE
Counsel of Record
DAVID J. ZIMMER
JONATHAN E. RANKIN
GOODWIN PROCTER LLP
100 Northern Avenue
Boston, MA 02210
gcedrone@goodwinlaw.com
(617) 570-1849

Counsel for Petitioner

June 3, 2024