No. 23-929

IN THE
Supreme Court of the United States

HUGO ABISAÍ MONSALVO VELÁZQUEZ,

Petitioner,

v.

MERRICK B. GARLAND, ATTORNEY GENERAL,

Respondent.

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

REPLY BRIEF FOR PETITIONER

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October 28, 2024

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INTRODUCTION

The phrase "60 days" in §1229c(b)(2) incorporates a familiar background rule that excludes terminal Saturdays, Sundays, and holidays from the calculation of legal deadlines. That interpretation is the best reading of the statute in light of a common-law practice and a settled regulatory definition codifying the practice—both of which would have informed the meaning of the statutory text in 1996.

The government barely contests the regulatory point. When Congress drafted §1229c, the definition of "day" in immigration regulations had long applied the usual weekend-and-holiday rule to all manner of immigration deadlines. The government now concedes (Br. 43) that Congress was not only aware of this regulatory definition, but actually "intended" to "incorporate [it]" into *other* deadlines in the same section of IIRIRA as the voluntary-departure deadline. There is no evidence that Congress gave the word "day" two different meanings—one incorporating the preexisting regulatory definition, one not—in a single section of the same statute. For that reason alone, the Court should reject the government's interpretation.

The government also fails to overcome a more general common-law principle, entrenched by the time of IIRIRA's passage, that legally prescribed time periods do not expire on weekends or holidays. Unable to contest the state of the law in 1996, the government primarily argues that the contours of the common-law rule were different in eighteenth-century England. But English common law is only the starting point of the analysis: what ultimately matters is how the public would have understood the statutory text (and the background principles informing the text) "at the time

Congress adopted [it]." *Niz-Chavez* v. *Garland*, 593 U.S. 155, 160 (2021). In casting aside more recent developments, the government ignores a host of relevant authorities—including decisions showing that, by 1996, common-law norms about weekend deadlines applied to statutory as well as court-created deadlines. The government also argues that the common-law rule is inapplicable here because it does not apply to "private conduct." But unlike the government's examples—contracts and tort suits between private parties—§1229c(b) governs the authority of "[t]he Attorney General" to issue orders defining noncitizens' rights vis-à-vis the state. There is nothing "private" about that.

Just as important as what the government's brief says is what it does not say. The U.S. Code is teeming with statutes requiring something to be done in a set number of "days"—from the "ninety days" for petitioners to seek certiorari, 28 U.S.C. §2101(c), to the "thirty days" for newly arrived noncitizens to get fingerprinted, 8 U.S.C. §1302(a). In that sea of deadlines, the government fails to identify a *single one* that works the way it says §1229c(b)(2) does. But the wording of the voluntary-departure statute is not special. So it follows the usual rules for weekend and holiday deadlines—as countless immigration judges, including the immigration judge in this case, have recognized. AILA Br. 3-6; Former IJ Br. 8. This Court should adopt that straightforward reading and reverse.

ARGUMENT

I. The Tenth Circuit had jurisdiction.

The government begins by trying to prevent this Court from deciding the question on which it granted

certiorari, arguing (Br. 15-20) that 8 U.S.C. §1252(a)(1) did not give the Tenth Circuit jurisdiction. But the government expressly disavowed this argument below, where it conceded (C.A. Br. 2) that, "[i]n general," the court had jurisdiction "under [§1252(a)(1)]." And the government has already failed once to persuade this Court of its statutory-jurisdiction theory: its brief in opposition pressed the argument (at 22-23), but the Court granted certiorari without requesting briefing on any jurisdictional issues.

The Court should again reject the government's theory, which is plainly wrong. Section 1252(a)(1) authorizes "[j]udicial review of a final order of removal." That is exactly what petitioner sought: he asked the Tenth Circuit to review—and reverse—the parts of a "final order of removal" that imposed penalties for failing to timely depart. The government now insists that, to secure review, petitioner needed to dispute not just the terms on which he was ordered removed but also his *removability*. That made-up requirement has no basis in the statute or this Court's cases. And the government's argument rests on nonjurisdictional aspects of §1252 in any event, so its objection is also waived.

A. Section 1252 authorizes review of the challenged BIA decision.

1. The INA expressly authorized the Tenth Circuit to decide the question presented. Under §1252(a)(1), a noncitizen may obtain "[j]udicial review of a final order of removal" by filing a Hobbs Act petition in the court of appeals. Section 1252(b)(9) makes clear that this review encompasses "all questions of law and fact . . . arising from" the removal proceedings—including

any issues the agency resolved in a decision on a motion to reopen or reconsider. "[C]ourts have reviewed those [reopening and reconsideration] decisions for nearly a hundred years," and §1252(b)(6) "expressly contemplates" such review. *Reyes Mata* v. *Lynch*, 576 U.S. 143, 147-148 (2015).

Petitioner's Tenth Circuit petition, which challenged the BIA's resolution of the disputed timeliness issue, plainly sought "[j]udicial review of a final order of removal" within the meaning of §1252(a)(1). The voluntary-departure order in this case provided that, if petitioner "fail[ed] to voluntarily depart the United States within the time period specified," an alternate removal order with severe penalties—including a fine and bars to future immigration relief—would enter against him. Pet. App. 42-43a. By contrast, if petitioner filed a timely motion to reopen during the voluntary-departure period, that motion would "automatically" trigger an alternate removal order *without* any severe penalties. Pet. App. 43a. The Board's finding that petitioner's motion to reopen was untimely thus caused the penalty-laden removal order, as opposed to its penalty-free counterpart, to take effect. Pet. App. 10a-11a. It is hard to characterize petitioner's challenge to that consequential determination—which controls which penalties get written into the operative removal order—as anything *but* a request for "[j]udicial review of a final order of removal." §1252(a)(1).

2. The government's contrary argument distorts a single passage from *Nasrallah* v. *Barr*, 590 U.S. 573 (2020), in which the Court wrote that agency orders that "affect the validity of the final order of removal merge into the final order of removal for purposes of

judicial review." *Id.* at 582. From this line, the government somehow concludes (Br. 17-18) that a noncitizen must attack his *removability* if he wishes to challenge other terms of the final removal order. But that requirement appears nowhere in *Nasrallah*, let alone in the text of §1252(a)(1). Again, the statute authorizes "[j]udicial review of *a final order of removal*"—not "judicial review of removability" alone. Just as the power to review an order "granting" a preliminary injunction, 28 U.S.C. §1292(a)(1), naturally includes the power to review the injunction's terms, so the authority to review "a final order of removal" includes the authority to review the terms of that final order.

Here, petitioner plainly challenged the terms of his removal order—even if he did not question his removability. As already discussed, the operative removal order in this case is more than just a bare command that petitioner leave the United States. Instead, it contains three distinct terms:

(1) petitioner "shall be removed";

(2) petitioner "shall be subject to a [monetary] penalty"; and

(3) petitioner "shall be ineligible for a period of 10 years for any further relief under [certain INA provisions]."

Pet. App. 42a-43a. Petitioner's challenge bears directly on the second and third of those clauses. If the Tenth Circuit had granted the petition for review, the result would have been to delete Clauses 2 and 3 from the operative removal order. So the essential premise of the government's jurisdictional objection fails: success in the Tenth Circuit would have wiped out and

replaced—*i.e.*, "affect[ed] the validity of"—the removal order currently in force.[1]

3. Despite its insistence that this action is jurisdictionally deficient, the government ultimately suggests (Br. 19-20) that there would have been an easy fix: petitioner would have been "free to raise his current challenge" if he had brought it "together with" an attack on his removability. In other words, the Tenth Circuit had the power to reverse the challenged BIA order on the exact grounds petitioner now advances; he just needed to bundle those arguments with a challenge—no matter how insubstantial—to his removability.

Nothing in §1252 or this Court's cases erects that needless hurdle. Section 1252 authorizes judicial review of the final order *as a whole*; it does not require a court to review terms other than removability through some sort of extrastatutory supplemental jurisdiction. The fact that the government's position requires noncitizens to burden appeals courts with pro forma arguments advanced solely to raise *other* issues reveals the government's argument for what it is: an effort to fend off review in this case without eliminating review of other categories of agency decisions that circuit courts indisputably have jurisdiction to con-

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[1] Petitioner did not "concede[]" otherwise (Gov't Br. 19) in the court below—nor could he have, given the government's waiver of its argument on this issue. Petitioner's explanation that he was not asking the Tenth Circuit to "vacate the order of removal against him" (C.A. Reply 6) merely clarified that he was not challenging Clause 1 of the operative removal order. In the same passage, he reiterated that he *was* attacking "the civil penalties"—*i.e.*, Clauses 2 and 3.

sider. Gov't Br. 18-19 (challenging only the supposedly "idiosyncratic features of [this] case"). The Court should reject that good-for-this-case-only objection and proceed to the merits.

B. The government's objection relies on nonjurisdictional aspects of §1252.

Even if the Court disagrees with the foregoing analysis, it should still proceed to the merits because the government's objection is nonjurisdictional—and thus waived. The government assumes, without explanation, that §1252(a)(1)'s grant of authority to review "final order[s] of removal" places implicit *jurisdictional* limitations on the types of BIA orders a circuit court may review. But not all "provisions within §1252 are essential jurisdictional prerequisites." *Santos-Zacaria* v. *Garland*, 598 U.S. 411, 422-423 (2023) (emphasis omitted). Instead, statutory language is "jurisdictional only if Congress clearly states" that the language "marks the bounds of a court's power." *Harrow* v. *Department of Defense*, 601 U.S. 480, 484 (2024) (brackets and quotation marks omitted).

Section 1252(a)(1) does not state any such thing—let alone state it clearly. Unlike the jurisdictional terms of other subsections, §1252(a)(1) says only that "[j]udicial review of a final order of removal" is governed by the Hobbs Act. The Hobbs Act, in turn, grants the courts of appeals "jurisdiction of the proceeding on the filing and service of a petition to review"—without regard for whether the BIA order at issue is a final order of removal. 28 U.S.C. §2349; *see also* 28 U.S.C. §2342 ("Jurisdiction is invoked by filing a petition as provided by [28 U.S.C. §2344]."). Accordingly, the Tenth Circuit had jurisdiction under the Hobbs Act when petitioner filed a petition pursuant to

§2344; the separate question of whether his petition challenged "a final order of removal" under §1252(a)(1) is best understood as a substantive—and waivable—element of the cause of action.

APA proceedings in district court follow a similar substantive/jurisdictional line. Like §1252, the APA creates a cause of action for "judicial review" with certain limitations on the availability and scope of relief. 5 U.S.C. §§701-706. But this Court has repeatedly recognized that "[t]he judicial review provisions of the APA are not jurisdictional." *Air Courier Conference* v. *Am. Postal Workers Union*, 498 U.S. 517, 523 n. 3 (1991). Instead, jurisdiction comes from the federal-question statute, 28 U.S.C. §1331. The same logic applies here: the Hobbs Act confers jurisdiction, while any restrictions in §1252(a)(1) are *nonjurisdictional* limitations on the availability of relief. The government waived any such limitations by deciding not to raise them below.

II. The sixty-day period described in §1229c follows the familiar weekend-deadline rule.

There are two mutually reinforcing grounds for holding that §1229c(b)(2) follows traditional deadline-calculation rules: the statute presumptively incorporates both a common-law principle concerning the calculation of legal deadlines (Pet. Br. 16-34) and a regulatory definition of "day" that codifies that common-law principle (Pet. Br. 34-44). The government does not meaningfully contest the relevance of the regulation—in fact, it concedes that IIRIRA incorporated the regulatory definition into *other* deadlines. That concession cuts a clear path to petitioner's interpretation of §1229c(b)(2). And the broader common-law princi-

ples support the same result. At bottom, the government fails to show that anything in the statute deviates from the background presumptions about Saturday deadlines that prevailed in 1996.

A. A longstanding regulatory definition informs the meaning of §1229c.

1. Since the INA's earliest days, immigration regulations have codified common-law rules regarding deadlines that fall on weekends and holidays. When IIRIRA passed, those regulations defined the term "day" to exclude terminal weekends and holidays from the "time for taking *any action* provided" in immigration regulations—including deadlines as varied as those for getting fingerprinted, marrying a fiancé(e), or retaking a citizenship test. Pet. Br. 37-38 (emphasis added). This Court has repeatedly held that statutes presumptively incorporate such "longstanding administrative construction[s]," *Haig* v. *Agee*, 453 U.S. 280, 297-298 (1981), and nothing in IIRIRA suggests that Congress intended to displace that longstanding definition. Pet. Br. 35-44.

2. The government accepts the central premise of petitioner's argument: Congress enacted IIRIRA against the backdrop of the regulatory definition of "day." In particular, the government concedes (Br. 43) that "when Congress enacted time limits for reconsideration and reopening motions" in IIRIRA, it "incorporate[d] [the regulation]'s definition of 'day'" into *those* deadlines.

That concession should be dispositive. Congress created the voluntary-departure regime in the same statutory provision—§304 of IIRIRA—as the reopening and reconsideration deadlines. Pub. L. No. 104-

208, Div. C, §304, 110 Stat. 3009-546, 3009-593, 3009-597. And "a given term" presumptively "mean[s] the same thing throughout a statute." *Brown* v. *Gardner*, 513 U.S. 115, 118 (1994). The government points to nothing in IIRIRA's text or structure to suggest that the phrases "30 days" and "90 days" incorporate the regulatory definition of "day" in the parts of §304 dealing with reconsideration and reopening while the phrase "60 days" elsewhere in *the same section* deviates from that regulatory definition.

Instead, the government defends its dual-meaning theory by observing (Br. 43-44) that IIRIRA's reopening and reconsideration deadlines mirror regulatory deadlines promulgated five months before IIRIRA passed. Those pre-IIRIRA regulations, the government notes, would have incorporated the regulatory definition of "day"—and so IIRIRA's codification of those deadlines must also incorporate the regulatory definition. But, the government insists, statutory deadlines with no pre-IIRIRA regulatory analogue follow a different rule.

The government's argument, if accepted, turns a simple question—does a given time period in IIRIRA expire on a Sunday or Monday?—into a complicated historical investigation. IIRIRA used the word "days" to establish numerous deadlines. If the government is right, for *each* of those uses, someone trying to figure out how the statute treats weekends needs to dig through pre-IIRIRA regulations to determine whether the deadline had a preexisting regulatory analogue. Nothing in IIRIRA suggests that interpreting each use of the word "day" should require that kind of regulatory archaeology. The far better reading is that, because (as the government concedes) Congress was

aware of the longstanding regulatory definition of "day" in immigration law, it intended to incorporate that definition into IIRIRA wholesale.

3. Not content to scramble the statute, the government also makes a hash of the regulations. As petitioner explained (Br. 39), deadlines in immigration regulations often parrot statutory deadlines—thus making clear that the definition of "day" in 8 C.F.R. §1001.1(h) represents an administrative gloss on the statute itself. Faced with that conundrum, the government invents a new limitation on the regulatory definition of "day," arguing (Br. 43) that the definition does not apply to regulatory deadlines with a statutory twin. That approach has numerous problems.

As an initial matter, it flouts the regulatory text. The definition of "day" in §1001.1(h) applies "when computing the period of time for taking any action provided in this chapter." A regulatory time period that mirrors a statutory deadline is still "provided in" the regulations. *See* 8 C.F.R. §1003.23(b)(4)(ii) (providing "180 days" to seek rescission of an *in absentia* removal order); 8 U.S.C. §1229a(b)(5)(C) (same).

The government's argument also runs headlong into a separate regulation applying the weekend-and-holiday rule to the *statutory* one-year asylum deadline. Pet. Br. 40-41. The Department of Justice promulgated that regulation for the express purpose of ensuring "consistency" with §1001.1(h). 65 Fed. Reg. 76,121, 76,123 (Dec. 6, 2000). But the government's current view that §1001.1(h) does not inform statutory deadlines is decidedly *inconsistent* with that asylum regulation. The government offers no response.

Finally, the government's position would make it exceptionally difficult to determine whether the regulatory definition of "day" applies to a given deadline. The word "days" appears hundreds of times throughout title 8 of the Code of Federal Regulations. On the government's view, the only way to tell which of these regulatory deadlines actually follows §1001.1(h) is to trawl through the U.S. Code, identifying which deadlines have statutory counterparts. For those deadlines, the government says (Br. 43), the regulatory definition of "day" does not apply—unless, of course, the statutory counterpart has an even older regulatory ancestor, in which case the regulatory definition of "day" *would* apply.

The notion that Congress crafted such a convoluted mechanism for deciding whether a given deadline falls on a Sunday or Monday beggars belief. Even for lawyers, this scheme would create traps for the unwary: surely a reasonable lawyer could be forgiven for reading a regulation requiring action in "*n* days," combined with a regulation defining "day" to exclude final weekends, as establishing that any weekend deadline carries over to Monday. And in an area in which most people *lack* legal representation—and where missing a deadline can mean certain deportation—the government's Rube Goldberg approach to something as simple as calculating deadlines is particularly indefensible.

The answer, in reality, is far simpler: Congress incorporated the longstanding regulatory definition of

"day" *throughout* IIRIRA, not just in parts of it. The Court need go no further to resolve this case.[2]

B. A settled common-law rule informs the meaning of §1229c.

Even if the regulation alone does not resolve the meaning of §1229c(b)(2), an entrenched common-law rule does. Congress would have understood when it enacted IIRIRA that, unless a statute says otherwise, a legal deadline falling on a "non-juridical" day carries over to the next business day. That principle originated in English courts before the Founding; it took root in early American law; and it developed over centuries into an entrenched presumption. Pet. Br. 19-29. The government fails to rebut it.

1. The government ignores the state of the law in 1996, when Congress enacted IIRIRA.

a. By 1996, countless decisions, regulations, and court rules made clear that the common-law weekend-and-holiday rule applies to a host of deadlines—including statutory deadlines and deadlines falling on Saturdays. Pet. Br. 28-29. The government cannot meaningfully contest the state of the law in 1996, so it casts aside entire swaths of the relevant history.

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[2] The government half-heartedly suggests (Br. 44) that §1001.1(h) is irrelevant because deadline-clarifying regulations stem from the agency's power to establish procedural rules, and the voluntary-departure deadline is "unlike a procedural filing deadline." That, again, conflicts with the regulation itself, which applies to "the period of time for taking *any action*," not just filing deadlines. Moreover, as discussed in more detail below (at 17-18), the voluntary-departure deadline is a quintessential litigation deadline: it appears in a compulsory order issued by a government official in civil-enforcement proceedings.

To do so, the government claims (Br. 42) that any decision or court rule that expanded the weekend-and-holiday rule beyond its original applications is a "*change* [to] existing legal practice" that cannot inform the meaning of §1229c(b)(2). On that premise, the government limits its discussion almost entirely to eighteenth- and nineteenth-century decisions, relegating every post-1949 case and rule to a single paragraph (Br. 41-42). But that truncated analysis misunderstands the interpretive question. While the origins of the weekend-and-holiday rule help situate it in our modern jurisprudence (Pet. Br. 19-22), the dispositive issue is what §1229c(b)(2) meant "at the time Congress adopted [it]." *Niz-Chavez*, 593 U.S. at 160. In other words, the Court must consider background common-law principles as an ordinary reader would have applied them in 1996.

Invoking *Erie*, the government argues (Br. 42) that it is improper to consider modern iterations of historical common-law norms because "there is no federal general common law." *Rodriguez* v. *FDIC*, 589 U.S. 132, 136 (2020). But petitioner's argument does not invite judges to "craft [substantive] rule[s] of decision" of the kind that *Erie* eschewed. *Id.* Instead, petitioner is asking the Court to give a statute its ordinary meaning at the time of enactment. That exercise often involves reading statutory language in light of contemporary common-law rules. Pet. Br. 16-19. For example, this Court has interpreted CERCLA to incorporate "fundamental principle[s]" of shareholder liability that were "deeply ingrained" in American law when the statute passed—even though different rules applied in eighteenth-century England. *United States* v. *Bestfoods*, 524 U.S. 51, 61-62 (1998) (quotation marks omitted); *see* S. Williston, *History of the Law of*

Business Corporations Before 1800, 2 Harv. L. Rev. 149, 162 (1888); *see also* Pet. Br. 16-19. Nothing about that unremarkable methodology poses an *Erie* problem.

The government's attempt to downplay any twentieth-century developments—and, particularly, the extension of the *dies non* principle to Saturdays—also misstates the background principle at issue. The simplest articulation of the common-law rule is that deadlines falling on non-juridical days carry over to the next business day. Pet. Br. 19-29. But *which* days the law recognizes as non-juridical can change over time, because that question is external to the rule itself. So, for example, federal statutory deadlines do not carry over when they fall on Midsummer-Day, even though that holiday would have been a *dies non* in eighteenth-century England. Pet. Br. 20-21. But they *do* carry over when they fall on November 11, even though Veterans Day did not become a federal holiday until 1938. Ch. 210, 52 Stat. 351. These are not changes to the *rule*; they are changes to the *application* of the rule. The government is wrong to disregard them.

b. At least three of the government's specific challenges to the application of the common-law rule in this case rest on the government's refusal to engage with more recent history—and can be disposed of on that basis.

First, the government argues (Br. 24-25) that special Sunday-deadline rules in common-law England were limited to "judicial acts" requiring a court to be "actually sitting." But the background principle in this country when IIRIRA passed did not contain either limitation. By 1996, courts consistently applied

special weekend-deadline rules to acts that did not require a judicial presence, *see Union Nat'l Bank* v. *Lamb*, 337 U.S. 38 (1949) (filing of a cert. petition), or that "did not involve judicial proceedings" at all, *Sherwood Bros.* v. *District of Columbia*, 113 F.2d 162, 164 (D.C. Cir. 1940) (filing of tax-refund claim); *see also Street* v. *United States*, 133 U.S. 299 (1890) (action by the President).

Going a step further, the government argues (Br. 26-27) that any common-law rules about weekends and holidays are now defunct because federal courts are "always open." But the government ignores the other half of that development: the *same procedural rules* that have allowed today's courts to receive papers at any time have *reaffirmed* the traditional weekend-and-holiday rules. Pet. Br. 33; *see* Fed. R. Civ. P. 6(a). For example, this Court's decision in *Lamb* and the subsequent promulgation of Rule 30.1 have carried forward the traditional norms surrounding weekend deadlines (Pet. Br. 25-26) *even though* this Court "may receive filings and enter orders on any day" (Gov't Br. 27). The stubborn persistence of these principles in our 24/7 era refutes the government's account of the history.

Second, the government argues (Br. 27) that English courts and some early American courts "generally did not extend" Sunday-deadline rules "to *statutory* deadlines." Even on its own terms, the government's argument is questionable: as the government acknowledges, several early American cases recognized that weekend-deadline rules applied to statutes. Br. 28-30 (citing *Goswiler's Estate*, 3 Pen. & W. 200 (Pa. 1831); *Carothers* v. *Wheeler*, 1 Or. 194 (1855); *Barnes* v. *Eddy*, 12 R.I. 25 (1878)). Regardless, the government

again fails to account for the state of the law in 1996, by which time cases like *Lamb* had made clear that the weekend-deadline rule applies to statutory deadlines. Pet. Br. 25-27.

Third, the government argues (Br. 36) that any applicable background presumption does not apply to Saturday deadlines because "Saturdays had the same status as weekdays at common law." But the government's discursion on nineteenth-century barques (*id.*) again misses the point: by 1996, that ship had sailed. At the time of IIRIRA's passage, case law, court rules, regulations, and agency decisions—including the BIA's decision in *Matter of Escobar*, 18 I. & N. Dec. 412 (1983)—made clear that any background rules that covered Sunday deadlines also applied to Saturday deadlines. Pet. Br. 27-29.

In disregarding any decision of more recent vintage, or any court rule that departs from eighteenth-century English common law, the government ignores some of the best indicators of what Congress would have meant when it enacted §1229c(b)(2). These authorities consistently show that §1229c(b)(2) follows the usual rule for Saturday, Sunday, and holiday deadlines.

2. The deadline in this case does not involve "private conduct."

The government next challenges the application of the common-law rule on the ground (Br. 31) that it does not apply to "private conduct." But this case does not involve private conduct for two reasons.

First, by its terms, §1229c(b) is not addressed to any private party; it regulates the authority of the Attorney General. That is apparent from its very first

words: "*The Attorney General* may permit an alien voluntarily to depart the United States" if certain conditions are met. §1229c(b)(1) (emphasis added). The next paragraph then cabins the AG's authority, by providing that permission to depart "shall not be valid for a period exceeding 60 days." §1229c(b)(2). In this way, §1229c(b) resembles the statute in *Street*, which also granted an executive-branch official a time-limited power—and which the Court read in light of usual *dies non* principles. 133 U.S. at 302-306; *see* Pet. Br. 24; Gov't Br. 37 (agreeing that *Street* involved "the timing of executive-branch statutory authority").

Second, the voluntary-departure orders that issue pursuant to §1229c(b) do not pertain to "private" acts. A voluntary-departure order is the culmination of a government-initiated civil prosecution; the order defines the terms of the relationship between the noncitizen and the government and spells out the government-backed consequences for any failure to comply. Pet. App. 42a-43a; *see* Pet. App. 44a (describing the grounds for removal as "charges"). That order hardly compares to the "dispute between non-state parties"—a maritime tort suit involving damage to private property—to which the government tries to analogize (Br. 34-35). The more apt comparison is between a voluntary-departure order and the countless orders that enter in district court every day, in which judges compel private parties to take certain non-filing actions within a set period of time.[3] No one would doubt that

[3] *E.g.*, *Bioconvergence LLC* v. *Attariwala*, No. 1:19-cv-1745, 2019 WL 8139811, at *1 (S.D. Ind. Dec. 18, 2019) (10 days to give opposing party access to certain accounts); *Mary Kay Inc.* v. *Wilson*, No. 3:13-cv-377, 2013 WL 12100773, at *3 (N.D. Tex. Apr. 1, 2013) (30 days to surrender infringing articles to opposing party).

those orders follow the usual weekend-and-holiday rule. Fed. R. Civ. P. 6(a) (applying the rule to "*any* . . . court order" (emphasis added)). A voluntary-departure order is not materially different.

For all these reasons, the government's observation (Br. 31) that "no law prohibited petitioner from departing the United States" on a Saturday is beside the point. The question is not whether a private person may "travel out of the country" on a weekend or holiday (Gov't Br. 34); it is how to construe a statute defining the Attorney General's authority to issue compulsory orders in enforcement proceedings. The answer to that question, in 1996, was to apply the usual weekend-deadline rule.

3. The government fails to distinguish specific authorities reflecting the entrenched common-law rule.

The government challenges three specific cases that are particularly problematic for its approach to §1229c(b)(2), but its arguments are unpersuasive.

First, the government tries and fails to distinguish *Street*. The government's only response to that decision (Br. 37-39) is that the passage applying the *dies non* principle to the disputed statutory provision was a "general observation" rather than a "holding." But that is not how this Court has subsequently described it: in *Lamb*, the Court explained that *Street* "treat[ed] Sunday as a *dies non* under [the] statute." 337 U.S. at 40. Regardless, the dicta/holding categorization makes little difference here. The government does not dispute that *Street*'s discussion of the *dies non* principle accurately stated the law and influenced subsequent decisions. So even if it contains only a "general

observation," *Street* is strong evidence of the relevant background presumptions in existence at that time.[4]

Second, the government is unable to explain away *Lamb*, which held that the ninety-day certiorari deadline carried over from a Sunday. Pet. Br. 25-26. The government argues (Br. 39) that *Lamb* relied on Rule 6(a) rather than "common-law principles." But Rule 6(a) merely "amplifi[es]" preexisting norms, so reliance on it—in a case in which it did not actually apply—*was* reliance on the background principles that it embodies. Pet. Br. 27. The government also argues (Br. 40) that §1229c(b)(2) "indicates a firm deadline that does not exclude holidays." But there is no material difference between §1229c(b)(2) and the certiorari statute at issue in *Lamb* in that regard: both contain unqualified deadlines stated in days. *See* 8 U.S.C. §1229c(b)(2); 28 U.S.C. §2101(c) (1946, Supp. II). So Rule 6(a) informs the meaning of §1229c(b)(2) just as much as it informed §2101(c).

Third, and finally, the government is unable to brush aside the D.C. Circuit's decision in *Sherwood*. That decision explained that the common-law *dies non* rules embody "[b]usiness practice and accepted legal principle, apart from statute." 113 F.2d at 163. The government now claims (Br. 40) that *Sherwood*'s only support came from "four decisions in a footnote" that did not "reflect[] an established common law practice." But *Sherwood* did not just rely on four footnoted cases: it relied on four federal decisions *and* a number of state court decisions *and* state statutes *and* Rule 6(a) *and* "the habits and customs of the community" *and*

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[4] The government's attempt (Br. 40-41) to cabin *Monroe Cattle Co.* v. *Becker*, 147 U.S. 47 (1893), rests on the same flimsy distinction, and so fails for the same reason.

"long-established legal and commercial tradition." 113 F.2d at 163-164 & nn. 4-7. Together, the court explained, these authorities demonstrated a "tradition" against which Congress presumptively legislated, *id.*, and which the government fails to refute.[5]

* * *

By 1996, a wealth of authorities reflected an entrenched presumption about weekend and holiday deadlines. In hacking away at each individual tree, the government loses sight of the fact that it is inviting the Court to clear an entire forest. The Court should decline the invitation and apply the usual common-law rule.

C. Nothing in the statutory text or surrounding context negates the usual rule.

A statute deviates from an established background principle or regulatory construction only if the text of the statute indicates as much. Pet. Br. 16-19, 35-37. Mere silence is not enough: the statute must "expressly negate[]" a common-law rule or regulatory definition. *Lexmark Int'l, Inc.* v. *Static Control Components, Inc.*, 572 U.S. 118, 129 (2014); *see* Pet. Br. 16-19, 35-37. Section 1229c(b)(2) does nothing of the sort, *see* Pet. Br. 29-34, 43-44, and the government fails to show otherwise.

1. The government observes (Br. 21-22) that Webster's dictionary defines "day" to mean a "calendar day," but the question in this case is not what the word "day" means in the abstract. Instead, the issue is how

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[5] The fact that a pre-*Sherwood* D.C. Circuit decision reached a different result (Gov't Br. 41) does not undermine that tradition: *Lamb* and later authorities definitively settled whatever disagreement used to exist in the case law.

to construe the phrase "60 days" in the context of a statute establishing a limited time period within which some action must occur. Pet. Br. 16. In *that* context, the phrase "60 days" carries a specialized meaning that excludes terminal Saturdays, Sundays, and holidays. Pet. Br. 19-29; *supra*, at 8-21.

Precedent confirms that the government's dictionary definition is insufficient to overcome that specialized meaning. This Court routinely interprets statutory language "in light of . . . relevant background principles" even though the individual words, "[r]ead literally," "might suggest" a different meaning. *Lexmark*, 572 U.S. at 129-132 (explaining that the statutory phrase "any person who believes that he or she is or is likely to be damaged" does not literally mean "*any* person"); *see* Pet. Br. 16-19.

The government's resort to Webster's also runs into a more specific problem: the word "day" carried substantively the same dictionary meaning in 1949, when this Court decided *Lamb*. *See Webster's New International Dictionary* 672 (2d ed. 1937); *Black's Law Dictionary* 506 (3d ed. 1933). Nevertheless, this Court held that the term "ninety days" in the certiorari statute follows the usual common-law rule. 337 U.S. at 40-41. If Webster's were sufficient to resolve the current interpretive dispute, then *Lamb* would have come out differently.

2. The government also argues (Br. 22-23) that an obscure IIRIRA provision dealing with stowaways shows that if Congress had wanted to "exclude weekends and holidays" from the voluntary-departure period, it would have done so expressly. But the provision the government cites actually *deviates* from the

common-law rule by excluding *all* Saturdays, Sundays, and holidays from the relevant time period. *See* 8 U.S.C. §1231(c)(3)(A)(ii)(III) (requiring vessel owners to pay the costs of maintaining stowaways "for a period not to exceed 15 days (excluding Saturdays, Sundays, and holidays)"). The common-law rule and regulatory definition that codifies it, by contrast, exclude only *terminal* Saturdays, Sundays, and holidays. If anything, therefore, §1231(c)(3)(A)(ii)(III) provides an example of what a statute looks like when Congress does exactly what it chose *not* to do in §1229c(b)(2): deviate from established background understandings.

D. The government's interpretation will confuse noncitizens and burden the courts.

The consequences of the government's interpretation also counsel against its reading of §1229c(b)(2). Pet. Br. 44-48. Two of those consequences are worth reiterating.

First, an interpretation that makes the voluntary-departure deadline a *sui generis* exception to the usual weekend-and-holiday rule creates a needless procedural trap. Pet. Br. 47-48; Former IJ Br. 8-9. The government assures the Court (Br. 45) that there is no risk of confusion because it "seems unlikely that non-lawyers would normally" apply the usual rule. But the opposite is almost certainly true. Even on the government's view, practically all deadlines in removal proceedings (all except those parroting statutes that do not in turn parrot pre-statutory regulations) follow the usual weekend-and-holiday rule. Pet. Br. 48. So the only "unlikely" conclusion is that a *pro se* noncitizen will intuit that a new deadline-calculation

rule applies for the first and only time to the voluntary-departure order.

Second, the government's interpretation promises a wave of further litigation. By supplying a uniform background principle that controls in the absence of express language to the contrary, the weekend-and-holiday rule has ensured predictability both in immigration proceedings and elsewhere. Pet. Br. 48; AILA Br. 3-6. In the government's view, however, courts will now need to decide on a statute-by-statute and regulation-by-regulation basis whether a deadline follows the usual rules. Nothing in §1229c(b)(2) compels the Court to open those floodgates. In light of common-law principles, reaffirmed in longstanding immigration regulations, the statute follows the usual rule for weekend and holiday deadlines.

CONCLUSION

The Court should reverse the judgment below.

Respectfully submitted.

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Monday, October 28, 2024
(*see* Sup. Ct. R. 30.1)