No. 23-929

IN THE
Supreme Court of the United States

HUGO ABISAI MONSALVO VELAZQUEZ,
Petitioner,

v.

MERRICK B. GARLAND, ATTORNEY GENERAL,
Respondent.

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

BRIEF OF THE ROUND TABLE OF FORMER IMMIGRATION JUDGES AS *AMICI CURIAE* IN SUPPORT OF PETITIONER

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INTEREST OF *AMICI CURIAE*[1]

Amici curiae The Round Table of Former Immigration Judges are former immigration judges and former members of the Board of Immigration Appeals ("BIA" or "Board"), listed in Appendix A, with many years of service in, and intimate knowledge of, the U.S. immigration system. *Amici* have devoted their careers to improving the efficiency and fairness of the U.S. immigration system, even after departing the bench. *Amici* submit this brief to elaborate on several ways that the decision below's misreading of 8 U.S.C. § 1229c(b) undermines both of those interests.

INTRODUCTION AND SUMMARY OF ARGUMENT

Petitioner correctly explains that, if the sixtieth calendar day of a noncitizen's "voluntary departure" period under Section 1229c(b) is not a business day, that period continues through the next business day. *Amici* write to underscore that this conclusion not only follows from generally applicable principles of statutory construction, but also accords with established immigration law practice. Further, the rule adopted below would have untenable consequences for already-overburdened immigration courts, noncitizens to whom the nation owes duties enshrined in international law, and U.S. citizens who will share in the draconian consequences visited on noncitizens caught in a trap for the unwary laid in a most unlikely place.

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[1] Pursuant to Supreme Court Rule 37.6, counsel for *amici* represent that they authored this brief in its entirety and that none of the parties or their counsel, nor any other person or entity other than *amici* or their counsel, made a monetary contribution intended to fund the preparation or submission of this brief.

ARGUMENT

I. THE *DIES NON* RULE IS CONSISTENT WITH LONG-SETTLED PRACTICE IN THE IMMIGRATION COURTS

A. The BIA Adopted the *Dies Non* Rule Four Decades Ago

Like many other statutes, Section 1229c(b) incorporates the common-law rule that statutory and other legal deadlines cannot lapse on days the courts are closed (*dies non juridicus* or *dies non*). As petitioner notes (at 28-29, 37), that principle is consistent with decades of BIA practice under *Matter of Escobar*, 18 I. & N. Dec. 412, 413 (BIA 1983).

Escobar concerned a regulation requiring that a notice of appeal from an immigration judge's decision to the Board "must be taken within 10 days after" the decision is rendered. *Id.* There, that period happened to end on a Saturday on which the relevant local office "apparently" was closed; the notice was filed on the next Monday. *Id.* at 414. The government argued that the notice came too late. It pointed to a Board regulation that, by its terms, followed an old federal-court rule by treating only Sundays and legal holidays (not Saturdays) as *dies non*. *See id.* at 413.[2]

The Board disagreed. It explained that Congress had since jettisoned the old rule with new "language" materially identical to today's Federal Rule of Civil Procedure 6(a), which "clearly reflects Congress' intent not to include as the last day of an appeal period a day in which the clerk's office is not open for business." *Id.* at 414. Pointing both "to the Congressional

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[2] *See also* Fed. R. Civ. P. 77 advisory committee's notes to 1963 amendment (discussing change that "authorize[d] closing of the clerk's office on Saturday as far as civil business is concerned").

authorization and approval manifested in" Rule 6(a) and to "the interest of fairness," the Board held that deadlines falling on a Saturday would be treated like those falling on Sundays or legal holidays. *Id.* Within a few years, the underlying regulation was amended to accord with *Escobar*'s "interpretation of the term 'day'" and make it generally applicable (not limiting it to the notice-of-appeal deadline). Final Rule, *Aliens and Nationality; Rules of Procedure for Proceedings Before Immigration Judges*, 52 Fed. Reg. 2931, 2935 (Jan. 29, 1987); *see also* Pet. Br. 37-38 (discussing modern descendants of *Escobar*).[3]

B. Parallel Principles Prevent the Arbitrary Application of Other Immigration Law Timing Rules

Consistent with the BIA in *Escobar*, the courts of appeals long have insisted that immigration law timing rules must not, in operation, arbitrarily impose severe consequences on noncitizens.

For example, in *Duarte-Ceri v. Holder*, the Second Circuit held that a person born in the evening would remain "under the age of eighteen years" even the morning of his eighteenth birthday – relevant there because a provision turning on that phrase allowed a petitioner to claim derivative U.S. citizenship from his mother's naturalization that morning. 630 F.3d 83, 87-89 (2d Cir. 2010). Recognizing the phrase as ambiguous, the Second Circuit looked to a century of cases from this Court explaining that timing rules like these should not be read to constitute "'unreasonable and arbitrary rules'" – a principle that applies with

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[3] Notably, the BIA incorporated this background principle despite regarding this deadline at the time as both "mandatory and jurisdictional." *Da Cruz v. INS*, 4 F.3d 721, 722 (9th Cir. 1993); *see Escobar*, 18 I. & N. Dec. at 414.

special force when the "'measure'" of "'deportation'" is at stake. *Id.* at 88-89 (quoting *Town of Louisville v. Portsmouth Sav. Bank*, 104 U.S. 469, 475 (1881), and *Fong Haw Tan v. Phelan*, 333 U.S. 6, 10 (1948)). The Second Circuit also relied on this Court's "long-standing presumption to construe 'any lingering ambiguities'" in a statute putting deportation at stake "in favor of" the noncitizen. *Id.* at 89 (quoting *INS v. Cardoza-Fonseca*, 480 U.S. 421, 449 (1987)). And it pointed to BIA precedent that "held that, when considering 'the great privilege of citizenship,' 'the method of arriving at the computation is to be in the interest of the person affected by it.'" *Id.* at 90 (quoting *Matter of L-M- and C-Y-C-*, 4 I. & N. Dec. 617, 620 (BIA 1952)).

For another, in *Irigoyen-Briones v. Holder*, the Board had held that it lacked jurisdiction to consider a filing that arrived a day late because of a post office error. 644 F.3d 943, 945 (9th Cir. 2011). The Ninth Circuit vacated that decision, emphasizing that the Board could not mitigate its heavy "caseload by arbitrarily enforcing claim-processing rules" – and that "rigidity is fundamentally unfair if people cannot assure their own compliance." *Id.* at 951. And the court chastised the Board for failing to create a modern electronic filing system – leaving noncitizens at the mercy of mail-service flukes. *See id.*

For a third, in *Avila-Santoyo v. U.S. Attorney General*, the Eleventh Circuit joined many others in holding that the 90-day statutory deadline by which to move to reopen an order of removal is subject to equitable tolling – noting that a wooden application of that deadline would be inconsistent with the BIA's own power to reopen a proceeding *sua sponte*. 713 F.3d 1357, 1363 (11th Cir. 2013) (per curiam); *see also*

Lugo-Resendez v. Lynch, 831 F.3d 337, 343-44 (5th Cir. 2016) (joining the "nine other circuits" that had reached the same conclusion); 8 C.F.R. § 1003.2(a) (describing same power).[4] Although this case does not involve a request for equitable tolling, the fundamental point holds: immigration law incorporates the same common-sense background rules that govern by default elsewhere in the law.

II. RESPONDENT'S CONTRARY READING OF SECTION 1229c(b) IS UNREASONABLE AND ARBITRARY

As petitioner explains (at 2, 14-15, 43-44) (citing *Haig v. Agee*, 453 U.S. 280, 297-98 (1981)), Section 1229c(b) incorporates (rather than rejects) these common-sense background principles. Respondent's contrary position has nothing to recommend it.

A. The Voluntary Departure Period Does Not Arbitrarily Limit a Noncitizen's Right To Move To Reopen Her Removal Proceedings

The decision below exempted Section 1229c(b) from the norms discussed above only by reading it in abstract isolation from the structure of immigration proceedings. The court acknowledged that a noncitizen granted permission to voluntarily depart the nation enjoys a right to file a motion to move to reopen her removal proceedings – the filing of which suspends the severe penalties for failing to voluntarily depart by the deadline (discussed below). App. 11a-12a (citing

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[4] Although the Department of Justice tried to narrow the authority to reopen a proceeding *sua sponte* in 2020, *see* Final Rule, *Appellate Procedures and Decisional Finality in Immigration Proceedings; Administrative Closure*, 85 Fed. Reg. 81,588 (Dec. 16, 2020), that order was enjoined and never went into effect, *see Bent v. Garland*, 2024 WL 3819829, at *5 n.3 (9th Cir. Aug. 15, 2024).

8 C.F.R. § 1240.26(b)(3)(iii), (e)(2)). It also recognized that the government's own practice manuals (channeling *Escobar*) follow the traditional rule, too (*see id.*) – stating over and over that, in cases where a deadline notionally expires on a day that is not a business day, it "is construed to fall on the next business day." *E.g.*, Exec. Off. for Immigr. Rev., U.S. Dep't of Justice, *Immigration Court Practice Manual* § 3.1(c)(2)(A) ("[i]f" an immigration judge directs "a party to file a brief by" a date certain and that date "falls on a Saturday, Sunday, or legal holiday, the deadline is construed to fall on the next business day"), https://www.justice.gov/eoir/book/file/1528921/dl?inline.[5] Yet the court below still said it "makes sense" that the same word ("day") means one thing "when filing appeals, motions, or other documents in immigration court or with the BIA," but something else "when interpreting a maximum time period designated by statute." App. 13a. That is because, the court below thought, one is free to leave the nation on a weekend or legal holiday, regardless of whether the courts are closed. *Id.*

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[5] *See id.* § 3.1(c)(2)(B) (same rule for filings "due a specific period of time *prior* to a hearing"); *id.* § 3.1(c)(2)(C) (same rule for filings "due within a specific period of time *following* a hearing"); *id.* § 3.1(c)(2)(D) (same rule for filings "due within a specific period of time following an immigration judge's decision"); *id.* § 3.1(c)(2)(E) (same rule where "[a] response to a filing" is "due within a specific period of time following the original filing"); *see also id.* § 3.1(d)(3) (if "an unplanned outage" to the electronic-filing system "has occurred, filing deadlines that occur on the last day for filing in a specific case will be extended until the first day of system availability that is not a Saturday, Sunday, or legal holiday"); Exec. Off. for Immigr. Rev., U.S. Dep't of Justice, *Board of Immigration Appeals Practice Manual* § 3.1(b)(2), (5)(A) (similar rules), https://www.justice.gov/eoir/book/file/1528926/dl?inline; *id.* §§ 4.5(b)(1), 5.6)(e)(7), 5.7(f)(3) (similar rules).

But this artificial separation between the deadline to leave the nation and the availability of relief in immigration court conflicts with the applicable remedial scheme for reasons the court below overlooked. For example, consider a noncitizen granted permission to depart the nation voluntarily on a Wednesday, leaving her 60-day period to run on a Sunday. After making the many arrangements necessary to move to another country, she ends that last Friday evening with her bags packed and every intention to leave on Sunday. And then, at 1:00 AM on Saturday, she receives a phone call telling her that (say) a drug cartel suspicious of her dealings with the U.S. government, or an abusive relative, has been keeping tabs on her whereabouts and will be waiting to greet her when she lands.

Under those circumstances, the nation may well have treaty obligations *not* to force her to depart. *See* Convention Relating to the Status of Refugees, art. 31, July 28, 1951, 189 UNTS 137. And if her voluntary departure order had been issued on a Monday, a Thursday, or a Friday, or if she had gotten that phone call Thursday night, she could rush to file a motion to reopen that would table the voluntary departure deadline for the time being. But under the rule adopted below, bad luck instead leaves her to choose between taking her chances outside the nation *or* staying here knowing that this would require her to overstay her voluntary departure period.

It is hard to imagine a rule that more "arbitrarily" punishes "people" in a circumstance where they "cannot assure their own compliance." *Irigoyen-Briones*, 644 F.3d at 951. There is no reason to read Section 1229c(b) with the "rigidity," *id.*, necessary to find that rule in it.

B. Respondent's Contrary Rule Will Harm the Immigration Courts, Noncitizens, and U.S. Citizens

For years, undersigned *amici* applied timing rules like the one at issue here day-in, day-out from the bench – just like Article III judges do. And (also like them) *amici* did not calculate deadlines by counting aloud the required number of days while looking at a calendar. They used "cheat sheets" (once paper, now electronic), guidance like that set forth above, and their experience applying common-sense principles like the "rule that generations of lawyers have learned early and applied often: deadlines falling on a Saturday, Sunday, or public holiday carry over to the next business day." Pet. Br. 1. That appears to be precisely what the immigration judge in this case did – telling petitioner that his initial deadline to depart lapsed on a Monday (not, as the government would have it, on the prior Saturday, making any motion to reopen due the prior Friday). *Id.* at 45 (citing App. 70a). There is no reason to upend this settled practice and append a bolded asterisk to the cheat sheet reminding judges to treat the voluntary departure deadline differently from any number of other deadlines.

That is particularly true in light of the fallout that attends a failure to depart within the allotted window. A noncitizen subject to removal who "fails to depart the United States within the time period specified" for voluntary departure is subject to a stiff civil penalty and a 10-year bar on most forms of lawful status. *See* 8 U.S.C. § 1229c(d)(1); *see also id.* § 1182(a)(9). And the effects are hardly limited to the noncitizen subject to removal: for the many noncitizens who, like petitioner (*see* Br. 9-10), have U.S.-citizen family members, this paperwork issue could turn their lives upside-down for years to come. The "drastic"

consequences that fall on the people subject to the rule counsel for reading it in their favor. *See Fong Haw Tan*, 333 U.S. at 10.

The Court should recall that many individuals "of good moral character" subject to this provision, 8 U.S.C. § 1229c(b)(1)(B), are among the least well-equipped to spot traps for the unwary. The large majority of people who appear in immigration court are not represented by counsel – a fact empirical evidence shows leads to "extreme differences in outcomes," compared to those who are. Michele R. Pistone, *The Crisis of Underrepresented Immigrants: Vastly Increasing the Number of Accredited Representatives Offers the Best Hope for Resolving It*, 92 Fordham L. Rev. 893, 898 (2023). Even today – 13 years after *Irigoyen-Briones* – noncitizens proceeding *pro se* still cannot file substantive legal documents electronically, leaving them vulnerable to the same arbitrariness observed in that case.[6] And the overwhelming majority of people appearing in immigration court have limited proficiency in English. *See* Exec. Off. for Immigr. Rev., U.S. Dep't of Justice, *Statistics Yearbook Fiscal Year 2018*, at 18, https://www.justice.gov/eoir/file/1198896/download.

Yet from the moment of the immigration judge's decision, these people are on a ticking clock to leave the country. There is no evidence that Congress would lay a timing trap – one contrary to the intuitions of every lawyer and the judge in this very case – to ensnare them, and there is no benefit to reading that harsh result into Section 1229c(b).

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[6] *See* Exec. Off. for Immigr. Rev., U.S. Dep't of Justice, *ECAS: Attorneys and Accredited Representatives*, https://www.justice.gov/eoir/ecas-attorneys-and-accredited-representatives (last visited Aug. 27, 2024).

CONCLUSION

The judgment of the court of appeals should be reversed.

Respectfully submitted,

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August 29, 2024

APPENDIX A

List of Amici

Hon. Steven Abrams, Immigration Judge, New York, Varick Street, and Queens Wackenhut, 1997-2013

Hon. Terry A. Bain, Immigration Judge, New York, 1994-2019

Hon. Sarah M. Burr, Assistant Chief Immigration Judge and Immigration Judge, New York, 1994-2012

Hon. Esmerelda Cabrera, Immigration Judge, New York, Newark, and Elizabeth, New Jersey, 1994-2005

Hon. Jeffrey S. Chase, Immigration Judge, New York, 1995-2007

Hon. George T. Chew, Immigration Judge, New York, 1995-2017

Hon. Joan V. Churchill, Immigration Judge, Washington, D.C. / Arlington, Virginia, 1980-2005

Hon. Lisa Dornell, Immigration Judge, Baltimore, 1995-2019

Hon. Bruce J. Einhorn, Immigration Judge, Los Angeles, 1990-2007

Hon. Noel A. Ferris, Immigration Judge, New York, 1994-2013

Hon. James R. Fujimoto, Immigration Judge, Chicago, 1990-2019

Hon. Annie S. Garcy, Immigration Judge, Newark, New Jersey, and Philadelphia, 1990-2023

Hon. Gilbert Gembacz, Immigration Judge, Los Angeles, 1996-2008

Hon. Jennie Giambastiani, Immigration Judge, Chicago, 2002-2019

Hon. Alberto E. Gonzalez, Immigration Judge, San Francisco, 1995-2005

Hon. John F. Gossart, Jr., Immigration Judge, Baltimore, 1982-2013

Hon. Paul Grussendorf, Immigration Judge, Philadelphia and San Francisco, 1997-2004

Hon. Charles M. Honeyman, Immigration Judge, New York and Philadelphia, 1995-2020

Hon. Rebecca Jamil, Immigration Judge, San Francisco, 2016-2018

Hon. William P. Joyce, Immigration Judge, Boston, 1996-2002

Hon. Samuel Kim, Immigration Judge, San Francisco, 2020-2022

Hon. Eliza C. Klein, Immigration Judge, Miami, Boston, Chicago, 1994-2015; Senior Immigration Judge, Chicago, 2019-2023

Hon. Christopher M. Kozoll, Immigration Judge, Memphis, 2022-2023

Hon. Elizabeth A. Lamb, Immigration Judge, New York, 1995-2018

Hon. Donn L. Livingston, Immigration Judge, Denver, New York, 1995-2018

Hon. Dana Leigh Marks, Immigration Judge, San Francisco, 1987-2021

Hon. Margaret McManus, Immigration Judge, New York, 1991-2018

Hon. Steven Morley, Immigration Judge, Philadelphia, 2010-2022

Hon. Charles Pazar, Immigration Judge, Memphis, 1998-2017

Hon. Laura L. Ramirez, Immigration Judge, San Francisco, 1997-2018

Hon. John W. Richardson, Immigration Judge, Phoenix, 1990-2018

Hon. Lory D. Rosenberg, Appellate Immigration Judge, Board of Immigration Appeals, 1995-2002

Hon. Susan G. Roy, Immigration Judge, Newark, 2008-2010

Hon. Paul W. Schmidt, Chairperson and Appellate Immigration Judge, Board of Immigration Appeals, 1995-2003; Immigration Judge, Arlington, Virginia, 2003-2016

Hon. Patricia M. B. Sheppard, Immigration Judge, Boston, 1993-2006

Hon. Ilyce S. Shugall, Immigration Judge, San Francisco, 2017-2019

Hon. Helen Sichel, Immigration Judge, New York, 1997-2020

Hon. Andrea Hawkins Sloan, Immigration Judge, Portland, 2010-2017

Hon. Gita Vahid, Immigration Judge, Los Angeles, 2002-2024

Hon. Robert D. Vinikoor, Immigration Judge, Chicago, 1984-2017

Hon. Polly A. Webber, Immigration Judge, San Francisco, 1995-2016

Hon. Robert D. Weisel, Assistant Chief Immigration Judge, Immigration Judge, New York, 1989-2016

Hon. Mimi Yam, Immigration Judge, San Francisco, Houston, 1995-2016