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Automatic Tolling of the Voluntary Departure Period - A Circuit Split Recent Development.

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RECENT DEVELOPMENT

AUTOMATIC TOLLING OF THE VOLUNTARY DEPARTURE PERIOD—A CIRCUIT SPLIT

KATHERINE A. TAPLEY

I. INTRODUCTION

The debate over the future role of immigrants in this country has come to the forefront in recent years.[1] Headlines continue to speak of controversies about how our nation's laws should treat individuals illegally living within the country. Various solutions have been proposed to deal with the issue. Some people have argued for amnesty, others have argued for guest-worker programs, and still others would like to see the deportation of all individuals illegally present within the country. These suggestions represent only a small fraction of the proposals that have been put forth.

1. *See* The White House: Comprehensive Immigration Reform, http://www.whitehouse.gov/infocus/immigration/ (last visited Nov. 13, 2007) (articulating the President's plan for immigration reform); *see also* Erin P. Billings, *Senate GOP Offers Its Agenda*, ROLL CALL, Feb. 15, 2007, *available at* 2007 WLNR 2991610 (explaining that immigration reform is among the key agenda items for Senate Republicans).

While this debate continues, our courts are forced to handle immigration issues using the existing laws on the books. Although an extensive body of immigration law exists, circumstances arise in which the law does not properly address the issue presented. It is in this area that courts struggle between applying the letter of the law and applying the spirit of the law. As they work through these issues, the courts are looking to Congress to help resolve some of these ambiguities and to develop comprehensive immigration reform.[2]

This recent development addresses a current circuit split regarding an interpretation of the law concerning "removal" of non-citizens found to be illegally present within the United States. Removal involves forcing the individual to leave the country, and it can happen for a variety of reasons.[3] An individual against whom removal is sought sometimes has the option to voluntarily leave the country.[4] If an individual qualifies for this option and chooses to leave voluntarily, he must depart within a set amount of time.[5] At issue is whether this fixed time period in which the individual must leave the country is tolled during the time it takes the immigration court system to review post-judgment motions and appeals.

Seven circuits have addressed the issue thus far, with the Fifth Circuit Court of Appeals creating the voice of dissent resulting in a circuit split.[6] Although four circuits held that the time period for

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2. *See* Press Release, United States Courts for the Ninth Circuit, Courts Look to New Congress for Leadership on Immigration Reform (Jan. 10, 2007) (on file with the *St. Mary's Law Journal*) (expressing that the courts are looking to Congress to create comprehensive immigration reform and articulating the "importan[ce] that Congress and the courts cooperatively ensure that new immigration law operates fairly and efficiently, without congestion and delay").

3. *See* 8 U.S.C.A. § 1182(a)(1)–(10) (West 2005 & Supp. 2007) (listing the categories of aliens subject to removal and not eligible to receive visas or admission into the United States).

4. *See id.* § 1229c(a)(1) (West 2005) (allowing certain aliens to receive "voluntary departure" and the right to leave the country on their own).

5. *See id.* § 1229c(b)(2) (capping the voluntary departure period at no more than sixty days).

6. *Compare* Banda-Ortiz v. Gonzales, 445 F.3d 387, 388 (5th Cir. 2006) (holding that a properly filed motion to reopen does not automatically toll the voluntary departure period), *with* Ugokwe v. U.S. Attorney Gen., 453 F.3d 1325, 1331 (11th Cir. 2006) ("[T]he timely filing of a motion to reopen tolls the period of voluntary departure pending the resolution of the motion to reopen . . . ."), Barroso v. Gonzales, 429 F.3d 1195, 1204 (9th Cir. 2005) (holding that even if the alien does not file a stay of the voluntary departure

voluntary departure is tolled during this process, the Fifth Circuit, and more recently the First and Fourth Circuits, have held that it is not.[7] The U.S. Supreme Court has recently decided to review a Fifth Circuit case addressing this issue.[8]

For the purpose of simplicity, the term "alien" in this recent development refers to a non-citizen of the United States, and the term "undocumented alien" refers to an alien in the country without the permission of the government.

Section II of this recent development provides a general background in the relevant areas of immigration law. Section III analyzes the circuit court decisions and reasoning. Section IV addresses the weaknesses of the Fifth Circuit's majority opinion

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period, the timely filing of a motion to reopen automatically tolls the departure period), Kanivets v. Gonzales, 424 F.3d 330, 331, 334–35 (3d Cir. 2005) (determining that the departure period was tolled with the filing of the motion to reopen), *and* Sidikhouya v. Gonzales, 407 F.3d 950, 952 (8th Cir. 2005) (adopting the rule that the departure period is automatically tolled if a motion to reopen is timely filed). *See generally* Azarte v. Ashcroft, 394 F.3d 1278, 1288 n.20 (9th Cir. 2005) (opining that "automatic tolling [even without a motion to stay the voluntary departure period] would be consistent with the legislative scheme" despite not reaching the issue because the appellant requested a stay of removal). The First and Fourth Circuits have also weighed in, joining the Fifth. *See* Chedad v. Gonzales, 497 F.3d 57, 64 (1st Cir. 2007) (agreeing with the Fifth Circuit that the filing of a motion to reopen does not automatically toll the voluntary departure period); Dekoladenu v. Gonzales, 459 F.3d 500, 507 (4th Cir. 2006) (following *Banda-Ortiz* and refusing to hold that the filing of a motion to reopen tolls the voluntary departure period).

7. *Compare Ugokwe*, 453 F.3d at 1331 ("[T]he timely filing of a motion to reopen tolls the period of voluntary departure pending the resolution of the motion to reopen ...."), *Barroso*, 429 F.3d at 1205 (determining that the voluntary departure period is tolled even if the alien does not file a stay of removal), *Kanivets*, 424 F.3d at 331, 334–35 (finding that the voluntary departure period was automatically tolled when the alien filed a motion to reopen), *Sidikhouya*, 407 F.3d at 952 (adopting the rule from *Azarte* that the timely filing of a motion to reopen tolls the voluntary departure period), *and Azarte*, 394 F.3d at 1288 n.20, 1289 (holding that the timely filing of a motion to reopen and motion to stay of removal tolls the voluntary departure period and opining that even without a motion to stay removal "automatic tolling would be consistent with the legislative scheme"), *with Banda-Ortiz*, 445 F.3d at 388 (concluding that a timely filed motion to reopen does not automatically toll the voluntary departure period). *See generally Chedad*, 497 F.3d at 64 (agreeing with the Fifth Circuit that the filing of a motion to reopen does not automatically toll the voluntary departure period); *Dekoladenu*, 459 F.3d at 507 (following *Banda-Ortiz* and refusing to hold that the filing of a motion to reopen tolls the voluntary departure period).

8. Dada v. Keisler, 128 S. Ct. 36, 36 (2007) (granting certiorari); *see* Dada v. Gonzales, 207 F. App'x 424, 425–26 (5th Cir. 2006) (not designated for publication) (upholding the BIA's decision refusing to toll the voluntary departure period during the pendency of a motion to reopen).

and its ramifications. Finally, Section V provides a suggestion for how the Supreme Court could resolve the issue and proposes a legislative change to create a more equitable statute.

II. BACKGROUND

The United States Citizenship and Immigration Services, formally the Immigration and Naturalization Service, "is responsible for the administration of immigration and naturalization adjudication functions and establishing immigration services policies and priorities."[9] The agency has the authority to bring proceedings in order to remove aliens illegally present in the United States.[10] These proceedings charge the aliens with "removability," or with being of such a status that the government can force the individual to leave the country.[11] The subsections below discuss several relevant provisions of the Immigration and Nationality Act.[12]

A. *Removability and Voluntary Departure*

Several categories of aliens are not eligible to receive visas or admission into the United States.[13] Among these categories are "[i]llegal entrants and immigration violators."[14] Such an alien is subject to removal from the country.[15] Many such individuals prefer not to be forcibly removed. The law provides several alternatives that can be pursued by removable aliens in order to avoid forcible removal.[16]

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9. About USCIS, http://www.uscis.gov/aboutus (last visited Nov. 12, 2007).

10. *See generally* 8 U.S.C.A. § 1182(a) (West 2005 & Supp. 2007) (addressing categories of aliens considered inadmissible into the United States); *id.* § 1229a(a)(2) (West 2005) (discussing the procedure for charging an allegedly removable alien).

11. *See id.* § 1229a(a)(2) (codifying the procedures for seeking removal).

12. Immigration and Nationality Act, 8 U.S.C.A. §§ 1101–1537 (West 2005 & Supp. 2007).

13. *Id.* § 1182(a)(1)–(10) (codifying a list of aliens not eligible to receive visas or admission into the United States).

14. *Id.* § 1182(a)(6).

15. 8 U.S.C.A. § 1229a(a)(2) (West 2005) (explaining that removal proceedings can be brought under any of the grounds listed in 8 U.S.C.A. § 1182(a)(1)–(10)).

16. *See, e.g., id.* § 1229b(b)(1)(A)–(D) (West 2005 & Supp. 2007) (allowing the Attorney General to grant an alien status as a lawfully admitted permanent resident in lieu of removal under certain circumstances); *id.* § 1229c (providing the option for an alien to

First, an individual can request "cancellation of removal."[17] This course of action, however, is only a possibility if the alien

> (A) has been physically present in the United States for a continuous period of not less than ten years immediately preceding the date of such application; (B) has been a person of good moral character during such period; (C) has not been convicted of [certain] offense[s] . . . ; and (D) establishes that removal would result in *exceptional and extremely unusual hardship* to the alien's spouse, parent, or child, who is a citizen of the United States or an alien lawfully admitted for permanent residence.[18]

If the alien meets these requirements, the Attorney General has the authority to "cancel removal" and change the alien's status to a lawfully admitted permanent resident.[19] Many individuals are unable to prove that their "removal would result in exceptional and extremely unusual hardship."[20] As such, a request for cancellation of removal is often sought in conjunction with a request for "voluntary departure."[21]

Voluntary departure allows the alien to leave the United States on his own and at his own expense.[22] "Voluntary departure serves the practical goals of reducing the costs associated with deporting individuals from the United States and providing a mechanism for illegal aliens to leave the country without being subject to the stigma or bars to future relief that are part of the sanction of deportation."[23] Further:

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request the ability to voluntarily leave the United States instead of being forced to leave by the government).

17. *See id.* § 1229b(b)(1)(A)–(D) (listing the requirements that an alien must meet in order to be eligible for cancellation of removal).

18. *Id.* (emphasis added).

19. 8 U.S.C.A. § 1229b(b)(1) (West Supp. 2007).

20. *Id.* § 1229b(b)(1)(D) (West 2005); *see also* Banda-Ortiz v. Gonzales, 445 F.3d 387, 388 (5th Cir. 2006) (explaining that Banda-Ortiz failed to meet the requirements for cancellation of removal but was instead granted voluntary departure).

21. *See generally* 8 U.S.C.A. § 1229c (West 2005 & Supp. 2007) (detailing the rules for voluntary departure); *Banda-Ortiz*, 445 F.3d at 388 (providing an example of a situation in which the alien charged with removability sought both cancellation of removal and voluntary departure).

22. 8 U.S.C.A. § 1229c(a)(1) (West 2005).

23. Azarte v. Ashcroft, 394 F.3d 1278, 1284 (9th Cir. 2005) (citing Inspection and Expedited Removal of Aliens; Detention and Removal of Aliens; Conduct of Removal Proceedings; Asylum Procedures, 62 Fed. Reg. 10,312, 10,324 (Mar. 6, 1997) (interim rule)).

> Voluntary departure affords the non-citizen "1) the ability to choose his own destination point; 2) the opportunity to put his affairs in order without fear of being taken into custody; 3) freedom from extended detention while the government prepares for his removal; 4) avoidance of the stigma of forced removal; and 5) continued eligibility for an adjustment of status." Because the individual pays for his own departure, the government saves money and avoids devoting additional time and resources to further proceedings.[24]

The government will not grant voluntary departure unless it is requested by the alien.[25] The granting of voluntary departure requires a showing "by clear and convincing evidence that the alien has the means to depart the United States and intends to do so."[26] In order to be eligible for such relief, the alien must also show that he "has been physically present in the United States for a period of at least one year immediately preceding the date the notice to appear was served"[27] and that he has been of "good moral character for at least five years immediately preceding the . . . application for voluntary departure."[28] Finally, the alien cannot be subject to deportation under certain provisions of the immigration code.[29] These include being subject to removal because of felonies or security-related reasons.[30]

Failing to depart is not taken lightly.[31] The statute imposes strict civil penalties for failing to depart within sixty days—the maximum voluntary departure period that can be granted by the

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24. Odogwu v. Gonzales, 217 F. App'x 194, 197 (4th Cir. 2007) (not designated for publication) (quoting *Banda-Ortiz*, 445 F.3d at 389–90).

25. *Banda-Ortiz*, 445 F.3d at 389 (quoting 8 C.F.R. § 240.25(c) (2006)).

26. 8 U.S.C.A. § 1229c(b)(1)(D) (West 2005); *accord Banda-Ortiz*, 445 F.3d at 388 (requiring Banda-Ortiz to prove he had the means and intent to depart the United States).

27. 8 U.S.C.A. § 1229c(b)(1)(A) (West 2005).

28. *Id.* § 1229c(b)(1)(B).

29. *See id.* § 1229c(b)(1)(C) (disqualifying individuals who are deportable under § 1227(a)(2)(A)(iii) and § 1227(a)(4)); *see also id.* § 1227(a)(2)(A)(iii) ("Any alien who is convicted of an aggravated felony at any time after admission is deportable."); *id.* § 1227(a)(4) (providing for deportation on the basis of security reasons, such as terrorism activities).

30. *See* 8 U.S.C.A. § 1227(a)(2)(A)(iii) (West 2005) ("Any alien who is convicted of an aggravated felony at any time after admission is deportable."); *id.* § 1227(a)(4) (making breaches of homeland security, such as terrorism activities, grounds for deportation).

31. *See id.* § 1229c(d)(1)(A)–(B) (West Supp. 2007) (providing that an alien who fails to depart can be liable for fines up to $5,000 and becomes ineligible to receive further relief under the statute for ten years).

immigration court.[32] Such failure can result in civil fines of up to $5,000 and ineligibility for similar relief within the next ten years.[33]

B. *General Proceedings and Appellate Review*

United States immigration judges hear immigration cases regarding removability.[34] Aliens have the right to representation in these proceedings, but they do not have the right to government-paid representation.[35] If the alien is not satisfied with the judge's ruling on removability, he can generally file one timely motion to reconsider and one timely motion to reopen.[36] The motion to reconsider must be filed within thirty days of when the immigration judge enters the final order.[37]

Motions to reopen are designed "to give aliens a means to provide new information relevant to their cases to the immigration authorities."[38] The motion to reopen must be filed within ninety days of the entering of the final order.[39] However, there is no time period in which the immigration authorities must rule on motions to reopen.[40] It typically takes the Board of Immigration Appeals (BIA) months or even years to rule on timely and properly filed motions to reopen.[41] In fact, in a 2004 press release, the Department of Justice explained that in 2002 there were more than 10,000 motions to reopen that "had been pending for more than three years" with an overall "back load of 56,000 cases."[42] If

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32. *See id.* § 1229c(b)(2) (West 2005) (allowing no more than sixty days for an alien to depart the country when granted the right to voluntary departure); *id.* § 1229c(d) (West Supp. 2007) (creating civil penalties for failure to depart within the allotted time period).

33. 8 U.S.C.A. § 1229c(d)(1)(A)–(B) (West Supp. 2007).

34. *Id.* § 1229a(a)(1) (West 2005).

35. *Id.* § 1229a(b)(4).

36. *See id.* § 1229a(c)(6) (providing details for a motion to reconsider, including the requirement that the motion be filed within thirty days from the entry of judgment); *id.* § 1229a(c)(7)(B) (explaining that a motion to reopen must state the new facts that the alien plans to argue).

37. 8 U.S.C.A. § 1229a(c)(6)(B).

38. Azarte v. Ashcroft, 394 F.3d 1278, 1283 (9th Cir. 2005).

39. 8 U.S.C.A. § 1229a(c)(6)(C)(i).

40. *Azarte*, 394 F.3d at 1284.

41. *See id.* ("[A]s of February 2002, the BIA had a back load of 56,000 cases, over 10,000 of which had been pending for more than three years.").

42. *See id.* (quoting Press Release, Dep't of Justice, Attorney Gen. Issues Final Rule Reforming Bd. of Immigration Appeals Procedure (Aug. 23, 2002)) (addressing the

an alien leaves the country before his motion to reopen is heard, he forfeits the right to have the motion heard.[43]

Appeals resulting from an immigration judge's decision of removability are taken to the BIA.[44] Following review by the BIA, appeals are taken to the federal court of appeals covering the geographic area of the immigration judge.[45] Not all BIA decisions are reviewable by the courts of appeals.[46] Federal statutes, in general, govern the scope of review that the courts have in these immigration matters.[47] In many cases, the reviewing courts give great deference to BIA decisions.[48] As is relevant to this recent development, circuit courts have the power to review BIA decisions denying motions to reopen and decisions denying motions to reconsider.[49] These decisions are reviewed "under a highly deferential abuse-of-discretion standard."[50]

C. *Tolling the Voluntary Departure Period*

If an alien is granted voluntary departure, the departure period begins to run when the judgment is rendered.[51] The Third,

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problems with the back load of work in the immigration courts).

43. *Id.* at 1281; Sidikhouya v. Gonzales, 407 F.3d 950, 951 (8th Cir. 2005).

44. 8 C.F.R. § 1003.1(b)(3) (2007).

45. *See, e.g.*, Banda-Ortiz v. Gonzales, 445 F.3d 387, 388 (5th Cir. 2006) (explaining that the court has the power to review the BIA decision according to 8 U.S.C.A. § 1252 (West 2005)).

46. *See* 8 U.S.C.A. § 1252(a)(2) (West 2005) (listing the situations in which judicial review of BIA decisions is not available).

47. *See generally id.* § 1252 (articulating the process for judicial review regarding orders of removal).

48. *See, e.g.*, Zhao v. Gonzales, 404 F.3d 295, 303 (5th Cir. 2005) (explaining that a BIA decision to deny a motion to reopen is reviewed "under a highly deferential abuse-of-discretion standard"); *accord Banda-Ortiz*, 445 F.3d at 388; Guerra-Soto v. Ashcroft, 397 F.3d 637, 640 (8th Cir. 2005).

49. *See* Sidikhouya v. Gonzales, 407 F.3d 950, 951 (5th Cir. 2006) (explaining that the court has jurisdiction to hear appeals from the BIA for denial of a motion to reopen); *accord Banda-Ortiz*, 445 F.3d at 388; *Zhao*, 404 F.3d at 303; *Guerra-Soto*, 397 F.3d at 640; *see also* Barroso v. Gonzales, 429 F.3d 1195, 1200 (9th Cir. 2005) (describing the court's ability to review denial of motions to reconsider).

50. *Zhao*, 404 F.3d at 303; *accord Banda-Ortiz*, 445 F.3d at 388 ("We review for an abuse of discretion."); *Guerra-Soto*, 397 F.3d at 640 ("[W]e have jurisdiction to review the BIA's decision for an abuse of discretion.").

51. *See, e.g.*, *Banda-Ortiz*, 445 F.3d at 395 n.11 (Smith, J., dissenting) (explaining the time periods of the voluntary departure period for petitioner Banda-Ortiz and starting the clock on the period at the time of judgment).

Eighth, Ninth, and Eleventh Circuit Courts of Appeals have held that a timely filed motion to reopen automatically tolls the voluntary departure period during the time it takes the court to hear and make a ruling on the motion.[52] To the contrary, the Fifth Circuit Court of Appeals has created a circuit split, holding that even if a motion to reopen is timely filed, the voluntary departure period is not tolled.[53] The First and Fourth Circuits have since agreed with the Fifth Circuit.[54]

Often, the immigration judge does not hear the motion to reopen before the voluntary period has expired.[55] Therefore, the alien is left in a situation in which he has timely filed the motion but has not received a response within the voluntary departure

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52. *See* Ugokwe v. U.S. Attorney Gen., 453 F.3d 1325, 1331 (11th Cir. 2006) ("[T]he timely filing of a motion to reopen tolls the period of voluntary departure pending the resolution of the motion to reopen."); *Barroso*, 429 F.3d at 1205 (holding that even if the alien does not file a stay of the voluntary departure period, the timely filing of a motion to reopen automatically tolls the departure period); Kanivets v. Gonzales, 424 F.3d 330, 331, 334–35 (3d Cir. 2005) (determining that the departure period was tolled with the filing of the motion to reopen); *Sidikhouya*, 407 F.3d at 952 (adopting the rule that the departure period is automatically tolled if a motion to reopen is timely filed); Azarte v. Ashcroft, 394 F.3d 1278, 1288 n.20 (9th Cir. 2005) (holding that the Azartes' filing of a motion to reopen and a motion to stay removal tolled the voluntary departure period). *Contra Banda-Ortiz*, 445 F.3d at 388 (holding that a properly filed motion to reopen does not automatically toll the voluntary departure period).

53. *See Banda-Ortiz*, 445 F.3d at 388 (declining to read automatic tolling of the voluntary departure period into the statutory scheme governing removal proceedings). *Contra Barroso*, 429 F.3d at 1205 (determining that a timely filed motion to reopen automatically tolls the voluntary departure period); *accord* Chedad v. Gonzales, 497 F.3d 57, 64 (1st Cir. 2007) (agreeing with *Banda-Ortiz*); Dekoladenu v. Gonzales, 459 F.3d 300, 507 (4th Cir. 2007) (following *Banda-Ortiz*); *Ugokwe*, 453 F.3d at 1331 ("[T]he BIA erred in declining to rule on her motion to reopen solely because of her failure to depart during her voluntary departure period."); *Kanivets*, 424 F.3d at 331, 334–35 (concluding that a motion to reopen tolls the voluntary departure period); *Sidikhouya*, 407 F.3d at 952 (affording the alien the right to receive a ruling on a motion to reopen despite the lapse of the voluntary departure period).

54. *See Chedad*, 497 F.3d at 64 (agreeing with the Fifth Circuit that the filing of a motion to reopen does not automatically toll the voluntary departure period); *Dekoladenu*, 459 F.3d at 507 (holding that the filing of a motion to reopen does not toll the voluntary departure period).

55. *See, e.g., Ugokwe*, 453 F.3d at 1327 (reviewing a situation in which the alien timely filed both a motion to reopen and a motion to stay the voluntary departure period, but the immigration judge did not rule on the motions before the voluntary departure period expired); *see also Azarte*, 394 F.3d at 1284 (addressing the lengthy process for review of motions to reopen and explaining that in 2002 more than 10,000 motions had been pending for more than three years).

period.[56] The high likelihood that an alien will end up in such a situation makes it even more important to understand whether or not the filing of such a motion automatically tolls the departure period.[57] A tension exists between the two statutory provisions regarding motions to reopen and voluntary departure.[58] In many cases, the alien is given the right to file a motion to reopen but must leave the country before the courts have an opportunity to rule on the motion.[59] The regulations that have been issued on the subject do not resolve this tension.[60]

III. THE CREATION OF A CIRCUIT SPLIT

A. *The Ninth Circuit Sets the Stage*

1. The Starting Point—*Azarte v. Ashcroft*

The Ninth Circuit first addressed the issue in *Azarte v. Ashcroft*[61] in early 2005.[62] Salvador Azarte and Celia Castellon (the Azartes) were Mexican citizens who illegally entered the

56. *See, e.g.*, *Ugokwe*, 453 F.3d at 1327 (leaving the alien in a position where she had overstayed the voluntary departure period because the immigration judge did not rule on her timely filed motions before the voluntary departure period expired).

57. *See Azarte*, 394 F.3d at 1284 (discussing the problem that many motions to reopen remain pending and unheard years after they were filed).

58. *Compare* 8 U.S.C.A. § 1229a(c)(7)(C)(i) (West 2005) (creating a ninety day window in which an alien may file a motion to reopen), *with id.* § 1229c(d)(1)(A)–(B) (West Supp. 2007) (imposing severe penalties for an alien's failure to depart within the voluntary departure period, including ineligibility for relief under the statute for ten years and fines up to $5,000).

59. *See* 8 U.S.C.A. § 1229a(c)(7) (West 2005 & Supp. 2007) (explaining that an alien generally has the right to file one motion to reopen stating the new facts that the alien plans to argue); *see also Azarte*, 394 F.3d at 1284 ("[A]s of February 2002, the BIA had a back load of 56,000 cases, over 10,000 of which had been pending for more than three years.").

60. *See Azarte*, 394 F.3d at 1285 ("[T]he Department of Justice . . . 'has not adopted any position' on the . . . effect of voluntary departure periods on motions to reopen." (quoting Inspection and Expedited Removal of Aliens; Detention and Removal of Aliens; Conduct of Removal Proceedings; Asylum Procedures, 62 Fed. Reg. 10,312, 10,324 (Mar. 6, 1997) (interim rule))).

61. Azarte v. Ashcroft, 394 F.3d 1278 (9th Cir. 2005).

62. *See id.* at 1288 n.20 (commenting in dicta that automatic tolling without a motion to stay voluntary removal and with a timely filed motion to reopen "would be consistent with the legislative scheme").

United States in 1987.[63] While living in the United States, the couple had two children who are both American citizens.[64] In 1997, the government charged the Azartes with removability.[65] The couple conceded the charge and requested cancellation of removal.[66] In the alternative, they requested voluntary departure.[67] The immigration judge granted the request for voluntary departure but denied the request for cancellation of removal.[68] In making this ruling, the immigration judge held that the Azartes had not met their burden of showing "that removal to Mexico would result in exceptional and extremely unusual hardship to their United States citizen children."[69] The judge based this decision (at least in part) on the fact that "[t]he Azartes' children, who were three and four years old at the time, were in good health and did not suffer from any mental, emotional, or physical problems at the time of the . . . hearing."[70]

Following this decision, the Azartes appealed to the BIA.[71] The BIA affirmed the decision and gave the couple thirty days to leave the country.[72] The BIA also noted the consequences for failing to

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63. *Id.* at 1280.

64. *See id.* (stating that the children were nine and ten at the time of the appeal).

65. *See id.* (charging the couple with removability because they were not admitted or paroled); *see also* 8 U.S.C.A. § 1182(a)(6)(A)(i) (West 2005) (providing that an alien is inadmissible if present in the United States without admission or parole).

66. *Azarte*, 394 F.3d at 1280. *See generally* 8 U.S.C.A. § 1229b(b)(1)(A)–(D) (West 2005 & Supp. 2007) (articulating the requirements that an alien must meet in order to be eligible for cancellation of removal).

67. *Azarte*, 394 F.3d at 1280. *See generally* 8 U.S.C.A. § 1229c (West 2005 & Supp. 2007) (providing the framework for voluntary removal).

68. *Azarte*, 394 F.3d at 1280; *see also* 8 U.S.C.A. § 1229b(b)(1)(A)–(D) (West 2005 & Supp. 2007) (codifying the requirements that must be met in order to be eligible for cancellation of removal); *id.* § 1229c(b)(1)(A)–(D) (West 2005) (codifying the requirements that must be met in order to be eligible for voluntary departure).

69. *Azarte*, 394 F.3d at 1280; *see also* 8 U.S.C.A. § 1229b(b)(1)(A)–(D) (West 2005 & Supp. 2007) (requiring, among other things, that the alien must show "that removal would result in exceptional and extremely unusual hardship to the alien's spouse, parent, or child, who is a citizen of the United States or an alien lawfully admitted for permanent residence" in order to be eligible for cancellation of removal).

70. *See Azarte*, 394 F.3d at 1280 (discussing the ruling made by the immigration judge who did not believe that the "exceptional and extremely unusual hardship" requirement had been satisfied).

71. Azarte v. Ashcroft, 394 F.3d 1278, 1280 (9th Cir. 2005); *see also* 8 C.F.R. § 1003.1(b)(3) (2007) (defining the appellate process in immigration cases in which appeals from immigration judges are first heard by the BIA).

72. *Azarte*, 394 F.3d at 1280; *see also* 8 U.S.C.A. § 1229c(b)(2) (West 2005) (requiring that the voluntary departure period granted by the immigration judge not be more than

depart on its order.[73] Before the voluntary departure period expired, the Azartes filed a timely motion to reopen.[74] This motion was accompanied with a motion to stay the departure period.[75] The motion to reopen was supported by evidence of new mental disabilities suffered by one of the children.[76] This evidence included a statement by a psychologist recommending a comprehensive treatment plan for the child.[77] Six months after these motions were filed, the BIA released a one-judge opinion denying the motions on the grounds that the Azartes had failed to depart the country within the voluntary departure period.[78]

The quandary in this case resulted from two conflicting statutes.[79] On the one hand, the Azartes had the right to file a motion to reopen within ninety days after the issuance of the final judgment.[80] On the other hand, they were required to leave the country within thirty days after the BIA issued its order affirming the immigration judge's denial of cancellation of removal and granting of voluntary departure.[81] The statutes are silent as to how these two provisions should be reconciled. In the realities of our overcrowded court system, this situation is likely to arise in more cases than not.[82]

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sixty days).

73. *Azarte*, 394 F.3d at 1280; *see also* 8 U.S.C.A. § 1229c(d)(1) (West Supp. 2007) (providing that an alien who fails to depart can be liable for fines up to $5,000 and becomes ineligible to receive further relief under the statute for ten years).

74. *Azarte*, 394 F.3d at 1280–81 (describing how the Azartes filed their motion to reopen with seven days remaining in their voluntary departure period).

75. *Id.* at 1281.

76. *Id.*; *see also* 8 U.S.C.A. § 1229a(c)(7)(B) (West 2005) (requiring that "[t]he motion to reopen shall state the new facts that will be proven at a hearing to be held if the motion is granted, and shall be supported by affidavits or other evidentiary material").

77. *Azarte*, 394 F.3d at 1281.

78. *Id.*; *see* 8 U.S.C.A. § 1229c(d) (West Supp. 2007) (providing penalties for aliens failing to depart within the voluntary departure period, including ineligibility for receiving any further relief under the statute for ten years after the violation).

79. *Compare* 8 U.S.C.A. § 1229a(c)(7)(C)(i) (West 2005) (allowing the alien ninety days to file a motion to reopen), *with id.* § 1229c(d)(1)(A)–(B) (West Supp. 2007) (establishing severe penalties for failure to depart including ineligibility for any relief under the statute for ten years and fines up to $5,000).

80. *See* 8 U.S.C.A. § 1229a(c)(7)(C)(i) (West 2005) (limiting the time in which to file a motion to reopen to ninety days).

81. *See id.* § 1229c(d)(1)(A)–(B) (West Supp. 2007) (creating penalties for failure to depart within the time allotted by the immigration judge).

82. *See Azarte*, 394 F.3d at 1284 (discussing the lengthy process for reviewing motions to reopen and explaining that many are left pending for months and even years).

The court reasoned that the BIA decision put the alien in an untenable position.[83] If an alien leaves the country before the motion to reopen is actually addressed by the court, the alien "forfeits any motion to reopen he may have filed because he is no longer within the United States."[84] The court interpreted the two statutory provisions at issue by following the rule of statutory interpretation that "courts are generally obligated to look at the statute as a whole."[85] This interpretation presumes that all statutory language has meaning.[86] "Under this statutory approach ... the statutory interpretation of the motion to reopen and voluntary departure provisions must be such that both provisions have force."[87] The court reasoned that the BIA's interpretation of the statutes eliminated the availability of motions to reopen to aliens who have been granted voluntary departure.[88] The court explained that the more appropriate interpretation, giving effect to all statutory provisions, would result in the voluntary departure period being tolled after the filing of a motion to reopen and a motion to stay the voluntary departure period.[89]

The *Azarte* court further explained that courts must interpret statutes in a manner that avoids absurd results.[90] The court reasoned that "[w]e find the notion nonsensical that Congress would have allowed aliens subject to voluntary departure to file motions to reopen but would have simultaneously precluded the BIA from issuing decisions on those motions."[91] The court held that it was "absurd to conclude that Congress 'intended to allow

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83. *Id.* at 1289.

84. Azarte v. Ashcroft, 394 F.3d 1278, 1281 (9th Cir. 2005) (citing 8 C.F.R. § 1003.2(d) (2006)).

85. *Id.* at 1287.

86. *Id.* at 1288.

87. *Id.*

88. *Id.*

89. *Azarte*, 394 F.3d at 1288.

90. *Id.* (citing United States v. Wilson, 503 U.S. 329, 334 (1992); Ma v. Ashcroft, 361 F.3d 553, 559 (9th Cir. 2004)); *see also* United States v. Turkette, 452 U.S. 576, 580 (1981) (explaining that absurd results should be avoided in statutory interpretation); Hughey v. JMS Dev. Corp., 78 F.3d 1523, 1529 (11th Cir. 1996) (explaining the presumption that Congress does not intend absurd results with its statutory language); *In re* Pac.-Atl. Trading Co., 64 F.3d 1292, 1303 (9th Cir. 1995) ("[The court] will not presume Congress intended an absurd result."); Bailey v. City of Lawrence, Ind., 972 F.2d 1447, 1452 (7th Cir. 1992) ("Courts are bound to construe a statute to avoid absurd results.").

91. *Azarte*, 394 F.3d at 1288–89.

motions to reopen to be filed but not heard.'"[92]

Finally the court relied on the principle that "'deportation statutes should be construed in favor of the alien.'"[93] The court explained that the application of that principle to the Azartes was clear in that "[p]reventing aliens from receiving decisions on their motions to reopen would eliminate all possibility of redress if their circumstances changed. If Congress desired such a draconian result, we are confident it would have said so."[94]

The Ninth Circuit Court of Appeals concluded that the BIA interpretation of the statutes was untenable.[95] The court held that the timely filing of the motions, as was the case with the Azartes, tolled the voluntary departure period until after a decision is reached by the BIA.

> To avoid creating an incompatibility in the statutory scheme, to implement a workable procedure for motions to reopen in cases in which aliens are granted voluntary departure, and to effectuate the purposes of the two statutory provisions, we hold that in cases in which a motion to reopen is filed within the voluntary departure period and a stay of removal or voluntary departure is requested, the voluntary departure period is tolled during the period the BIA is considering the motion.[96]

As discussed above, *Azarte* involved a situation in which the alien filed a motion to stay the voluntary departure period.[97] The court commented in dicta, however, that even if the appellant had not requested a stay, tolling the voluntary departure period "would be consistent with the legislative scheme."[98] These comments set the stage for several cases to follow.

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92. *Id.* at 1289 (quoting Shaar v. INS, 141 F.3d 953, 960 (9th Cir. 1998)).

93. *Id.* (quoting Kwai Fun Wong v. United States, 373 F.3d 952, 962 (9th Cir. 2004)); *accord* INS v. Cardoza-Fonseca, 480 U.S. 421, 449 (1987) (explaining the long-standing principle that "any lingering ambiguities in deportation statutes [should be construed] in favor of the alien" (citing INS v. Errico, 385 U.S. 214, 225 (1966); Costello v. INS, 376 U.S. 120, 128 (1964); and Fong Haw Tan v. Phelan, 333 U.S. 6, 10 (1948))).

94. Azarte v. Ashcroft, 394 F.3d 1278, 1289 (9th Cir. 2005).

95. *Id.*

96. *Id.*

97. *Id.* at 1281.

98. *Id.* at 1288 n.20 (citing Inspection and Expedited Removal of Aliens; Detention and Removal of Aliens; Conduct of Removal Proceedings; Asylum Procedures, 62 Fed. Reg. 10,312, 10,321, 10,325–26 (Mar. 6, 1997) (interim rule)).

2. Expanding the Doctrine—*Barroso v. Gonzales*

In *Barroso v. Gonzales*,[99] the Ninth Circuit directly addressed the situation in which there was no filing of a motion to stay the voluntary departure period.[100] Jose Juan Martinez Barroso was a Mexican citizen illegally residing the United States.[101] After thirteen years, he decided he wanted to "'put an end to his unregulated stay in the United States.'"[102] Unfortunately for Barroso, the "attorney" he hired to help him was not actually an attorney—he was simply an immigration consultant.[103] As such, Barroso's time in the immigration court system was filled with incorrect filings and missed deadlines.[104] The immigration judge denied his request for cancellation of removal and granted him voluntary removal.[105] After the BIA affirmed this decision, Barroso filed a motion to reconsider without filing a stay of voluntary departure.[106] His motion to reconsider provided two grounds for relief: "first, ineffective assistance of counsel, and second, that he was denied his statutory right to counsel of his choice when the [immigration judge] insisted on conducting the hearing without obtaining a valid waiver of his statutory right to such counsel."[107] The BIA denied his motion to reconsider, in part, on his failure to depart during the voluntary departure period.[108] This decision by the BIA, however, predated the

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

100. *Id.* at 1200, 1202 (explaining that Barroso only filed a motion to reconsider).

101. *Id.* at 1196. *See generally* 8 U.S.C.A. § 1182(a)(1)–(10) (West 2005 & Supp. 2007) (listing situations in which aliens are not eligible to receive visas or admission into the United States).

102. *Barroso*, 429 F.3d at 1196.

103. *See id.* (discussing how the person he hired as his "attorney" was just a "notarial"). Many aliens are taken advantage of by "notarials," also called "notarios," with this scenario being particularly prevalent in Southern California where Barroso lived. *Id.*

104. *See id.* at 1197–99 (walking through the missteps in Barroso's dealings with the immigration judge).

105. *See id.* at 1199 (providing failure to show "exceptional and extremely unusual hardship" as the reason for denying cancellation of removal).

106. *See Barroso*, 429 F.3d at 1202 (listing Barroso's arguments in his motion to reconsider as ineffective assistance of counsel and lack of access to his statutorily guaranteed right to counsel of choice).

107. *Id.* at 1200.

108. *See* Barroso v. Gonzales, 429 F.3d 1195, 1200 (9th Cir. 2005) (expressing the two grounds for denial of the motion as (1) failure to depart within the voluntary departure period, and (2) failure of the record to show prejudice from ineffective assistance of

Azarte decision.[109]

In *Barroso*, the court held true to the *Azarte* dicta, concluding that it was an abuse of discretion for the BIA to deny the motion on the basis of failing to leave the country within the voluntary departure period.[110] Barroso timely filed his motion to reconsider within his voluntary departure period.[111] The court held that Barroso's failure to file a motion to stay his voluntary departure period was irrelevant to this determination.[112] The court first reasoned that such a conclusion supports the idea of resolving ambiguities in immigration statutes "in favor of the alien."[113] Further, the court noted that in the recent regulations on the issue, the Department of Justice forwarded three possible solutions to the statutory conflict: "'[N]o tolling of any period of voluntary departure; *tolling the voluntary departure period for any period that an appeal or motion is pending*; or setting a brief, fixed period of voluntary departure (for example, 10 days) after any appeal or motion is resolved.'"[114] Two of the three suggested solutions include an automatic tolling provision.[115]

Next, the court reasoned that the statute contains no affirmative

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counsel).

109. *Id.* at 1202.

110. *See id.* at 1208 (holding the BIA decision to deny the motion based on a failure to leave within the voluntary departure period was an abuse of discretion); *see also* Azarte v. Ashcroft, 394 F.3d 1278, 1288 n. 20 (commenting that even if the appellant had not requested a stay of the voluntary departure period, tolling the period "would be consistent with the legislative scheme").

111. *See Barroso*, 429 F.3d at 1202–04 (discussing the methods for calculating the time periods for voluntary departure and for filing a motion to reconsider and concluding that the motion to reconsider was properly filed within the thirty-day voluntary departure period).

112. *See id.* at 1204–08 (discussing the reasons why failure to file a motion to stay should be irrelevant to the determination of the issue).

113. *Id.* at 1205 (citing INS v. St. Cyr, 533 U.S. 289, 320 (2001)); *see also* INS v. Cardoza-Fonseca, 480 U.S. 421, 449 (1987) (explaining the long-standing principle that "any lingering ambiguities in deportation statutes [should be construed] in favor of the alien" (citing INS v. Errico, 385 U.S. 214, 225 (1966); Costello v. INS, 376 U.S. 120, 128 (1964); Fong Haw Tan v. Phelan, 333 U.S. 6, 10 (1948))).

114. *Barroso*, 429 F.3d at 1205 (quoting Inspection and Expedited Removal of Aliens; Detention and Removal of Aliens; Conduct of Removal Proceedings; Asylum Procedures, 62 Fed. Reg. 10,312, 10,325–26 (Mar. 6, 1997) (interim rule)).

115. *Id.* (citing Inspection and Expedited Removal of Aliens; Detention and Removal of Aliens; Conduct of Removal Proceedings; Asylum Procedures, 62 Fed. Reg. 10,312, 10,325–26 (Mar. 6, 1997) (interim rule)).

requirement for filing a stay of voluntary departure.[116] Finally, the court addressed the concern that tolling increases the amount of time allowed for voluntary departure.[117] The statute restricts the ability of the BIA to extend the voluntary departure period beyond a specified period of time.[118] The court explained that "automatic tolling does not *extend* the amount of time granted for voluntary departure."[119] It "'merely tolls the running of that period.'"[120] "Tolling" refers to "'stop[ping] the running of.'"[121] In contrast, "extending" means providing "'[a] period of additional time to take an action.'"[122]

B. *The Eighth Circuit Followed Suit*

The Eighth Circuit was the next to hold consistently with the *Azarte* court. In *Sidikhouya v. Gonzales*,[123] Youssef Sidikhouya was a Moroccan citizen who entered the country on a visitor's visa.[124] He did not leave the country upon the expiration of the visa.[125] In December 2001, Sidikhouya was charged with removability.[126] He conceded removability and sought voluntary removal.[127] He also sought a continuance to await a decision on a labor certification, which would make him eligible for relief from removal.[128] The immigration judge denied his request for a continuance but granted voluntary removal.[129] Sidikhouya

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116. *Id.* (citing Desta v. Ashcroft, 365 F.3d 741, 749 (9th Cir. 2004)).

117. *Id.* at 1206.

118. *See* Barroso v. Gonzales, 429 F.3d 1195, 1206 (9th Cir. 2005) (addressing the time limitations for voluntary departure periods contained within the statute); *see also* 8 U.S.C.A. § 1229c(b)(2) (West 2005) (limiting the time period for voluntary departure to a maximum of sixty days).

119. *Barroso*, 429 F.3d at 1206.

120. *Id.* (quoting Bocova v. Gonzales, 412 F.3d 257, 269 (1st Cir. 2005)).

121. *Id.* (quoting BLACK'S LAW DICTIONARY 1525 (8th ed. 2004)).

122. *Id.* (quoting BLACK'S LAW DICTIONARY 622 (8th ed. 2004)).

123. Sidikhouya v. Gonzales, 407 F.3d 950 (8th Cir. 2005).

124. *Id.* at 951.

125. *Id.*

126. *Id.*; *see also* 8 U.S.C.A. § 1182(a)(1)–(10) (West 2005 & Supp. 2007) (listing circumstances which keep aliens from being eligible for admission).

127. *Sidikhouya*, 407 F.3d at 951. *See generally* 8 U.S.C.A. § 1229c (West 2005 & Supp. 2007) (providing the specifications and processes to be followed with requests for voluntary departure).

128. *Sidikhouya*, 407 F.3d at 951.

129. *Id.*; *see also* 8 U.S.C.A. § 1229c(b)(1) (West 2005) (listing the four requirements

appealed to the BIA.[130] In August 2003, he married an American citizen who filed a Petition for Alien Relative the following month.[131] In January 2004, the BIA affirmed the judgment denying relief from removal.[132] Before the expiration of his voluntary departure period, he filed a motion to reopen "seeking an immediate relative visa petition with eligibility for the bona fide marriage exception, and a stay of voluntary departure."[133] The BIA denied his motion solely on the basis that he had remained in the country beyond the expiration of the voluntary departure period.[134]

In reviewing the BIA decision, the Eighth Circuit court walked through the reasoning set forth in *Azarte*.[135] After reviewing the arguments, the court agreed that not automatically tolling the departure period "functionally deprived [aliens] of their statutory right to file a motion to reopen."[136] As such, the rule in the Eighth Circuit requires that an alien "must be afforded an opportunity to receive a ruling on the merits of his timely filed motion to reopen . . . ."[137]

C. *The Third Circuit Continued the Trend*

Not long after *Sidikhouya*, the Third Circuit Court of Appeals further agreed with its sister courts. Oleg Kanivets, a citizen of Kyrgyzstan, entered the United States at the beginning of 1998 with authorization to remain until January 20, 1999.[138] On August 20, 1999, he requested asylum alleging that he suffered religious persecution.[139] The immigration judge denied his motion for asylum but granted voluntary departure.[140] The BIA affirmed the

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an alien must meet in order to qualify for voluntary departure).

130. *Sidikhouya*, 407 F.3d at 951.

131. *See id.* (explaining that "his wife filed a Form I-130 Petition for Alien Relative" in September 2003).

132. *Id.*

133. Sidikhouya v. Gonzales, 407 F.3d 950, 951 (8th Cir. 2005).

134. *Id.*

135. *See id.* at 952 (reviewing the arguments put forward in *Azarte*).

136. *Id.*

137. *Id.*

138. Kanivets v. Gonzales, 424 F.3d 330, 331 (3d Cir. 2005).

139. *Id.*

140. *Id.* at 332.

ruling.[141] "Kanivets filed timely motions to reopen the order of removal, for a stay of removal, and a remand for adjustment of status based on his alien worker certification and his employer's pending immigration petition."[142] The BIA denied these motions because Kanivets refused to leave the country during the voluntary departure period.[143]

On appeal, the Third Circuit Court of Appeals reviewed the reasoning applied by the *Azarte* court.[144] The court addressed the "significant conundrum" in which Kanivets was placed.

> Under the BIA ruling, the result is that an alien who does not leave the United States within the time specified in the grant of voluntary departure is not entitled to adjustment of status. On the other hand, if the alien leaves the country within the period allowed for voluntary departure, he forfeits his motion to reopen.[145]

The court agreed with *Azarte* in that once the motion to reopen was timely filed, the BIA must review the motion on the merits.[146]

D. *The Fifth Circuit Creates a Circuit Split*—Banda-Ortiz v. Gonzales

1. Banda-Ortiz's Case

After the decisions in the cases discussed above, the Fifth Circuit heard *Banda-Ortiz v. Gonzales*.[147] In 2000, Banda-Ortiz, a Mexican citizen residing in the country since 1989, was charged with removability for being in the United States illegally.[148] He conceded being subject to removability, but he asserted "that his departure would impose 'exceptional and extremely unusual

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141. *Id.*

142. *Id.*

143. *Kanivets*, 424 F.3d at 333.

144. *See id.* at 334–35 (reviewing the analysis used by the *Azarte* court to determine that the BIA should review a timely filed motion to reopen even if the individual did not leave within the voluntary departure period).

145. *Id.* at 334.

146. *See id.* at 336 (holding in favor of Kanivets and requiring the BIA to hear his motion to reopen on the merits).

147. Banda-Ortiz v. Gonzales, 445 F.3d 387 (5th Cir. 2006).

148. *Id.* at 388; *see also* 8 U.S.C.A. § 1182(a)(6)(A)(i) (West 2005) (providing that an alien is subject to removability if "present in the United States without being admitted or paroled").

hardship' . . . on his older son and adoptive parents."[149] Banda-Ortiz also pleaded "in the alternative for voluntary departure."[150] The immigration judge denied his request for cancellation of removal.[151] However, the judge granted his request for voluntary departure after Banda-Ortiz showed "by clear and convincing evidence that he had the means and intent to depart from the United States."[152]

Banda-Ortiz appealed this decision to the BIA.[153] The BIA affirmed the decision of the immigration judge and allowed Banda-Ortiz thirty days in which to voluntarily leave the United States.[154] Banda-Ortiz did not depart.[155] Instead, he filed a motion to reopen his case in order to consider additional information about the alleged hardship to his family that removal would cause.[156] The BIA granted this motion and remanded his case back to the immigration judge in order to reconsider the new evidence.[157] Banda-Ortiz did not accompany his motion to reopen with a motion to stay his period for voluntary departure.[158]

On remand, the immigration judge ruled that because Banda-Ortiz had not filed a motion to stay his period for voluntary departure, he had become ineligible to pursue his request for cancellation of removal.[159] The BIA affirmed this ruling, holding that filing a motion to reopen did not toll his period for voluntary departure.[160] The BIA further "held that it . . . had erred in

149. *Banda-Ortiz*, 445 F.3d at 388; *see also* 8 U.S.C.A. § 1229b(b)(1)(D) (West 2005) (explaining that "exceptional and extremely unusual hardship" is one of the requirements necessary for cancellation of removal).

150. *Banda-Ortiz*, 445 F.3d at 388. *See generally* 8 U.S.C.A. § 1229c (West 2005 & Supp. 2007) (detailing the rules for voluntary departure).

151. *Banda-Ortiz*, 445 F.3d at 388. *See generally* 8 U.S.C.A. § 1229b(b)(1)(A)–(D) (West 2005 & Supp. 2007) (providing the criteria that an alien must meet in order to be considered for cancellation of removal).

152. *See Banda-Ortiz*, 445 F.3d at 388 (granting voluntary departure); *accord* 8 U.S.C.A. § 1229c(b)(1)(D) (West 2005) (providing that an alien must prove means and intent to leave the country in order to be granted voluntary departure).

153. *Banda-Ortiz*, 445 F.3d at 388.

154. *Id.*

155. *Id.*

156. *Id.*

157. Banda-Ortiz v. Gonzales, 445 F.3d 387, 388 (5th Cir. 2006).

158. *Id.*

159. *Id.*

160. *Id.*

initially granting the motion to reopen."[161]

2. Majority Opinion

Banda-Ortiz appealed the BIA's decision to the Fifth Circuit Court of Appeals.[162] The majority explained the situation as one "concern[ing] the interaction of several statutory provisions and an administrative regulation concerning voluntary departure and motions to reopen."[163] This conflict, as acknowledged by the court, was the same conflict previously addressed by the Third, Eighth, and Ninth Circuit Courts of Appeals.[164] The Fifth Circuit, however, looking at the same statutory conflict, came to a very different conclusion.[165]

The majority explained the nature of voluntary departure as "an agreed-upon exchange of benefits between the alien and the Government."[166] The majority noted that an alien's decision to request and accept voluntary departure is not without costs.[167] Because of his decision, the alien is subjected to the possibility of civil fines and other penalties.[168] Discussing the motivation

161. *Id.*

162. *Banda-Ortiz*, 445 F.3d at 387.

163. *Id.* at 388.

164. *See* Ugokwe v. U.S. Attorney Gen., 453 F.3d 1325, 1331 (11th Cir. 2006) (determining that the timely filing of a motion to reopen tolls the departure period until the court rules on the motion); Barroso v. Gonzales, 429 F.3d 1195, 1204 (9th Cir. 2005) (concluding that the timely filing of a motion to reopen automatically tolls the departure period, even without the filing of a stay of the voluntary departure period); Kanivets v. Gonzales, 424 F.3d 330, 331, 334–35 (3d Cir. 2005) (holding that the departure period was tolled once a motion to reopen was timely filed); Sidikhouya v. Gonzales, 407 F.3d 950, 952 (8th Cir. 2005) (automatically tolling the departure period if a motion to reopen is timely filed); Azarte v. Ashcroft, 394 F.3d 1278, 1288 n.20 (9th Cir. 2005) (opining that even without a motion to stay removal "automatic tolling would be consistent with the legislative scheme," although not reaching the issue because the appellant requested a stay of removal).

165. *See Banda-Ortiz*, 445 F.3d at 391 (holding that the voluntary departure period was not automatically tolled with the timely filing of a motion to reopen).

166. *Id.* at 389.

167. *See id.* at 390 (discussing how such a decision "exposes [the alien] to civil fines and renders him ineligible for certain forms of relief if he does not timely depart"); *see also* 8 U.S.C.A. § 1229c(d) (West Supp. 2007) (creating these penalties for failure to voluntary depart).

168. Banda-Ortiz v. Gonzales, 445 F.3d 387, 390 (5th Cir. 2006); *see also* 8 U.S.C.A. § 1229c(d)(1)(A)–(B) (West Supp. 2007) (codifying that an alien who fails to depart within the voluntary departure period can be liable for fines up to $5,000 and becomes ineligible to receive further relief under the statute for ten years).

behind offering voluntary departure, the court explained:

> The statutory scheme "reveals Congress'[s] intention to offer an alien a specific benefit—exemption from the ordinary bars on subsequent relief—in return for a quick departure at no cost to the government.... But if the alien does not depart promptly, so that the [government] becomes involved in further and more costly procedures by his attempts to continue his illegal stay here, the original benefit to the [government] is lost."[169]

The majority reasoned that because the statute placed a sixty day limit on the amount of time that may be granted for voluntary departure, tolling would extend the period beyond that authorized by Congress.[170] Further, the court argued that such an extension would be contrary to the provision in the regulations that an extension beyond that which was originally ordered by the immigration judge or BIA "'is only within the jurisdiction of the district director, the Deputy Executive Associate Commissioner for Detention and Removal, or the Director of the Office of Juvenile Affairs.'"[171]

Although Banda-Ortiz did not file a motion to stay his voluntary departure period,[172] there is no indication that this played a role in the court's decision. It appears that the court's ruling would not have changed even if such a motion had been filed.[173]

The court acknowledged Banda-Ortiz's argument that a failure to recognize automatic tolling would be contrary to the intent of Congress.[174] He argued that Congress authorized motions to reopen and did not exclude aliens seeking voluntary departure from utilizing them.[175] The majority strongly disagreed with this line of reasoning, stressing that

Banda-Ortiz's interpretation ... permits an alien to request

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169. *Banda-Ortiz*, 445 F.3d at 390 (quoting Ngarurih v. Ashcroft, 371 F.3d 182, 194 (4th Cir. 2004); Ballenilla-Gonzalez v. INS, 546 F.2d 515, 521 (2d Cir. 1976)).

170. *Id.* (citing 8 U.S.C.A. § 1229c(b)(2) (West 2005); 8 C.F.R. § 1240.26(f) (2006)).

171. *Id.* (quoting 8 C.F.R. § 1240.26(f) (2006)).

172. *Id.* at 388.

173. *See id.* at 390 (quoting section 1240.26(f) when explaining the majority's understanding that the courts do not have the power to extend the voluntary departure period in situations not limited to those in which there was no motion to stay filed).

174. *See Banda-Ortiz*, 445 F.3d at 391 ("Banda-Ortiz disputes this conclusion because Congress authorized aliens to file a motion to reopen and did not exclude aliens who elect voluntary departure from its application." (citation omitted)).

175. *Id.* at 391.

> voluntary departure, exhaust his administrative appeals, move to reopen the removal proceedings, and overstay the period of voluntary departure, thereby depriving the government of a speedy departure. "This is as if the accused in a criminal prosecution demanded not only the chance of acquittal at trial but also the benefits that go with a guilty plea and the acceptance of responsibility."[176]

For these reasons, the court refused to hold that the voluntary departure period would be tolled after the filing of a motion to reopen.[177]

Although the majority acknowledged that the Third, Eighth, and Ninth Circuits have reached a different conclusion, it did not discuss the reasoning behind those decisions.[178] Instead the court simply noted that the *Azarte* court held that "it would be absurd for Congress to provide an alien who elects voluntary departure with the right to file a motion to reopen when that motion would, in the vast majority of cases, be deemed withdrawn when the alien complies with the voluntary departure order."[179]

3. Dissent

The initial criticism in the dissent, authored by Judge Smith, stemmed from the majority's creation of a circuit split without a complete analysis.[180] Smith emphasized the "high hurdle" that exists when one of the circuit courts decides to create a split with another.[181] In the instant case, the Fifth Circuit did not disagree with just one, but rather three other circuit courts to have previously addressed the issue.[182] Smith emphasized that the

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176. *Id.* at 391 (quoting Alimi v. Ashcroft, 391 F.3d 888, 892 (7th Cir. 2004)).

177. *Id.*

178. Banda-Ortiz v. Gonzales, 445 F.3d 387, 389 (5th Cir. 2006) (providing only a cursory review and acknowledging that differing opinions exist).

179. *Id.* (citing Azarte v. Ashcroft, 394 F.3d 1278, 1288–89 (9th Cir. 2005)).

180. *See id.* at 391 (Smith, J., dissenting) (expressing discontent with the lack of attention paid by the majority to contrary decisions in sister circuits); *see also id.* at 389 (majority opinion) (discussing briefly the opinion in *Azarte* that led to the other circuits' holdings that are contrary to that reached by the majority).

181. *Id.* at 391 (Smith, J., dissenting).

182. *See Banda-Ortiz*, 445 F.3d at 391 (noting that the Fifth Circuit was the first court to rule that a timely filed motion to reopen did not automatically "toll the voluntary departure period" after three other circuit courts held otherwise). *But see* Barroso v. Gonzales, 429 F.3d 1195, 1204 (9th Cir. 2005) (holding that a timely filed motion to reopen

court typically "'begin[s] with trepidation in the face of a solid array of . . . federal courts of appeals' that have reached the same conclusion, because '[the circuit court is] always chary to create a circuit split.'"[183] Smith did not find that sufficient reasoning existed to justify departing from the consensus of the other courts.[184]

Smith asserted that the majority only focused on two arguments: "[F]irst, that it is sensible for aliens who receive the benefits of voluntary departure to incur the costs associated with not leaving the country in a timely fashion, and second, that courts have no authority to extend the voluntary departure period beyond the sixty days authorized by statute."[185] As such, he argued that the court reached its conclusion by focusing solely on the statutory provisions dealing with voluntary departure without considering the statutory provisions concerning motions to reopen.[186] After making this assertion, Smith addressed some of the arguments that he felt the court left untouched.[187]

First, Smith agreed with the majority that voluntary departure is based on a bargain between the alien and the government.[188] He "object[ed], however, to limiting our search for the terms of that bargain to statutory provisions conferring benefits on only one of the parties."[189] In order to understand both sides of the bargain, Smith asserted that the court must look at the statutory provisions

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tolls the voluntary departure period); *accord* Ugokwe v. U.S. Attorney Gen., 453 F.3d 1325, 1331 (11th Cir. 2006) ("We adopt the rule established in *Azarte* that the timely filing of a motion to reopen tolls the period of voluntary departure pending the resolution of the motion to reopen."); Kanivets v. Gonzales, 424 F.3d 330, 331, 334–36 (3d Cir. 2005) ("[B]ecause Kanivets timely filed his petition for reopening, the BIA should decide his motion for reopening on the merits."); Sidikhouya v. Gonzales, 407 F.3d 950, 952 (8th Cir. 2005) ("We agree with the view in *Azarte* that Sidikhouya must be afforded an opportunity to receive a ruling on the merits of his timely filed motion to reopen . . . .").

183. *Banda-Ortiz*, 445 F.3d at 391 (Smith, J., dissenting) (quoting Alfaro v. Comm'r, 349 F.3d 225, 229 (5th Cir. 2003)).

184. *See id.* at 391 (explaining that the majority had not reached the "high hurdle" needed to depart from the concurring decisions of multiple sister circuit courts).

185. *Id.* (citing 8 U.S.C.A. § 1229c(b)(2) (West 2005); 8 C.F.R. § 1240.26(f) (2006)).

186. *Id.* at 391.

187. *See* Banda-Ortiz v. Gonzales, 445 F.3d 387, 391–96 (5th Cir. 2006) (Smith, J., dissenting) (analyzing the arguments in favor of automatically tolling the voluntary departure period upon the timely filing of a motion to reopen).

188. *Id.* at 392.

189. *Id.*

covering both voluntary departure and motions to reopen.[190]

The dissent next examined the position in which this decision placed Banda-Ortiz: he must either (1) choose to leave the country and forfeit his right to file the motion; or (2) assert his right to file a motion and fail to leave within the voluntary departure period.[191] "The result is particularly harsh when one considers that it operates to disadvantage those aliens whose good behavior has entitled them to the solicitude of the law of voluntary departure."[192] Smith explained that in order to qualify for voluntary departure the alien must have been of good moral character for five years and must not be subject to removal for felonies or security-related reasons.[193]

Smith further explained that Banda-Ortiz's situation represents exactly why Congress included the option of filing a motion to reopen—the alien had new facts that demonstrated "exceptional and extremely unusual hardship."[194] Further, these facts only developed after Banda-Ortiz appealed to the BIA.[195]

Next, the dissent addressed the unequal results that occur because of how crowded the court's docket is at the time of filing.[196] "[I]t cannot accord with due process for the resolution of motions to turn on . . . how quickly an agency can clear its docket during a given thirty-day period."[197] Smith argued that "[t]he

190. *Id.*

191. *Id.* at 393.

192. *Banda-Ortiz*, 445 F.3d at 393; *see also* 8 U.S.C.A. § 1229c(b)(1)(A)–(D) (West 2005) (providing a list of criteria an alien must meet in order to be eligible for voluntary departure and requiring that the alien be of good moral character and not removable for felonies or security reasons).

193. *Banda-Ortiz*, 445 F.3d at 393 (Smith, J., dissenting); *see* 8 U.S.C.A. § 1229c(b)(1) (West 2005) (providing the requirements that an alien must meet in order to be eligible for voluntary departure).

194. *Banda-Ortiz*, 445 F.3d at 393 (Smith, J., dissenting) (quoting 8 U.S.C.A. § 1229b(b)(1)(D) (West 2005)).

195. *Id.*

196. *See id.* at 393–94 (discussing the consequences of basing a decision to hear a motion on the status of an administrative docket).

197. Banda-Ortiz v. Gonzales, 445 F.3d 387, 393 (5th Cir. 2006) (Smith, J., dissenting). As the *Banda-Ortiz* dissent noted, the United States Supreme Court had explained that "[a] state's failure to convene a timely hearing, through no fault of [a] petitioner, violate[s] due process in part because a 'system or procedure that deprives persons of their claims in a random manner . . . necessarily presents an unjustifiably high risk that meritorious claims will be terminated.'" *Id.* at 393–94 n.7 (quoting Logan v. Zimmerman Brush Co., 455 U.S. 422, 434–35 (1982)).

possibility that two materially similar motions will be treated differently, depending on the extent of administrative backlog at the time of filing, should convince the panel majority that its interpretation leads to absurd results."[198]

Finally, Smith addressed the majority's concerns that the courts do not have the power to extend the voluntary departure period beyond the maximum sixty-day period provided for in the statute.[199] The dissent noted that the majority cited four cases from different circuits in support of the conclusion that it did not have the authority to toll the voluntary departure period.[200] Three of those circuits, however, have since decided that the voluntary departure period is automatically tolled upon the timely filing of a motion to reopen.[201] Smith explained that the fourth case is distinguishable.[202] In *Ngarurih v. Ashcroft*,[203] the court had the power to continue to hear the case "even after [the alien] depart[ed] the United States."[204] Unlike *Ngarurih*, "the

198. *Id.* at 393–94. Generally speaking, courts should avoid interpreting a statute in a manner that creates absurd results. Azarte v. Ashcroft, 394 F.3d 1278, 1288 (9th Cir. 2005) (citing United States v. Wilson, 503 U.S. 329, 334 (1992); Ma v. Ashcroft, 361 F.3d 553, 559 (9th Cir. 2004)); *accord* United States v. Turkette, 452 U.S. 576, 580 (1981) (seeking to avoid absurd results and internal inconsistencies); Hughey v. JMS Dev. Corp., 78 F.3d 1523, 1529 (11th Cir. 1996) (presuming Congress does not intend absurd results); *In re* Pac.-Atl. Trading Co., 64 F.3d 1292, 1303 (9th Cir. 1995) (refusing a presumption of absurd results); Bailey v. City of Lawrence, Ind., 972 F.2d 1447, 1452 (7th Cir. 1992) ("Courts are bound to construe a statute to avoid absurd results . . .").

199. *See Banda-Ortiz*, 445 F.3d at 394–96 (Smith, J., dissenting) (disagreeing with the arguments supporting a conclusion that the courts do not have the power to toll the voluntary departure period beyond the maximum sixty days provided for in the statute).

200. *Id.* at 394 (addressing the majority's reliance upon *Ngarurih v. Ashcroft*, 371 F.3d 182, 194 (4th Cir. 2004), *Garcia v. Ashcroft*, 368 F.3d 1157, 1159 (9th Cir. 2004), *Reynoso-Lopez v. Ashcroft*, 369 F.3d 275, 280 (3d Cir. 2004), and *Zazueta-Carrillo v. Ashcroft*, 322 F.3d 1166, 1172–73 (9th Cir. 2003)).

201. *See id.* (explaining that those cases relied upon by the majority are no longer good precedent). The Third and Ninth Circuits are among the circuits to have ruled that the timely filing of a motion to reopen tolls the voluntary departure period. *See* Barroso v. Gonzales, 429 F.3d 1195, 1204 (9th Cir. 2005) (holding that even if the alien does not file a stay of the voluntary departure period, the timely filing of a motion to reopen automatically tolls the departure period); Kanivets v. Gonzales, 424 F.3d 330, 331, 334–36 (3d Cir. 2005) (determining that the departure period was tolled with the filing of the motion to reopen).

202. *See Banda-Ortiz*, 445 F.3d at 394 (Smith, J., dissenting) (pointing out that in *Ngarurih*, unlike the instant case, the court could still hear the case after the alien left the country).

203. Ngarurih v. Ashcroft, 371 F.3d 182 (4th Cir. 2004).

204. *Id.* at 192–93; *accord Banda-Ortiz*, 445 F.3d at 394 (Smith, J., dissenting) (demanding "safeguard[s] to provide that an alien can have his motion to reopen heard on

government has offered no similar safeguard" in cases such as that of Banda-Ortiz.[205]

Smith further explained that in practice the voluntary departure period is tolled upon an alien's standard appeal of the immigration judge's decision to the BIA.[206] Refusing to allow any tolling jeopardizes an alien's right to even this basic appeals process.[207] Further, Smith stressed:

> It is not enough to defeat an argument for tolling to point out that tolling would undermine the statutory text. It is the very *nature* of tolling to suspend the period of time provided by statute for certain actions, when the circumstances of the case require. In fact, the Supreme Court has suggested, at least in the statute of limitations context, that we presume the availability of tolling against the government unless Congress provides otherwise.[208]

Smith reasoned that tolling was "particularly appropriate" in a situation such as this because it would be used "to preserve a statutory right."[209]

4. Denial of Rehearing En Banc

After the court's decision was released, Banda-Ortiz filed a motion for rehearing en banc.[210] Although the majority of the Fifth Circuit Court of Appeals did not vote in favor of the rehearing en banc, Chief Judge Jones and Judges Benavides, Stewart, and Dennis voted along with Judge Smith to rehear the case en banc.[211]

The dissent chose not to restate all of the arguments that were presented in the original opinion.[212] The dissenting opinion pointed out, however, that since the decision was released an

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the merits if he leaves the United States.").

205. *Banda-Ortiz*, 445 F.3d at 394 (Smith, J., dissenting).

206. *See id.* at 395 (explaining that Banda-Ortiz's voluntary departure period was tolled during the pendency of his initial appeal to the BIA).

207. *See* Banda-Ortiz v. Gonzales, 445 F.3d 387, 395 (5th Cir. 2006) (Smith, J., dissenting) (discussing the dilemma that results "[i]f the voluntary departure period cannot exceed sixty days under any circumstance").

208. *Id.* (citing Irwin v. Dep't of Veterans Affairs, 498 U.S. 89, 95–96 (1990)).

209. *Id.* at 394 (referring to the statutory right to file a motion to reopen).

210. *See* Banda-Ortiz v. Gonzales (*Banda-Ortiz II*), 458 F.3d 367, 368 (5th Cir. 2006) (denying Banda-Ortiz's request for a rehearing en banc).

211. *Id.* (Smith, J., dissenting).

212. *Id.*

additional circuit, the Eleventh Circuit, had joined the Third, Eighth, and Ninth Circuits in holding that the filing of a motion to reopen tolls the voluntary departure period.[213] As such, the dissent explained that "[i]t would be more prudent for this court, in light of the foregoing, to be willing to rehear this case en banc."[214] Further, the dissent stated, "[t]here certainly may be times when [the court is] justified in creating a circuit split, but this issue is important enough that the entire court should be willing to review it . . . to make sure that the position taken by the panel majority is correct."[215]

Since the opinion was issued denying the motion for rehearing en banc, Banda-Ortiz filed an appeal with the United States Supreme Court.[216] The Supreme Court denied certiorari without explanation.[217]

E. *After the Split*

1. The Eleventh Circuit Did Not Follow the Fifth Circuit

The Eleventh Circuit was next to address the issue.[218] In *Ugokwe v. United States Attorney General*,[219] the court considered the case of Mildred Ugokwe, a visitor to the United States who overstayed her visa.[220] Based on this fact, the government argued that she was subject to removal.[221] After the immigration judge

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213. *See id.* (explaining that Ugokwe v. U.S. Attorney Gen., 453 F.3d 1325 (11th Cir. 2006) added the Eleventh Circuit Court of Appeals to the courts reaching a conclusion contrary to that of the Fifth Circuit).

214. *Id.* at 368.

215. *Banda-Ortiz II*, 458 F.3d at 368 (Smith, J., dissenting).

216. Petition for Writ of Certiorari, Banda-Ortiz v. Gonzales, 127 S. Ct. 1874, 1874 (2007) (No. 06-477), 2006 WL 2842003, at *1.

217. *See* Banda-Ortiz v. Gonzales, 127 S. Ct. 1874, 1874 (2007) (denying certiorari summarily). Since then, however, the Supreme Court has granted certiorari to hear another case from the Fifth Circuit dealing with this same issue. *See* Dada v. Keisler, 128 S. Ct. 36, 36 (2007) (granting certiorari); *see also* Dada v. Gonzales, 207 F. App'x 424, 425–26 (5th Cir. 2006) (not designated for publication) (upholding a decision by the BIA refusing to toll the voluntary departure period in accordance with the *Banda-Ortiz* decision).

218. *See generally* Ugokwe v. U.S. Attorney Gen., 453 F.3d 1325 (11th Cir. 2006) (addressing removal and tolling of the voluntary departure period).

219. Ugokwe v. U.S. Attorney Gen., 453 F.3d 1325 (11th Cir. 2006).

220. *Id.* at 1326.

221. *Id.*

entered an order requiring removal, Ugokwe filed a motion to reopen and also a motion to stay voluntary departure.[222] As in many cases, the judge did not rule on her motion until after the voluntary departure period had passed.[223] As such, the immigration judge denied Ugokwe's motion to reopen because she did not depart within the departure period and because of a Ninth Circuit decision from 1998 holding that "the filing of a motion to reopen during the voluntary departure period []does not toll or extend the voluntary departure period.[]"[224]

In reviewing the case, the Eleventh Circuit Court of Appeals walked through the decisions of its sister circuits discussed above.[225] After reviewing the reasoning of the different courts, the Eleventh Circuit followed *Azarte* and "adopt[ed] the rule . . . that the timely filing of a motion to reopen tolls the period of voluntary departure pending the resolution of the motion to reopen."[226]

2. The First and Fourth Circuits Joined the Dissent

a. Fourth Circuit

Shortly after the decision in *Banda-Ortiz*, the Fourth Circuit Court of Appeals heard a similar case, ultimately siding with the Fifth Circuit.[227] In *Dekoladenu v. Gonzales*,[228] Dekoladenu filed a motion to reopen on the last day of his voluntary departure period.[229] The new evidence he presented concerned the fact that his employer had filed an Immigration Petition for Alien Worker,

222. *Id.* at 1327.

223. *Id.*

224. *See Ugokwe*, 453 F.3d at 1327 (referring to the rule announced in *Shaar v. INS*, 21 I & N Dec. 541, 549 (BIA 1996), *aff'd*, 141 F.3d 953 (9th Cir. 1998)). *Shaar* is no longer good law. Since the 2005 decision in *Azarte*, the filing of a motion to reopen tolls the voluntary departure period in the Ninth Circuit. *See* Azarte v. Ashcroft, 394 F.3d 1278, 1288 (9th Cir. 2005) (establishing this new rule for the Ninth Circuit).

225. *See Ugokwe*, 453 F.3d at 1329–31 (reviewing the decisions concerning the same situation in the other circuits and concluding that a timely motion to reopen tolls the voluntary departure period).

226. *Id.* at 1331.

227. *See* Dekoladenu v. Gonzales, 459 F.3d 500, 507 (4th Cir. 2006) (holding that the filing of a motion to reopen does not automatically toll the voluntary departure period).

228. Dekoladenu v. Gonzales, 459 F.3d 500 (4th Cir. 2006).

229. *Id.* at 502.

and that he had filed an Application to Register Permanent Residence or Adjust Status.[230] His motion to reopen was denied by the immigration judge and affirmed by the BIA because he had overstayed his voluntary departure period.[231] The Fourth Circuit upheld the decision.[232]

The Appeals Court, in part, based its holding on the "canon of statutory construction that 'a specific statutory provision controls a more general one,'" pointing to the fact that "[t]he voluntary departure provision applies to *certain* removable aliens, . . . while the motion to reopen provision applies to *all* aliens subject to removal."[233] As such, the court disagreed with the *Azarte* court's classification of the result as "'nonsensical'" or "'absurd.'"[234]

b. First Circuit

The First Circuit, in *Chedad v. Gonzales*,[235] is the latest to join in the debate, also siding with the Fifth Circuit.[236] The court acknowledged the statutory conflict, explaining that "[t]he joint effect of these provisions is practically to foreclose the availability of motions to reopen in most cases where the alien has received voluntary departure."[237] The court further explained:

> These provisions reflect a coherent effort to ensure that voluntary departure does, in fact, result in the alien's expeditious departure from the United States. Reading § 1229a(c)(7)(c)(i) as stopping the voluntary departure clock would contravene this purpose, allowing the filing of motions to reopen to delay voluntary departure dates. We cannot read the [statutes] as achieving this self-defeating result.[238]

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230. *Id.*

231. *Id.*

232. *See id.* at 507 (holding that the filing of a motion to reopen does not automatically toll the voluntary departure period).

233. *Dekoladenu*, 459 F.3d at 505 (quoting Warren v. N.C. Dept. of Human Res., 65 F.3d 385, 390 (4th Cir. 1995)).

234. *Id.* at 506 (quoting Azarte v. Ashcroft, 394 F.3d 1278, 1289 (9th Cir. 2005)).

235. Chedad v. Gonzales, 497 F.3d 57 (1st Cir. 2007).

236. *Id.* at 64 (agreeing with *Banda-Ortiz* that the filing of a motion to reopen does not toll the voluntary departure period).

237. *Id.* at 62.

238. *Id.* at 64.

IV. WHAT DOES IT ALL MEAN?

There is no clear-cut solution to the problem. Arguments can be made that the voluntary departure period should be tolled, and arguments can be made that it should not. However, aliens should be afforded the same federal rights regardless of the circuit in which they happen to be located. Despite this general principle, a split in the circuits has occurred, resulting in varying rights being granted to aliens based solely upon which court hears their case.

When interpreting the meaning of a statute, courts should first look to the plain text of the statute.[239] If no definitions are provided within the statute, the words should be given "their ordinary and natural meaning."[240] "All words and provisions of statutes are intended to have meaning and are to be given effect . . . "[241] "If the statutory language is unambiguous, in the absence of 'a clearly expressed legislative intent to the contrary, that language must ordinarily be regarded as conclusive.'"[242] Further, "'[w]here possible, [courts] avoid construing a statute so as to render a provision mere surplusage.'"[243] "Specific words within a statute . . . may not be read in isolation of the remainder of that section or the entire statutory scheme."[244] If, however, the statutory language is ambiguous, the courts should "look to the statute as a whole and construct an interpretation that comports with its primary purpose and does not lead to anomalous or

239. United States v. Turkette, 452 U.S. 576, 580 (1981).

240. *In re* Merchants Grain, Inc., 93 F.3d 1347, 1353 (7th Cir. 1996).

241. United States v. Ven-Fuel, Inc., 758 F.2d 741, 751 (1st Cir. 1985).

242. *Turkette*, 452 U.S. at 580 (quoting Consumer Prod. Safety Comm'n v. GTE Sylvania, Inc., 447 U.S. 102, 108 (1980)); *accord In re Merchants Grain*, 93 F.3d at 1353.

243. Lutwin v. Thompson, 361 F.3d 146, 157 (2d Cir. 2004) (quoting Burrus v. Vegliante, 336 F.3d 82, 91 (2d Cir. 2003)); *accord In re Merchants Grain*, 93 F.3d at 1353–54 (applying rules of statutory construction to a statute creating agricultural liens); Pa. Dep't of Pub. Welfare v. U.S. Dep't of Health & Human Servs., 928 F.2d 1378, 1385 (3d Cir. 1991) (avoiding interpretation rendering statutory language superfluous when construing Medicaid provisions of the Social Security Act); Bridger Coal Co. v. Dir., Office of Workers' Comp. Programs, 927 F.2d 1150, 1153 (10th Cir. 1991) (avoiding superfluous language in the Black Lung Benefits Act); Beisler v. Comm'r, 814 F.2d 1304, 1307 (9th Cir. 1987) (refusing to render "nature-of-the-injury language surplusage" when interpreting Internal Revenue Code); *Ven-Fuel*, 758 F.2d at 751–52 (interpreting Tariff Act of 1930 to avoid superfluous or redundant words and phrases); Duke v. Univ. of Tex. at El Paso, 663 F.2d 522, 526 (5th Cir. 1981) (interpreting a Texas Anti-Discrimination Statute).

244. Sutton v. United States, 819 F.2d 1289, 1293 (5th Cir. 1987).

unreasonable results."[245]

A. *Interpreting the Two Statutory Provisions—Was the Fifth Circuit Correct?*

1. Starting with the Language of the Statute

This author proposes that the Fifth Circuit reached the incorrect conclusion in its analysis of the *Banda-Ortiz* case.[246] The Fifth Circuit's analysis does not seem to comport with the process for statutory interpretation outlined above. One part of a statute cannot be interpreted in isolation.[247] The statutory provisions on voluntary removal and those on motions to reopen are parts of the larger Immigration and Nationality Act.[248] As such, each provision must be construed in a manner consistent with the other provisions.[249] Concluding that the statute did not intend to give an alien accepting voluntary departure access to a motion to reopen does not take into account the language in the motion to reopen section giving the alien the right to file such a motion.[250] The interpretation drawn by the Fifth Circuit essentially leaves an alien who accepts voluntary departure with a Hobson's choice—leave the country and lose your ability to pursue a motion to reopen or stay in the country past the departure period and lose your ability to pursue a motion to reopen.[251] How can this be the

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245. Connecticut *ex rel.* Blumenthal v. U.S. Dep't of Interior, 228 F.3d 82, 89 (2d Cir. 2000). Statutes should not be interpreted in a manner that creates absurd results. *Turkette*, 452 U.S. at 580; *accord* Hughey v. JMS Dev. Corp., 78 F.3d 1523, 1529 (11th Cir. 1996) (avoiding absurd results when interpreting the Clean Water Act); *In re* Pac.-Atl. Trading Co., 64 F.3d 1292, 1303 (9th Cir. 1995) (avoiding absurd taxation issues when interpreting the Bankruptcy Code); Bailey v. City of Lawrence, Ind., 972 F.2d 1447, 1452 (7th Cir. 1992) (committing to avoiding absurd results and favoring public convenience when interpreting Indiana Police and Fire Employment Policies).

246. *See generally* Banda-Ortiz v. Gonzales, 445 F.3d 387, 391 (5th Cir. 2006) (concluding that a timely filed motion to reopen does not toll the voluntary departure period).

247. *See Ven-Fuel*, 758 F.2d at 751 (explaining that every part of the statute should be given meaning).

248. Immigration and Nationality Act, 8 U.S.C.A. §§ 1101–1537 (West 2005 & Supp.2007).

249. *See Sutton*, 819 F.2d at 1293 (articulating that a part of the statute cannot be read in isolation from the other parts of the statute).

250. *See* 8 U.S.C.A. § 1229a(c)(7)(A) (West Supp. 2007) (providing that an alien has the right to file one motion to reopen).

251. *See Banda-Ortiz*, 445 F.3d at 391 (concluding that the voluntary departure

result that Congress intended?

This result is further contradicted by the mandate that courts should avoid interpreting statutes so as to create absurd results.[252] Voluntary departure is, in a sense, a reward given to aliens who have demonstrated good moral character and who have not committed felonies or security-related violations.[253] It gives the alien the right to leave the country without the penalties associated with forced removal.[254] Likewise, voluntary departure is not available to an alien who has demonstrated poor moral character or who has been convicted of felonies or security-related violations.[255] These individuals are not eligible for the reward of the lighter punishment provided by the voluntary departure

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period is not automatically tolled when an alien timely files a motion to reopen). A "Hobson's choice" refers to a situation in which there is really no choice at all. *See, e.g.*, Crawford v. Wash., 541 U.S. 36, 42 n.1 (2004) (outlining a Hobson's choice present when invoking the marital privilege). Specifically, *Crawford* used the term to refer to the "choice" arising when courts "forc[e] the defendant to choose between the marital privilege and confronting his spouse." *Id.* (quoting State v. Crawford, 54 P.3d 656, 660 (Wash. 2002)); *see also* INS v. Chadha, 462 U.S. 919, 968 (1983) (White, J., dissenting) (referring to the choice available to Congress "either to refrain from delegating the necessary authority, leaving itself with a hopeless task of writing laws with the requisite specificity to cover endless special circumstances across the entire policy landscape, or in the alternative, to abdicate its law-making function to the executive branch and independent agencies").

252. *See* Connecticut *ex rel.* Blumenthal v. U.S. Dep't of Interior, 228 F.3d 82, 89 (2d Cir. 2000) (explaining that, if possible, statutes should be interpreted so as not to create absurd or unreasonable results); *accord* United States v. Turkette, 452 U.S. 576, 580 (1981) (explaining that ambiguous statutes should be interpreted to avoid absurd results); Hughey v. JMS Dev. Corp., 78 F.3d 1523, 1529 (11th Cir. 1996) (concluding Congress does not intend courts to reach absurd results when interpreting statutes); *In re Pac.-Atl.*, 64 F.3d at 1303 (rejecting the presumption that Congress intends an absurd result); Bailey v. City of Lawrence, Ind., 972 F.2d 1447, 1452 (7th Cir. 1992) (asserting that courts must interpret statutes to "avoid absurd results and favor public convenience").

253. *See* 8 U.S.C.A. § 1229c(b)(1)(B) (West 2005) (requiring, in order to be eligible for voluntary departure, that the alien be of "good moral character for at least [five] years immediately preceding the . . . application for voluntary departure").

254. *See id.* § 1182(a)(1)–(10) (West 2005 & Supp. 2007) (explaining when aliens are subject to removability); *see also id.* § 1229c(a)(1) (West 2005) (preventing application of 8 U.S.C.A. 1229a removal proceedings under certain circumstances).

255. *See id.* § 1229c(b)(1)(B)–(C) (West 2005) (foreclosing the availability of voluntary departure to aliens who have not demonstrated good moral character or are deportable under specific subsections of 8 U.S.C.A. § 1227); *see also id.* § 1227(a)(2)(A)(iii) (rendering "deportable" those aliens convicted of an aggravated felony); 8 U.S.C.A. § 1227(a)(4) (West 2005) (rendering deportable an "alien who has engaged, is engaged, or at any time after admission engages in" acts jeopardizing homeland security).

statute.[256] Thus, it appears "absurd," according to modern principles of statutory interpretation, that Congress would have intended only to offer illegal aliens who demonstrated poor moral character the ability to file and have heard motions to reopen by the courts, but not offer the same to those that demonstrated good moral character. Yet interpreting the statute in the manner implemented by the Fifth Circuit leads to this result.

Further, it has been held that "deportation statutes should be construed in favor of the alien."[257] Two interpretations of the statute have been presented. One clearly disfavors the alien by not providing the individual with access to the statutorily granted motion to reopen. The second clearly favors aliens by providing them access to this right. Therefore, the rule that statutes should be interpreted in a manner in favor of the alien further supports an interpretation in accord with *Azarte* and the dissent in *Banda-Ortiz*.[258]

2. Tolling Versus Extending Time

In addition, the Fifth Circuit asserted that the courts do not have the power to extend the time period for departure.[259] The *Banda-Ortiz* court was correct in its contention that only a limited number of people are granted an affirmative right to "extend" the period for voluntary departure.[260] Extension, however, is not the role

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256. *See id.* § 1229c(b)(1)(B) (West 2005) (requiring that in order to receive voluntary departure an alien must demonstrate good moral character and, conversely, foreclosing this benefit to those who cannot).

257. Azarte v. Ashcroft, 394 F.3d 1278, 1289 (9th Cir. 2005) (quoting Kwai Fun Wong v. United States, 373 F.3d 952, 962 (9th Cir. 2004)); *accord* INS v. Cardoza-Fonseca, 480 U.S. 421, 449 (1987) (explaining the long-standing principle that "any lingering ambiguities in deportation statutes [should be construed] in favor of the alien" (citing INS v. Errico, 385 U.S. 214, 225 (1966); Costello v. INS, 376 U.S. 120, 128 (1964); Fong Haw Tan v. Phelan, 333 U.S. 6, 10 (1948))).

258. *See generally Azarte*, 394 F.3d at 1289 (concluding that timely filing a motion to reopen tolls the voluntary departure period); Banda-Ortiz v. Gonzales, 445 F.3d 387, 391 (5th Cir. 2006) (Smith, J., dissenting) (asserting that the majority was incorrect in its conclusion that the filing of a motion to reopen does not toll the voluntary departure period).

259. *See Banda-Ortiz*, 445 F.3d at 390 (discussing the majority's conclusion that courts do not have the power to toll the voluntary departure period).

260. *See id.* (requiring that an extension of the voluntary departure period "is only within the jurisdiction of the district director, the Deputy Executive Associate Commissioner for Detention and Removal, or the Director of the Office of Juvenile

served by tolling.[261] Extension gives additional time.[262] Tolling, on the other hand, works to freeze the time period.[263] It does not give additional time or "extend" the time period.[264] Although this may appear to be mere semantics, these two different views of the definition of tolling create two very different results in this statutory interpretation. The majority's analysis in *Banda-Ortiz* results in an interpretation in which one part of the statute appears to be ignored.[265] The proposed analysis presented by the Fifth Circuit's *Banda-Ortiz* dissent and the Third, Eighth, Ninth, and Eleventh Circuits, allows the two statutory provisions to be reconciled.[266]

An examination of the actual practice in the immigration courts further weakens the argument forwarded by the Fifth Circuit. The Fifth Circuit appears to lay down a rule that the courts can *never* toll the voluntary departure period.[267] Typically, however, the voluntary departure period is tolled during the basic appeal process from the immigration judge to the BIA.[268] For example, Banda-Ortiz's appeal from the immigration judge to the BIA took six months to be heard.[269] During the pendency of this initial appeal process, his voluntary departure period was tolled.[270] Nobody contested the validity of this action. The *Banda-Ortiz* majority did not address this specific act of tolling or the impact its

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Affairs" (quoting 8 C.F.R. § 1240.26(f) (2006))).

261. *See* Barroso v. Gonzales, 429 F.3d 1195, 1206 (9th Cir. 2005) (addressing the differences between "tolling" and "extending").

262. *See id.* (quoting BLACK'S LAW DICTIONARY 622 (8th ed. 2004)) (clarifying the principle by "defining . . . 'extension' as '[a] period of additional time to take an action'") (second alteration in original).

263. *See id.* (quoting BLACK'S LAW DICTIONARY 1525 (8th ed. 2004)) (construing the principle of tolling by "defining 'toll' as 'to stop the running of' a time period'").

264. *See id.* (explaining that an extension gives additional time, but tolling simply stops the clock).

265. *See Banda-Ortiz*, 445 F.3d at 391 (creating a situation in which the alien could not take advantage of the statutory ability to file a motion to reopen).

266. *See generally id.* at 391–96 (Smith, J., dissenting) (explaining an alternate interpretation of the statute, followed by the other circuits, that appeared to give effect to the overall statutory meaning).

267. *See id.* at 390 (majority opinion) (explaining the majority's conclusion that the courts do not have the statutory authority to extend the voluntary departure period and not discussing any exception that would apply to the initial appellate process).

268. *See id.* at 395 n.11 (Smith, J., dissenting) (using *Banda-Ortiz* as an example to show that during the initial appeal to the BIA the voluntary departure period is tolled).

269. *Id.*

270. *Banda-Ortiz*, 445 F.3d at 395 n.11 (Smith, J., dissenting).

decision would have on such practice. It is, however, a tolling not specifically authorized by the statute. The court's holding threatens to take even this basic appellate remedy away from an alien who has accepted voluntary departure.[271]

3. An Agreement Between the Alien and the Government

The majority in *Banda-Ortiz* further based its decision on the fact that voluntary departure requires an agreement between the alien and the government.[272] The court asserted that in making that agreement, the alien is opening himself up to potential consequences.[273] In the court's view, these consequences include not only the possibility of penalties for failing to leave, but also the inability to file a motion to reopen.[274] It is true that upon asking for and receiving voluntary departure, aliens open themselves up to possible penalties.[275] But as Judge Smith explained in the dissenting opinion, the terms of this agreement between the government and the alien should be analyzed by looking at the statute as a whole, including the provisions on motions to reopen.[276] There is no statutory indication that these potential consequences should include losing the right to file a motion to reopen in the event that additional circumstances present themselves.[277]

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271. *See id.* at 390 (majority opinion) (asserting that the courts do not have the ability to toll the voluntary departure period). This broad assertion was not limited to situations in which an alien is filing a motion to reopen. *See id.* (explaining that the authority to extend the departure period lies with authorities outside the court system). As such, lower courts could interpret this statement to mean that they no longer have any power to toll the voluntary departure period, including during the initial appellate process.

272. *See id.* at 389–90 (detailing this agreement between the government and the alien).

273. *See id.* at 390 (discussing how, as a result of the decision to accept voluntary departure, the alien is exposed "to civil fines and [is] render[ed] . . . ineligible for certain forms of relief if he does not timely depart").

274. *See* Banda-Ortiz v. Gonzales, 445 F.3d 387, 390 (5th Cir. 2006) (concluding that the inability to file a motion to reopen is one of the consequences of accepting voluntary departure).

275. *See* 8 U.S.C.A. § 1229c(d)(1)(A)–(B) (West Supp. 2007) (creating penalties for failing to depart within the voluntary departure period including fines up to $5,000 and ineligibility for similar such relief for the next ten years).

276. *See Banda-Ortiz*, 445 F.3d at 392 (Smith, J., dissenting) (stressing that the bargain must be looked at from both sides).

277. *See* Azarte v. Ashcroft, 394 F.3d 1278, 1289 (9th Cir. 2005) (discussing the importance of seeking Congress's true intention in codifying motions to reopen). Like

4. Varying Rights Based on Busy Dockets

The Supreme Court has held that the due process clause of the U.S. Constitution applies to aliens, although the degree of protection varies depending on the circumstances.[278] *Banda-Ortiz* threatens to put undocumented aliens in a position where their due process rights are determined based upon the state of the BIA's docket.[279] If the BIA has a particularly light docket and the motion can be heard within the alien's voluntary departure period, the alien has the opportunity to have new evidence taken into account. This opportunity, however, is unlikely given the fact that an alien can only be given a maximum of sixty days in which to depart.[280] If aliens are faced with a typical docket situation, they are unlikely to have the opportunity to have their motion heard.[281] It can take the courts three years or more to hear these cases.[282] Such a policy potentially deprives aliens of their rights in

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Azarte, the dissenting opinion in *Banda-Ortiz* found particularly "absurd the proposition that Congress, while expressly codifying the tradition of motions to reopen, intended *sub silentio* to preclude their availability in a significant number of cases." *Banda-Ortiz*, 445 F.3d at 392 (Smith, J., dissenting) (quoting *Azarte*, 394 F.3d at 1289).

278. *See, e.g.*, Demore v. Kim, 538 U.S. 510, 523 (2003) (explaining the well-settled rule that due process applies to aliens during deportation proceedings); Zadvydas v. Davis, 533 U.S. 678, 693–94 (2001) ("[T]his Court has held that the Due Process Clause protects an alien subject to a final order of deportation, though the nature of that protection may vary depending upon status and circumstance . . . " (citations omitted)). *But see* Dekoladenu v. Gonzales, 459 F.3d 500, 507 (4th Cir. 2006) ("[B]ecause Dekoladenu has neither a liberty nor a property interest in adjustment of status, he cannot make out a due process violation.").

279. *See Banda-Ortiz*, 445 F.3d at 393–94 (Smith, J., dissenting) (raising the concern that the majority's holding causes the fate of aliens to be determined by how crowded the BIA's docket is at the time of their filing of a motion to reopen). Although, "[i]n the exercise of its broad power over naturalization and immigration, Congress regularly makes rules that would be unacceptable if applied to citizens," *Demore v. Kim*, 538 U.S. at 521, basing the availability of due process to aliens on whether one is tried in a busy court versus one with a light docket seems to take this principle too far. *Banda-Ortiz*, 445 F.3d at 393–94 (Smith, J., dissenting) ("The possibility that two materially similar motions will be treated differently, depending on the extent of administrative backlog at the time of filing, should convince the panel majority that its interpretation leads to absurd results.").

280. *See* 8 U.S.C. § 1229c(b)(2) (West 2005) (setting the maximum length of a voluntary departure period at sixty days).

281. *See Azarte*, 394 F.3d at 1284 (noting that, according to a press release from the Department of Justice, in 2002 there were more than 10,000 cases that had been pending for three or more years waiting to have the courts hear the motions to reopen).

282. *See id.* (mentioning it often takes months or years for a reviewing court to issue

a random manner creating a risk that meritorious claims will not be heard.[283]

C. *Implications of the Split*

The consequences of the Fifth Circuit's decision in *Banda-Ortiz* could be far reaching.[284] As a start, it is possible "that the immigration bar will hesitate before requesting voluntary departure because of the now-heightened risk that a successful request will result in an automatic denial of all forms of discretionary relief."[285] This reaction could easily carry outside the Fifth Circuit into other parts of the country.

Although the Fifth Circuit Court of Appeals raised its voice in dissent among the circuits to have addressed the issue,[286] it has one of the largest immigration dockets of any of the circuits.[287] Further, the amount of immigration-related cases in the Fifth Circuit continues to grow each year.[288] As such, the court has

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an opinion).

283. *See Banda-Ortiz*, 445 F.3d at 393–94 (Smith, J., dissenting) (speculating that such an arbitrary determinant of alien rights might offend due process principles).

284. *See id.* at 391 (majority opinion) (holding that the filing of a motion to reopen does not automatically toll the voluntary departure period); *Azarte*, 394 F.3d at 1289 (discussing the effect of precluding the "availability [of motions to reopen] in a significant number of cases, likely a substantial majority").

285. *Banda-Ortiz*, 445 F.3d at 396 (Smith, J., dissenting). Judge Smith called such an outcome "predictable." *Id.*

286. *See* Chedad v. Gonzales, 497 F.3d 57, 64 (1st Cir. 2007) (agreeing with the Fifth Circuit that the filing of a motion to reopen does not automatically toll the voluntary departure period); Dekoladenu v. Gonzales, 459 F.3d 500, 507 (4th Cir. 2006) (following *Banda-Ortiz* and refusing to hold that the filing of a motion to reopen tolls the voluntary departure period); *Banda-Ortiz*, 445 F.3d at 388 (holding that a properly filed motion to reopen does not automatically toll the voluntary departure period). *Contra* Ugokwe v. U.S. Attorney Gen., 453 F.3d 1325, 1331 (11th Cir. 2006) ("[T]he timely filing of a motion to reopen tolls the period of voluntary departure pending the resolution of the motion to reopen."); *accord* Barroso v. Gonzales, 429 F.3d 1195, 1205 (9th Cir. 2005) (holding that a timely filed motion to reopen automatically tolls the voluntary departure period); Kanivets v. Gonzales, 424 F.3d 330, 331, 334–35 (3d Cir. 2005) ("[T]he time allotted for departure is tolled pending a ruling on the motion [to reopen] . . . ."); Sidikhouya v. Gonzales, 407 F.3d 950, 952 (8th Cir. 2005) (holding that the alien was entitled to a ruling on the motion to reopen despite overstaying the voluntary departure period).

287. Banda-Ortiz v. Gonzales (*Banda-Ortiz II*), 458 F.3d 367, 368 (5th Cir. 2006) (Smith, J., dissenting).

288. *See* CHARLES R. FULBRUGE III, JUDICIAL WORKLOAD STATISTICS: UNITED STATES COURT OF APPEALS, FIFTH CIRCUIT, 2006 CLERK'S ANNUAL REPORT 1–3, *available at* http://www.ca5.uscourts.gov/clerk/docs/arstats.pdf (concluding that the

more experience than many of its sister circuits interpreting the immigration statutes. Since the court's decision in *Banda-Ortiz*, several other cases in the Fifth Circuit have encountered the same issue.[289] This is representative of the expansive size of the circuit's immigration docket.

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number of appeals from "agency, primarily immigration matters," increased by more than twenty percent since the previous year although the number of overall new appeals decreased).

289. *See e.g.*, Martinez-Salazar v. Gonzales, 239 F. App'x 87, 88 (2007) (not designated for publication) (following *Banda-Ortiz* and upholding the BIA's failure to toll the voluntary departure period during the pendency of post-decision motions); Huang v. Gonzales, 235 F. App'x 260, 261 (5th Cir. 2007) (not designated for publication) (holding, pursuant to *Banda-Ortiz*, that the argument that a motion to reopen vacates a prior order to voluntarily depart "lacks merit"); Cabrera-Benavidez v. Gonzales, 229 F. App'x 323, 323–24 (5th Cir. 2007) (not designated for publication) (holding that under "applicable statutory and regulatory provisions, as well as *Banda-Ortiz* ... the BIA was without authority to extend the voluntary departure period beyond the 60 days already granted"); Ortiz v. Gonzales, 229 F. App'x 321, 321 (5th Cir. 2007) (not designated for publication) (holding that the argument that a voluntary departure period is automatically told by a motion for reconsideration "is without merit"); Moti v. Gonzales, 212 F. App'x 277, 279 (5th Cir. 2006) (not designated for publication) (noting the court has consistently rejected the argument that a "timely-filed motion to reopen toll[s] the voluntary departure period"); Dada v. Gonzales, 207 F. App'x 425, 425 (5th Cir. 2006) (not designated for publication) (holding that "[t]he BIA's interpretation of the applicable statutes" rendering Dada "ineligible for adjustment of status" was reasonable); Chowdhury v. Gonzales, 187 F. App'x 417, 417 (5th Cir. 2006) (not designated for publication) (holding the BIA's denial of a motion to reconsider for failure to depart voluntarily does not demonstrate an abuse of discretion); Khan v. Gonzales, 184 F. App'x 424, 425 (5th Cir. 2006) (not designated for publication) (refusing to toll voluntary departure dates); Moorani v. Gonzales, 182 F. App'x 352, 354 (5th Cir. 2006) (not designated for publication) (holding that "*Banda-Ortiz* disposes of Moorani's first argument" that a motion to reopen "automatically toll[s] an alien's voluntary departure period"); Gonzalez-Hernandez, 2006 WL 3922217, at n.1 (BIA Dec. 18, 2006) (denying relief to an alien in Houston, Texas who failed to depart the United States pursuant to voluntary departure); Soto-Pelyvas, 2006 WL 3712548 (BIA Dec. 5, 2006) ("[I]t is well-settled that the filing of a timely motion to reopen does not automatically toll the voluntary departure period or stay the execution of any decision issued in the case."). Further, several BIA decisions from other circuits relied on those circuits' opinions, which are contrary to the Fifth Circuit's *Banda-Ortiz* ruling. *See, e.g.*, Persaud, 2007 WL 275792 (BIA Jan. 19, 2007) (not designated for publication) (granting the motion to reopen in Miami, Florida appeal); Meng, 2006 WL 3712429 (BIA Nov. 28, 2006) (not designated for publication) (allowing the motion to reopen to go forward in Atlanta, Georgia appeal); Jung Sook Bae, 2005 WL 3709292 (BIA Dec. 28, 2005) (not designated for publication) (reopening Honolulu, Hawaii case in light of decisions holding that the motion to reopen is not barred by the alien's failure to depart within the departure period); Okeyo, 2005 WL 1104361 (BIA Mar. 16, 2005) (not designated for publication) (allowing the motion to reopen based on new case law in Newark, New Jersey appeal).

V. WHERE DO WE GO FROM HERE?

Circuit splits should not be made lightly.[290] Before creating a split, the courts of appeals should carefully analyze the arguments of their sister circuits that have already ruled on the issue.[291] In this situation, the majority panel in *Banda-Ortiz*, without much analysis, believed the facts warranted the creation of a circuit split.[292] As a result, aliens in the First, Fourth, and Fifth Circuits will be more easily removed than aliens in the Third, Eighth, Ninth, and Eleventh Circuits.[293] The U.S. Supreme Court or Congress should intervene to ensure a uniform treatment of aliens across the country.

A. *The Supreme Court Could Settle the Issue*

Although the Supreme Court has denied certiorari of *Banda-Ortiz*,[294] the BIA and the Fifth Circuit have already heard several other cases dealing with this same issue.[295] In fact, the Supreme

290. *See* Banda-Ortiz v. Gonzales, 445 F.3d 387, 391 (5th Cir. 2006) (Smith, J., dissenting) (stressing that the courts "are always chary to create a circuit split" (quoting Alfaro v. Comm'r, 349 F.3d 225, 229 (5th Cir. 2003))).

291. *See id.* (examining the "high hurdle" that a court must overcome before creating a circuit split).

292. *See generally id.* at 387–91 (majority opinion) (analyzing Banda-Ortiz's case and determining that the other circuits were incorrect in their analysis).

293. *Compare* Chedad v. Gonzales, 497 F.3d 57, 64 (1st Cir. 2007) (agreeing with the Fifth Circuit that the filing of a motion to reopen does not automatically toll the voluntary departure period), Dekoladenu v. Gonzales, 459 F.3d 500, 507 (4th Cir. 2006) (following *Banda-Ortiz* and refusing to hold that the filing of a motion to reopen tolls the voluntary departure period), and *Banda-Ortiz*, 445 F.3d at 391 (concluding that a motion to reopen does not toll the running of the voluntary departure period), *with* Ugokwe v. U.S. Attorney Gen., 453 F.3d 1325, 1331 (11th Cir. 2006) (finding BIA's refusal to rule on a motion to reopen because an alien overstayed a departure period was reversible error), Barroso v. Gonzales, 429 F.3d 1195, 1204 (9th Cir. 2005) (holding that a timely filed motion to reopen tolls the voluntary departure period), Kanivets v. Gonzales, 424 F.3d 330, 331, 334–35 (3d Cir. 2005) (ruling that the departure period was tolled until a ruling on the motion to reopen), Sidikhouya v. Gonzales, 407 F.3d 950, 952 (8th Cir. 2005) (holding the alien must be afforded an opportunity to receive a ruling on the timely filed motion to reopen), *and* Azarte v. Ashcroft, 394 F.3d 1278, 1288 (9th Cir. 2005) (holding that a timely filed motion to reopen and a motion to stay removal tolls the voluntary departure period and opining that the period would be stayed even without the filing of a motion to stay removal).

294. *See* Banda-Ortiz v. Gonzales, 127 S. Ct. 1874, 1874 (2007) (denying Banda-Ortiz's request for certiorari).

295. *See e.g.*, Martinez-Salazar v. Gonzales, 239 F. App'x 87, 88 (2007) (not

Court recently granted certiorari to hear *Dada v. Gonzales*,[296] a case from the Fifth Circuit dealing with the same issue presented in *Banda-Ortiz*.[297] In conducting its review, the Supreme Court

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designated for publication) (following *Banda-Ortiz* and upholding the BIA's failure to toll the voluntary departure period during the pendency of post-decision motions); Huang v. Gonzales, 235 F. App'x 260, 261 (5th Cir. 2007) (not designated for publication) (not designated for publication) (holding, pursuant to *Banda-Ortiz*, that the argument that a motion to reopen vacates a prior order to voluntarily depart "lacks merit"); Cabrera-Benavidez v. Gonzales, 229 F. App'x 323, 323–24 (5th Cir. 2007) (not designated for publication) (holding that under "applicable statutory and regulatory provisions, as well as *Banda-Ortiz* . . . the BIA was without authority to extend the voluntary departure period beyond the 60 days already granted"); Ortiz v. Gonzales, 229 F. App'x 321, 321 (5th Cir. 2007) (not designated for publication) (holding that the argument that a voluntary departure period is automatically told by a motion for reconsideration "is without merit"); Moti v. Gonzales, 212 F. App'x 277, 279 (5th Cir. 2006) (not designated for publication) (noting the court has consistently rejected the argument that a "timely-filed motion to reopen toll[s] the voluntary departure period"); Dada v. Gonzales, 207 F. App'x 425, 425 (5th Cir. 2006) (not designated for publication) (holding that "[t]he BIA's interpretation of the applicable statutes" rendering Dada "ineligible for adjustment of status" was reasonable); Chowdhury v. Gonzales, 187 F. App'x 417, 417 (5th Cir. 2006) (not designated for publication) (holding the BIA's denial of a motion to reconsider for failure to depart voluntarily does not demonstrate an abuse of discretion); Khan v. Gonzales, 184 F. App'x 424, 425 (5th Cir. 2006) (not designated for publication) (refusing to toll voluntary departure dates); Moorani v. Gonzales, 182 F. App'x 352, 354 (5th Cir. 2006) (not designated for publication) (holding "*Banda-Ortiz* disposes of Moorani's first argument" that a motion to reopen "automatically toll[s] an alien's voluntary departure period"); Gonzalez-Hernandez, 2006 WL 3922217, at n.1 (BIA Dec. 18, 2006) (denying relief to an alien in Houston, Texas who failed to depart the United States pursuant to voluntary departure); Soto-Pelyvas, 2006 WL 3712548 (BIA Dec. 5, 2006) ("[I]t is well-settled that the filing of a timely motion to reopen does not automatically toll the voluntary departure period or stay the execution of any decision issued in the case."). Further, several BIA decisions that have been heard in other circuits relied on those circuits' opinions, which are contrary to the Fifth Circuit's *Banda-Ortiz* ruling. *See, e.g.*, Persaud, 2007 WL 275792 (BIA Jan. 19, 2007) (not designated for publication) (granting the motion to reopen in Miami, Florida appeal); Meng, 2006 WL 3712429 (BIA Nov. 28, 2006) (not designated for publication) (allowing the motion to reopen to go forward in Atlanta, Georgia appeal); Jung Sook Bae, 2005 WL 3709292 (BIA Dec. 28, 2005) (not designated for publication) (reopening Honolulu, Hawaii case in light of decisions holding that the motion to reopen is not barred by the alien's failure to depart within the departure period); Okeyo, 2005 WL 1104361 (BIA Mar. 16, 2005) (not designated for publication) (allowing the motion to reopen based on new case law in Newark, New Jersey appeal).

296. Dada v. Gonzales, 207 F. App'x 424 (5th Cir. 2006) (not designated for publication).

297. *See* Dada v. Keisler, 128 S. Ct. 36, 36–37 (2007) (granting certiorari; addressing "[w]hether the filing of a motion to reopen removal proceedings automatically tolls the period within which an alien must depart the United States under an order granting voluntary departure"); *Dada v. Gonzales*, 207 F. App'x at 425–26 (not designated for publication) (upholding the BIA's decision refusing to toll the voluntary departure period

will have an opportunity to carefully analyze both sides of the issue. This author forwards that the Supreme Court should rule along with the Third, Eighth, Ninth, and Eleventh Circuits and the Fifth Circuit dissent in *Banda-Ortiz* that the timely filing of a motion to reopen automatically tolls the voluntary departure period.[298]

B. *Proposed Congressional Action*

Congress also clearly has the power to clear up the confusion. An amended statute stating clearly that the filing of a motion to reopen *does* toll the voluntary departure period would put an end to this debate. Proposed regulations have already indicated that the government is considering two possible solutions to the conflict that would toll the voluntary departure period.[299] This recent development proposes that Congress amend both the section dealing with voluntary departure and the section dealing with post-judgment motions to reopen to allow for the tolling of the voluntary departure period during the pendency of review of timely filed motions to reopen. These sections could be amended by simply adding language stating:

> A timely and properly filed motion to reopen tolls the voluntary departure period until after the motion has been reviewed and ruled upon by the Board of Immigration Appeals. If the motion is granted, the voluntary departure period is tolled until the alien's case has been reheard and ruled upon. If the motion is denied, the

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during the pendency of a motion to reopen).

298. *See* Ugokwe v. U.S. Attorney Gen., 453 F.3d 1325, 1331 (11th Cir. 2006) (establishing in the Eleventh Circuit that a timely filed motion to reopen tolls the running of the voluntary departure period); *accord* Barroso v. Gonzales, 429 F.3d 1195, 1204 (9th Cir. 2005) (representing the Ninth Circuit); Kanivets v. Gonzales, 424 F.3d 330, 331, 334–35 (3d Cir. 2005) (representing the Third Circuit); Sidikhouya v. Gonzales, 407 F.3d 950, 952 (8th Cir. 2005) (representing the Eight Circuit); *see also Banda-Ortiz*, 445 F.3d at 391 (Smith, J., dissenting) (arguing that the majority arrived at the wrong conclusion and that the filing of a timely motion to reopen should automatically toll the voluntary departure period).

299. *See Barroso*, 429 F.3d at 1205 (forwarding three possible solutions to the statutory conflict: "no tolling of any period of voluntary departure; *tolling the voluntary departure period for any period that an appeal or motion is pending*; or setting a brief, fixed period of voluntary departure (for example, ten days) after any appeal or motion is resolved" (quoting Inspection and Expedited Removal of Aliens; Detention and Removal of Aliens; Conduct of Removal Proceedings; Asylum Procedures, 62 Fed. Reg. 10,312, 10,325–26 (Mar. 6, 1997) (interim rule))).

alien must depart within the period remaining in his voluntary departure period.

C. *Dealing with the Implications of Banda-Ortiz*

In the meantime, aliens in the First, Fourth, and Fifth Circuits face a difficult dilemma. These three circuits have spoken that they will not allow the voluntary departure period to be tolled upon a motion to reopen.[300] As a result, undocumented aliens must either (1) forego their statutory right to file a motion to reopen; (2) file a motion to reopen, overstay their voluntary departure period, and face the penalties that creates; or (3) choose not to request and accept voluntary departure in order to take advantage of options such as the motion to reopen.

VI. CONCLUSION

The debate over immigration reform is not a new one, and it does not seem to be going away any time soon. The current Immigration and Nationality Act[301] leaves several gaps that must be filled in and interpreted by the courts. In so doing, the circuits should be wary of interpreting the gaps in a manner that creates a split between the circuits.[302] Doing so creates a situation in which aliens receive different rights depending on the circuit in which they are located.

A clear conflict exists between the statutory provisions concerning voluntary departure and those concerning the right to file a motion to reopen. In order to avoid a situation in which an undocumented alien is treated differently in Texas than in, for example, California or Arizona, it is imperative that the Supreme Court or Congress intervene to clear up the issue.

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300. *See* Chedad v. Gonzales, 497 F.3d 57, 64 (1st Cir. 2007) (agreeing with the Fifth Circuit that the filing of a motion to reopen does not automatically toll the voluntary departure period); Dekoladenu v. Gonzales, 459 F.3d 500, 507 (4th Cir. 2006) (following *Banda-Ortiz* and refusing to hold that the filing of a motion to reopen tolls the voluntary departure period); *Banda-Ortiz*, 445 F.3d at 391 (concluding that the voluntary departure period is not tolled upon the timely filing of a motion to reopen).

301. Immigration and Nationality Act, 8 U.S.C.A. §§ 1101-1537 (West 2005 & Supp.2007).

302. *See Banda-Ortiz*, 445 F.3d at 391 (Smith, J., dissenting) (discussing how circuit splits should not be made lightly).

Now that the Supreme Court has decided to address this issue, when it reviews *Dada*, it has an opportunity to settle this conflict.[303] This author hopes that the Court, in its careful analysis of the situation, will determine that the Fifth Circuit's decision in *Banda-Ortiz* was incorrect. Such a conclusion by the Court would allow the Court to give full force and effect to the provisions dealing with voluntary departure and those dealing with motions to reopen. Further, such a conclusion appears to most closely represent the intent Congress desired in creating the statutes. Finally, such a conclusion would no longer tie the due process offered to an undocumented alien to the size of each individual court's docket.

303. *See generally* Dada v. Keisler, 128 S. Ct. 36, 36–37 (2007) (granting certiorari; addressing "[w]hether the filing of a motion to reopen removal proceedings automatically tolls the period within which an alien must depart the United States under an order granting voluntary departure").