

# **Crossing the Judicial Border: Access to Judicial Review for a Premature Appeal of an Order for Removal**

*Evelyn Rodriguez\**

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\* J.D. Candidate, 2018, Seton Hall University School of Law. B.A., 2014, Rutgers University, English and Political Science. I would like to thank Professor Farrin Anello for her guidance and insight during the writing process. This Comment is dedicated to my family for their unconditional love and support.

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## I. INTRODUCTION

To what extent can Congress deprive noncitizens of access to judicial review to challenge government actions that harm them?

To avoid removal from the United States, a noncitizen, who is typically unrepresented and lacks understanding of our immigration laws is required to go through a rigorous administrative process before a federal judge will review his case and ultimately decide his fate. The stakes are especially high for noncitizens who escaped violence in their homelands. Often, due to the lack of guidance from Congress and the federal courts, noncitizens are deprived of their right to seek federal judicial review and are ultimately removed to unsafe countries.

The Immigration and Nationality Act (“INA”),<sup>1</sup> provides the basic framework for current U.S. immigration law. The INA covers immigration quotas, entry, exclusion, deportation proceedings, visa issuance and inspection, and the legal relief available to those facing deportation.<sup>2</sup> Under the INA, noncitizens<sup>3</sup> may petition for judicial review<sup>4</sup> of an adverse decision of the Board of Immigration Appeals (“Board” or “BIA”) as long as that decision constitutes a final order of removal.<sup>5</sup> But nowhere in the INA is the relevant phrase “final order of removal” clearly defined.<sup>6</sup> Instead, “terminology concerning finality is

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<sup>1</sup> Immigration and Nationality Act of 1952, Pub. L. No. 82-414, 66 Stat. 163 (codified as amended in scattered sections of 8, 18, 22 U.S.C.).

<sup>2</sup> Richard D. Steel, *Steel on Immigration Law* § 1:2 (2014).

<sup>3</sup> The INA defines the term “alien” as “any person not a citizen or national of the United States.” 8 U.S.C. § 1101(a)(3). For simplicity and to advance social equality, the non-derogatory term “noncitizen” will be used throughout this Comment.

<sup>4</sup> The principal vehicle for judicial review is a “petition for review,” which must be filed in the circuit in which the removal hearing was held. 8 U.S.C. § 1252(b)(2).

<sup>5</sup> 8 U.S.C. §§ 1252(a)(1), (a)(5). However, there are also restrictions on judicial review for people removable on criminal grounds. § 1252(a)(2)(C) (“no court shall have jurisdiction to review any final order of removal against an alien who is removable by reason of having committed a criminal offense . . .”).

<sup>6</sup> The courts have linked the term “order of removal” to the INA’s definition of a final order of deportation. Thus, an “order of removal” refers to the administrative order concluding that the noncitizen is removable or ordering removal. *See* 8 U.S.C. § 1101(a)(47)(A).

spread throughout both the statute and regulations, leaving ample room for courts to construct their own views on whether or when certain Board decisions become final for purposes of judicial review.”<sup>7</sup>

As to the existence of an “order,” the INA provides that immigration judges will decide cases and, if necessary, order removal at the conclusion of the proceedings.<sup>8</sup> The regulation defines the “order of the immigration judge” as one that “direct[s] the respondent’s removal from the United States, or the termination of the proceedings, or other such disposition of the case.”<sup>9</sup> As the Board has observed, “the regulations contemplate that an Immigration Judge will enter an order that leads to a final conclusion of the removal proceedings.”<sup>10</sup> Once there is an order of removal, the INA provides two conditions upon which the order becomes final: (1) when the Board affirms it; or (2) when the time to appeal the order to the Board expires.<sup>11</sup>

After the order by the immigration judge becomes final, the noncitizen may file a petition for review with the court of appeals for their geographic location.<sup>12</sup> On petition for review, “whether from the immigration judge’s or the Board’s decision, the other requirements of 8 U.S.C. § 1252 must be met, including the timely filing of the petition for review from the final order of removal and the noncitizen’s exhaustion of all administrative remedies.”<sup>13</sup> Generally, the thirty-day statutory filing deadline to obtain judicial review by the court of appeals begins to run when the Board issues a decision that affirms the immigration judge’s removal order in its entirety.<sup>14</sup> In some cases, however, noncitizens seek multiple forms of relief from removal in a single proceeding, leading to confusion regarding finality. In such a case, the Board may uphold part of

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<sup>7</sup> Jesi J. Carlson et al., *Finality and Judicial Review Under the Immigration and Nationality Act: A Jurisprudential Review and Proposal for Reform*, 49 U. Mich. J.L. Reform 635, 637 (2016).

<sup>8</sup> See 8 U.S.C. § 1229a(c)(1)(A).

<sup>9</sup> See 8 C.F.R. § 1240.12(c).

<sup>10</sup> In re I-S- & C-S-, 24 I. & N. Dec. 432, 433 (B.I.A. 2008) (“Since the regulations require entry of an order that will result in the conclusion of proceedings, a grant of voluntary departure without an alternate order of deportation is improper because it leaves the proceedings unresolved and incomplete” (citing In re Chamizo, 13 I. & N. Dec. 435 (B.I.A. 1969); 8 U.S.C. § 1101(a)(47)(A)).

<sup>11</sup> 8 U.S.C. § 1101(a)(47)(B).

<sup>12</sup> See 8 U.S.C. §§ 1252(a)(1).

<sup>13</sup> Jesi J. Carlson et al., *Finality and Judicial Review Under the Immigration and Nationality Act: A Jurisprudential Review and Proposal for Reform*, 49 U. Mich. J.L. Reform 635, 650 (2016) (citing 8 U.S.C. §§ 1252(b)(1), 1252 (d)(1)).

<sup>14</sup> See 8 U.S.C. §§ 1252(a)(1), 1252(b)(1).

a removal order but remand to the immigration judge for further proceedings.<sup>15</sup>

For instance, in *Singh v. Lynch*, the BIA denied the noncitizen's asylum request, but remanded his case to an immigration judge for further proceedings.<sup>16</sup> Singh waited until post-remand proceedings were complete before timely filing a petition for review from the order of removal that finally concluded his removal proceedings.<sup>17</sup> The Ninth Circuit dismissed Singh's petition, however, holding that the BIA's earlier remand order was the "final order of removal" from which Singh had only 30 days to petition for review.<sup>18</sup> As a result, the Ninth Circuit refused to hear the merits of Singh's claim.<sup>19</sup> Singh's case depicts the confusion and conflicts that exist among the circuits due to the lack of a bright-line rule for finality. The confusion regarding what constitutes the "final order of removal" for purposes of judicial review often results in noncitizens losing their ability to challenge the denial of relief from removal.<sup>20</sup>

Currently, the circuit courts are split on whether courts of appeals have jurisdiction to review a noncitizen's premature appeal. The Second, Third, Tenth and Eleventh Circuits held that circuit courts have jurisdiction over premature appeals when the subsequent agency action becomes final.<sup>21</sup> On the other hand, the Fifth, Sixth and Ninth Circuits held that courts of appeals do not have jurisdiction if the appeal is premature and that later events cannot cure the defect.<sup>22</sup> The inter-circuit

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<sup>15</sup> Carlson, *supra* note 7, at 636 ("When that occurs, some forms of relief might be granted, while others are denied or require a remand to the immigration judge for further proceedings. This hybrid 'mixed' decision often leaves aliens and attorneys wondering when the removal order becomes final, and thus when they should file a petition for review. When the Board issues its decision? Or at the conclusion of the remanded proceedings? Which order constitutes the 'final order of removal' for purposes of judicial review?").

<sup>16</sup> *Singh v. Lynch*, 835 F.3d 880, 881-82 (9th Cir. 2016).

<sup>17</sup> *Id.* at 882.

<sup>18</sup> *Id.* at 883.

<sup>19</sup> *Id.*

<sup>20</sup> Over 40% of noncitizens are not represented by counsel during removal proceedings. See U.S. Dep't of Justice, Executive Office for Immigration Review, FY 2015 Statistics Yearbook (April 2016).

<sup>21</sup> See *Herrera-Molina v. Holder*, 597 F.3d 128, 132 (2d Cir. 2010) (holding that a premature petition for review "can become a reviewable final order upon the adjudication of remaining applications for relief and protection, provided that the Attorney General has not shown prejudice"); *Mohammed Shuaib Khan v. United States Att'y Gen.*, 691 F.3d 488, 494 (3d Cir. 2012) (holding that if the "Attorney General has not shown that he will suffer prejudice resulting from the premature filing of a petition for review," "a premature petition for review can ripen once the BIA issues a final order"); *Jimenez-Morales v. United States Att'y Gen.*, 821 F.3d 1307, 1308 (11th Cir. 2016) (holding that the noncitizen's petition ripened when the immigration judge found that the noncitizen "did not have a reasonable fear of persecution or torture").

<sup>22</sup> See *Moreira v. Mukasey*, 509 F.3d 709 (5th Cir. 2007); *Jaber v. Gonzales*, 486 F.3d 223 (6th Cir. 2007).

conflicts regarding the issue of finality, and under what circumstances a Board decision may be deemed final for purposes of judicial review breed confusion; a petition for review that is deemed timely in one circuit may be considered premature or untimely in a different circuit.

Consequently, noncitizens will lose their opportunity to seek judicial review of the agency's disposition of their claims.<sup>23</sup> The ambiguity as to when a petition for review should be filed results in noncitizens filing too late or too early, thereby risking the dismissal of their petitions. For instance, noncitizens who file multiple petitions to avoid removal may find those petitions dismissed as premature if the agency has yet to issue a final decision. Conversely, if the petition for review is late because the noncitizen missed the mandatory filing deadline, he has lost his ability to seek judicial review of the agency decision and will be removed from the United States. This result is unfair to noncitizens, who are often not represented by counsel, especially where the late filing is due to contradictory circuit court precedent on finality rather than a mistake on the part of the noncitizen. Furthermore, this uncertainty can result in the inefficient and unjust operation of immigration law by stalling judicial review by the appropriate court of appeals.

This Comment seeks to clarify the circuit split regarding judicial review of premature petitions and address the inconsistencies amongst the courts of appeals. This Comment proceeds in four parts. Part I outlines the history of appeals and judicial review under the INA. Part II provides an overview of the current circuit split on the availability of judicial review for a noncitizen's premature petition for review. Part III criticizes the limited availability of judicial review in the immigration context. Lastly, Part IV proposes an expansion of judicial review in immigration proceedings to provide noncitizens with due process and a fair opportunity to be heard by an impartial decision maker. This Comment argues that the rule applied by the Second, Third, Tenth and Eleventh Circuits, allowing a noncitizen's premature petition for review to ripen into a reviewable order if there is no prejudice to the adverse party, promotes fairness and advances principles of due process.<sup>24</sup>

## II. BACKGROUND AND DEVELOPMENT OF JUDICIAL REVIEW UNDER THE IMMIGRATION AND NATIONALITY ACT

The INA provides that the federal courts of appeals are the "sole and exclusive means for judicial review of an order of removal."<sup>25</sup> As such, a

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<sup>23</sup> Carlson, *supra* note 7, at 637.

<sup>24</sup> See *Herrera-Molina*, 597 F.3d 128, *Khan*, 691 F.3d 488, and *Jimenez-Morales*, 821 F.3d 1307.

<sup>25</sup> 8 U.S.C. § 1252(a)(5).

noncitizen may seek judicial review of an adverse decision only when the relevant order becomes final.<sup>26</sup>

The INA synonymously describes an order of removal in two parts: (1) an order of the immigration judge or administrative officer that (2) either concludes deportability or orders deportation.<sup>27</sup> The regulation defines the “order of the immigration judge” as one that “direct[s] the respondent’s removal from the United States, or the termination of the proceedings, or other such disposition of the case as may be appropriate.”<sup>28</sup>

The INA does not clearly define “final order of removal,” and thus courts construct their own views on whether and when certain immigration judge or Board decisions become final for purposes of judicial review. Under the INA, a noncitizen must seek judicial review of the final order of removal within thirty days, and this filing deadline is mandatory and jurisdictional.<sup>29</sup> A noncitizen who files his petition for review after a decision is deemed non-final risks having the petition dismissed for lack of jurisdiction. If the noncitizen then fails to file a petition for review within thirty days of the actual final agency order, his petition will be deemed late and he will be barred from bringing an appeal.<sup>30</sup> Additionally, if the “premature” petition is adjudicated at the expiration of the thirty days, the noncitizen will also be left with no recourse. Noncitizens are often unable to gain access to judicial review because of the confusion regarding the existence of a final order of removal and the rigid filing deadline for appeals.

#### A. Appeal Procedure

Initially, a Notice to Appear is filed in the immigration court charging the noncitizen with a violation of law.<sup>31</sup> Thereafter, various hearings are scheduled before the immigration judge and the noncitizen has the opportunity to contest the charges and pursue appropriate forms of relief under the INA.<sup>32</sup> At the conclusion of the hearings, the immigration judge will issue a decision.<sup>33</sup> The parties may then file an administrative appeal with the Board within thirty days of the immigration judge’s

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<sup>26</sup> 8 U.S.C. § 1252(a)(1).

<sup>27</sup> 8 U.S.C. § 1101(a)(47)(A).

<sup>28</sup> 8 C.F.R. § 1240.12.

<sup>29</sup> See 8 U.S.C. § 1252(b)(1) (“The petition for review must be filed not later than 30 days after the date of the final order of removal.”); *Magtanong v. Gonzales*, 494 F.3d 1190, 1191 (9th Cir. 2007) (“The provision establishing the thirty-day filing period is mandatory and jurisdictional.”) (citing *Stone v. INS*, 514 U.S. 386, 405 (1995)).

<sup>30</sup> *Id.*

<sup>31</sup> See 8 U.S.C. § 1229(a)(1); 8 C.F.R. § 1003.14(a).

<sup>32</sup> 8 U.S.C. § 1229(a).

<sup>33</sup> 8 C.F.R. § 1003.37.

decision.<sup>34</sup> As a last resort, a noncitizen may seek judicial review of the Board's final order in the federal court of appeals.<sup>35</sup>

The general grant of appellate jurisdiction found in 8 U.S.C. § 1252(a)(1) establishes "judicial review of a final order of removal."<sup>36</sup> An order of removal becomes final when the Board affirms the immigration judge's finding of removability or when the time for appealing the immigration judge's decision has expired.<sup>37</sup> Circuit courts "may review a final order of removal only if the [noncitizen] has exhausted all administrative remedies."<sup>38</sup> However, the statute divests the courts of jurisdiction over claims by noncitizens with criminal convictions.<sup>39</sup> Additionally, under the INA, the Attorney General may use his discretion in granting various forms of relief from removal; the denial of such discretionary relief is not subject to judicial review.<sup>40</sup>

If the petition for review overcomes the procedural barriers, the federal court of appeals reviewing the case will base its decision on the merits of the petition for review solely on the administrative record.<sup>41</sup> The administrative findings of fact are conclusive unless a "reasonable adjudicator would be compelled to conclude to the contrary."<sup>42</sup>

#### *B. Meaning of "Finality" in the INA*

Finality dictates whether or when a noncitizen may seek judicial review of agency action under the relevant provisions of the INA. The INA contains only indirect references to the finality requirement;<sup>43</sup>

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<sup>34</sup> 8 C.F.R. §§ 1003.3(a)(1), 1003.38(a)-(b).

<sup>35</sup> 8 U.S.C. § 1252(b)(3)(A).

<sup>36</sup> 8 U.S.C. § 1252(a)(1).

<sup>37</sup> 8 U.S.C. § 1101(a)(47)(B).

<sup>38</sup> 8 U.S.C. § 1252 (d)(1) ("A court may review a final order of removal only if (1) the alien has exhausted all administrative remedies available to the alien as of right.").

<sup>39</sup> 8 U.S.C.S. § 1252(a)(2)(C) ("no court shall have jurisdiction to review any final order of removal against an alien who is removable by reason of having committed a criminal offense covered in section 212(a)(2) or 237(a)(2)(A)(iii), (B), (C), or (D) [8 USCS § 1182(a)(2) or 1227(a)(2)(A)(iii), (B), (C), or (D)], or any offense covered by section 237(a)(2)(A)(ii) [8 USCS § 1227(a)(2)(A)(ii)] for which both predicate offenses are, without regard to their date of commission, otherwise covered by section 237(a)(2)(A)(i) [8 USCS § 1227(a)(2)(A)(i)].").

<sup>40</sup> 8 U.S.C. § 1252(a)(2)(B).

<sup>41</sup> 8 U.S.C. § 1252(b)(4)(A).

<sup>42</sup> 8 U.S.C. § 1252(b)(4)(B).

<sup>43</sup> Section 242(a)(1) of the INA provides that "judicial review of a final order of removal . . . is governed only by chapter 158 of Title 28, except as provided in subsection (b) of this section and except that the court may not order the taking of additional evidence under section 2347 of such title." 8 U.S.C. § 1252(a)(1); see 8 U.S.C. §§1252(a)-(g) (providing, with limited exceptions, that a petition for review in the courts of appeals is the sole and exclusive means for judicial review of a final order of removal). In turn, chapter 158 of Title 28, which relates to judicial review of federal agency orders, more expressly

however, its provisions authorizing judicial review of orders of removal have universally been understood to contain a finality requirement for federal court jurisdiction.<sup>44</sup> In part, this is because administrative law recognizes a strong presumption “that judicial review will be available only when agency action becomes final.”<sup>45</sup>

The INA requires that an agency order be “final” for judicial review to be available, however, it does not define or state when an order of removal becomes final.<sup>46</sup> Such ambiguity has resulted in uncertainty as

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alludes to the finality requirement. See, e.g., 28 U.S.C. § 2344; see also 28 U.S.C. §§2342, 2349 (stating that the courts of appeals have jurisdiction to review “final orders” of the relevant agencies and providing that the filing of a petition for review “does not itself stay or suspend the operation of the order of the agency”). In addition to the section authorizing judicial review, the INA refers to final orders of removal in other sections as well, using finality to describe a condition or serve as a reference point. See, e.g., 8 U.S.C. §§1182(a)(6)(F), 1182(d)(3)(B), 1227(d)(1), 1228(b)(4)(F), 1229a(b)(7), 1229a(c)(6)-(7), 1231(a)(1), 1253(a)(1). The implementing regulations similarly refer to final and finality throughout their provisions. See, e.g., 8 C.F.R. §§1.2, 210.4, 214.11(d)(9), 214.14(c)(1)(ii), 216.5(a)(2), 236.1(c)(1), 236.8(a)(4), 245a.12(b)(3), 245a.13(f), 245a.18(c)(1), 245.20(a)(1), (e), 274a.12(c)(18), 1001.1(p), 1003.23(b), 1208.18(b)(2), 1241.1, 1241.31.

<sup>44</sup> See, e.g., *Lopez-Ruiz v. Ashcroft*, 298 F.3d 886, 887 (9th Cir. 2002) (dismissing petition for review because “the BIA’s granting of the motion to reopen means there is no longer a final decision to review.”); *Gafurova v. Holder*, 448 F. App’x 139, 140 (2d Cir. 2011) (“The BIA granted [the noncitizen’s] motion to reopen and remanded her case to an immigration judge for further proceedings and entry of a new decision. Accordingly, there is no longer a final order of removal against her over which [the court] may exercise jurisdiction, and [the court] dismiss[es] the petition for review.”); *Satheeskumar v. United States Att’y Gen.*, 557 F. App’x 128, 130 n.2 (3d Cir. 2014) (“[The order of removal] was rendered non-final when the BIA granted [the noncitizen’s] motion to reopen.”); *Sanchez-Naranjo v. Holder*, 510 F. App’x 759, 760 (10th Cir. 2013) (“[W]hen, as here, the BIA reopens a previously concluded removal proceeding and remands for a new decision by the immigration judge, the prerequisite for circuit court jurisdiction ceases to exist and any pending petition for review must be dismissed.”); *Suharti v. United States Att’y Gen.*, 349 F. App’x 443, 450 (11th Cir. 2009) (“Absent language explicitly upholding a final order of removal, the BIA’s sua sponte reopening of proceedings removes the finality of the removal order and [the court’s] jurisdiction to review it.”); see also *Castaneda-Castillo v. Holder*, 638 F.3d 354, 360 (1st Cir. 2011) (noting that the Board’s reopening of the case “would have meant that there would be no final agency determination for [the court] to review, and so [the court] would no longer have had jurisdiction over the case”).

<sup>45</sup> *Bell v. New Jersey*, 461 U.S. 773, 778 (1983). In the administrative context, even if the relevant statute does not expressly require a “final order” for judicial review, the Supreme Court has stated that there is a “strong presumption . . . that judicial review will be available only when agency action becomes final.” *Id.*; see *McKart v. United States*, 395 U.S. 185, 193–95 (1969) (referring to exhaustion principles to explain necessity of finality rule); Charles Alan Wright et al., 16 *Federal Practice and Procedure* § 3942 (3d ed. 2012) (discussing the requirement and reasons for finality in federal court review of administrative decisions).

<sup>46</sup> “The petition for review must be filed not later than 30 days after the date of the final order of removal.” 8 U.S.C. § 1252(b)(1). This filing requirement is “indeed jurisdictional in nature,” *Ruiz-Martinez v. Mukasey*, 516 F.3d 102, 118 (2d Cir. 2008), and thus courts have “no authority to create equitable exceptions” to the thirty-day filing deadline, *Bowles v. Russell*, 551 U.S. 205, 214 (2007).



to when a petition for review may be filed and ultimately the loss of the noncitizen's opportunity for judicial review.<sup>47</sup>

### III. CIRCUIT SPLIT

While the Supreme Court has not yet weighed in on the lingering question of whether premature petitions for review may ripen into petitions over which the courts of appeals have jurisdiction, the circuit courts have decided the question. The circuit courts are split on whether and when certain orders become final for purposes of judicial review. This Section will review how the courts of appeals have considered the issue of whether a premature petition for review may "ripen" into a timely petition for review once the agency has concluded all relevant administrative proceedings. Under one approach, if a petition for review is late, the noncitizen has lost his ability to seek judicial review because the filing deadline is mandatory and jurisdictional, and, thus, not susceptible to tolling or any other equitable exception.<sup>48</sup> On the other hand, if the petition for review is premature (i.e., the noncitizen has filed the petition prior to the agency's order obtaining the requisite degree of finality for review purposes), there is a possibility that a circuit court will hold that the petition ripens upon the completion of all agency proceedings, negating any need to file a second, timely petition for review.<sup>49</sup>

The courts of appeals are divided as to whether, and under what circumstances, they have jurisdiction to review a noncitizen's premature appeal. The Second, Third, Tenth and Eleventh Circuits held that circuit courts have jurisdiction over premature appeals when the subsequent agency action becomes final.<sup>50</sup> The Fifth, Sixth and Ninth

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<sup>47</sup> See *Batubara v. Holder*, 733 F.3d 1040, 1042–43 (10th Cir. 2013) (dismissing petition for review because the petitioner, who waited until administrative proceedings were completed, failed to file a timely petition for review of the Board's order remanding the case to the immigration judge for further proceedings).

<sup>48</sup> See 8 U.S.C. § 1252(b)(1) ("The petition for review must be filed not later than 30 days after the date of the final order of removal."); *Magtanong v. Gonzales*, 494 F.3d 1190, 1191 (9th Cir. 2007) ("The provision establishing the thirty-day filing period is mandatory and jurisdictional.") (citing *Stone v. INS*, 514 U.S. 386, 405 (1995)).

<sup>49</sup> See *Herrera-Molina v. Holder*, 597 F.3d 128 (2d Cir. 2010); *Mohammed Shuaib Khan v. United States Att'y Gen.*, 691 F.3d 488 (3d Cir. 2012); *Jimenez-Morales v. United States Att'y Gen.*, 821 F.3d 1307 (11th Cir. 2016).

<sup>50</sup> See *Herrera-Molina*, 597 F.3d at 132 (holding that a premature petition for review "can become a reviewable final order upon the adjudication of remaining applications for relief and protection, provided that the Attorney General has not shown prejudice"); *Khan*, 691 F.3d at 494 (holding that if "the Attorney General has not shown that he will suffer prejudice resulting from the premature filing of a petition for review," "a premature petition for review can ripen once the BIA issues a final order"); *Jimenez-Morales*, 821 F.3d at 1308 (holding that the noncitizen's petition ripened when the immigration judge found that the noncitizen "did not have a reasonable fear of persecution or torture").

Circuits held that circuit courts do not have jurisdiction if the appeal is premature and that later events cannot cure the defect.<sup>51</sup>

*A. Circuits Where a Premature Petition for Review May Ripen for Purposes of Judicial Review*

i. Second Circuit

In *Herrera-Molina v. Holder*, decided in 2010, the noncitizen sought review of a “decision of the United States Department of Homeland Security, Immigration and Customs Enforcement reinstating a prior order of deportation for illegal entry, entered in July 1985” against the noncitizen.<sup>52</sup> Mr. Herrera-Molina, a citizen of Colombia, illegally entered the United States in 1972 and was deported in 1985.<sup>53</sup> Thereafter, Mr. Herrera-Molina reentered the United States without inspection and started a family.<sup>54</sup> In 1995, Mr. Herrera-Molina’s spouse became a naturalized United States citizen, and in 1997, she “filed on behalf of Mr. Herrera-Molina a Petition for Alien Relative (“Form I-130”) and an Application to Adjust Status (“Form I-485”).”<sup>55</sup> In 2003, Mr. Herrera-Molina “filed an Application for Permission to Reapply for Admission into the United States after Deportation or Removal (“Form I-212”), which was denied.”<sup>56</sup> Thereafter, in 2007, Immigration and Customs Enforcement (“ICE”) reinstated his prior order of deportation and placed him in custody.<sup>57</sup>

After Mr. Herrera-Molina indicated that he feared for his life, an asylum officer interviewed him and issued a Reasonable Fear Determination, finding that “he had a reasonable fear of returning to Colombia” and that he should be allowed to pursue his “withholding of removal claim before an immigration judge.”<sup>58</sup> Mr. Herrera-Molina was then “placed in withholding of removal proceedings before an immigration judge, and on November 8, 2007, the immigration judge denied his application for withholding of removal.”<sup>59</sup> Mr. Herrera-Molina “appealed the immigration judge’s decision to the BIA” and in July 2009,

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<sup>51</sup> See *Moreira v. Mukasey*, 509 F.3d 709 (5th Cir. 2007); *Jaber v. Gonzales*, 486 F.3d 223 (6th Cir. 2007).

<sup>52</sup> *Herrera-Molina*, 597 F.3d 128, 130.

<sup>53</sup> *Id.*

<sup>54</sup> *Id.* at 131.

<sup>55</sup> *Id.*

<sup>56</sup> *Id.*

<sup>57</sup> *Id.* at 130.

<sup>58</sup> *Herrera-Molina*, 597 F.3d at 131.

<sup>59</sup> *Id.*

the BIA dismissed the appeal.<sup>60</sup> Subsequently, Mr. Herrera-Molina filed a petition for review with the Second Circuit.<sup>61</sup>

The Second Circuit began its analysis by determining whether it had jurisdiction over the case because, “at the time that the parties filed their briefs,” Mr. Herrera-Molina’s appeal of the immigration judge’s initial “denial of withholding of removal was still pending before the BIA.”<sup>62</sup> However, after the BIA dismissed Mr. Herrera-Molina’s appeal of the denial of withholding of removal, the Attorney General conceded that the petition for review ripened from a premature petition into a petition for review of a final order of removal.<sup>63</sup>

The court held that “a premature petition for review of a not-yet-final order of removal can become a reviewable final order upon the adjudication of remaining applications for relief and protection, provided that the Attorney General has not shown prejudice.”<sup>64</sup> The court found that when the BIA rendered a decision resolving Mr. Herrera-Molina’s appeal and the Attorney General did not claim that he was prejudiced by Mr. Herrera-Molina “filing a petition for review prior to the BIA’s decision,” the noncitizen’s petition became reviewable.<sup>65</sup>

## ii. Third Circuit

In *Khan v. United States Att’y Gen.*, decided in 2012, the United States Immigration and Naturalization Service initiated removal proceedings after the petitioners, a father and his son, overstayed their visas.<sup>66</sup> The petitioners sought asylum, withholding of removal, and protection under the Convention Against Torture (“CAT”),<sup>67</sup> alleging that the father had been “persecuted in Pakistan based on his membership in

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<sup>60</sup> *Id.*

<sup>61</sup> *Id.*

<sup>62</sup> *Id.* at 132.

<sup>63</sup> *Id.*

<sup>64</sup> *Herrera-Molina*, 597 F.3d at 132 (citing *Lewis v. Gonzales*, 481 F.3d 125, 128–29 (2d Cir. 2007)); *Foster v. INS*, 376 F.3d 75, 77 (2d Cir. 2004) (“Despite his premature petition to us, we exercised jurisdiction noting that the BIA has since affirmed petitioner’s removal order and the respondent has not shown prejudice.”).

<sup>65</sup> *Herrera-Molina*, 597 F.3d at 132 (“Accordingly, even if Herrera-Molina’s initial petition were premature, we conclude that the reinstatement of his prior deportation order is now a reviewable final order and proceed to the merits of his arguments.”).

<sup>66</sup> *Khan v. United States Att’y Gen.*, 691 F.3d 488, 491 (3d Cir. 2012).

<sup>67</sup> Article III of the CAT provides that a state may not remove a person to another nation if there are “substantial grounds for believing that he would be in danger of being subjected to torture” in that nation. FARRA § 2242. The United States has signed, ratified, and codified CAT. “It [is] the policy of the United States not to expel . . . or otherwise effect the involuntary return of any person to a country in which there are substantial grounds for believing the person would be in danger of being subjected to torture . . .” FARRA § 2242(a) (codified at 8 U.S.C. § 1231).

the Pakistan People's Party."<sup>68</sup> Before the BIA decided the petitioners' motion for an emergency stay of removal and a motion to reopen their case, the petitioners prematurely filed a petition for review with the Third Circuit "challenging the BIA's alleged refusal to adjudicate their motion for an emergency stay of removal and motion to reopen."<sup>69</sup> The Attorney General moved to dismiss the petition arguing that the petition was "(1) untimely with respect to the BIA's February 2003 decision and (2) premature with respect to the BIA's anticipated decision on the petitioners' motion for an emergency stay of removal and motion to reopen."<sup>70</sup> The BIA ultimately denied the petitioners' motion to reopen because it was untimely and also denied the motion for an emergency stay of removal.<sup>71</sup>

The court noted that it had jurisdiction to review the BIA's denial of a motion to reopen unless 8 U.S.C. § 1252(a)(2) strips it of jurisdiction.<sup>72</sup> The court then looked to other circuits for guidance.<sup>73</sup> The Third Circuit decided it would not dismiss the petition on the basis that it was filed two weeks prematurely based on the principle that in civil cases the court has held that "where there is no showing of prejudice by the adverse party and [the court] has not taken action on the merits of an appeal, a premature notice of appeal, filed after disposition of some of the claims before a district court, but before entry of final judgment, will ripen upon the court's disposal of the remaining claims."<sup>74</sup>

The Third Circuit held that "so long as the Attorney General has not shown that he will suffer prejudice resulting from the premature filing of a petition for review, and we have yet to take action on the merits of the appeal, a premature petition for review can ripen once the BIA issues a

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<sup>68</sup> *Khan*, 691 F.3d at 491.

<sup>69</sup> *Id.* at 492.

<sup>70</sup> *Id.*

<sup>71</sup> *Id.*

<sup>72</sup> *Id.* (citing *Cruz v. Att'y Gen.*, 452 F.3d 240, 246 (3d Cir. 2006) ("Congress has explicitly granted federal courts the power to review 'any final order of removal' under 8 U.S.C. § 1252(a)(1). Implicit in this jurisdictional grant is the authority to review the denial of a motion to reopen any such final order.").

<sup>73</sup> *Khan*, 691 F.3d at 492 ("There are differing views among our sister Courts of Appeals with regard to whether premature petitions for review can ripen upon a final decision by the BIA. The Courts of Appeals for the Fifth and Sixth Circuits have held that a premature petition for review does not ripen into a timely petition when the final order is eventually issued. *Moreira v. Mukasey*, 509 F.3d 709, 713 (5th Cir. 2007); *Jaber v. Gonzales*, 486 F.3d 223, 228–30 (6th Cir. 2007). The Court of Appeals for the Second Circuit, in contrast, has held that a premature petition can ripen provided that the BIA later orders the petitioner removed and the Attorney General has not shown that he would be prejudiced. *Herrera-Molina v. Holder*, 597 F.3d 128, 132 (2d Cir. 2010).").

<sup>74</sup> *Khan*, 691 F.3d at 493 (internal citations omitted).

final order on a motion to reopen.”<sup>75</sup> The Third Circuit ultimately refused to treat premature petitions for review from final orders of removal differently from the way in which it has treated premature notices of appeal in other cases.<sup>76</sup>

### iii. Tenth Circuit

The Tenth Circuit, in the same case where it decided that a final administrative removal order (“FARO”) is reviewable when issued,<sup>77</sup> concluded that it could review the noncitizen’s petition for review of the administrative removal order because reasonable fear proceedings were concluded during the pendency of the noncitizen’s petition and the government has shown no prejudice.<sup>78</sup>

### iv. Eleventh Circuit

Like the Second and Third Circuits, the Eleventh Circuit faced a situation in which the petitioner filed a petition for review with the court of appeals before his immigration proceedings had concluded.<sup>79</sup> After he was removed to Colombia, Mr. Jimenez-Morales “unsuccessfully tried to re-enter the United States without authorization near Hidalgo, Texas.”<sup>80</sup> The Department of Homeland Security (“DHS”) took Mr. Jimenez-Morales into custody and “administratively reinstated his 2011 order of removal.”<sup>81</sup> Mr. Jimenez-Morales was placed in a reasonable fear proceeding after expressing “concern that he would be harmed if returned to Colombia.”<sup>82</sup> Before oral argument, an asylum officer found that the noncitizen “did not have a reasonable fear of persecution or torture if he

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<sup>75</sup> *Khan*, 691 F.3d at 494.

<sup>76</sup> *Id.*

<sup>77</sup> *See* *G.S. v. Holder*, 373 F. App’x 836, 841 (10th Cir. 2010) (“a FARO is not appealable to the BIA—review lies only with the courts of appeals. *See* 8 U.S.C. § 1228(b)(3) (“The Attorney General may not execute [a FARO] until 14 calendar days have passed from the date that such order was issued, unless waived by the alien, in order that the alien has an opportunity to apply for judicial review under section 1252 of this title.”); *id.* § 1252(a)(1), (a)(5) (final orders of removal are appealable to courts of appeals).”).

<sup>78</sup> *G.S.*, 373 F. App’x at 843 (as the final administrative removal order was itself “final,” and there being no express prohibition against the ripening of a premature petition for review, “a petition for review filed after a FARO has issued but before an alien has completed the reasonable-fear process ripens upon completion of that process, provided the government has shown no prejudice arising from the timing of the petition.”).

<sup>79</sup> *Jimenez-Morales v. United States Att’y Gen.*, 821 F.3d 1307 (11th Cir. 2016).

<sup>80</sup> *Id.*

<sup>81</sup> *Id.*

<sup>82</sup> *Id.* A reasonable fear proceeding is available if in the course of the administrative removal or reinstatement process, the noncitizen expresses fear of returning to the country of removal. 8 U.S.C. § 208.31(a).

were removed to Colombia,” and an “immigration judge ratified the asylum officer’s finding.”<sup>83</sup>

The Eleventh Circuit first considered whether it had jurisdiction over the noncitizen’s petition because the DHS’s reinstatement of the 2011 order of removal was not “final” since the reasonable fear proceeding was ongoing.<sup>84</sup> The court noted that the noncitizen’s premature appeal “presents a jurisdictional problem because the Immigration and Nationality Act vests circuit courts with jurisdiction to review only ‘final’ orders of removal.”<sup>85</sup> The court agreed with the Ninth and Tenth Circuits that, “where a noncitizen pursues a reasonable fear proceeding following DHS’s initial reinstatement of a prior order of removal, the reinstated removal order does not become final until the reasonable fear proceeding is completed.”<sup>86</sup> Thus, the court held it did not have jurisdiction when Mr. Jimenez-Morales filed his petition for review.<sup>87</sup>

Nonetheless, the court went on to consider whether the petition ripened when the “immigration judge found that Mr. Jimenez-Morales did not have a reasonable fear of persecution or torture, had no basis for withholding of removal, and could not obtain relief under the CAT.”<sup>88</sup> The court held that the petition for review ripened at the conclusion of the reasonable fear proceeding and that the court had jurisdiction to review it.<sup>89</sup> The court sided with the Second and Third Circuits because “their approach is consistent with how we have addressed premature appeals in other contexts.”<sup>90</sup> The court reasoned that this case is similar to cases where a premature notice of appeal is filed from an order dismissing a claim or party, and in those cases the premature notice of appeal is valid if followed by a subsequent final judgment.<sup>91</sup> Therefore, the court concluded that it had jurisdiction to consider the noncitizen’s petition.<sup>92</sup>

In conclusion, the Second, Third, Tenth and Eleventh Circuits have jurisdiction over premature petitions for review upon the adjudication of

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<sup>83</sup> *Id.* at 1307–08 (“The immigration judge found that Mr. Jimenez-Morales did not have a reasonable fear of persecution or torture, that he had no basis for withholding of removal, and that he could not obtain relief under the Convention Against Torture, 8 C.F.R. § 208.18. Pursuant to 8 C.F.R. § 208.31(g)(1), no further administrative appeal was available to Mr. Jimenez-Morales from the immigration judge’s decision.”).

<sup>84</sup> *Id.* at 1308.

<sup>85</sup> *Jimenez-Morales*, 821 F.3d at 1308. *See* 8 U.S.C. § 1252(a)(1).

<sup>86</sup> *Id.* at 1308.

<sup>87</sup> *Id.*

<sup>88</sup> *Id.*

<sup>89</sup> *Id.*

<sup>90</sup> *Id.* at 1309 (stating that a premature notice of appeal is valid if it is filed from an order dismissing a claim or party, and is followed by a subsequent final judgment, even without a new notice of appeal being filed) (internal citations omitted).

<sup>91</sup> *Jimenez-Morales*, 821 F.3d at 1309.

<sup>92</sup> *Id.*

the remaining applications for relief and protection, provided that the Attorney General has not shown prejudice.

*B. Circuits Where a Premature Petition for Review May Not Ripen for Judicial Review*

The Fifth, Sixth, and Ninth Circuits have concluded that a premature petition for review may not ripen into a properly filed petition based on the principle that finality is a jurisdictional prerequisite to review.<sup>93</sup>

i. Fifth Circuit

In *Moreira v. Mukasey*, the Immigration and Naturalization Service filed a Notice to Appeal, alleging that Mr. Moreira was “subject to removal under § 1227 because he had been convicted of two crimes involving moral turpitude not arising out of a single scheme of criminal misconduct.”<sup>94</sup> The immigration judge ordered removal, rejecting Mr. Moreira’s “contention that his offenses failed to qualify as crimes of moral turpitude.”<sup>95</sup> Mr. Moreira “filed a timely *pro se* notice of appeal to the BIA,” and “the BIA affirmed the decision of the immigration judge and dismissed Mr. Moreira’s appeal.”<sup>96</sup> Mr. Moreira then “filed a motion for reconsideration and to reopen the BIA’s decision dismissing his appeal of the immigration judge’s order.”<sup>97</sup> However, the BIA denied this motion.<sup>98</sup> Mr. Moreira then “filed a second motion to reopen and reconsider,” which the BIA also denied.<sup>99</sup> “While his appeal to the BIA was pending,” Mr. Moreira “filed a habeas corpus petition in the District of Connecticut.”<sup>100</sup>

The Fifth Circuit addressed whether it had “jurisdiction to consider Mr. Moreira’s challenges to the immigration judge’s order of removal and the BIA’s affirmance of that order.”<sup>101</sup> The court noted that “the passage of the REAL ID Act divested district courts of jurisdiction over removal orders and designated the courts of appeals as the sole forums for such challenges via petitions for review.”<sup>102</sup> The government argued that the

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<sup>93</sup> *Moreira v. Mukasey*, 509 F.3d 709, 713–14 (5th Cir. 2007); see *Jaber v. Gonzales*, 486 F.3d 223, 228–30 (6th Cir. 2007) (dismissing a case where review was sought from the immigration judge’s decision, but no petition for review was filed after the Board finally disposed of the case); *Brion v. INS*, 51 F. App’x 732, 733 (9th Cir. 2002) (citing *Chu v. INS*, 875 F.2d 777, 780, 781 (9th Cir. 1989)).

<sup>94</sup> *Moreira*, 509 F.3d at 711.

<sup>95</sup> *Id.*

<sup>96</sup> *Id.*

<sup>97</sup> *Id.*

<sup>98</sup> *Id.*

<sup>99</sup> *Id.*

<sup>100</sup> *Moreira*, 509 F.3d at 711.

<sup>101</sup> *Id.* at 712.

<sup>102</sup> *Id.*

court lacked jurisdiction because “Mr. Moreira’s appeal of the immigration judge’s removal order was pending at the time he filed his habeas petition.”<sup>103</sup> The government also argued that the noncitizen’s petition should be dismissed because he “had not exhausted his administrative remedies as required by § 1252(d)(1).”<sup>104</sup>

The court concluded that it lacked jurisdiction over Mr. Moreira’s petition.<sup>105</sup> With regard to the noncitizen’s challenge of the immigration judge’s order of removal, the court lacked “jurisdiction to review the immigration judge’s decision independently.”<sup>106</sup> The court found that “at the time that Mr. Moreira filed his petition for review, there was no final order that would permit it to review the order of deportation.”<sup>107</sup> The Fifth Circuit followed the approaches taken by the Sixth and Ninth Circuits in holding that “because there was no final order of removal to review, the court lacked jurisdiction at the time Mr. Moreira’s petition was filed” and that the “BIA’s later dismissal of Mr. Moreira’s appeal could not cure this jurisdictional defect.”<sup>108</sup>

#### ii. Sixth Circuit

In *Jaber v. Gonzales*, the petitioner “entered the United States on an immigrant visa as the spouse of a United States citizen with the status of a conditional permanent resident.”<sup>109</sup> After the marriage was annulled, “the Immigration and Naturalization Service served Mr. Jaber with notice that it intended to terminate his conditional permanent resident status” on the basis of this annulment.<sup>110</sup> Mr. Jaber responded by filing a petition requesting “a waiver of the requirement that he and his wife file a joint petition for permanent residence.”<sup>111</sup> Thereafter, Mr. Jaber married another U.S. citizen who filed a Petition for Alien Relative (“Form I-130”) so that he could apply for a visa.<sup>112</sup> Mr. Jaber “filed a petition for a writ of habeas corpus in federal district court” while his appeal to the BIA was pending.<sup>113</sup>

The Sixth Circuit held it did not have jurisdiction over Mr. Jaber’s petition; although he “sought BIA review of the immigration judge’s

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<sup>103</sup> *Id.*

<sup>104</sup> *Id.*

<sup>105</sup> *Id.* at 713.

<sup>106</sup> *Moreira*, 509 F.3d. at 713.

<sup>107</sup> *Id.*

<sup>108</sup> *Id.* at 713–14.

<sup>109</sup> *Jaber v. Gonzales*, 486 F.3d 223, 225 (6th Cir. 2007).

<sup>110</sup> *Id.*

<sup>111</sup> *Id.*

<sup>112</sup> *Id.* at 226.

<sup>113</sup> *Id.* at 227.



denial of his motions to reopen,” “the BIA did not issue its decision until after Mr. Jaber filed his habeas petition in the district court and after the district court transferred the case” to the Sixth Circuit.<sup>114</sup> The court relied on 8 U.S.C. § 1252(b)(1), holding that “a party must file a petition for review with the court of appeals within 30 days.”<sup>115</sup>

### iii. Ninth Circuit

In *Abdisalan v. Holder*, the Ninth Circuit held in its unanimous *en banc* opinion that when the Board issues a decision that denies relief in part, but remands other claims to an immigration judge for further proceedings, the agency decision is not a final reviewable order of removal and “does not trigger the thirty-day window in which to file a petition for review.”<sup>116</sup>

The Ninth Circuit “adopted a straightforward rule: when the BIA issues a decision that denies some claims but remands any other claims for relief to an immigration judge for further proceedings (a ‘mixed’ decision), the BIA decision is not a final order of removal with regard to any of the claims, and it does not trigger the thirty-day window in which to file a petition for review.”<sup>117</sup> Rather, a noncitizen should only seek judicial review at the conclusion of the proceedings, after either the immigration judge has issued a decision and the time for filing an administrative appeal has passed, or the BIA has issued a final decision after appeal from the immigration judge’s decision.<sup>118</sup> Therefore, the court lacks jurisdiction over any petition for review filed prior to the conclusion of the proceedings.<sup>119</sup>

In rendering its decision, the court recognized that the “point at which a removal order becomes final is critical for the purposes of timely petitioning for judicial review.”<sup>120</sup> Indeed, the Ninth Circuit was concerned about the injustice that could arise because of the inconsistency in its jurisprudence regarding “mixed” decisions.<sup>121</sup> The court recognized that “finality is less obvious when the Board affirms the denial of relief on some of an alien’s claims but remands to the immigration judge for further proceedings on others in a ‘mixed’ decision.”<sup>122</sup>

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<sup>114</sup> *Id.* at 229–30.

<sup>115</sup> *Jaber*, 486 F.3d at 229.

<sup>116</sup> *Abdisalan v. Holder*, 774 F.3d 517, 520 (9th Cir. 2014) (*en banc*).

<sup>117</sup> *Id.* at 520.

<sup>118</sup> *Id.* at 526–27.

<sup>119</sup> *Id.*

<sup>120</sup> *Id.* at 521.

<sup>121</sup> *Id.*

<sup>122</sup> *Abdisalan*, 774 F.3d at 522.

The court relied on the statutory text to “indicate that an order of removal cannot become final for any purpose when it depends on the resolution of further issues by the immigration judge on remand.”<sup>123</sup> First, in defining finality for purposes of judicial review, the court reviewed 8 U.S.C. § 1252, which states that the court has jurisdiction to review “a final order of removal.”<sup>124</sup> The court relied on the definition of “order of removal” as set forth in 8 U.S.C. § 1101(a)(47)(A), where Congress defined an order of removal as “the order” of the immigration judge “concluding that the alien is deportable or ordering deportation.”<sup>125</sup> “The order [] becomes “final upon the earlier of (i) a determination by the Board [] affirming such order; or (ii) the expiration of the period in which the alien is permitted to seek review of such order by the Board.”<sup>126</sup>

Next, the court examined “the INA’s repeated reference to ‘the’ order” and concluded that those references “suggest that Congress contemplated that an alien’s removal proceedings would typically culminate in one final order of removal.”<sup>127</sup> Thus, since there is only one final order of removal, the court found it “difficult to conceive how the order could become final at multiple points in time.”<sup>128</sup> In support of this reading of the statute, the court relied on the plain meaning of the word “final,” and its common definition, as well as Congress’s use of the familiar term to conclude that Congress could not have “intend[ed] for an order of removal to become final while remanded proceedings remained ongoing.”<sup>129</sup>

In conclusion, the Fifth, Sixth and Ninth Circuits concluded that a premature petition for review cannot ripen into a properly filed petition because the INA provides jurisdiction to review only final orders of removal, and that finality is a jurisdictional prerequisite to review. Therefore, the Fifth, Sixth, and Ninth Circuits will not review premature petitions under any circumstances.

#### IV. THE INA’S AMBIGUOUS JUDICIAL REVIEW PROVISIONS CREATE CONFUSION

To promote justice, premature petitions for review should ripen into reviewable orders upon disposal of all claims and absent prejudice to the government. The lack of access to judicial review of final orders of

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<sup>123</sup> *Id.* at 523.

<sup>124</sup> *Id.*

<sup>125</sup> *Id.*

<sup>126</sup> 8 U.S.C. § 1101(a)(47)(B).

<sup>127</sup> *Abdisalan*, 774 F.3d at 523–24.

<sup>128</sup> *Id.* at 774 F.3d at 524.

<sup>129</sup> *Id.*

removal deprives noncitizens of their due process rights and often results in noncitizens with valid claims being deported to dangerous countries.<sup>130</sup> The INA's obscure language regarding the availability of judicial review of undefined "final" orders of removal creates confusion. The current confusion and conflict among the circuits not only wastes judicial resources, but also serves to deprive noncitizens of judicial review. In light of the current circuit split, noncitizens will likely receive more favorable results if their premature petitions are filed in the Second, Third, Tenth or Eleventh Circuits. In contrast, if the premature petition is filed in the Fifth, Sixth, or Ninth Circuits, the noncitizen will be left with no recourse and likely forced to return to his/her country and endure the hardships and dangerous conditions he/she was fleeing from in the first place.

The rule applied by the Second, Third, Tenth and Eleventh Circuits is the fairer and more efficient rule. Under this standard, absent a showing of prejudice to the adverse party, a noncitizen's premature petition for review will ripen into a reviewable order upon disposal of all claims.<sup>131</sup> This rule promotes fairness and advances principles of due process as it provides noncitizens with the opportunity to have their case heard by an impartial decision maker. Furthermore, it allows the agency to complete its proceedings without premature interference from the courts and provides noncitizens with essential, clear guidance about the proper time in which to file a petition for review. Indeed, orders of removal require strict judicial review as the result of such an order will drastically impact the welfare and future of the noncitizen and his family.

The INA's judicial review provisions leave the critical detail of "finality" undefined. Such inadequacy ultimately has resulted in uncertainty as to when a petition for review may be filed, and in some unfortunate cases, the loss of the noncitizen's opportunity for judicial review. It is well established that constitutional protections extend to noncitizens within the United States' geographic borders.<sup>132</sup> Pursuant to the Fifth Amendment, no person—including noncitizens—shall be

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<sup>130</sup> See *Demore v. Kim*, 538 U.S. 510, 543, 546 (2003) (Souter, J., concurring in part and dissenting in part) (citing *Fong Yue Ting v. United States*, 149 U.S. 698, 724 (1893)) (Noncitizens are "persons" entitled to the protection of the Due Process Clause of the Constitution.).

<sup>131</sup> See *Jimenez-Morales*, 821 F.3d at 1308–09; *Khan*, 691 F.3d at 493; *Herrera-Molina*, 597 F.3d at 132.

<sup>132</sup> *Zadvydas v. Davis*, 533 U.S. 678, 693 (2001) ("It is well established that certain constitutional protections available to persons inside the United States are unavailable to [noncitizens] outside of our geographic borders . . . but once a [noncitizen] enters the country, the legal circumstance changes, for the Due Process Clause applies to all 'persons' within the United States, including [noncitizens], whether their presence here is lawful, unlawful, temporary, or permanent.").

deprived of “life, liberty, or property, without due process of law.”<sup>133</sup> As such, noncitizens, like United States citizens, are entitled to have their orders of removal reviewed by an impartial decision maker. Because noncitizens are not versed with the laws of the United States or judicial procedure, the courts of appeals must adopt a uniform standard that outlines the requirements for review of petitions to soothe the confusion and promote the due process rights and liberties detailed in the Constitution.

Critics of judicial review in immigration cases believe that judicial review is a tactic to delay deportation.<sup>134</sup> However, this criticism ignores the fact that some delays are necessary to preserve the values of our constitution and to correct injustice done at the administrative level. Proponents of judicial review have argued that “judicial review is a key to success for improvement of the immigration adjudication system” because it “helps to boost immigration esteem,” “is essential to a more efficient system,” and “increases the legitimacy of the entire adjudication system.”<sup>135</sup> Strict judicial review is essential in immigration cases because the stakes are high for vulnerable noncitizens and the federal courts of appeals are in a superior position to simplify immigration law and set precedent which allows noncitizens every opportunity to have their case heard by an impartial decision maker. Indeed, federal judges have critiqued immigration court decisions because of the lack of quality and, at times, injustice.<sup>136</sup> The importance of judicial review is amplified in the context of removal hearings due to the highly punitive nature of deportation. Certainly, a clear standard of judicial review promotes justice and provides that judiciary resources are efficiently used in cases where all administrative remedies have been exhausted.

#### V. PROPOSAL FOR EXPANDING JUDICIAL REVIEW IN IMMIGRATION

The rule adopted by the Second, Third, Tenth and Eleventh Circuits which permits the courts of appeals to review premature petitions absent a showing of prejudice to the adverse party safeguards the interests of noncitizens and is the most efficient rule. This rule avoids unnecessary piecemeal litigation, allows the agency to complete its proceedings without premature interference from the courts, and provides noncitizens with clear guidance about the proper time to file a petition for review.

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<sup>133</sup> U.S. CONST. amend. V.

<sup>134</sup> See Jill E. Family, *Stripping Judicial Review During Immigration Reform: The Certificate of Reviewability*, 8 Nev. L.J. 499, 521–22 (2008).

<sup>135</sup> *Beyond Decisional Independence: Uncovering Contributors to the Immigration Adjudication Crisis*, 59 Kan. L. Rev. 541, 584.

<sup>136</sup> *Id.* at 570.

Additionally, a universal interpretation of the INA provisions would preserve a fair opportunity for noncitizens to seek judicial review of final orders of removal. Judicial review is essential in cases involving final orders of removal because of the punitive nature of removal from the United States. For noncitizens in removal proceedings, the stakes could hardly be higher. Noncitizens face the prospect of being forced from the country they call home—leaving behind friends, family, and loved ones—and being deported to a country where they may fear imprisonment, torture, and even death.<sup>137</sup>

Because noncitizens are required to exhaust administrative remedies prior to seeking judicial review, it is imperative that the courts adopt a universal interpretation of the INA language regarding the finality of an order of removal to safeguard the interests of noncitizens and the judiciary. It is well established that “the presence of a final agency action is important in order to, *inter alia*, ‘provide[] the agency with every reasonable opportunity to resolve the matter by using its special expertise.’”<sup>138</sup> As such, the INA provisions must detail when the agency action is complete so that there is guidance as to when noncitizens may seek federal judicial review of an order of removal.

One proposal is for the courts of appeal to adopt a bright-line rule dictating when judicial review could be sought. “A bright-line rule ensures that noncitizens are on clear notice of when they must file their petition for review, thus guarding against a missed filing deadline.”<sup>139</sup> A uniform interpretation of “final order of removal” will minimize costs associated with seeking judicial review and ensure that judicial review is only used when the agency has finally decided all issues.<sup>140</sup> Certainly, the circuit court’s immigration docket will be reduced if there is a universal rule that specifies when an order is “final” so that a noncitizen may seek judicial review. Such a rule will ease the burden on the courts of appeals

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<sup>137</sup> See *Padilla v. Kentucky*, 559 U.S. 356, 360 (2010) (deportation is a “drastic measure” with “harsh consequences”); *Bridges v. Wixon*, 326 U.S. 135, 154 (1945) (“[D]eportation may result in the loss ‘of all that makes life worth living.’”) (citing *Ng Fung Ho v. White*, 259 U.S. 276, 284 (1922)).

<sup>138</sup> *Administrative Abstention*, 67 Ala. L. Rev. 1019, 1058 (citing William A. McGrath, et al., *Project: State Judicial Review of Administrative Action*, 43 Admin. L. Rev. 571, 685–86 (1991)).

<sup>139</sup> Carlson, *supra* note 7, at 687.

<sup>140</sup> Charles Alan Wright, et al., 16 Federal Practice and Procedure § 3942 (3d ed. 2012) (discussing the requirement and reasons for finality in federal court review of administrative decisions). The general policy reasons behind the finality requirement often converge with the reasons for requiring exhaustion. *Id.* Thus, while one does not equal the other, the justifications for exhaustion, e.g., concepts such as judicial efficiency and administrative primacy often explain or elucidate the purpose of the finality requirement. *Id.* Notably, some have suggested that finality and the ripeness doctrine completely overlap and that the former may be substituted by the latter. *Id.*

dockets because noncitizens will be on clear notice as to when to file a petition for review, thus eliminating the need for the courts to evaluate petitions which have not matured for purposes of jurisdiction.

The Supreme Court can step in and resolve the circuit split by interpreting the INA provisions dealing with final orders of removal. The Supreme Court should adopt the reasoning of the Second, Third, Tenth and Eleventh Circuits which allow the courts of appeals to review premature petitions absent a showing of prejudice to the adverse party. This interpretation clarifies when a noncitizen should file a petition for review and safeguards the constitutional rights of noncitizens. Indeed, the United States Supreme Court has held that practical, not technical, considerations are to govern the application of principles of finality.<sup>141</sup> The standard followed by the Second, Third, Tenth and Eleventh Circuits not only provides clarity, but it is fair and efficient.<sup>142</sup> Under this approach, the courts participate in a burden-benefit analysis in considering premature petitions.<sup>143</sup> Under this standard, if there is no showing of prejudice by the Attorney General and the court has not acted on the merits of an appeal, a premature notice of appeal will ripen into a reviewable order upon the immigration court's disposal of the remaining claims.<sup>144</sup> Thus, the standard followed by the Second, Third, Tenth and Eleventh Circuits effectively preserves the rights of noncitizens to seek judicial review. This impartial interpretation of the INA is necessary to protect the rights of noncitizens who are already vulnerable and intimidated by the lengthy and uncertain process to obtain lawful status and avoid removal.

Congress could, as well, step in and resolve the problem by enacting a clear definition of what constitutes a final order of removal for purposes of judicial review. In accordance with the decisions of the Fifth, Sixth, and Ninth Circuits, Congress can enact a universal rule that "finality, for purposes of judicial review, does not exist so long as any determination of removability or application for relief remains to be decided by the agency."<sup>145</sup> The addition of a finality definition into 8 U.S.C. § 1252, which governs judicial review of orders of removal, provides the benefit

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<sup>141</sup> *Gillespie v. U.S. Steel Corp.*, 379 U.S. 148, 152 (1949).

<sup>142</sup> *See Herrera-Molina*, 597 F.3d at 132 (holding that a premature petition for review "can become a reviewable final order upon the adjudication of remaining applications for relief and protection, provided that the Attorney General has not shown prejudice"); *Khan*, 691 F.3d at 494 (holding that if "the Attorney General has not shown that he will suffer prejudice resulting from the premature filing of a petition for review," "a premature petition for review can ripen once the BIA issues a final order"); *Jimenez-Morales*, 821 F.3d at 1308 (holding that the noncitizen's petition ripened when the immigration judge found that the noncitizen "did not have a reasonable fear of persecution or torture").

<sup>143</sup> *Id.*

<sup>144</sup> *See Khan*, 691 F.3d at 494.

<sup>145</sup> *Carlson*, *supra* note 7, at 685.

of clarity and eases the noncitizen's burden of applying for judicial review.<sup>146</sup> The following language, proposed by Jesi J. Carlson, Patrick J. Glen and Kohsei Ugumori naturally fits into 8 U.S.C. § 1252(b), and clearly provides that judicial review would be premature until all agency proceedings are completed:

(2) Finality

(A) An order of removal entered under 8 U.S.C. §§ 1228, 1229a, and 1231(a)(5), is not final for purposes of judicial review unless (i) removability has been finally determined and (ii) all applications for relief and protection and other administrative matters, including but not limited to asylum, withholding of removal, cancellation of removal, adjustment of status, voluntary departure, background checks, and designation of country of removal, have been resolved by the Board, an immigration judge, or other immigration official charged with resolving such application or matter.

(B) The filing of any applications for relief or protection from removal following entry of the final order of removal shall not affect the finality of such order.

(C) An order denying reopening or reconsideration becomes a final order of removal upon entry of the order by the Board or, if denied by the immigration judge, when such order becomes final pursuant to regulation.<sup>147</sup>

The proposed language allows the agency to complete its proceedings without premature interference from the courts and provides noncitizens with clear guidance about the proper time to file a petition for review. A universal interpretation or rule that an order of removal is not "final" until all administrative proceedings have concluded, irrespective of remands or voluntary departures is supported by the statutory and regulatory language and administrative precedent. This universal rule would also preserve a fair opportunity for noncitizens to seek judicial review of final orders of removal.

## VI. CONCLUSION

The vagueness in the Immigration and Nationality Act judicial review provisions has left many noncitizens without any recourse from removal orders. Many noncitizens are deported to countries full of violence and turmoil because of the INA's lack of clarity as to when an order of removal is final for purposes of judicial review.<sup>148</sup> This confusion

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<sup>146</sup> *Id.*

<sup>147</sup> *Id.* at 684.

<sup>148</sup> In 2015, a total of 333,341 noncitizens were removed compared to 407,075 in 2014. See Department of Homeland Security (DHS) Yearbook of Immigration Statistics (2015)

is evidenced in the diverging circuit decisions regarding premature petitions for review.<sup>149</sup> The time is ripe for the courts of appeals to adopt a uniform standard of review for premature petitions for review to resolve the confusion and promote the due process rights and liberties detailed in the Constitution.

The standard followed by the Second, Third, Tenth and Eleventh Circuits preserves a fair opportunity for noncitizens to seek judicial review of final orders of removal and provides clarity as to when judicial review is available. It is also the fairest and most efficient rule. Under this standard, if there is no showing of prejudice by the adverse party and the court of appeals has not acted on the merits of an appeal, a premature notice of appeal will ripen into a reviewable order upon the BIA or immigration court's disposal of the remaining claims.<sup>150</sup> This rule guarantees that noncitizens are on clear notice of when they must file their petition for review and preserves the resources of the judiciary so that judicial review is only used when the agency has finally decided all issues. Lastly, a uniform rule advances the values detailed in the United States Constitution.

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<https://www.dhs.gov/immigration-statistics/yearbook/2015/table39>, accessed on Oct. 23, 2017.

<sup>149</sup> See *Herrera-Molina v. Holder*, 597 F.3d 128 (2d Cir. 2010); *Mohammed Shuaib Khan v. United States Att'y Gen.*, 691 F.3d 488 (3d Cir. 2012); *Jimenez-Morales v. United States Att'y Gen.*, 821 F.3d 1307 (11th Cir. 2016); *Moreira v. Mukasey*, 509 F.3d 709 (5th Cir. 2007); *Jaber v. Gonzales*, 486 F.3d 223 (6th Cir. 2007); *Abdisalan v. Holder*, 774 F.3d 517 (9th Cir. 2014) (en banc).

<sup>150</sup> See *Khan*, 691 F.3d at 494.