No. 13-70653

UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

CATHERINE LOPENA TORRES,

Petitioner,

v.

WILLIAM P. BARR,

Respondent.

On Petition for Review of a Decision of the Board of Immigration Appeals
(No. A087-957-047)

PETITION FOR REHEARING EN BANC

STEPHEN CARL WOODRUFF
Susupe Terraces #3
P.O. Box 500770
Saipan, MP 96950
(670) 989-2797

DANIEL S. VOLCHOK
ALEX HEMMER
WILMER CUTLER PICKERING
HALE AND DORR LLP
1875 Pennsylvania Avenue N.W.
Washington, D.C. 20006
(202) 663-6000

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INTRODUCTION AND RULE 35 STATEMENT

The Immigration and Nationality Act ("INA") provides that a noncitizen who lacks a valid entry document "at the time of [his or her] application for admission" to the United States is inadmissible. 8 U.S.C. §1182(a)(7)(A)(i). In *Minto v. Sessions*, 854 F.3d 619 (9th Cir. 2017), this Court gave that statutory provision an atextual and improperly broad reading. Specifically, *Minto* interpreted this provision to make inadmissible any noncitizen who lacks a valid entry document not just "at the time of [his or her] application for admission"—as the plain text says—but at *all* times. Although the panel here recognized that it was bound by *Minto*, *see* App. 5, all three members joined a concurring opinion expressing the view that *Minto* "was wrongly decided." App. 9.

That view is correct: *Minto*'s holding, as the concurring opinion explained, "requires a tortured definition" of a key statutory term; "disregards congressional intent"; and, "contrary to established canons of statutory interpretation," reads a separate statute out of the U.S. Code altogether. App. 11.

Minto's error warrants rehearing en banc because of its far-reaching consequences. First and foremost, *Minto* "renders meaningless," App. 10 (concurring op.), a statute that Congress enacted specifically to protect a vulnerable class of noncitizens: residents of the Commonwealth of the Northern Mariana Islands ("CNMI") who lacked lawful status under U.S. immigration law at the time

that law took effect in that territory. The petitioner here is one such person, and *Minto* improperly robs her—and thousands of similarly situated individuals—of the protection Congress meant to confer by enacting the statute. *See id.* ("[U]nder *Minto* the very people ostensibly protected from removal by Congress were not actually protected….").

Minto's consequences, however, run beyond the CNMI. Under *Minto*, virtually every nonadmitted noncitizen in the United States is removable on grounds that Congress never intended. And the expansive reading that *Minto* gave the INA puts this Court's case law in serious tension with cases from other circuits and the Board of Immigration Appeals ("BIA").

Given all this, whether to overrule *Minto* is a question of "exceptional importance," Fed. R. App. P. 35(a)(2).

BACKGROUND

A. Statutory Framework

1. The Immigration and Nationality Act generally governs the admission of noncitizens to the United States. It defines "admission" as "the lawful entry of [an] alien into the United States after inspection and authorization by an immigration officer." 8 U.S.C. §1101(a)(13)(A). And it sets out a number of grounds that make a person who has not yet been admitted "inadmissible." *Id.* §1182. A noncitizen who is "inadmissible" and has not yet entered the United

States may not be admitted. *Id.* §1182(a). A noncitizen who is "inadmissible" and *has* entered the United States (but has not been admitted) may be removed on the basis of his or her inadmissibility. *Id.* §1229a(e)(2).

This case concerns one particular ground of inadmissibility, which is set out at 8 U.S.C. §1182(a)(7). That provision provides, as relevant here, that "any immigrant at the time of [his or her] application for admission … who is not in possession of a valid" entry document "is inadmissible." *Id.* §1182(a)(7)(A)(i). The INA defines "application for admission" to refer to a noncitizen's "application for admission to the United States." *Id.* §1101(a)(4).

2. The Commonwealth of the Northern Mariana Islands is a U.S. insular area comprising 14 islands in the northwest Pacific Ocean. It has been overseen by the U.S. government since the end of World War II. In 1976, Congress approved a negotiated covenant under which the CNMI would govern itself according to its own laws, including its own immigration laws. *See* Pub. L. No. 94-241, 90 Stat. 263. But in the 1980s and 1990s, foreign workers entered the CNMI in large numbers to work in the Commonwealth's booming garment industry, and many were forced to endure "exploitation and mistreatment" by their employers. S. Rep. No. 110-324, at 4 (2008) ("Senate Report"); *see also Northern Mariana Islands v. United States*, 670 F. Supp. 2d 65, 72-73 (D.D.C. 2009). To end this state of affairs, Congress enacted Title VII of the Consolidated Natural Resources Act of

2008 ("CNRA"), Pub. L. No. 110-229, tit. VII, §702, 122 Stat. 754, 854, which provided for the first time that U.S. immigration law would govern the CNMI. Title VII of the CNRA provided that, on the "transition program effective date"—eventually set as November 28, 2009, *see* 8 C.F.R. §1001.1(bb)—federal law would "supersede and replace all laws, provisions, or programs of the [CNMI] relating to the admission of aliens." 48 U.S.C. §1806(a)(1), (f).

Recognizing, however, "the deeply destabilizing effect" that the sudden imposition of U.S. immigration law "would have on the CNMI and its inhabitants," App. 9 (concurring op.), Congress created a two-year transition period during which people who had lawful status under CNMI immigration law but not under U.S. immigration law could apply for lawful status in the United States, *see* Senate Report 7 (indicating Congress's intent to allow "any alien present in the CNMI, at the start of the transition program effective date[, to] remain in the CNMI"). The statute specifically provided that for two years from the transition program's effective date, "no alien who is lawfully present" in the CNMI pursuant to *its* immigration laws "shall be removed from the United States on the grounds that such alien's presence in the Commonwealth is in violation of" 8 U.S.C. §1182(a)(6)(A), which makes a person inadmissible on the basis of his or her

presence in the United States without having been admitted or paroled. 48 U.S.C. §1806(e)(1)(A).[1]

B. Facts And Procedural History

Petitioner Catherine Torres is a native and citizen of the Philippines who entered the CNMI in 1997 as a lawful guest worker. *See* Administrative Record ("AR") 26. During the CNRA transition period—in fact, well more than a year before the period ended—she was arrested by agents of Immigration & Customs Enforcement ("ICE") and placed into removal proceedings. AR108. Despite Congress's command in the CNRA that individuals not be removed during the transition period if they were lawfully in the CNMI prior to the law's enactment, the government charged Torres as removable under §1182(a)(6)(A) for having entered the United States without being admitted or paroled. But it also charged her as removable under §1182(a)(7)(A)—i.e., for lacking a valid entry document at the time of an application for admission. AR292. The immigration judge did not decide whether Torres was removable under paragraph (a)(6), but held that she was removable under paragraph (a)(7), and denied her application for cancellation of

[1] Congress envisioned that many of the people affected by the CNRA would be able to obtain a new type of visa—the "CW" visa—available to foreign workers in the CNMI. *See* 48 U.S.C. §1806(d). But the Department of Homeland Security did not make these visas available until October 2011, one month before the expiration date of the two-year transition period.

removal. AR30. The BIA affirmed, AR3, and Torres petitioned this Court for review.

The panel denied the petition in a published opinion. App. 9. It explained that "binding precedent"—*Minto*—foreclosed Torres's arguments. App. 5. In particular, the panel explained, *Minto* held that "although Congress's two-year reprieve protected immigrants like Torres from removability on the basis that they had not been admitted or paroled into the United States, it did not exempt them from removal based on *other* grounds." App. 7. And under *Minto*, the panel continued, Torres was "'deemed' to be 'an applicant for admission' to the United States" under a separate provision of the INA, and thus was removable under §1182(a)(7)(A). *Id.* at 7-8. The panel also held that Torres was ineligible for cancellation of removal under *Eche v. Holder*, 694 F.3d 1026 (9th Cir. 2012). *Id.* at 8.

As discussed, every member of the panel joined a concurring opinion explaining that *Minto* "was wrongly decided." App. 9.

ARGUMENT

I. *MINTO* MISREAD THE INA

The panel in this case was correct: *Minto* was wrongly decided. Section 1182(a)(7)(A) does not render inadmissible a noncitizen who *at any time* is physically present in the United States without a valid entry document; rather, it

makes inadmissible only a noncitizen who lacks such a document "at the time of [his or her] application for admission." 8 U.S.C. §1182(a)(7)(A)(i). *Minto* reached a contrary result by disregarding the statute's text and structure.[2]

"[B]egin … with the text." *Esquivel-Quintana v. Sessions*, 137 S. Ct. 1562, 1568 (2017). Section 1182(a)(7)(A)(i) states plainly that it applies only to a noncitizen who lacks valid entry documents at a particular time, namely "at the time of [his or her] application for admission." The phrase "at the time of" has a natural and uncontroversial meaning: It tells a reader *when* a certain condition must be met. The INA is full of similar temporal references. Many of those references, like §1182(a)(7)(A), refer to "the time of" an application, an entry, or a filing. For example, one provision makes inadmissible a noncitizen who, "at the time of" his application for a visa, for admission, or for adjustment of status, "is likely … to become a public charge." 8 U.S.C. §1182(a)(4). Another tolls certain deadlines for noncitizens "physically present in the United States at the time of filing" certain motions. *Id.* §1229a(c)(7)(C)(iv). Other temporal references are more expansive. For instance, §1257(a) directs the attorney general to adjust certain aliens' status if, "at the time of admission or subsequently," they become entitled to nonimmigrant

[2] Not surprisingly, at oral argument in this case, government counsel was unable to identify any prior case, administrative or judicial, that had given §1182(a)(7) the broad reading that *Minto* ascribed to it. *See* Oral Arg. 17:38.

status. And §1324a(a)(6)(C)(i) makes an employer liable for hiring an unauthorized worker if it knew "at the time of hiring or afterward" that the worker was unauthorized. So there should be no difficulty understanding when a noncitizen becomes inadmissible under the text of §1182(a)(7)(A): She becomes inadmissible under this provision if she lacks a valid entry document "at the time of [his or her] application for admission" to the United States. That should be the end of the matter. If Congress wanted to make a noncitizen inadmissible for lacking valid entry documents at *any* time, it could have said so.[3]

The structure of the INA confirms that §1182(a)(7)(A)(i) was not meant to authorize the removal of any nonadmitted noncitizen present in the United States without a valid entry document. Most obviously, reading the law so broadly renders superfluous a neighboring inadmissibility ground: §1182(a)(6)(A), which makes inadmissible a noncitizen who is physically present in the United States without having been admitted or paroled. By definition, a person who is physically present in the United States without having been admitted or paroled will lack a valid entry document. *See* App. 12 (concurring op.). Under *Minto*, therefore, "the

[3] Consistent with the statute's focus on the "application for admission," reported cases applying §1182(a)(7)(A) generally involve noncitizens who present fraudulent entry documents at the time of their admissions to the United States. *See, e.g.*, *Kyong Ho Shin v. Holder*, 607 F.3d 1213, 1215 (9th Cir. 2010); *Wen Zhong Li v. Lynch*, 837 F.3d 127, 131 (1st Cir. 2016).

government need *never* charge entry without admission under [§1182(a)(6)(A)], as any immigrant removable under that ground will also lack 'a valid entry document' at 'the time of [the fictional] application for admission.'" *Id.* (second alteration in original). *Minto* neither identified any reason Congress would have wanted §1182(a)(7) to subsume §1182(a)(6) nor acknowledged this flaw in its reading of the statute. *See Knight v. Commissioner*, 552 U.S. 181, 190 (2008) ("render[ing] part of the statute entirely superfluous[is] something we are loath to do").

Minto also makes a muddle of other provisions of the INA. For one, *Minto* has the perverse effect of making removable noncitizens whose entry into the United States has been specifically authorized by Congress. In particular, the INA authorizes the attorney general to temporarily "parole" certain noncitizens into the United States—that is, to allow them to enter. 8 U.S.C. §1182(d)(5)(A). Such parole "shall not be regarded as an admission of the alien." *Id.* And §1182(a)(6) accordingly makes inadmissible only noncitizens who are in the United States "without being admitted *or paroled*." *Id.* §1182(a)(6)(A)(i) (emphasis added). That exception makes sense, because parolees' presence has been authorized by the government. But a parolee in the United States will not possess an "entry document" as that term is defined in §1182(a)(7)(A)—that is, a document authorizing him or her to enter the United States—and so is removable under

Minto despite having been allowed to enter the country by the government pursuant to a statute expressly authorizing that entrance. That cannot be right.[4]

Factors unique to the CNMI context confirm this textual and structural evidence. As the concurring opinion explained, the CNRA's legislative history indicates that Congress intended 48 U.S.C. §1806(e), which established the two-year grace period for CNMI residents without legal status in the United States, to permit "any alien present in the CNMI[] at the start of the transition program effective date … to remain in the CNMI." Senate Report 7. But under *Minto*'s reading of the INA, §1806(e) did no such thing. Instead, it waived only one of two inadmissibility grounds that would have rendered these people removable, leaving the other intact. Hence, under *Minto*, "*every* immigrant who might otherwise have benefited from the two-year delay [set out at §1806(e)] was nonetheless removable" under §1182(a)(7). App. 10 (concurring op.). *Minto* identified no

[4] The history of §1182(a)(7) sheds further light on the role that it was intended to play in the administration of U.S. immigration law. Section 1182(a)(7) was enacted as part of the Immigration Act of 1990. *See* Pub. L. No. 101-649, tit. VI, §601, 104 Stat. 4978, 5067. At that time, §1182 applied only to *excludable* aliens—that is, aliens physically at the borders of the United States. *See Hing Sum v. Holder*, 602 F.3d 1092, 1109 (9th Cir. 2010). The provision's focus on the "time of application for admission" thus only served to underscore a limitation that was obvious from the structure of the statute: It applied to noncitizens outside the United States seeking admission, not to those already within the U.S. borders.

reason that Congress would have wanted to rob CNMI residents of the protection it had just afforded them, nor any basis to conclude that it did.[5]

Minto justified its reading in part by citing 8 U.S.C. §1225(a)(1), which provides that an alien "in the United States who has not been admitted … shall be deemed for purposes of this chapter an applicant for admission." In the *Minto* panel's view, this language means that any noncitizen physically present in the United States without admission is deemed by law "to be making a continuing application for admission by his mere presence." 854 F.3d at 624. But as the BIA has explained, the reference in §1225(a)(1) to an "applicant for admission" simply ensures that a noncitizen who is in the United States without having been admitted is "entitle[d] … to a removal hearing" before being removed. *Matter of Y-N-P-*, 26 I. & N. Dec. 10, 13 (BIA 2012); *see also* 8 U.S.C. §1225(b)(2) (providing that "an alien who is an applicant for admission … shall be detained *for a proceeding* under [8 U.S.C. §1229a]" (emphasis added)). It does not mean that he or she is

[5] *Minto* did observe that a noncitizen could "avoid removal under §1182(a)(7)" by obtaining a CW visa. 854 F.3d at 625; *see also supra* n.1 (discussing CW visas). But the purpose of the two-year grace period was to give CNMI residents time to obtain legal status under U.S. immigration law—a purpose flatly defeated by *Minto*'s reading of the INA, which renders these noncitizens removable (under §1182(a)(7)) the day that U.S. immigration law took effect. In any event, the government did not make CW visas available until late 2011, almost two years into the transition period and well after the dates on which Torres and Minto were ordered removed.

continuously submitting what the concurring opinion rightly called a "fictional[] application for admission." App. 12; *see also* Oral Arg. 14:34 (Judge Bennett: "I'd like to know the government's view as to why the terms 'applicant for admission' and 'application for admission' should be interpreted exactly the same."). The proper reading is that where—as here—*no* application for admission was ever submitted, there is no role for §1182(a)(7)(A) to play. To conclude otherwise requires a "tortured" view of the word "application," and indeed of the statutory scheme as a whole. App. 11 (concurring op.).[6]

As the concurring opinion explained, *Minto* adopted an incorrect and atextual reading of the INA. The Court should grant rehearing en banc to correct that error.

II. *MINTO*'S VALIDITY IS A QUESTION OF EXCEPTIONAL IMPORTANCE

Whether *Minto* correctly interpreted the INA is a matter of "exceptional importance." Fed. R. App. P. 35(a). As explained, *see supra* pp.10-11, *Minto* effectively negates §1806(e) of the CNRA, which Congress enacted to allow "any

[6] *Minto* grounded that "tortured" reading in *Matter of Valenzuela-Felix*, I. & N. Dec. 53 (BIA 2012), which observed that "an application for admission is a continuing one and that admissibility is determined on the basis of the law and facts existing at the time the application is finally considered," *id.* at 59-60. But in *Valenzuela-Felix*, as in the cases on which it relied, the noncitizen had sought admission and been paroled into the United States—that is, he actually *had* made an "application for admission," and that application remained pending. Nothing in *Valenzuela-Felix* speaks to a case in which no "application for admission" was ever made.

alien present in the CNMI[] at the start of the transition program effective date … [to] remain in the CNMI," Senate Report 7. In doing so, *Minto* rendered as many as 20,000 lawfully admitted CNMI residents vulnerable to removal. *Minto*'s impact, moreover, is not limited to the CNMI; the Court's interpretation of the INA permits the government to charge *any* noncitizen who is physically present in the United States without a valid entry document as removable, effectively nullifying statutory safeguards that would otherwise protect such people. Finally, *Minto* puts this Court's caselaw in deep tension with the jurisprudence of the BIA and other circuits. These circumstances warrant rehearing en banc.

A. *Minto* Renders Removable Thousands of Lawfully Admitted CNMI Residents Whose Status Congress Intended To Protect

The consequences of *Minto*'s misreading of the INA are most apparent in cases arising from the CNMI. As the concurring opinion observed, *Minto* "renders meaningless Congress's grant of respite." App. 10. Specifically, Congress intended to afford noncitizens lawfully in the CNMI two years to obtain some form of legal status under U.S. law. Congress did so by "[p]rohibit[ing]" such persons' "removal," 48 U.S.C. §1806(e)(1)—providing that, for a period of two years, no such person "shall be removed from the United States on the grounds that such alien's presence in the Commonwealth is in violation of" §1182(a)(6)(A), *id.* §1806(e)(1)(A). But under *Minto*, "the very people ostensibly protected from removal by Congress were not actually protected—even if they could not be

removed for lack of a valid entry, … they were removable for lack of a valid entry *document*." App. 10 (concurring op.).

The number of people in the CNMI affected by *Minto* is significant. In 2010, the Interior Department estimated that over 20,000 guest workers were left without lawful status under U.S. immigration law on November 28, 2009, when U.S. immigration law took effect in the Commonwealth. *See* U.S. Dep't of the Interior, *Report on the Alien Worker Population in the Commonwealth of the Northern Mariana Islands* ii (2010), *available at* https://tinyurl.com/y6a4mdkq. "[A]pproximately ninety-nine percent" of them, moreover, had lawful status in the CNMI, and so were intended to be protected from removal by Congress during the transition period. *Id.* at iii. Instead, many of those people—including Torres—were arrested and put into removal proceedings well before the transition period expired. Many of those removal proceedings are still winding their way through the immigration bureaucracy. Indeed, two members of the panel that heard this case also heard six other cases in October 2018 that turned on the application of *Minto*. And the government attorney who argued this case told the panel that ICE had put "a lot of … people in removal proceedings" arising out of the CNMI transition; that those cases have "had to work [their] way through the [BIA] and up to this Court"; and that the Court is "just now" beginning to schedule them for argument. Oral Arg. 19:18. In short, rehearing to correct *Minto*'s error would

have salutary effects for a large number of people (and in a large number of cases pending in or headed toward this Court).

Minto's effective invalidation of §1806(e)—and its effect on the population of the CNMI—is reason enough to grant rehearing en banc. The invalidation of a federal law is a paradigmatic ground for discretionary review. *See Iancu v. Brunetti*, 139 S. Ct. 2294, 2298 (2019) (describing a grant of certiorari as the "usual" practice "when a lower court has invalidated a federal statute"). Although *Minto* did not expressly declare §1806 unconstitutional, its reading of the INA effectively renders that provision as much of a dead letter as such a declaration would have. If *Minto* remains good law, the CNMI residents affected by that provision—people whose lives were "transformed overnight as the border of the United States' immigration authority passed, figuratively, over their homes," App. 9 (concurring op.)—will remain excluded from the lawful status that Congress expected they could obtain.

B. *Minto*'s Sweeping Interpretation Of The INA Will Reverberate Beyond The CNMI

Although *Minto* appeared to view the question before it as one that would affect only cases arising from the CNMI, its misreading of the INA is not limited to that context. Under *Minto*, *every* nonadmitted noncitizen in the United States who lacks a valid entry document at any time is removable. That greatly expands

the scope of federal immigration law—and places this Court's caselaw in deep tension with that of other courts of appeals and of the BIA.

Outside the context of the CNMI, the most obvious consequence of *Minto*'s misreading of the INA is that the government can now charge noncitizens as removable on grounds that Congress never intended. The text and structure of the INA suggest that §1182(a)(7) was meant to allow the government only to exclude a person at the border who lacked a valid entry document. *See supra* pp.7-10. But *Minto*'s gloss on the statute turns it into an all-purpose charge that the government can bring at any time against any nonadmitted noncitizen within the United States. Under *Minto*, as the concurring opinion explained (App. 12), the government need not charge a such a person as inadmissible under §1182(a)(6) to remove him or her; the government may now instead charge such a person as inadmissible on the ground that he or she lacks a valid entry document under §1182(a)(7). The *Minto* panel appeared not to understand that its holding in that case—which on its face presented only a question about the application of the INA to the CNMI—would dramatically alter the sweep of the statute outside the Marianas as well.

Minto also puts this Court's case law in tension with that of the BIA. *See* App. 11-12 (concurring op.). In particular, the BIA has declined to adopt *Minto*'s expansive interpretation of §1225(a)(1), the provision that "deems" nonadmitted noncitizens "applicant[s] for admission." In *Matter of Y-N-P-*, 26 I. & N. Dec. 10,

the noncitizen made an argument analogous to the one the government made in *Minto*: that by operation of §1225(a)(1), she should be treated as "applying … for admission" for the purpose of seeking a specific form of relief from removal (namely, a waiver under 8 U.S.C. §1182(h)(2)). 26 I. & N. Dec. at 12-13. The BIA rejected that argument, explaining that "being an 'applicant for admission' under [§1225(a)(1)] is distinguishable from 'applying … for admission to the United States' within the meaning of [§1182(h)]." *Id.* at 13. "The fact that the [noncitizen] is considered an 'applicant for admission'" by §1225(a)(1), the BIA elaborated, "merely entitles her to a removal hearing." *Id.* *Minto*, in other words, adopts a reading of the statutory scheme starkly at odds with BIA's.

Moreover, as the concurring opinion here observed (App. 12), the Fifth and Eleventh Circuits have taken the position—albeit in cases in which the noncitizen had been lawfully admitted—that §1182(a)(7) does not apply to noncitizens who are "not outside the United States seeking entry, but rather already in the United States and seeking an adjustment of status permitting them to remain." *Ortiz-Bouchet v. U.S. Attorney General*, 714 F.3d 1353, 1356 (11th Cir. 2013) (per curiam); *accord Marques v. Lynch*, 834 F.3d 549, 561 (5th Cir. 2016). Given "the need for national uniformity in immigration law," *Cazarez-Gutierrez v. Ashcroft*, 382 F.3d 905, 910 (9th Cir. 2004), this Court should grant rehearing en banc to eliminate the discord between its approach and that of its sister circuits.

CONCLUSION

The petition for rehearing en banc should be granted.

Respectfully submitted,

/s/ Alex Hemmer

DANIEL S. VOLCHOK
ALEX HEMMER
WILMER CUTLER PICKERING
HALE AND DORR LLP
1875 Pennsylvania Avenue NW
Washington, DC 20006
(202) 663-6000

STEPHEN CARL WOODRUFF
Susupe Terraces #3
P.O. Box 500770
Saipan, MP 96950
(670) 989-2797

September 10, 2019

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

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9th Cir. Case Number(s) 13-70653

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○ In compliance with Fed. R. App. P. 32(a)(4)-(6) and does not exceed 15 pages.

Signature /s/ Alex Hemmer **Date** September 10, 2019

(use "s/[typed name]" to sign electronically-filed documents)

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PETITION FOR REVIEW OF AN ORDER OF
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RESPONDENT'S OPPOSITION TO PETITIONER'S PETITION FOR REHEARING EN BANC

JOSEPH H. HUNT
Assistant Attorney General
Civil Division

JOHN W. BLAKELEY
Assistant Director

AIMEE J. CARMICHAEL
Senior Litigation Counsel
Office of Immigration Litigation
U.S. Department of Justice
Civil Division
P.O. Box 878, Ben Franklin Station
Washington, D.C. 20044
Telephone: (202) 305-7203
Attorneys for Respondent

INTRODUCTION

Respondent respectfully opposes petitioner Catherine Lopina Torres's (Torres) petition for rehearing en banc. Although Torres identifies important questions regarding the proper interpretation of the interplay between various sections of the Immigration and Nationality Act (INA), she has failed to establish why those questions should be answered in this case and why the answers are of sufficient importance that this Court should exercise the extraordinary remedy of en banc review. As an initial matter, the extensive analysis of the inadmissibility provisions and whether *Minto v. Sessions*, 854 F.3d 619 (9th Cir. 2017), governs the outcome of this case, obscure the reality that this case turns on one simple fact—Torres was unable to obtain an umbrella permit and thus failed to establish that she was lawfully present under the laws of the Commonwealth of Northern Mariana Islands (Commonwealth) on November 28, 2009 when she became subject to the laws of the United States. Because she was not lawfully present, she was not among those protected by the transitional laws. Thus, even if this Court were to reverse *Minto*, those in Torres's position would nonetheless be subject to removal under 8 U.S.C. § 1182(a)(6)(A)(i).

That only a few other cases might ever present this issue underscores Torres's inability to establish exceptional importance. Of the limited number of cases arising in the Commonwealth, only a small subset raise transitional claims

and even fewer present situations where alternative grounds of inadmissibility are unavailable. Moreover, the transitional period expired eight years ago, and the likelihood of future cases raising the same issue diminishes with each day. To the extent that Torres attempts to establish exceptional importance by identifying a conflict between this Court and the Fifth and Eleventh Circuits, any apparent disagreement is readily distinguishable. In the absence of such conflict, or some other basis for exceptional importance, and because the Board properly applied the applicable inadmissibility grounds, as explained below, Torres fails to establish that en banc review is warranted.

BACKGROUND

I. Statutory provisions.

Although a territory, the Commonwealth has not always been a part of the United States for purposes of the INA. It was not until 2008, when Congress enacted Title VII of the Consolidated Natural Resources Act of 2008 (CNRA), Pub. L. No. 110–229, § 702(a), (e), and (f), 122 Stat. 853-854, 863-864, 48 U.S.C. § 1806-1808 (supp. II 2008), that federal immigration laws applied to the Commonwealth for the first time. Specifically, the CNRA provides that federal immigration laws "supersede and replace all laws, provisions, or programs of the Commonwealth relating to the admission of aliens and the removal of aliens from the Commonwealth." 48 U.S.C. § 1806(f).

Mindful of the differences between the INA and the immigration rules that had previously applied, Congress created a statutory regime to ensure the Commonwealth had sufficient workers during a transition period, which began November 28, 2009, and currently expires December 31, 2029. 48 U.S.C. § 1806(a)(2). First, any alien who qualifies to enter the United States as a nonimmigrant worker under the INA, 8 U.S.C. § 1101(a)(15)(H), may do so without being counted against the normal numerical limitations for purposes of employment within Guam or the Commonwealth. 48 U.S.C. § 1806(b). Next, Congress directed the Secretary of Homeland Security to establish and administer a program for conditional nonimmigrant workers specific to the Commonwealth. 48 U.S.C. § 1806(d) (2012 & Supp. III 2015); *see* 76 Fed. Reg. 55,499, 55,530 (Sept. 7, 2011). That Commonwealth nonimmigrant classification (CW status) is specific to aliens who would not otherwise be eligible for admission. 48 U.S.C. § 1806(d)(2) (Supp. III 2015).

To allow time to implement the new regime, Congress created two additional exceptions applicable during the first two years of the transition. 48 U.S.C. § 1806(e). First, Congress provided that no alien lawfully present in the Commonwealth could be removed under 8 U.S.C. § 1182(a)(6)(A)(i) until the earlier of (i) the expiration of the alien's admission to the Commonwealth or (ii) two years after the effective date of the CNRA, that is, November 28, 2011. 48

U.S.C. § 1806(e)(1)(A). Second, Congress provided that any alien who was lawfully present and authorized to work in the Commonwealth "shall be considered authorized by the Secretary of Homeland Security to be employed" in the Commonwealth for up to two years. 48 U.S.C. § 1806(e)(2). For many aliens, that authorization was established through the issuance of "umbrella permits."[1] Together, these two exceptions ensured that aliens in the Commonwealth who were lawfully present and working could continue to do so for two years, affording the aliens time to either obtain lawful status under the INA or seek CW status. The statute further specified that "[e]xcept as specifically provided in paragraph (1)(A) of this subsection, nothing in this subsection shall prohibit or limit the removal of any alien who is removable under the Immigration and Nationality Act." 48 U.S.C. § 1806(e)(4).

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[1] During the last weeks of immigration control by the Commonwealth government, the Commonwealth's Department of Labor issued two-year conditional work permits, commonly referred to as "umbrella permits," to many aliens holding Commonwealth non-resident worker permits. See de Guzman v. Napolitano, No. 11-00021, 2011 WL 8186655, at *1 (D. N. Mar. I. Dec. 30, 2011). The Commonwealth issued the umbrella permits because the CNRA prohibited the removal of any alien lawfully present pursuant to the immigration laws of the Commonwealth on the effective date of the transition program until: (1) the expiration of the individual's legal status under the immigration laws of the Commonwealth, or (2) two years had elapsed since the effective date of CNRA. *Id.* (citing 48 U.S.C. 1806(e)(1)(A)). The umbrella permits therefore allowed alien workers to stay in the Commonwealth until November 28, 2011. *Id.* The Commonwealth no longer has the authority to issue umbrella permits, or grant any other type of immigration status. See 48 U.S.C. 1806(a)(1), (f).

II. Factual background.

Torres is a native and citizen of the Philippines. Certified Administrative Record (A.R.) 291. Torres claimed she initially entered the Commonwealth in 1997 with a Commonwealth work permit. *See* A.R. 128. Torres was no longer in a valid status on November 27, 2009, when the INA went into effect and her counsel admitted that she did not have an "umbrella permit," that is, authorization to continue working after the CNRA took effect. A.R. 57. Because she lacked work authorization, the Commonwealth's Department of Labor referred Torres to the Department of Homeland Security (DHS) for overstaying her visa. A.R. 108. On July 12, 2010, DHS commenced removal proceedings, charging Torres with removability for being present in the United States without having been admitted or paroled, and for not being in possession of a valid entry document. A.R. 292.

The immigration judge concluded that Torres failed to submit evidence that her admission was lawful or that she had a valid umbrella permit. A.R. 38. The immigration judge concluded that, because Torres did not have valid documentation, she was removable under 8 U.S.C. § 1182(a)(7)(A)(i)(I). The immigration judge additionally denied cancellation of removal. A.R. 38-39. The Board affirmed, observing that she had not been admitted to the United States, and accordingly was required to seek admission. A.R. 4. The Board also held there

was no evidence she had been granted parole in place, nor did she have a valid visa or other entry document. A.R. 4.

In a published decision on June 12, 2019, the Court denied Torres's petition for review. The Court held it was bound by the conclusion in *Minto* that Torres was required to seek admission. Slip Op. at 7. Judge Berzon wrote a concurring opinion, which Judges Wardlaw and Bennett joined, opining that the panel's conclusion was required by circuit precedent, but that *Minto* was wrongly decided.

ARGUMENT

I. Torres fails to demonstrate that this case meets the stringent requirements of Rule 35.

En banc review entails an extraordinary call on scarce judicial resources and is disfavored. *See Hart v. Massanari*, 266 F.3d 1155, 1172 & n.29 (9th Cir. 2001). Under Rule 35(a), *en banc* review will be granted only when required to maintain uniformity of the Court's precedents or when an issue of exceptional importance is involved. Torres has not demonstrated that this case presents an issue of exceptional importance.

Despite Torres's complicated legal arguments, the sole issue in this case is actually a factual question: whether Torres was in lawful status on the date of the transition. The record shows she was not, and she has not contended otherwise in her petition. A.R. 108, 151. That is the crux of this case because the provision at issue only applies to an alien "lawfully present in the Commonwealth pursuant to

the immigration laws of the Commonwealth on the transition program effective date." 48 U.S.C. § 1806(e)(1)(A). Torres suggests in her petition that the provision should apply to her because she was "lawfully in the CNMI prior to the law's enactment." But there is a specific date on which Torres was required to be lawfully present – on the date of enactment, November 28, 2009. That she initially may have entered the Commonwealth lawfully or previously had lawful status is irrelevant. Her failure on this factual question is the failure of her case because she is not ultimately eligible for the exception. *See, e.g.*, *Xu Huang v. Whitaker*, 750 F. App'x 602, 603 (9th Cir. 2019) (unpublished) (remanding for further proceedings because the petitioner appeared to have a valid umbrella permit). In other words, she could be removed under either 8 U.S.C. § 1182(a)(6) or (a)(7), so whatever the appropriate applicability of those provisions may be does not change the outcome of Torres's case.

Moreover, the class of people impacted by this question is exceedingly small. The statutory exception at issue applies solely to residents of the Commonwealth, was in force only two years, and expired in 2011. Although Torres contends "thousands" will be impacted by this case, only 830 notices to appear total have ever been filed with the Immigration Court in Saipan, and fewer than half of those cases were brought prior to 2012. *See* EOIR Statistics Yearbooks, FY2011-2018, available at www.justice.gov/eoir/statistical-year-book.

Of those cases brought while the exception was in force, only a small subset of cases will even implicate the exception. Westlaw shows that only seven removal cases have cited *Minto*, and of those, only one case suggested the person may have been in lawful status at the time of the transition. *See Huang*, 750 F. App'x at 603; *Liqiang Gu v. Barr*, 771 F. App'x 780 (9th Cir. Jun. 12, 2019); *Quan Bin Jin v. Sessions*, 740 F. App'x 579 (9th Cir. Oct. 24, 2018); *Bashar v. Barr*, 753 F. App'x 444 (9th Cir. Feb. 15, 2019); *Erwin v. Whitaker*, 752 F. App'x 535 (9th Cir. 2019); *Jing Guo Jin v. Sessions*, 688 F. App'x 458 (9th Cir. Apr. 20, 2017), *cert. denied* 138 S. Ct. 1280 (2018). And because the exception expired eight years ago, no new cases will be forthcoming.

Torres bases her claim on the allegation that "20,000 guest workers were without lawful status under U.S. immigration laws." Pet. at 14. Although the 20,000 figure as a rough estimate of the number of guest workers is accurate, the "without lawful status" label is wholly lacking in support. The Federal Register relied on statistics like those Torres cites in support of setting the starting cap for CW status as 22,417 visas. 76 Fed. Reg. at 55, 530. CW status provides a visa; anyone who obtains CW status is not inadmissible under 8 U.S.C. § 1182(a)(7). Torres criticizes this point because CW status did not become available until October 2011, one month prior to the end of the exception. Pet. at 5 n.1. However, this is the reason the Commonwealth issued umbrella permits valid for

the duration of the transition – the statute also states that an alien who was lawfully present and authorized to be employed pursuant to the Commonwealth's immigration laws as of November 27, 2009, shall be considered to be in status until the expiration of that employment authorization. 48 U.S.C. § 1806(e)(2). Together, the umbrella permits, the exception in § 1806(e)(1), and CW status allowed the vast majority of aliens to remain in status and pass seamlessly through the transition period. The relatively low number people placed in removal proceedings during the first two years of the transition shows that Congress's plan functioned as intended.

Finally, en banc is not warranted because Torres has not demonstrated that en banc is required to maintain the uniformity of this Court's case law or to address a circuit split. Although Torres cites two cases which she claims are in tension with the holding of *Minto*, *Ortiz-Bouchet v. U.S. Att'y Gen.*, 714 F.3d 1353, 1356 (11th Cir. 2013), and *Marques v. Lynch*, 834 F.3d 549, 561 (5th Cir. 2016), those cases are readily distinguishable. Indeed, Torres explains why: those were cases "in which the noncitizen had been lawfully admitted." Pet. at 17. But Torres has not been lawfully admitted, which is her fundamental problem. Those cases draw a distinction between seeking admission and adjustment of status – indeed, *Ortiz-Bouchet* states directly that § 1182(a)(7)(A)(i)(I) did not apply to post-entry applicants for adjustment of status, but "applies only to applicants for admission."

714 F.3d at 1356. Torres is an applicant for admission, so the provision applies to her. As Torres has not demonstrated that this case meets the requirements of Rule 35, the en banc petition should be denied.

II. *Minto* was correctly decided and the en banc court need not revisit it.

Rather than demonstrating exceptional importance, Torres primarily argues that *Minto* was not correctly decided. But "[e]n banc review is not an opportunity for us to dig through our circuit's trove of opinions and call cases that we would have decided differently." *Makaeff v. Trump University, LLC*, 736 F.3d 1180, 1187 (9th Cir. 2013) (Wardlaw, J. & Callahan, J., concurring in the denial of reh'g en banc). In any event, *Minto* correctly held that Torres was required to seek admission. And like this case, *Minto* did not involve an alien who was in lawful status at the time of the transition, and thus did not address what would happen in that scenario. At bottom, Torres is claiming that *Minto* should be reversed because, although she has never been admitted, she should not be required to demonstrate that she has any basis to remain in the United States. Her argument is at odds with the statutory scheme.

A. Torres was required to seek admission.

As the Court observed in *Minto*, 853 F.3d at 624, 8 U.S.C. § 1182(a)(7)(A) "has three elements: the individual in question (1) is an immigrant (2) who 'at the time of application for admission' (3) lacks a valid entry document." Also, as in

Minto, only the second element – whether Torres was applying for admission when she appeared before the immigration judge – is in dispute. There is no meaningful dispute that Torres, who entered the Commonwealth when it was not governed by the INA, has never been admitted to the United States. *See* 8 U.S.C. § 1101(a)(13)(A) (stating that an "admission" requires "lawful entry of the alien into the United States after inspection and authorization by an immigration officer"). She only disputes that she must now seek admission. But the statute clearly answers that question: 8 U.S.C. § 1225(a)(1) requires that "[a]n alien present in the United States who has not been admitted . . . shall be deemed for the purposes of this chapter an applicant for admission." This is important because whether an alien is an "applicant for admission" or has already been "admitted" determines whether the alien or the government bears the burden of proof in a removal proceeding. 8 U.S.C. § 1229a(c)(2), (3).

Prior to 1996, the INA provided for two separate types of proceedings to adjudicate the legal status of aliens: "deportation" and "exclusion" proceedings. *See Landon v. Plasencia*, 459 U.S. 21, 25 (1982). "[D]eportation" proceedings were provided to aliens who were already present in the United States, while "exclusion" proceedings were provided to aliens who were seeking entry. *Id.* Under that regime, aliens in deportation proceedings had some advantages over aliens in exclusion proceedings – important here, in deportation proceedings the

burden of proof was on the government, but in exclusion proceedings, the burden of proof was on the alien. *See* 8 U.S.C. § 1361 (1994). Moreover, because it was the alien's presence – not her admission – that determined which procedure applied to her, there was an incentive for aliens to enter the United States without inspection in order to obtain the greater procedural protections in deportation proceedings.

In 1996, Congress removed that incentive by enacting the Illegal Immigration Reform and Immigrant Responsibility Act of 1996. Pub. L. No. 104–208, Div. C; § 304, 110 Stat. 3009-587 (IIRIRA). IIRIRA amended the INA by eliminating separate deportation and exclusion proceedings and replacing them with a single procedure: removal. Id. Despite replacing the two proceedings with one, Congress maintained the difference between the burdens of proof applicable to an alien who is excludable (now termed "inadmissible") and an alien who is deportable. It did so by making an alien's prior admission – rather than her presence – dispositive in determining which particular charge of removability is appropriate to her removal proceedings. An alien who has been "admitted to the United States" is subject to a charge of deportability. 8 U.S.C. § 1227(a). In a proceeding to determine deportability, "the [government] has the burden of establishing by clear [and] convincing evidence that . . . the alien is deportable." 8 U.S.C. § 1229a(c)(3)(A). By contrast, an alien who is an applicant for admission

is subject to a charge of inadmissibility, 8 U.S.C. § 1182(a), 1225(a)(1), and bears the burden of establishing that he "is clearly and beyond doubt entitled to be admitted and is not inadmissible . . . or . . . by clear and convincing evidence, that [she] is lawfully present in the United States pursuant to a prior admission." 8 U.S.C. 1229a(c)(2), (e)(2).

Torres argues that although she is "deemed . . . an applicant for admission," she never made an "application for admission" within the meaning of 8 U.S.C. § 1182(a)(7)(A). Pet. at 7. In essence, she asserts she is an *applicant* for admission, but claims an *application* for admission can only be made while literally standing at the border. The statute, however, explicitly applies 8 U.S.C. § 1182(a)(7) not only to aliens who are "arriving," but to aliens who have "not been admitted or paroled" and fail to demonstrate continuous physical presence for at least two years. 8 U.S.C. § 1225(b)(1)(A)(i), (iii). Those who have been physically present longer than two years are placed in removal proceedings, 8 U.S.C. § 1225(b)(2)(A), where they bear the burden of demonstrating they are entitled to be admitted "beyond doubt" and are "not inadmissible under 1182." 8 U.S.C. § 1229a(c)(2)(A). There is no exception suggesting that § 1182(a)(7) is exempted from that requirement. This demonstrates a clear Congressional intent that an alien who is an applicant for admission is subject to § 1182(a)(7), even if it is well after the alien's physical entry. To conclude otherwise would undo what

Congress sought to accomplish with IIRIRA, allowing an alien who is physically present to escape the requirement that she have a visa or travel document allowing her to remain.

Torres also claims that, if any alien who is present but has not been admitted is required to provide documents showing she is entitled to admission, it will render superfluous the provision stating that an alien is inadmissible for being present without admission. This contention is simply wrong. The purpose of maintaining both provisions is readily identifiable – it prevents the admission of an alien who procures a visa *after* illegal entry. For example, an alien who marries a United States citizen is eligible for a visa. But possession of a visa notwithstanding, she would not be entitled to admission where she surreptitiously entered the United States – she is separately inadmissible on that ground.[2] This is consistent with the principle that a visa is *required* for admission, but does not *entitle* an alien to admission. *See Pazcoguin v. Radcliffe*, 292 F.3d 1209, 1213 (9th Cir. 2002). Instead, the alien must make an application for admission, which examines a number of factors, only one of which is documents. Having never

[2] Similarly, the result of a VAWA self-petition is a visa; the exemption in 8 U.S.C. § 1182(a)(6) for VAWA self-petitioners allows them to be admitted notwithstanding an illegal entry in some circumstances. 8 U.S.C. § 1101(a)(50); *see* Am. Br. at 15.

previously demonstrated that she was entitled to admission, Torres was required to make that showing. She failed to do so.

Torres's arguments rely heavily on the phrase "at the time of admission," but the Board has explained that the "time" is when the application for admission is actually adjudicated. *Matter of Valenzuela-Felix*, 26 I. & N. Dec. 53, 59 (BIA 2012). Torres contends that the case is unhelpful because the applicant in that case had been paroled into the United States, and thus "had sought admission." Pet. at 12 n.6. This contention is in direct conflict with the claim earlier in the petition that it "cannot be right" that a parolee would be required to provide evidence of documents permitting her to enter or remain in the United States. Pet. at 9-10. The simplest answer is that an applicant for admission is required to demonstrate that she may be admitted – which includes documents demonstrating there is some basis for her to enter or remain in the United States.

Nor are Torres's arguments based on *Matter of Y-N-P-*, 26 I. & N. Dec. 10 (BIA 2012), helpful to her cause. In that case, the alien was an "applicant for admission," but she had been held inadmissible and was seeking relief. The question was whether due to her *status* as an applicant for admission she could use a waiver of inadmissibility. The language Torres relies on was not distinguishing between an "applicant" and "application." It was clarifying that her status as an "applicant" did not convert her application for *relief* to an application for

admission. *Id.* at 12-13. In contrast, Torres is challenging the conclusion that she is inadmissible – not an application for relief – and accordingly she is an applicant for admission.

B. Because Torres was seeking admission, she was required to present documents showing she was entitled to enter or remain in the United States and the CNRA does not provide an exception to that requirement.

With this background in mind, the remaining statutory interpretation is straightforward. As Torres was seeking admission, she was required to present documents demonstrating that she was admissible. 8 U.S.C. § 1182(a)(7)(A). Nothing in the CNRA prevents this outcome. Congress provided explicitly that "nothing in this subsection shall prohibit or limit the removal of any alien" under the INA "[e]xcept as specifically provided in paragraph (1)(A) of this subsection." 48 U.S.C. 1806(e)(4). The sole exception in paragraph (1)(A) was limited to those who were lawfully present in the Commonwealth on the date of transition, for a maximum of two years. 48 U.S.C. § 1806(e)(1)(A). Congress was plainly capable of writing an exception, and it unequivocally limited the exception to presence without admission.

As with the general admission process, this exception serves a specific purpose in the statutory scheme: it ensures that an alien who was lawfully present under the Commonwealth's immigration laws and is eligible for status under the transition rules or the INA would not be rendered inadmissible solely by virtue of

the fact that the alien was present in the Commonwealth at the time the INA became applicable. The exception that Congress included in 48 U.S.C. § 1806(e)(1)(A) was important because an alien who is present in the United States without having been admitted is inadmissible and thus removable – for that sole reason – even if the alien is eligible for a visa that would otherwise allow the alien to seek admission into the United States. 8 U.S.C. § 1182(a)(6)(A). Without the exception in 48 U.S.C. § 1806(e)(1), aliens who obtained CW status would have been rendered inadmissible because of their presence in the United States without having been admitted. Reading the additional exception that Torres seeks into the statute, however, undermines this scheme. Congress created specific exemptions to keep people in the Commonwealth in status and to create new statutes for them – which would have no purpose if no one was required to demonstrate that they, were in fact, eligible to remain in the United States. Accordingly, there was no error in *Minto*'s conclusion, or in the panel's application of it, and the Court should deny rehearing en banc.

CONCLUSION

For the reasons set forth above, the Court should deny the petition for rehearing.

Respectfully submitted,

JOSEPH H. HUNT
Assistant Attorney General
Civil Division

JOHN W. BLAKELEY
Assistant Director

/s/ Aimee J. Carmichael
AIMEE J. CARMICHAEL
Senior Litigation Counsel
Office of Immigration Litigation
Civil Division
United States Department of Justice
P.O. Box 878, Ben Franklin Station
Washington, D.C. 20044
(202) 305-7203

Date: October 4, 2019

Attorneys for Respondent

CERTIFICATE OF COMPLIANCE

Pursuant to Ninth Circuit Rule 35-4 and 40-1, I certify that Respondent's Opposition to Petitioner's Rehearing En Banc:

(1) was prepared using Microsoft Word using Times New Roman, 14 point, font type;

(2) is proportionally spaced;

(3) contains 4,130 words;

(4) and does not exceed 4,200 words.

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/s/ Aimee J. Carmichael
AIMEE J. CARMICHAEL
Attorney
Office of Immigration Litigation
Civil Division
U.S. Department of Justice
Post Office Box 878
Ben Franklin Station
Washington, D.C. 20044
(202) 305-7203

CERTIFICATE OF SERVICE

I hereby certify that on October 4, 2019, I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system.

Participants in the case who are registered CM/ECF users will be served by the appellate CM/ECF system.

Signature /s/ Aimee J. Carmichael