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

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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,

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UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

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OR

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

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APPENDIX

FOR PUBLICATION

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

CATHERINE LOPENA TORRES, *Petitioner*, v. WILLIAM P. BARR, Attorney General, *Respondent.*	No. 13-70653 Agency No. A087-957-047 OPINION

On Petition for Review of an Order of the
Board of Immigration Appeals

Argued and Submitted October 11, 2018
Honolulu, Hawaii

Filed June 12, 2019

Before: Kim McLane Wardlaw, Marsha S. Berzon, and Mark J. Bennett, Circuit Judges.

Opinion by Judge Wardlaw;
Concurrence by Judge Berzon

SUMMARY*

Immigration

Denying Catherine Lopena Torres's petition for review of a decision of the Board of Immigration Appeals, the panel concluded that, because it must follow the court's binding precedent involving immigrants residing in the Commonwealth of the Northern Mariana Islands (CNMI), Torres was removable and ineligible for cancellation of removal.

Torres, a native and citizen of the Philippines, entered the CNMI as a lawful guest worker at a time when the CNMI was enforcing its own immigration laws pursuant to a covenant between it and the United States establishing the CNMI as a Commonwealth of the United States. Effective November 28, 2009, U.S. immigration laws were imposed on the territory, but Congress enacted a two-year reprieve during which immigrants who had been lawfully present in the CNMI under CNMI law on the effective date would not be deported under 8 U.S.C. § 1182(a)(6)(A)(i) for not having been admitted or paroled into the United States.

In 2010, Torres was placed in removal proceedings, and the BIA determined that she was removable under 8 U.S.C. § 1182(a)(7)(A)(i)(I) as an alien who "at the time of application for admission" lacked a "valid entry document." The BIA also concluded that she was ineligible for cancellation of removal.

* This summary constitutes no part of the opinion of the court. It has been prepared by court staff for the convenience of the reader.

The panel concluded that substantial evidence supported the BIA's decision that Torres was removable under 8 U.S.C. § 1182(a)(7)(A)(i)(I). The panel explained that this court held in *Minto v. Sessions*, 854 F.3d 619 (9th Cir. 2017), *cert. denied*, 138 S. Ct. 1261 (2018), that although Congress's two-year reprieve protected immigrants like Torres from removability under 8 U.S.C. § 1182(a)(6)(A)(i) 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 of removability. Therefore, the reprieve offered Torres no protection from the charge that, under 8 U.S.C. § 1182(a)(7)(A)(i)(I), she was an immigrant who "at the time of application for admission" lacked a "valid entry document."

The panel concluded that substantial evidence also supported the BIA's determination that Torres failed to establish the ten years of continuous presence in the United States required for cancellation of removal. In so concluding, the panel explained that in *Eche v. Holder*, 694 F.3d 1026 (9th Cir. 2012), this court held that residence in the CNMI before U.S. immigration law became effective does not count toward the residence required for naturalization as a U.S. citizen.

Finally, the panel concluded that it lacked jurisdiction to consider Torres's request to remand her case to the agency to determine whether United States Citizenship and Immigration Services should grant her application for parole-in-place.

Concurring, Judge Berzon, joined by Judges Wardlaw and Bennett, wrote separately because she believes that *Minto v. Sessions* was wrongly decided. Judge Berzon wrote that *Minto* rendered meaningless Congress's grant, under

48 U.S.C. § 1806(e), of the two-year respite from removal for aliens present without admission or parole. Under *Minto*, Judge Berzon wrote, 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, under *Minto* they were removable for lack of a valid entry *document*. Judge Berzon wrote that this holding requires a tortured definition of "application" for admission, disregards congressional intent, and, contrary to established canons of statutory interpretation, construes 48 U.S.C. § 1806(e) to be inoperative or superfluous, void or insignificant.

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OPINION

WARDLAW, Circuit Judge:

Catherine Lopena Torres, a native and citizen of the Philippines who resides in the Commonwealth of the Northern Mariana Islands (CNMI), petitions for review of the Board of Immigration Appeals' (BIA) decision affirming an Immigration Judge's (IJ) determination that Torres was removable "as an intending immigrant without a . . . valid entry document," *see* 8 U.S.C. § 1182(a)(7)(A)(i)(I), and that she was ineligible for cancellation of removal. We have jurisdiction pursuant to 8 U.S.C. § 1252. Because we must follow our court's binding precedent in *Minto v. Sessions*, 854 F.3d 619 (9th Cir. 2017), *cert. denied*, 138 S. Ct. 1261 (2018), and *Eche v. Holder*, 694 F.3d 1026 (9th Cir. 2012), we deny Torres's petition for review.

I.

When Torres entered the CNMI in 1997, the CNMI was enforcing its own immigration laws pursuant to a covenant between it and the United States, establishing the CNMI as a Commonwealth of the United States. *See* Covenant to Establish a Commonwealth of the Northern Mariana Islands in Political Union with the United States of America (Covenant), Pub. L. No. 94-241, 90 Stat. 263 (1976) (joint resolution of Congress approving the Covenant). Torres entered as a lawful guest worker, and maintained that status up through November 28, 2009, the effective date of the Consolidated Natural Resources Act of 2008 (CNRA), Pub. L. No. 110-229, 122 Stat. 754 (codified in relevant part at 48 U.S.C. §§ 1806–1808), which imposed U.S. immigration laws, specifically the Immigration and Nationality Act (INA), 8 U.S.C. §§ 1101–1537, within the island territory. In an effort to insure that immigrants like Torres were not

unfairly penalized by the sudden imposition of U.S. immigration laws and that the CNMI economy would not be destabilized by the ensuing deportation of previously lawfully admitted guest workers, Congress enacted a two-year reprieve during which immigrants who had been lawfully present in the CNMI on the effective date would not be deported on the basis that they had not been admitted or paroled into the United States. 8 U.S.C. § 1182(a)(6)(A).

In 2010, the Department of Homeland Security (DHS) issued a Notice to Appear to Torres, charging her with removability both under 8 U.S.C. § 1182(a)(6)(A)(i), as an alien present without having been admitted or paroled, and under 8 U.S.C. § 1182(a)(7)(A)(i)(I), as an alien who "at the time of application for admission" lacked a "valid entry document." The BIA concluded that Torres was an "applicant for admission" who lacked a valid entry document, that she was ineligible for cancellation of removal because she could not satisfy the requisite ten years of continuous residence in the United States, and that the agency lacked the power to grant her parole-in-place. It therefore affirmed the IJ's order of deportation against Torres.

II.

We conclude that substantial evidence supports the BIA's decision that Torres is removable as charged.[1] As an

[1] Torres exhausted the arguments later decided in *Minto* before the agency. Although she did not fully raise her claims in her opening brief, she did so in her reply brief, and both she and the government were allowed to fully brief the issues in supplemental briefing. Thus, while we ordinarily do not consider arguments that are not presented in the appellant's opening brief, we do so here because Torres's failure to properly raise these arguments did not "prejudice" the government. *See*

initial matter, this court held in *Minto* 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 of removability set forth in the INA. 854 F.3d at 623, 625. The reprieve, then, offered Torres no protection from the charge that she was an immigrant who "at the time of application for admission" lacked a "valid entry document." 8 U.S.C. § 1182(a)(7)(A)(i)(I).

In light of *Minto*, the BIA did not err in deeming Torres an applicant for admission as of the CNRA's effective date. In *Minto*, this court held that an immigrant "who was present in the CNMI without admission or parole on November 28, 2009, is 'deemed' to be 'an applicant for admission'" to the United States under 8 U.S.C. § 1225(a)(1). *Minto*, 854 F.3d at 624. This court further held that by virtue of Minto's mere presence in the CNMI, he was deemed to have made a continuing application for admission that did not terminate "until it was considered by the IJ." *Id*. Thus, under *Minto*, the BIA properly concluded that Torres was an applicant for admission, whose continuing application was before the agency.

Because Torres failed to submit any evidence demonstrating that she possessed a valid unexpired immigrant visa, reentry permit, border crossing card, or other valid entry document required by the INA, the BIA

Alcaraz v. I.N.S., 384 F.3d 1150, 1161 (9th Cir. 2004) (explaining that one of the "notable exceptions to" the court's rule that it will not consider arguments raised for the first time in the reply brief is "if the failure to raise the issue properly did not prejudice the defense of the opposing party").

properly determined that she was removable under 8 U.S.C. § 1182(a)(7)(A)(i)(I).

III.

Substantial evidence also supports the BIA's determination that Torres failed to carry her burden of establishing ten years of continuous presence in the United States. Construing § 705 of the CNRA, 122 Stat. at 867 (codified at 48 U.S.C. § 1806 note), we held in *Eche* that "residence in the CNMI before United States immigration law became effective" does not "count toward the residence required for naturalization as a United States citizen." 694 F.3d at 1030. Torres does not dispute that she resided in the CNMI from 1997 through 2010. Therefore, the BIA properly concluded that she is ineligible for relief in the form of cancellation of removal.

IV.

The BIA correctly noted that although Torres applied for parole-in-place, she presented no evidence that such status had been granted. Torres asks us to remand her case to the agency to determine whether United States Citizenship and Immigration Services should grant her application for parole-in-place under 8 U.S.C. § 1182(d)(5)(A), which grants the Attorney General discretion to "parole into the United States temporarily under such conditions as he may prescribe only on a case-by-case basis for urgent humanitarian reasons or significant public benefit any alien applying for admission to the United States." Neither we nor the agency has jurisdiction over this question. *See* 8 U.S.C. § 1182(d)(5)(A); 8 C.F.R. § 212.5(a); *Rodriguez v. Robbins*, 715 F.3d 1127, 1144 (9th Cir. 2013) ("The parole process is purely discretionary and its results are unreviewable by IJs."). As the BIA correctly stated, the "parole authority

under section 212(d)(5)(A) of the [INA] is delegated solely to the [DHS secretary] and is not within the jurisdiction of the [agency]."

PETITION DENIED.

BERZON, Circuit Judge, with whom Judge Wardlaw and Judge Bennett join, concurring:

Circuit precedent allows no other result, so I concur in the opinion. I write separately, however, because I believe that *Minto v. Sessions*, 854 F.3d 619 (9th Cir. 2017), *cert. denied*, 138 S. Ct. 1261 (2018), was wrongly decided.

A group of immigrants, of which Ms. Torres might be a part, resided legally in the Commonwealth of the Northern Mariana Islands ("CNMI") before November 28, 2009. On that date, their status was transformed overnight as the border of the United States' immigration authority passed, figuratively, over their homes. *See* Consolidated Natural Resources Act of 2008, Pub. L. No. 110-229 § 702, 122 Stat. 754, 854–64 (codified at 48 U.S.C. §§ 1806–1808). In recognition of the deeply destabilizing effect such a dramatic change would have on the CNMI and its inhabitants, Congress provided that "no alien who is lawfully present in the Commonwealth pursuant to the immigration laws of the Commonwealth on the transition program effective date shall be removed from the United States on the grounds that such alien's presence in the Commonwealth is in violation of section 212(a)(6)(A) of the Immigration and Nationality Act," until the noncitizen's authorization expired or two years after the effective date of transition. 48 U.S.C. § 1806(e)(1)(A). Section 212(a)(6)(A) makes inadmissible

"aliens present without admission or parole." 8 U.S.C. § 1182(a)(6)(A).

Minto renders meaningless Congress's grant of respite. Because of our ruling in that case, *every* immigrant who might otherwise have benefited from the two-year delay was nonetheless removable under section 212(a)(7)(A)(i)(I), which provides that "any immigrant at the time of application for admission . . . who is not in possession of a . . . valid entry document" is inadmissible. 8 U.S.C. § 1182(a)(7)(A)(i). The CNMI immigrants in question had taken no affirmative act to apply for admission to the United States on the effective date of consolidation or thereafter. Yet *Minto* noted that a noncitizen "who was present in the CNMI without admission or parole on November 28, 2009, is 'deemed' to be 'an applicant for admission'" to the United States under section 235, 8 U.S.C. § 1225(a)(1), and then assumed that every constructive "applicant" within the meaning of section 235(a)(1) must have made a putative (even though actually nonexistent) "application for admission" for purposes of section 212(a)(7)(A)(i)(I). *Minto*, 854 F.3d at 624. Any such individual in the CNMI who had not been admitted or paroled within the meaning of section 212(a)(6)(A) would also necessarily lack "a valid entry document" for purposes of section 212(a)(7)(A)(i)(I). As a result, it appears that 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, under *Minto* they were removable for lack of a valid entry *document*.[1]

[1] *Minto* suggested that a visa program for CNMI workers would provide relief from section 212(a)(7)(A)(i)(I). *Minto*, 854 F.3d at 625. But that program was not available until October 7, 2011, nearly the end

This holding requires a tortured definition of "application," disregards congressional intent, and, contrary to established canons of statutory interpretation, construes 48 U.S.C. § 1806(e) to be "inoperative or superfluous, void or insignificant." *Hibbs v. Winn*, 542 U.S. 88, 101 (2004) (quoting 2A N. Singer, *Statutes and Statutory Construction* § 46.06, at 181–86 (rev. 6th ed. 2000)); *see also* Antonin Scalia & Bryan A. Garner, *Reading Law: The Interpretation of Legal Texts* 63–65, 174–79 (2012) (explaining presumption against ineffectiveness and the surplusage canon).

Under the Immigration and Nationality Act ("INA"), "applicant for admission" is a term of art denoting a particular legal status. 8 U.S.C. § 1225(a)(1). It does not mean an individual has made an actual application, since someone could be classified as an "applicant for admission" by way of their presence in the United States—as CNMI residents were—despite never having applied for admission. *See id. Minto* ignores a published BIA decision holding that the constructive status of being an "applicant for admission" under section 235(a)(1) does not mean that one is deemed to be "applying . . . for admission" for purposes of section 212(h), a provision contained in the same section as section 212(a)(7)(A)(i)(I), the relevant ground of removal. *Matter of Y-N-P-*, 26 I. & N. Dec. 10, 13 (B.I.A. 2012). Before *Minto*, we had determined that this precedential BIA opinion is worthy of deference. *Garcia-Mendez v. Lynch*,

of the two-year transition period and months after both Torres and Minto were ordered removed. *See* Commonwealth of the Northern Mariana Islands Transitional Worker Classification, 76 Fed. Reg. 55,501, 55,502 (Sept. 7, 2011) (to be codified at 8 C.F.R. pts. 103, 214, 274a, 299), https://www.govinfo.gov/content/pkg/FR-2011-09-07/pdf/2011-22622.pdf.

788 F.3d 1058, 1063–65 (9th Cir. 2015); *see also Arevalo v. U.S. Attorney Gen.*, 872 F.3d 1184, 1197 (11th Cir. 2017) (per curiam).

Finally, *Minto*—without acknowledgment, let alone justification—put this circuit's interpretation of the INA in tension with at least two other circuit courts. In 2013, years before *Minto*'s 2017 publication, the Eleventh Circuit held that section 212(a)(7) of the INA was inapplicable to undocumented individuals who "were 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. Att'y Gen.*, 714 F.3d 1353, 1356 (11th Cir. 2013) (per curiam). The Fifth Circuit agreed in 2016. *Marques v. Lynch*, 834 F.3d 549, 561 (5th Cir. 2016). This conflict highlights that *Minto*'s impact is not limited to the CNMI. So long as its holding regarding the meaning of "application for admission" stands, national immigration law will lack consistency.

Moreover, within our circuit, the government need *never* charge entry without admission under section 212(a)(6)(A), as any immigrant removable on that ground will also lack "a valid entry document" at "the time of [the fictional] application for admission" for purposes of section 212(a)(7)(A)(i)(I).

Of course, as a three-judge panel, we cannot overturn *Minto* absent superseding Supreme Court authority. *See Miller v. Gammie*, 335 F.3d 889, 899–900 (9th Cir. 2003) (en banc). For that reason, I respectfully concur.