

1 IN THE UNITED STATES DISTRICT COURT  
2 FOR THE NORTHERN DISTRICT OF CALIFORNIA  
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5 FERNANDO MORENO MENDEZ  
6 and MARIA DEL CARMEN  
7 MORENO GOMEZ,

8 Petitioners,

9 v.

10 JANET NAPOLITANO, et al.,

11 Respondents.

NO. C10-2471 TEH

ORDER DENYING MOTION TO  
DISMISS

12 This matter comes before the Court on Respondents' motion to dismiss, currently  
13 scheduled for hearing on December 6, 2010. After carefully reviewing the parties' written  
14 arguments, the Court finds oral argument to be unnecessary, and the December 6, 2010  
15 hearing is hereby VACATED. Respondents' motion is DENIED for the reasons discussed  
16 below.

17 The Court need not examine the long procedural history presented by this case to  
18 resolve the pending motion. It is undisputed that Petitioners are under a final order of  
19 removal, and that their habeas petition raises claims of ineffective assistance by counsel after  
20 the final removal order was issued.

21 Respondents acknowledge that "a district court has jurisdiction to consider a petition  
22 for a writ of habeas corpus brought by a person in custody pursuant to an order of removal,  
23 where the petition is not a direct challenge to an order of removal," Mot. at 4 (citing *Singh v.*  
24 *Gonzales*, 499 F.3d 969 (9th Cir. 2007)), but argue that the Court must dismiss this petition  
25 because Petitioners "ultimately do seek to challenge the removal order that has already been  
26 reviewed by the Ninth Circuit Court of Appeals." Reply at 4. Petitioners' ultimate goal,  
27 however, is not the dispositive issue. In *Singh*, as in this case, the petitioner claimed  
28 ineffective assistance by counsel after issuance of a final removal order. The Ninth Circuit

1 held that Singh’s claim “cannot be construed as seeking judicial review of his final order of  
2 removal, notwithstanding his ultimate goal or desire to overturn that final order of removal.”  
3 *Singh*, 499 F.3d at 979. As in *Singh*, the petition in this case does not seek review of the final  
4 removal order; instead, “[a]s an adequate remedy, petitioners request an order of remand  
5 directing the [Board of Immigration Appeals] to reissue its original March 6, 2006 decision  
6 and order, thereby permitting petitioners to file a timely petition for judicial review as to the  
7 underlying removal proceeding order, or exercising voluntary departure.” Pet’n ¶ 39. This  
8 was the same remedy at issue in *Singh*: “Singh’s only remedy would be the restarting of the  
9 thirty-day period for the filing of a petition for review with [the Ninth Circuit].” *Singh*, 499  
10 F.3d at 979. Thus, under *Singh*, this Court has jurisdiction over this case.

11 Respondents also urge the Court to dismiss the petition for failure to exhaust  
12 administrative remedies, citing the recently decided *Singh v. Napolitano*, 619 F.3d 1101  
13 (9th Cir. 2010), for support. In that case, Singh, like Petitioners here, “alleged ineffective  
14 assistance [that] occurred after a final order of removal has been entered.” *Id.* at 1103. The  
15 Ninth Circuit held “that Singh did not exhaust his available administrative remedies because  
16 he did not first file a motion to reopen with the Board before bringing his habeas petition in  
17 district court.” *Id.* at 1105. However, Respondents do not dispute that the mandate has yet to  
18 issue, thus making the decision non-final. *United States v. Foumai*, 910 F.2d 617, 620 (9th  
19 Cir. 1990) (“A court of appeals may modify or revoke its judgment at any time prior to  
20 issuance of the mandate, sua sponte or by motion of the parties. Thus, finality of an appellate  
21 order hinges on the mandate. . . .”). The Court finds it would be premature to dismiss this  
22 petition based on a non-final decision by the Ninth Circuit.


23 Perhaps in recognition of the non-final nature of *Singh*, Respondents’ reply abandoned  
24 reliance on that case and instead argued that the Court lacks jurisdiction under *Puga v.*  
25 *Chertoff*, 488 F.3d 812 (9th Cir. 2007). *Puga*, however, is distinguishable because the  
26 alleged ineffective assistance of counsel in that case “occurred prior to and during the  
27 removal proceeding,” *id.* at 815, and not, as in this case, after the final order of removal had  
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Accordingly, with good cause appearing, Respondents' motion to dismiss is DENIED. Within fourteen days of the issuance of the mandate in *Singh v. Napolitano*, the parties shall file a stipulated briefing schedule on this petition unless they are able to resolve this case prior to that date without further litigation.

**IT IS SO ORDERED.**

Dated: 12/01/10

  
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THELTON E. HENDERSON, JUDGE  
UNITED STATES DISTRICT COURT