No. 23-

IN THE

Supreme Court of the United States

JOSE ANTONIO MARTINEZ,
Petitioner,

v.

MERRICK B. GARLAND, ATTORNEY GENERAL,
Respondent.

ANA CECILIA MARROQUIN-ZANAS,
Petitioner,

v.

MERRICK B. GARLAND, ATTORNEY GENERAL,
Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

PETITION FOR A WRIT OF CERTIORARI

AIMEE MAYER-SALINS
ADINA APPELBAUM
SAM HSIEH
BRADLEY JENKINS
AUSTIN ROSE
AMICA CENTER FOR IMMIGRANT RIGHTS
1025 Connecticut Ave NW
Suite 701
Washington, DC 20036

*TOBIAS S. LOSS-EATON
CHIKE B. CROSLIN
AUSJIA PERLOW
SIDLEY AUSTIN LLP
1501 K Street NW
Washington, DC 20005
(202) 736-8427
tlosseaton@sidley.com

JEFFREY T. GREEN
DANIELLE HAMILTON
NORTHWESTERN SUPREME COURT PRACTICUM
375 East Chicago Avenue
Chicago, IL 60611
(312) 503-1486

Counsel for Petitioners

*Counsel of Record

May 29, 2024

QUESTIONS PRESENTED

When a noncitizen who was previously removed from the United States reenters the country, the government can summarily issue a new order reinstating the prior order of removal. But it cannot deport her if she expresses a fear of persecution or torture if removed. If she does, she enters fear-based proceedings—an initial determination of whether her fear is reasonable and, if so, "withholding-only" proceedings before an immigration judge, where she can apply for withholding of removal and protection under the Convention Against Torture. If the judge denies either form of protection, the non-citizen can appeal to the Board of Immigration Appeals.

These proceedings may be the noncitizen's first chance to seek protection based on fear of persecution or torture. Both reasonable-fear review and withholding-only proceedings include the right to present and challenge evidence, culminating in new factual findings and legal conclusions. Thus, they generally continue long after the initial removal order is reinstated.

An adverse reasonable-fear determination and a denial of withholding or CAT protection are both judicially reviewable. A petition for judicial review "must be filed not later than 30 days after the date of the final order of removal." 8 U.S.C. § 1252(b)(1).

The questions presented are:

1. Whether § 1252(b)(1)'s 30-day deadline runs from the end of any fear-based proceedings, rather than the date when a reinstatement order is entered and fear-based proceedings can begin.

2. Whether § 1252(b)(1)'s 30-day deadline is a claim-processing rule rather than a jurisdictional limit.

PARTIES TO THE PROCEEDING AND RULE 29.6 STATEMENT

Petitioners are Jose Antonio Martinez and Ana Cecilia Marroquin-Zanas.

Respondent is Merrick B. Garland, Attorney General of the United States.

No corporate parties are involved in this case.

RULE 14.1(B)(iii) STATEMENT

This case arises from the following proceedings in the U.S. Court of Appeals for the Fourth Circuit:

Martinez v. *Garland*, No. 22-1221 (4th Cir.); and

Marroquin-Zanas v. *Garland*, No. 22-1122 (4th Cir.).

No other proceedings are directly related to this case.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES Page

TABLE OF AUTHORITIES — continued

CONSTITUTION, STATUTES AND REGULATIONS

TABLE OF AUTHORITIES — continued

PETITION FOR A WRIT OF CERTIORARI

Under this Court's Rule 12.4, Jose Antonio Martinez and Ana Cecilia Marroquin-Zanas respectfully petition for a writ of certiorari to review the judgments below.

OPINIONS AND ORDERS BELOW

The Fourth Circuit's panel opinion in Mr. Martinez's case is reported at 86 F.4th 561 and reproduced at Pet. App. 1a–14a. The unreported order denying rehearing *en banc* is reproduced at Pet. App. 31a–32a. The Fourth Circuit's panel opinion in Ms. Marroquin-Zanas's case is available at 2024 WL 1672352 and reproduced at Pet. App. 53a–55a.

STATEMENT OF JURISDICTION

The Fourth Circuit entered judgment in *Martinez* on November 16, 2023, and denied both Mr. Martinez's and the government's timely petitions for rehearing *en banc* on March 1, 2024. On May 22, 2024, the Chief Justice extended the time to file a petition in *Martinez* to July 1, 2024. The Fourth Circuit entered judgment in *Marroquin-Zanas* on April 18, 2024. 28 U.S.C. § 1254(1) supplies jurisdiction.

STATUTORY AND REGULATORY PROVISIONS INVOLVED

The relevant statutory provisions are part of the Immigration and Nationality Act, codified at U.S. Code Title 8.

Section 1101(a)(47), defining "order of deportation," provides:

> (A) The term "order of deportation" means the order of the special inquiry officer, or other such

> administrative officer to whom the Attorney General has delegated the responsibility for determining whether an alien is deportable, concluding that the alien is deportable or ordering deportation.
>
> (B) The order described under subparagraph (A) shall become final upon the earlier of—
>
> (i) a determination by the Board of Immigration Appeals affirming such order; or
>
> (ii) the expiration of the period in which the alien is permitted to seek review of such order by the Board of Immigration Appeals.

Section 1231(a)(5), governing reinstatement of removal orders, provides:

> If the Attorney General finds that an alien has reentered the United States illegally after having been removed or having departed voluntarily, under an order of removal, the prior order of removal is reinstated from its original date and is not subject to being reopened or reviewed, the alien is not eligible and may not apply for any relief under this chapter, and the alien shall be removed under the prior order at any time after the reentry.

Section 1252(a)(4), governing claims under the Convention Against Torture, states:

> Notwithstanding any other provision of law . . . a petition for review filed with an appropriate court of appeals in accordance with this section shall be the sole and exclusive means for judicial review of any cause or claim under the United Nations Convention Against Torture and Other

> Forms of Cruel, Inhuman, or Degrading Treatment or Punishment, except as provided in subsection (e).

Section 1252(b), governing petitions for review, provides as relevant:

> (1) . . . The petition for review must be filed not later than 30 days after the date of the final order of removal.
>
> (9) . . . Judicial review of all questions of law and fact, including interpretation and application of constitutional and statutory provisions, arising from any action taken or proceeding brought to remove an alien from the United States under this subchapter shall be available only in judicial review of a final order under this section. . . .

The relevant regulatory provisions—8 C.F.R. §§ 208.16, 208.31, 241.8, 1208.16, and 1208.31—are reproduced at Pet. App. 66a–81a.

INTRODUCTION

This petition presents two important and recurring questions that have divided the circuits.

First, when the government issues a reinstatement order against a noncitizen who expresses a fear of persecution or torture, what is the deadline for her to petition for judicial review of any eventual denial of those fear-based claims—30 days after the reinstatement order, or 30 days after the end of the administrative proceedings considering those claims, which can be "months or even years" later? See Pet. App. 14a (Floyd, J., concurring). The answer is the latter. Until then, the administrative proceedings are not final, and the noncitizen cannot know what the result will be and

whether she will have grounds to challenge it. And the former rule pointlessly burdens courts and parties alike, requiring countless premature petitions and setting traps for unwary litigants.

Nine circuits have adopted this commonsensical answer, holding that the 30-day deadline runs from the end of any fear-based proceedings, not the reinstatement order. But in the decision below, the Fourth Circuit joined the Second Circuit in holding the opposite. The court then denied rehearing *en banc* by an 8–6 vote, entrenching its position.

Second, is this 30-day deadline jurisdictional? The statute includes no clear statement to that effect—it says merely that a "petition for review must be filed not later than 30 days after the date of the final order of removal." § 1252(b)(1). Two circuits thus read this language to create a non-jurisdictional claim-processing rule, relying on *Santos-Zacaria* v. *Garland*, 598 U.S. 411 (2023). But at least two other circuits hold otherwise, again including the Fourth Circuit here. And given the *en banc* vote below, this split will persist "until . . . the Supreme Court says otherwise." Pet. App. 14a (Floyd, J., concurring).

And the Fourth Circuit's rule is draconian and senseless. Under the decisions below, if noncitizens want to be able to challenge the eventual denial of fear-based protection, they must petition for review months or years before they can know whether protection will be denied and on what grounds. Many noncitizens—who are often detained, *pro se*, and non-English speakers—will have no idea this counterintuitive process is required. And even if they do, completing this process will be difficult, costly, and time consuming. The Fourth Circuit's rule thus amounts to a denial of judicial review in many cases—with potential life-or-death

consequences. And even for those noncitizens savvy enough to file unripe protective petitions, this rule will simply burden courts and litigants to no useful end.

This case is an ideal vehicle to resolve these questions and restore uniformity to the nation's immigration law. The petition should be granted.

STATEMENT OF THE CASE

To issue a reinstatement order, the government must determine that someone who was deported has reentered the country without inspection. 8 C.F.R. § 241.8(a). During this process, if a person expresses fear of returning to her country of origin, she must receive a reasonable fear interview. *Id.* § 241.8(e). If an asylum officer determines her fear is not reasonable, she can seek immigration-judge review of that determination. *Id.* § 208.31(g). If either the asylum officer or the immigration judge finds her fear reasonable, she is placed in withholding-only proceedings, where she can apply for withholding of removal and protection under the Convention Against Torture. *Id.* §§ 208.31(e), (g)(2), 208.16. If the immigration judge denies either form of protection, she may appeal to the Board of Immigration Appeals. *Id.* § 208.31(e), (g)(2)(ii).

An adverse reasonable-fear determination and a denial of withholding or CAT protection are both judicially reviewable. See § 1252(a)(4), (b)(4); Pet. App. 50a. A petition for judicial review "must be filed not later than 30 days after the date of the final order of removal." § 1252(b)(1). This case concerns when such an order becomes final.

A. *Martinez* v. *Garland*.

1. Jose Antonio Martinez first fled his native Honduras and entered the United States around 2004. He sought safety because many of his family members there had been targeted and killed by gangs. His brother was cut to pieces in front of his mother; his sister was shot and killed; one nephew was murdered while working as a taxi driver; and another nephew was raped and murdered by gang members who then threated to kill other relatives who sought a police investigation. See *Martinez* A.R. 409–414 (No. 22-1221, ECF 15-2).

Mr. Martinez is "profoundly traumatized" by these experiences. *Martinez* A.R. 485. He suffers from alcoholism, poor memory, and cognitive challenges—exacerbated by a later head injury, which may have caused a traumatic brain injury and a resulting neurocognitive disorder. *Id.* at 481, 483–85.

Mr. Martinez was placed in removal proceedings in 2013, during which he expressed fear of the Honduran gangs. Pet. App. 4a; see *Martinez* A.R. 410–13. As part of those initial proceedings, Mr. Martinez testified that he had been involved in a violent altercation in Honduras in which another person was killed. Pet. App. 23a. Mr. Martinez was arrested, but he later testified that he was not convicted of a crime, and he produced police and court records showing that he had no criminal record. *Id.* at 22a–23a. Mr. Martinez was ordered removed in 2018. *Id.* at 4a, 21a.

Upon returning to Honduras, Mr. Martinez immediately began receiving death threats himself. *Martinez* A.R. 413. He fled as quickly as he could, seeking protection in the United States in 2019. His order of removal was reinstated in January 2020. Pet. App. 5a.

An immigration judge found that Mr. Martinez had established a reasonable fear of returning to Honduras and that he was incompetent, appointing counsel. Pet. App. 21a–22a. Through counsel, Mr. Martinez sought withholding of removal and protection under the Convention Against Torture. *Id.* at 22a. The government alleged that Mr. Martinez had committed a "serious nonpolitical crime" because of his arrest relating to the killing in Honduras. *Id.* The immigration judge ultimately deemed Mr. Martinez ineligible for withholding and denied CAT protection, *id.* at 29a, and the BIA affirmed, *id.* at 20a.

2. Mr. Martinez petitioned for review in the Fourth Circuit. After supplemental jurisdictional briefing, the panel held that it lacked jurisdiction. Pet. App. 6a. Section 1252(b)(1)'s 30-day deadline, the panel majority said, is "mandatory and jurisdictional." *Id.* Thus, the court could exercise jurisdiction only if a "final order of removal" was entered no more than 30 days before the petition was filed. See *id.*

The panel held that the BIA's order affirming the denial of withholding and CAT protection did not qualify as a final order. Although Mr. Martinez "filed his petition for review within 30 days of that order," it was "not a final order of removal." Pet. App. 7a. "Because withholding-only orders do not affect removability"—dictating only *where* a noncitizen can be removed to, not *whether* he can be removed—the panel held that "they are not orders of removal." *Id.*

By contrast, the panel said, the 2018 removal order entered in Mr. Martinez's prior removal proceedings "obviously qualifies as a final order of removal." Pet. App. 7a. But Mr. Martinez did not and could not seek review of that order. See *id.*

Finally, the court addressed the "the 2020 decision reinstating Martinez's 2018 removal order." Pet. App. 8a. Under the INA's definition of "order of deportation," "a removal order becomes final upon the earlier of (1) 'a determination by the [BIA] affirming such order,' or (2) 'the expiration of the period in which the alien is permitted to seek review of such order by the [BIA].'" *Id.* (quoting § 1101(a)(47)(B)). The court admitted that "this definition appears inapposite" because a reinstatement decision cannot be appealed to the BIA, but it concluded that "a reinstatement decision becomes final once the agency's review process is complete," whether or not that process actually involves the BIA. *Id.* (citation omitted).

The Fourth Circuit thus rejected the argument that a "reinstatement decision becomes final only after the conclusion of the [noncitizen]'s withholding-only proceedings." Pet. App. 9a. Relying on *Nasrallah* v. *Barr*, 590 U.S. 573 (2020), and *Johnson* v. *Guzman Chavez*, 594 U.S. 523 (2021), the panel asserted that "removal orders and withholding-only proceedings address two distinct questions," so withholding-only proceedings do not affect the finality of a removal order. Pet. App. 9a. The court acknowledged that *Guzman Chavez* addressed "only whether an order of removal is 'administratively final' for purposes of . . . detention pending removal," but held that, under circuit precedent, "finality for purposes of [judicial review] is the same as finality for purposes of [detention]." *Id.* Thus, the court said, "the finality of a removal order for purposes of judicial review also cannot depend on withholding-only proceedings." *Id.* The court thus aligned itself "with the Second and Fifth Circuits," noting contrary precedent from the Sixth, Ninth, and Tenth Circuits. *Id.* at 10a–11a. (As described below, the Fifth Circuit has since reversed itself on this question.)

Finally, the panel refused to apply its new rule only prospectively, repeating that the 30-day deadline is jurisdictional and thus allows no exceptions. Pet. App. 12a.

Judge Floyd concurred only in the judgment. He thought the majority "may be correct that Martinez did not timely file his petition within 30 days of a final order of removal." Pet. App. 14a. But he explained that *Santos-Zacaria* "calls into question our treatment of the 30-day deadline as jurisdictional." *Id.* at 12a–13a. Indeed, he noted, "both the exhaustion requirement of § 1252(d)(1)" at issue in *Santos-Zacaria* "and the 30-day deadline of § 1252(b)(1) lack any jurisdictional language." *Id.* at 14a.

In closing, Judge Floyd emphasized the "serious consequences on future petitioners" of the Fourth Circuit's rule: "It means they cannot obtain judicial review when, for instance, reinstatement proceedings violate their due process rights. Today's decision also departs from the 'well-settled' and 'strong presumption' favoring judicial review of administrative action, including in the immigration context." Pet. App. 14a. "And the absence of judicial review makes little sense when considering that withholding and CAT proceedings often take months or even years to conclude—long past the 30-day mark." *Id.* Judge Floyd saw "no support for the proposition that Congress meant the [30-day] deadline to doubly function as a countdown clock on our jurisdiction." *Id.* Still, he felt bound to concur in the judgment "unless and until this Court *en banc* or the Supreme Court says otherwise." *Id.*

Mr. Martinez and the government each petitioned for rehearing *en banc*. Each argued that the panel decision was wrong about both when the 30-day deadline begins to run and whether it is jurisdictional. See Pet.

App. 34a. The government also indicated that, while it views the deadline as a mandatory claim-processing rule that is "not subject to equitable tolling," it would "waive the filing deadline" for Mr. Martinez because he "complied with the relevant law at the time he filed." *Id.* at 41a n.1.

The Fourth Circuit denied rehearing *en banc* by a vote of 8–6. Pet. App. 32a.

B. *Marroquin-Zanas* v. *Garland*.

1. Ana Cecilia Marroquin-Zanas is a native and citizen of El Salvador. Pet. App. 58a. She has three children, including two born in the United States. See *id.* at 59a. She has lived in the United States since 2016. She has never been arrested or convicted of any crime anywhere and is not in immigration detention.

Ms. Marroquin-Zanas first came to the United States in 2009. But she was apprehended at the border and promptly removed. Pet. App. 54a, 59a.

Upon returning to El Salvador, she was targeted by MS-13 gang members with extortion and death threats based on a familial relationship. Pet. App. 59a–60a. Terrified for her daughter's life and safety, and unable to relocate within El Salvador because the police are corrupt and MS-13 is everywhere, Ms. Marroquin-Zanas fled El Salvador in 2016, returning to the United States. *Marroquin-Zanas* A.R. 135–192, 221–222 (No. 22-1122, ECF 12-2). Upon her return, the government issued a reinstatement order against her, and she expressed a fear of returning to El Salvador. Pet. App. 54a.

An asylum officer initially issued a negative finding, but the immigration judge vacated that finding, Pet. App. 54a, and Ms. Marroquin-Zanas applied for with-

holding of removal and CAT protection, *id.* at 58a. After a merits hearing, the immigration judge concluded that her "testimony was internally consistent" and "essentially truthful regarding her claim." *Id.* at 61a. But he denied protection and the BIA affirmed. *Id.* at 56a–57a.

2. Ms. Marroquin-Zanas petitioned for review in the Fourth Circuit "less than 30 days after the BIA's decision." Pet. App. 55a. The court of appeals dismissed her petition based on *Martinez*, holding that it "lack[ed] jurisdiction to review Marroquin-Zanas's petition because it was not filed within 30 days of a final order of removal." *Id.* "As in *Martinez*," the court said, "the BIA order is not a final order of removal; and, assuming Marroquin-Zanas seeks review of the reinstatement of the removal order or the removal order itself, the petition is untimely." *Id.* Thus, in the Fourth Circuit's view, the fact that Ms. Marroquin-Zanas "was engaged in withholding-only proceedings until less than 30 days prior to filing her petition" was "of no consequence." *Id.*

REASONS FOR GRANTING THE PETITION

I. The circuits are openly split on both questions presented.

The circuits are split 9–2 on the first question presented and at least 2–2 on the second. Courts on both sides have had ample opportunity to consider each other's positions. These open, entrenched splits warrant review.

A. The circuits are split on when the 30-day petition deadline begins to run.

The Second and Fourth Circuits hold that § 1252(b)(1)'s 30-day deadline begins to run even if the

petitioner is still embroiled in fear-based proceedings. The First, Third, Fifth, Sixth, Seventh, Eighth, Ninth, Tenth, and Eleventh Circuits, by contrast, hold that the 30-day clock starts to run only when those proceedings end—with several of those courts having recently reaffirmed that rule.

This disagreement turns in part on how to read *Nasrallah* and *Guzman Chavez*. *Nasrallah* held that a noncitizen subject to § 1252(a)(2)(C), which prohibits factual challenges to certain removal orders, can still raise factual challenges to a denial of CAT protection. 590 U.S. at 583. *Guzman Chavez* held that, for detention purposes under § 1231(a)(1), a removal order becomes "administratively final" immediately upon reinstatement. 594 U.S. at 534–35. Although neither case addresses the finality of removal orders for judicial-review purposes—and *Nasrallah* emphasized that Congress expressly *allowed* judicial review of CAT claims—the Second and Fourth Circuits read these decisions to support their rules, while the other circuits hold otherwise.

1. The Second Circuit relied on *Guzman Chavez* to hold—despite the government's agreement that jurisdiction existed there—that the pendency of withholding proceedings has no effect on the finality of a reinstated removal order for judicial-review purposes. See *Bhaktibhai-Patel* v. *Garland*, 32 F.4th 180, 193–94 (2d Cir. 2022). In the court's view, if "withholding-only proceedings do not impact the finality of a removal order for the purpose of § 1231's detention provisions . . . those proceedings also do not impact the finality of an order of removal for the purposes of judicial review under § 1252." *Id.* The court acknowledged and declined to follow contrary precedent from other circuits. See

id. at 194. It also declared that the presumption favoring judicial review and due-process principles did not require a different result. See *id.* at 196–99. The Second Circuit thus held that "the INA does not permit judicial review of illegal reentrants' withholding-only decisions in some cases." *Id.* at 196.[1]

The Fourth Circuit similarly cited *Nasrallah* and *Guzman Chavez* in the decisions below. After pointing to the definition language in § 1101(a)(47)(A), the *Martinez* panel said the "Supreme Court has clarified in *Nasrallah* and *Guzman Chavez* that 'removal orders and withholding-only proceedings address two distinct questions.'" Pet. App. 9a. In the panel majority's view, "[e]ven if withholding-only relief is granted, the removal order 'is not vacated or otherwise set aside,'" so the "initiation of withholding-only proceedings does not render non-final an otherwise 'administratively final' reinstated order of removal." *Id.* (citations omitted); see also *id.* at 55a (*Marroquin-Zanas*).

2. The Fifth, Sixth, Seventh, Ninth, and Tenth Circuits all hold that the 30-day deadline runs from the end of any fear-based proceedings—and that *Nasrallah* and *Guzman Chavez* are not to the contrary.

The Fifth Circuit initially agreed with the Second Circuit that, under *Nasrallah* and *Guzman Chavez*, the 30-day clock runs from the reinstatement order. *Argueta-Hernandez* v. *Garland*, 73 F.4th 300, 303 (5th Cir. 2023) (per curiam). But on rehearing—where both parties argued that jurisdiction existed—the panel reversed itself. See *Argueta-Hernandez* v. *Garland*, 87

[1] In subsequent cases, the Second Circuit has issued a briefing order indicating that it may reconsider *Bhaktibhai-Patel*. *See* Pet. App. 35a. Those cases were argued in April 2024 and remain pending. *See Cerrato-Barahona* v. *Garland*, No. 22-6349 (2d Cir.); *Castejon-Paz* v. *Garland*, No. 22-6024 (2d Cir.).

F.4th 698, 706 (5th Cir. 2023). As the court explained: "It cannot be the case that a petitioner may only seek review before reinstatement of a removal order, and without a full administrative record. A decision to the contrary could have disastrous consequences on the immigration and judicial systems" by greatly burdening noncitizens and courts alike. See *id.* at 706 & n.5. The court distinguished *Nasrallah* and *Guzman Chavez* because the former did not involve jurisdiction or statutory withholding and the latter did not address judicial review. *Id.* at 706. The Fifth Circuit thus had jurisdiction over a petition for review "filed within 30 days of BIA's order [denying withholding-only protection] but several years after the reinstated removal order." *Id.* at 705.

The Sixth Circuit similarly reaffirmed that the 30-day clock begins only once withholding-only proceedings are complete. *Kolov* v. *Garland*, 78 F.4th 911, 918–19 (6th Cir. 2023). Like the Fifth Circuit, the court distinguished between administrative finality for detention purposes and "finality for purposes of judicial review of [a noncitizen's] withholding-only claim." *Id*. at 919. The Sixth Circuit also noted that *Guzman Chavez* "expressly refused to consider this judicial-review issue," meaning that case "d[id] not undermine [the] logic" of existing circuit precedent. *Id.* Judge Murphy concurred, noting: "In the end, whether the Supreme Court's decisions in *Nasrallah* and [*Guzman Chavez*] have ushered in these significant changes to longstanding judicial-review practices is for the Supreme Court to decide." *Id.* at 929 (Murphy, J., concurring).

The Seventh Circuit reached the same result in *F.J.A.P.* v. *Garland*, 94 F.4th 620 (7th Cir. 2024). In a thorough opinion, the court concluded that neither

Nasrallah nor *Guzman Chavez* "dictate that reinstated orders of removal become final for purposes of § 1252(b)(1) judicial review at reinstatement." *Id.* at 633. Indeed, applying *Guzman Chavez*'s reasoning to fix when to seek judicial review "ignores the context" of the decision, "dismisses Congress's explicit language," and "leads to incoherent results." *Id.* at 632–33. The court also explained that the plain meaning of "final" indicates "that a reinstatement order does not become final for purposes of judicial review until the agency has also concluded withholding proceedings," and that this plain meaning "tracks legal understanding" and "comports with the principle of statutory construction that presumes congressional intent in favor of judicial review." *Id.* at 634.

The Ninth Circuit likewise holds that "neither *Nasrallah* nor *Guzman Chavez*" altered circuit precedent holding that "the thirty-day deadline for filing a petition for review is triggered upon the completion of reasonable fear proceedings." *Alonso-Juarez* v. *Garland*, 80 F.4th 1039, 1043, 1046 (9th Cir. 2023). *Nasrallah* "did not address . . . the point at which a reinstated removal order becomes final for purposes of calculating the time to petition for review." *Id.* at 1049. And like the Fifth, Sixth, and Seventh Circuits, the Ninth Circuit held that *Guzman Chavez* "was concerned only with when an order becomes final for the purposes of detention—not for purposes of judicial review." *Id.* at 1050 (emphasis omitted). The court also concluded that adopting the Second Circuit's reasoning "would raise grave constitutional concerns" because it results in "the wholesale elimination of judicial review of virtually all withholding-only decisions." *Id.* at 1052–53.

The Tenth Circuit agrees. See *Arostegui-Maldonado* v. *Garland*, 75 F.4th 1132, 1142 (10th Cir. 2023). In a pre-*Nasrallah* case, the court had "concluded that when a noncitizen 'pursues reasonable fear proceedings, the reinstated removal order is not final in the usual legal sense because it cannot be executed until further agency proceedings are complete.'" *Id.* (citing *Luna-Garcia* v. *Holder*, 777 F.3d 1182, 1185 (10th Cir. 2015)). *Nasrallah* did not conflict with this holding because *Luna-Garcia* "did not say . . . that the BIA's disposition in the withholding-only proceedings would *itself* be a final order," but rather "that the culmination of the withholding-only proceedings would render the reinstated order of removal final." *Id.* And *Guzman Chavez* did not contradict *Luna-Garcia* because "[h]olding that a reinstated removal order is final for the purposes of an IJ's consideration of detention does not answer whether it is final for purposes of circuit court review of the outcome of withholding-only proceedings." *Id.* at 1143.

3. In cases decided before *Nasrallah* and *Guzman Chavez*, the First, Third, Eighth and Eleventh Circuits likewise held that petitions are timely if filed within 30 days after fear-based proceedings end.

The First Circuit held that an order entered at the end of withholding-only proceedings "constituted a final order over which we have jurisdiction." *Garcia* v. *Sessions*, 856 F.3d 27, 35 (1st Cir. 2017). Likewise, the Third and Eighth Circuits held that an IJ's decision "concur[ring] with the asylum officer's decision that the applicant did not establish a reasonable fear of persecution or torture . . . constitutes a final order of removal." *Bonilla* v. *Sessions*, 891 F.3d 87, 90 n.4 (3d Cir. 2018); see also *Lara-Nieto* v. *Barr*, 945 F.3d 1054, 1058 (8th Cir. 2019) ("The IJ's denial of Lara-Nieto's

appeal" from an adverse reasonable-fear determination "became the final agency decision.").

Finally, the Eleventh Circuit adopted the same rule: "where an alien pursues a reasonable fear proceeding following DHS'[s] initial reinstatement of a prior order of removal, the reinstated removal order does not become final until the reasonable fear proceeding [including withholding of removal] is completed." See *Jimenez-Morales* v. *Att'y Gen.*, 821 F.3d 1307, 1308 (11th Cir. 2016). "This is because the reinstated removal order cannot be executed (*i.e.*, carried out) until the reasonable fear proceeding is over." *Id.*

B. The circuits are split on whether the 30-day deadline is jurisdictional.

The courts of appeals also disagree on whether § 1252(b)(1)'s 30-day deadline is jurisdictional. Before this Court decided *Santos-Zacaria* in 2023, the lower courts relied on *Stone* v. *INS* to treat the INA's filing deadline as "mandatory and jurisdictional." 514 U.S. 386, 405 (1995) (citation omitted). But after *Santos-Zacaria*, the Fifth and Ninth Circuits hold that *Stone* does not control and the deadline is not jurisdictional, while the Fourth and Seventh Circuits hold the opposite. And other courts have not revisited the issue since *Santos-Zacaria*, so they still treat the deadline as jurisdictional too.

1. The Fifth Circuit's analysis is straightforward: "the 30-day filing deadline is not jurisdictional." *Argueta-Hernandez*, 87 F.4th at 705. "In *Santos-Zacaria*, the Supreme Court explained that" *Stone* "did not establish that the exhaustion requirement in 8 U.S.C. § 1252(d)(1) was jurisdictional in nature." *Id.* (citations omitted). Thus, "Argueta-Hernandez's petition is not time barred." *Id.*

The Ninth Circuit reached the same conclusion. "[I]n *Santos-Zacaria*, the Supreme Court clarified that *Stone* is no longer dispositive as to the question of whether judicial review provisions are jurisdictional, rather than mandatory, rules." *Alonso-Juarez*, 80 F.4th at 1047. "*Stone* predated cases that brought some discipline to the use of the term jurisdictional, under which we treat a rule as jurisdictional only if Congress clearly states that it is." *Id.* (cleaned up). And "[t]he thirty-day deadline provision is contained within the same statute as the exhaustion provision deemed non-jurisdictional in *Santos-Zacaria*, and similarly lacks plainly jurisdictional language." *Id.* Thus, "the thirty-day deadline provision, § 1252(b)(1), is a non-jurisdictional rule." *Id.*

2. The Fourth Circuit held the opposite below: "The 30-day deadline is mandatory and jurisdictional and is not subject to equitable tolling." Pet. App. 6a (cleaned up) (*Martinez*); accord *id.* at 55a (*Marroquin-Zanas*). The *Martinez* panel majority acknowledged *Santos-Zacaria*, but asserted that "'the holding in *Santos-Zacaria* is limited to § 1252(d)(1)," so "we are bound to apply *Stone* unless and until the Supreme Court provides to the contrary." *Id.* at 6a–7a n.3. As noted, Judge Floyd's concurrence emphasized that *Santos-Zacaria* "calls into question our treatment of the 30-day deadline as jurisdictional," given that "both the exhaustion requirement of § 1252(d)(1) and the 30-day deadline of § 1252(b)(1) lack any jurisdictional language." *Id.* at 12a–14a.

The Seventh Circuit likewise deemed the deadline jurisdictional because although "*Santos-Zacaria* v. *Garland* called the jurisdictionality of § 1252(b)(1) into question, it did not directly overrule *Stone*," and thus

the court was bound to apply *Stone* "until [it] is overturned by the [Supreme] Court itself." *F.J.A.P.*, 94 F.4th at 626. Judge Brennan concurred to emphasize that § 1252(b)(1) "would likely not be called jurisdictional" today. *Id.* at 645 (Brennan, J., concurring in part).

3. Other circuits that relied on *Stone* to treat the deadline as jurisdictional have not revisited the question since *Santos-Zacaria*. Thus, the jurisdictional precedent in those circuits presumably still controls. See, *e.g.*, *Garcia*, 856 F.3d at 35 (First Circuit); *Bhaktibhai-Patel*, 32 F.4th at 188 (Second Circuit); *Bonilla*, 891 F.3d at 90 (Third Circuit); *Luna-Garcia*, 777 F.3d at 1185 (Tenth Circuit); cf. *Arostegui-Maldonado*, 75 F.4th at 1140 (Tenth Circuit repeating this rule, apparently undisputed by the parties, after *Santos-Zacaria*).

II. The decisions below are wrong.

The Fourth Circuit decided both questions incorrectly. When the government issues a reinstatement order, the 30-day deadline to petition for review does not start until reasonable-fear or withholding-only proceedings are over. And the 30-day clock is not jurisdictional. Together, the Fourth Circuit's errors produce a draconian and nonsensical rule.

A. The 30-day deadline does not start running until any fear-based proceedings end.

1. A "petition for review must be filed not later than 30 days after the date of the final order of removal." § 1252(b)(1). "[I]n the deportation context, a 'final order of removal' is a final order 'concluding that the [noncitizen] is deportable or ordering deportation.'" *Nasrallah*, 590 U.S. at 579 (quoting

§ 1101(a)(47)(A)). And the INA's "zipper clause" consolidates "a noncitizen's various challenges arising from the removal proceeding" in a single action, *id.* at 580, 589: Judicial review "of all questions of law and fact . . . arising from any action taken or proceeding brought to remove" a noncitizen "shall be available only in judicial review of a final order" in a court of appeals. See § 1252(b)(9).

A noncitizen who "has previously been ordered removed and subsequently reenters the United States without permission"—like both Petitioners here—is subject to streamlined reinstatement proceedings. *F.J.A.P.*, 94 F.4th at 627. In these cases, "the prior order of removal is reinstated from its original date" and "the [noncitizen] is not eligible" for asylum. § 1231(a)(5).

But fear-based protection—which includes both statutory withholding of removal and CAT protection—remains available. Under statutory withholding, a noncitizen may not be removed to a country where her "life or freedom . . . threatened" based on a protected ground. § 1231(b)(3)(A). And under the CAT, a noncitizen may not be removed to a country where she would face torture. See § 1231 note; 8 C.F.R. § 208.16(c). Immigration judges' decisions in these withholding-only proceedings are reviewable by the BIA, 8 C.F.R. § 1208.31(g), and in the courts of appeals, § 1252(a)(1), (a)(4); *F.J.A.P.*, 94 F.4th at 628; Pet. App. 50a.

2. Read in light of the whole statutory scheme, the key term—"final order of removal"—means that a reinstatement order does not become final for judicial-review purposes until the agency has also concluded fear-based proceedings.

As relevant, the ordinary meaning of "final" is "1) marking the last stage of a process; leaving nothing

to be looked for or expected; ultimate; [or] 2) putting an end to something ...; putting an end to strife or uncertainty; not to be undone, altered, or revoked; conclusive." See *F.J.A.P.*, 94 F.4th at 633 (quoting Oxford English Dictionary (2d ed. 1989)) (emphasis omitted) (quotation marks omitted). When fear-based proceedings remain pending, a reinstatement order does not satisfy this ordinary definition. Until it is determined whether a noncitizen is entitled to withholding protection—and thus whether she may be removed to the country where she fears return—the removal process has not reached its "last stage," and a reinstatement order does not "put[] an end to" the proceedings. Rather, its effect may be "altered," so it is not "conclusive." See *id.* at 633–34.

The same is true under the legal meaning of "final," which likewise contemplates a terminal or conclusive action. *Id.* at 634; see Black's Law Dictionary (6th ed. 1990) ("[l]ast; conclusive; definitive; terminated; completed"; "a judgment is 'final' if no further judicial action . . . is required"). A reinstatement order requires "further agency action when a noncitizen enters withholding proceedings." *F.J.A.P.*, 94 F.4th at 634. "Although the noncitizen has been determined deportable, the agency's work is not completed, and it may not remove the noncitizen until agency withholding review is complete." *Id.*; see also *Ponce-Osorio* v. *Johnson*, 824 F.3d 502, 505–06 (5th Cir. 2016) (per curiam) ("only upon completion of reasonable-fear and withholding-of-removal proceedings" have the agency proceedings reached their "ending").

So too under this Court's test of final agency action, which asks whether a decision "ends the litigation on the merits and leaves nothing for the [agency] to do but execute the judgment." *Catlin* v. *United States*, 324

U.S. 229, 233–34 (1945); see *Bennett* v. *Spear*, 520 U.S. 154, 178 (1997). While fear-based proceedings remain pending, the agency has yet to consummate its decision-making process and cannot execute the removal order. *F.J.A.P.*, 94 F.4th at 635. "Only when withholding proceedings are complete have 'the rights, obligations, and legal consequences of the reinstated removal order' been fully established." *Id.* (citation omitted).

The broader statutory structure confirms this reading. As noted, § 1252(b)(9)'s zipper clause "consolidate[s] 'judicial review' of immigration proceedings into one action in the court of appeals." *INS* v. *St. Cyr*, 533 U.S. 289, 313 (2001). Like the final-judgment rule in the federal courts, then, the zipper clause contemplates one appellate-court action at the *end* of the agency proceedings. See *id.* at 313 & n.37. Thus, it is only natural to conclude that the deadline to seek appellate review is not triggered until those proceedings conclude, when a single petition can bring up for review "all questions of law and fact . . . arising from [the] proceeding brought to remove" a noncitizen. See § 1252(b)(9); cf. Fed. R. App. P. 4(a).

3. This textual analysis finds further support in the presumption of judicial review, due-process principles, and the wasteful burdens the Fourth Circuit's rule imposes.

This Court applies a "strong presumption that Congress intends judicial review of administrative action," *Smith* v. *Berryhill*, 139 S. Ct. 1765, 1776 (2019), which applies equally in immigration proceedings, *Guerrero-Lasprilla* v. *Barr*, 589 U.S. 221, 229 (2020). The presumption "can only be overcome by 'clear and convincing evidence' of congressional intent to preclude judicial review." *Id.* (citation omitted). No such evidence

exists here. On the contrary, Congress "expressly provide[d] for judicial review of CAT claims," *Nasrallah*, 590 U.S. at 585, and "expected withholding claims to be subject to judicial review" as well, see Pet. App. 50a (citing § 1252(b)(4)).

Yet the Fourth Circuit's rule would foreclose review in countless cases. Under that rule, noncitizens can preserve their right to judicial review of fear-based claims only by petitioning for review right after the reinstatement order—likely long before any fear-based proceedings have ended, and possibly before they have even started. "These *pro se* litigants, who often face language and education barriers, would be forced to navigate a confusing system set up to require appeals of decisions not yet made and pay a hefty filing fee that they likely cannot afford, effectively ensuring that they miss their chance at review." *Alonso-Juarez*, 80 F.4th at 1053. Thus, in many cases, requiring these measures would amount to a denial of review.

"Nothing in the statute suggests Congress intended withholding determinations to be unreviewable in this way." Pet. App. 50a. The presumption of judicial review thus precludes adopting an interpretation that would foreclose "review of most—if not all—[fear-based] orders." See *F.J.A.P.*, 94 F.4th at 635–36 (citation omitted); *Alonso-Juarez*, 80 F.4th at 1052.

For similar reasons, the Fourth Circuit's rule raises due process concerns by cutting off the only avenue to correct errors in the agency proceedings. *Alonso-Juarez,* 80 F.4th at 1052. In fact, because "asylum officers, IJs, and the BIA frequently make substantive and procedural errors in assessing claims in reasonable fear proceedings ... [r]eview in the courts of appeal is ... essential to the proper, constitutional functioning of this system." *Id.* at 1054 n.7. While some noncitizens may

receive reduced due-process protections, see *DHS* v. *Thuraissigiam*, 591 U.S. 103, 138–39 (2020), that will not be true for many petitioners, and the statute must be construed in light of potential constitutional issues "whether or not those constitutional problems pertain to [a] particular litigant." *Clark* v. *Martinez*, 543 U.S. 371, 380–81 (2005).

The Fourth Circuit's rule also threatens "disastrous consequences on the immigration and judicial system." *Argueta-Hernandez*, 87 F.4th at 706. Those petitioners who have the necessary information and wherewithal "would inevitably have to file a petition for review to preserve the possibility of judicial review, even when unsure if they would need to, or even choose to, challenge the decision in the future." *Id.* at 706 n.5 (quoting *Alonso-Juarez*, 80 F.4th at 1053). This "in turn 'would require [the] court[s] to dedicate resources to tracking and closing moot or abandoned petitions' and 'to establish a system of holding petitions for review in abeyance for years at a time.'" *Id.* (citation omitted). All of this would be "immensely resource intensive." *Id.* (citation omitted). As this Court has noted before, "requiring conscientious [parties] to file unripe suits would add to the burden imposed on courts, applicants, and the [government], with no clear advantage to any." *McDonough* v. *Smith*, 588 U.S. 109, 121 (2019) (cleaned up).

4. The Fourth Circuit's contrary reasoning lacks merit. The *Martinez* panel majority relied on the finality definition in § 1101(a)(47)(B), which says a removal order "becomes final upon the earlier of . . . (1) a determination by the [BIA] affirming such order; or (2) the expiration of the period . . . to seek review of such order by the [BIA]." See Pet. App. 8a (cleaned up). The majority admitted that this definition "at

first blush . . . appears inapposite" because a reinstatement order cannot be appealed to the BIA. *Id.* But it still concluded that "the ruling at the last available stage of agency review [is] the agency's final order for purposes of judicial review." *Id.* (cleaned up).

The majority should have stopped at first blush. This language simply does not address the question presented—it says nothing about the finality of an unappealable reinstatement order, whether or not fear-based proceedings remain pending. That is why every other circuit to consider the question (even the Second Circuit) agrees that this language "does not squarely apply" to reinstatement decisions. *Bhaktibhai-Patel*, 32 F.4th at 192; see also *F.J.A.P.*, 94 F.4th at 633; *Alonso-Juarez*, 80 F.4th at 1048.

Nor do *Nasrallah* or *Guzman Chavez* support the decision below. *Contra* Pet. App. 9a. As noted, *Nasrallah* addressed § 1252(a)(2)(C), which says "no court shall have jurisdiction to review any final order of removal against an alien who is removable" for specified criminal offenses, with exceptions for certain constitutional and legal claims. The Court held that a noncitizen subject to this provision can still raise factual challenges to a denial of CAT protection even though he cannot challenge the factual basis of his removal order. 590 U.S. at 583. The crux of *Nasrallah*'s holding was not the word "final," but the term "order of removal": An "order denying CAT relief does not fall within the statutory definition of an 'order of deportation [*i.e.*, removal]' because it is not an order 'concluding that the [noncitizen] is deportable or ordering deportation.'" *Id.* at 584 (quoting § 1101(a)(47)(A)); see *id.* at 582. That conclusion does not speak to when an order of removal becomes final. See Pet. App. 48a.

And a key premise of *Nasrallah* was that Congress had "expressly provide[d] for judicial review of CAT claims." 590 U.S. at 585. That being so, it would not have been "proper" for a court to undermine Congress's judgment by restricting judicial review as the government urged there. *Id.* at 583. The same reasoning, applied here, cuts against the Fourth Circuit's rule. Because Congress has expressly allowed noncitizens to seek judicial review, it would undermine the congressional scheme to block review unless noncitizens can bear the burden and expense of filing a potentially pointless protective petition.

Guzman Chavez held that, for noncitizens in withholding proceedings, a reinstatement order becomes "administratively final" immediately upon reinstatement. 594 U.S. at 535. Thus, noncitizens subject to reinstatement but awaiting withholding-only decisions had been "ordered removed" under § 1231 and could be detained without bond. *Id.* at 534. By using the term *administratively* final, Congress focused "on the *agency's* review proceedings," and pending withholding proceedings do not make removal orders any less "administratively final." See *id.*

Guzman Chavez's conclusion that "§ 1231's detention provisions are a natural fit for aliens subject to reinstated orders of removal," *id.* at 535, does not control here. In fact, the Court specifically distinguished the question there from the finality question presented here, noting that "§ 1252 . . . uses different language than § 1231 and relates to judicial review of removal orders rather than detention." *Id.* at 535 n.6.

The Fifth, Sixth, Seventh, Ninth, and Tenth Circuits are thus correct—neither *Nasrallah* nor *Guzman Chavez* supports the Fourth Circuit's rule.

B. The 30-day deadline is not jurisdictional.

Section 1252(b)(1)'s 30-day deadline is a non-mandatory claim-processing rule, not a jurisdictional provision.

"Harsh consequences attend the jurisdictional brand." *Fort Bend Cnty.* v. *Davis*, 139 S. Ct. 1843, 1849 (2019) (cleaned up). True jurisdictional rules "set[] the bounds of the court's adjudicatory authority." *Santos-Zacaria*, 598 U.S. at 416 (cleaned up). By contrast, "nonjurisdictional rules govern how courts and litigants operate within" those bounds. *Id.* "Filing deadlines . . . are quintessential claim-processing rules"—which are not jurisdictional. See *Henderson ex rel. Henderson* v. *Shinseki*, 562 U.S. 428, 435 (2011).

This Court "treat[s] a rule as jurisdictional only if Congress clearly states that it is." *Santos-Zacaria*, 598 U.S. at 416 (cleaned up). Indeed, in several recent decisions this Court has "clarified that time prescriptions, however emphatic, are not properly typed jurisdictional." *Arbaugh* v. *Y&H Corp.*, 546 U.S. 500, 510 (2006) (cleaned up) (citing cases). Thus, "most time bars are nonjurisdictional." *E.g.*, *Harrow* v. *Dep't of Def.*, No. 23-21, 2024 WL 2193874, at *3 (U.S. May 16, 2024) (citation omitted) (60-day deadline to petition for review of Merit Systems Protection Board decision is not jurisdictional). And with good reason. Jurisdictional limits can "disserve the very interest in efficiency" that claim-processing rules ordinarily promote. See *Santos-Zacaria*, 598 U.S. at 418.

Section § 1252(b)(1) is a non-jurisdictional claim-processing rule. It merely says: "The petition for review must be filed not later than 30 days after the date of the final order of removal." § 1252(b)(1). This language "does not speak in jurisdictional terms or refer

in any way to the jurisdiction of the [reviewing] Court." *Harrow*, 2024 WL 2193874, at *3 (citation omitted). It also contrasts sharply with jurisdictional language that Congress used in other parts of the same statute, like "no court shall have jurisdiction." See *Santos-Zacaria*, 598 U.S. at 419 & n.5 (citing examples). This lack of "unmistakeabl[e]" language is fatal to the Fourth Circuit's position, see *id.* at 416–17, given the "high bar" created by this Court's clear-statement rule, *Harrow*, 2024 WL 2193874, at *3.

Nor does *Stone* rescue the decision below. *Stone* addressed a prior version of the statute, not the current § 1252. See 514 U.S. at 390 (quoting 8 U.S.C. § 1105a(a)(1) (1988)). And this Court has already made clear that *Stone* does not control this question. As *Santos-Zacaria* explained, *Stone* did not apply the Court's modern clear-statement rule, and thus failed to "attend[] to the distinction between 'jurisdictional' rules (as we understand them today) and nonjurisdictional" rules. 598 U.S. at 421. Beyond that, "whether the provision[] [was] jurisdictional 'was not central to the case'" in *Stone*. *Id.* (citation omitted). The Fourth Circuit's reflexive reliance on *Stone* thus clashes with this Court's "marked desire to curtail such 'drive-by jurisdictional rulings,' which too easily can miss the critical differences between true jurisdictional conditions and nonjurisdictional limitations on causes of action." *Reed Elsevier, Inc.* v. *Muchnick*, 559 U.S. 154, 161 (2010) (cleaned up).

III. The questions presented are important and recurring.

As the government put it below, the questions presented are "exceptionally important." Pet. App. 50a.

The Fourth Circuit's rule would "have disastrous consequences on the immigration and judicial systems." *Argueta-Hernandez*, 87 F.4th at 706. The decisions below force noncitizens to either (i) petition for review when their reinstatement orders are issued, when their fear-based proceedings may not have even begun, or (ii) forfeit that right altogether. *Id.* at 706 & n.5. Many noncitizens in reinstatement proceedings—lacking funds and counsel, with limited English-language skills, and potentially held in detention—will not be able to comply with this rule. They will thus lose their right to judicial review without even realizing it—with potential life-or-death consequences.

And even if this uncodified requirement became widely known and followed, it would simply burden noncitizens, the government, and courts with countless petitions that may well be unnecessary. *Alonso-Juarez*, 80 F.4th at 1053. For example, since *Bhaktibhai-Patel*, legal-services organizations in the Second Circuit must frequently file petitions on behalf of clients in pending reasonable-fear and withholding-only proceedings, which they must then move to hold in abeyance or stipulate to dismiss without prejudice. See Br. of the Bronx Defenders et al. in Supp. of Rehr'g *En Banc* 1–2, No. 22-1221 (4th Cir. Feb. 8, 2024), ECF 95-2. "This new process burdens the circuit with petitions that are not ripe," "creates significant work for the parties," and it "may deprive many individuals—particularly *pro se* litigants—of meaningful judicial review." *Id.* at 2; see *id.* at 11–13.

These questions also arise often. "According to government data, reinstatement orders generally account for forty percent of all deportations annually and more

deportations than any other source."[2] And many noncitizens seek withholding-only protection. For example, from May 2023 through April 2024, 15,942 people were referred for reasonable fear interviews, which are the first step of withholding-only proceedings.[3] As a result, thousands of people each year will have to determine when they must petition for review to preserve their judicial-review rights.

The questions presented also warrant review because of the disuniformity these circuit splits have created. The Constitution requires a "uniform Rule of Naturalization," U.S. Const. art. I, § 8, cl. 4, and Congress has declared that "the immigration laws of the United States should be enforced vigorously *and uniformly*." Pub. L. No. 99-603, § 115(1), 100 Stat. 3359, 3384 (1986) (emphasis added). Yet these overlapping splits produce dramatically different immigration-review regimes in different jurisdictions.

This is not just an abstract concern. For example, if a noncitizen's reinstatement proceedings occur in a circuit that follows the majority rule—like the Fifth Circuit, along the border—there will be no reason to file a petition within 30 days of the reinstatement order (and even if one were filed, the court may well dismiss it as premature). But if the withholding-only proceedings

---

[2] Am. Immigr. Council & Nat'l Immigr. Project, *Reinstatement of Removal* at i (May 23, 2019), https://shorturl.at/rwH09; *see also* DHS, *Annual Flow Report, Immigration Enforcement Actions: 2022* at 16 (Nov. 2023), https://shorturl.at/hiI78 (in 2022, "33 percent [of all removals] were based on the reinstatement of prior removal orders").

[3] U.S. Citizenship & Immigr. Servs., *Semi-Monthly Credible Fear and Reasonable Fear Receipts and Decisions: Congressional Semi-Monthly Report—April 16, 2023–April 30, 2024*, https://shorturl.at/efvU2 (last visited May 27, 2024).

then occur in the Second or Fourth Circuits because a noncitizen settles or is held in immigration custody there, it will be too late to seek review—the noncitizen will have forfeited her judicial-review rights without realizing it.

The Fourth Circuit's denial of rehearing *en banc* means only this Court can resolve these problems.

IV. This case is an ideal vehicle.

This case is an ideal vehicle to decide both questions presented. No procedural issues would complicate review—the questions presented were addressed in both *Martinez* and *Marroquin-Zanas*, with *Martinez* producing two opinions thoroughly analyzing these issues and prompting rehearing petitions by both Mr. Martinez and the government, supported by amici. The questions presented are also dispositive, as they were the basis for dismissing both Petitioners' cases. And as noted, the government agreed to "waive the filing deadline" for Mr. Martinez, Pet. App. 41a n.1; thus, as long as the deadline is non-jurisdictional, Mr. Martinez's petition is timely. Both questions presented are also purely legal.

Finally, both questions have sufficiently percolated. This Court thus has the benefit of numerous reported opinions considering these questions from all possible angles.

CONCLUSION

For these reasons, the petition should be granted.

Respectfully submitted,

AIMEE MAYER-SALINS
ADINA APPELBAUM
SAM HSIEH
BRADLEY JENKINS
AUSTIN ROSE
AMICA CENTER FOR
IMMIGRANT RIGHTS
1025 Connecticut Ave NW
Suite 701
Washington, DC 20036

JEFFREY T. GREEN
DANIELLE HAMILTON
NORTHWESTERN SUPREME
COURT PRACTICUM
375 East Chicago Avenue
Chicago, IL 60611
(312) 503-1486

Counsel for Petitioner

*TOBIAS S. LOSS-EATON
CHIKE B. CROSLIN
AUSJIA PERLOW
SIDLEY AUSTIN LLP
1501 K Street NW
Washington, DC 20005
(202) 736-8427
tlosseaton@sidley.com

*Counsel of Record

May 29, 2024