No. 23-7678

IN THE
Supreme Court of the United States

JOSE ANTONIO MARTINEZ, ET AL.,
Petitioners,
v.
MERRICK B. GARLAND, ATTORNEY GENERAL,
Respondent.

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

BRIEF OF THIRTY-THREE FORMER IMMIGRATION JUDGES AND MEMBERS OF THE BOARD OF IMMIGRATION APPEALS AS *AMICI CURIAE* IN SUPPORT OF PETITIONERS

RICHARD W. MARK
Counsel of Record
AMER S. AHMED
TIMOTHY SUN
ALEXANDRA PERLOFF-GILES
SASHA DUDDING
MEGAN R. MURPHY
GRAHAM ELLIS
GIBSON, DUNN & CRUTCHER LLP
200 Park Avenue
New York, NY 10166
(212) 351-4000
rmark@gibsondunn.com

Counsel for Amici Curiae

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INTEREST OF *AMICI CURIAE*[1]

Amici curiae are thirty-three former immigration judges ("IJs") and members of the Board of Immigration Appeals ("BIA" or "Board").[2]

Amici have dedicated their careers to upholding the immigration laws of the United States. *Amici*'s extensive experience adjudicating immigration cases provides a unique perspective on the procedures and practicalities of immigration proceedings.

SUMMARY OF ARGUMENT

Judicial review of agency proceedings is a cornerstone of our system of government, ensuring that Article III courts set clear guidance for the administrative courts. Crucially, in the immigration context, judicial review also guarantees due process to noncitizens facing potentially life-threatening risks in their home countries. The Fourth Circuit's decision would deprive many noncitizens of this potentially life-saving judicial review.

When a noncitizen unlawfully reenters the United States after having been removed, the prior order of removal is reinstated. 8 U.S.C. § 1231(a)(5). The noncitizen may not be removed to the country designated in the removal order, however, if he can establish eligibility for either statutory withholding of removal under 8 U.S.C. § 1231(b)(3) or protection under the Convention Against Torture ("CAT").

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[1] *Amici* notified all parties about their intent to file this brief on June 27, 2024. This brief was not authored in any part by counsel for any party, and no person or entity other than *amici* or their counsel contributed financially to the preparation of this brief.

[2] The appendix provides a complete list of signatories.

Administrative determinations on such claims are subject to judicial review, provided the noncitizen files a timely petition for review, within 30 days of the "final order of removal." *Id.* § 1252(b)(1).

Until recently, courts across the country agreed that an order of removal became final for purposes of obtaining judicial review upon the completion of all administrative proceedings. The Second and Fourth Circuits recently broke with this consensus, however, holding that a petition for review must be filed within 30 days of the reinstatement of a prior order of removal. *Bhaktibhai-Patel v. Garland*, 32 F.4th 180 (2d Cir. 2022); *Martinez v. Garland*, 86 F.4th 561 (4th Cir. 2023). That rule results in effectively barring many noncitizens from obtaining judicial review. Alternatively, the Second and Fourth Circuits' unique rule encourages filing of placeholder petitions to preserve a right to seek review later—a scheme that only puts unripe cases onto court dockets and erects unnecessary financial and logistical roadblocks to considering noncitizens' claims.

The result below conflicts with this Court's determination in *Nasrallah v. Barr* that Congress specifically preserved judicial review of CAT claims, 590 U.S. 573, 585–86 (2020), and violates this Court's presumption in favor of judicial review, *see Kucana v. Holder*, 558 U.S. 233, 251–52 (2010). It also poses significant due process concerns. *See Zadvydas v. Davis*, 533 U.S. 678, 679 (2001). Judicial review is especially important here in light of errors that can occur simply because our immigration system struggles under a heavy workload.

The Court should grant certiorari and reverse the Fourth Circuit's decisions in *Martinez* and *Marroquin-Zanas v. Garland*, 2024 WL 1672352 (4th Cir.

Apr. 18, 2024) (per curiam), to keep courthouse doors open and to preserve nationwide uniformity in the immigration laws.

ARGUMENT

I. BACKGROUND

A. Fear-Based Proceedings

When a noncitizen is removed from the United States, later returns, and is determined to have reentered unlawfully, the Department of Homeland Security ("DHS") reinstates the initial order of removal. *See* 8 U.S.C. § 1231(a)(5). Once such an order is reinstated, federal regulations provide that "the alien shall be removed" without administrative appeal, unless, *inter alia*, the noncitizen expresses a fear of returning to the country designated in the removal order. 8 C.F.R. § 241.8(c), (e).

Noncitizens subject to reinstated orders of removal cannot seek asylum, 8 U.S.C. § 1231(a)(5), but can seek statutory withholding of removal or protection under CAT. Notably, the basis for a noncitizen's reasonable fear of persecution or torture justifying relief may have arisen between the time of the first removal order and that order's reinstatement. For example, the petitioner in *Lara-Aguilar v. Sessions* first unlawfully entered the United States in September 2013, at which time he expressed no fear of returning to his home country of El Salvador. 889 F.3d 134, 136 (4th Cir. 2018). But after he was removed to El Salvador, he campaigned with a local minority political party and was twice severely assaulted by supporters of the dominant party. He returned to the United States and, at that time, showed that his campaign activity caused him to fear political persecution if

forced to return. *Id*. at 137. Based on that showing, he obtained withholding of removal. *Id*.

When a noncitizen like Mr. Lara-Aguilar expresses a fear of being returned to the designated country, the noncitizen is "referred to an asylum officer for an interview to determine whether the alien has a reasonable fear of persecution or torture." 8 C.F.R. § 241.8(e). That referral marks the beginning of "reasonable fear" proceedings. Absent "exceptional circumstances," the reasonable fear interview is required to take place "within 10 days" of the referral to an asylum officer. *Id.* § 208.31(b). In practice, however, the interview often doesn't take place for months. *See, e.g., Bhaktibhai-Patel*, 32 F.4th at 185–86 (noting that DHS issued a reinstatement order on March 9, 2019, but an asylum officer did not conduct the reasonable fear interview until June 14, 2019).

After that interview, if the asylum officer concludes the noncitizen does not have a "reasonable fear," the noncitizen can seek review of that determination by an IJ. 8 C.F.R. § 208.31(g). This review should ordinarily be conducted within 10 days, *id.*, but again, it often takes much longer, *see, e.g., Bhaktibhai-Patel*, 32 F.4th at 187 (two months between the asylum officer interview and the IJ's review); *Ortiz-Alfaro v. Holder*, 694 F.3d 955, 957 (9th Cir. 2012) (reasonable fear proceedings ongoing approximately two years after reinstatement of removal order).

If the IJ concludes on review that the noncitizen does have a reasonable fear, or if the asylum officer so finds in the first instance, the noncitizen is placed in withholding-only proceedings for a full consideration of the noncitizen's eligibility for relief. From 2014 to

2019, more than 3,000 withholding-only proceedings were initiated in each year.[3]

Withholding-only proceedings can be intensive, time-consuming undertakings. They involve evidentiary hearings, in which the applicant bears the burden of proof on the claim. *See* 8 C.F.R. § 1208.16(b), (c)(2). The IJ reviews the evidence—which can include written submissions and witness testimony—before issuing a decision. *See id.* § 1208.16(b), (c)(3). Because a meritorious CAT or withholding claim is predicated on showing a likelihood of real harm, grants of relief are non-discretionary, meaning the IJ cannot deny relief to a noncitizen who establishes eligibility for relief. *E.g.*, *INS v. Aguirre-Aguirre*, 526 U.S. 415, 420 (1999); *Moncrieffe v. Holder*, 569 U.S. 184, 187 n.1 (2013). Both parties can appeal the IJ's decision to the BIA, 8 C.F.R. § 208.31(g), which in turn can remand for further proceedings before the IJ, *see id.* § 1003.1(d)(7).

The reinstated removal order cannot be executed until the conclusion of these administrative proceedings. While the reinstated removal order identifies a country to which the noncitizen should be removed, the administrative proceedings assessing withholding or CAT relief determine whether the noncitizen can be removed to the designated country under United States and international law. *See Johnson v. Guzman Chavez*, 594 U.S. 523, 530 (2021) ("pursuing withholding-only relief … prevent[s] DHS from executing [a] removal to the particular country

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[3] *The Difference Between Asylum and Withholding of Removal*, Am. Immigr. Council & Nat'l Immigrant Just. Ctr. (2020), https://www.americanimmigrationcouncil.org/sites/default/files/research/the_difference_between_asylum_and_withholding_of_removal.pdf.

designated"). As a matter of logic as well as law, then, the noncitizen's removal cannot be executed before any withholding-only or CAT claims are resolved. As discussed, this administrative process can take months, or even years, to complete.

B. The Circuit Split Regarding Judicial Review of Administrative Decisions in Fear-Based Proceedings

Section 1252 grants federal courts the ability to review such administrative determinations where a petition for review is filed by the noncitizen "[no] later than 30 days after the date of the final order of removal." 8 U.S.C. § 1252(b)(1)–(2), (9). There is no dispute that a decision to reinstate a prior order of removal is an "order of removal" for purposes of the statute. *E.g., Velasquez-Gabriel v. Crocetti*, 263 F.3d 102, 105 (4th Cir. 2001); *Ortiz-Alfaro v. Holder*, 694 F.3d 955 (9th Cir. 2012); *Luna-Garcia v. Holder*, 777 F.3d 1182 (10th Cir. 2015).

Until recently, it was similarly undisputed that that a reinstated order of removal becomes "final" when the agency determines the noncitizen's eligibility for relief. Many courts of appeals considering this question have held that the 30-day clock begins running when the fear-based proceedings conclude—*not* at the earlier time when the reinstated order of removal issued. *See Inestroza-Tosta v. Att'y Gen.*, 2024 WL 3078270, at *7 (3d Cir. June 21, 2024); *F.J.A.P. v. Garland*, 94 F.4th 620, 633 (7th Cir. 2024); *Argueta-Hernandez v. Garland*, 87 F.4th 698, 705 (5th Cir. 2023); *Alonso-Juarez v. Garland*, 80 F.4th 1039, 1043, 1046 (9th Cir. 2023); *Kolov v. Garland*, 78 F.4th 911, 918–19 (6th Cir. 2023); *Arostegui-Maldonado v. Garland*, 75 F.4th 1132, 1142 (10th Cir. 2023); *Lara-Nieto v. Barr*, 945 F.3d 1054, 1058 (8th Cir. 2019); *Garcia v.*

Sessions, 856 F.3d 27, 35 (1st Cir. 2017); *Jimenez-Morales v. Att'y Gen.*, 821 F.3d 1307, 1308 (11th Cir. 2016). The government even conceded in several recent cases that the 30-day clock to seek judicial review begins when the fear-based proceedings conclude, and *not* when the order of removal is reinstated. *See Bhaktibhai-Patel v. Garland*, 32 F.4th 180, 187 (2d Cir. 2022); *Inestroza-Tosta*, 2024 WL 3078270, at *4, *7 (government "concedes that Inestroza-Tosta's petition is timely" even though it was filed "over a year after his removal order was reinstated").

Two years ago, the Second Circuit upset the settled law, holding in *Bhaktibhai-Patel* that a petition for review must be filed within 30 days of the reinstatement of the removal order rather than within 30 days of the conclusion of the administrative proceedings. 32 F.4th at 193–94. Shortly thereafter, the Fourth Circuit followed suit and adopted the Second Circuit's timeline. *See Martinez v. Garland*, 86 F.4th 561 (4th Cir. 2023). The Fourth Circuit's decision deepens the circuit split, sowing confusion and leading to disparate availability of judicial review across jurisdictions.

II. THE FOURTH CIRCUIT'S PRACTICAL ELIMINATION OF JUDICIAL REVIEW IS CONTRARY TO THIS COURT'S PRECEDENTS, TO THE PRESUMPTION OF JUDICIAL REVIEW, AND TO PRINCIPLES OF DUE PROCESS.

A. The Fourth Circuit's rule deprives many noncitizens of judicial review.

The Second and Fourth Circuits' rule that judicial review is forfeited if not sought within 30 days of the reinstatement order will preclude many noncitizens

from obtaining judicial review of agency decisions denying CAT relief or withholding of removal.

The Second Circuit's approach seems premised on the belief that the agency completes proceedings, from reinstatement of a removal order to a final decision on withholding/CAT, in short order. *See Bhaktibhai-Patel*, 32 F.4th at 195 n.21 (optimistically observing that "review may be available when the withholding-only proceedings conclude within 30 days of DHS's reinstatement decision and the reentrant files a petition for review before that period expires"). That view is entirely disconnected from the reality of the immigration system in which fear-based proceedings virtually never conclude within 30 days of a reinstated removal order. Take *Martinez*. In that case, the asylum officer did not even *refer* Martinez for withholding-only proceedings until April 2020—well over 30 days after the January 2020 reinstatement of the removal order. That is, Martinez's withholding-only proceedings did not even *begin* until *after* the 30-day clock had run, per the Fourth Circuit's rule. In *Marroquin-Zanas*, the petitioner's removal order was reinstated on October 29, 2016. The administrative proceedings adjudicating withholding of removal concluded with the BIA's decision on January 20, 2022, *more than five years* after the reinstatement.

Other Second and Fourth Circuit cases applying *Bhaktibhai-Patel* and *Martinez* likewise demonstrate that starting the 30-day clock when the order of removal is reinstated makes "little sense" given that "withholding and CAT proceedings often take months or even years to conclude." *Martinez*, 86 F.4th at 574 (Floyd, J., concurring in the judgment). In each case, the petitioners sought judicial review within 30 days

of the conclusion of withholding-only proceedings.[4] And in each case, the petitioners were denied judicial review because review was being sought more than 30 days after reinstatement of the removal order even though the final administrative determination of relief had taken months or years to complete.

Because resolution of withholding-only proceedings typically takes more than 30 days from the reinstatement of the removal order, the Fourth Circuit's rule effectively denies judicial review for the entire population of noncitizens seeking withholding or CAT relief upon a reinstated removal order. Egregiously, this would include those like Mr. Lara-Aguilar, whose fear-based claims arose between the time of the first removal order and the reinstatement of that order. *Supra* pp. 3–4. Under the Fourth Circuit's rule, these noncitizens would effectively *never* have the opportunity for Article III courts to hear their fear-based claims.

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[4] *See, e.g.*, *Alvarado-Perez v. Garland*, 2024 WL 2286186, at *1 (4th Cir. May 21, 2024); *Flores-Bacigalupo v. Garland*, 2024 WL 1636463, at *1 (4th Cir. Apr. 16, 2024); *Sanchez v. Garland*, 2023 WL 8439343, at *1 (4th Cir. Dec. 5, 2023); *Rodriguez Suriel v. Garland*, 2023 WL 3033510, at *1 (2d Cir. Apr. 21, 2023); *Alvarez Morales v. Garland*, 2023 WL 2395670, at *1 (2d Cir. Mar. 8, 2023); *Thompson v. Garland*, 2023 WL 33336, at *1 (2d Cir. Jan. 4, 2023); *Recinos v. Garland*, 2022 WL 3712298, at *1 (2d Cir. Aug. 29, 2022); *Esiquio-Marcial v. Garland*, 2022 WL 3640447, at *1 (2d Cir. Aug. 24, 2022); *Chambers v. Garland*, 2022 WL 2563352, at *1 (2d Cir. July 8, 2022); *Lagos Rivera v. Garland*, 2022 WL 2445440, at *1 (2d Cir. July 6, 2022); *Reyes Hercules v. Garland*, 2022 WL 1641448, at *1 (2d Cir. May 24, 2022); *Marin Portillo v. Garland*, 2022 WL 1447802, at *1 (2d Cir. May 9, 2022); *Parchment v. Garland*, 2022 WL 1320315, at *1 (2d Cir. May 3, 2022).

The Fourth Circuit's denial of judicial review could devastate the lives of thousands of noncitizens whose claims, by definition, involve persecution or torture if removed.

B. The Fourth Circuit's rule is contrary to *Nasrallah*.

The Fourth Circuit's decision purports to rest on two recent Supreme Court decisions: *Nasrallah* and *Guzman Chavez*. *Martinez*, 86 F.4th at 569. In fact, *Nasrallah* supports Petitioners' position.[5]

Nasrallah, which upheld a noncitizen's right to judicial review of factual challenges to a CAT order, "stands for the principle that judicial review should not be precluded unless Congress explicitly precludes such review." *Alonso-Juarez*, 80 F.4th at 1050. The Court found that Congress "expressly provide[d] for judicial review of CAT claims" because "the issues related to a CAT order will not typically have been litigated prior to the alien's removal proceedings. Those factual issues may range from the noncitizen's past experiences in the designated country of removal, to the noncitizen's credibility, to the political or other current conditions in that country," which "may be critical to determining whether the noncitizen is likely to be tortured if returned." *Nasrallah*, 590 U.S. at 585–86.

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[5] *Guzman Chavez*, which addressed challenges to detention, "expressly refused to consider this judicial-review issue." *Kolov*, 78 F.4th at 919; *see Guzman Chavez*, 594 U.S. at 535 n.6 (noting that 8 U.S.C. § 1252 "uses different language" than the provision at issue there regarding administrative finality of detention orders and "expres[ing] no view" on what constitutes a final order of removal for purposes of judicial review).

The same reasoning applies to withholding orders which, while not at issue in *Nasrallah*, likewise involve newly raised claims implicating threats to the petitioner's life or freedom. 590 U.S. at 587 (citing 8 U.S.C. § 1231(b)(3)(A)). As this Court observed, "[i]t would be easy enough for Congress to preclude judicial review of factual challenges to CAT orders," or withholding orders, "just as Congress has precluded judicial review of factual challenges to certain final orders of removal. But Congress has not done so, and it is not the proper role of the courts to rewrite the laws passed by Congress and signed by the President." *Id.* at 583.

The Fourth Circuit's rule is completely at odds with *Nasrallah*'s teaching that Congress fully intended judicial review over CAT (and withholding) claims. Rather than facilitate the review scheme Congress expressly created, the Fourth Circuit's rule would instead effectively eliminate judicial review of CAT and withholding claims raised in reinstatement proceedings. Either that or require petitioners to file placeholder petitions to preserve judicial review of such claims before those claims had blossomed, much less ripened. *Infra* Part IV. It would be akin to rejecting a civil litigant's appeal because the party had not filed a preemptive notice of appeal within 30 days of a complaint's filing, with claims for relief unadjudicated. There is no basis to believe Congress created such a system, and no reason for Congress to have done so.

C. The Fourth Circuit's rule is contrary to the strong presumption of judicial review.

The Fourth Circuit's holding conflicts not only with *Nasrallah* but with the longstanding

presumption in favor of judicial review. *See, e.g.*, *Kucana v. Holder*, 558 U.S. 233, 251–52 (2010).

"From the beginning," in seminal cases like *Marbury v. Madison*, 5 U.S. (1 Cranch) 137 (1803), the Court has established that "judicial review of a final agency action by an aggrieved person will not be cut off unless there is persuasive reason to believe that such was the purpose of Congress." *Bowen v. Mich. Acad. of Fam. Physicians*, 476 U.S. 667, 670 (1986). As a result, there is a "well-settled" and "strong" presumption favoring judicial review of administrative action. *Guerrero-Lasprilla v. Barr*, 589 U.S. 221, 229 (2020).

The Court has "consistently" applied this presumption to "legislation regarding immigration, and particularly to questions concerning the preservation of federal-court jurisdiction." *Kucana*, 558 U.S. at 251. The Court "assumes that 'Congress legislates with knowledge of' the presumption," and thus requires "'clear and convincing evidence' to dislodge" it. *Id.* at 252.

"Separation-of-powers concerns" also militate "against reading legislation, absent clear statement, to place in executive hands authority to remove cases from the Judiciary's domain." *Kucana*, 558 U.S. at 237. "Article III is 'an inseparable element of the constitutional system of checks and balances'" and "preserve[s] the integrity of judicial decisionmaking." *Stern v. Marshall*, 564 U.S. 462, 482–84 (2011). It "bar[s] congressional attempts to transfer jurisdiction [to non-Article III tribunals] for the purpose of emasculating constitutional courts and thereby prevent[s] the encroachment or aggrandizement of one branch at the expense of the other." *CFTC v. Schor*, 478 U.S. 833, 850 (1986) (cleaned up). In the bankruptcy

context, for instance, "Article I adjudicators" may decide claims without "offend[ing] the separation of powers" only "so long as Article III courts retain supervisory authority over the process." *Wellness Int'l Network, Ltd. v. Sharif*, 575 U.S. 665, 678 (2015). To allow otherwise risks upsetting the Framers' "solution to governmental power and its perils … : divid[ing] it." *Seila Law LLC v. CFPB*, 140 S. Ct. 2183, 2202 (2020).

Against this backdrop, "it is most unlikely that Congress intended to foreclose all forms of meaningful judicial review" for fear-based proceedings. *McNary v. Haitian Refugee Ctr., Inc.*, 498 U.S. 479, 496 (1991). The Fourth Circuit's rule would leave any noncitizen whose fear-based proceedings ran longer than 30 days—as almost all do—or who did not file a premature placeholder petition, with "no remedy, no appeal to the laws of his country." *United States v. Nourse*, 34 U.S. (9 Pet.) 8, 29 (1835) (Marshall, C.J.). At the same time, it would deny Article III courts "supervisory authority" to check that administrative determinations are correct, and to provide administrative courts with consistent guidance on such determinations going forward. *Wellness Int'l*, 575 U.S. at 678.

D. The Fourth Circuit's rule raises significant due process concerns.

All noncitizens present in the United States, including those in fear-based proceedings, are entitled to due process, "whether their presence … is lawful, unlawful, temporary, or permanent." *Zadvydas v. Davis*, 533 U.S. 678, 693 (2001). Due process becomes all the more essential when an individual has "gain[ed] admission to our country and beg[un] to develop the ties that go with permanent residence," *Landon v. Plasencia*, 459 U.S. 21, 32 (1982), as many noncitizens with reinstated removal orders have. Mr. Martinez,

for example, has spent nearly 20 years in the United States.

Judicial review is an essential element of due process. Where a noncitizen's life and liberty are at stake, a rule that provides for review solely in "administrative proceedings, where the alien bears the burden of" establishing his entitlement to relief, and denies "later judicial review" of that proceeding raises a "serious constitutional problem." *Zadvydas*, 533 U.S. at 692. The Fourth Circuit's rule would even prevent noncitizens from "obtain[ing] judicial review when, for instance, reinstatement proceedings violate their due process rights." *Martinez*, 86 F.4th at 574 (Floyd, J., concurring in the judgment).

III. ARTICLE III REVIEW IS CRITICAL TO CORRECT ERRORS ARISING FROM THE OVERBURDENED IMMIGRATION ADJUDICATION SYSTEM.

Article III review of withholding and CAT determinations ensures that "minimum standards of legal justice" are met. *Benslimane v. Gonzales*, 430 F.3d 828, 830 (7th Cir. 2005).

Every level of the immigration system is under stress. USCIS faces a backlog of over 9.3 million cases.[6] Every year, tens of thousands of removal orders are executed by DHS. In 2022, USCIS received 6,900 reasonable fear referrals, of which it completed 6,100, up from 5,100 referrals and 4,500 completions

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6 *Number of Service-Wide Forms by Quarter: FY24 Q1 All Forms*, USCIS, https://www.uscis.gov/sites/default/files/document/data/quarterly_all_forms_fy2024_q1.xlsx; *see also Historical National Median Processing Time (in Months) for All USCIS Offices for Select Forms by Fiscal Year*, USCIS, https://egov.uscis.gov/processing-times/historic-pt (last updated May 31, 2024).

in 2021.[7] The number of credible fear referrals—involving noncitizens without prior removal orders but handled by the same overburdened asylum officers—reached 68,300 in 2022, up from 59,200 in 2021, with a backlog of around 20 percent in both years. Immigration courts face a growing backlog of around 2.8 million cases nationwide,[8] or an average backlog of nearly 3,800 cases for each of the approximately 725 IJs.[9] One judge described her experience as "nightmarish," explaining that, to tackle her "pending caseload [of] about 4,000 cases," she had only "about half a judicial law clerk and less than one full-time legal assistant to help [her]."[10] The BIA, which currently has 22 members plus three temporary members,[11] had

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7 *Annual Statistical Report: FY 2022*, at 16, USCIS, https://www.uscis.gov/sites/default/files/document/reports/FY2022_Annual_Statistical_Report.pdf.

8 *Adjudication Statistics: Pending Cases, New Cases, and Total Completions*, Exec. Off. for Immigr. Rev. (Jan. 18, 2024), https://www.justice.gov/eoir/media/1344791/dl?inline (through the first quarter of 2024).

9 *Adjudication Statistics: Immigration Judge (IJ) Hiring*, Exec. Off. for Immigr. Rev. (Jan. 2024), https://www.justice.gov/eoir/media/1344911/dl?inline. An estimated 1,349 IJs would be needed to clear the backlog by 2032. Holly Straut-Eppsteiner, Cong. Rsch. Serv., R47637, *Immigration Judge Hiring and Projected Impact on the Immigration Courts Backlog* 10 (2023), https://crsreports.congress.gov/product/pdf/R/R47637.

10 *Amid "Nightmarish" Case Backlog, Experts Call for Independent Immigration Courts*, A.B.A. News (Aug. 9, 2019), https://www.americanbar.org/news/abanews/aba-news-archives/2019/08/amid-_nightmarish-case-backlog--experts-call-for-independent-imm.

11 *See* 8 C.F.R. § 1003.1(a)(1); *Board of Immigration Appeals*, Exec. Off. for Immigr. Rev., https://www.justice.gov/eoir/board-

112,907 pending appeals at the end of the first quarter of 2024, up 14.6 percent from the end of 2022 and 217 percent from 2018.[12] As a result, according to EOIR, each BIA member spends just one hour adjudicating each appeal.[13]

The pressures on the immigration adjudication system routinely produce errors that Article III courts review and correct.[14] Social science research confirms that "[t]he accuracy of human judgments decreases

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of-immigration-appeals#board (last updated May 14, 2024). The number of temporary members can vary.

12 *Adjudication Statistics: All Appeals Filed, Completed, and Pending*, Exec. Off. for Immigr. Rev. (Jan. 18, 2024), https://www.justice.gov/eoir/media/1344986/dl?inline (tallying "[a]ppeals from completed removal, deportation, exclusion, asylum-only, and withholding-only proceedings").

13 Faiza W. Sayed, *The Immigration Shadow Docket*, 117 Nw. U.L. Rev. 893, 945 (2023).

14 *See, e.g.*, *Arita-Deras v. Wilkinson*, 990 F.3d 350, 358 (4th Cir. 2021) (criticizing numerous IJ and BIA decisions as "err[oneous] as a matter of law," "flawed," with "no plausible basis … in violation of the Board's precedent"); *Zaya v. Garland*, 2021 WL 4452422, at *3 (6th Cir. Sept. 29, 2021) (per curiam) (reversing finding of no reasonable fear where "the asylum officer provided no analysis" and "made some mistakes," and the IJ failed to "explain the reasons for the IJ's decision"); *Quinteros v. U.S. Att'y Gen*, 945 F.3d 772, 791 (3d Cir. 2019) (McKee, J., concurring) ("There are numerous examples of [the BIA's] failure to apply the binding precedent of this Circuit," including "in the two years since we explicitly emphasized its importance"); *Zavaleta-Policiano v. Sessions*, 873 F.3d 241, 248 (4th Cir. 2017) ("[T]he IJ and BIA failed to appreciate, or even address, critical evidence in the record"); *Ssali v. Gonzales*, 424 F.3d 556, 563 (7th Cir. 2005) (BIA was "not aware of the most basic facts of [the petitioner's] case" and ruling lacked "a rational basis"); *Niam v. Ashcroft*, 354 F.3d 652, 656 (7th Cir. 2004) (IJ's opinion "is riven with [factual] errors" that "were not noticed by the [B]oard").

under time pressure."[15] "[T]he time and resource shortfalls that afflict agency decision-making may make its adjudicators more error-prone, while federal judges' comparative surfeit of both improves their relative capacity to decide cases accurately."[16] Since 2014, the circuit courts have remanded over 10,000 BIA decisions.[17] Just last year, the circuit courts issued remands in around 20 percent of all BIA appeals.[18] These rates may increase in light of *Loper Bright Enterprises v. Raimondo*, as circuit courts independently determine whether petitioners satisfied the statutory requirements for withholding or CAT relief without deferring to IJ or BIA denials. 2024 WL 3208360, at *22 (U.S. June 28, 2024).

Moreover, for agency adjudicators, "[c]onsistency and accuracy across this staggering number of

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15 Anne Edland & Ola Svenson, *Judgment and Decision Making Under Time Pressure: Studies and Findings*, in *Time Pressure and Stress in Human Judgment and Decision Making* 29, 35–36 (Ola Svenson & A. John Maule eds., 1993); *see also* Eberhard Feess & Roee Sarel, *Judicial Effort and the Appeals System: Theory and Experiment*, 47 J. Legal Stud. 269, 270–71 (2018) (concluding from a laboratory experiment that penalizing reversals prompts greater trial-level effort compared with systems with no appeals and systems where reversals are not penalized).

16 Jonah B. Gelbach & David Marcus, *Rethinking Judicial Review of High Volume Agency Adjudication*, 96 Tex. L. Rev. 1097, 1111 (2018).

17 *Adjudication Statistics: Circuit Court Remands Filed*, Exec. Off. for Immigr. Rev. (Jan. 18, 2024), https://www.justice.gov/eoir/media/1344996/dl?inline.

18 *Id.*; *Federal Judicial Caseload Statistics: 2023*, U.S. Courts, https://www.uscourts.gov/statistics-reports/federal-judicial-caseload-statistics-2023 (BIA appeals accounted for 79 percent of the 4,450 administrative agency appeals in 2023).

decisions may be impossible to achieve."[19] "[T]he large number of cases" on the dockets of IJs and BIA judges "imposes practical limitations on the length" of written opinions. *Voci v. Gonzales*, 409 F.3d 607, 613 n.3 (3d Cir. 2005). The BIA publishes only 0.001% of its decisions each year, leaving thousands of unpublished, nonprecedential decisions where errors and inconsistencies lurk unseen.[20] Article III courts impose consistent legal standards, ensuring that "crowded dockets or a backlog of cases" do not "allow an IJ or the BIA to dispense with an adequate explanation … merely to facilitate or accommodate administrative expediency." *Valarezo-Tirado v. U.S. Att'y Gen.*, 6 F.4th 542, 549 (3d Cir. 2021).

Article III courts' error-correcting function is particularly important given the life-or-death stakes of many withholding-only cases. To give just one example, the Fifth Circuit recently held in *Argueta-Hernandez* that petitions filed within 30 days of the end of withholding-only proceedings were timely—withdrawing, on rehearing, the panel's own prior holding to the contrary. 87 F.4th at 714. On the merits, the Fifth Circuit held that the BIA had "misapplied prevailing case law, disregarded crucial evidence, and failed to adequately support its decisions." *Id.* at 703. It remanded to the agency, underscoring that Mr. Argueta-Hernandez had received several "sustained" death threats "so credible that numerous Salvadoran

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19 Sayed, *supra* note 13, at 944; *see id.* at 921, 925 (noting "the well-documented inconsistencies in the application of immigration law" by agency adjudicators and finding that "precedent is crucial for creating uniformity in immigration law").

20 Sayed, *supra* note 13, at 926. Around 13 percent of federal circuit court decisions are published, and even unpublished decisions are easily accessible and citable by parties. *Id.* at 900.

officials told Argueta-Hernandez to flee the country." *Id.* at 708–09.

Significantly, had Mr. Argueta-Hernandez lived in the Fourth or Second Circuits, or had the Fifth Circuit not reversed itself, the circuit court would not have reached the merits and those death threats may well have been carried out upon his removal. Judicial review of agency determinations in withholding-only proceedings is crucial for all noncitizens, and this Court should ensure that it not be reserved only for those in certain jurisdictions.

IV. THE FOURTH CIRCUIT'S RULE IMPOSES UNNECESSARY BURDENS ON NONCITIZENS AND COURTS.

The only way for noncitizens with withholding or CAT claims to preserve judicial review under the Fourth Circuit's rule is to file a placeholder petition for review upon reinstatement of the removal order. Such a petition would "ripen" and come alive only after the withholding-only proceedings concluded—some months or years after the filing. *Alonso-Juarez*, 80 F.4th at 1053. The courts of appeals would therefore have to "establish a system of holding petitions for review in abeyance" and keeping track of "the progress of [the ongoing] administrative proceedings," which can take months or years to resolve after the reinstatement order is issued. *Id.* A rule that encourages the filing of docket placeholders is "unworkable" for several reasons. *Id*.

First, the financial burdens of having to file potentially unnecessary placeholder petitions are significant. Noncitizens would be required to pay a "hefty" filing fee—$600 in both the Second and Fourth

Circuits[21]—just in case they later need to seek review of a withholding-only determination. *Alonso-Juarez*, 80 F.4th at 1053. Those who prevail in their administrative proceedings and never need that review presumably would have no way of being reimbursed.

Second, *pro se* noncitizens and noncitizens with educational and linguistic barriers may have particular difficulty navigating a perverse system of prophylactic "appeals of decisions not yet made." *Alonso-Juarez*, 80 F.4th at 1053. Just 36 percent of noncitizens in all immigration proceedings are represented by counsel, and in the withholding-only proceedings concluded in the first five months of 2024, more than 60 percent of noncitizens appeared without counsel.[22]

Third, requiring placeholder petitions also imposes significant burdens on other actors in the system. The appeals courts' administrative staff will be required to docket many new cases which will slumber for months or years until administrative proceedings conclude and the noncitizen determines whether to seek judicial review. Department of Justice attorneys may also have to expend resources in additional docket-monitoring.

Fourth, the current circuit split creates additional complications, as noncitizens may move—or be

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21 *Fee Schedule*, U.S. Ct. of Appeals for the Second Circuit, https://www.ca2.uscourts.gov/clerk/case_filing/fee_schedule.html; *Fee Schedule*, U.S. Ct. of Appeals for the Fourth Circuit, https://www.ca4.uscourts.gov/court-forms-fees/fee-schedule.

22 *Current Representation Rates*, Exec. Off. for Immigr. Rev. (Jan. 18, 2024), https://www.justice.gov/eoir/media/1344931/dl?inline; *Outcomes of Immigration Court Proceedings*, TRAC Immigr., https://trac.syr.edu/phptools/immigration/closure/ (last visited June 14, 2024).

moved, if detained[23]—resulting in the transfer of their removal cases while proceedings are pending. *See* 8 C.F.R. § 1003.20. A noncitizen could initially reside or be detained in one of the nine circuits where a withholding-only order is a reviewable final order and then move or be moved to the Second or Fourth Circuit, where it is not, while withholding-only proceedings are pending. Although the noncitizen would not originally have needed to file a placeholder petition for review of the reinstatement order, he would find himself unable to seek review in the Second or Fourth Circuit. Alternatively, a well-advised noncitizen in the Second Circuit might file an initial petition for review to be held in abeyance throughout the withholding-only proceedings, only to move to the Fourth Circuit. The Second Circuit would be left with a vestigial petition for review that the noncitizen might forget to dismiss, while the Fourth Circuit, again, would lack jurisdiction to review the agency's final withholding-only determination. *See Martinez*, 86 F.4th at 567.

This potential "trap for the unwary" weighs heavily in favor of resolving the circuit split and announcing a nationwide rule. *Martinez v. Sessions*, 873 F.3d 655, 660 (9th Cir. 2017). Otherwise, not only will

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[23] Noncitizens in ICE custody pending removal may be transferred among ICE detention facilities whenever "deemed necessary" by ICE. U.S. Immigr. & Customs Enf't, Policy 11022.1: Detainee Transfers (Jan. 4, 2012), https://www.ice.gov/doclib/detention-reform/pdf/hd-detainee-transfers.pdf. In 2011, Human Rights Watch reported that approximately 15 percent of transfers during the 1998–2010 period were between facilities in different federal circuits. Hum. Rts. Watch, *A Costly Move: Far and Frequent Transfers Impede Hearings for Immigrant Detainees in the United States* (June 14, 2011), https://www.hrw.org/report/2011/06/14/costly-move/far-and-frequent-transfers-impede-hearings-immigrant-detainees-united.

"many of the victims of the trap … be pro se litigants without the assistance of sophisticated counsel," *id.*; some will also be "trap[ped]" by virtue of detention and transfer determinations made by the government, completely outside the noncitizen's control, *see supra* note 23.

V. THE IMMIGRATION SYSTEM DEMANDS NATIONWIDE UNIFORMITY.

In holding that the 30-day deadline to seek review of a reinstated removal order runs from the time of the reinstatement order, the Second Circuit and now the Fourth Circuit departed from the majority rule across the other circuits. A noncitizen located in Delaware who fears torture or persecution in his home country can seek judicial review of a withholding or CAT determination before being removed to that country under the Third Circuit's rule, while that avenue for review is closed for a similarly situated noncitizen a few miles away in Maryland under the Fourth Circuit's rule. *See Martinez*, 86 F.4th at 567; *Cazun v. Att'y Gen.*, 856 F.3d 249, 252 (3d Cir. 2017).[24] In ruling below against the availability of judicial review, the Fourth Circuit has taken a decidedly minority position that will close the courthouse doors to a subset of noncitizens with withholding and CAT claims, based solely on where their case has been adjudicated.

To allow the Fourth Circuit's ruling—and the circuit split it entrenches—to stand would undermine the long-recognized interest in maintaining a uniform body of federal immigration law. Building on the Constitution's mandate to Congress to "establish an

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[24] The Fourth Circuit compounded this issue in joining the review-restricting side of another circuit split, holding that the 30-day deadline is "mandatory and jurisdictional." Pet. §§ I.B, II.B.

uniform Rule of Naturalization," both Congress and this Court have recognized the importance of maintaining one body of immigration law to be applied across the entire United States. U.S. Const. art. I, § 8, cl. 4; *Texas v. United States*, 809 F.3d 134, 187–88 (5th Cir. 2015) ("[T]he immigration laws of the United States should be enforced vigorously *and uniformly*" (emphasis altered)), *aff'd by equally divided court*, 579 U.S. 547 (2016) (per curiam); *Arizona v. United States*, 567 U.S. 387, 394–95 (2012) (recognizing importance of "communicat[ing] [as] one national sovereign" on immigration law and status).

"[P]redictability and uniformity … underlie our society's commitment to the rule of law." *Lassiter v. Dep't of Soc. Servs. of Durham Cnty.*, 452 U.S. 18, 50 (1981) (Blackmun, J., dissenting). Those values are all the more important when the denial of judicial review to some noncitizens could imperil their lives. *Cf. Sessions v. Dimaya*, 584 U.S. 148, 156–57 (2018) (recognizing "the most exacting" version of the vagueness standard applies in cases involving "severe" outcomes of deportation). The prospect of vastly different outcomes, based solely on where a noncitizen is located at the time a removal order is reinstated, creates the appearance of arbitrariness in precisely the high-stakes cases where predictability and uniformity matter most.

CONCLUSION

For the reasons stated above, this Court should grant certiorari and reverse the decision below.

Respectfully submitted,

RICHARD W. MARK
Counsel of Record
AMER S. AHMED
TIMOTHY SUN
ALEXANDRA PERLOFF-GILES
SASHA DUDDING
MEGAN R. MURPHY
GRAHAM ELLIS
GIBSON, DUNN & CRUTCHER LLP
200 Park Avenue
New York, NY 10166
(212) 351-4000
rmark@gibsondunn.com

Counsel for Amici Curiae

July 10, 2024

APPENDIX

Table of Contents

AMICI CURIAE SIGNATORIES

Hon. Steven Abrams

Immigration Judge, New York, Varick St., and Queens Wackenhut, 1997-2013

Hon. Terry A. Bain

Immigration Judge, New York, 1994-2019

Hon. Sarah M. Burr

Assistant Chief Immigration Judge and Immigration Judge, New York, 1994-2012

Hon. Jeffrey S. Chase

Immigration Judge, New York, 1995-2007

Hon. George T. Chew

Immigration Judge, New York, 1995-2017

Hon. Joan V. Churchill

Immigration Judge, Washington D.C. and Arlington, VA, 1980-2005

Hon. Bruce J. Einhorn

Immigration Judge, Los Angeles, 1990-2007

Hon. Noel A. Ferris

Immigration Judge, New York, 1994-2013

Hon. Annie S. Garcy

Immigration Judge, Newark, NJ, and Philadelphia, 1990-2023

Hon. John F. Gossart, Jr.

Immigration Judge, Baltimore, 1982-2013

Hon. Paul Grussendorf

Immigration Judge, Philadelphia and San Francisco, 1997-2004

Hon. Miriam Hayward

Immigration Judge, San Francisco, 1997-2018

Hon. Charles M. Honeyman

Immigration Judge, New York and Philadelphia, 1995-2020

Hon. Rebecca Jamil

Immigration Judge, San Francisco, 2016-2018

Hon. William P. Joyce

Immigration Judge, Boston, 1996-2002

Hon. Samuel Kim

Immigration Judge, San Francisco, 2020-2022

Hon. Carol King

Immigration Judge, San Francisco, 1995-2017

Hon. Eliza C. Klein

Immigration Judge, Miami, Boston, Chicago, 1994-2015; Senior Immigration Judge, Chicago, 2019-2023

Hon. Christopher M. Kozoll

Immigration Judge, Memphis, 2022-2023

Hon. Elizabeth A. Lamb

Immigration Judge, New York, 1995-2018

Hon. Dana Leigh Marks

Immigration Judge, San Francisco, 1987-2021

Hon. Margaret McManus

Immigration Judge, New York, 1991-2018

Hon. Steven Morley

Immigration Judge, Philadelphia, 2010-2022

Hon. Charles Pazar

Immigration Judge, Memphis, 1998-2017

Hon. Laura L. Ramírez

Immigration Judge, San Francisco, 1997-2018

Hon. John W. Richardson

Immigration Judge, Phoenix, 1990-2018

Hon. Lory D. Rosenberg

Appellate Immigration Judge, Board of Immigration Appeals, 1995-2002

Hon. Susan G. Roy

Immigration Judge, Newark, 2008-2010

Hon. Paul W. Schmidt

Chairperson and Appellate Immigration Judge, Board of Immigration Appeals, 1995-2003; Immigration Judge, Arlington, VA, 2003-2016

Hon. Ilyce S. Shugall
Immigration Judge, San Francisco, 2017-2019

Hon. Gita Vahid
Immigration Judge, Los Angeles, 2002-2024

Hon. Gabriel C. Videla
Immigration Judge, New York and Miami, 1994-2022

Hon. Polly A. Webber
Immigration Judge, San Francisco, 1995-2016