Nos. 23-1270 & 23-7678

**IN THE**
**Supreme Court of the United States**

PIERRE YASSUE NASHUN RILEY, *Petitioner,*

v.

MERRICK B. GARLAND, U.S. ATTORNEY GENERAL,
*Respondent.*

JOSE ANTONIO MARTINEZ ET AL., *Petitioners,*

v.

MERRICK B. GARLAND, U.S. ATTORNEY GENERAL,
*Respondent.*

On Petitions for Writs of Certiorari to the United States Court of Appeals for the Fourth Circuit

# BRIEF *AMICI CURIAE* OF FORMER U.S. ATTORNEYS GENERAL IN OPPOSITION TO THE PETITIONS


GENE P. HAMILTON
AMERICA FIRST LEGAL FOUNDATION
611 PENNSYLVANIA AVE. SE NO. 231
WASHINGTON, DC 20003
(202) 964-3722
gene.hamilton@aflegal.org

R. TRENT MCCOTTER
*Counsel of Record*
BOYDEN GRAY PLLC
801 17TH ST. NW SUITE 350
WASHINGTON, DC 20006
(202) 706-5488
tmccotter@boydengray.com

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## INTEREST OF *AMICI CURIAE*[1]

*Amici curiae* are former United States Attorneys General whose terms spanned three presidential administrations: William P. Barr, Jefferson B. Sessions III, and Michael B. Mukasey. *Amici* submit this brief because they have unique insights into the nation's immigration system, *see* 6 U.S.C. § 521 (immigration courts are "subject to the direction and regulation of the Attorney General"), and they believe the Department of Justice has a solemn responsibility to enforce Congress's clear immigration scheme—an obligation that DOJ has largely failed to uphold in the proceedings below.

"Policies pertaining to the entry of aliens and their right to remain here" are "entrusted exclusively to Congress." *Galvan v. Press*, 347 U.S. 522, 531 (1954). In 1996, frustrated with delays in the immigration system, Congress enacted the Illegal Immigration Reform and Immigrant Responsibility Act, which "toed a harder line" against illegal reentrants (like Petitioner Martinez) and aliens with aggravated criminal convictions (like Petitioner Riley). *Fernandez-Vargas v. Gonzales*, 548 U.S. 30, 34 (2006).

Congress subjected such aliens to expedited removal, shortened the time for criminal aliens to seek judicial review, and mandated that illegal

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[1] No counsel for any party has authored this brief in whole or in part, and no entity or person, aside from *Amici*'s counsel, made any monetary contribution intended to fund the preparation or submission of this brief. All parties have received timely notification of the filing of this brief.

reentrants are "not eligible and may not apply for *any* relief under this chapter." 8 U.S.C. §§ 1228(b), 1231(a)(5) (emphasis added).

Congress could not have been clearer that it was ending the loopholes and incentives for delay *in the exact circumstances* raised by Petitioners here. The number of aliens in the system has only grown since 1996, yet in the proceedings below, DOJ adopted Petitioners' position that they are entitled to further judicial review. DOJ refused to defend the Fourth Circuit's caselaw foreclosing Petitioners' challenges[2] and has also called for the Second Circuit's similar precedent to be overturned.[3]

*Amici* accordingly shoulder the burden of submitting this brief to raise important arguments and considerations that the Court otherwise may not hear. The immigration system is bursting at the seams and will only be worsened by collusive requests for additional, often meritless appeals despite Congress's express enactments to the contrary.

This Court should deny *certiorari*, but if it does grant review, it should appoint *Amici* to defend the judgment below. Indeed, *Amici*'s counsel has already presented oral argument on these issues at the Second Circuit to ensure adversarial presentation.

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[2] Gov't Rule 28(j), *Riley v. Garland*, No. 22-1609 (4th Cir. Aug. 14, 2023) (abandoning prior positions); Gov't Rule 28(j), *Martinez v. Garland*, No. 22-1221 (4th Cir. Aug. 17, 2023).

[3] Br. for Resp't, *Castejon-Paz v. Garland*, No. 22-6024 (2d Cir. Jan 10, 2024); Br. for Resp't, *Cerrato-Barahona v. Garland*, No. 22-6349 (2d Cir. Jan. 10, 2024).

## SUMMARY OF THE ARGUMENT

The Court should deny the petitions. They raise issues on which the lower courts either are in substantial agreement or on which further percolation is warranted. Additionally, adopting Petitioners' views would herald a return to the days of rewarding delays and untimely requests for judicial review, eviscerating Congress's carefully "crafted [] system" for "expeditiously removing" such aliens, *DHS v. Thuraissigiam*, 591 U.S. 103, 106 (2020), and eliminating their "incentive to delay things," *Niz-Chavez v. Garland*, 593 U.S. 155, 158 (2021).

If the Court does grant review, however, it should add an additional question presented on an important threshold issue and also appoint *Amici*—former U.S. Attorneys General whose terms spanned three presidential administrations—to defend the judgment below and present adversarial briefing because the Department of Justice has refused to defend the lower court's holdings on the questions presented.

## ARGUMENT

### I. The Court Should Deny Review on Whether Section 1252(b)(1) Is Jurisdictional.

Filing deadlines are important because "no adjudicative system can function effectively without imposing some orderly structure on the course of its proceedings." *Woodford v. Ngo*, 548 U.S. 81, 90–91 (2006). That is especially true in the context of judicial review of immigration decisions, which number well into the thousands every year.

Petitioners ask the Court to decide whether 8 U.S.C. § 1252(b)(1)'s 30-day filing deadline is jurisdictional. The Court should deny review. Almost all circuits agree § 1252(b)(1) remains jurisdictional, Petitioners' view would herald a return to the days of encouraging delay, and the Fourth Circuit's decision correctly applied statutory *stare decisis* in adhering to this Court's express holding that § 1252(b)(1) is "mandatory and jurisdictional." *Stone v. INS*, 514 U.S. 386, 405 (1995).

### A. Almost All Circuits Agree that Section 1252(b)(1) Remains Jurisdictional.

The Fourth Circuit's holding that 8 U.S.C. § 1252(b)(1)'s filing deadline is jurisdictional accords with the vast majority of other circuits. Just in the last year, the Second, Fourth, Fifth, Sixth, Seventh, Tenth, and Eleventh Circuits have issued opinions labeling Section 1252(b)(1) as jurisdictional,[4] sometimes in unpublished opinions indicating the

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[4] *See Valderamos-Madrid v. Garland*, No. 21-6221, 2023 WL 5423960, at *1 (2d Cir. Aug. 23, 2023); *Salgado v. Garland*, 69 F.4th 179, 181 n.1 (4th Cir. 2023); *Quintanilla-Benitez v. Garland*, No. 22-60289, 2023 WL 8519115, at *1 (5th Cir. Dec. 8, 2023); *Kolov v. Garland*, 78 F.4th 911, 917 (6th Cir. 2023); *F.J.A.P. v. Garland*, 94 F.4th 620, 626 (7th Cir. 2024); *Arosteguí-Maldonado v. Garland*, 75 F.4th 1132, 1140 (10th Cir. 2023); *Allen v. U.S. Att'y Gen.*, No. 23-13044, 2024 WL 164403, at *2 (11th Cir. Jan. 16, 2024). The Fifth Circuit previously issued a decision stating that § 1252(b)(1) is not jurisdictional. *Argueta-Hernandez*, 87 F.4th 698, 705 (5th Cir. 2023).

issue was so obvious that it was not even debatable.[5] Only two circuits—the Third and Ninth—have consistently disagreed.

There is little reason to grant review when, at best, any circuit split is exceedingly lopsided, and especially when many circuits do not view the issue as even debatable.

### B. Petitioners Seek a Return to the Days of Incentivizing Delays.

Petitioners' position would impose extraordinary burdens on the lower courts and incentivize delays—the very things Congress sought to eliminate in 1996 by enacting the Illegal Immigration Reform and Immigrant Responsibility Act ("IIRIRA").

Before IIRIRA, aliens would "exploit[] administrative delays to 'buy time'" and "manipulate or delay removal proceedings." *Pereira v. Sessions*, 585 U.S. 198, 219 (2018). Such delays ripple through the immigration system, "delay[ing] the adjudication of meritorious" cases, "caus[ing] the release of many inadmissible aliens into States and localities that must shoulder the resulting costs," and "divert[ing] Department resources from protecting the border." *Thuraissigiam*, 591 U.S. at 112 n.9.

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[5] *See United States v. Montague*, 67 F.4th 520, 535 n.4 (2d Cir. 2023) (Menashi, J.) ("[N]onprecedential decisions should be used only when the legal issue is clear enough that all reasonable judges will come out the same way," meaning the issue was "so 'clear or obvious, rather than subject to reasonable dispute,' that an opinion addressing the issue would [have] serve[d] no jurisprudential purpose.").

Frustrated with those delays and loopholes, Congress enacted IIRIRA, which carefully "crafted a system" for "expeditiously removing" certain classes of aliens, *id.* at 106, and thereby eliminating their "incentive to delay things," *Niz-Chavez*, 593 U.S. at 158.

For example, IIRIRA established a fair and expedited scheme for removing aliens with convictions for aggravated crimes and also those with reinstated removal decisions, even expressly stating that aliens in the latter category are "not eligible and may not apply for any relief under this chapter." 8 U.S.C. §§ 1228(b), 1231(a)(5). Congress also eliminated the automatic stays of removal that many aliens received pre-IIRIRA. *See Nken v. Holder*, 556 U.S. 418, 435 (2009).

But allowing judicial-review petitions to be filed months or even years after the deadline Congress imposed would eviscerate this scheme by once again rewarding delay and diverting scarce resources. And it would do so in the very scenarios where Congress went out of its way to ensure expedited treatment: aliens with aggravated convictions (like Petitioner Riley), and aliens who have already been previously removed (like Petitioner Martinez).

As demonstrated by the procedural history of Petitioners' cases, DOJ has been more than willing to waive untimeliness across the board, even when the circuit-court petitions are based on removal orders issued years earlier. The only thing preventing a flood of untimely petitions is the fact that the lower courts largely still deem the filing deadline to be

jurisdictional—and thus unable to be waived despite DOJ's best efforts.

The circuit courts are already underwater on review of immigration petitions. *See* Admin. Off. of the U.S. Courts, *Table B-5—U.S. Courts of Appeals Statistical Tables for the Federal Judiciary* (Mar. 31, 2024), https://tinyurl.com/44hbdvr3; Admin. Off. of the U.S. Courts, *Federal Judicial Caseload Statistics 2023*, https://tinyurl.com/5n8sw9wk. And now Petitioners—with support from DOJ—propose diverting those scarce judicial resources away from timely immigration cases brought by individuals who have just recently received a final order of removal, and towards untimely ones brought by individuals who were ordered removed long ago but then illegally reentered, or who forwent their opportunity for judicial review when it was provided.

The concerns about delay are heightened in courts like the Second Circuit, which typically issues a temporary stay of removal before there has been an adjudication on the merits, regardless of whether the case shows any merit. Such stays violate IIRIRA, which "eliminated the reason for categorical stays," *Nken*, 556 U.S. at 435, precisely because they provide a strong incentive to seek judicial review even when months or years late.

Despite all this delay and draining of judicial resources, the odds of the aliens ultimately prevailing on the underlying merits of these kinds of cases are vanishingly low. Just look at the procedural history here. The government fully supports Petitioners on timeliness and jurisdiction yet still argued below that

they should lose on the merits. *See* Resp't Answering Br. at 2, *Martinez*, No. 22-1221 (4th Cir. Aug. 15, 2022) ("Martinez's petition for review should be denied" on the merits); Br. for Resp't at 58, *Riley*, No. 22-1609 (4th Cir. Jan. 13, 2023) (if court finds it has jurisdiction, it "should deny Petitioner's petition for review"). The government has filed similar briefs across the lower courts.

In 1996, when immigration levels were substantially lower than now, Congress went out of its way to eliminate dilatory petitions, yet now Petitioners and DOJ ask this Court to greenlight the very thing Congress expressly forbade, with no substantial benefits. The Court should decline the invitation.

### C. The Fourth Circuit's Decision Follows Principles of Statutory *Stare Decisis*.

The Fourth Circuit's holding that the filing deadline in § 1252(b)(1) is jurisdictional also fully accords with principles of statutory *stare decisis*.

"[*S*]*tare decisis* carries enhanced force when a decision … interprets a statute" because "critics of our ruling can take their objections across the street, and Congress can correct any mistake it sees." *Kimble v. Marvel Ent., LLC*, 576 U.S. 446, 456 (2015). Predictability with deadlines is especially important.

As noted above, this Court held in *Stone* that the filing deadline in § 1252(b)(1) is jurisdictional.[6] To be sure, this Court has since moved away from *Stone*'s framework when evaluating provisions the Court has not previously addressed, but the Court has carefully preserved its prior rulings that *specific* provisions are jurisdictional.

For example, this Court has conspicuously declined to list § 1252(b)(1) among provisions in the INA that are "nonjurisdictional in nature." *Santos-Zacaria v. Garland*, 598 U.S. 411, 420 (2023). The Court has also declined to overrule its holding in *Bowles v. Russell*, 551 U.S. 205 (2007), that the deadline to appeal from a district court to a circuit court is jurisdictional, *see Harrow v. Dep't of Def.*, 144 S. Ct. 1178, 1185–86 (2024).

This Court recently employed this same approach in *Loper Bright Enterprises v. Raimondo*, holding that even though the *Chevron* deference framework is eliminated going forward, prior Supreme Court decisions relying on *Chevron* deference to conclude that "specific agency actions are lawful … are still subject to statutory *stare decisis* despite our change in interpretive methodology." *Loper Bright Enterprises v. Raimondo*, No. 22-1219, 2024 WL 3208360, at *21 (U.S. June 28, 2024). The same logic applies to *Stone*'s

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[6] At the time *Stone* was decided, the provision was codified at 8 U.S.C. § 1105a(a)(1) and imposed a 90-day deadline in most circumstances but otherwise is materially the same as the current § 1252(b)(1).

specific holding on § 1252(b)(1) despite the subsequent change in methodology.

The correctness of the Fourth Circuit's holding under statutory *stare decisis* principles likewise favors denying review on the question of whether § 1252(b)(1)'s filing deadline is jurisdictional.[7]

## II. The Court Should Deny Review on When the Thirty-Day Deadline Begins.

Petitioners also ask the Court to grant review of whether a circuit court can review withholding-only determinations whenever a circuit court petition was filed within thirty days of the completion of the withholding-only proceedings. The Court should also decline to grant this issue.

This arises in the context of aliens whose final removal orders are issued well before there is an adjudication of their requests for withholding relief or Convention Against Torture ("CAT") relief. The most common scenario is an illegal reentrant, i.e., an alien determined removable years ago and deported, but who then illegally reenters the United States, is apprehended, and asks for withholding or CAT relief (together commonly referred to as "withholding-only"). Petitioner Martinez falls in this category. Such individuals' prior removal orders are automatically

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[7] DOJ has repeatedly asked the lower courts to assume that *Stone* has been fully overruled, but that violates this Court's rule that "if a precedent of this Court has direct application in a case, yet appears to rest on reasons rejected in some other line of decisions, the Court of Appeals should follow the case which directly controls." *Agostini v. Felton*, 521 U.S. 203, 237 (1997); *Mallory v. Norfolk S. Ry. Co.*, 600 U.S. 122, 136 (2023) (same).

reinstated and cannot be challenged, 8 U.S.C. § 1231(a)(5), meaning the aliens must be removed, but they can ask for withholding-only relief which, if successful, would mean they would be removed to a third country rather than to their country of origin. In such cases, the withholding-only determination is necessarily made after the final order of removal was issued.

The same scenario can arise for aliens with aggravated criminal convictions—like Petitioner Riley—who likewise are subject to expedited removal determinations, 8 U.S.C. § 1228, which can occur before withholding-only proceedings are completed.

There is a reason this issue arises for illegal reentrants and aliens with aggravated convictions: those are the two primary categories for whom Congress imposed expedited removal procedures in IIRIRA after becoming especially frustrated with illegal reentrants and criminal aliens delaying their adjudications and removal.

This issue does not often arise where an alien is first determined removable and does not have aggravated criminal convictions. In those cases, the removability determination and any withholding-only claims are typically resolved together by the BIA. Both components of that decision can thus be challenged together in a circuit-court petition, assuming all other procedural requirements are satisfied.

### A. Further Percolation Is Warranted.

The Second Circuit was the first to recognize that this Court's holdings in *Nasrallah v. Barr*, 590 U.S. 573 (2020), and *Johnson v. Guzman Chavez*, 594 U.S. 523 (2021), signaled that a decision on withholding-only cannot serve as the requisite "final order of removal" necessary to trigger judicial review. *See Bhaktibhai-Patel v. Garland*, 32 F.4th 180 (2d Cir. 2022) (Menashi, J.). The Fourth Circuit soon agreed in *Martinez*.

But only a few years have passed since *Nasrallah* and *Guzman Chavez* were issued. Several circuit panels have recently declined to follow course, but only because their internal circuit precedent held that a withholding-only decision was a final order of removal, and—as three-judge panels—they felt bound to continue applying that caselaw because in their view it is not "clearly irreconcilable" with *Nasrallah* and *Guzman Chavez*. *See, e.g.*, *Alonso-Juarez v. Garland*, 80 F.4th 1039, 1049 (9th Cir. 2023); *Kolov*, 78 F.4th at 919 (same); *Inestroza-Tosta v. Att'y Gen.*, No. 22-1667, 2024 WL 3078270, at *7 (3d Cir. June 21, 2024) (prior Third Circuit precedent "is not patently inconsistent with *Nasrallah* and *Guzman Chavez*"); Riley Pet. 22–25.

These circuits should be given the opportunity to consider whether to undertake *en banc* proceedings to

bring their circuit caselaw into alignment with *Nasrallah* and *Guzman Chavez*.[8]

### B. Petitioners Again Seek to Contravene Congress's Clear Desire to Stop the Endless Appeals.

As with the other question presented, Petitioners' petition on this issue, especially when coupled with their position on jurisdictionality, would result in a flood of untimely and meritless claims hitting the circuit courts, even though IIRIRA's goal of foreclosing such stratagems could not have been clearer, particularly for aliens with aggravated convictions (like Riley) and for illegal reentrants (like Martinez). *See* Part I.B, *supra*. Again, this Court should decline that invitation.

### C. The Decision Below Flows Directly from this Court's Holdings.

Review should be denied for the additional reason that the Fourth Circuit's decision was correct and flows inexorably from this Court's recent holdings.

For judicial review, there must be a final order of removal. 8 U.S.C. § 1252. This Court defined "final orders of removal" in *Nasrallah* as "encompass[ing] only the rulings made by the immigration judge or Board of Immigration Appeals that affect the validity of the final order of removal." *Nasrallah*, 590 U.S. at

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[8] The Seventh Circuit in *F.J.A.P.* did a "mini en banc" poll on the issue, and Chief Judge Sykes and Judges Easterbrook, Brennan, and Kirsch voted in favor of rehearing the panel's rejection of the Second and Fourth Circuit's position. *F.J.A.P.*, 94 F.4th at 624 n.2.

582. Any subsequent "rulings that affect the validity of the final order of removal merge into the final order of removal for purposes of judicial review." *Id.*

But "a CAT claim does not affect the validity of the final order of removal"—i.e., the alien will still be removed, just perhaps not to his country of origin—and therefore the decision on such a claim is not itself a final order of removal, nor does it "merge into the final order of removal." *Id.* And *Guzman Chavez* held the exact same for statutory-withholding-only claims, which (as the name indicates) likewise address only *where* an alien will be removed, not *whether* he will be removed. *Guzman Chavez*, 594 U.S. at 540 ("[T]he validity of removal orders is not affected by the grant of withholding-only relief.").

This Court in *Guzman Chavez* also rejected the argument that the finality of the underlying removal order is somehow tolled or delayed until the end of accompanying withholding-only proceedings. "[T]he finality of the order of removal does not depend in any way on the outcome of the withholding-only proceedings." *Id.* at 539. In other words, "[i]t makes no sense for finality of an order to depend on a separate order that can't change the first one." *Ruiz-Perez v. Garland*, 49 F.4th 972, 985 (5th Cir. 2022) (Oldham, J., dissenting). Whatever happens in withholding-only proceedings, the decision to remove the alien is already set in stone. Its finality therefore cannot be

tolled pending completion of withholding-only proceedings.[9]

This Court further rejected Petitioners' reliance on 8 U.S.C. § 1252(b)(9)—the so-called "zipper clause"—and held in *Nasrallah* that "§ 1252(b)(9) simply establish[es] that a CAT order may be *reviewed together* with the final order of removal, not that a CAT order is the same as, or affects the validity of, a final order of removal." *Nasrallah*, 590 U.S. at 583 (emphasis added). The zipper clause often applies in cases where an alien is first subjected to removal proceedings, and he asserts withholding-only claims. As explained above, in such cases the immigration judge and BIA typically address both removability and withholding-only together, and the zipper clause says that those issues can both go up to the circuit court together. According to this Court, that is all the zipper clause does. It does not apply when the final order of removal and the withholding-only determinations are made far apart in time.

Taken together, this Court's holdings therefore establish that withholding-only denials (1) are not

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[9] *Guzman Chavez* addressed finality in the context of § 1231, rather than § 1252, but there is only one definition of finality in the INA, *see* 8 U.S.C. § 1101(a)(47). Courts have thus held both before and after *Guzman Chavez* that finality for § 1231 is equivalent to finality for § 1252. *Bhaktibhai-Patel*, 32 F.4th at 193; *Martinez v. Garland*, 86 F.4th 561, 569 (4th Cir. 2023); *see also Arostegui-Maldonado*, 75 F.4th at 1150 (Tymkovich, J., concurring). Further, it makes no sense to cite definitions of finality from dictionaries or the APA, *see* Martinez Pet. 21, when Congress already provided a unique and very specific definition of finality in the INA itself.

themselves final orders, (2) do not merge with a final order, and (3) do not toll the finality of any actual final order. That is exactly what the Fourth Circuit has held, adopting Judge Menashi's opinion for the Second Circuit in *Bhaktibhai-Patel*.

Petitioners' contrary view would eviscerate IIRIRA's expedited scheme, which Congress enacted specifically to prevent illegal reentrants and aliens with aggravated crimes from seeking yet another round of judicial review.

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For all these reasons, the Court should deny review of this question presented. If the Court does grant *certiorari*, however, it should include an additional question presented, as explained next.

## III. If the Court Grants Review, It Should Include an Additional Question Presented and Appoint *Amici* to Defend the Judgment Below.

1. For all the reasons above, the Court should deny both petitions. If this Court does grant review, however, it should add another question presented: *Whether a reinstatement decision is a final order of removal for purposes of 8 U.S.C. § 1252.*

As explained above, the questions presented arise most frequently in the context of illegal reentrants, whose prior final order of removal is automatically reinstated when they illegally reenter the United States and are apprehended. 8 U.S.C. § 1231(a)(5). That reinstatement document is commonly referred to as a "reinstatement decision."

Section 1252 requires a "final order of removal" to trigger a circuit court's jurisdiction. If a reinstatement decision is *not* a final order of removal, then the subsequent withholding-only proceedings associated with that reinstatement decision cannot be judicially reviewed regardless of whether § 1252(b)(1)'s timeline is jurisdictional, and regardless of whether the deadline is tolled pending completion of withholding-only proceedings. Accordingly, an important threshold issue is whether a reinstatement decision is a final order of removal in the first place.[10]

Some courts have assumed that the reinstatement decision can serve as the final order of removal necessary to trigger judicial review, but as the Second Circuit explained in *Bhaktibhai-Patel*, there are very strong reasons to conclude after *Nasrallah* and *Guzman Chavez* that a reinstatement decision is *never* a final order of removal. *See* 32 F.4th at 195–96.

A reinstatement decision does precisely what its name says: it reinstates a "*prior* order of removal," 8 U.S.C. § 1231(a)(5) (emphasis added), but it does not qualify as "the issuance of a new one," *Bhaktibhai-Patel*, 32 F.4th at 195. Further, the reinstatement is

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[10] Unlike most cases raising these issues, *Riley* does not arise out of reinstated removal proceedings. *See* Riley Pet.App.5a. Rather, his case arises under 8 U.S.C. § 1228, which authorizes expedited removal of aliens who commit aggravated felonies. Section 1228(b)(3) provides a shortened window for such aliens to seek judicial review under § 1252 before they can be promptly removed. Petitioner Riley apparently did not pursue that route when it was available. This unusual aspect, although found to be immaterial by the Fourth Circuit below, likely makes *Riley* an even worse vehicle.

mandatory because "§ 1231(a)(5) does not authorize the agency to make a discretionary decision." *Id.* And that order is reinstated "from its original date," 8 U.S.C. § 1231(a)(5), confirming beyond any doubt that there is no *new* removal order. There is only the original removal decision, from perhaps years earlier.

Further, as explained above, this Court held in *Guzman Chavez* and *Nasrallah* that a decision cannot qualify as a final order of removal unless it affects the underlying removal decision, but a reinstatement decision (just like a withholding-only decision) necessarily "does not disturb the final order of removal." *Nasrallah*, 590 U.S. at 582. In fact, it does just the opposite: it *reinstates* the pre-existing final removal order, which Congress expressly barred reentrants from challenging. 8 U.S.C. § 1231(a)(5).

"[I]t's not as if Congress gave us jurisdiction over things that are not-quite-but-perhaps-related-to removal orders. … 'An order is either a final order of removal or it is not. Reinstatement decisions are not.'" *Ruiz-Perez*, 49 F.4th at 983 (Oldham, J., dissenting).

Petitioner Martinez suggests it would be odd to require aliens to file "unripe" petitions for circuit court review promptly after a reinstatement decision but before their withholding-only proceedings end. Martinez Pet. 23–24, 29. But there is a simple answer: under the INA, the reinstatement decision is not a final order in the first place, so no judicial review can be sought from it or its subsequent withholding-only proceedings, regardless of when the petition is filed with a circuit court.

This statutory regime makes perfect sense. Recall that Congress imposed an expedited process for those with reinstated removal decisions, saying they are "not eligible [for] and may not apply for any relief under" the INA and face summary removal "under the prior order at any time after the reentry." 8 U.S.C. § 1231(a)(5); *see Fernandez-Vargas*, 548 U.S. at 34 ("Congress replaced [the] reinstatement provision with one that toed a harder line" after recidivist illegal aliens had abused the old system for the purposes of delay).

Ostensibly to comply with treaty obligations, Congress ensured aliens with reinstated removal decisions could receive executive branch review of a narrow class of claims related to potential torture, *see Bhaktibhai-Patel*, 32 F.4th at 198, but there is no obligation to provide *judicial* review of such claims. In fact, allowing years-long judicial proceedings in such cases would directly contradict Congress's desire for expedited treatment.

For these reasons, if the Court grants review, it should add a question presented on whether a reinstatement decision is a final order of removal for purposes of 8 U.S.C. § 1252.

2. In the event the Court grants review on any of the questions presented, it should also appoint *Amici*—former Attorneys General who oversaw the immigration system in three different administrations—to defend the judgment below because DOJ has stated in these proceedings and others that it will not defend the Second and Fourth

Circuits' positions on the questions presented.[11] Accordingly, the government will not provide adequate adversarial briefing.

Counsel for *Amici* has already presented oral argument on these issues. The Second Circuit granted leave for the undersigned to present adversarial oral argument in April 2024 in two related cases raising these same issues after DOJ declined to defend that court's precedent and even asked the Second Circuit to go *en banc* and overturn it.[12]

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[11] *See* Interest of *Amici Curiae* & nn.2–3, *supra* (listing a sampling of filings where the government abandoned its prior positions on the questions presented and refused to rely on precedent that favored the government).

[12] *See Castejon-Paz*, No. 22-6024 (2d Cir.); *Cerrato-Barahona*, No. 22-6349 (2d Cir.).

## CONCLUSION

For the foregoing reasons, *Amici* urge the Court to deny the petitions. If the Court grants review, however, it should appoint *Amici* to defend the judgment below, and the Court should also add a new question presented on whether reinstatement decisions are final orders of removal.

Respectfully submitted,

GENE P. HAMILTON
AMERICA FIRST LEGAL FOUNDATION
611 PENNSYLVANIA AVE. SE NO. 231
WASHINGTON, DC 20003
(202) 964-3722
gene.hamilton@aflegal.org

R. TRENT MCCOTTER
*Counsel of Record*
BOYDEN GRAY PLLC
801 17TH ST. NW SUITE 350
WASHINGTON, DC 20006
(202) 706-5488
tmccotter@boydengray.com

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