No. 23-7678

IN THE SUPREME COURT OF THE UNITED STATES

JOSE ANTONIO MARTINEZ, ET AL., PETITIONERS

v.

MERRICK B. GARLAND, ATTORNEY GENERAL

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

BRIEF FOR THE RESPONDENT

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QUESTIONS PRESENTED

1. Whether the 30-day deadline in 8 U.S.C. 1252(b)(1) for filing a petition for review of an order of removal in a court of appeals is jurisdictional.

2. Whether a noncitizen satisfies the deadline in Section 1252(b)(1) by filing a petition for review challenging an agency order denying withholding of removal or protection under the Convention Against Torture within 30 days of the issuance of that order.

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OPINIONS BELOW

The opinion of the court of appeals in Martinez v. Garland (Pet. App. 1a-14a) is reported at 86 F.4th 561. The opinion of the court of appeals in Marroquin-Zanas v. Garland (Pet. App. 53a-55a) is not published in the Federal Reporter but is available at 2024 WL 1672352. The decisions of the Board of Immigration Appeals (Pet. App. 15a-20a, 56a-57a) and the immigration judge (Pet. App. 21a-29a, 58a-65a) are unreported.

JURISDICTION

The judgment of the court of appeals in Martinez was entered on November 16, 2023. A petition for rehearing was denied on March

1, 2024. Pet. App. 31a-32a. On May 22, 2024, the Chief Justice extended the time within which to file a petition for a writ of certiorari to and including July 1, 2024. The judgment of the court of appeals in Marroquin-Zanas was entered on April 18, 2024. The petition for a writ of certiorari, involving both cases, was filed on May 29, 2024. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. a. Under the Immigration and Nationality Act (INA), 8 U.S.C. 1101 et seq., when a noncitizen who has been removed from the United States later reenters illegally, the prior removal order may be reinstated. 8 U.S.C. 1231(a)(5).[1] When that occurs, the original removal order "is not subject to being reopened or reviewed," and the noncitizen is ineligible for any form of categorical relief from removal. Ibid. But Section 1231(a)(5) "does not * * * preclude an alien from pursuing withholding-only relief to prevent [the Department of Homeland Security (DHS)] from executing his removal to the particular country designated in his reinstated removal order." Johnson v. Guzman Chavez, 594 U.S. 523, 530 (2021).

A withholding-only proceeding cannot result in a complete bar on a noncitizen's removal; instead, it may prevent him from being removed to a specific country in which he is likely to be persecut-

[1] This brief uses the term "noncitizen" as equivalent to the statutory term "alien." See Barton v. Barr, 590 U.S. 222, 226 n.2 (2020) (quoting 8 U.S.C. 1101(a)(3)).

ed or tortured. See Guzman Chavez, 594 U.S. at 531-532. Statutory withholding of removal is available under 8 U.S.C. 1231(b)(3)(A), which prohibits removal to a country where the noncitizen's "life or freedom would be threatened" because of "race, religion, nationality, membership in a particular social group, or political opinion." Withholding or deferral of removal is also available under regulations implementing the United States' obligations under Article 3 of the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (Convention or CAT), adopted Dec. 10, 1984, S. Treaty Doc. No. 20, 100th Cong., 2d Sess. (1988), 1465 U.N.T.S. 114. The Convention "prohibits removal of a noncitizen to a country where the noncitizen likely would be tortured." Nasrallah v. Barr, 590 U.S. 573, 580 (2020).

b. A noncitizen who is subject to a reinstated removal order may seek statutory withholding or CAT protection by asserting a reasonable fear that he will be persecuted or tortured if he returns to the country designated in his original removal order. 8 C.F.R. 241.8(e); see Guzman Chavez, 594 U.S. at 531. In general, a noncitizen who is subject to a reinstated removal order has "no right to a hearing before an immigration judge [(IJ)]." 8 C.F.R. 241.8(a). Rather, regulations provide that an "immigration officer shall determine" whether the noncitizen is eligible for reinstatement, ibid., provide the noncitizen with "written notice" of the determination, 8 C.F.R. 241.8(b), and consider any "written or oral statement" the noncitizen makes "contesting the determination,"

ibid. If the officer ultimately decides that the requirements for reinstatement are met, then the noncitizen "shall be removed under the previous order * * * in accordance with" Section 1231(a)(5). 8 C.F.R. 241.8(c).

The regulations, however, provide an "[e]xception for withholding of removal." 8 C.F.R. 241.8(e) (emphasis omitted). When a noncitizen "expresses a fear of returning to the country designated in" his original removal order, he will receive a reasonable-fear interview with an asylum officer. Ibid.; see 8 C.F.R. 208.31(b). If the asylum officer finds that the noncitizen has no reasonable fear and an IJ sustains that finding, the noncitizen will be deemed ineligible for withholding. 8 C.F.R. 208.31(f) and (g)(1). But if the asylum officer or the IJ finds that the noncitizen has a reasonable fear, then the noncitizen is entitled to full withholding-only proceedings before an IJ and an appeal to the Board of Immigration Appeals (Board). 8 C.F.R. 208.31(e) and (g)(2).

An order denying withholding of removal "may not be reviewed in [the] district courts, even via habeas corpus," and must instead "be reviewed only in the courts of appeals" under 8 U.S.C. 1252. Nasrallah, 590 U.S. at 580-581. And under 8 U.S.C. 1252(b)(1), "[t]he petition for review must be filed not later than 30 days after the date of the final order of removal."

2. a. Petitioner Martinez is a native and citizen of Honduras. Pet. App. 4a. He was ordered removed in 2018 and removed from the United States in 2019. Id. at 4a, 21a. Martinez subse-

quently reentered the country illegally, and in 2020, an immigration officer determined that the requirements were met for reinstating his removal order. Id. at 4a-5a. Martinez did not contest the reinstatement determination, but he expressed a fear of persecution or torture in Honduras. Id. at 5a. An asylum officer found that he had no reasonable fear, but an IJ vacated that finding and referred Martinez to withholding-only proceedings. Ibid.

At the conclusion of those proceedings, the IJ found that Martinez is statutorily ineligible for withholding of removal because there are serious reasons to believe that he has committed a serious, nonpolitical crime outside the United States. Pet. App. 6a; see 8 U.S.C. 1231(b)(3)(B)(iii). The IJ based that determination primarily on Martinez's prior testimony that he had been convicted of murder in Honduras. Pet. App. 6a; see id. at 17a-18a, 23a. Although Martinez had more recently claimed that he had not been convicted of that crime and was merely imprisoned while the offense was investigated, the IJ credited the original testimony. Id. at 18a, 22a-23a. The same bar applied to his request for withholding under the Convention, but the IJ considered whether Martinez is eligible for deferral of removal under the CAT. Id. at 6a, 23a. The IJ found that his testimony was not credible but that, even if all of his testimony were credited, he had not established that it is more likely than not that he would be tortured if he were removed to Honduras. Id. at 24a-29a.

On February 25, 2022, the Board affirmed the IJ's decision denying withholding of removal and CAT protection. Pet. App. 15a-20a. Martinez filed a petition for review with the Fourth Circuit on March 3, 2022, within 30 days of the Board's decision. Id. at 6a.

b. The court of appeals held that it had no jurisdiction to consider Martinez's petition for review because it was filed more than 30 days after the determination to reinstate his removal order. Pet. App. 6a-12a.

The court of appeals first found that the 30-day filing deadline in Section 1252(b)(1) is jurisdictional, relying on its prior precedent, which had in turn relied on this Court's decision in Stone v. INS, 514 U.S. 386 (1995). Pet. App. 6a-7a. The court recognized that both parties had drawn its attention to Santos-Zacaria v. Garland, 598 U.S. 411 (2023), Pet. App. 6a n.3, which explained that Stone did not "attend[] to the distinction between 'jurisdictional' rules (as we understand them today) and nonjurisdictional but mandatory ones," Santos-Zacaria, 598 U.S. at 421. But the court of appeals noted that it had already held that Santos-Zacaria did not "overrule" Stone or affect Fourth Circuit precedent finding Section 1252(b)(1) jurisdictional. Pet. App. 6a n.3 (citing Salgado v. Garland, 69 F.4th 179, 181 n.1 (4th Cir. 2023)).

The court of appeals then found that Martinez had not satisfied Section 1252(b)(1)'s filing deadline, which requires a noncitizen to file a petition for review "not later than 30 days after

the date of the final order of removal," 8 U.S.C. 1252(b)(1). See Pet. App. 7a-10a. The court determined that Martinez's withholding order was not itself a "final order of removal" that could form the basis of a petition for review under Section 1252. Id. at 7a. The court found that, under 8 U.S.C. 1101(a)(47)(A), an order of removal is one that "conclude[s] that the alien is deportable or order[s] deportation." Pet. App. 7a. A withholding order does neither because it determines a location to which the noncitizen may not be removed, not whether he is removable. Ibid. The court therefore found that, under 8 U.S.C. 1252(b)(9), an order denying CAT protection is judicially reviewable "as part of [a court's] review of a final order of removal." Ibid.; see 8 U.S.C. 1252(b)(9) (providing that "judicial review of all questions of law and fact * * * arising from any action taken or proceeding brought to remove an alien shall be available only in judicial review of a final order under this section"). But such an order may not be reviewed in isolation and, because it does not qualify as a "final order of removal," it cannot trigger Section 1252(b)(1)'s 30-day deadline. Pet. App. 7a.

The court of appeals then observed that the 30-day deadline for filing a petition for review of Martinez's original removal order had long passed. Pet. App. 7a-8a. And while the court "assume[d]" that the reinstatement of an order of removal would also constitute an "order of removal" that could form the basis of a petition for review, id. at 8a, the court took the view that Mar-

tinez's reinstatement decision became final on January 15, 2020, when the immigration officer determined that his prior removal order should be reinstated, id. at 12a. Because the withholding-only proceedings did not conclude until 2022 and Martinez did not file his petition for review until 30 days after the ultimate denial of withholding relief, the court deemed the petition for review "untimely." Id. at 11a.

In reaching that conclusion, the court of appeals relied on the Second Circuit's reasoning in Bhaktibhai-Patel v. Garland, 32 F.4th 180 (2022), which had held that this Court's decisions in Nasrallah, supra, and Guzman Chavez, supra, require the rejection of the previously well-established understanding that a petition for review is timely so long as it is filed within 30 days of a withholding order. See Pet. App. 8a-10a. The decision below similarly concluded that Nasrallah made it clear that a CAT order is distinct from a "final order of removal," and that Guzman Chavez found that a reinstated removal order is final for purposes of administrative detention under 8 U.S.C. 1231 even if the related withholding-only proceedings are still ongoing. Id. at 9a. The court reasoned that Guzman Chavez's understanding of finality in the context of detention pending removal should also apply in the context of judicial review under Section 1252. Ibid. Accordingly, the court found that a reinstatement decision becomes final and Section 1252(b)(1)'s 30-day deadline begins to run when an immigration officer determines that a prior removal order should be rein-

stated, even if withholding-only proceedings continue after that. Id. at 10a-11a.

The court of appeals recognized that the Sixth and Ninth Circuits have declined to adopt Bhaktibhai-Patel's understanding of Nasrallah and Guzman Chavez, but the court found those opinions less persuasive. Pet. App. 10a-11a. The court also rejected petitioner's reliance on the presumption in favor of judicial review, finding that this is an instance in which the "strong presumption" is overcome by the "language and structure" of the applicable INA provisions. Id. at 11a (citation and quotation marks omitted).

c. Senior Judge Floyd issued an opinion concurring in the judgment. Pet. App. 12a-14a. He recognized that the panel was bound by circuit precedent which had treated Section 1252(b)(1) as jurisdictional, but he found that this Court's decision in Santos-Zacaria had called that precedent into question. Id. at 13a, 14a. He explained that "the absence of judicial review" of withholding-only proceedings that occur after a removal order is reinstated "makes little sense when considering that withholding-only and CAT proceedings often take months or even years to conclude -- long past the 30-day mark." Id. at 14a.

d. Both Martinez and the government sought rehearing en banc. See Pet. App. 31a-32a. The government explained that, in light of this Court's recent decision in Santos-Zacaria, Section 1252(b)(1)'s filing deadline cannot be deemed jurisdictional. Id. at 38a-41a. And the government asserted that neither Nasrallah nor

Guzman Chavez disturbed the prior understanding that Section 1252(b)(1)'s 30-day clock does not begin to run until withholding-only proceedings are complete. Id. at 41a-50a. The court of appeals denied rehearing, although six judges would have granted the petition. Id. at 32a.

3. a. Petitioner Marroquin-Zanas is a native and citizen of El Salvador who was removed in 2009. Pet. App. 54a. Marroquin-Zanas subsequently reentered the country and was apprehended. Ibid. On October 29, 2016, an immigration officer determined that her prior removal order should be reinstated. Ibid. She did not contest reinstatement, but she expressed a fear of returning to El Salvador. Ibid. She was interviewed by an asylum officer who determined that she did not have a reasonable fear of persecution or torture in El Salvador, but an IJ reversed that determination and placed her in withholding-only proceedings. Ibid.

On April 9, 2019, an IJ determined that Marroquin-Zanas failed to meet her burden of proof for statutory withholding of removal and CAT protection. Pet. App. 58a-65a. Marroquin-Zanas appealed that decision to the Board, which affirmed the IJ's decision on January 20, 2022. Id. at 56a-57a. On February 8, 2022, less than 30 days after the Board's decision, Marroquin-Zanas filed a petition for review in the court of appeals. Id. at 54a-55a.

b. On April 18, 2024, the court of appeals issued an unpublished decision dismissing the petition for review for lack of jurisdiction. Pet. App. 53a-55a. The court explained that its re-

cent decision in "Martinez mandates that we dismiss [the] petition" because Marroquin-Zanas had not filed her petition for review within 30 days of the immigration officer's reinstatement decision and had instead waited until after the completion of the withholding-only proceedings. Id. at 55a.

DISCUSSION

Petitioners contend (Pet. 27-28) that the court of appeals erred in holding that the deadline in 8 U.S.C. 1252(b)(1) for filing a petition for review of an order of removal is jurisdictional. Petitioners are correct, and there is division in the circuits regarding whether Section 1252(b)(1)'s filing deadline is jurisdictional. But plenary review of that question would be premature because this Court recently held that an analogous statutory filing deadline is not jurisdictional, and it emphasized that "most time bars are nonjurisdictional," even when "framed in mandatory terms." Harrow v. Department of Def., 601 U.S. 480, 484 (2024) (citations omitted). Because Harrow was decided after the court of appeals' proceedings in these cases had concluded, this Court should grant certiorari, vacate the court of appeals' decisions, and remand for further proceedings in light of Harrow's guidance regarding when a time limit may be deemed jurisdictional.[2]

[2] Two other pending petitions for writs of certiorari seek review of the same or related questions, and the government is urging the same disposition for those petitions. See Miranda Sanchez v. Garland, No. 24-11 (filed July 3, 2024); Riley v. Garland, No. 23-1270 (filed May 31, 2024).

Petitioners also contend (Pet. 19-26) that the court of appeals erred in holding that a petition for review must be filed within 30 days of an immigration officer's decision to reinstate a removal order, rather than within 30 days of the conclusion of the withholding-only proceedings associated with that reinstatement. Petitioners are correct, but again, review by this Court would be premature. The court of appeals reached its erroneous holding in reliance on the Second Circuit's decision in Bhaktibhai-Patel v. Garland, 32 F.4th 180 (2022). But the Second Circuit ordered supplemental briefing on the continued vitality of Bhaktibhai-Patel in a pair of cases that are still pending, suggesting that the issue is not yet ripe for the Court's review. Moreover, if these cases are remanded in light of Harrow and the court of appeals appropriately determines that the deadline in Section 1252(b)(1) is nonjurisdictional, the government intends to waive the application of the 30-day deadline, which could prevent petitioners from being affected by the court of appeals' erroneous understanding of when a petition for review must be filed.

1. The court of appeals erred in holding that Section 1252(b)(1) is jurisdictional. That holding cannot be reconciled with Santos-Zacaria v. Garland, 598 U.S. 411 (2023), and Harrow, supra. But because the court of appeals addressed the issue without the benefit of Harrow, the Court should grant, vacate, and remand for further consideration in light of that decision.

a. Section 1252(b)(1) provides that a "petition for review must be filed not later than 30 days after the date of the final order of removal." That text does not clearly indicate that the provision is intended to govern the court of appeals' subject-matter jurisdiction, but until recently, the lower courts and the government had characterized the time limit as jurisdictional based on this Court's 1995 decision in Stone v. INS, 514 U.S. 386.[3] In Stone, the Court described a prior version of the INA's filing deadline, 8 U.S.C. 1105a(a)(6) (Supp. V 1993), as "jurisdictional." 514 U.S. at 405 (citation omitted). The Court reasoned that "[j]udicial review provisions * * * are jurisdictional in nature," and this was "all the more true of statutory provisions specifying the timing of review, for those time limits are, as we have often stated, 'mandatory and jurisdictional.'" Ibid. (citation omitted).

Yet this Court's more recent decisions have made clear that Stone cannot be used to establish that Section 1252(b)(1) is jurisdictional. In Santos-Zacaria, supra, the Court rejected the government's reliance on Stone to support its argument that the INA's exhaustion requirement, 8 U.S.C. 1252(d)(1), is jurisdictional. 598 U.S. at 421. The Court explained that, while Stone "described portions of the [INA] that contained [Section] 1252(d)(1)'s prede-

[3] See, e.g., Mendias-Mendoza v. Sessions, 877 F.3d 223, 227 (5th Cir. 2017); Chavarria-Reyes v. Lynch, 845 F.3d 275, 277 (7th Cir. 2016); Hurtado v. Lynch, 810 F.3d 91, 93 (1st Cir. 2016); Skurtu v. Mukasey, 552 F.3d 651, 658 (8th Cir. 2008).

cessor as 'jurisdictional,'" the Stone Court had not "attend[ed] to the distinction between 'jurisdictional' rules (as we understand them today) and nonjurisdictional but mandatory ones." Santos-Zacaria, 598 U.S. at 421. Moreover, "whether the provisions were jurisdictional 'was not central to the case.'" Ibid. (citation omitted). In recognizing that Stone did not use the term "jurisdictional" to refer to subject-matter jurisdiction and did not focus on the question of subject-matter jurisdiction at all, Santos-Zacaria severely undermined continued reliance on Stone to establish the jurisdictional status of the deadline in Section 1252(b)(1).

The Court's more recent decision in Harrow makes it even more clear that Section 1252(b)(1) should not be deemed jurisdictional. In Harrow, the Court held that the "60-day statutory deadline" in 5 U.S.C. 7703(b)(1) for filing a petition for review of a veterans' benefits determination in the Federal Circuit is not a "jurisdictional requirement." 601 U.S. at 483. In reaching that holding, the Court repeatedly emphasized that "most time bars are nonjurisdictional." Id. at 484 (citation omitted); see id. at 489 n.1 ("time limits[,] * * * we repeat, are generally nonjurisdictional").

The Court in Harrow further explained that, even when "framed in mandatory terms," time bars should not be deemed jurisdictional unless the "traditional tools of statutory construction * * * plainly show that Congress imbued [the rule] with jurisdictional

consequences." 601 U.S. at 484-485 (citations omitted; brackets in original). And the Court recognized that statutory time limits are generally not jurisdictional when they appear alongside other procedural requirements that are plainly nonjurisdictional. Id. at 488 (finding that the deadline could not be deemed jurisdictional in part because it appeared as part of "a bevy of procedural rules," concerning things like the manner of "service and other forms").

b. In light of those precedents, the court of appeals erred in holding that Section 1252(b)(1)'s 30-day filing deadline is jurisdictional. Pet. App. 6a-7a & n.3. Santos-Zacaria and Harrow demonstrate that Stone was not using the term "jurisdictional" to refer to subject-matter jurisdiction when it stated that "statutory provisions specifying the timing of review" are "'mandatory and jurisdictional.'" Stone, 514 U.S. at 405 (citation omitted). Further, while Section 1252(b)(1)'s text reflects that the INA's deadline is mandatory, the provision does not reference jurisdiction or otherwise "set[] the bounds of the 'court's adjudicatory authority.'" Santos-Zacaria, 598 U.S. at 416 (citation omitted). And Section 1252(b)(1) appears as part of a list of procedural rules for petitions for review -- governing things like the manner of "[s]ervice" and whether the record must be "typewritten," 8 U.S.C. 1252(b)(2) and (3) -- that Congress is unlikely to have intended to imbue with jurisdictional significance.

Accordingly, after Santos-Zacaria, both the government and several courts of appeals reconsidered their earlier position that Section 1252(b)(1) is jurisdictional and recognized that the provision is more appropriately characterized as a mandatory claims-processing rule. See Alonso-Juarez v. Garland, 80 F.4th 1039, 1047 (9th Cir. 2023); Argueta-Hernandez v. Garland, 87 F.4th 698, 705 (5th Cir. 2023); Inestroza-Tosta v. Garland, 105 F.4th 499, 509-512 (3d Cir. 2024). The Fourth Circuit, in the decisions below, and the Seventh Circuit declined to revisit their precedent in light of Santos-Zacaria. See Pet. App. 6a-7a; F.J.A.P. v. Garland, 94 F.4th 620, 634 (7th Cir. 2024). But those decisions preceded Harrow's clear emphasis on the principle that time bars are generally nonjurisdictional.

c. The court of appeals did not have the benefit of this Court's decision in Harrow when it decided the cases below; nor did it have the benefit of that decision when it denied the parties' petitions for en banc rehearing in Martinez. This Court should therefore grant the petition for a writ of certiorari, vacate the decisions below, and remand for further proceedings in light of Harrow.

2. The court of appeals also erred in holding that the petitions for review in these cases were untimely under Section 1252(b)(1), even though they were filed within 30 days of the Board's orders affirming the denial of withholding and CAT protection. But again this Court's intervention would be premature be-

cause the Second Circuit appears to be reconsidering the precedent on which the decision below relied, and the importance of the question will be diminished if the court of appeals determines on remand that Section 1252(b)(1)'s deadline is not jurisdictional.

a. Until 2022, the courts of appeals agreed that when a removal order is reinstated under Section 1231(a)(5), the reinstatement determination is not final for purposes of seeking judicial review until any withholding-only proceedings associated with the reinstatement are completed.[4] That understanding accords with the traditional rule that an administrative decision is not final for purposes of judicial review until the "consummation of the agency's decisionmaking process" -- that is, not until all of the administrative proceedings arising from the agency action (including withholding-only proceedings) have been completed. Luna-Garcia v. Holder, 777 F.3d 1182, 1185 (10th Cir. 2015) (quoting Bennett v. Spear, 520 U.S. 154, 178 (1997)).

Pursuant to that understanding, the reinstatement decision and the related order denying withholding or CAT protection become final at the same time, thereby ensuring that they may be reviewed through a single petition for review filed within 30 days of the "final order of removal." 8 U.S.C. 1252(b)(1). Congress obviously intended that synchronicity because 8 U.S.C. 1252(b)(9) provides that judicial review of "all questions of law and fact * * *

[4] See, e.g., Ponce-Osorio v. Johnson, 824 F.3d 502 (5th Cir. 2016) (per curiam); Luna-Garcia v. Holder, 777 F.3d 1182 (10th Cir. 2015); Ortiz-Alfaro v. Holder, 694 F.3d 955 (9th Cir. 2012).

arising from any action taken or proceeding brought to remove an alien * * * shall be available only in judicial review of a final order under this section." See Nasrallah v. Barr, 590 U.S. 573, 583 (2020) (recognizing that, under 8 U.S.C. 1252(b)(9), "a CAT order may be reviewed together with the final order of removal"). Because of Section 1252(b)(1)'s 30-day filing deadline, it would not be possible to consolidate judicial review of all removal-related issues into a single proceeding, as Section 1252(b)(9) contemplates, unless the removal order and any related administrative orders were understood as becoming final at the same time.

In 2022, however, the Second Circuit broke from the previous consensus that Section 1252(b)(1)'s 30-day clock begins to run after withholding-only proceedings are complete. Bhaktibhai-Patel, supra. In Bhaktibhai-Patel, the court of appeals held that a reinstatement decision becomes "final" under Section 1252 as soon as the immigration officer determines that the prior removal order should be reinstated, triggering the 30-day filing deadline well before most withholding-only proceedings have concluded. The Second Circuit believed that position followed from this Court's decisions in Nasrallah, supra, and Johnson v. Guzman Chavez, 594 U.S. 523 (2021). Bhaktibhai-Patel, 32 F.4th at 193-194. The Second Circuit observed that, under Nasrallah, an order regarding withholding or CAT protection is distinct from a "removal order." Id. at 191. And it further observed that, in Guzman Chavez, the Court held that a reinstated removal order is final for purposes of de-

tention pending removal under 8 U.S.C. 1231(a)(1)(B), even if the related withholding-only proceedings are still pending. Bhaktibhai-Patel, 32 F.4th at 193.

From those premises, Bhaktibhai-Patel concluded that a reinstated removal order must also be final for purposes of judicial review under Section 1252, even if withholding-only proceedings are still pending. 32 F.4th at 193-195. And because an order denying withholding or CAT protection is not itself a "final order of removal," the court found that such an order cannot trigger another 30-day window for filing a petition for review under Section 1252(a)(1). Id. at 191. Bhaktibhai-Patel therefore concluded that judicial review of an order denying withholding is possible only if a petition for review is filed within 30 days of the underlying decision to reinstate a previous removal order. Id. at 191-192.

b. The court of appeals erred in adopting Bhaktibhai-Patel's reasoning and holding in the decision below. Pet. App. 8a-11a. As the Fifth Circuit recently recognized when it reconsidered a decision that had adopted Bhaktibhai-Patel's reasoning -- and as every other circuit to address the issue has held -- neither Nasrallah nor Guzman Chavez upsets the well-established understanding that a petition for review of an order denying withholding or CAT protection is timely so long as it is filed within 30 days of the date on which that order was issued. See Argueta-Hernandez, 87 F.4th at 706.

Nasrallah involved the applicability of a judicial-review bar to findings of fact within an order denying CAT protection; it did not change the timing or availability of judicial review of CAT orders. 590 U.S. at 587. To the contrary, the Court recognized that Congress has "provide[d] for direct review of CAT orders in the courts of appeals." Id. at 585 (citing 8 U.S.C. 1252(a)(4) and (b)(9)). And the Nasrallah Court expressly stated that its "decision d[id] not affect the authority of the courts of appeals to review CAT orders." Ibid. That assurance would be eviscerated if the 30-day deadline for seeking judicial review starts to run before any attendant withholding-only proceedings have concluded.

Further, while Guzman Chavez held that the pendency of withholding-only proceedings does not render a removal order nonfinal for purposes of triggering administrative detention under 8 U.S.C. 1231, the Court cautioned that it was not expressing any "view on whether the lower courts are correct in" holding that a removal order is not final for purposes of Section 1252 until withholding-only proceedings are complete. 594 U.S. at 535 n.6. The Court observed that Section 1252 "uses different language than [Section] 1231 and relates to judicial review of removal orders rather than detention." Ibid.

As the Fifth Circuit recently explained, embracing the reasoning of Bhaktibhai-Patel could also "have disastrous consequences on immigration and judicial systems." Argueta-Hernandez, 87 F.4th at 706. If a noncitizen could obtain review of a withholding or CAT

order only by filing a petition for review within 30 days of the immigration officer's reinstatement decision, then the noncitizen would have an incentive to file a prophylactic petition for review, in the hopes of convincing the court of appeals to hold his petition in abeyance until the withholding or CAT proceedings have concluded so that, if the agency ultimately denies withholding or CAT protection, he may then challenge any asserted errors in that denial order. See id. at 706 & n.5. And given that most withholding and CAT proceedings take months or years to complete, the courts of appeals would be forced to choose between permitting "numerous" burdensome prophylactic petitions, ibid., or effectively foreclosing judicial review of post-reinstatement withholding or CAT determinations. But see Nasrallah, 590 U.S. at 583-584 (emphasizing that CAT orders are judicially reviewable).

c. Although the decision below erred in adopting the reasoning of Bhaktibhai-Patel, this Court's intervention on the issue would be premature. Most of the courts of appeals to have considered the question have declined to adopt Bhaktibhai-Patel's reasoning.[5] And the Second Circuit itself has issued a briefing order indicating that it may be inclined to reconsider its decision. See 22-6024 Doc. 25.1, Castejon-Paz v. Garland (July 12, 2023); 22-6349 Doc. 23.1 Cerrato-Barahona v. Garland (July 12, 2023). The court

[5] See Inestroza-Tosta, 105 F.4th at 515 & n.12; F.J.A.P., 94 F.4th at 631-638; Argueta-Hernandez, 87 F.4th at 705-706; Alonso-Juarez, 80 F.4th at 1047-1054; Kolov v. Garland, 78 F.4th 911, 916-919 (6th Cir. 2023); Arostegui-Maldonado v. Garland, 75 F.4th 1132, 1141-1143 (10th Cir. 2023).

held oral argument in the cases in which the briefing order was issued in April, but the cases have not yet been decided. If the Second Circuit retreats from its erroneous position, the Fourth Circuit could well do the same, obviating the need for this Court's intervention.

Moreover, the importance of the question would be diminished if the Court remands the jurisdictional question for reconsideration in light of Harrow, and the court of appeals appropriately deems Section 1252(b)(1)'s filing deadline to be nonjurisdictional. In that event, the government intends to waive any argument that the petitions for review were untimely -- both in these cases and in other cases in which a similarly situated noncitizen had filed a petition for review within 30 days of the conclusion of his post-reinstatement withholding-only proceedings. The government's waiver would permit the same filing deadline to apply regardless of the circuit in which the petition for review was filed.

CONCLUSION

The petition for a writ of certiorari should be granted, and the decisions below should be vacated and remanded for further consideration in light of Harrow v. Department of Defense, 601 U.S. 480 (2024).

Respectfully submitted.

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