No. 23-7678

IN THE

Supreme Court of the United States

JOSE ANTONIO MARTINEZ,
Petitioner,

v.

MERRICK B. GARLAND, ATTORNEY GENERAL,
Respondent.

ANA CECILIA MARROQUIN-ZANAS,
Petitioner,

v.

MERRICK B. GARLAND, ATTORNEY GENERAL,
Respondent.

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

PETITIONERS' REPLY BRIEF

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The government agrees that both questions presented have produced "division in the circuits" and were decided incorrectly below. See Resp. Br. 11–12. But it explains that plenary review "would be premature" because (1) in deciding whether the deadline is jurisdictional, the Fourth Circuit lacked this Court's guidance in *Harrow* v. *Department of Defense*, 144 S. Ct. 1178 (2024), and (2) if the Fourth Circuit "appropriately determines that the deadline in Section 1252(b)(1) is nonjurisdictional, the government intends to waive" the deadline, which would moot the question of when the 30-day filing period starts. See Resp. Br. 11–12. The government thus urges a GVR.

Given *Harrow* and the government's commitment to waive the 30-day deadline, Petitioners agree that a GVR would be appropriate here and in the other cases raising similar issues. See *id.* at 11 n.2. But if the Court grants plenary review, it should grant this petition, which is the best vehicle, and hold the other cases. And there is no basis to add another question presented, as some *amici* suggest; the proposed question is splitless and was not raised or decided in any of these cases.

I. A GVR is appropriate in these cases.

Petitioners concur with the government's proposal to GVR this case and the other, similar cases. The recent developments on the jurisdictional question—*Harrow*, the Second Circuit's apparent desire to reconsider *Bhaktibhai-Patel*, see Resp. Br. 12, and the Third Circuit's rejection of the Fourth Circuit's approach, see Suppl. Br. 2—together suggest a reasonable likelihood that the Fourth Circuit would reach the correct result on remand.

In particular, *Harrow* underscored this Court's consistent "demand for a clear statement" before it will "treat a procedural requirement as jurisdictional." 144 S. Ct. at 1183. In doing so, the Court made clear that *Bowles* v. *Russell*, 551 U.S. 205 (2007)—which the Fourth Circuit cited below, Pet. App. 12a—does not apply to statutory deadlines for appeals from agencies; it governs only deadlines to appeal from one Article III court to another. *Harrow*, 144 S. Ct. at 1185. Section 1252(b)(1) governs appeals from an agency, and it lacks the required clear statement. See Pet. 27–28; Resp. Br. 12–16.

And if the Fourth Circuit reverses its jurisdictional holding on remand, the government's decision "to waive the application of the 30-day deadline," Resp. Br. 12—echoing its commitment at the *en banc* stage in *Martinez*, Pet. App. 41a n.1—will suffice to resolve any timeliness issues in these cases, allowing the court of appeals to reach the merits of each petitioner's fear-based claims. In that scenario, this Court's intervention will not be necessary. See Resp. Br. 22 ("The government's waiver would permit the same filing deadline to apply regardless of the circuit in which the petition for review was filed."). A GVR is thus appropriate.

II. If the Court grants plenary review, this case is the best vehicle.

If the Court concludes that plenary review is appropriate, it should grant this petition—including both questions presented—and hold the other petitions raising similar questions. See *Miranda Sanchez* v. *Garland*, No. 24-11 (filed July 3, 2024); *Riley* v. *Garland*, No. 23-1270 (filed May 31, 2024).

The Court should hear both questions because, as just discussed, the answer to the jurisdictional question will dictate whether the Court needs to decide the 30-day question. If the Court holds that the deadline is not jurisdictional, then the government's commitment to waive the deadline in these cases will suffice to allow the Fourth Circuit to reach the merits below, obviating the need to decide when the 30-day clock starts. See Resp. Br. 12, 22. But if the deadline *is* jurisdictional, the government cannot waive it, so the Court will need to decide whether Petitioners (and other similarly situated parties) timely filed their petitions for review.

This case is the best vehicle to decide these questions if necessary. Indeed, the government does not dispute that this is an ideal vehicle. This petition was the first filed, and it arises from the case in which the Fourth Circuit resolved both questions in a published panel opinion and then narrowly denied rehearing en banc. See Pet. App. 6a, 11a, 32a.

This petition also presents the most common scenario in which these questions arise: A petitioner seeks protection from removal—withholding of removal, CAT protection, or both—after a reinstatement order is entered. See Pet. 6–7, 10–11. Indeed, all the recent cases forming the split involve this reinstatement scenario. See *F.J.A.P.* v. *Garland*, 94 F.4th 620, 625 (7th Cir. 2024); *Argueta-Hernandez* v. *Garland*, 87 F.4th 698, 703–05 (5th Cir. 2023); *Arostegui-Maldonado* v. *Garland*, 75 F.4th 1132, 1137 (10th Cir. 2023); *Kolov* v. *Garland*, 78 F.4th 911, 914–16 (6th Cir. 2023); *Alonso-Juarez* v. *Garland*, 80 F.4th 1039, 1043 (9th Cir. 2023); *Bhaktibhai-Patel* v. *Garland*, 32 F.4th 180, 195–96 (2d Cir. 2022).

While *Miranda Sanchez* also involves reinstatement, the petitioner there sought only CAT protection,

while Petitioners here each sought withholding of removal and CAT protection. Compare Pet. 7, 10–11, with *Miranda Sanchez* v. *Garland*, No. 22-1319, 2023 WL 8439343, at *1 (4th Cir. Dec. 5, 2023) (per curiam), *pet. for cert. filed* (U.S. July 9, 2024) (No. 24-11). Thus, *Miranda Sanchez* essentially involves a subset of the facts here. And *Riley*'s procedural posture differs; that case "involves a Final Administrative Order of Removal issued under § 1228(b), not a reinstated removal order." *Riley* v. *Garland*, No. 22-1609, 2024 WL 1826979, at *2 (4th Cir. Apr. 26, 2024) (per curiam).

III. The Court should not address a splitless question neither raised nor decided below.

If the Court grants plenary review, it should decline certain *amici*'s suggestion to add a question presented addressing "[w]hether a reinstatement decision is a final order of removal for purposes of 8 U.S.C. § 1252." Former AG *Amici* Br. 16 (emphasis omitted).

"This Court . . . is a court of final review and not first view, and it does not ordinarily decide in the first instance issues not decided below." *City of Austin* v. *Reagan Nat'l Advert. of Austin, LLC*, 142 S. Ct. 1464, 1476 (2022) (cleaned up). The Fourth Circuit did not decide this bonus question in *Martinez* or *Marroquin-Zanas*. See, *e.g.*, Pet. App. 8a ("We can assume that a reinstatement decision is an order of removal . . . ."). Nor did the Fourth Circuit decide this question in any of the cases where petitions are currently pending. *Amici* do not claim otherwise.

What's more, there is no circuit split on this question. The language from *Bhaktibhai-Patel* that *amici* cite (at 17) is simply dicta criticizing the Second Circuit's and other circuits' uniform precedent. See 32 F.4th at 195–96 (noting circuit precedent holding "that a reinstatement decision itself qualifies as a final order

of removal" and citing similar cases from other courts); *Ojeda-Terrazas* v. *Ashcroft*, 290 F.3d 292, 295 & n.7 (5th Cir. 2002) (collecting cases and agreeing with "several other circuits that have resolved this issue in favor of jurisdiction"). In any case, the courts of appeals' consistent decisions reflect that *amici* are wrong on the merits of this issue. See *Arevalo* v. *Ashcroft*, 344 F.3d 1, 9 (1st Cir. 2003) (finding "little doubt that we have appellate jurisdiction over the reinstatement of an order to deport an illegal reentrant").

CONCLUSION

The Court should grant the petition, vacate the judgments below, and remand for further proceedings. Alternatively, the Court should grant plenary review in this case and hold the other petitions raising similar questions. The Court should not add a third question presented.

Respectfully submitted,

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