No. 24-11

In the Supreme Court of the United States

MARCO ANTONIO MIRANDA SANCHEZ,

Petitioner,

v.

MERRICK GARLAND, Attorney General,

Respondent.

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

REPLY BRIEF FOR PETITIONER

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The petition explained that this Court's intervention is needed to resolve an entrenched split among the circuits regarding an important question of immigration procedure: whether the courts of appeals have jurisdiction to review denials of withholding-only relief where—as is practically certain to be the case—the administrative withholding-only proceedings take longer than 30 days to complete. See Pet. 9-13 (identifying a 6-2 circuit split regarding the proper application of 8 U.S.C. § 1252(b)(1)'s 30-day filing deadline to this scenario).

In response, the Solicitor General agrees that the court below erred, and requests that the Court grant, vacate and remand (GVR) as to one aspect of the dispute: whether the 30-day filing deadline in Section 1252(b)(1) is jurisdictional. Gov't Br. 7-11.

As to a second facet of the issue—whether a reinstatement order becomes final, thus triggering the 30-day deadline, only upon the completion of withholding-only proceedings—the government also agrees with petitioner's position. Gov't Br. 11-15. But the government asserts that review on this substantive question would be premature, in light of developments in an ongoing case in the Second Circuit, which (together with the Fourth Circuit below) makes up the short side of the circuit split. *Id.* at 15-16.

Finally, the government disagrees with petitioner's contention that, under the Court's holding in *Nasrallah* v. *Barr*, 590 U.S. 573 (2020), Section 1252(a)(4) provides an independent font of jurisdiction over withholding claims under the U.N. Convention Against Torture (CAT). Gov't Br. 16-17; see Pet. 16-17.

1. Petitioner agrees with the Solicitor General that—at a minimum—a GVR in light of *Harrow* v. *Department of Defense*, 601 U.S. 480 (2024), is warranted on the issue of Section 1252(b)(1)'s jurisdictional status. See Gov't Br. 7-11. *Harrow* confirmed that "most time bars are nonjurisdictional," including in the context of the deadline for petitioning a court of appeals for review of an agency's order. 601 U.S. at 484; see *id.* at 485-489. Because the Fourth Circuit did not have the benefit of *Harrow* when reaching the opposite conclusion with respect to Section 1252(b)(1) below, a GVR is appropriate.

2. That said, there are good reasons why the Court may wish to review this case on the merits.

First, resolving the jurisdictional status of Section 1252(b)(1)'s 30-day deadline will not fully resolve the conflict among the circuits, which also disagree over when the 30-day clock begins—that is, whether the filing clock is triggered only upon conclusion of withholding-only proceedings, or much earlier. Pet. 9-13.

Second, and as a result, even if the deadline is held to be non-jurisdictional, noncitizens in the Fourth and Second Circuits will be precluded as a practical matter from challenging withholding-only decisions in court—unless the government in its grace happens to waive the time bar in each and every case.[1]

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[1] The Solicitor General has represented that, if Section 1252(b)(1) is held to be nonjurisdictional, "the government intends to waive any argument that the petition for review was untimely—both in this case and in other * * * similarly situated" cases. Gov't Br. 16. But nothing guarantees this current position's durability. Indeed, the government has already changed its position in this case. Compare Gov't C.A. Br. 12-18 (arguing against jurisdiction), with C.A. Dkt. 54 (government's 28(j) letter, arguing for jurisdiction).

And even if the government *does* waive or forfeit the filing deadline, litigants in those circuits may be at the mercy of the courts nevertheless enforcing their incorrect interpretations. Compare, *e.g.*, *Lopez-Reyes* v. *Garland*, 2023 WL 8919744, at *2 (4th Cir. 2023) (observing that "[w]e have inherent power to enforce mandatory claim-processing rules on our own initiative," but declining to do so with respect to an exhaustion requirement); with *Miguel-Pena* v. *Garland*, 94 F.4th 1145, 1157-1158 (10th Cir. 2024) (sua-sponte enforcing Section 1252(d)(1)'s exhaustion requirement against noncitizen, notwithstanding the government's "forfeiture" of any "exhaustion objections"), petition for cert. filed, No. 24-12 (U.S.).

The government suggests that plenary review as to the meaning of Section 1252(b)(1) is premature because "the Second Circuit * * * has issued a briefing order indicating that it may be inclined to reconsider" its position. Gov't Br. 15-16. The Second Circuit simply invited the parties to brief "whether *Santos-Zacaria* * * * calls into question *Bhaktibhai-Patel v. Garland*, 32 F.4th 180, 190-91 (2d Cir. 2022)" (Order, *Castejon-Paz* v. *Garland*, No. 22-6024 (July 12, 2023), Dkt. 25.1)—a question that the Fourth Circuit, for its part, has already answered in the negative. See *Martinez* v. *Garland*, 86 F.4th 561, 566 n.3 (2023). The Second Circuit may or may not change its position—but it appears the Fourth Circuit will not.

3. Finally, if the Court does grant plenary review, it should grant this case. Cf. Gov't Br. 6-7 n.2 (noting two other pending petitions that raise "the same or related questions") (citing *Martinez* v. *Garland*, No. 23-7678, and *Riley* v. *Garland*, No. 23-1270). Unlike *Martinez* and *Riley*, this case presents the question whether Section 1252(a)(4) provides an independent

font of jurisdiction for review of orders denying CAT relief. Compare Pet. App. 3a-4a n.2 (passing upon the Section 1252(a)(4) argument) with *Martinez*, 86 F.4th 561 (not addressing Section 1252(a)(4)); also see generally Pet., *Riley* v. *Garland*, No. 23-1270 (not pressing the contention that Section 1252(a)(4) independently supplies jurisdiction). That is an important aspect of the question presented: Many if not most withholding-only cases involve CAT claims as well as statutory withholding claims, so resolving only the meaning and jurisdictional status of Section 1252(b)(1), without addressing Section 1252(a)(4), leaves important questions unanswered.[2]

The government also asserts that petitioner "is wrong" on the merits of this issue (Gov't Br. 16)—but it does not even attempt to address our demonstration that *Nasrallah* held otherwise. Pet. 16-17; see *Nasrallah*, 590 U.S. at 585 (rejecting "[t]he premise" that "the only statute that supplies judicial review of CAT claims is the statute that provides for judicial review of final orders of removal"—because "as a result of the 2005 REAL ID Act, § 1252(a)(4) now provides for direct review of CAT orders in the courts of appeals."); *id.* at 591 (Thomas, J., dissenting) ("[T]he majority views § 1252(a)(4) as a specific grant of jurisdiction over CAT claims."). If the court chooses to grant

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[2] The government notes that petitioner raised this issue below through a Fed. R. App. P. 28(j) letter. Gov't Br. 16. But regardless of the manner in which the issue was "pressed" below, there can be no dispute that it was "passed upon" by the court of appeals, making it a proper subject of the Court's review. *United States* v. *Williams*, 504 U.S. 36, 41 (1992) ("Our traditional rule * * * permit[s] review of an issue not pressed so long as it has been passed upon.").

plenary review on these issues, it should do so in this case.

CONCLUSION

The Court should grant the petition. In the alternative, it should grant, vacate, and remand in light of *Harrow*.

Respectfully submitted.

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