No.

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

PETITION FOR A WRIT OF CERTIORARI

SIMON SANDOVAL-MOSHENBERG
Murray Osorio PLLC
4103 Chain Bridge Road
Suite 300
Fairfax, VA 22030

PAUL W. HUGHES
Counsel of Record
ANDREW A. LYONS-BERG
SARAH P. HOGARTH
CHARLES SEIDELL
McDermott Will & Emery LLP
500 North Capitol Street NW
Washington, DC 20001
(202) 756-8000
phughes@mwe.com

Counsel for Petitioner

QUESTION PRESENTED

When a noncitizen reenters the country after being removed earlier, the removal order is reinstated. But the noncitizen may resist removal to a particular country by demonstrating that he or she will be persecuted or tortured if removed to that country. If an asylum officer determines that a noncitizen has a reasonable fear of persecution or torture, he or she may enter withholding-only proceedings. In light of agency backlogs, these administrative proceedings extend over a protracted period of time; here, petitioner's withholding-only proceeding spanned more than 800 days.

Six courts of appeals have concluded that there is appellate jurisdiction to review an order denying withholding relief. Two circuits, however, conclude that, because such orders are entered more than 30 days after the original removal order is reinstated, the withholding-only order is essentially unreviewable.

The question presented is:

Whether the courts of appeals have jurisdiction to review the agency's denial of withholding-only relief.

RELATED PROCEEDINGS

Sanchez v. *Garland*, No. 22-1319 (4th Cir. Dec. 5, 2023)

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Cases—continued

Cases—continued

Statutes

Other Authorities

Other Authorities—continued

PETITION FOR A WRIT OF CERTIORARI

Petitioner Marco Antonio Miranda Sanchez respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Fourth Circuit in this case.

OPINIONS BELOW

The opinion of the court of appeals (App., *infra*, 1a-4a) is unreported but available at 2023 WL 8439343. The decisions of the Board of Immigration Appeals (App., *infra*, 5a-12a, 26a-27a) and decisions of the immigration judge (*id*. at 13a-25a, 28a-58a) are unreported.

JURISDICTION

The court of appeals entered judgment on December 5, 2023, and denied a timely filed petition for rehearing on April 5, 2024. This Court's jurisdiction is invoked under 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

8 U.S.C. § 1252(a)(1) states:

> Judicial review of a final order of removal (other than an order of removal without a hearing pursuant to section 1225(b)(1) of this title) is governed only by chapter 158 of title 28, except as provided in subsection (b) and except that the court may not order the taking of additional evidence under section 2347(c) of such title.

8 U.S.C. § 1252(a)(4) states:

> Notwithstanding any other provision of law (statutory or nonstatutory), including section 2241 of title 28, or any other habeas corpus provision, and sections 1361 and 1651 of such title, a petition for review filed with an

> appropriate court of appeals in accordance with this section shall be the sole and exclusive means for judicial review of any cause or claim under the United Nations Convention Against Torture and Other Forms of Cruel, Inhuman, or Degrading Treatment or Punishment, except as provided in subsection (e).

8 U.S.C. § 1252(b)(1) states:

> The petition for review must be filed not later than 30 days after the date of the final order of removal.

Article 3 of the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (CAT), Dec. 10, 1984, S. Treaty Doc. No. 100-20 (1988), 1465 U.N.T.S. 85, sets forth:

> No State Party shall expel, return ("refouler") or extradite a person to another State where there are substantial grounds for believing that he would be in danger of being subjected to torture.

STATEMENT

This Court's review is warranted to resolve a well-recognized and entrenched conflict among the circuits regarding a frequently-recurring question concerning the scope of jurisdiction over agency adjudications in the immigration context.

The immigration agency is frequently called upon to address a question of critical importance: Whether noncitizens have demonstrated that they are likely to be tortured or killed if removed to their homeland, and thus are entitled to withholding of removal under the Immigration and Nationality Act (INA) or the United Nations Convention against Torture (CAT). These agency proceedings are some of the most grave

confronted by federal adjudicators; "[Immigration] Judges say they must handle 'death penalty' cases in a traffic court setting, with inadequate budgets and grueling caseloads." Maria Sacchetti & Carolyn Van Houten, *Death Is Waiting for Him*, Wash. Post (Dec. 6, 2018), perma.cc/VR2C-VGEU. Errors in agency adjudications do occur—and with horrifying frequency. See, *e.g.*, David Hausman, *The Failure of Immigration Appeals*, 164 U. Pa. L. Rev. 1177 (2016); Human Rights Watch, *Deported to Danger* (Feb. 5, 2020) (identifying 138 individuals who, after being deported to El Salvador, were subsequently killed), perma.cc/L8CN-PSEG.

Judicial review of the immigration agency's decisions in withholding-of-removal cases is therefore of the utmost importance. But two circuits in the wake of this Court's decisions in *Johnson* v. *Guzman Chavez*, 141 S. Ct. 2271 (2021), and *Nasrallah* v. *Barr*, 590 U.S. 573 (2020), have effectively foreclosed judicial review of these crucial orders.

The court of appeals could only reach the decision that it lacked jurisdiction by misreading this Court's decisions in *Guzman Chavez* and *Nasrallah* as fundamentally upsetting the broad circuit consensus that a reinstatement order is final at the time of the completion of withholding-only proceedings; by disregarding the independent grant of jurisdiction to review CAT claims enacted in Section 1252(a)(4); and by treating a filing deadline as a jurisdictional bar.

The decision below is at odds with this Court's precedent and squarely conflicts with the holdings of six other courts of appeals that correctly recognize the availability of judicial review under these circumstances.

This case presents a uniquely optimal vehicle for resolving the question presented because it presents for review each of the reasons confirming the existence of jurisdiction.

A. Legal background.

1. The Immigration and Nationality Act (INA) provides the legal framework for removal of noncitizens from the country.

Under the INA, when the government first seeks to remove a noncitizen from the country, agency adjudicators must determine—and the noncitizen is entitled to contest—both whether the noncitizen is removable in the first place and whether he or she is entitled to discretionary relief from removal, such as asylum.

Through the Illegal Immigration Reform and Immigrant Responsibility Act (IIRIRA), Congress "streamlined the reinstatement process for removing noncitizens already subject to orders of removal who later reenter the country illegally." *F.J.A.P.* v. *Garland*, 94 F.4th 620, 627 (7th Cir. 2024). "In such cases, * * * [t]he 'prior order of removal is reinstated from its original date,' and is 'not subject to being reopened or reviewed.' Nor may the noncitizen pursue discretionary relief, like asylum." *Tomas-Ramos* v. *Garland*, 24 F.4th 973, 976 (4th Cir. 2022) (quoting 8 U.S.C. § 1231(a)(5)).

Notwithstanding the bar on asylum and the inability to "otherwise challenge a reinstated removal order," a noncitizen subject to such an order "still may pursue two forms of relief to prevent removal to a particular country: withholding of removal under § 1231(b)(3)(A)"—also known as statutory withholding—"and protection under the CAT." *Tomas-Ramos*,

24 F.4th at 977; see also *Johnson* v. *Guzman Chavez*, 141 S. Ct. 2271, 2282 (2021).

That is, despite implementing a streamlined process for reinstated removal orders, Congress still ensured the United States would adhere to its treaty obligations. The CAT prohibits the United States from removing a "noncitizen to a country where the noncitizen likely would be tortured." *Nasrallah* v. *Barr*, 590 U.S. at 573, 580 (2020).

Because statutory and CAT withholding are the only forms of relief available in the case of a reinstated removal order, the subsequent administrative litigation is known as a withholding-only proceeding. Withholding-only proceedings are initiated when the noncitizen expresses a reasonable fear of persecution or torture if returned to the country of removal. The noncitizen is first referred to an asylum officer for a screening interview. *F.J.A.P.*, 94 F.4th at 628. "If the asylum officer finds a reasonable fear, she refers the noncitizen to an immigration judge for withholding-only review," and the immigration judge's decision is then reviewable by the Board of Immigration Appeals (BIA). *Ibid*.

2. Review of BIA decisions proceeds directly to the courts of appeals.

Section 1252 gives the courts of appeals jurisdiction to review "a final order of removal" and sets a 30-day deadline for a noncitizen to petition for review. 8 U.S.C. § 1252(a)(1), (b)(1). Section 1252(b)(9), the so-called zipper clause, provides that "[j]udicial review of all questions of law and fact * * * arising from any action taken or proceeding brought to remove an alien from the United States * * * shall be available only in

judicial review of a final order under this section." *Id*. § 1252(b)(9).

Through the Foreign Affairs Reform and Restructuring Act (FARRA), which implemented Article III of the CAT, Congress "provide[d] for judicial review of CAT claims 'as part of the review of a final order of removal pursuant to [Section 1252].'" *Nasrallah*, 590 U.S. at 580 (quoting 112 Stat. 2681–822, note following 8 U.S.C. § 1231).

Subsequently, Section 1252(a)(4), enacted as part of the 2005 REAL ID Act, provides that "a petition for review filed with an appropriate court of appeals in accordance with this section" is the "means for judicial review of any cause or claim under the United Nations Convention Against Torture." 8 U.S.C. § 1252(a)(4).

B. Factual background & proceedings below.

1. Petitioner first entered the United States without inspection in 1994. Four years later, he was removed to Mexico pursuant to a 1998 removal order. App., *infra*, 2a. Years later, petitioner re-entered the United States again without inspection. *Ibid*. While in the United States, he was coerced into selling drugs for a U.S.-based associate of the Cartel Jalisco Nueva Generacion (CJNG), Mexico's most powerful and violent cartel, and was arrested, convicted, and jailed. A.R. 1157, 1895-1896. In November 2019, the Department of Homeland Security (DHS) reinstated petitioner's 1998 removal order. App., *infra*, 2a.

Petitioner expressed a fear of being tortured by the cartel if returned to Mexico. App., *infra*, 2a. DHS referred petitioner to an asylum officer for a screening interview, and the asylum officer confirmed that petitioner's fear of torture was reasonable. *Ibid*. The

asylum officer found that "members of the [CJNG] specifically intend to inflict severe suffering on [petitioner] due to his debt of $8,000 and the fact that he provided American authorities with information about [the cartel]." A.R. 1181.

Petitioner was then referred to an Immigration Judge (IJ) for withholding-only proceedings, in which petitioner applied for CAT protection. A.R. 1181. The IJ set the first merits hearing on petitioner's CAT application for October 6, 2020, nearly a year after his removal order had been reinstated. A.R. 809. After an initial denial of CAT relief, petitioner appealed to the BIA, and the BIA remanded the proceedings back to the IJ for a new withholding-only hearing due to the IJ's production of a hearing recording and transcript that was of such poor quality that it precluded effective appellate review. A.R. 627.

Petitioner's application for CAT relief was denied a second time, and he again appealed to the BIA. App., *infra*, 6a. On March 21, 2022—more than two years after DHS reinstated petitioner's order of removal—the BIA sustained the IJ's denial of CAT relief and dismissed petitioner's appeal. *Ibid*. Altogether, petitioner's withholding-only proceedings concluded more than 800 days after his removal order was reinstated.

2. Petitioner then filed a petition for review with the Fourth Circuit. Although "the parties [] agreed" that the court "possess[ed] jurisdiction" to review the BIA's denial of withholding-only relief, the court of appeals *sua sponte* dismissed the petition on jurisdictional grounds. App., *infra*, 3a-4a.

The court based its conclusion on its earlier decision in *Martinez* v. *Garland*, 86 F.4th 561 (4th Cir. 2023). Following *Martinez*, the decision below

concluded "that an order denying CAT relief is not a final order of removal for purposes of § 1252(a)(1)." App., *infra*, 3a. As a result, the court found that "there is no final order of removal properly in front of us that would allow us to review the Board's order affirming the denial of CAT relief." App., *infra*, 3a. That is, although petitioner had petitioned for review within 30 days of the BIA's order denying him CAT relief, he had not filed a petition for review within 30 days of the reinstated order of removal (i.e., years before his withholding-only proceedings would be completed). App., *infra*, 3a. In effect, the court held that petitioner's reinstated order of removal was final for purposes of Section 1252(a)(1) in 2019, despite the agency not completing its consideration of his CAT claim until 2021. *Ibid*.

The court of appeals also separately rejected petitioner's argument that, under *Nasrallah* v. *Barr*, 590 U.S. 573 (2020), the court of appeals has jurisdiction over petitioner's CAT claim directly under 8 U.S.C. § 1252(a)(4), independent of Section 1252(a)(1). *See* App., *infra*, 3a n.2.

Finally, the court of appeals held, in accordance with *Martinez*, that the 30-day deadline to petition for review of a final order of removal "is mandatory and jurisdictional and is not subject to equitable tolling." App., *infra*, 3a.

REASONS FOR GRANTING THE PETITION

Certiorari is warranted. The question presented is the subject of an intractable six-to-two divide among the circuits, with the court below recently denying a petition for rehearing en banc. The decision reached below is wrong on multiple grounds; indeed, it is irreconcilable with *Nasrallah*'s express recognition that

Section 1252(a)(4) itself provides a font of jurisdiction. And the issue—which determines the availability of judicial review in cases where noncitizens claim a likelihood of torture or death upon removal—is exceedingly important. The Court should grant review.

A. The circuits are expressly divided regarding whether courts have jurisdiction to review agency decisions in withholding-only proceedings.

There is an acknowledged and intractable circuit split over whether the courts of appeals have jurisdiction to review agency decisions in withholding-only proceedings when the petition is filed more than 30 days after reinstatement of the removal order but within 30 days of completion of the withholding-only proceeding. This acknowledged "circuit split" sprang from this Court's decisions in *Nasrallah* and *Guzman Chavez*, which "caused some circuits to reconsider whether they have jurisdiction to review CAT orders." *F.J.A.P.*, 94 F.4th at 629.

As it stands now, six circuits hold that they have jurisdiction over a petition for review filed upon completion of withholding-only proceedings; by contrast, two circuits have "broken from their precedent" and hold that the 30-day deadline to petition for review "begins to run upon reinstatement of a removal order, regardless of whether DHS subsequently places the noncitizen in withholding proceedings." *F.J.A.P.*, 94 F.4th at 629.

Without this Court's intervention, there is no prospect of this circuit split resolving. The Fourth Circuit's views are entrenched—despite being presented with the division of authority, it has declined to rehear this issue en banc. App., *infra*, 60a.

1. Six circuits hold that they have jurisdiction over petitions for review filed within 30 days of completion of withholding-only proceedings.

The **Third Circuit** quite recently concluded that a noncitizen's "petition for review was timely because it was filed less than thirty days from when the BIA denied [the] request for withholding-only relief, which finalized [the] reinstated order of removal for the purpose of judicial review." *Inestroza-Tosta* v. *Attorney Gen.*, __ F. 4th __, 2024 WL 3078270, at *8 (3d Cir. June 21, 2024). In so holding, the court explicitly recognized that its conclusion "has been adopted by several of our sister Circuits," but "the Second and Fourth Circuits go the other way." *Id*. at *7 n.12.

The **Seventh Circuit** likewise recently acknowledged the circuit conflict—and it joined the majority approach. As that court put it, "the Second and Fourth Circuits" found a lack of jurisdiction following this Court's decisions in *Nasrallah* and *Guzman Chavez*. *F.J.A.P.*, 94 F.4th 620, 629 (7th Cir. 2024). But, carefully canvassing the reasons supplied by those courts, the Seventh Circuit expressly disagreed: "[W]e conclude that a reinstated order of removal is not final for purposes of judicial review until the agency has completed withholding proceedings." *Id*. at 629-638.

Initially, the **Fifth Circuit** concluded that *Nasrallah* and *Guzman Chavez* precluded jurisdiction. *Argueta-Hernandez* v. *Garland*, 73 F.4th 300 (5th Cir. 2023). But the Fifth Circuit then changed course on rehearing. The Court recognized that "[i]t cannot be the case that a petitioner may only seek review before reinstatement of a removal order, and without a full administrative record;" a holding otherwise "could have disastrous consequences on the

immigration and judicial systems." *Argueta-Hernandez* v. *Garland*, 87 F.4th 698, 705 (5th Cir. 2023). The Court thus concluded that it had "jurisdiction over the petition for review, which was filed within 30 days of BIA's order [denying withholding] but several years after the reinstated removal order."

The **Sixth**, **Ninth**, and **Tenth Circuits** have all reached the same conclusion. See, *e.g.*, *Kolov* v. *Garland*, 78 F.4th 911, 918-919 (6th Cir. 2023) ("[W]e remain bound by circuit precedent permitting review of BIA orders on withholding-only and CAT relief in these circumstances" because the "denial of withholding-only relief would qualify as the final order of removal subject to judicial review."); *Alonso-Juarez* v. *Garland*, 80 F.4th 1039, 1046 (9th Cir. 2023) ("We hold that * * * the thirty-day deadline for filing a petition for review is triggered upon the completion of reasonable fear proceedings," not upon the entry of a reinstatement order); *Arostegui-Maldonado* v. *Garland*, 75 F.4th 1132, 1143 (10th Cir. 2023) ("[the] reinstated removal order became final for purposes of judicial review upon culmination of his withholding-only proceedings when the BIA affirmed the IJ's order.").

2. By contrast, two circuits hold that they lack jurisdiction over petitions for review filed more than 30 days after entry of the reinstated removal order even if filed within 30 days of the completion of withholding-only proceedings.

The **Fourth Circuit** in *Martinez* v. *Garland* held that it did not have jurisdiction over a petition for review filed upon completion of withholding-only proceedings because "withholding-only orders do not affect the finality of a decision reinstating a prior order

of removal." 86 F.4th at 570. In so holding, the court relied on this Court's decisions in *Nasrallah* and *Guzman Chavez* to divine the rule that a "removal order's finality for purposes of Section 1231 does not depend on withholding-only proceedings—and because we have held that finality for purposes of Section 1231 and Section 1252 are the same—the finality of a removal order for purposes of judicial review also cannot depend on withholding-only proceedings." *Id*. at 569.

Similarly, the **Second Circuit** in *Bhaktibhai-Patel* v. *Garland* held that it lacked jurisdiction because a reinstated order of removal "becomes final once the agency's review process is complete," and the agency's review process is complete at the time of reinstatement because it is "not subject to further review within the agency—and [is] therefore 'final' for the purposes of § 1252[.]" 32 F.4th 180, 192 (2d Cir. 2022). The court reasoned that raising a CAT claim does "not affect the finality of" "[a] reinstatement decision" because "even if an illegal reentrant obtains relief through withholding-only proceedings, '[t]he [reinstated] removal order is not vacated or otherwise set aside * * * and DHS retains the authority to remove the alien to any other country authorized by the statute.'" *Id*. at 193.

The Second Circuit expressed reservations about this result, finding it an "oddity" that a noncitizen may obtain judicial review of a reinstated order of removal, but "generally may not obtain judicial review of subsequent withholding-only proceedings."[1] 32

[1] To be clear, review of a denial of withholding-only relief would be available only if 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."

F.4th at 195. But it felt its decision was compelled by "questionable precedent that implicitly holds that a reinstatement decision itself qualifies as a final order of removal under § 1252." *Ibid*.[2]

This Court's review is necessary to resolve this deep divide among the circuits.

B. The decision below is wrong.

Certiorari is additionally warranted because the decision below is wrong. The courts of appeals possess jurisdiction to review orders issued in withholding-only proceedings for three reasons. *First*, *Nasrallah* and *Guzman Chavez* did not disturb the circuit consensus that finality for purposes of judicial review under Section 1252 occurs when withholding-only proceedings are complete. *Second*, at the very least, courts of appeals have jurisdiction over any CAT order issued in a withholding-only proceeding because, as *Nasrallah* held, Section 1252(a)(4) "now provides for *direct* review of CAT orders in the courts of appeals." 590 U.S. at 585 (emphasis added). *Third*, the 30-day deadline to appeal a final order of removal is not a jurisdictional requirement following *Santos-Zacaria*.

Bhaktibhai-Patel, 32 F.4th at 195 n.21. But withholding-only proceedings rarely conclude within 30 days, rendering this avenue effectively unavailable.

[2] In two pending consolidated appeals, the Second Circuit ordered the parties to brief "whether *Santos Zacaria* * * * calls into question *Bhaktibhai-Patel*." Order at 2, *Castleton-Paez* v. *Garland*, No. 22-6024 (2d Cir. July 12, 2023); see also C.A. Gov't 28(j) Letter.

1. A reinstated order is final when withholding-only proceedings complete.

Before the Court's recent decisions in *Nasrallah* and *Guzman Chavez*, there was widespread consensus among the circuits "that a reinstated order of removal is not 'final' for purposes of judicial review until the agency completes adjudication of a noncitizen's request for withholding of removal." *Guzman Chavez* v. *Hott*, 940 F.3d 867, 880 (4th Cir. 2019) (collecting cases), rev'd on other grounds, 141 S. Ct. 2271; see also, *e.g.*, *Ponce-Osorio* v. *Johnson*, 824 F.3d 502, 505-506 (5th Cir. 2016); *Luna-Garcia* v. *Holder*, 777 F.3d 1182, 1184-1186 (10th Cir. 2015); *Ortiz-Alfaro* v. *Holder,* 694 F.3d 955, 958 (9th Cir. 2012).

Two circuits have now diverged from the widespread consensus. The premise for that departure is that this Court's decisions in "*Nasrallah* and *Guzman Chavez* implicitly overruled" this robust authority (*Martinez*, 86 F.4th at 570 (quotation marks omitted); *see also id.* at 569)—but as six courts of appeals have held, those cases did no such thing.

Although *Nasrallah* held that "[a] CAT order is not itself a final order of removal," the Court expressly cautioned that its "decision *does not affect* the authority of the courts of appeals to review CAT orders." 140 S. Ct. at 1693 (emphasis added). And in *Guzman Chavez*, the Court answered a different question from finality for review purposes: when a reinstated removal order becomes "*administratively* final" within the meaning of Section 1231(a)(1)(B), which has consequences regarding detention authority, not judicial review. *Guzman Chavez*, 141 S. Ct. at 2284-2285 (emphasis added); see 8 U.S.C. § 1231(a)(1)(B)(i), (a)(2).

Indeed, the Court in *Guzman Chavez* expressly declined to disturb the court of appeals cases holding that finality for purposes of judicial review under Section 1252 occurs only when withholding-only proceedings are complete—on the basis that Section 1252 and Section 1231 "use[] different language" and have different subject matter: "We *express no view* on whether the lower courts are correct in their interpretation of § 1252, which uses different language than § 1231 and relates to judicial review of removal orders rather than detention." *Guzman Chavez*, 141 S. Ct. at 2285 n.6 (emphasis added).

Thus, as six circuits have held, neither *Guzman Chavez* nor *Nasrallah* affects the pre-existing consensus that finality for review purposes occurs only after withholding-only proceedings conclude. See *Argueta-Hernandez*, 87 F.4th 698, 706 ("Neither *Nasrallah* nor *Johnson* overrules this court's precedent" that "reinstatement orders are deemed final under § 1252(b)(1) only upon completion of reasonable-fear and withholding-of-removal proceedings."); accord *Arostegui-Maldonado*, 75 F.4th at 1142-1143; *Kolov*, 78 F.4th at 917-919; *Alonso-Juarez*, 80 F.4th at 1047-1051; *F.J.A.P.*, 94 F.4th at 631-633.[3]

This consensus was correct: "[A] reinstatement order does not become final for purposes of judicial review until the agency has also concluded withholding proceedings." *F.J.A.P.*, 94 F.4th at 634. This follows

---

[3] In reaching the contrary result, the Fourth Circuit rested on a cramped view of *stare decisis*. That court found that selective aspects of its earlier decision in *Guzman Chavez*—which this Court *reversed*—somehow compelled the result reached below. In all events, this idiosyncratic reading of circuit precedent has little bearing on the correct construction of the governing statutes.

from the statutory text. A "judgment is 'final' if no further judicial action is required." *Ibid*. (quoting Black's Law Dictionary (6th ed. 1990)). But "a reinstatement order does require further agency action when a noncitizen enters withholding proceedings;" while "the noncitizen has been determined deportable, the agency's work is not completed, and it may not remove the noncitizen until agency withholding review is complete." *Ibid*. In sum, "[o]nly when withholding proceedings are complete have 'the rights, obligations, and legal consequences of the reinstated removal order' been fully established." *Ibid*.

The Third, Fifth, Sixth, Seventh, Ninth, and Tenth Circuits are correct to hold that a reinstated removal order does not become final for purposes of judicial review until withholding-only proceedings conclude.

2. As Nasrallah *held, Section 1252(a)(4) provides an independent font of jurisdiction over CAT orders.*

The decision below additionally rests on the flawed assertion that courts have jurisdiction to review CAT orders only when paired with timely review of a final order of removal under Section 1252(a)(1). *See* App., *infra*, 3a n.2. As this Court held in *Nasrallah*, that is incorrect.

Nasrallah explained that, "as a result of the 2005 REAL ID Act, [Section] 1252(a)(4) now provides for *direct* review of CAT orders in the courts of appeals." 590 U.S. at 585 (emphasis added); see 8 U.S.C. § 1252(a)(4) (providing that "a petition for review filed with an appropriate court of appeals" is the proper "means for judicial review of any cause or claim under the [CAT]."). This "direct review" is *in addition to* the

preexisting route of "judicial review of CAT claims together with the review of final orders of removal" under FARRA. *Nasrallah*, 590 U.S. at 585. That is, since the passage of the REAL ID Act in 2005, there are two avenues to petition for judicial review of CAT orders: (1) A CAT order can piggyback on review of final orders of removal via FARRA and the zipper clause; and (2) under Section 1252(a)(4), a CAT order may be directly reviewed by a court of appeals. *Ibid*.

If the *Nasrallah* majority were not clear enough, the dissent in that case confirms what the majority held. As Justice Thomas wrote in dissent, "the majority views [Section] 1252(a)(4) as *a specific grant of jurisdiction* over CAT claims." *Nasrallah*, 590 U.S. at 591 (Thomas, J., dissenting) (emphasis added). The majority did not object to that characterization. In other words, the *Nasrallah* majority's holding that Section "1252(a)(4) now provides for direct review of CAT orders in the courts of appeals" (590 U.S. at 585) was an express *rejection* of a contrary view that "a final order of removal is required if a court is to review a CAT order at all." *Id.* at 592 (Thomas, J., dissenting).

The decision below employed precisely the same reasoning—that Section 1252(a)(4) "does not permit us to review an order denying CAT relief without a final order of removal properly before us." See App., *infra*, 3a n.2 (Section 1252(a)(4). That view conflicts irreconcilably with *Nasrallah*'s holding that Section 1252(a)(4) is an independent source of jurisdiction over CAT orders.

3. Section 1252(b)(1)'s deadline to petition for review is not jurisdictional.

The decision below was also wrong to hold that Section 1252(b)(1)'s 30-day deadline to file a petition for review is jurisdictional. Only by that incorrect view could the court dismiss *sua sponte*.[4] But the 30-day deadline is not jurisdictional.

A jurisdictional requirement specifies the limits of a "court's adjudicatory authority." *Santos-Zacaria v. Garland*, 598 U.S. 411, 416 (2023) (quoting *Kontrick* v. *Ryan*, 540 U.S. 443, 455 (2004)). Jurisdictional

---

[4] Whether Section 1252(b)(1)'s 30-day deadline is jurisdictional or merely a claim-processing rule also implicates a three-to-six circuit split. Three circuits—the Third, Fifth, and Ninth—hold that the 30-day deadline in Section 1252(b)(1) is a non-jurisdictional rule. See *Inestroza-Tosta*, 2024 WL 3078270, at *6 ("*Santos-Zacaria* also all but abrogated *Stone* v. *I.N.S.*, the Supreme Court case we relied on in holding that § 1252(b)(1)'s filing deadline is jurisdictional. * * * Thus, we join the Ninth and Fifth Circuits in holding that § 1252(b)(1) is a nonjurisdictional claim-processing rule."); *Argueta-Hernandez*, 87 F.4th at 705 ("[T]he 30-day filing deadline is not jurisdictional.") (citing *Santos-Zacaria*, 598 U.S. 411); *Alonso-Juarez*, 80 F.4th at 1046-1047 ("[A]lthough we previously relied on *Stone* [v. *INS*, 514 U.S. 386 (1995)] to hold that § 1252(b)(1) was a jurisdictional rule, that reasoning is now 'clearly irreconcilable' with the Supreme Court's intervening reasoning in *Santos-Zacaria*. We therefore hold today that the thirty-day deadline provision, § 1252(b)(1), is a non-jurisdictional rule.") (citation omitted)).

Six circuits—the First, Second, Fourth, Sixth, Seventh, and Tenth—all hold that Section 1252(b)(1) does impose a jurisdictional requirement. See, *e.g.*, *Garcia Sarmiento* v. *Garland*, 45 F.4th 560, 563 (1st Cir. 2022); *Bhaktibhai-Patel* v. *Garland*, 32 F.4th 180, 190-191 (2d Cir. 2022); *Martinez*, 86 F.4th at 566-567; *Kolov*, 78 F.4th a 917; *F.J.A.P.*, 94 F.4th at 625-626; *Arosteguí-Maldonado*, 75 F.4th at 1143.

requirements cannot be waived by the parties, must be raised by courts *sua sponte*, and do not allow for equitable exceptions. *Boechler*, *P.C.* v. *Comm'r*, 596 U.S. 199, 203 (2022). Claim-processing rules, by contrast, "seek to promote the orderly progress of litigation by requiring that the parties take certain procedural steps at certain specified times." *Santos-Zacaria*, 598 U.S. at 416 (quoting *Henderson ex rel. Henderson* v. *Shinseki*, 562 U.S. 428, 435 (2011)). Crucially, claim-processing rules may be waived, and a court may excuse non-compliance for equitable reasons. *Harrow* v. *Dep't of Def.*, 144 S. Ct. 1178, 1182 (2024).

As this Court explained in *Santos-Zacaria*, a procedural rule is treated as jurisdictional "only if Congress 'clearly states' that it is." 598 U.S. at 416 (quoting *Arbaugh* v. *Y & H Corp.*, 546 U.S. 500, 515 (2006)). Under this "clear-statement principle" courts may impose "harsh jurisdictional consequences only when Congress unmistakably has so instructed." *Id.* at 417.

The Court in *Santos-Zacaria* held that the exhaustion requirement in Section 1252(d)(1) is not jurisdictional for two reasons: an exhaustion requirement is a "quintessential claim-processing rule" and the "provision's language differs substantially from more clearly jurisdictional language in related statutory provisions." *Id*. at 417-418. As Judge Floyd pointed out, "[b]oth rationales apply" to the 30-day deadline in Section 1252(b)(1). *Martinez*, 86 F.4th at 573 (Floyd, J., concurring).

First, the filing deadline in Section 1252(b)(1)—like the exhaustion requirement in 1252(d)(1)—is a quintessential claim processing rule. See *Henderson*, 562 U.S. at 435-436 ("Filing deadlines * * * are

quintessential claim-processing rules."). Congress may still attach jurisdictional consequences "to a requirement that usually exists as a claim-processing rule" but "we would need unmistakable evidence, on par with express language addressing the court's jurisdiction." *Santos-Zacaria*, 598 U.S. at 418. Congress included no such unmistakable or express language here.

Second, Congress provided no clear statement that Section 1252(b)(1) should be understood as jurisdictional. Congress was clear in Section 1252 when it intended for some rules to be jurisdictional by specifying that "no court shall have jurisdiction" to review certain orders. In fact, this language appears five times in Section 1252 and in many other immigration laws but is absent from Section 1252(b)(1).[5] The lack of express jurisdictional language in Section 1252(b)(1) indicates that Congress did not intend to create a jurisdictional requirement. Cf., *e.g.*, *Jama* v. *ICE*, 543 U.S. 335, 341 (2005) ("We do not lightly assume that Congress has omitted from its adopted text requirements that it nonetheless intends to apply, and our reluctance is even greater when Congress has shown elsewhere in the same statute that it knows how to make such a requirement manifest.").

The Fourth Circuit's reliance on *Stone* v. *INS* to hold that Section 1252(b)(1) is jurisdictional is at odds with the Court's reasoning in *Santos-Zacaria*. *Stone* v. *INS*, 514 U.S. 386 (1995); *Santos-Zacaria*, 598 U.S. at 422. The Court in *Santos Zacaria* was clear: *Stone*

---

[5] *Santos-Zacaria*, 598 U.S. at 419 n.5 (citing 8 U.S.C. §§ 1252(a)(2)(A), (a)(2)(B), (a)(2)(C), (b)(9), (g), 1182(a)(9)(B)(v), (d)(3)(B)(i), (d)(12), (h), (i)(2), 1158(a)(3), 1227(a)(3)(c)(ii), 1229c(f), 1255a(f)(4)(C), 1225(b)(1)(D)).

does 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. *Stone* predates a line of cases that brought "some discipline to the use of th[e] term 'jurisdictional'" after courts applied the "jurisdictional" term too loosely. *Santos-Zacaria,* 598 U.S. at 421 (quoting *Henderson*, 562 U.S. at 435). Thus, as the Ninth Circuit pointed out, "although we previously relied on *Stone* to hold that [Section] 1252(b)(1) was a jurisdictional rule, that reasoning is now 'clearly irreconcilable' with the Supreme Court's intervening reasoning in *Santos-Zacaria*." *Alonso-Juarez*, 80 F.4th at 1047.

The government has acknowledged that Section 1252(b)(1) is no longer jurisdictional. In a letter to the court of appeals below, the government recognized that "[i]n light of [] the decision in *Santos-Zacaria*, the government has reassessed its position, and will argue … that the INA's thirty-day deadline is mandatory but not jurisdictional." C.A. Gov't 28(j) Letter.

Finally, in a line of recent cases in other contexts, this Court has found that filing deadlines are not jurisdictional. See, *e.g.*, *Harrow*, 144 S. Ct. at 1186 (60-day deadline to appeal decision of Merit Systems Protection Board was non-jurisdictional); *Boechler*, 596 U.S. at 211 (Internal Revenue Code's "30-day time limit to file a petition for review of a collection due process determination is an ordinary, nonjurisdictional deadline subject to equitable tolling."). There is no basis for a different result here.

* * *

The court's *sua sponte* conclusion in the decision below that it lacked jurisdiction over petitioner's

request for judicial review of the denial of CAT relief following a withholding-only proceeding was wrong thrice over. This Court's review is imperative to restore uniformity and to preserve essential judicial review of agency action across the circuits.

C. This is an excellent vehicle to resolve this exceptionally important question.

1. This case is an ideal vehicle for review. First, this case addresses Section 1252(a)(4)—the provision that grants courts of appeals an independent source of jurisdiction to review CAT withholding-only claims. App., *infra*, 3a n.2. *Martinez*, by contrast, does not discuss Section 1252(a)(4) at all. See generally 86 F.4th at 564-572. And the Fourth Circuit's holding below—denying that Section 1252(a)(4) functions as an independent source of jurisdiction—was a clear misapplication of *Nasrallah* that this court must address. See App., *infra*, 3a n.2.

This case also cleanly presents one side of two entrenched circuit splits: whether a reinstated order of removal is final when withholding-only proceedings are pending, and whether the 30-day deadline in Section 1252(b)(1) operates as a jurisdictional rule.

What is more, there is a reasonable prospect that, if the court of appeals had jurisdiction over petitioner's claim, it would reverse. An asylum officer determined that petitioner had a reasonable fear of torture if returned to Mexico because "members of the [CJNG] specifically intend to inflict severe suffering on [Petitioner] due to his debt of $8,000 and the fact that he provided American authorities with information about [the cartel]." A.R. 1181.

In contrast to cases in which no immigration official has ever found the noncitizen to have a reasonable

fear of torture, an asylum officer found that petitioner had a reasonable fear of torture. It is thus plausible that, on remand, petitioner may demonstrate that the BIA's decision was error. See *Aguado-Cuevas* v. *Garland*, No. 21-60574, 2022 WL 17546291, at *4 (5th Cir. Dec. 9, 2022) (vacating BIA's denial of CAT relief because the "BIA did not properly consider evidence that [] Aguado-Cuevas owed CJNG $120,000 after his botched deal [and] Aguado-Cuevas was identified by the media as an informant in the prosecution of a CJNG member"); cf. *Gonzalez Ruano* v. *Barr*, 922 F.3d 346, 352-357 (7th Cir. 2019) (finding that persecution by members of the CJNG was sufficient to grant CAT relief and eligibility for asylum). Should the Court grant review, it should do so in a case where an asylum officer made an affirmative finding.

2. This case involves an issue of substantial importance. The approach taken by the court below has "disastrous consequences on the immigration and judicial systems." *Argueta-Hernandez*, 87 F.4th at 706. The decision below renders orders in withholding-only proceedings effectively unreviewable—leaving thousands of noncitizens each year to be deported notwithstanding their claims of likely persecution or torture, without any opportunity for Article III review. See, *e.g.*, Am. Immigration Council & Nat'l Immigrant Justice Ctr., *The Difference Between Asylum and Withholding of Removal* 4 (Oct. 6, 2020) (noting that "more than 3,000 withholding-only proceedings were begun each year" "[f]rom FY 2014 to FY 2019."), perma.cc/F5R6-8QCW.

Because withholding-only proceedings have a near-zero chance of completing within 30 days of the reinstatement order, the court below is slamming the door on the ability of noncitizens to seek judicial

review of their withholding-only proceedings. In petitioner's case, for example, he did not even receive a scheduling hearing for his withholding-only claims until 97 days after his reinstatement order—more than three times the deadline for petitioning for review—and those proceedings were not completed for over two years. That timeline is completely normal; it is unheard of for the government to issue a decision on a noncitizen's withholding-only claims within 30 days. See, *e.g.*, *Guzman Chavez*, 141 S. Ct. at 2294 (Breyer, J., dissenting) (collecting studies that "have found that [withholding-only] procedure often takes over a year, with some proceedings lasting well over two years before eligibility for withholding-only relief is resolved.").

If the approach taken in the decision below is allowed to persist, noncitizens will be incentivized to file premature petitions for review. But this approach is unworkable: it "would be immensely resource intensive" since "petitioners would inevitably have to file a petition for review to preserve the possibility of judicial review, even when unsure if they would need to, or even choose to, challenge the decision in the future." *Alonso-Juarez*, 80 F.4th at 1053. The courts of appeals would then need to "establish a system of holding petitions for review in abeyance for years at a time and require parties to inform [the] court of the progress of its administrative proceedings." *Ibid*.

Ultimately, the decision below stands to create a deeply inefficient system for judicial oversight of agency action. And the burdens will fall on noncitizens, a substantial minority of whom are proceeding pro se. See Ingrid Eagly and Steven Shafer, Access to Counsel in Immigration Court, *American Immigration Council*, 2 (2016) (noting that "only 37 percent of

all immigrants secured legal representation in their removal cases"), perma.cc/777W-KEQU. These noncitizens facing deportation "would be forced to navigate a confusing system set up to require appeals of decisions not yet made and pay a hefty filing fee that they likely cannot afford, effectively ensuring that they miss their chance at review." *Alonso-Juarez*, 80 F.4th at 1053.

It is essential to "recogniz[e] the gravity of the wholesale elimination of judicial review of virtually all withholding-only decisions[.]" *Alonso-Juarez*, 80 F.4th at 1053. That result would be contrary to the "well-settled and strong presumption" "favoring judicial review of administrative action," which the Supreme Court has "consistently applied * * * to immigration statutes." *Guerrero-Lasprilla v. Barr*, 140 S. Ct. 1062, 1069 (2020) (quotation marks omitted). This "presumption can only be overcome by 'clear and convincing evidence' of congressional intent to preclude judicial review." *Ibid*. Such clear and convincing evidence is absent here. The Court's review is warranted to ensure the uniform availability of judicial review of these highly consequential decisions from the immigration agency.

CONCLUSION

The Court should grant the petition.

Respectfully submitted.

SIMON SANDOVAL-MOSHENBERG
Murray Osorio PLLC
4103 Chain Bridge Road
Suite 300
Fairfax, VA 22030

PAUL W. HUGHES
Counsel of Record
ANDREW A. LYONS-BERG
SARAH P. HOGARTH
CHARLES SEIDELL
McDermott Will & Emery LLP
500 North Capitol Street NW
Washington, DC 20001
(202) 756-8000
phughes@mwe.com

Counsel for Petitioner

JULY 3, 2024