No. 24-11

In the Supreme Court of the United States

MARCO ANTONIO MIRANDA SANCHEZ, PETITIONER

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

ELIZABETH B. PRELOGAR
Solicitor General
Counsel of Record
BRIAN M. BOYNTON
Principal Deputy Assistant Attorney General
JOHN W. BLAKELEY
MELISSA L. NEIMAN-KELTING
DAWN S. CONRAD
Attorneys

Department of Justice
Washington, D.C. 20530-0001
SupremeCtBriefs@usdoj.gov
(202) 514-2217

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 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.

3. Whether the denial of a noncitizen's claim for protection under the Convention Against Torture is independently subject to judicial review under 8 U.S.C. 1252(a)(4).

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-4a) is not published in the Federal Reporter but is available at 2023 WL 8439343. The decisions of the Board of Immigration Appeals (Pet. App. 5a-12a, 26a-27a) and the immigration judge (Pet. App. 13a-25a, 28a-59a) are unreported.

JURISDICTION

The judgment of the court of appeals was entered on December 5, 2023. A petition for rehearing was denied on April 5, 2024 (Pet. App. 60a). The petition for a writ of certiorari was filed on July 3, 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 il-

legally, 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 persecuted 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).

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[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)).

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 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 is a native and citizen of Mexico who was removed from the United States in 2008. Pet. App. 29a. He later reentered the United States. *Ibid.* On November 13, 2019, an immigration officer determined that petitioner's prior removal order should be reinstated. *Ibid.* Petitioner did not contest reinstatement, but he expressed a fear of persecution or torture in Mexico. *Id.* at 2a-3a. An asylum officer found he had a reasonable fear of persecution or torture and referred petitioner to withholding-only proceedings. *Id.* at 29a.

Because petitioner had been convicted of several drug offenses, he conceded that he was not eligible for statutory or CAT withholding and therefore sought deferral of removal under the CAT. Pet. App. 30a n.2. After several hearings, the IJ denied petitioner's application for CAT protection, and the Board affirmed the IJ's decision on March 21, 2022. *Id.* at 5a-59a. Petitioner filed a petition for review with the court of appeals on March 24, 2022, within 30 days of the Board's decision but more than two years after the immigration officer had determined that his prior order of removal should be reinstated. *Id.* at 2a-3a.

b. On December 5, 2023, the court of appeals issued an unpublished decision dismissing the petition for review for lack of jurisdiction. Pet. App. 1a-4a. The court found that its decision was controlled by *Martinez* v. *Garland*, 86 F.4th 561, 566 (4th Cir. 2023), petition for

cert. pending, No. 23-7678 (filed May 29, 2024). Pet. App. 2a-3a.

In *Martinez*, the Fourth Circuit held that it lacked jurisdiction to consider a petition for review of an order denying withholding and CAT protection because the petition was filed more than 30 days after the noncitizen's prior order of removal was reinstated under Section 1231(a)(5). 86 F.4th at 571. In reaching that holding, the court first found that Section 1252(b)(1)'s 30-day filing deadline is jurisdictional. *Id.* at 566-567 & n.3. It then determined that Section 1252(b)(1)'s deadline cannot be triggered by a withholding order because it is not a "final order of removal." *Id.* at 567.

Martinez assumed that a reinstatement order under Section 1231(a)(5) can qualify as a "final order of removal" but—relying on the Second Circuit's decision in *Bhaktibhai-Patel* v. *Garland*, 32 F.4th 180 (2022)—*Martinez* held that a reinstatement determination becomes final as soon as the immigration officer makes his decision, regardless of the pendency of any withholding-only proceedings. 86 F.4th at 568-572. Accordingly, *Martinez* found that a petition for review of a post-reinstatement order denying withholding or CAT protection is untimely if it is filed more than 30 days after the immigration officer's reinstatement determination becomes final, even if the withholding-only proceedings are still ongoing at that time. *Id.* at 571.

In the decision below, the court of appeals found that, under *Martinez*, it lacked jurisdiction to consider petitioner's challenge to the order denying him CAT protection because the petition for review was not filed within 30 days of the immigration officer's reinstatement decision. Pet. App. 2a-3a. In a footnote, the court also addressed an argument that petitioner had raised

"[i]n a Fed. R. App. P. 28(j) letter." *Id.* at 3a n.2. In the letter, petitioner had asserted that 8 U.S.C. 1252(a)(4) supplies an independent basis for judicial review of orders denying CAT protection. Pet. App. 3a n.2. The court rejected the contention, observing that Section 1252(a)(4) permits review of CAT orders when they are challenged as part of a petition for review of a final order of removal. *Ibid.* Section 1252(a)(4) does not supply an independent basis for judicial review. *Ibid.*

c. The court of appeals denied a petition for rehearing en banc on April 5, 2024. Pet. App. 60a.

DISCUSSION

Petitioner contends (Pet. 18-22) 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. Petitioner is 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 this case had concluded, this Court should grant certiorari, vacate the court of appeals' decision, and remand for further proceedings in light of *Harrow*'s guidance regarding when a time limit may be deemed jurisdictional.[2]

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[2] Two other pending petitions for writs of certiorari seek review of the same or related questions, and the government is urging the

Petitioner also contends (Pet. 14-15) 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. Petitioner is 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 the case is 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 petitioner from being affected by the court of appeals' erroneous understanding of when a petition for review must be filed.

Finally, petitioner contends (Pet. 16-17) that an order denying CAT protection is independently subject to judicial review under 8 U.S.C. 1252(a)(4). Petitioner is incorrect, and no court of appeals has ever adopted that understanding of Section 1252(a)(4). Accordingly, that issue does not warrant this Court's review.

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

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same disposition for those petitions in responses being filed at the same time as this one. See *Martinez* v. *Garland*, No. 23-7678 (filed May 29, 2024); *Riley* v. *Garland*, No. 23-1270 (filed May 31, 2024).

appeals addressed the issue without the benefit of *Harrow*, this 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 predecessor as 'jurisdictional,'" the *Stone* Court had not "attend[ed] to the distinction between 'ju-

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[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).

risdictional' rules (as we understand them today) and nonjurisdictional but mandatory ones." *Ibid.* 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 (citation omitted). In reaching that holding, the Court repeatedly emphasized that "most time bars are nonjurisdictional." *Id.* at 484 (citation omitted); see *id.* at 489 n.* ("time limits[,] * * * we repeat, are generally non-jurisdictional").

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 statutory 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. 3a. *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 and the Seventh Circuit have declined to revisit their precedent in light of *Santos-Zacaria*. See *Martinez* v. *Garland*, 86 F.4th 561, 566-567 (4th Cir. 2023), petition for cert. pending, No. 23-7678 (filed May 29, 2024);

F.J.A.P. v. *Garland*, 94 F.4th 620, 634 (7th Cir. 2024). But those decisions preceded *Harrow*'s clear emphasis of 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 *Martinez*, when it applied the holding in *Martinez* to this case, or when it denied rehearing in this case. This Court should therefore grant the petition for a writ of certiorari, vacate the decision below, and remand for further proceedings in light of *Harrow*.

2. The court of appeals also erred in holding that the petition for review in this case was untimely under Section 1252(b)(1), even though it was filed within 30 days of the Board's order affirming the denial of CAT protection. Pet. App. 3a. But again this Court's intervention would be premature because the Second Circuit appears to be reconsidering the precedent on which the Fourth Circuit relied, and the importance of the question will be diminished if the court of appeals holds on remand that Section 1252(b)(1) 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

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[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).

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 * * * 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.

Nonetheless, in 2022 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 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 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 detention 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 (citation omitted). *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 decision below found that the petition for review in this case was untimely based on the court of appeals' prior decision in *Martinez*, *supra*. Pet. App. 3a. *Martinez* in turn adopted the holding and reasoning of *Bhaktibhai-Patel*, agreeing with the Second Circuit's determination that, under *Nasrallah* and *Guzman Chavez*, a petition for review of a post-reinstatement withholding or CAT order is timely under Section

1252(b)(1) only if it is filed within 30 days of the immigration officer's reinstatement determination. See *Martinez*, 86 F.4th 568-570. That was error. 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 CAT 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 explained 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 the 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 the requested relief, 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 and CAT determinations. But see *Nasrallah*, 590 U.S. at 583-584 (emphasizing that CAT orders are judicially reviewable).

c. Although the court of appeals' decision to adopt the reasoning of *Bhaktibhai-Patel* was erroneous, this Court's intervention on this 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

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[5] See *Inestroza-Tosta*, 105 F.4th at 514 & n.12; *F.J.A.P.*, 94 F.4th at 631-638; *Argueta-Hernandez*, 87 F.4th at 705-706; *Alonso-Juarez*,

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 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 petition for review was untimely—both in this case and in other cases in which a similarly situated noncitizen has filed a petition for review within 30 days of the issuance of a CAT or withholding order. The government's waiver would permit the same filing deadline to apply regardless of the circuit in which the petition for review was filed.

3. Finally, petitioner errs in contending (Pet. 16-17) that this Court should grant review to consider whether CAT orders are independently subject to judicial review under 8 U.S.C. 1252(a)(4). No court of appeals has ever accepted that argument, which petitioner raised for the first time through a letter to the court of appeals pursuant to Federal Rule of Appellate Procedure 28(j). See Pet. App. 3a n.2. And it is wrong.

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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).

Section 1252(a)(4) provides that "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" CAT claim. As *Nasrallah* recognized, Section 1252(a)(4) makes clear Congress's understanding that CAT orders are subject to "direct review" in the courts of appeals, 590 U.S. at 585, but the plain text of the provision specifies that such review must occur through a "petition for review filed * * * *in accordance with this section*," 8 U.S.C. 1252(a)(4) (emphasis added), meaning Section 1252. Because Section 1252(b)(1) requires the filing of a petition for review within 30 days of a "final order of removal," that requirement applies to those seeking judicial review of CAT orders too.

Were there any doubt, it would be dispelled by Section 1252(b)(9), which requires that "[j]udicial 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." This Court has explained that Section 1252(b)(9) is a "zipper clause" that "'consolidate[s] judicial review of immigration proceedings into one action in the court of appeals.'" *Guerrero-Lasprilla* v. *Barr*, 589 U.S. 221, 230 (2020) (citation omitted). Section 1252(b)(9) therefore leaves no room for independent review of CAT orders under Section 1252(a)(4).

CONCLUSION

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

Respectfully submitted.

ELIZABETH B. PRELOGAR
Solicitor General
BRIAN M. BOYNTON
Principal Deputy Assistant Attorney General
JOHN W. BLAKELEY
MELISSA L. NEIMAN-KELTING
DAWN S. CONRAD
Attorneys

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