No.

IN THE

Supreme Court of the United States

PIERRE RILEY,

Petitioner,

v.

MERRICK GARLAND, U.S. 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

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QUESTIONS PRESENTED

Petitioner Pierre Riley, ineligible for cancellation of removal or discretionary relief from removal, sought deferral in withholding-only proceedings, pursuant to the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment. After the Board of Immigration Appeals issued a decision reversing an immigration judge's grant of relief, Riley promptly petitioned for review by the U.S. Court of Appeals for the Fourth Circuit. Although both parties urged the court to decide the merits of the case, the Fourth Circuit dismissed Riley's petition for lack of jurisdiction pursuant to 8 U.S.C. 1252(b)(1), which states "[t]he petition for review must be filed not later than 30 days after the date of the final order of removal."

This holding implicates two circuit splits, each of which independently warrants review.

1. Whether 8 U.S.C. 1252(b)(1)'s 30-day deadline is jurisdictional, or merely a mandatory claims-processing rule that can be waived or forfeited.

2. Whether a person can obtain review of the BIA's decision in a withholding-only proceeding by filing a petition within 30 days of that BIA decision?

RELATED PROCEEDINGS

This petition arises from *Riley* v. *Garland*, No. 22-1609 (4th Cir. Apr. 26, 2024). There are no directly related cases pursuant to Rule 14.1(b)(iii).

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PETITION FOR A WRIT OF CERTIORARI

Petitioner Pierre Yassue Nashun Riley respectfully petitions for a writ of certiorari to review the judgment of the U.S. Court of Appeals for the Fourth Circuit.

OPINIONS AND ORDERS BELOW

The Fourth Circuit's opinion is unreported, but is available at 2024 WL 1826979 and reproduced at App., *infra*, 1a-6a. The decisions of the Board of Immigration Appeals (App., *infra,* 7a-14a) and the immigration judge (App., *infra,* 15a-27a) are unreported.

JURISDICTION

The Fourth Circuit entered judgment on April 26, 2024. This Court has jurisdiction under 28 U.S.C. 1254(1).

STATUTORY, TREATY, AND REGULATORY PROVISIONS INVOLVED

8 U.S.C. 1252(a)(4) states in relevant part:

> 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.

8 U.S.C. 1252(b)(9) states:

> Judicial review of all questions of law and fact, including interpretation and application of constitutional and statutory provisions, arising from any action taken or proceeding brought to remove an alien from the United States under this subchapter shall be available only in judicial review of a final order under this section.

8 U.S.C. 1252(d)(1) states:

> A court may review a final order of removal only if * * * the alien has exhausted all administrative remedies available to the alien as of right.

8 U.S.C. 1228(b) states:

> (1) The Attorney General may, in the case of an alien described in paragraph (2), determine the deportability of such alien under section 1227(a)(2)(A)(iii) of this title (relating to conviction of an aggravated felony) and issue an order of removal pursuant to the procedures set forth in this subsection or section 1229a of this title.
>
> (2) An alien is described in this paragraph if the alien—
>
> (A) was not lawfully admitted for permanent residence at the time at which proceedings under this section commenced; or

(B) had permanent resident status on a conditional basis (as described in section 1186a of this title) at the time that proceedings under this section commenced.

(3) The Attorney General may not execute any order described in paragraph (1) until 14 calendar days have passed from the date that such order was issued, unless waived by the alien, in order that the alien has an opportunity to apply for judicial review under section 1252 of this title.

(4) Proceedings before the Attorney General under this subsection shall be in accordance with such regulations as the Attorney General shall prescribe. The Attorney General shall provide that—

(A) the alien is given reasonable notice of the charges and of the opportunity described in subparagraph (C);

(B) the alien shall have the privilege of being represented (at no expense to the government) by such counsel, authorized to practice in such proceedings, as the alien shall choose;

(C) the alien has a reasonable opportunity to inspect the evidence and rebut the charges;

(D) a determination is made for the record that the individual upon whom the notice for the proceeding under this section is served (either in person or by mail) is, in fact, the alien named in such notice;

(E) a record is maintained for judicial review; and

(F) the final order of removal is not adjudicated by the same person who issues the charges.

(5) No alien described in this section shall be eligible for any relief from removal that the Attorney General may grant in the Attorney General's discretion.

U.N. Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment art. 3, Dec. 10, 1984, 1465 U.N.T.S. 114, 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.

8 C.F.R. 1208(e)(1) establishes, in relevant part, that:

> Pursuant to the provisions of section 2242(d) of the Foreign Affairs Reform and Restructuring Act of 1998, there shall be no judicial appeal or review of any action, decision, or claim raised under the Convention [Against Torture] or that section, except as part of the review of a final order of removal pursuant to section 242 of the [Immigration and Nationality] Act.

STATEMENT OF THE CASE

The precedents of the Fourth Circuit prevent broad classes of noncitizens from seeking judicial review of claims under the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or

Punishment ("CAT"). This outcome results from two persistent misinterpretations regarding jurisdiction and timing for petitions from the Board of Immigration Appeals ("BIA") that are contrary to Congress's express intentions. Each of these misunderstandings is the basis of an entrenched circuit split, independently warranting this Court's review.

First, 8 U.S.C. 1252(b)(1) requires a petition to be filed within 30 days of the "final order of removal." The Fourth Circuit holds timely filing to be a jurisdictional prerequisite. That holding deviates from the precedents of at least two other circuits. It is also contrary to this Court's teachings over the past two decades, which have repeatedly admonished that deadlines are ordinarily not jurisdictional.

Second, the Fourth Circuit holds that a BIA decision solely addressing CAT claims, with removability resolved at an earlier stage in the immigration proceeding, cannot constitute a "final order of removal" for purposes of Section 1252(b)(1). That holding precludes judicial review of CAT claims for any noncitizen who lacks a colorable claim to non-removability, because the statute simultaneously bars judicial review until the administrative process is complete (*i.e.* a BIA decision). 8 U.S.C. 1252(d)(1). The Fourth Circuit's doctrine is contrary to the precedents of at least five other circuits, which hold the removal order does not become "final" until completion of the administrative proceedings including resolution of claims under the CAT. The Fourth Circuit is joined only by the Second Circuit, whose decision in *Bhaktibhai-Patel* v. *Garland*, 32 F.4th 180 (2d Cir. 2022), laid the groundwork. This position is mistaken as a matter of plain text, because the statute says explicitly that an order

of removal does not become "final" until the conclusion of BIA processes. 8 U.S.C. 1101(47)(B).

Mr. Riley is a Jamaican native who has lived in New York City for nearly 30 years. If he returns to Jamaica, he faces a significant likelihood of being killed by an influential local figure who has murdered several members of Riley's family and operates under the government's aegis. Riley had no colorable claim to cancellation of removal, because of a past criminal conviction. But an immigration judge found Riley and his documentary evidence credible and ruled his removal should be deferred under the CAT. Then the BIA, upon the government's appeal, reversed that decision.

The government urged the Fourth Circuit to hear the merits of the case. The government has previously regarded the BIA's decision as marking the final order of removal, but the government said the *Bhaktibhai-Patel* decision obligated it to present the countervailing possibility. The government also explained (as did Riley) that the 30-day time limit should not be regarded as jurisdictional. The Fourth Circuit resisted the parties' entreaties, and concluded that Riley's final order of removal was the document issued at the *beginning* of his case, not at the end. Although Riley filed his case within 30 days after the BIA decision, that was 16 months after the initial document. The Fourth Circuit found that 16-month gap deprived it of jurisdiction.

This case is a compelling vehicle for addressing both questions. The merits of Riley's case are strong, so much so that the Fourth Circuit granted a rare stay of his removal at the outset of the case. A different outcome on either question would have allowed the

panel to reach those merits. In the Fifth Circuit, which differs on both questions presented, a noncitizen in comparable circumstances received judicial relief; there is ample reason to expect Riley would as well, but for the Fourth Circuit's errors. In particular, once the 30-day deadline is recognized as nonjurisdictional, the Fourth Circuit can and should accept the government's effort to waive the deadline.

The Fourth Circuit is wrong on both points, and both are the basis of a substantial circuit split. The divide requires this Court's resolution. Multiple judges have recognized the timeline should not be jurisdictional but have said they feel bound by *Stone* v. *INS*, 514 U.S. 386 (1995), a precedent under the pre-1996 statute, until this Court holds otherwise. Multiple courts have recognized the intractable split about what constitutes a final order of removal. These problems recur frequently in the mass of immigration adjudications, and the issue is extraordinarily grave. Even when the United States declines under domestic policies to allow a noncitizen to stay, the CAT protects the person from torture and death at the hands of the person's original government. The people who most need that protection are exactly those whom the Fourth Circuit excludes from judicial review.

I. STATUTORY AND REGULATORY BACKGROUND

Under the Convention Against Torture, no country "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." CAT art. 3, Dec. 10, 1984, 1465 U.N.T.S. 114. Congress implemented the CAT

in the Foreign Affairs Reform and Restructuring Act of 1998 ("FARRA"). Pub. L. No. 105-277, § 2242, 112 Stat. 2681-822 (1998). The government has "no discretion to deny relief to a noncitizen who establishes his eligibility," and "[a] conviction of an aggravated felony has no effect on CAT eligibility." *Moncrieffe* v. *Holder*, 569 U.S. 184, 187 n.1 (2013).

Congress instructed the Department of Justice ("DOJ") to issue regulations for processing CAT claims. FARRA §2242(b). Those regulations say an otherwise removable noncitizen must not be removed to a country where it is "more likely than not that he [] would be tortured." 8 C.F.R. 1208.16(c)(2)-(3). "Torture" is defined as "any act by which severe pain or suffering, whether physical or mental, is intentionally inflicted ... by or at the instigation of or with the acquiescence of a public official." *Id.* §1208.18(a)(1).

In general, the proceedings to remove a noncitizen from the country commence with a charging document from the Department of Homeland Security ("DHS"), 8 C.F.R. 1003.14. The case goes before an immigration judge ("IJ"), who conducts an evidentiary hearing, finds facts, and renders a conclusion about the noncitizen's removability. *Id.* §§1240.10, 1240.12. That decision includes not only an assessment whether the noncitizen presents a valid defense to removal, but also claims for other forms of relief, such as withholding of removal or protection under CAT. *See id.* §1240.12(c).

Two main categories of noncitizen are barred from various forms of relief through this process. One category is noncitizens who have responded to a removal order by leaving the country. Upon reentry, the re-

moval order is reinstated, and "[is] not subject to reopening or review." *Johnson* v. *Guzman Chavez*, 594 U.S. 523, 534 (2021) (quoting 8 U.S.C. 1231(a)(5)). Another category is noncitizens who have been convicted of "aggravated felonies"; these individuals are generally ineligible for discretionary relief such as cancellation of removal. *Moncrieffe*, 569 U.S. at 187.[1] For these individuals, DHS initiates a proceeding under 8 U.S.C. 1228(b). That proceeding includes a notice of intent and then, if the person's status under Section 1228(b) is established, a "Final Administrative Removal Order." 8 C.F.R. 1238.1(b), (d).

For both categories, DOJ regulations establish procedures for handling their CAT claims. 8 C.F.R. 1208.31. That process commences, for the second category (which includes Riley), "[u]pon issuance of a Final Administrative Removal Order." *Id.* §1208.31(a). If the noncitizen has expressed fear of returning to the country of removal, an officer conducts a reasonable-fear interview. *Id.* §1208.31(c)-(d). If the officer finds reasonable fear of torture, the matter is referred to an IJ for withholding-only adjudication. *Id.* §1208.31(e). The IJ then holds an evidentiary hearing on the substance of the CAT claim. If the IJ finds the claim meritorious, the protection granted may be withholding of removal or, for some individuals excluded from that relief,[2] deferral of removal. *Id.* §§1208.16(d), 1208.17.

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[1] "Aggravated felony" is defined to include many kinds of offenses, including any felony under the Controlled Substances Act. 569 U.S. at 188.

[2] The exclusions from withholding of removal overlap with, but differ from, the bars against discretionary removal discussed above. 8 C.F.R. 1208.16(d)(2), (3).

Either the United States or the noncitizen may appeal the IJ's decision to the BIA. *Id.* §1208.31(g)(2)(ii). The BIA is a body of administrative judges with nationwide jurisdiction over immigration appeals. *Id.* §1003.1. The BIA can, on such an appeal, only review the IJ's decision regarding the noncitizen's "eligibility for withholding or deferral of removal under 8 C.F.R. 1208.16," the provision that encompasses CAT claims (and claims to asylum). *Id.* §1208.31(g)(2)(ii).

The individual can petition for circuit-court review of an adverse BIA decision. 8 U.S.C. 1252(a)(1). "[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 [CAT]." *Id.* §1252(a)(4). Similarly, FARRA allows review of a CAT claim only "as part of the review of a final order of removal pursuant to" 8 U.S.C. 1252. FARRA §2242(d). The "petition for review must be filed not later than 30 days after the date of the final order of removal." 8 U.S.C. 1252(b)(1).

Section 1252(a)(2)(C) declares that "[n]otwithstanding any other provision of law, ... no court shall have jurisdiction to review any final order of removal against an alien who is removable" on account of certain criminal convictions, including aggravated felonies. In *Nasrallah* v. *Barr*, the Court held this provision does not restrict review of CAT claims for such persons, because the BIA's decision on a CAT claim "is not itself a final order of removal." 590 U.S. 573, 590 (2020). Yet the statute also defines an "order of deportation" not to be "final" until the BIA has affirmed the order (or time for seeking BIA review has elapsed).

8 U.S.C. 1101(47)(B). Thus, the previous orders in the course of the administrative process would not be "final orders of removal."

II. FACTUAL BACKGROUND

Riley is from Jamaica. R. 271-273 (No. 22-1609, ECF 24-1). He entered the United States in 1995 on a tourist visa, R. 137, and has lived in this country since then. He has seven children, all U.S. citizens. R. 271-273. In 2011, Riley was convicted of an earlier conspiracy to distribute marijuana (and of a related firearms charge). R. 623. While in prison, Riley enrolled in a variety of courses, completed his GED, graduated *summa cum laude* with an associate degree, and tutored dozens of fellow inmates. R. 274; R. 372; R. 380. In January 2021, the district court granted him compassionate release because his diabetes put him at substantial risk from COVID-19 and because the court found the time he had served was sufficient punishment. R. 363-366.

Immigration and Customs Enforcement immediately took Riley into custody for removal proceedings. On January 27, 2021, DHS served Riley a notice of intent to issue a removal order. R. 827-R. 828. One day later, DHS issued a document titled "Final Administrative Removal Order" ("FARO") finding that Riley had been convicted of an aggravated felony and must be deported to Jamaica. R. 825.

In a subsequent reasonable-fear interview, Riley explained that a particular drug kingpin, associated with the Jamaican government, already ordered the murder of several of Riley's relatives, and threatened to kill Riley upon his return. R. 645-660.

III. PROCEEDINGS BELOW

Riley then filed a formal request for CAT relief. At an evidentiary hearing before an IJ, Riley testified, and presented a range of documentary evidence alongside his testimony, as well as affidavits from relatives. The kingpin is a former police officer with strong connections with the Jamaican government and influence over the police. R. 144-145. After he ordered the killing of two of Riley's cousins, the Jamaican police did not investigate those murders. R. 145. The kingpin has threatened to kill all male members of the family, *id.*, and men have approached family members still in Jamaica to threaten Riley's murder when he arrives. R. 146-147.

The IJ, finding Riley credible, determined that if Riley is sent to Jamaica, more likely than not the kingpin will have him killed, with the acquiescence of that country's government. R. 134-135. Riley is not eligible for withholding of removal, due to his prior conspiracy conviction, but the IJ ordered his removal deferred pursuant to the CAT. R. 135.

DHS appealed the IJ's decision to the BIA. R. 081-083. The BIA judge purported to accept the IJ's positive determination of Riley's credibility, but proceeded to reverse the finding that Riley will more likely than not be killed in Jamaica. The BIA said it found no "corroborating evidence" proving the past murders of Riley's relatives, and it held that Riley must prove those past murders are also more likely than not, as well as the predicted future killing. R. 004-005. The BIA criticized the IJ for demanding corroborating evidence for only parts of Riley's testimony. *Id.*

Riley promptly petitioned the Fourth Circuit for review of the BIA's decision. The Fourth Circuit granted a stay of Riley's removal pending the disposition of his petition.

Meanwhile, the Second Circuit decided *Bhaktibhai-Patel*, which held that a CAT-only decision by the BIA about a noncitizen with a reinstated removal order is not a "final order of removal," so that a petition from that BIA decision is not within 30 days of a "final order." 32 F.4th at 190-191. The government's answer brief in Riley's case acknowledged that "[h]istorically, the Attorney General has taken the position, and the courts of appeals have agreed, that finality for purposes of judicial review is obtained only after the completion of all proceedings connected to a reinstatement order, including the final disposition of any reasonable-fear or withholding-only proceedings." Gov't C.A. Br. 22 (No. 22-1609, ECF 33-1). But in light of *Bhaktibhai-Patel*, the government said it felt obligated to question that approach. The government urged the court to review the merits of Riley's case while establishing a jurisdictional rule for future cases. *Id*. at 28.

In May 2023, this Court decided, in *Santos-Zacaria* v. *Garland*, that Section 1252(d)(1), allowing review only to a noncitizen who has exhausted administrative remedies, is not a jurisdictional limitation. 598 U.S. 411 (2023). Riley then asked the Fourth Circuit to conclude that the 30-day deadline (the time for filing after a final order of removal) is also not jurisdictional. The government agreed with that suggestion and urged the court again to decide the merits. Riley C.A. 28(j) Ltr. (July 12, 2023).

In the meantime, the Fourth Circuit decided *Santos-Zacaria* does not affect the Fourth Circuit's precedents about the 30-day deadline. The doctrine that the deadline is jurisdictional remains mandated by *Stone*, the court concluded, and the court held that *Santos-Zacaria* had not overruled *Stone*. *Salgado* v. *Garland*, 69 F.4th 179, 181 & n.1 (4th Cir. 2023).

In November 2023, the Fourth Circuit decided to follow *Bhaktibhai-Patel*, and held that an "an order denying CAT relief is not a final order of removal for purposes of [8 U.S.C.] § 1252(a)(1)," so that the court lacked jurisdiction to review a CAT order issued after withholding-only proceedings. *Martinez* v. *Garland*, 86 F.4th 561, 567 (4th Cir. 2023). The *Martinez* petitioner promptly sought rehearing, and the Fourth Circuit held Riley's case in abeyance pending the decision on that rehearing request.

After the court denied rehearing in *Martinez*, it proceeded to dismiss Riley's petition, in reliance on *Martinez*. App., *infra*, 1a-6a.

REASONS FOR GRANTING THE PETITION

The Court should grant certiorari to resolve two splits that have divided the circuits on issues fundamental to review of immigration matters, which make up a significant portion of circuit-court dockets. First, the Court should make clear that the Section 1252(b)(1) deadline is not a jurisdictional limitation. That conclusion follows from two decades of the Court's reiterated teaching about what is truly *jurisdictional*. But some circuit courts still feel themselves bound by *Stone*, and need this Court to issue a correc-

tion. Second, what constitutes the final order of removal, in a withholding-only proceeding, has generated deep confusion in the lower courts. That the same case might lead to reversal in one circuit and dismissal in another is intolerable.

I. THERE IS AN ACKNOWLEDGED AND DEEP SPLIT ON THE QUESTIONS PRESENTED.

The circuits are profoundly divided on the questions presented here.

A. The circuits disagree whether Section 1252(b)(1)'s deadline is jurisdictional.

The Court has never directly addressed whether Section 1252(b)(1)'s 30-day deadline is a jurisdictional rule. There is now a well-defined circuit split on this issue, demanding the Court's further clarification.

Stone arose under the predecessor provisions (before a 1996 overhaul of the immigration statute). The Court addressed whether a reconsideration motion at the agency would toll or restart the time for judicial review. 514 U.S. at 405-06. In concluding there is no such pause for reconsideration, the Court stated that "statutory provisions specifying the timing of review ... are, as we have often stated, 'mandatory and jurisdictional.'" *Id.* at 405.

Stone did not address whether the deadline at issue could be waived by the government, as a truly jurisdictional prerequisite cannot be. *Arbaugh* v. *Y&H Corp.*, 546 U.S. 500, 514 (2006). Nor did *Stone* decide whether Section 1252(b)(1)'s deadline, at issue here, is jurisdictional; Section 1252(b)(1) was not enacted

until a year later. Pub. L. No. 104-208, §306(a)(2), (b), 110 Stat. 3009-607, 3009-607.

Nevertheless, circuit courts across the country then applied *Stone* to conclude Section 1252(b)(1) also states a "mandatory and jurisdictional" limitation. *Magtanong* v. *Gonzales*, 494 F.3d 1190, 1191 (9th Cir. 2007). See *Zhang* v. *INS*, 348 F.3d 289, 292 (1st Cir. 2003); *Malvoisin* v. *INS*, 268 F.3d 74, 76 (2d Cir. 2001); *Tshibonge* v. *Ashcroft*, 81 F. App'x 785, 786 (4th Cir. 2003); *Navarro-Miranda* v. *Ashcroft*, 330 F.3d 672, 676 (5th Cir. 2003); *Prekaj* v. *INS*, 384 F.3d 265, 267 (6th Cir. 2004); *Sankarapillai* v. *Ashcroft*, 330 F.3d 1004, 1006 (7th Cir. 2003); *Skurtu* v. *Mukasey*, 552 F.3d 651, 658 (8th Cir. 2008); *Nahatchevska* v. *Ashcroft*, 317 F.3d 1226, 1227 (10th Cir. 2003); *Dakane* v. *U.S. Att'y Gen.*, 371 F.3d 771, 774 n.3 (11th Cir. 2004).

Since then, the Court has concluded that courts have overused the concept of "jurisdiction." In *Arbaugh*, the Court observed that "recent decisions ... have clarified that time prescriptions, however emphatic, 'are not properly typed 'jurisdictional.'" 546 U.S. at 510. In *Henderson ex rel. Henderson* v. *Shinseki*, the Court declined to rely on *Stone* as authority that deadlines are usually jurisdictional. To the contrary, the Court explained, "[f]iling deadlines, ... are quintessential claim-processing rules" that are not jurisdictional. 562 U.S. 428, 435 (2011). Then *Santos-Zacaria* stated explicitly that "we treat a rule as jurisdictional only if Congress clearly states that it is." 598 U.S. at 416. The Court observed that *Stone* is inconsistent with the last two decades of precedent "that 'bring some discipline to the use of th[e] term jurisdictional.'" *Id.* at 421.

In the wake of *Santos-Zacaria*, five circuits have revisited their precedents holding Section 1252(b)(1) is jurisdictional. The **Ninth Circuit** and the **Fifth Circuit** have both now held that it is not, and that *Santos-Zacaria* abrogated their previous precedents. *Alonso-Juarez* v. *Garland*, 80 F.4th 1039, 1056 (9th Cir. 2023); *Argueta-Hernandez* v. *Garland*, 87 F.4th 698, 705 (5th Cir. 2023). These circuits found the Section 1252(b)(1) 30-day deadline "suffers from the same flaw" as the Court identified in *Santos-Zacaria*. *Alonso-Juarez*, 80 F.4th at 1047; *Argueta-Hernandez*, 87 F.4th at 705. Section 1252(b)(1)'s deadline is in the same statute as Section 1252(d)(1), the provision that *Santos-Zacaria* deemed non-jurisdictional, and similarly lacks language making it plainly jurisdictional. *Id.* Accordingly, "although we previously relied on *Stone* 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*." *Alonso-Juarez*, 80 F.4th at 1047.

In contrast, the **Seventh Circuit** adheres to its prior precedents that Section 1252(b)(1)'s filing deadline is jurisdictional. *F.J.A.P.* v. *Garland*, 94 F.4th 620, 626 (7th Cir. 2024). The Seventh Circuit was "aware that ... *Santos-Zacaria* v. *Garland* called the jurisdictionality of § 1252(b)(1) into question, but it did not directly overrule *Stone*." *Id.* "[U]ntil *Stone* is overturned by the Court itself," the Seventh Circuit holds, "we must continue to apply it." *Id.* (citations omitted).[3] The **Eleventh Circuit** reached a similar

[3] As discussed below, *F.J.A.P.* ultimately accepted jurisdiction over its petitioner's case, because the Seventh Circuit joined the majority view about what constitutes a final order of removal in a withholding-only case.

conclusion in an unpublished decision. *Allen* v. *Att'y Gen.*, No. 23-13044, 2024 WL 164403, at *2 (11th Cir. Jan. 16, 2024) ("[W]e are obligated to follow [our prior precedent] because *Santos-Zacaria* is not clearly on point….").

The **Fourth Circuit**, similarly, believes *Stone* still controls this issue. *Salgado* enforced the 30-day deadline as a jurisdictional limitation. "Because the holding in *Santos-Zacaria* is limited to §1252(d)(1) and the Supreme Court has not overruled *Stone*, we are bound to apply *Stone* unless and until the Supreme Court provides to the contrary." 69 F.4th at 181 n.1. *Martinez*, too, enforced the 30-day deadline as a jurisdictional bar, on the basis of *Stone*. 86 F.4th at 572. The court refused to entertain supplemental briefing on the consequences of *Santos-Zacaria*, because *Salgado* had already established that *Stone* remains binding. *Id.* at 566 n.3. Judge Floyd, concurring in the judgment, noted that *Santos-Zacaria* "cast[s] doubt on our characterization of the deadline as 'jurisdictional'" and "strongly suggests" the 30-day deadline is a claims-processing rule. *Id.* at 574. But he "recogniz[ed] this panel is bound by this Court's previous treatment of §1252(b)(1) as jurisdictional." *Id.*

Thus, there is now an established split on whether Section 1252(b)(1) states a jurisdictional limitation. Two circuits, the **Fifth** and the **Ninth**, hold that it does not. Four circuits have, since *Santos-Zacaria*, continued to apply their prior precedents treating Section 1252(b)(1) as jurisdictional, but without assessing the impact of *Santos-Zacaria*. See *Valderamos-Madrid* v. *Garland*, No. 21-6221, 2023 WL 5423960, at *1 (2d Cir. 2023); *Duenas* v. *Att'y Gen.*, No. 22-3024, 2023

WL 6442601, at *2 (3d Cir. 2023); *Kolov* v. *Garland*, 78 F.4th 911, 917 n.4 (6th Cir. 2023); *Arostegui-Maldonado* v. *Garland*, 75 F.4th 1132, 1140 (10th Cir. 2023). Three circuits, the **Fourth**, the **Seventh**, and the **Eleventh**, have explicitly concluded that Section 1252(b)(1) remains jurisdictional notwithstanding *Santos-Zacaria*.

This split will not disappear without the Court's intervention. In *F.J.A.P.* and *Martinez*, the government itself asked the courts to correct their precedent, but they refused. In this case, the government explicitly asked the lower court to conclude the 30-day deadline is non-jurisdictional, but to no avail. At least seven judges—the panels in *F.J.A.P.* and *Salgado*, and Judge Floyd in *Martinez*—have said they need the Court to overrule *Stone* before they can cease miscategorizing Section 1252(b)(1). In these courts where precedent dictates clearly that *Stone*, from this Court, is binding on this issue and has not been overruled, no *en banc* rehearing is likely to reconsider that conclusion. Indeed, the Fourth Circuit denied rehearing in *Martinez*. Order, *Martinez* v. *Garland*, No. 22-1221 (4th Cir. Mar. 1, 2024).

B. The circuits disagree about when Section 1252(b)(1)'s 30-day deadline begins in withholding-only cases.

Until recently, every circuit agreed that Section 1252(b)(1)'s 30-day deadline ran from the conclusion of agency withholding-only proceedings. See *Garcia* v. *Sessions*, 856 F.3d 27, 35 (1st Cir. 2017); *Garcia-Villeda* v. *Mukasey*, 531 F.3d 141, 144 (2d Cir. 2008); *Bonilla* v. *Sessions*, 891 F.3d 87, 90 n.4 (3d Cir. 2018);

Tomas-Ramos v. *Garland*, 24 F.4th 973, 980 n.3 (4th Cir. 2022); *Luna-Garcia de Garcia* v. *Barr*, 921 F.3d 559, 565 & n.4 (5th Cir. 2019); *Martinez* v. *Larose*, 968 F.3d 555, 563 (6th Cir. 2020); *Garcia-Arce* v. *Barr*, 946 F.3d 371 (7th Cir. 2019) *Lara-Nieto* v. *Barr*, 945 F.3d 1054, 1058 (8th Cir. 2019); *Ortiz-Alfaro* v. *Holder*, 694 F.3d 955, 958 (9th Cir. 2012); *Luna-Garcia* v. *Holder*, 777 F.3d 1182, 1186 (10th Cir. 2015); *Jimenez-Morales* v. *Att'y Gen.*, 821 F.3d 1307, 1308 (11th Cir. 2016). That was also the government's view. Gov't C.A. Br. 22.

But *Nasrallah* and *Guzman Chavez* have caused two circuits to conclude their prior precedents are overruled, generating another split openly acknowledged among seven circuits.

Nasrallah examined whether Section 1252(a)(2)(C)'s bar "precluding judicial review of factual challenges to final orders of removal" also "preclude[s] factual challenges to CAT orders" during withholding-only proceedings. 590 U.S. at 581. The Court concluded it does not, because a CAT decision is not itself a final order of removal. *Id.* at 582-583. The Court noted that Congress did not explicitly foreclose judicial review of CAT orders, and the Court said it would not interpret the statute to do so implicitly. *Id.* at 583.

In *Guzman Chavez*, the Court decided the government can detain noncitizens who were ordered removed from the United States, later reentered the county without authorization, and sought withholding-only relief to prevent the government from executing those orders based on fears of returning to their home country. 594 U.S. at 526. The statute requires

such detention when a removal is "administratively final." 8 U.S.C. 1231. The Court concluded that a reinstated removal order is "administratively final" even though withholding-only proceedings are pending. *Id.* at 545-546.

Though *Nasrallah* said its analysis should not "affect the authority of the courts of appeals to review CAT orders," 590 U.S. at 585, and *Guzman Chavez* said the Court was not expounding the meaning of "final[ity]" under Section 1252, 594 U.S. at 535 n.6, two circuits have held that these decisions do in fact change what counts as a "final order of removal" starting the 30-day clock.

The **Second Circuit** and the **Fourth Circuit** hold that the BIA's decision in a withholding-only case is not a "final order of removal"; that "final order" came at some past point, such as the FARO in Riley's case or the reinstatement order in *Martinez* and *Bhaktibhai-Patel*. *Bhaktibhai-Patel* reasoned that "[d]ecisions made during withholding-only proceedings cannot qualify as orders of removal," per *Nasrallah*, and therefore withholding-only orders are not final orders of removal for Section 1252(b)(1) purposes. 32 F.4th at 190-91. According to the Second Circuit, "a reinstatement decision becomes final once the agency's review process is complete," at which time the 30-day filing window begins to run, and the court does not have jurisdiction under Section 1252(b)(1) to review a final CAT decision if a petitioner waits until completion of withholding-only proceedings to appeal. *Id.* at 192-93.

Martinez followed that lead to conclude that, after *Nasrallah*, withholding-only proceedings do not lead to a final order of removal. The final order of removal

must have been issued some time previously, at the outset of the withholding-only proceedings. 86 F.4th at 567. The proceedings below applied the same reasoning to Riley's withholding-only case arising from a FARO. App., *infra*, 4a ("[A]n order denying CAT relief is not a final order of removal for purposes of § 1252(a)(1)."). The court "discern[ed] no reason" to "differentiat[e] between those two types of orders"—a reinstatement order or a FARO—"when applying the jurisdictional principles delineated in *Martinez*." App., *infra*, 5a. The court identified the FARO, which as explained above is the *beginning* of the withholding-only process, as the final order of removal in Riley's case. App., *infra*, 4a.

Because withholding-only proceedings inevitably take more than 30 days, a petition filed after the BIA's decision in those proceedings will necessarily be later than 30 days after the initial order that the Second and the Fourth Circuits deem the "final order of removal." Thus, such petitions will always fail the Section 1252(b)(1) deadline, and—under precedents in both circuits—be dismissed for lack of jurisdiction.

The Fourth Circuit and the Second Circuit are in the minority on this issue. Five other circuits—the **Fifth**, **Sixth**, **Seventh**, **Ninth**, and **Tenth Circuits**—have all held that an order of removal does not become "final," thus triggering the 30-day deadline, until the conclusion of the proceedings regarding CAT relief. *F.J.A.P.*, 94 F.4th at 638; *Alonso-Juarez*, 80 F.4th at 1056; *Argueta-Hernandez*, 87 F.4th at 705-06; *Kolov*, 78 F.4th at 919; *Arostegui-Maldonado*, 75 F.4th at 1143.

The **Seventh Circuit**, in an opinion by Judge St. Eve, specifically rejected the reasoning in *Martinez*

and *Bhaktibhai-Patel* and surveyed the decisions of the Fifth, Sixth, Ninth, and Tenth Circuits. *F.J.A.P.*, 94 F.4th at 629-30. In viewing what it characterized as a "circuit split," the Seventh Circuit analyzed *Nasrallah* and *Guzman Chavez* and concluded that neither decision determined the meaning of finality under Section 1252(b)(1). *Id.* at 631-33.

Accordingly, the Seventh Circuit engaged in a detailed analysis of the statutory text, after which it concluded that "[o]nly when withholding proceedings are complete have 'the rights, obligations, and legal consequences of the reinstated removal order' been fully established." *Id.* at 633-35 (citation omitted). The court further emphasized that this "plain meaning of the statute comports with the principle of statutory construction that presumes congressional intent in favor of judicial review," and that "Congress ... explicitly provided for judicial review of CAT orders." *Id.* at 635. "An interpretation that forecloses review of CAT orders cannot stand; it directly contradicts the presumption of review, a presumption supported by the language of the [Immigration and Nationality Act]." *Id.*

"Based on the statutory language, structure, and context of § 1252," the Seventh Circuit held that it had jurisdiction to hear the petition and proceed to the merits because petitioner filed his petition within 30 days of the completion of his CAT proceedings. *Id.* at 637-38. "Only when those [CAT] proceedings conclude, if the noncitizen is eligible for that review, has the agency finalized all mandatory review and 'fully determined' the noncitizen's fate." *Id.*

The **Sixth Circuit**, in an opinion by Judge Gibbons, also rejected the Second Circuit's conclusion in *Bhaktibhai-Patel* that *Nasrallah* and *Guzman Chavez*

preclude review of the BIA's denial of withholding-only relief. *Kolov*, 78 F.4th at 918. The court emphasized that its prior precedent was fully in line with *Nasrallah* and *Guzman Chavez*. *Id.* at 918-19. The Sixth Circuit had, even before *Guzman Chavez*, "rejected the argument that the phrase 'administratively final'"—the text that *Guzman Chavez* interpreted—"meant the same thing as the phrase 'final order of removal' (the phrase in § 1252(a)(1) that concerns judicial review)." *Id.* at 919 (citation omitted). The court therefore adhered to its prior precedent holding that "an order about withholding of removal functions as a reviewable final order because such relief could foreclose an avenue of deportation if granted," and concluded that "[t]hese holdings are not clearly inconsistent with *Nasrallah* and [*Guzman Chavez*] and therefore remain binding." *Id.* (citation omitted). In a concurrence, Judge Murphy explained various complications arising from *Nasrallah* and *Guzman Chavez*. He agreed "we should continue to follow our current approach," but called for "the Supreme Court to decide" the real consequences of its recent decisions. *Id.* at 929 (Murphy, J., concurring).

In the **Fifth Circuit**, a panel that had originally chosen to follow *Bhaktibhai-Patel* subsequently reheard the matter and reversed its own decision, coming into line with the majority of circuits noted above. *Argueta-Hernandez* v. *Garland*, 73 F.4th 300 (5th Cir. 2023) (dismissing petition for lack of jurisdiction), *withdrawn and superseded*, 87 F.4th 698 (5th Cir. 2023). The court then accepted its jurisdiction over a petition filed within 30 days after the BIA's decision in a withholding-only case, and the court reversed the BIA's decision. 87 F.4th at 714.

The **Ninth** and **Tenth Circuits** share this view about finality in withholding-only proceedings. *Alonso-Juarez*, 80 F.4th at 1056 (holding that the Section 1252(b)(1) 30-day deadline was not triggered until the conclusion of withholding-only proceedings); *Arostegui-Maldonado*, 75 F.4th at 1143 (holding the same).

In the **Third Circuit**, dueling unpublished opinions have decided the issue both ways. Compare *Farooq* v. *Att'y Gen.*, No. 20-2950, 2023 WL 1813597 (3d Cir. Feb. 8, 2023) (concluding Section 1252(b)(i)'s filing deadline runs from the date of the removal order even though withholding-only proceedings continue), with *Duenas* v. *Att'y Gen.*, No. 22-3024, 2023 WL 6442601 (3d Cir. Oct. 3, 2023) (holding the deadline begins to run only when withholding-only proceedings are complete).

This split, too, will not disappear on its own. The question is complex and challenging—witness the facts that a Fifth Circuit panel reversed itself, two Third Circuit panels reached opposite conclusions, and the Fourth Circuit denied rehearing by a vote of eight to six—and that complexity is impeding the emergence of a consensus view. The Fourth Circuit, having considered and rejected an *en banc* rehearing in *Martinez*, is not likely to undertake that process any time soon. Meanwhile, the Seventh Circuit carefully assessed the reasoning of the Second and Fourth Circuits, and came to a different view with full awareness of the split. The Sixth Circuit reviewed the same decisions, *Nasrallah* and *Guzman Chavez*, that motivated the Second and Fourth Circuits, and it reached a contrary conclusion precisely because *Guzman Chavez* aligned with its precedents. Because courts

on both sides of the split have entrenched and contrary views, the Court's guidance is needed to bring the circuits into alignment.

II. THE QUESTIONS PRESENTED ARE IMPORTANT.

The questions presented are also of great practical importance.

The Court has repeatedly emphasized the importance of "bring[ing] some discipline to the use of th[e] term jurisdictional" when it comes to procedural rules imposed by Congress, and for good reason. *Henderson*, 562 U.S. at 435; *Santos-Zacaria*, 598 U.S. at 421. "Harsh consequences attend the jurisdictional brand." *Fort Bend County* v. *Davis*, 587 U.S. ____, 139 S. Ct. 1843, 1849, 204 L.Ed.2d 116 (2019) (alteration and internal quotation marks omitted). "[B]ecause courts are not able to exceed limits on their adjudicative authority, they cannot grant equitable exceptions to jurisdictional rules." *Santos-Zacaria*, 598 U.S. at 416. "Jurisdictional objections," by contrast, "can be raised at any time in the litigation," and "courts must enforce jurisdictional rules *sua sponte*, even in the face of a litigant's forfeiture or waiver." *Id.*

Riley's case is a striking example of such harsh consequences. The government sought to waive the Section 1252(b)(1) deadline and permit the court to reach the merits of Riley's petition. Gov't C.A. 28(j) Ltr. (Aug. 14, 2023), 1-2. The Fourth Circuit could not accept such a waiver because it considers the deadline a jurisdictional rule. App., *infra,* 4a. This sort of situation is why the Court "adopted [its] clear-statement principle in *Arbaugh* 'to leave the ball in Congress'

court,' [thereby] ensuring that courts impose harsh jurisdictional consequences only when Congress unmistakably has so instructed." *Santos-Zacaria*, 598 U.S. at 416-17.

The current uncertainty over Section 1252(b)(1) risks "unfair prejudice" to litigants. *Henderson*, 562 U.S. at 434. Litigants need to know whether the government's waiver is effective. *Arbaugh*, 546 U.S. at 514-516; *Union Pac. R.R. Co.* v. *Bhd. of Locomotive Eng'rs*, 558 U.S. 67 (2009). Conversely, litigants who wish to waive their own arguments may be prejudiced if they are unexpectedly or unnecessarily forbidden from doing so. Government agencies may often wish to waive statutory requirements for efficiency or policy reasons, as occurred in the proceedings below. See *Sebelius* v. *Auburn Reg'l Med. Ctr.*, 568 U.S. 145, 154 (2013); *Weinberger* v. *Salfi*, 422 U.S. 749, 766 (1975).

As for the second question presented—when Section 1252(b)(1)'s 30-day deadline starts in withholding-only cases—the "decision regarding *when* an order of removal becomes final will determine *what* can be reviewed." *F.J.A.P.*, 94 F.4th at 635. The Second Circuit and Fourth Circuit's interpretation of Section 1252(b)(1) bars judicial review for CAT claims from a wide range of individuals. Perversely, these are generally the very people for whom such CAT relief is likely to be most important, because they are ineligible for other forms of relief from removal. The irony is harsh: If a person cannot receive relief under domestic immigration policies, the CAT may be the only avenue available to save the person from facing torture or death in the country of origin. But that ineligibility channels the person into withholding-only proceedings, and thereby, in the Second and Fourth

Circuits, ensures the person will not be able to present that CAT claim to a court. This outcome is the opposite of *Nasrallah*'s observation, that "it makes some sense that Congress would provide an opportunity for judicial review" given that "factual issues may be critical to determining whether the noncitizen is likely to be tortured if returned." 590 U.S. at 586.

Riley will be killed if he is forced back to Jamaica, and the judicial review process is supposed to be a key part of the mechanism ensuring the United States does not cause that result. People like the *Martinez* and *Bhaktibhai-Patel* petitioners return to the United States to escape torture or death in their countries of origin, and that chain of events is precisely what blocks them from judicial review of their claims to prevent the torture.

If a petition for review of an order denying withholding or deferral of removal pursuant to the CAT must be filed within 30 days of a FARO or reinstatement order, judicial review may be foreclosed for many CAT claims. This outcome is in tension with the obligations of the United States under the CAT, an international treaty, and with Congress's evident intent. As Judge St. Eve observed in *F.J.A.P.*, "Congress did not explicitly foreclose judicial review of CAT orders," and the Court in *Nasrallah* refused to "interpret the statute to do so implicitly." 94 F.4th at 631. "In fact, *Nasrallah* very clearly grounds its intent in § 1252(a)(4) that CAT orders be subject to judicial review." *Id.* As things currently stand, noncitizens dealing with Section 1252(b)(1)'s deadline face uncertainty as to when they need to file a petition for review

with the court of appeals, and their ability to seek judicial review of a denial of CAT relief depends on the vicissitude of where the government detains them.[4]

Resolving when Section 1252(b)(1)'s 30-day deadline starts is also important to further Congress's intention to ensure an efficient and streamlined process for judicial review of CAT orders. Under the Second Circuit and Fourth Circuit's interpretation of 1252(b)(1), "[p]reserving review of CAT claims" in withholding-only cases "would require noncitizens to file premature and incomplete petitions seeking review of not-yet-complete withholding proceedings in order to meet § 1252(b)(1)'s 30-day filing deadline." *F.J.A.P.*, 94 F.4th at 636. This outcome contravenes the purpose of Section 1252(b)(9)'s "zipper clause," which is supposed to "consolidate[] [the court of appeals'] review of withholding proceedings with [its] review of final orders of removal." *Id.* at 635. Similar to other cases decided by the Court, such a "scheme requiring 'conscientious defense attorneys' to file unripe suits 'would add to the burden imposed on courts, applicants, and the States, with no clear advantage to any.'" *McDonough* v. *Smith*, 588 U.S.109, 121 (2019) (quoting *Panetti* v. *Quarterman*, 551 U.S. 930, 943 (2007)). These premature petitions would have to sit with the courts, unresolved, pending the resolution of administrative proceedings, because Congress instructed that a court "may review a final order of removal" only if the noncitizen has "exhausted all administrative remedies available as of right." 8 U.S.C.

[4] The petition for judicial review must be filed in the circuit where the IJ's hearing took place. 8 U.S.C. 1252(b)(2).

1252(d)(1)—including the BIA's decision on a claim for withholding or deferral of removal.

The current uncertainty on this issue is likely to further increase the substantial number of petitions for review filed with the courts of appeals. In the Second and Fourth Circuits, and any circuits that have not yet issued a clear opinion on this issue, CAT applicants facing removal under 8 U.S.C. 1228 or in reinstatement proceedings must file petitions for review before they finish withholding-only proceedings to try to preserve judicial review of their as-yet adjudicated CAT claims. Even those in favorable circuits may choose to file unripe petitions for review before the resolution of their CAT claims as a precautionary measure. Removing this uncertainty by deciding the questions presented will avoid adding yet more burden to an already overtaxed immigration system.

III. THIS CASE IS AN IDEAL VEHICLE TO RESOLVE THE QUESTION.

This case presents an ideal vehicle to address the questions presented.

The Fourth Circuit's two rulings regarding jurisdiction are the only obstacle preventing Riley from receiving judicial review of the merits of his CAT claim. In the proceedings below, the government argued that the "30-day deadline is mandatory but not jurisdictional," and requested that the Fourth Circuit treat "petitions for review filed following the completion of withholding-only proceedings a[s] timely and reviewable." Gov't C.A. 28(j) Ltr. (Aug. 14, 2023), 1-2. Thus, if the Court finds that Section 1252(b)(1) is a jurisdictional rule and can therefore be waived, the government has already waived Section 1252(b)(1) as a bar

and requested that the Fourth Circuit reach the merits of Riley's petition.

Riley's case is also an ideal vehicle to address the second question presented—whether a petition for review filed within 30 days of the completion of withholding-only proceedings is timely under Section 1252(b)(1). Riley's withholding-only proceedings were complete on May 31, 2022, when the BIA reversed the IJ's prior grant of CAT relief and ordered Riley removed from the United States to Jamaica. App., *infra*, 13a-14a. Riley then filed his petition for review with the Fourth Circuit on June 3, 2022, only 3 days after completion of the withholding-only proceedings. App., *infra*, 3a. His petition to the Fourth Circuit was timely under Section 1252(b)(1) if the Court determines that the 30-day deadline began to run upon the completion of withholding-only proceedings (in line with the majority of courts in the split).

Thus, resolution of either question presented in Riley's favor would provide him substantial relief.

And if Section 1252(b)(1) had not blocked Riley's petition, he presents a strong case on the merits. The IJ, the primary factfinder, found him credible and determined he was entitled to CAT relief. The Fourth Circuit necessarily recognized Riley had shown a significant likelihood of success on the merits, a showing that *Nken* v. *Holder*, 556 U.S. 418, 434 (2009), required for the Fourth Circuit to stay Riley's removal.

The questions presented recur in two primary types of cases: when a noncitizen faces a statutory bar to cancellation of removal due to a prior conviction, and when a noncitizen faces a procedural bar on contesting removability, because of a prior removal order.

The statutory barriers to contesting overall removal, in these two situations, and the initial orders of removal, are different, though the resulting withholding-only adjudication then occur under the same regulations and process. Riley's case is an ideal exemplar of the first category, and presents a ripe vehicle for the Court to address the application of Section 1252(b)(1)'s 30-day deadline for this category.

IV. THE FOURTH CIRCUIT'S DECISION WAS INCORRECT.

The Fourth Circuit was wrong to hold (i) that Section 1252(b)(1) is a jurisdictional rule, as opposed to a mandatory processing rule that can be waived; and (ii) that Section 1252(b)(1)'s 30-day deadline begins to run before the conclusion of agency withholding-only proceedings.

A. Congress did not clearly state that Section 1252(b)(1) is a jurisdictional rule.

The Fourth Circuit based its holding that Section 1252(b)(1) is a jurisdictional rule on *Stone*, 514 U.S. at 405, and prior Fourth Circuit precedent relying on *Stone*. App., *infra*, 4a; *Martinez*, 86 F.4th at 566-67. *Stone*, and the Fourth Circuit cases, did not engage in the more "disciplined" approach the Court has directed lower courts to use when assessing whether a rule is truly jurisdictional. *Santos-Zacaria*, 598 U.S. at 421 (explaining that *Stone* predated the Court's more recent jurisprudence that has "tried ... to bring some discipline to the use of the term jurisdictional") (citation omitted).

The Court has repeatedly clarified since *Stone*, and as recently as a few weeks ago, that "most time bars are nonjurisdictional," and that "this Court will 'treat a procedural requirement as jurisdictional only if Congress clearly states that it is." *Harrow* v. *Dep't of Def.*, 601 U.S. ____, 144 S. Ct. 1178 (2024) (citations omitted); see also *Santos-Zacaria*, 598 U.S. at 416 (same); *United States* v. *Wong*, 575 U.S. 402, 410 (2015) (same). The Court further stated in *Santos-Zacaria* that *Stone* is no longer dispositive as to whether judicial review provisions, like Section 1252(b)(1), are jurisdictional rules. 598 U.S. at 421.

The Ninth Circuit and Fifth Circuit are the only circuits to have engaged in a disciplined textual analysis of Section 1252(b)(1) since *Santos-Zacaria*, and both have held that the Court's analysis in *Santos-Zacaria* of Section 1252's separate exhaustion provision demonstrates that Section 1252(b)(1) is not a jurisdictional rule. *Alonso-Juarez*, 80 F.4th at 1056; *Argueta-Hernandez*, 87 F.4th at 705. *Santos-Zacaria*, observed that, unlike Section 1252(d)(1)'s exhaustion provision, Congress spoke in plain jurisdictional terms elsewhere in Section 1252. *Id.* at 418. In other provisions of Section 1252, Congress specified that "no court shall have jurisdiction" to review certain matters. *Id.* at 418-19 & n.5 (citing 8 U.S.C. 1252(a)(2)(A), (a)(2)(B), (a)(2)(C), (b)(9), (g)). Section 1252(d)(1)'s exhaustion provision contains no such jurisdictional language, and the contrast confirms that Section 1252(d)(1) is not a jurisdictional rule. *Id.* at 419.

Section 1252(b)(1)'s 30-day deadline provision "suffers from the same flaw" as Section 1252(d)(1)'s exhaustion provision. *Alonso-Juarez*, 80 F.4th at 1047; *Argueta-Hernandez*, 87 F.4th at 705. Section

1252(b)(1)'s deadline is in the same statute as the exhaustion provision that the Court considered non-jurisdictional in *Santos-Zacaria*, and it also lacks plainly jurisdictional language. *Id.* Consequently, the reasoning of *Santos-Zacaria* leads to the same conclusion about Section 1252(b)(1), namely that it is no more jurisdictional than Section 1252(d)(1).

Even the Fourth, Seventh, and Eleventh Circuits have acknowledged that "*Santos-Zacaria v. Garland* called the jurisdictionality of § 1252(b)(1) into question." *F.J.A.P.*, 94 F.4th at 626; *Martinez*, 86 F.4th at 574 (Floyd, J., concurring in the judgment) (noting that *Santos-Zacaria* "cast[s] doubt on our characterization of the deadline as 'jurisdictional'" and "strongly suggests" the 30-day deadline is a claims-processing rule); *Allen*, 2024 WL 164403, at *2 ("[T]the Supreme Court's reasoning in *Santos-Zacaria* may be at odds with our reasoning in [prior precedent]."). They treat Section 1252(b)(1) as jurisdictional not because that is the correct approach, but because they think *Stone* mandates that treatment and "until *Stone* is overturned by the Court itself, we must continue to apply it." *F.J.A.P.*, 94 F.4th at 626.

The primary rationale of *Stone* was a principle stated back then, that "statutory provisions specifying the timing of review … are, … 'mandatory and jurisdictional.'" 514 U.S. at 405. The Court has repeatedly and explicitly rejected that premise. "Courts will … not assume that in creating a mundane claims-processing rule, Congress made it 'unique in our adversarial system' by allowing parties to raise it at any time and requiring courts to consider it *sua sponte*." *Wilkins* v. *United States*, 598 U.S. 152, 158 (2023). Absent the now-discarded presumption animating

Stone, and absent any textual indications that Section 1252(b)(1) was meant to limit jurisdiction, the Fourth Circuit's categorization of the provision cannot stand.

B. Section 1252(b)(1)'s 30-day deadline does not start until the completion of withholding proceedings.

The Fourth Circuit concluded that the FARO issued to Riley was the only "final order of removal" in the case, and because the FARO was the beginning of the process, it necessarily occurred more than 30 days before the BIA decision for which Riley sought review. App., *infra*, 4a-5a.

The statute itself precludes this outcome. It bars judicial review until the noncitizen has exhausted all available administrative remedies. 8 U.S.C. 1252(d)(1). The orders issued in the case cannot be "final" if there are administrative proceedings still to be completed. Consistent with that view, the definition of "order of deportation" says such an order is not "final" until the BIA issues its decision (or the time to appeal to the BIA has elapsed). 8 U.S.C. 1101(47)(B).

The Fourth Circuit considers its conclusion mandated by *Nasrallah* and *Guzman Chavez*. But neither case interpreted the meaning of "finality" under Section 1252(b)(1). Indeed, the Court explicitly warned lower courts that it was not deciding the issue. See *Guzman Chavez*, 594 U.S. at 535 n.6; *Nasrallah*, 590 U.S. at 585 (warning courts to not read its decision as "affect[ing] the authority of the courts of appeals to review CAT orders"). While *Guzman Chavez* held that a reinstated order of removal is "administratively final" for detention purposes under 8 U.S.C. 1231, Congress's use of the word "administratively" in section

1231 distinguishes it from a "final order" for judicial review purposes in Section 1252. 594 U.S. at 534 ("By using the word 'administratively,' Congress focused our attention on the agency's review proceedings, separate and apart from any judicial review proceedings that may occur in a court.").

The statutory language, structure, and context of Section 1252 all indicate "final order" in Section 1252 has a meaning different from "administratively final" for purposes of detention under Section 1231. The "ordinary, contemporary, [and] common meaning" of "final" indicates that it is "the last stage in the process; leaving nothing to be looked for or expected." *F.J.A.P.*, 94 F.4th at 634 (citations omitted). "[A]lthough a CAT order does not determine *whether* a noncitizen can be removed, it does determine *where* that noncitizen can be sent," and "[t]he indeterminacy of *where*, while CAT proceedings are pending, suggests that the reinstated order might yet leave something 'to be looked for or expected,' subject to possible alteration." *Id.* (citations omitted). The same is true for a FARO, which, despite the word "final" in its title, actually marks the beginning, not the end, of a process to decide if the removal will be carried out as ordered. "[T]he plain meaning of 'final' points us toward the conclusion" that an order "does not become final for purposes of judicial review until the agency has also concluded withholding proceedings." *Id.*

Both Judge St. Eve and Judge Murphy have pointed out that this interpretation also tracks the ordinary understanding of "finality." Black's Law Dictionary defines final as "last; conclusive; definitive; terminated; completed;" and in reference to legal actions, "a judgment is 'final' if no further judicial action

… is required." *F.J.A.P.*, 94 F.4th at 634 (quoting Black's Law Dictionary 6th ed. 1990). "[P]erhaps we should interpret the word 'final' in the judicial-review provision against the background of the final-judgment rule—which presumes that there will be one appeal at the end of proceedings rather than many appeals in 'fits and starts' after each order." *Kolov,* 78 F.4th 911 at 928 (J. Murphy, concurring) (citation omitted). "Although the noncitizen has been determined deportable" in the case of a reinstatement order or a FARO, "the agency's work is not completed, and it may not remove the noncitizen until agency withholding review is complete." *F.J.A.P.*, 94 F.4th at 634 (citing 8 C.F.R. 1208.5(a) (explaining that a noncitizen cannot be removed "before a decision is rendered on his or her ... application")). Thus, the final decision in a noncitizen's withholding-only proceedings reflect that the agency is finished, at which time Section 1252(b)(1)'s deadline begins to run.

This reading of the statute also respects the presumption that Congress intends judicial review. *Smith* v. *Berryhill*, 587 U.S. ____, 139 S. Ct. 1765, 1776, 204 L.Ed.2d 62 (2019). This presumption applies equally to the reviewability of immigration statutes. *Guerrero-Lasprilla* v. *Barr*, 589 U.S. 221, 228-231 (2020). Congress itself also explicitly provided for judicial review of CAT orders. *Nasrallah,* 590 U.S. at 585-586 (explaining that section 2242(d) of FARRA granted jurisdiction to review CAT claims along with removal orders). Section 1252(a)(4), enacted as part of the 2005 Real ID Act, further confirmed the authority of the courts of appeals to review CAT orders. *Id.* "It would be easy enough for Congress to limit judicial review of CAT orders, just as Congress has limited ju-

dicial review of reinstated orders of removal to a narrow set of questions. But Congress has not done so." *F.J.A.P.*, 94 F.4th at 637 (citing *Nasrallah*, 590 U.S. at 583).

Santos-Zacaria further bolsters this interpretation. While *Santos-Zacaria* dealt with a different Immigration and Nationality Act provision, that the Court did not mention Section 1252(b)(1)'s filing deadline when discussing jurisdiction is suggestive. 598 U.S. at 414-417. After the government reinstated Santos-Zacaria's removal order, she filed a petition for review in the Fifth Circuit more than 30 days after the reinstatement of that order but within 30 days of the conclusion of withholding proceedings. However, when deciding *Santos-Zacaria*, the Court never raised the issue of jurisdiction as it must if there is a jurisdictional problem. While not dispositive, *Santos-Zacaria* at a minimum suggests that the majority interpretation of Section 1252(b)(1)'s 30-day deadline is correct—"[o]nly when [withholding] proceedings conclude, if the noncitizen is eligible for that review, has the agency finalized all mandatory review and 'fully determined' the noncitizen's fate" under Section 1252(b)(1). *F.J.A.P.*, 94 F.4th at 637 (citation omitted).

The Court should grant certiorari to make clear that although the portion of an order that discusses CAT relief is not in itself an "order of removal," the "order of removal" does not become "final" for purposes of Section 1252(b)(1), thus starting a 30-day deadline for review, until the conclusion of agency proceedings including the BIA's decision regarding CAT relief.

CONCLUSION

The Court should grant the petition.

Respectfully submitted.

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APPENDIX

TABLE OF APPENDICES

APPENDIX A — OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT, FILED APRIL 26, 2024

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 22-1609

PIERRE YASSUE NASHUN RILEY,

Petitioner,

v.

MERRICK B. GARLAND, ATTORNEY GENERAL,

Respondent.

On Petition for Review of an Order of the Board of Immigration Appeals.

March 27, 2024, Submitted;
April 26, 2024, Decided

Before KING, HARRIS, and QUATTLEBAUM, Circuit Judges.

Petition dismissed by unpublished per curiam opinion.

Unpublished opinions are not binding precedent in this circuit.

Appendix A

PER CURIAM:

Pierre Yassue Nashun Riley, a native and citizen of Jamaica, petitions for review of an order of the Board of Immigration Appeals ("Board") vacating the Immigration Judge's ("IJ") order granting Riley's application for deferral of removal under the Convention Against Torture ("CAT") and ordering Riley removed to Jamaica. Because we lack jurisdiction over Riley's petition for review, we dismiss it.

I.

Riley entered the United States in 1995 on a tourist visa. In 2006, a federal grand jury returned an indictment charging Riley with conspiracy to distribute and possess with intent to distribute 1000 kilograms or more of marijuana and possession of a firearm in furtherance of a drug-trafficking crime. A jury found Riley guilty of both offenses, and he was sentenced to 25 years' imprisonment. In January 2021, Riley was granted compassionate release.

Just after Riley's release from federal prison, the immigration authorities took custody of him. On January 26, 2021, the Department of Homeland Security issued a Final Administrative Removal Order, explaining that Riley was removable because he had been convicted of an aggravated felony. *See* 8 U.S.C. § 1228(b). Riley expressed a fear of returning to Jamaica, and an immigration officer conducted a reasonable fear interview. The immigration officer determined that Riley had not established a

reasonable fear of persecution or torture in Jamaica, but an IJ disagreed and referred Riley to the immigration court for withholding-only proceedings.

Riley appeared with counsel before the IJ and conceded removability under § 1228(b). Although Riley applied for asylum, statutory withholding of removal, and both withholding of removal and deferral of removal under CAT, he later conceded that he was eligible only for deferral of removal under CAT given his prior convictions.

After an evidentiary hearing, the IJ granted Riley's application for deferral of removal under CAT. The Department of Homeland Security appealed the IJ's decision to the Board, and a three-member panel of the Board issued a May 31, 2022, unpublished decision sustaining the appeal. That is, the Board vacated the IJ's order granting relief and ordered Riley removed to Jamaica.

On June 3, 2022, Riley petitioned this court for review of the Board's decision. We later placed this appeal in abeyance for the issuance of the mandate in *Martinez v. Garland*, No. 22-1221 (4th Cir.). The mandate in *Martinez* has issued, and so Riley's case has been removed from abeyance.

Appendix A

II.

A.

"We have an independent obligation to assure ourselves of jurisdiction to decide an appeal." *Martinez v. Garland*, 86 F.4th 561, 566 (4th Cir. 2023). We generally possess jurisdiction to review "a final order of removal." 8 U.S.C. § 1252(a)(1). A noncitizen must petition for review within 30 days "of the final order of removal." 8 U.S.C. § 1252(b)(1). "The 30-day deadline is mandatory and jurisdictional and is not subject to equitable tolling." *Martinez*, 86 F.4th at 566 (internal quotation marks omitted). "[O]nce we have a final order of removal before us, we can consider along with it 'all questions of law and fact . . . arising from any action taken or proceeding brought to remove [the] alien from the United States.'" *Id.* (quoting 8 U.S.C. § 1252(b)(9)) (ellipsis and second alteration in original).

Riley seeks review of the Board's order vacating the IJ's order and denying his application for deferral of removal under CAT. We recently held in *Martinez*, however, that an order denying CAT relief is not a final order of removal for purposes of § 1252(a)(1). *Id.* at 567. So for us to exercise jurisdiction over the Board's order denying CAT relief, Riley "must identify another eligible order" that is properly before us. *Id.* But Riley cannot do so because he did not timely petition for review of a final order of removal. That is, Riley did not petition for review within 30 days of the January 26, 2021, Final Administrative Removal Order. So there is no final order of removal properly in front of us that would allow us to

review the Board's order denying CAT relief. We thus lack jurisdiction over Riley's petition for review. *Id.* at 571.

B.

Riley offers several arguments in favor of our exercise of jurisdiction, but none convinces us. To start, Riley contends that *Martinez* should not control in this case because it involves a Final Administrative Order of Removal issued under § 1228(b), not a reinstated removal order, which *Martinez* addressed. But Riley offers no persuasive justification for differentiating between those two types of orders when applying the jurisdictional principles delineated in *Martinez*, and we discern no reason to do so.

Riley next argues that the Final Administrative Order of Removal was not actually final for purposes of § 1252(a)(1) because he applied for asylum. Riley was statutorily ineligible for asylum, however, and he effectively withdrew his asylum application during his merits hearing. *See* 8 U.S.C. § 1158(b)(2)(A)(ii), (B)(i). Because Riley could not have obtained asylum relief, his asylum application did not impact his removability. The Final Administrative Order of Removal was thus in fact final despite Riley's asylum application.

Finally, Riley maintains that we may exercise jurisdiction over the Board's order affirming the denial of CAT relief under 8 U.S.C. § 1252(a)(4) ("[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 [CAT.]"). But that provision means only that we may review an order denying CAT relief as part of our review of a final order of removal. It does not authorize us to review an order denying CAT relief without a final order of removal properly before us. *See Nasrallah v. Barr*, 140 S. Ct. 1683, 1691, 207 L. Ed. 2d 111 (2020) (citing § 1252(a)(4) and explaining that order denying CAT relief is reviewable "as part of the review of a final order of removal" (internal quotation marks omitted)); *Martinez*, 86 F.4th at 567 (recognizing that federal appellate court may review order denying CAT relief only as part of its review of final order of removal); *Bhaktibhai-Patel v. Garland*, 32 F.4th 180, 190 n.13 (2d Cir. 2022) (explaining that § 1252(a)(4) does not enable federal appellate court to exercise jurisdiction over order denying CAT relief "in the absence of a judicially reviewable final order of removal").

III.

Because we lack jurisdiction, we dismiss the petition for review. We dispense with oral argument because the facts and legal contentions are adequately presented in the materials before this court and argument would not aid the decisional process.

PETITION DISMISSED

APPENDIX B — OPINION OF THE UNITED STATES DEPARTMENT OF JUSTICE, EXECUTIVE OFFICE FOR IMMIGRATION REVIEW, BOARD OF IMMIGRATION APPEALS, FILED MAY 31, 2022

U.S. DEPARTMENT OF JUSTICE
EXECUTIVE OFFICE FOR IMMIGRATION REVIEW
BOARD OF IMMIGRATION APPEALS

MATTER OF:

PIERRE YASSUE NASHUN RILEY, A097-534-840

Applicant

IN WITHHOLDING ONLY PROCEEDINGS
On Appeal from a Decision of the Immigration Court, Arlington, VA

Before: Baird, Appellate Immigration Judge; Gorman, Appellate Immigration Judge; Wilson, Appellate Immigration Judge

Opinion by Appellate Immigration Judge Wilson

WILSON, Appellate Immigration Judge

The Department of Homeland Security ("DHS") has appealed from an Immigration Judge's July 27, 2021, decision granting the applicant's request for protection under the regulations implementing the Convention

Against Torture ("CAT").[1] The applicant, a native and citizen of Jamaica, has filed responses in opposition to DHS' appeal. The appeal will be sustained.

We review the Immigration Judge's factual findings for clear error. 8 C.F.R. § 1003.1(d)(3)(i). Questions of law, discretion and judgment, and all other issues, are reviewed de novo. 8 C.F.R. § 1003.1(d)(3)(ii).

The applicant alleged before the Immigration Judge that a man named [redacted] a gang leader in his former neighborhood in Kingston and a drug kingpin, will torture or kill him upon his return to Jamaica. He alleges that [redacted] killed two of the applicant's cousins in 2008 and 2011 and has recently sent death threats to his mother and sister because he believes the applicant will seek retribution against him for killing his cousins (IJ at 8; Tr. at 47-48, 55-59; Exhs. 2, 6A).

The Immigration Judge found that based on the applicant's credible testimony and the background information in the case he has demonstrated that he faces a particularized risk of torture and that it is more likely than

1. The Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, Dec. 10, 1984, S. Treaty Doc. No. 100-20, 1465 U.N.T.S. 85 (entered into force for United States Nov. 20, 1994). The applicant's attorney stated that he is only applying for deferral of removal under the CAT (Tr. at 33). The Immigration Judge found the applicant is not eligible for asylum, withholding of removal under the INA or withholding of removal under the CAT because he has been convicted of a particularly serious crime (IJ at 6). This finding has not been contested on appeal.

not that [redacted] will harm the applicant upon his return to Jamaica (IJ at 9-10). In addition, the Immigration Judge found that the applicant credibly testified that [redacted] has influence with the neighborhood and the police, that the applicant would be forced to register with the police and keep them informed of his movements, which would allow [redacted] to know his whereabouts and that he will more likely than not be tortured with the acquiescence of the government (IJ at 10).

DHS challenges the Immigration Judge's positive credibility determination (IJ at 4-6). Based on the deferential clear error standard of review, we discern no clear error in the Immigration Judge's credibility determination and will treat the applicant's testimony as credible for purposes of this appeal.

However, as explained more fully below, we discern clear error in the Immigration Judge's factual findings regarding what is likely to happen to the applicant upon his removal to Jamaica, and we agree with DHS that the applicant has not met his burden of proof to show eligibility for deferral of removal under the CAT. The applicant bears the burden to show that it is more likely than not that he would be tortured in Jamaica by, or with the consent or acquiescence (to include the concept of willful blindness) of, a public official or an individual acting in an official capacity. 8 C.F.R. §§ 1208.16(c), 1208.18. The applicant must make two distinct showings: (i) likely future mistreatment, i.e., that it is more likely than not he will endure severe pain or suffering that is intentionally inflicted; and (ii) that the likely future mistreatment will

occur at the hands of the government or with the consent or acquiescence of the government. *Cruz-Quintanilla v. Whitaker*, 914 F.3d 884, 886 (4th Cir. 2019). Importantly, an applicant cannot establish eligibility by stringing together a series of suppositions to show that it is more likely than not that torture will result where the evidence does not establish that each step in the hypothetical chain of events is more likely than not to happen. *Matter of J-F-F-*, 23 I&N Dec. 912, 917-18 (A.G. 2006). An Immigration Judge's findings regarding the likelihood of future harm and of acquiescence by the government (i.e., what is likely to happen) are factual findings that the Board reviews for clear error. Whether that predicted future harm meets the definition of torture and whether future governmental conduct meets the definition of consent or acquiescence are questions of law we review de novo. *Turkson v. Holder*, 667 F.3d 523, 530 (4th Cir. 2012).

DHS argues on appeal that the Immigration Judge erred in finding that the applicant showed he will more likely than not be tortured and should have found that he presented a speculative chain of events that would happen to him. We agree. While the Immigration Judge found that the applicant has shown a particularized risk of torture, this finding is based on speculative assertions by the respondent regarding [redacted]

The applicant, who has been in the United States for many years, claims that [redacted] killed two of his cousins in Jamaica. But other than his testimony, which is not based on first-hand knowledge, there is no objective corroborating evidence that [redacted] killed his relatives

or why. Indeed, the grand jury indictment in California against [redacted] states he was arrested on February 12, 2010, on his way to pick up marijuana, and thus, he would have been incarcerated in the United States at the time of the cousin's murder in 2011 (Exh. 6D). When asked how he knows [redacted] killed his cousins, he stated that [redacted] and his gang members "brag about this stuff" (Tr. at 51-52). Yet, the affidavits from the applicant's family make no mention of [redacted] (Exh. 6). Nor do the affidavits from the applicant's mother, sister, and stepfather mention [redacted] when describing threats to kill the applicant they received in 2021 (Exh. 6B). The mother's affidavit states she received phone calls "from individuals who live in Jamaica threatening to kill [the applicant] on site should he come home" and that neighbors reported to her that three masked men asked about the applicant's whereabouts (Exh. 6B; Tr. at 68-69). The applicant's sister states in her affidavit that "people" have asked about him and unknown guys told her the applicant has a green light on him but did not tell her why (Exh. 6B; Tr. at 68-69). When the applicant was asked why [redacted] has any interest in harming him now and sees him as a threat, the applicant testified "[t]hat's the big question" and that he will expect the applicant to retaliate against [redacted] for his cousins' deaths because that is the "Jamaican lifestyle" (Tr. at 47-48). Thus, the applicant's claims that [redacted] killed or ordered the killing of his cousins and is behind the threats his mother and sister received in 2021 are speculative.

The Immigration Judge also found that country conditions evidence supports the applicant's claim

but cited generalized statements in the 2020 State Department Report regarding government human rights abuses, fatalities involving government security forces, allegations of torture of people in police custody, and insufficient action in addressing abuse and unlawful killings by security forces (IJ at 8-9; Exh. 4C). The Immigration Judge did not explain and did not cite to any particular evidence of record corroborating the claim that [redacted] is an ex-police officer, that he controls the applicant's old neighborhood, that he killed the applicant's relatives, or that he poses a particularized risk of harm to the applicant that would amount to torture. The country conditions evidence does not mention [redacted] and does not indicate the police will acquiesce in torture. In fact, the evidence the applicant cites in his brief on appeal is either information about crime and safety for foreign travelers to Jamaica or evidence indicating that crime is a significant problem, but the evidence also indicates that Jamaica has an independent police oversight body and that efforts are made to address gangs, corruption, and impunity for police killings (Exh. 6 at pages 142-52, 158-64). Moreover, the mother's affidavit does not demonstrate a likelihood of acquiescence simply because the police stated it would not investigate threats from unknown persons against the applicant who currently is not in Jamaica (Exh. 6B). The mere existence of a pattern of human rights violations in a particular country does not constitute a sufficient ground for finding that a person would more likely than not be tortured. *Nolasco v. Garland*, 7 F.4th 180, 191 (4th Cir. 2021).

Thus, we conclude that the respondent's claim is based on the stringing together of a series of suppositions and is not supported by sufficient objective evidence to corroborate his speculative fear of torture by [redacted] or that the government will acquiesce in his torture. *Matter of O-R-E-*, 28 I&N Dec. 330, 350 (BIA 2021); *Matter of J-F-F-*, 23 I&N Dec. at 917-18.[2]

For these reasons, we will reverse the Immigration Judge's determination that the applicant has demonstrated that it is more likely than not that he would be subjected to torture inflicted by, or at the instigation of or with the consent, acquiescence, or willful blindness of a Jamaican public official or other person acting in an official capacity for purposes of deferral of removal under the CAT.

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2. The applicant also alleges in his reply brief that the Immigration Judge did not consider, in the aggregate, the likelihood of torture because of his status as a criminal deportee and his long-time residence in the United States (Respondent's Reply Br. at 22-24). However, the Immigration Judge found that the applicant never mentioned that he fears the police directly (IJ at 7). The applicant states he will be required to register with the government and wear an ankle monitor and cites evidence stating that criminal deportees are stigmatized (Exh. 6 at 263-303, 310-25). However, he has not cited specific evidence that police or other government officials subject criminal deportees to extreme mistreatment, intentionally inflict torture on them, or that he personally faces a risk of torture by the government or with the consent or acquiescence of a public official. The evidence he cites does not mention torture of criminal deportees, but rather discusses the difficulty criminal deportees have reintegrating into society and the blame they experience by society and the government for rising crime rates (Exh. 6). Thus, we find this claim to be without merit.

Accordingly, the following orders will be entered.

ORDER: The Department of Homeland Security's appeal is sustained.

FURTHER ORDER: The Immigration Judge's order dated July 27, 2021, granting deferral of removal under the CAT is vacated, and the applicant is ordered removed from the United States to Jamaica.

APPENDIX C — DECISION AND ORDER OF THE UNITED STATES DEPARTMENT OF JUSTICE, EXECUTIVE OFFICE FOR IMMIGRATION REVIEW, UNITED STATES IMMIGRATION COURT, ARLINGTON, VIRGINIA, DATED JULY 27, 2021

UNITED STATES DEPARTMENT OF JUSTICE
EXECUTIVE OFFICE FOR IMMIGRATION REVIEW
UNITED STATES IMMIGRATION COURT
ARLINGTON, VIRGINIA

File: A097-534-840

In the Matter of

PIERRE YASSUE NASHUN RILEY

Applicant

IN WITHHOLDING ONLY PROCEEDINGS

July 27, 2021

CHARGES:

APPLICATIONS: Form I-589, application for withholding of removal under INA Section 241(b)(3), and under the Convention against Torture.

Appendix C

ORAL DECISION OF THE IMMIGRATION JUDGE

PROCEDURAL HISTORY

Applicant is a native and citizen of Jamaica. He last entered the United States on a visitor visa in 1995; overstayed. While in the United States he was arrested twice. First in 1998 for marijuana possession as a minor, youthful offender, and then in 2006 he was convicted for distribution of marijuana and possession of a firearm in furtherance of that distribution and then was sentenced to 25 years' incarceration. Fast forward to 2021, the District Court Judge signed an order authorizing compassionate release, and thereafter he was placed in ICE custody and was ordered removed pursuant to INA Section 238(b). And then he claimed a reasonable fear which an Immigration Judge found to be reasonable and placed in these proceedings.

SUMMARY OF RELEVANT TESTIMONY

Applicant was born on March 22, 1979, native and citizen of Jamaica, lived in Kingston. He did use an alias, Adrian Francis for ID and to get into certain bars and clubs, what have you. He last entered the United States under his real name on February 3, 1995 and never left. He testified to having distributed marijuana in the past, acknowledged that he was convicted and sentenced to 25 years. Ultimately he was released. He said if he returned to Jamaica he would be tortured and killed by a man named [redacted]

This person, [redacted] he is from the neighborhood of Central Kingston, Jamaica, same neighborhood as the applicant. In fact, applicant said he knew [redacted] His family knew him growing up. Applicant said that [redacted] took over the neighborhood sometime in the 2000's. He was an ex-cop, supporter of the JLP Party, and after he took over the neighborhood he and his supporters in the neighborhood would harm people and property. Applicant testified that at one point [redacted] even came to the United States but he still had contacts in his old neighborhood in Jamaica, including authorities. Applicant testified that [redacted] was deported back to Jamaica from the United States sometime in 2016 or 2017. He knows because the applicant's mother and sister still live in Jamaica. They have seen [redacted] Applicant testified also that [redacted] has an issue with his family. He had killed two of the applicant's cousins, a person named O'Neal, as well as a person named Darrel, and then threatened all male relatives which includes the applicant, that he would kill them or threaten to kill them if they return or if he sees them in Jamaica. And this is because, according to the applicant, [redacted] feels that the relatives of the two people that he murdered would exact revenge for the murders against [redacted] Now, [redacted] wants to harm the applicant because he thinks applicant is going to seek revenge against him.

Regarding these two cousins who died, one was O'Neal, he died in 2008. He was actually somewhat associated with [redacted] He used to give money to him to pay off groups, individuals and politics. But when O'Neal wanted to quit doing this [redacted] killed him because he

took that as a sign of disrespect. Applicant said that the police did nothing to investigate or solve O'Neal's murder. And in fact, when his other cousin, Darrel Scott, tried to get the police to investigate further, [redacted] ordered him killed, according to word on the street. That was sometime in March 2011. The police, according to applicant, did not investigate Darrel's death.

The applicant, after serving 15 years in prison, was released for his marijuana distribution conviction, following a sentence reduction. Thereafter, his mother started receiving calls threatening to harm the applicant if he ever returned to Jamaica. Applicant said there was even a car with masked men who approached applicant's mother looking for the applicant in Jamaica. Applicant testified that his mother then went to file a police report but the police told applicant's mother that the applicant was not even in Jamaica as among the reasons why they refused to take the report. They also knew that the report was against [redacted] Applicant said that his mother was even approached at work by [redacted] himself and threatened that he will kill the applicant. At this point the applicant told his mother to stop reporting to the police for fear of being killed. He said his sister also received communication from [redacted] in Jamaica. They threatened to harm the applicant. He said that the people who approached his sister said they have the green light to murder the applicant from [redacted] Applicant also testified as two other individuals who live in the same neighborhood as he did in Jamaica both died following deportation back. He said he cannot relocate anywhere in Jamaica because Jamaican authorities force him to

register upon his return, they would know where he is. That would tie directly into [redacted] and allow [redacted] to easily become aware of where the applicant is located. That and the entire country of Jamaica is about the size of New Jersey. It is fairly small.

Cross-examination he said at the interview that he grew up in a neighborhood controlled by the JLP. But explained that was just a point of fact, not like a choice that he was making. He also clarified that he could be killed as a member or for being a supporter of the JLP because that is just the way people are killed in Jamaica. There is a lot of violence; a lot of it is political. And he indicated he did not mean to claim that he was a member of the JLP or the family was a member of the JLP.

LAW FINDINGS, ANALYSIS, CREDIBILITY, CORROBORATION

When testimony is offered in support of an application for relief the Court must consider whether such testimony is credible. INA Section 240(c)(4)(B). For applications filed after May 11, 2005 provisions of the REAL ID Act govern the credibility analysis. Making this determination the Court considers the totality of the circumstances and all relevant factors. *See id.* Section 240(c)(4)(C). *Matter of J-Y-C-*, 24 I&N Dec. 260, 262 (BIA 2007). Generally, to be credible, testimony shall satisfactorily explain any material discrepancies or omissions, INA Section 240(c)(4)(C). The Court may base a credibility determination on the witness's demeanor, candor, or responsiveness, the inherent plausibility of his account. INA Section 240(c)

(4)(C). Other factors include the consistency between written and oral statements without regard to whether inconsistency goes to the heart of the applicant's claim. *Id.*; *Matter of J-Y-C-*, 24 I&N Dec. at 263-66.

In this case the Court listened carefully to the applicant's testimony. I observed the applicant very carefully as he was answering questions, reviewed the detailed affidavit and the Form I-589 as well as the background *Country Reports* from the Department of State and other background country evidence in this case. Based on this Court's thorough review it will find the applicant to be generally credible. The Court notes applicant did provide a very detailed application, Form I-589, affidavit. Lays out his history growing up. His commission of the crime, his fear of return, who he fears return from. Harm that his family experienced as the basis for his own fear. And testified in a manner that was overall consistent with his prior statements. The Court notes that the evidence also independently corroborates the identity of this individual named [redacted] his involvement with drugs, convictions here in the United States. There is a letter from family members that also identify [redacted] as being influential in the neighborhood having been the source of various threats. There is also corroboration of the two cousins who were killed, and clearly the death reports or the death certificates are not going to indicate or point the finger at who committed the offense. The applicant has himself filled in that gap at portion of the testimony to what the Court finds to be credible just based on the information provided by the applicant, the manner in which he testified. And

the Court's opinion that he was forthright and honest. He clarified some of the statements that he was confronted with by the Government on cross-examination, namely, that pertaining to questions of his involvement with the JLP Party or the opposition party to the JLP, initially it appeared that applicant was critical of the JLP Party with no indication that he was a member. The Government did point to some questions and answers in the reasonable fear interview that would seem to indicate that he was either a member or supporter of the JLP Party. The applicant clarified that the way the question was asked and the way he answered that it was much more narrow point that he was trying to make. That is that he grew up in a neighborhood that was controlled by the JLP Party. Again, the applicant indicated that he presented this just as a matter of fact and not some choice that his family made to join the JLP versus another party. He followed that up with an explanation of his answers as to whether he could be killed for being a member of the JLP Party. His answer was in the affirmative, but he clarified that not him as a member of the JLP Party but that this is what happens in Jamaica. Politics is violent. One could be killed for simply being a member of the JLP Party or any other party. The Court accepts these explanations. The Court notes that applicant had been in prison for 15 years and is only questioned about his fear of return. It appears that the answers could be construed in several different ways. The Court gives the applicant the benefit of the doubt and I would accept his explanations for why he answers the questions in the manner he did. And with that clarified the Court would find the applicant has put forth a credible claim.

Appendix C

DEFERRAL OF REMOVAL UNDER THE CONVENTION AGAINST TORTURE

Initially, the Court notes that the applicant is not eligible for asylum under INA Section 208 or withholding under Section 241(b)(3) or withholding under the Convention against Torture for having been convicted of a particularly serious crime, that pertaining to distribution of marijuana and then having been sentenced to 25 years, reduced to 15. That leaves him eligible to apply for protection from removal under the Convention against Torture or deferral of removal under the Convention against Torture.

To be extended protection under the Convention against Torture the applicant must establish that it is more likely than not that he would be tortured if removed to his home country. *See* 8 C.F.R. Section 208.16(c), and *see also Matter of M-B-A-*, 23 I&N Dec. 474, 477-78 (BIA 2002). Torture is defined in part as the intentional infliction of severe physical or mental pain or suffering by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity in the country of removal. 8 C.F.R. Section 1208.18(a)(1). To meet his burden for CAT protection the applicant must meet two distinct showings. First, he must demonstrate likely future mistreatment in his home country that constitutes severe pain or suffering that is intentionally inflicted. *See Cruz-Quintanilla v. Whittaker*, 914 F.3d 884, 886 (4th Cir. 2019). And second, the applicant must show the mistreatment will occur at the hands of government or with their consent or acquiescence. *See id.*

Appendix C

In this case, the applicant testified that he fears [redacted] and his associates. Applicant never mentioned that he fears the police directly. His only comment about the police is that they will not do anything and that they did not do anything when his mother and his cousin, two of whom are dead, but one of them went to the police and ended up dying. In neither of those incidents the police ever did anything. So the applicant must demonstrate that it is more likely than not that the police, the authorities in Jamaica would acquiesce to his torture at the hands of [redacted] or [redacted] associates. To prove this, applicant must do more than show that the government is powerless to stop the torture. He has to show that the public official would have awareness of or will remain willfully blind to the activity constituting torture prior to its commission, and therefore breach their responsibility to intervene to prevent such activity. 8 C.F.R. Section 1208.18(a)(7); *see also Suarez-Valenzuela v. Holder*, 714 F.3d 241, 245-46 (4th Cir. 2013). Relevant factors to assessing willful blindness include but is not limited to, evidence of past torture, evidence of gross, flagrant or mass violations of human rights, general country conditions, and whether the applicant could relocate to another part of the country where he or she is unlikely to be tortured. *See Suarez-Valenzuela v. Holder*, 714 F.3d at 245.

Applicant here has credibly testified, as previously mentioned, the existence of this individual named Andrew [redacted] his Jamaican nationality, his involvement with drugs, and credibility he testified as to his control over the neighborhood in which applicant lived in which his

mother and sister continue to live. Applicant also credibly testified as to [redacted] biography. He is an ex-cop. He is tied politically to the JLP Party which dominates his neighborhood in Jamaica. Applicant also credibly testified as to the harm that [redacted] caused his two cousins, having killed one and then having killed the other for trying to get police to investigate the killing of the first cousin. Applicant also credibly testified that the police, when informed of threats of [redacted] against him, did not do anything, refused to do anything. And the Court found all of the above credible, not just based on the detailed testimony, but based on the background evidence in this case. The one that is very reliable is the U.S. Department of State *Human Rights Report* of Jamaica, the most recent one coming from 2020. Right off the bat on page one it states significant human rights include numerous reports of unlawful and arbitrary killings by government security forces, harsh and life-threatening conditions in prisons and detention facilities, arbitrary arrests and detentions, serious corruption by officials, lack of accountability for violence against vulnerable populations. It also states the government took steps to investigate, prosecute officials, but there were credible reports that some officials alleged to have committed human rights abuses were not subject to full and swift accountability. The report goes on to discuss the number of people who have been killed, or examples of people who have been killed by the government security forces. The increase in the number of fatalities involving security forces in 2020 compared to 2019. Specific to torture, the Department of State states that there is no definition of torture in Jamaica. That there were allegations of torture

especially for people in police custody. Some examples of these torture that resulting in death, injury, rape. States that the government did not take sufficient action to address abuse and unlawful killings by security forces. Says the government has mechanisms to investigate and punish the abuse, but they were not always employed. In fact, it states fewer than ten percent of investigations of abuse resulted in recommendations for disciplinary action or criminal charges, and fewer than two percent led to a conviction. All of this is not inconsistent with the applicant's description of how police reacted to his cousin's attempt to find or to have police investigate the murder of the applicant's first cousin, O'Neal, or the applicant's testimony as to how his mother tried to get the police take the report but they refused to do so. Based on the applicant's credible testimony which is consistent with the background information in this case, and the Court is not even going to go into, although it can, the various other background articles that were submitted in support of the applicant's case, which details gang violence, prevalence or the influence of gangs, the growing influence of gangs in Jamaica. There is also a detailed article on the growing influence of gangs and gang violence in Jamaica from Amnesty International. That is all under Exhibit 6, tabs F and G. And for these reason the Court finds the applicant has done enough to demonstrate he faces a particularized risk of torture. That being that he is a male member of his family who have all been threatened by [redacted] who has killed two male members of his family with the police not investigating the death of the cousins. Applicant has also credibility testified as to the influence that this individual, [redacted] has in the neighborhood and on police. That is

important for a variety of reasons, one of which is also that applicant would be forced to register his return to Jamaica and keep police informed of his movements which as counsel pointed out would allow [redacted] to know the applicant's whereabouts. So based on the history of this case and [redacted] treatment of applicant's family the Court find that the threats are real and it is more likely than not that [redacted] would harm the applicant if he returns to Jamaica. Again, a small country with the police knowing where the applicant is, and does not find it reasonable for the applicant to relocate and be safe. And therefore would find that the applicant is more likely than not to be tortured through the acquiescence of and therefore will grant applicant protection from removal under the Convention against Torture.

CONCLUSION AND ORDERS

For the reasons stated, the court enters the following orders.

IT IS ORDERED that the applicant be ordered removed from the United States to Jamaica.

FURTHER ORDERED that the applicant's application for withholding of removal under Section 241(b)(3) be denied.

FURTHER ORDERED that the applicant's application for withholding of removal under the Convention against Torture be denied.

FURTHER ORDERED that applicant's application for deferral of removal under the Convention against Torture be granted.

July 27, 2021

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CHOI, RAPHAEL
Immigration Judge

Appendix C

UNITED STATES DEPARTMENT OF JUSTICE
EXECUTIVE OFFICE FOR IMMIGRATION REVIEW
ARLINGTON IMMIGRATION COURT

Respondent Name:
RILEY, PIERRE YASSUE NASHUN

To:
Georgiev-Remmel, Dimitar Plamenov
1220 N. Fillmore St.
Suite 300
Arlington, VA 22201

Alien Registration Number:
097534840

Riders:
In Withholding Only Proceedings Initiated by the Department of Homeland Security

Date:
07/27/2021

ORDER OF THE IMMIGRATION JUDGE

☒ This is a summary of the oral decision entered on 07/27/2021.

☐ Both parties waived the issuance of a formal oral decision in this proceeding.

Appendix C

The alien's request for:

☐ Withholding of Removal under Immigration and Nationality Act § 241(b)(3) is:
☐granted ☒denied ☐withdrawn.

☐ Withholding of Removal under the Convention Against Torture is:
☐granted ☒denied ☐withdrawn.

☒ Deferral of Removal under the Convention Against Torture is:
☒granted ☐denied ☐withdrawn.

/s/
Immigration Judge: Choi, Raphael
07/27/2021

Appeal: Department of Homeland Security:
☐waived ☒reserved

Respondent:
☒waived ☐reserved

Appeal Due: 08/26/2021