No. 23-1270

In the Supreme Court of the United States

PIERRE YASSUE NASHUN RILEY, PETITIONER

v.

MERRICK B. GARLAND, ATTORNEY GENERAL

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF FOR THE RESPONDENT

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QUESTIONS PRESENTED

1. Whether the 30-day deadline in 8 U.S.C. 1252(b)(1) for filing a petition for review of an order of removal is jurisdictional.

2. Whether a noncitizen satisfies the deadline in Section 1252(b)(1) by filing a petition for review challenging an agency order denying withholding of removal or protection under the Convention Against Torture within 30 days of the issuance of that order.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-6a) is not published in the Federal Reporter but is available at 2024 WL 1826979. The decisions of the Board of Immigration Appeals (Pet. App. 7a-14a) and the immigration judge (Pet. App. 15a-27a) are unreported.

JURISDICTION

The judgment of the court of appeals was entered on April 26, 2024. The petition for a writ of certiorari was filed on May 31, 2024. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. a. Under the Immigration and Nationality Act (INA), 8 U.S.C. 1101 *et seq.*, a noncitizen may be subject to abbreviated removal proceedings under 8 U.S.C. 1228 when the noncitizen has been convicted of an ag-

gravated-felony offense. 8 U.S.C. 1228(b).[1] When a noncitizen is ordered removed under that process, he is ineligible for any form of "relief from removal that the Attorney General may grant in the Attorney General's discretion." 8 U.S.C. 1228(b)(5). But a noncitizen who is statutorily barred from obtaining categorical relief from removal may still pursue "withholding-only relief to prevent [the Department of Homeland Security (DHS)] from executing his removal to the particular country designated in his reinstated removal order." *Johnson* v. *Guzman Chavez*, 594 U.S. 523, 530 (2021); see *ibid.* (recognizing that noncitizens who are barred from obtaining relief from removal under Section 1231(a)(5) are still eligible for withholding of removal).

A withholding-only proceeding cannot result in a complete bar on a noncitizen's removal; instead, it may prevent him from being removed to a specific country in which he is likely to be persecuted or tortured. See *Guzman Chavez*, 594 U.S. at 531-532. Statutory withholding of removal is available under 8 U.S.C. 1231(b)(3)(A), which prohibits removal to a country where the noncitizen's "life or freedom would be threatened" because of "race, religion, nationality, membership in a particular social group, or political opinion." Withholding or deferral of removal is also available under regulations implementing the United States' obligations under Article 3 of the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (Convention or CAT), *adopted* Dec. 10, 1984, S. Treaty Doc. No. 20, 100th Cong., 2d Sess. (1988), 1465 U.N.T.S. 114. The Convention "prohibits

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[1] This brief uses the term "noncitizen" as equivalent to the statutory term "alien." See *Barton* v. *Barr*, 590 U.S. 222, 226 n.2 (2020) (quoting 8 U.S.C. 1101(a)(3)).

removal of a noncitizen to a country where the noncitizen likely would be tortured." *Nasrallah* v. *Barr*, 590 U.S. 573, 580 (2020).

b. When a noncitizen is subject to abbreviated removal procedures under Section 1228(b), he generally does not appear before an immigration judge (IJ) or have a right to an administrative appeal before the Board of Immigration Appeals (Board). See 8 C.F.R. 238.1. Instead, regulations provide that an immigration officer shall conduct written removal proceedings. 8 C.F.R. 238.1(a)-(c). If the officer finds that the noncitizen is eligible for removal under Section 1228(b), he issues a "Final Administrative Removal Order." 8 C.F.R. 238.1(d).

The regulations, however, provide an exception for noncitizens who seek withholding of removal. 8 C.F.R. 238.1(f). When a noncitizen "has requested withholding of removal," he will receive a reasonable-fear interview with an asylum officer. 8 C.F.R. 238.1(f)(3); see 8 C.F.R. 208.31(b). If the asylum officer finds that the noncitizen has no reasonable fear and an IJ sustains that finding, the noncitizen will be deemed ineligible for withholding. 8 C.F.R. 208.31(f) and (g)(1). But if the asylum officer or the IJ finds that the noncitizen has a reasonable fear, then the noncitizen is entitled to full withholding-only proceedings before an IJ and an appeal to the Board. 8 C.F.R. 208.31(e) and (g)(2).

An order denying withholding of removal "may not be reviewed in [the] district courts, even via habeas corpus," and must instead "be reviewed only in the courts of appeals" under 8 U.S.C. 1252. *Nasrallah*, 590 U.S. at 580-581. And under 8 U.S.C. 1252(b)(1), "[t]he petition for review must be filed not later than 30 days after the date of the final order of removal."

2. Petitioner is a native and citizen of Jamaica. Pet. App. 16a. He entered the United States in 1995 as a tourist and overstayed his visa. *Ibid.* In 2006, he was convicted in federal court of multiple firearm and drug-trafficking offenses and sentenced to a 25-year term of imprisonment. *Id.* at 2a. In January 2021, he was granted compassionate release. *Ibid.* He was then taken into custody by DHS and found removable under Section 1228(b)'s abbreviated proceedings for noncitizens who have been convicted of an aggravated felony. *Ibid.* On January 26, 2021, an immigration officer issued a Final Administrative Removal Order. *Ibid.* After petitioner expressed a fear of returning to Jamaica, he was interviewed by an immigration officer who determined that he had not established a reasonable fear of persecution or torture in Jamaica. *Id.* at 2a-3a. But an IJ disagreed and placed petitioner in withholding-only proceedings. *Ibid.*

During the withholding-only proceedings, petitioner conceded that, in light of his prior convictions, he was eligible solely for deferral of removal under the CAT. Pet. App. 3a. After an evidentiary hearing, the IJ granted petitioner's application for CAT deferral, *id.* at 15a-27a, but DHS appealed that decision to the Board, *id.* at 3a. On May 31, 2022, the Board issued a decision vacating the IJ's order granting CAT protection, and the Board ordered petitioner removed to Jamaica. *Id.* at 7a-14a. Four days later, on June 3, 2022, petitioner filed a petition for review in the court of appeals. *Id.* at 3a.

3. On April 26, 2024, the court of appeals issued an unpublished decision dismissing the petition for review for lack of jurisdiction. Pet. App. 2a-6a. The court found that its decision was controlled by *Martinez* v.

Garland, 86 F.4th 561, 566 (4th Cir. 2023), petition for cert. pending, No. 23-7678 (filed May 29, 2024). Pet. App. 4a-6a.

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

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

In the decision below, the court of appeals found that, under *Martinez*, Section 1252(b)(1)'s 30-day filing deadline is jurisdictional. Pet. App. 4a. And the court further found that, under *Martinez*, the 30-day deadline began to run as soon as the immigration officer ordered petitioner removed under Section 1228(b), even though

the withholding-only proceedings were still pending. *Ibid.* The court explained that it could "discern no reason" to "differentiat[e] between" reinstatement determinations under Section 1231(a)(5) and administrative removal orders under Section 1228(b). *Id.* at 5a.

DISCUSSION

Petitioner contends (Pet. 15-19) that the court of appeals erred in holding that the deadline in 8 U.S.C. 1252(b)(1) for filing a petition for review of an order of removal is jurisdictional. Petitioner is correct, and there is division in the circuits regarding whether Section 1252(b)(1)'s filing deadline is jurisdictional. But plenary review of that question would be premature because this Court recently held that an analogous statutory filing deadline is *not* jurisdictional, and it emphasized that "most time bars are nonjurisdictional," even when "framed in mandatory terms." *Harrow* v. *Department of Def.*, 601 U.S. 480, 484 (2024) (citations omitted). Because *Harrow* was decided after the court of appeals' proceedings in this case had concluded, this Court should grant certiorari, vacate the court of appeals' decision, and remand for further proceedings in light of *Harrow*'s guidance regarding when a time limit may be deemed jurisdictional.[2]

Petitioner also contends (Pet. 19-26) that the court of appeals erred in holding that a petition for review must be filed within 30 days of the underlying administrative removal determination, rather than within 30 days of

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[2] Two other pending petitions for writs of certiorari seek review of the same or related questions, and the government is urging the same disposition for those petitions in responses being filed at the same time as this one. See *Martinez* v. *Garland*, No. 23-7678 (filed May 29, 2024); *Miranda Sanchez* v. *Garland*, No. 24-11 (filed July 3, 2024).

the issuance of the order denying CAT protection. Petitioner is correct, but again, review by this Court would be premature. The court of appeals reached its erroneous holding in reliance on its precedent regarding the timeliness of petitions for review of orders denying withholding of removal or CAT protection after previous orders of removal have been reinstated under 8 U.S.C. 1231(a)(5). That precedent was in turn based on the Second Circuit's decision in *Bhaktibhai-Patel* v. *Garland*, 32 F.4th 180 (2022). But the Second Circuit ordered supplemental briefing on the continued vitality of *Bhaktibhai-Patel* in a pair of cases that are still pending, suggesting that the issue is not yet ripe for the Court's review. Moreover, if the case is remanded in light of *Harrow* and the court of appeals appropriately determines that the deadline in Section 1252(b)(1) is nonjurisdictional, the government intends to waive the application of the 30-day deadline, which could prevent petitioner from being affected by the court of appeals' erroneous understanding of when a petition for review must be filed.

1. The court of appeals erred in holding that Section 1252(b)(1) is jurisdictional. That holding cannot be reconciled with *Santos-Zacaria* v. *Garland*, 598 U.S. 411 (2023), and *Harrow*, *supra*. But because the court of appeals addressed the issue without the benefit of *Harrow*, this Court should grant, vacate, and remand for further consideration in light of that decision.

a. Section 1252(b)(1) provides that a "petition for review must be filed not later than 30 days after the date of the final order of removal." That text does not clearly indicate that the provision is intended to govern the court of appeals' subject-matter jurisdiction, but until recently, the courts of appeals and the government

characterized the time limit as jurisdictional based on this Court's 1995 decision in *Stone* v. *INS*, 514 U.S. 386.[3] In *Stone*, the Court described a prior version of the INA's filing deadline, 8 U.S.C. 1105a(a)(6) (Supp. V 1993), as "jurisdictional." 514 U.S. at 405 (citation omitted). The Court reasoned that "[j]udicial review provisions * * * are jurisdictional in nature," and this was "all the more true of statutory provisions specifying the timing of review, for those time limits are, as we have often stated, 'mandatory and jurisdictional.'" *Ibid.* (citation omitted).

Yet this Court's more recent decisions have made clear that *Stone* cannot be used to establish that Section 1252(b)(1) is jurisdictional. In *Santos-Zacaria*, *supra*, the Court rejected the government's reliance on *Stone* to support its argument that the INA's exhaustion requirement, 8 U.S.C. 1252(d)(1), is jurisdictional. 598 U.S. at 421. The Court explained that, while *Stone* "described portions of the [INA] that contained [Section] 1252(d)(1)'s predecessor as 'jurisdictional,'" the *Stone* Court had not "attend[ed] to the distinction between 'jurisdictional' rules (as we understand them today) and nonjurisdictional but mandatory ones." *Ibid.* Moreover, "whether the provisions were jurisdictional 'was not central to the case.'" *Ibid.* (citation omitted). In recognizing that *Stone* did not use the term "jurisdictional" to refer to subject-matter jurisdiction and did not focus on the question of subject-matter jurisdiction at all, *Santos-Zacaria* severely undermined continued

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[3] See, *e.g.*, *Mendias-Mendoza* v. *Sessions*, 877 F.3d 223, 227 (5th Cir. 2017); *Chavarria-Reyes* v. *Lynch*, 845 F.3d 275, 277 (7th Cir. 2016); *Hurtado* v. *Lynch*, 810 F.3d 91, 93 (1st Cir. 2016); *Skurtu* v. *Mukasey*, 552 F.3d 651, 658 (8th Cir. 2008).

reliance on *Stone* to establish the jurisdictional status of the deadline in Section 1252(b)(1).

The Court's more recent decision in *Harrow* makes it even more clear that Section 1252(b)(1) cannot be deemed jurisdictional. In *Harrow*, the Court held that the "60-day statutory deadline" in 5 U.S.C. 7703(b)(1) for filing a petition for review of a veterans' benefits determination in the Federal Circuit is not a "jurisdictional requirement." 601 U.S. at 483 (citation omitted). In reaching that holding, the Court repeatedly emphasized that "most time bars are nonjurisdictional." *Id.* at 484 (citation omitted); see *id.* at 489 n.* ("time limits[,] * * * we repeat, are generally non-jurisdictional").

The Court in *Harrow* further explained that, even when "framed in mandatory terms," time bars should not be deemed jurisdictional unless the "traditional tools of statutory construction * * * plainly show that Congress imbued [the rule] with jurisdictional consequences." 601 U.S. at 484-485 (citations omitted; brackets in original). And the Court recognized that statutory time limits are generally not jurisdictional when they appear alongside other procedural requirements that are plainly nonjurisdictional. *Id.* at 488 (finding that the statutory deadline could not be deemed jurisdictional in part because it appeared as part of "a bevy of procedural rules," concerning things like the manner of "service and other forms").

b. In light of those precedents, the court of appeals erred in holding that Section 1252(b)(1)'s 30-day filing deadline is jurisdictional. Pet. App. 4a-5a. *Santos-Zacaria* and *Harrow* demonstrate that *Stone* was not using the term "jurisdictional" to refer to subject-matter jurisdiction when it stated that "statutory provisions specifying the timing of review" are "'mandatory

and jurisdictional.'" *Stone*, 514 U.S. at 405 (citation omitted). Further, while Section 1252(b)(1)'s text reflects that the INA's deadline is mandatory, the provision does not reference jurisdiction or otherwise "set[] the bounds of the 'court's adjudicatory authority.'" *Santos-Zacaria*, 598 U.S. at 416 (citation omitted). And Section 1252(b)(1) appears as part of a list of procedural rules for petitions for review—governing things like the manner of "[s]ervice" and whether the record must be "typewritten," 8 U.S.C. 1252(b)(2) and (3)—that Congress is unlikely to have intended to imbue with jurisdictional significance.

Accordingly, after *Santos-Zacaria*, both the government and several courts of appeals reconsidered their earlier position that Section 1252(b)(1) is jurisdictional and recognized that the provision is more appropriately characterized as a mandatory claims-processing rule. See *Alonso-Juarez* v. *Garland*, 80 F.4th 1039, 1047 (9th Cir. 2023); *Argueta-Hernandez* v. *Garland*, 87 F.4th 698, 705 (5th Cir. 2023); *Inestroza-Tosta* v. *Garland*, 105 F.4th 499, 509-512 (3d Cir. 2024). The Fourth Circuit and the Seventh Circuit have declined to revisit their precedent in light of *Santos-Zacaria*. See *Martinez* v. *Garland*, 86 F.4th 561, 566-567 (4th Cir. 2023), petition for cert. pending, No. 23-7678 (filed May 29, 2024); *F.J.A.P.* v. *Garland*, 94 F.4th 620, 634 (7th Cir. 2024). But those decisions preceded *Harrow*'s clear emphasis of the principle that time bars are generally nonjurisdictional.

c. The court of appeals did not have the benefit of this Court's decision in *Harrow* when it decided *Martinez* or when it applied the holding in *Martinez* to this case. This Court should therefore grant the petition for

a writ of certiorari, vacate the decision below, and remand for further proceedings in light of *Harrow*.

2. The court of appeals also erred in holding that the petition for review in this case was untimely under Section 1252(b)(1), even though it was filed within 30 days of the Board's order denying CAT protection. Pet. App. 4a-5a. But again this Court's intervention would be premature because the Second Circuit appears to be reconsidering the precedent on which the Fourth Circuit relied, and the importance of the question will be diminished if the court of appeals holds on remand that Section 1252(b)(1) is not jurisdictional.

a. Until 2022, the courts of appeals agreed that a removal determination is not final for purposes of seeking judicial review until any withholding-only proceedings associated with the reinstatement are completed.[4] That understanding accords with the traditional rule that an administrative decision is not final for purposes of judicial review until the "consummation of the agency's decisionmaking process"—that is, not until all of the administrative proceedings arising from the agency action (including withholding-only proceedings) have been completed. *Luna-Garcia* v. *Holder*, 777 F.3d 1182, 1185 (10th Cir. 2015) (quoting *Bennett* v. *Spear*, 520 U.S. 154, 178 (1997)).

Pursuant to that understanding, the administrative removal determination and the related withholding or

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[4] See, *e.g.*, *Ponce-Osorio* v. *Johnson*, 824 F.3d 502 (5th Cir. 2016) (per curiam); *Luna-Garcia* v. *Holder*, 777 F.3d 1182 (10th Cir. 2015); *Ortiz-Alfaro* v. *Holder*, 694 F.3d 955 (9th Cir. 2012). Although each of those decisions involved a reinstatement determination under Section 1231(a)(5) rather than an administrative removal order under Section 1228(b), the court of appeals found that distinction immaterial when it found that its Section 1231(a)(5) precedent controlled the outcome of this case. Pet. App. 5a.

CAT order become final at the same time, thereby ensuring that they may be reviewed through a single petition for review filed within 30 days of the "final order of removal." 8 U.S.C. 1252(b)(1). Congress obviously intended that synchronicity because 8 U.S.C. 1252(b)(9) provides that judicial review of "all questions of law and fact * * * arising from any action taken or proceeding brought to remove an alien * * * shall be available only in judicial review of a final order under this section." See *Nasrallah* v. *Barr*, 590 U.S. 573, 583 (2020) (recognizing that, under 8 U.S.C. 1252(b)(9), "a CAT order may be reviewed together with the final order of removal"). Because of Section 1252(b)(1)'s 30-day filing deadline, it would not be possible to consolidate judicial review of all removal-related issues into a single proceeding, as Section 1252(b)(9) contemplates, unless the removal order and any related administrative orders were understood as becoming final at the same time.

Nonetheless, in 2022 the Second Circuit broke from the previous consensus that Section 1252(b)(1)'s 30-day clock begins to run after withholding-only proceedings are complete. See *Bhaktibhai-Patel*, *supra*. In *Bhaktibhai-Patel*, the court of appeals held that an immigration officer's decision to reinstate a prior removal order under Section 1231(a)(5) becomes "final" under Section 1252 (and the 30-day clock starts to run) as soon as the decision is made, even if withholding-only proceedings are still pending. The Second Circuit believed that position followed from this Court's decisions in *Nasrallah*, *supra*, and *Johnson* v. *Guzman Chavez*, 594 U.S. 523 (2021). *Bhaktibhai-Patel*, 32 F.4th at 193-194. The Second Circuit observed that, under *Nasrallah*, an order regarding withholding is distinct from a "removal order." *Id.* at 191. And it further observed that, in *Guz-*

man Chavez, the Court held that a reinstated removal order is final for purposes of detention pending removal under 8 U.S.C. 1231(a)(1)(B), even if the related withholding-only proceedings are still pending. *Bhaktibhai-Patel*, 32 F.4th at 193.

From those premises, *Bhaktibhai-Patel* concluded that a reinstated removal order must also be final for purposes of judicial review under Section 1252, even if withholding-only proceedings are still pending. 32 F.4th at 193-195. And because an order denying withholding or CAT protection "is not itself a final order of removal," the court found that such an order cannot trigger another 30-day window for filing a petition for review under Section 1252(a)(1). *Id.* at 191 (citation omitted). *Bhaktibhai-Patel* therefore concluded that judicial review of an order denying withholding is possible only if a petition for review is filed within 30 days of the underlying decision to reinstate a previous removal order. *Id.* at 191-192.

b. Relying on *Bhaktibhai-Patel*, the Fourth Circuit held in *Martinez*, *supra*, that a petition for review of a post-reinstatement withholding order is timely only if it is filed within 30 days of the reinstatement determination. And, relying on *Martinez*, the decision below held that a petition for review of an order denying CAT protection is untimely when it is filed more than 30 days after the underlying administrative removal determination under Section 1228(b). Pet. App. 4a-5a. That was error.

While the court of appeals was correct that the same principles apply in the context of administrative removal orders under Section 1228(b) and reinstatement determinations under Section 1231(a)(5), Pet. App. 5a, those principles establish that neither an administrative

removal order nor a reinstatement determination becomes final until after the conclusion of any associated CAT or withholding proceedings. See pp. 11-12, *supra.* And as the Fifth Circuit recently recognized when it reconsidered a decision that had adopted *Bhaktibhai-Patel*'s reasoning, neither *Nasrallah* nor *Guzman Chavez* upsets the well-established understanding that a petition for review of an order denying CAT protection is timely so long as it is filed within 30 days of the date on which the CAT order was issued. See *Argueta-Hernandez*, 87 F.4th at 706.

Nasrallah involved the applicability of a judicial-review bar to findings of fact within an order denying CAT protection; it did not change the timing or availability of judicial review of CAT orders. 590 U.S. at 587. To the contrary, the Court recognized that Congress has "provide[d] for direct review of CAT orders in the courts of appeals." *Id.* at 585 (citing 8 U.S.C. 1252(a)(4) and (b)(9)). And the *Nasrallah* Court expressly stated that its "decision d[id] not affect the authority of the courts of appeals to review CAT orders." *Ibid.* That assurance would be eviscerated if the 30-day deadline for seeking judicial review starts to run before any attendant CAT proceedings have concluded.

Further, while *Guzman Chavez* held that the pendency of withholding-only proceedings does not render a removal order nonfinal for purposes of triggering administrative detention under 8 U.S.C. 1231, the Court explained that it was not expressing any "view on whether the lower courts are correct in" holding that a removal order is *not* final for purposes of Section 1252 until withholding-only proceedings are complete. 594 U.S. at 535 n.6. The Court observed that Section 1252 "uses different language than [Section] 1231 and relates

to judicial review of removal orders rather than detention." *Ibid.*

As the Fifth Circuit recently observed, embracing the reasoning of *Bhaktibhai-Patel* could also "have disastrous consequences on the immigration and judicial systems." *Argueta-Hernandez*, 87 F.4th at 706. If a noncitizen could obtain review of a withholding or CAT order only by filing a petition for review within 30 days of the underlying removal determination, then the noncitizen would have an incentive to file a prophylactic petition for review, in the hopes of convincing the court of appeals to hold his petition in abeyance until the withholding or CAT proceedings have concluded so that, if the agency ultimately denies the requested relief, he may then challenge any asserted errors in that denial order. See *id.* at 706 & n.5. And given that most withholding and CAT proceedings take months or years to complete, the courts of appeals would be forced to choose between permitting "numerous" burdensome, prophylactic petitions, *ibid.*, or effectively foreclosing judicial review of withholding and CAT orders in the context of administrative removal orders under Section 1228(b) and reinstatement determinations under Section 1231(a)(5). But see *Nasrallah*, 590 U.S. at 583-584 (emphasizing that CAT orders are judicially reviewable).

c. Although the court of appeals' decision regarding the timeliness of the petition for review was erroneous, this Court's intervention would be premature. Most of the courts of appeals to have considered the question have declined to adopt *Bhaktibhai-Patel*'s reasoning.[5]

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[5] See *Inestroza-Tosta*, 105 F.4th at 514 & n.12; *F.J.A.P.*, 94 F.4th at 631-638; *Argueta-Hernandez*, 87 F.4th at 705-706; *Alonso-Juarez*, 80 F.4th at 1047-1054; *Kolov* v. *Garland*, 78 F.4th 911, 916-919 (6th

And the Second Circuit itself has issued a briefing order indicating that it may be inclined to reconsider its decision. See 22-6024 Doc. 25.1, *Castejon-Paz* v. *Garland* (July 12, 2023); 22-6349 Doc. 23.1 *Cerrato-Barahona* v. *Garland* (July 12, 2023). The court held oral argument in the cases in which the briefing order was issued in April, but the cases have not yet been decided. If the Second Circuit retreats from its erroneous position, the Fourth Circuit could well do the same, obviating the need for this Court's intervention.

Moreover, the importance of the question would be diminished if the Court remands the jurisdictional question for reconsideration in light of *Harrow*, and the court of appeals appropriately deems Section 1252(b)(1)'s filing deadline to be nonjurisdictional. In that event, the government intends to waive any argument that the petition for review was untimely—both in this case and in other cases in which a similarly situated noncitizen has filed a petition for review within 30 days of the issuance of a CAT or withholding order. The government's waiver would permit the same filing deadline to apply regardless of the circuit in which the petition for review was filed.

Cir. 2023); *Arostegui-Maldonado* v. *Garland*, 75 F.4th 1132, 1141-1143 (10th Cir. 2023).

CONCLUSION

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

Respectfully submitted.

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