No. 23-1270

IN THE

Supreme Court of the United States

PIERRE YASSUE NASHUN RILEY,

Petitioner,

v.

MERRICK GARLAND, ATTORNEY GENERAL,

Respondent.

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

BRIEF FOR PETITIONER

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QUESTIONS PRESENTED

Petitioner Pierre Riley sought protection from removal, pursuant to the Convention Against Torture and Other Cruel, Inhuman, or Degrading Treatment or Punishment, in withholding-only proceedings. After the Board of Immigration Appeals issued a decision reversing an immigration judge's grant of protection, petitioner promptly sought 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 court of appeals dismissed the petition for lack of jurisdiction, citing 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."

The questions presented are:

(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.

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

Page(s)

Cases

Cases—Continued

Cases—Continued

Cases—Continued

Cases—Continued

Statutes, Treaties, Rules, and Regulations

Statutes, Treaties, Rules, and Regulations—Continued

Other Authorities

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OPINIONS BELOW

The Fourth Circuit's opinion (Pet. App. 1a–6a) is unpublished but available at 2024 WL 1826979.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 court of appeals entered judgment on April 26, 2024. This Court granted a timely certiorari petition on November 4, 2024, and has jurisdiction under 28 U.S.C. 1254(1).

STATUTORY PROVISIONS INVOLVED

Pertinent provisions are reproduced in the appendix. App. 1a–39a.

STATEMENT

Individuals who are not lawful permanent residents and have been convicted of aggravated felonies are subject to summary administrative-removal processes. See 8 U.S.C. 1228(b); 8 C.F.R. 1238.1. They are generally barred from seeking relief from removal; but may seek withholding or deferral, particularly under Article 3 of the Convention Against Torture ("CAT" or "Convention").

The Convention and U.S. domestic law prohibit the United States from deporting a noncitizen to a country where he is likely to face government-sponsored torture (hereinafter simply "torture"). This prohibition applies in all removal proceedings, including Section 1228(b) administrative-removal processes. A person's reasonable fear of torture in the country designated for deportation triggers a proceeding before an immigration judge ("IJ") to determine the person's entitlement to withholding or deferral of removal (hereinafter referred to solely as "withholding" for brevity). Either side—government or noncitizen—can then appeal to the Board of Immigration Appeals ("Board"). 8 C.F.R. 1208.31(e), (g)(2)(ii). The Board's decision determines whether the noncitizen will be deported to the country where the noncitizen fears torture. The

stakes are enormous, indeed life-or-death. An erroneous denial of withholding, if uncorrected, leads the United States to contribute to an individual's persecution or torture (sometimes his murder) by forcibly sending him to that fate.

The questions in this case determine when—and ultimately whether—a noncitizen in that situation can obtain judicial review of the Board's decision. The Fourth Circuit holds its jurisdiction is predicated on the filing of a petition for review within 30 days of an administrative document issued by a Department of Homeland Security ("DHS") immigration officer at the outset, not the Board's subsequent decision adjudicating withholding of removal. The latter happens more than 30 days after the immigration officer's decision—in this case 15 months later—so the Fourth Circuit's holding effectively curtails judicial review of withholding claims after Section 1228(b) proceedings.

The Fourth Circuit's conclusion is wrong on two fronts. First, the 30-day deadline is not jurisdictional. It is a simple claims-processing rule, like myriad others that the Court has clarified are not jurisdictional limits. Second, the 30-day clock starts upon issuance of a "final" removal order, and an agency order becomes "final" at the completion of administrative proceedings. That occurred only when the Board issued its decision. Nothing in the Immigration and Nationality Act ("INA") signals a different meaning for the finality of removal orders. The lower court misapprehended *Nasrallah*, which held a denial of CAT relief is not itself an order of removal. *Nasrallah* does not alter the ordinary meaning of finality for the agency's decisionmaking regarding the order of removal.

Withholding of removal, for those who qualify, is mandatory. No matter what misdeeds may cloud a person's past, the United States maintains a solemn commitment not to send the person to face torture or death at the hands of a lawless regime in another country. Congress has repeatedly reaffirmed that commitment by authorizing judicial review of CAT claims as a backstop to prevent legal error. Section 1252 should not be interpreted, contrary to that commitment, to strip review from those whose claims to withholding of removal are the most pressing.

I. Legal Background

A. Removal Proceedings

Noncitizens previously convicted of aggravated felonies[1] are "presumed to be deportable." 8 U.S.C. 1228(c). The Department of Justice ("DOJ") may determine a person's deportability through a hearing before an IJ. 8 U.S.C. 1229a(a). Or, if the person is not a lawful permanent resident, an immigration officer can determine his deportability, based on the aggravated-felony conviction, through an administrative order without an IJ. 8 U.S.C. 1228(b)(1)–(2).

In the second path—Section 1228(b) administrative-removal proceedings—the immigration officer issues a "Notice of Intent." 8 C.F.R. 238.1(b). The noncitizen has 10 days to file a response. 8 C.F.R. 238.1(c)(1). DHS can then, upon making the requisite determinations, issue a document titled a "Final Administrative Removal Order" ("FARO"). 8 C.F.R.

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[1] "Aggravated felonies" include, among others, petitioner's conviction under the Controlled Substances Act. 8 U.S.C. 1101(a)(43); 18 U.S.C. 924(c),

238.1(d). The determinations at this stage can be complex, and the statute contemplates judicial review at the appropriate time. 8 U.S.C. 1228(b)(3), (4)(E).

The FARO must "designate the country of removal." 8 C.F.R. 1238.1(f)(2). If the noncitizen expresses fear of returning to that country, an asylum officer conducts "a reasonable fear determination." 8 C.F.R. 1238.1(f)(3).

If the noncitizen "has a reasonable fear of persecution or torture,"[2] an IJ adjudicates, under 8 C.F.R. part 1208 subpart A, the claim to withholding or deferral of removal. 8 C.F.R. 1208.31(e). During that process, the noncitizen cannot be deported. 8 C.F.R. 1208.5(c). Withholding refers to both a statutory bar on deporting a noncitizen to a country where the person's "life or freedom would be threatened . . . because of the [noncitizen's] race, religion," or other specified causes, 8 U.S.C. 1231(b)(3)(A); and to the comparable protection under CAT Article 3. Deferral is CAT protection for those individuals whose circumstances render them ineligible for withholding. See *infra* 47–49. (As noted above, *supra* 2, for brevity this brief generally uses the term "withholding" to refer to both forms of protection.) The noncitizen is not allowed to contest removability before the IJ. 8 C.F.R. 1208.2(c)(3)(i). But the procedures are the same as for ordinary removal proceedings. 8 C.F.R. 1208.2(c)(3) (incorporat-

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[2] If the asylum officer determines the noncitizen lacks reasonable fear, the person can request IJ review on that point. 8 C.F.R. 1208.31(e), (g). If the IJ's decision is also negative, that decision is susceptible to judicial review.

ing "the same rules of procedure as proceedings conducted under 8 C.F.R. part 1240, subpart A"). An IJ's order granting withholding must include an order that the noncitizen be removed to a specific country, for which removal is withheld. *Matter of I-S & C-S-*, 24 I. & N. Dec. 432, 434 (BIA 2008).

The noncitizen or DHS can appeal the IJ's decision to the Board. 8 C.F.R. 1208.31(e). A removal order cannot be executed while the appeal is pending. 8 C.F.R. 1003.6(a).

B. The Convention Against Torture

Under CAT Article 3, "[n]o 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." Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, Art. 3, Dec. 10, 1984, S. Treaty Doc. No. 100–20, 1465 U.N.T.S. 113. Article 3 is absolute. Even "persons who pose a danger to the security of the United States" are protected. 64 Fed. Reg. 8,478, 8,479 (Feb. 19, 1999). That protection, where it applies, is mandatory. 8 C.F.R. 1208.16(d), 1208.17(a) (if eligibility is proved, relief "shall be granted"). *Moncrieffe* v. *Holder*, 569 U.S. 184, 187, n.1 (2013) (government "has no discretion to deny relief to a noncitizen who establishes his eligibility").

The Foreign Affairs Reform and Restructuring Act ("FARRA") called for regulations to implement CAT Article 3. Pub. L. 105-277, § 2242(b), 112 Stat. 2681-822. DOJ's 1999 rule incorporated CAT claims into the framework described above. 64 Fed. Reg. at 8,479.

To address an instruction in FARRA, § 2242(c), to exclude certain categories of noncitizens from protection to the extent permitted by CAT Article 3, DOJ established two tiers of relief. A noncitizen who is not disqualified by a circumstance such as a prior felony sentence would receive "withholding" of removal.[3] A noncitizen who is disqualified would, instead, receive "deferral." *Id.* at 8,480. (As noted above, p.2 *supra*, this brief generally uses the term "withholding" to encompass both forms of protection.) Both outcomes block DHS from removing the noncitizen to the country where he would likely be tortured. *Id.* They differ in various administrative details, such as "the mode of termination" of the protection if circumstances change. *Id.* at 8,481–8,482.

C. Judicial Review

In 1996, the Illegal Immigration Reform and Immigrant Responsibility Act ("IIRIRA"), Pub. L. 104-208, §§ 301–388, 110 Stat. 3009-575, "repealed the old judicial-review scheme . . . and instituted a new (and significantly more restrictive) one." *Reno* v. *American-Arab Anti-Discrimination Comm.*, 525 U.S. 471, 475 (1999). One restriction was a "zipper" clause, under which "[j]udicial review of all questions of law and fact, . . . arising from any . . . proceeding brought to

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[3] Besides CAT article 3, 8 U.S.C. 1231(b)(3) also prescribes withholding to prevent persecution. The Fourth Circuit's conclusions about the 30-day deadline apply for this protection too. A noncitizen who received a sentence over five years for an aggravated felony can only receive deferral, not CAT withholding or statutory withholding. *Id.*

remove [a noncitizen] . . . shall be available only in judicial review of a final order under this section." 8 U.S.C. 1252(b)(9). A further limitation tightened judicial review standards for factual determinations. 8 U.S.C. 1252(b)(4). IIRIRA also barred judicial review of "any final order of removal against [a noncitizen] who is removable" because of a prior aggravated felony conviction. 8 U.S.C. 1252(a)(2)(C).

In 2001, this Court held the new restrictions did not preclude writs of habeas corpus, preserving that mechanism for contesting removal orders. *INS* v. *St. Cyr*, 533 U.S. 289 (2001). Subsequently, given the entitlement of some noncitizens to CAT protection under FARRA and its implementing regulations, lower courts entertained claims in habeas challenging denials of CAT protection. *E.g.*, *Saint Fort* v. *Ashcroft*, 329 F.3d 191, 202 (1st Cir. 2003); *Ogbudimkpa* v. *Ashcroft*, 342 F.3d 207, 222 (3d Cir. 2003).

In 2005, the REAL ID Act, Pub. L. 109-13, § 106, 119 Stat. 310, amended Section 1252 to bar habeas cases yet ensure that circuit-court review would be an "adequate substitute." *Guerrero-Lasprilla* v. *Barr*, 589 U.S. 221, 232–233 (2020); see also *Nasrallah* v. *Barr*, 590 U.S. 573, 580 (2020). To that end, Section 1252 now allows "review of constitutional claims or questions of law raised upon a petition for review . . . in accordance with this section," even for those with criminal convictions. 8 U.S.C. 1252(a)(2)(D). In addition, "[n]otwithstanding any other provision of law (statutory or nonstatutory), . . . a petition for review . . . in accordance with this section shall be the sole and exclusive means for judicial review of any cause or claim under [CAT]." 8 U.S.C. 1252(a)(4).

Circuit courts generally understood new Section 1252(a)(4) allowed judicial review of CAT claims even after administrative-removal processes. See, *e.g.*, *Jean-Pierre* v. *U.S. Attorney General*, 500 F.3d 1315, 1316–1317 (11th Cir. 2007); *Owino* v. *Holder*, 575 F.3d 956, 958 (9th Cir. 2009). Courts also recognized that the 30-day filing deadline, from Section 1252(b)(1), starts at the true conclusion of administrative proceedings: the Board's decision (where Board appeal is available). *E.g.*, *Eke* v. *Mukasey*, 512 F.3d 372, 377–378 (7th Cir. 2008) ("[T]he immigration authorities were not finished with Eke's case until the [Board's] final decision.").

Nasrallah held a Board denial of CAT withholding is not in itself an "order of removal," so that the jurisdictional bars at Section 1252(a)(2)(B)–(C) do not preclude judicial review of factual issues regarding CAT protection. 590 U.S. 573. *Nasrallah* noted that Section 1252(a)(4), added by the REAL ID Act, "provides for direct review of CAT orders in the courts of appeals," and consequently "our decision does not affect the authority of the courts of appeals to review CAT orders." *Id.* at 585.

The topic here is whether that review can be obtained by a petition filed (like petitioner's) within 30 days of the Board's decision about withholding. The lower court concluded that because denying CAT protection is not itself an order of removal, the final order of removal must have been the FARO issued over a year before the Board's decision, before the adjudication of withholding even began. The Fourth Circuit also deems that 30-day deadline a jurisdictional requirement. The questions of when the 30-day clock

starts, and whether it is a jurisdictional limitation, determine whether the Fourth Circuit can hear petitioner's case.

II. Factual and Procedural Background

Petitioner was born in Jamaica. His father, a U.S. citizen, brought petitioner here in 1995 as a minor on a tourist visa. App. 12a. Since then, petitioner has lived continuously in New York City, believing he was a U.S. citizen.[4] He has seven children here, all U.S. citizens.

In 2006, petitioner was convicted of drug distribution and firearm possession and sentenced to 25 years' imprisonment. App. 1a. In January 2021, the district court granted compassionate release, finding he had received sufficient punishment. App. 3a–5a.

DHS served petitioner a Notice of Intent on January 27, 2021, and issued a FARO the following day. App. 52a–55a, 7a–8a. The FARO stated that petitioner would be deported to Jamaica. App. 8a. Petitioner immediately asserted he feared persecution and torture there. App. 55a. An IJ found petitioner had reasonable fear and undertook to determine his eligibility for CAT protection. App. 9a–10a, 59a.

At the ensuing hearing, petitioner testified that a drug kingpin with ties to the Jamaican government ordered the murder of several of petitioner's relatives, including having one of petitioner's cousins killed for asking police to investigate another relative's murder. App. 23a–27a.

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[4] While this brief uses the term "noncitizen," petitioner does not waive any potential claim he may have to citizenship.

The kingpin has vowed to kill every male member of petitioner's family for at least a decade, and has specifically threatened to kill petitioner if he returns to Jamaica. App. 21a–23a, 66a–67a. The situation has escalated as news of petitioner's release from prison spread. App. 21a. The kingpin and his gang have told petitioner's family members both here and in Jamaica—in no uncertain terms and on multiple occasions—that the kingpin will kill petitioner as soon as he arrives in Jamaica. App. 21a, 30a–35a. Jamaican police said they could not and would not intervene to prevent petitioner's murder. App. 31a–32a.

Petitioner explained the kingpin's association with the Jamaican government. App. 15a–18a. 35a. Petitioner also presented documentary evidence, including affidavits from relatives; corroboration for the narrative about the kingpin; and "country conditions" evidence about Jamaica's government. See App. 18a. He further explained that upon return to Jamaica, he will be unable to hide from the kingpin, because the Jamaican government requires the registration and tracking of deportees like petitioner. App. 37a.

The IJ found petitioner credible, and determined his murder, with the acquiescence of Jamaican authorities associated with the kingpin, is more likely than not if petitioner returns to Jamaica. Pet. App. 20a–21a. The IJ therefore granted his application for CAT protection. Pet. App. 27a.

DHS appealed that decision. App. 91a. The Board then (improperly) reweighed the evidence and concluded that to show his murder would be more likely than not, petitioner first had to reach that same threshold of proof for each of the kingpin's murders of petitioners' relatives. Pet. App. 8a–13a. The Board

then reversed the IJ's grant of protection. The resulting order stated: "[T]he applicant is ordered removed from the United States to Jamaica." Pet. App. 14a. A notice accompanying the Board's order informed petitioner that any petition for review . . . must be filed . . . within 30 days of the date of the [attached] decision." App. 44a.

Petitioner promptly petitioned for judicial review, App. 42a. He requested a stay of removal pending the appeal, explaining he would be killed if he returned to Jamaica. Pet. C.A. Mot. for Stay 17. The Fourth Circuit granted that request. No. 22-1609 (4th Cir. July 5, 2022). The parties fully briefed the merits, but while the case was pending the Fourth Circuit decided in *Martinez* v. *Garland*, 86 F.4th 561 (4th Cir. 2023), that a Board decision resolving only a disputed withholding claim is not a final removal order, and the 30-day clock starts at some earlier point. The Fourth Circuit then dismissed petitioner's case for lack of jurisdiction, over the objections of both petitioner and the government. Pet. App. 6a. The court withheld its mandate pending this Court's disposition of the case, so petitioner's removal to Jamaica currently remains stayed. No. 22-1609 (4th Cir. June 5, 2024).

SUMMARY OF ARGUMENT

This case presents two related questions concerning 8 U.S.C. 1252(b)(1), which requires a petition for judicial review to be filed "not later than 30 days after the date of the final order of removal." The first question concerns whether that deadline is jurisdictional; the second, when the 30-day period starts.

A. Section 1252(b)(1)'s deadline is not jurisdictional. The Court has clarified the standard for elevating a statutory requirement to a jurisdictional prerequisite: It will "treat a rule as jurisdictional 'only if Congress clearly states that it is.'" *Santos-Zacaria* v. *Garland*, 598 U.S. 411, 416 (2023). Absent "unmistakabl[e]" evidence of such intent, a rule is presumed to be nonjurisdictional. *Id.* at 417.

There is no such evidence for Section 1252(b)(1). As observed in *Santos-Zacaria*, some provisions within Section 1252 clearly address jurisdiction, by using that word. The lack of such language in subsection (d)(1), considered in *Santos-Zacaria*, and in subsection (b)(1) here, indicates these provisions are not intended to be jurisdictional. The text of subsection (b)(1) is similar to provisions the Court has held nonjurisdictional; and subsection (b)(1) is placed alongside several other nonjurisdictional requirements.

The Fourth Circuit erroneously relies on *Stone* v. *INS*, 514 U.S. 386 (1995). That case predated the Court's clarification of what it means for a requirement to be "jurisdictional." *Stone* was not truly about subject-matter jurisdiction. Rather, the Court addressed whether a motion to reopen tolls the time for seeking judicial review of the underlying Board decision. *Stone*'s passing reference to time limits as jurisdictional was just the sort of "drive-by" that the Court has said will not rank as precedent against its more recent explication of how to identify truly jurisdictional limitations. That dictum cannot stand against the mass of decisions reiterating that time limits are usually not jurisdictional.

B. Nor should the petition have been rejected as untimely. The Section 1252(b)(1) deadline runs from

the date of a "final order of removal." Here, that date was May 31, 2022, when the Board issued its decision both denying Petitioner protection under CAT and terminating agency proceedings. Petitioner timely filed for judicial review just four days later. The FARO issued in January 2021 was not "final" for these purposes until the Board resolved petitioner's claim for CAT protection; and the Board's decision itself also constituted an "order of removal" that was "final."

This Court has a well-developed understanding, based on ordinary English usage, of what it means for an order to be "final." An order is not "final" until all pending proceedings before the decisionmaker have concluded. The language and context of Section 1252(b)(1) incorporate that ordinary meaning of "final." That ordinary meaning was settled for judicial review under the Hobbs Act, 28 U.S.C. 2341–2351, and under the Administrative Procedure Act ("APA"), 5 U.S.C. 551–559. The use of "final order" in Section 1252(b)(1) presumably carries those traditional understandings. Congress reaffirmed its incorporation of established meanings by explicitly invoking the Hobbs Act as the source of procedures in Section 1252.

The context confirms that the Board's decision, in petitioner's situation, was the moment of the "final order of removal," because only that interpretation is consistent with Section 1252's other provisions. First, the requirement to exhaust all administrative remedies, 8 U.S.C. 1252(d)(1), presupposes that a noncitizen is able to attempt those remedies before the order of removal reaches finality. Second, the zipper clause, 8 U.S.C. 1252(b)(9), requires consolidation of all questions arising from "any . . . proceeding brought to remove an alien," into "judicial review of a final order

under this section." Apart from one explicit exception (involving a motion to reopen a Board decision, inapplicable here), a given removal proceeding must be presumed to generate only one occasion for judicial review. That Congress also expressly authorized review of CAT claims in that context indicates Congress understood a removal order becomes final alongside the CAT order.

Contrary to the Fourth Circuit's suggestion, no other statute, and no decision of this Court, suggests a departure from the settled approach to finality.

The Fourth Circuit erroneously relies on 8 U.S.C. 1101(a)(47)(B), which identifies two particular circumstances making an "order of deportation" final: a Board decision "affirming" such an order or the expiration of the deadline for appealing to the Board. On its face, Section 1101(a)(47)(B) does not actually *define* finality for all purposes. Indeed, it cannot. A Section 1228(b) administrative-removal order does not generate a Board appeal right, so neither situation identified in paragraph (a)(47)(B) ever occurs. Finality must therefore be governed by the ordinary and traditional meaning of the term "final."

The Fourth Circuit also misinterpreted this Court's recent decisions in *Nasrallah* and *Guzman Chavez*. *Nasrallah* did not address when an order of removal becomes "final." Nor did it hold that an order resolving a claim for withholding of removal cannot also include a removal order, or render a removal order final.

Johnson v. *Guzman Chavez* addressed a different provision that uses different language to address a dif-

ferent situation. The Court held a request for withholding does not prevent a removal order from being "administratively final" for purposes of detention under 8 U.S.C. 1231. 594 U.S. 523, 540 (2021). The Court acknowledged Section 1252(b)(1)—the provision at issue here—uses "different language," and "express[ed] no view" about the proper interpretation that provision. *Id.* at 535, n.6.

A FARO cannot be executed as written until the agency proceedings have concluded. 8 C.F.R. 1208.5(a); 8 C.F.R. 1003.6(a). (A noncitizen can, by statute, be deported to another country besides the one identified in the FARO, but that cannot happen while DOJ is adjudicating claims to protection against removal to the designated country.) It is on hold until that point; so only at the end of that administrative process does it become "final" in the Section 1252(b)(1) sense. The Board order itself, by releasing the hold on removal, constitutes an "order of removal" that is "final." And the Board order in petitioner's case explicitly ordered petitioner removed, Pet. App. 14a, thereby constituting an "order of removal" that was, of course, "final." Thus, although the substance of the Board's decision concerned petitioner's claim for CAT protection, the issuance of that order also marked a final order of removal.

Concluding otherwise would effectively bar review of claims to withholding of removal, because the Board's order necessarily comes more than 30 days after the immigration officer's initial order. Such a result would run contrary to the general presumption of judicial review and the explicit grant of judicial review for CAT claims in Section 1252.

ARGUMENT

The petition should not have been dismissed for lack of jurisdiction, because the 30-day deadline is not jurisdictional. Nor should it have been rejected as untimely, because the 30 days started upon the Board's decision.

I. Section 1252(b)(1) does not state a jurisdictional prerequisite.

The Court "treat[s] a rule as jurisdictional 'only if Congress clearly states that it is.'" *Santos-Zacaria*, 598 U.S. at 416 (citation omitted). The Court "adopted this clear-statement principle in *Arbaugh* [v. *Y & H Corp.*, 546 U.S. 500 (2006)]" because "[h]arsh consequences attend the jurisdictional brand," as the Court has detailed multiple times. 598 U.S. at 416. Those consequences include a court's inability to "grant equitable exceptions to jurisdictional rules," the fact that jurisdictional objections "can be raised at any time in the litigation," and the mandate to "enforce jurisdictional rules *sua sponte*, even in the face of a litigant's forfeiture or waiver." *Id.* The *Arbaugh* principle "ensure[s] that courts impose such harsh jurisdictional consequences only when Congress unmistakably has so instructed." *Id.* at 416–417.

"Congress need not 'incant magic words,' . . . but the 'traditional tools of statutory construction must plainly show that Congress imbued a procedural bar with jurisdictional consequences.'" *Boechler, P.C.* v. *Commissioner of Internal Revenue*, 596 U.S. 199, 203 (2022).

A. No unmistakable evidence marks Section 1252(b)(1) as jurisdictional.

"Time and again, [the Court] ha[s] described filing deadlines as 'quintessential claim-processing rules,' which 'seek to promote the orderly progress of litigation,' but do not deprive a court of authority to hear a case." *United States* v. *Kwai Fun Wong*, 575 U.S. 402, 410 (2015). "[M]ost time bars are nonjurisdictional," *id.*—for example the two-year and six-month bars in the Federal Tort Claims Act, *id.*; the 12-year limit in the Quiet Title Act, *Wilkins* v. *United States*, 598 U.S. 152 (2023); the 30-day deadline for seeking Tax Court review of a seizure, *Boechler*, 596 U.S. 199; the 60-day deadline for review of a Merit Systems Protection Board decision, *Harrow* v. *Department of Defense*, 601 U.S. 480 (2024); and the 120-day deadline to appeal a denial of veterans' benefits, *Henderson ex rel. Henderson* v. *Shinseki*, 562 U.S. 428 (2011).

Section 1252(b)(1) is textually similar to those other timing rules. The structure of Section 1252 signals the nonjurisdictional character of subsection (b)(1) by separating it from statements about jurisdiction. And subsection (b)(1) is located near, and parallel to, a provision the Court already held is nonjurisdictional.

First, the text "lacks plainly jurisdictional language." *Alonso-Juarez* v. *Garland*, 80 F.4th 1039, 1047 (9th Cir. 2023). "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). That sentence does not "expressly refer to subject-matter jurisdiction or speak in jurisdictional terms." *Musacchio* v. *United States*, 577 U.S. 237, 246 (2016). It does not state any

"bounds of the 'court's adjudicatory authority,'" *Santos-Zacaria*, 598 U.S. at 416. The words are like those considered in *Henderson*, where the provision said a petitioner "shall file a notice of appeal . . . within 120 days after the date" of notice of the agency's decision, 562 U.S. at 438 (quoting 38 U.S.C. 7266(a)). The word "must" does not convey a jurisdictional intent; "[not] 'all mandatory prescriptions, however emphatic, are . . . properly typed jurisdictional.'" *Henderson,* 562 U.S. at 439 (omission in original). Nothing else about Section 1252(b)(1) speaks of jurisdiction any more than the *Henderson* provision did. It "'reads like an ordinary, run-of-the-mill statute of limitations,' spelling out a litigant's filing obligations without restricting a court's authority." *Wong*, 575 U.S. at 411.

Second, paragraph (b)(1) is one of nine "requirements" for "review of an order of removal." 8 U.S.C. 1252(b)(1). Most of those requirements are obviously not jurisdictional. For example, paragraph (2) identifies the proper venue, a matter "relate[d] to the convenience of litigants" that has a "basic difference [from] the court's power." *Neirbo Co.* v. *Bethlehem Shipbuilding Corp.*, 308 U.S. 165, 168 (1939). Paragraph (4) says the court "shall decide the petition only on the administrative record," 8 U.S.C. 1252(b)(4)(A), a provision that logically cannot be a jurisdictional prerequisite. Paragraph (3)(C) states a time limit, after the court's receipt of the administrative record, for the noncitizen's opening brief. 8 U.S.C. 1252(b)(3)(C). That deadline cannot be jurisdictional because "the jurisdiction of the court depends upon the state of things at the time of the action brought." *Grupo Dataflux* v. *Atlas Global Group, L.P.*, 541 U.S. 567, 570 (2004). "Congress's separation of a filing deadline from a jurisdictional grant often indicates that the time bar is

not jurisdictional." *Wong*, 575 U.S. at 412. Positioning (b)(1) alongside multiple plainly non-jurisdictional provisions is an even stronger sign.

True, paragraph (b)(9) says: "Except as otherwise provided in this section, no court shall have jurisdiction . . . to review such an order." 8 U.S.C. 1252(b)(9). Placement in the same subsection cannot support a "proximity-related" inference that paragraph (b)(1) is jurisdictional; "[a] requirement we would otherwise classify as nonjurisdictional . . . does not become jurisdictional simply because it is placed in a section of a statute that also contains jurisdictional provisions." *Sebelius* v. *Auburn Regional Medical Center*, 568 U.S. 145, 155 (2013). *Auburn* held that jurisdictional status for paragraphs (a)(1) and (2) within 42 U.S.C. 1395oo would not confer jurisdictional character for a neighboring paragraph (a)(3) deadline. *Id.* The separation and distinction between paragraphs (b)(1) and (9) here are even clearer. Nor does paragraph (9), by limiting jurisdiction "[e]xcept as otherwise provided in this section," elevate all requirements in Section 1252 to jurisdictional status. "[A] nonjurisdictional provision does not metamorphose into a jurisdictional limitation by cross-referencing a jurisdictional provision," *Fort Bend County* v. *Davis*, 587 U.S. 541, 551, n.8 (2019), nor by being "cross-referenced," *Gonzalez* v. *Thaler*, 565 U.S. 134, 145 (2012). *Harrow* rejected an argument that by conferring jurisdiction for petitions filed "pursuant to" a given statutory section, Congress converted that section's procedural requirements into jurisdictional prerequisites. "[W]e . . . could say that Harrow filed his appeal 'pursuant to' § 7703(b)(1) even though he failed to satisfy that section's time bar." 601 U.S. at 487.

Third, *Santos-Zacaria* decided that a neighboring procedural requirement in the same statute, subsection (d)(1), is nonjurisdictional. 598 U.S. at 416. Two observations were particularly salient to the Court's analysis. The Court noted the (d)(1) requirement—exhaustion of administrative remedies—is a "quintessential claim-processing rule" and "routinely . . . 'nonjurisdictional.'" *Id.* at 417. And the expressly jurisdictional language in paragraph (b)(9) affirmatively suggests paragraph (d)(1) is nonjurisdictional: Paragraph (d)(1)'s "language differs substantially from more clearly jurisdictional language in related statutory provisions." *Id.* at 418. Both observations are equally true for subsection (b)(1). "No jurisdictional language is present in the [(b)(1)] provision even though Congress clearly provided for jurisdictional treatment elsewhere." *Inestroza-Tosta* v. *Attorney General*, 105 F.4th 499, 511 (3d Cir. 2024). And filing deadlines are also "quintessential claims-processing rules," *Wong*, 575 U.S. at 410. *Santos-Zacaria* held that "to be confident Congress took th[e] unexpected tack" of "attach[ing] jurisdictional consequences to a requirement that usually exists as a claims-processing rule," "we would need unmistakable evidence, on par with express language addressing the court's jurisdiction." 598 U.S. at 418. There is no evidence of that sort for paragraph (b)(1), any more than for (d)(1).

B. This Court has not definitively interpreted Section 1252(b)(1) as jurisdictional.

The Court has "stated it would treat a requirement as 'jurisdictional' when 'a long line of [Supreme] Cour[t] decisions left undisturbed by Congress' attached a jurisdictional label to the prescription." *Fort Bend County*, 587 U.S. at 548 (alterations in original).

But such cases are "exceptional." *Harrow*, 601 U.S. at 488.

1. Stone *does not dictate the interpretation of Section 1252(b)(1).*

This Court has never addressed whether Section 1252(b)(1) is jurisdictional—*Stone* considered the pre-IIRIRA statute, with substantially different judicial review provisions—so there is no "long line" of such decisions from this Court. In theory, a decision about a predecessor provision could provide the requisite precedent. See *John R. Sand & Gravel Co.* v. *United States*, 552 U.S. 130 (2008) (adhering to old precedent treating as jurisdictional the statute of limitations for damages against the government). But *Stone* does not pass muster as a jurisdictional decision under the Court's post-*Arbaugh* rubric.

"[C]ourts, including this Court, have more than occasionally misused the term 'jurisdictional' to refer to nonjurisdictional prescriptions." *Wilkins*, 598 U.S. at 159. "To separate the wheat from the chaff, this Court has asked if the prior decision addressed whether a provision is 'technically jurisdictional'—whether it truly operates as a limit on a court's subject-matter jurisdiction—and whether anything in the decision 'turn[ed] on that characterization.'" *Id.* at 160 (alteration in original). "The mere existence of a decision employing the term jurisdiction without elaboration does not show Congress adopted that view." *Id.* at 165.

By that standard, *Stone* is not a jurisdictional precedent about the 30-day deadline. *Stone* decided whether a motion for reconsideration rendered an im-

migration order non-final, thus tolling the filing deadline triggered by the order. 514 U.S. at 389–390. In passing, the Court said the applicable filing deadline (under an earlier version of the INA), which might have been tolled by a reconsideration motion had the Court's interpretation gone the other way, is "mandatory and jurisdictional." *Id.* at 405. This Court has specifically characterized the *Stone* statement as "without elaboration," *Henderson*, 562 U.S. at 437, exactly the sort of passing remark that *Wilkins* said would not count.

In *Stone,* the government consistently argued that the noncitizen's petition was untimely against the original order. Rejecting the petition was warranted whether on jurisdictional or merely procedural grounds. The court of appeals denominated its action as a dismissal for lack of jurisdiction, *Stone*, 514 U.S. at 389; but "[i]f a decision simply states that 'the court is dismissing for lack of jurisdiction'" it is understood as a 'drive-by jurisdictional rulin[g]' that receives 'no precedential effect.'" *Wilkins*, 598 U.S. at 160 (alteration in original).

Nothing in *Stone* turned on its characterization of the 30-day deadline as jurisdictional. The Court relied primarily on an INA provision requiring review of a motion to reconsider to be consolidated with review of the underlying order, thus indicating each order needed its own petition. 514 U.S. at 393–394. The Court's mention of the 30-day deadline as jurisdictional appears in a short penultimate paragraph, noting the Court's interpretation was supported by the principle that "[j]udicial review provisions . . . are jurisdictional in nature and must be construed with strict fidelity to their terms." *Id.* at 405. Nothing in

Stone suggests the Court would have been less faithful to the statutory text with those provisions deemed non-jurisdictional.

Stone's statement that "judicial review provisions" are "jurisdictional" is a sterling example of what *Wilkins* said would not detract from the *Arbaugh* clear-statement rule. Provisions about appeal to a court from an agency are not presumptively jurisdictional; they are governed by the *Arbaugh* principle. *Harrow*, 601 U.S. at 489. While *Stone* said time limits are "mandatory and jurisdictional," 514 U.S. at 405, calling a time limit "mandatory and jurisdictional" is not necessarily a reference to subject-matter jurisdiction. *Kontrick* v. *Ryan*, 540 U.S. 443, 454–455 (2004) ("[C]lassify[ing] time prescriptions, even rigid ones, under the heading 'subject matter jurisdiction' can be confounding.") (alteration in original).

Furthermore, *Santos-Zacaria* already found *Stone*'s judicial characterization lacking. *Santos-Zacaria* construed a judicial review provision that is, as noted, in the same section of the same statute as Section 1252(b)(1). Were the *Stone* observation about "judicial review provisions" binding, *Santos-Zacaria* could not have found Section 1252(d)(1) nonjurisdictional. Instead, the Court conducted the same analysis that *Wilkins* described. It rejected *Stone* because (a) *Stone* did not "attend[] to the distinction between 'jurisdictional' rules . . . and nonjurisdictional but mandatory ones," and (b) "whether the provision[] w[as] jurisdictional 'was not central to the case.'" 598 U.S. at 421.

2. Had Stone *decided the judicial-review deadline was truly jurisdictional, the Court should overrule that decision.*

Even if the foregoing analysis were incorrect, the "principles of *stare decisis*," *Wilkins*, 598 U.S. at 159, would call for rejecting the *Stone* observation.

When "deciding whether to overrule a past decision," the Court considers factors that include (1) "the quality of [the precedent's] reasoning"; (2) "the workability of the rule it established"; (3) the precedent's "consistency with other related decisions"; (4) "developments since the decision was handed down"; and (5) "reliance on the decision." *Janus* v. *State, County, and Municipal Employees*, 585 U.S. 878, 917 (2018) (alteration in original). Those factors disfavor *Stone*'s observation about the 30-day deadline.

a. *Stone* provided no reasoning about whether the deadline is jurisdictional; it simply recited that time limits are "mandatory and jurisdictional." The Court has described such statements as "confounding" and a "[mis]use[]" of the terms. *Scarborough* v. *Principi*, 541 U.S. 401, 413–414 (2004) (quoting *Kontrick*, 540 U.S. at 454–455) (alteration in original); see also *Eberhart* v. *United States*, 546 U.S. 12, 16 (2005) ("recent decisions have attempted to brush away confusion introduced by our earlier opinions" about which prescriptions are jurisdictional).

b. The *Stone* observation is not "workab[le]." *Santos-Zacaria* reiterated that treating a procedural requirement as limiting judicial authority is problematic because of the "harsh consequences." 598 U.S. at 416.

c. The *Stone* observation is inconsistent with other related decisions. If *Stone* governed the Court's decision today, Section 1252(b)(1) would stand nearly alone as a time limit with jurisdictional consequences. The jurisdictional time limits regarding judicial appeals, *Bowles* v. *Russell*, 551 U.S. 205 (2007), are "statutory deadlines to appeal 'from one Article III court to another'"; "[a]s to all other time bars," including appeal "from an agency," "we now demand a 'clear statement.'" *Harrow*, 601 U.S. at 489.

d. The government has not relied on the *Stone* observation, but, rather, agrees Section 1252(b)(1) is not jurisdictional. Br. in Opp. 7–9.

e. Developments have fatally undercut *Stone*'s jurisdictional observation. The Court has adopted the *Arbaugh* principle since then, and also established that time limits are ordinarily not jurisdictional. Moreover, Congress substantially amended the INA just a year after *Stone*. Pub. L. 104-208, §§ 301–388, 110 Stat. 3009-575. IIRIRA was no mere recodification; it "repealed the old judicial-review scheme . . . and instituted a new (and significantly more restrictive) one." *American-Arab Anti-Discrimination Comm.*, 525 U.S. at 475; see also *Calcano-Martinez* v. *INS*, 533 U.S. 348, 350 (2001) (describing IIRIRA's "new provisions governing the judicial review of immigration orders"). The statutory context and structure are different from what *Stone* considered.

3. Hobbs Act decisions from lower courts do not show Congress meant Section 1252(b)(1) to be jurisdictional.

In *Henderson*, the government contended the deadline for petitions to the Veterans Court should be

jurisdictional because "lower court decisions have uniformly held that the Hobbs Act's 60-day time limit for filing a petition for review of certain final agency decisions, 28 U.S.C. 2344, is jurisdictional." 562 U.S. at 437. But this Court has not decided whether the Hobbs Act time limit is jurisdictional. For overcoming the *Arbaugh* principle, "lower court opinions" cannot "stand in for a ruling of this Court." *Wilkins*, 598 U.S. at 165. *Boechler* too rejected the argument that lower-court decisions suffice for the "long line" of precedents to displace the *Arbaugh* presumption. 596 U.S. at 208. Moreover, lower-court doctrines about the Hobbs Act deadline generally "predate this Court's effort to 'bring some discipline' to the use of the term 'jurisdictional.'" *Id.* (quoting *Henderson*, 562 U.S. at 435). "[P]re-*Arbaugh* lower court cases interpreting a related provision are not enough to make clear that a rule is jurisdictional." *Santos-Zacaria*, 598 U.S. at 422.

If this Court considered the Hobbs Act deadline today, that deadline would likely be non-jurisdictional. Its separation from the pertinent jurisdiction-conferring provision is particularly stark. One section, entitled "Jurisdiction of court of appeals," states that a circuit court "has exclusive jurisdiction . . . to determine the validity of" certain agency orders. 28 U.S.C. 2342. The deadline appears in a different section, entitled "Review of orders; time; notice; contents of petition; service." 28 U.S.C. 2344. The heading groups the time limit with other procedural requirements, treating them all as ordinary claims-processing rules. That organization and the separation from the jurisdictional provision make it particularly unlikely the

Court would conclude, under *Arbaugh* and its progeny, that the Hobbs Act time limit was clearly intended to rank as jurisdictional.

In sum, Section 1252(b)(1) is plainly not a jurisdictional limitation in light of the Court's precedents over the last two decades. *Stone*, which made a passing observation about the time limit in the pre-IIRIRA statute, is not a precedent the Court must or should respect on that point.

II. Petitioner satisfied Section 1252(b)(1) by filing in court within 30 days of the Board's decision.

Congress explicitly authorized judicial review for claims under CAT Article 3 (as implemented in FARRA and DOJ regulations). Section 1252(a)(4) says circuit courts review "cause[s] or claim[s] under the [CAT]." *Nasrallah* explained this provision "provides for direct review of CAT orders in the courts of appeals." 590 U.S. at 585.

"With respect to review of an order of removal . . . [t]he 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). That sentence does not explicitly address review of CAT orders. But the zipper clause says "[j]udicial review . . . shall be available only in judicial review of a final order under this section." 8 U.S.C. 1252(b)(9). Lower courts take for granted that for judicial review of a CAT order, the petition must be filed within 30 days of a final order of removal.

Petitioner's was, because under the ordinary meaning of "final," his removal order was not final until the termination of agency proceedings resolving all remaining outstanding issues. That is the concept of

finality in ordinary English, and multiple features of Section 1252 confirm that usage in this context. "In statutory interpretation disputes, a court's proper starting point lies in a careful examination of the ordinary meaning and structure of the law itself." *Food Marketing Institute* v. *Argus Leader Media*, 588 U.S. 427, 436 (2019). The relevant words are to be read "not in a vacuum, but with reference to the statutory context, 'structure, history, and purpose.'" *Abramski* v. *United States*, 573 U.S. 169, 179 (2014) (citation omitted). Further, DOJ's regulations implementing CAT Article 3 are in line with petitioner's understanding; and treating an earlier order of an official subordinate in the process as the "final order" would contravene the presumption of judicial review. The text, context, structure, and purpose all yield the same answer: The Board decision marked the point in time of a "final order of removal" in petitioner's case, even though the issue directly addressed was about CAT protection.

A. Under the ordinary meaning of "final," the order of removal does not reach that point until all agency proceedings conclude.

"Final" refers to an event "constituting the end result of a succession or process," the "ultimate" outcome. American Heritage College Dictionary 510 (3d ed. 1993). The "final" decision "com[es] at the end: being the last in a series, process, or progress." Webster's Collegiate Dictionary 628 (10th ed. 1993). A "final order," according to Black's Law Dictionary, is one that "terminates the litigation" [and] "leaves nothing to be done." (6th ed. 1993). "[U]nless otherwise defined, words will be interpreted as taking their

ordinary, contemporary, common meaning.'" *Sandifer* v. *United States Steel Corp.,* 571 U.S. 220, 227 (2014) (citation omitted).[5]

The Court has understood finality this way for decades. In 1948, the Court explained that a particular decision by the Civil Aeronautics Board was not final because it was not the "consummation of the administrative process." *Chicago & Southern Air Lines* v. *Waterman S.S. Corp.*, 333 U.S. 103, 113 (1948). Conversely, in 1970, in holding a different agency's decision was final for purposes of review, the Court said one of the two "relevant considerations in determining finality [is] whether the process of administrative decisionmaking has reached a stage where judicial review will not disrupt the orderly process of adjudication." *Port of Boston Marine Terminal Assn.* v. *Rederiaktiebolaget Transatlantic*, 400 U.S. 62, 71 (1970). Lower courts uniformly apply such standards under the Hobbs Act. "[I]n an adjudication a final order is one that disposes of all issues as to all parties." *Natural Resources Defense Council, Inc.* v. *NRC*, 680 F.2d 810, 815 (D.C. Cir. 1982).

Bennett v. *Spear* applied these concepts for interpreting the word "final" in the Administrative Procedure Act ("APA"): "[F]or agency action to be 'final'," "the action must mark the 'consummation' of the agency's decisionmaking process." 520 U.S. 154, 177–

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[5] The statutory definition of "order of deportation" is followed by a list of two situations in which such an order becomes final. That does not mandate an understanding of finality different from the ordinary meaning. See *infra* at 38–39 (discussing 8 U.S.C. 1101(a)(47)).

178 (1997). See also *Whitman* v. *Am. Trucking Assns.*, 531 U.S. 457, 478 (2001) (same for direct circuit-court review of EPA Clean Air Act rules). *Smith* v. *Berryhill* held that given the plain meaning of "final," "the phrase 'final decision' [in the Social Security Act] clearly denotes some kind of terminal event." 587 U.S. 471, 479 (2019).

The Court's understanding of what makes a district-court judgment "final" is similar. "A 'final decision' is typically one 'by which a district court disassociates itself from a case.'" *Mohawk Industries, Inc.* v. *Carpenter*, 558 U.S. 100, 106 (2009).

Under the ordinary meaning of "final," there was no "final order of removal" in petitioner's case until the Board's decision. That decision constituted the "end result" of the administrative process, and it completed the administrative work by accomplishing the "disposit[ion] of the entire case."

The Board's order was also "final" according to this Court's elaboration of finality for judicial review. The administrative process was not "consummat[ed]" until that point; as the course of the proceedings show, there was more work for administrative adjudicators to do. Neither DOJ nor DHS "dissociated" itself from the case; both continued to engage in administrative process—DOJ as adjudicator, and DHS by filing and prosecuting the Board appeal. *Port of Boston* asks whether judicial review at an earlier point would "disrupt the ordinary process of adjudication." It surely would have done so here: Had petitioner sought judicial review earlier, DOJ would have defended some prior intermediate order in court while simultaneously acting as an administrative tribunal in the same proceeding.

With respect to the FARO, the Board's decision marks the point of finality. This Court has "long taken" a "pragmatic' approach" regarding finality. *Army Corps of Engineers* v. *Hawkes Co.*, 578 U.S. 590, 599 (2016). The FARO could not be executed as written until the completion of further administrative processes. DHS and DOJ regulations bar a person's deportation "before a decision is rendered on [the] asylum application," and while a Board appeal is pending. 8 C.F.R. 1208.5(a);[6] see also 8 C.F.R. 1003.6(a). Whatever removal might eventually be carried out might well change depending on what the Board decides about withholding: If a noncitizen receives withholding, DHS might then designate a different deportation destination (to the extent 8 U.S.C. 1231(b) permits), and would revise the FARO accordingly. Moreover, the FARO specifically ordered petitioner "removed from the United States to Jamaica." App. 8a. That order could not be carried out before DOJ completed its review of petitioner's contentions that he would be killed upon his forced return to Jamaica.

This understanding of the finality of the FARO is similar to how lower courts understand the review of ordinary removal proceedings. After an IJ determines removability, the Board's decision starts the 30-day clock, because, by finishing the agency appeal, the Board's decision "eliminates the impediments to removal." *Solano-Chicas* v. *Gonzales*, 440 F.3d 1050, 1054 (8th Cir. 2006); *Delgado-Reynua* v. *Gonzales,* 450 F.3d 596, 600–601 (5th Cir. 2006) (agreeing with *Solano-Chicas*). The Board's order renders the IJ's or-

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[6] The term "asylum application" includes a request for withholding. 8 C.F.R. 1208.1(a)(1).

der final by "eliminating the impediment to that order's enforcement." *Lolong* v. *Gonzales*, 484 F.3d 1173, 1177 (9th Cir. 2007) (en banc).

As the Seventh Circuit has explained, "although a CAT order does not determine whether a noncitizen can be removed, it does determine where that noncitizen can be sent." *F.J.A.P.* v. *Garland*, 94 F.4th 620, 634 (7th Cir. 2024). "The indeterminacy of *where* . . . suggests that the [removal] order might yet leave something 'to be looked for or expected,' subject to possible alteration." *Id.* Indeed, had petitioner's case resulted in deferral of removal, an immigration officer might then have designated a different country (if there is some other permissible destination).[7] "Consequently, the plain meaning of 'final' points us toward the conclusion that a [removal] order does not become final for purposes of judicial review until the agency has also concluded withholding proceedings." *Id.* Given the indeterminacy of where the noncitizen will be removed, a noncitizen's "rights, obligations, and [the order's] legal consequences" are "not fully determined until the reasonable fear and withholding of removal proceedings are complete." *Luna-Garcia* v. *Holder*, 777 F.3d 1182, 1185 (10th Cir. 2015). Similarly, agency action is ordinarily not final if it is only "the ruling of a subordinate official." *Franklin* v. *Massachusetts*, 505 U.S. 788, 797 (1992). That there are administrative bodies—the IJ and then the Board—whose activities bar enforcement of the FARO as written shows the immigration officer is "subordinate" in that sense.

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[7] 8 U.S.C. 1231(b) details where a noncitizen can be deported.

In petitioner's case, the Board actually ordered removal itself. The Board's order says so on its face: "[T]he applicant is ordered removed from the United States to Jamaica." Pet. App. 14a. That was an "order of removal." And it was the last such order that could or would be issued in petitioner's proceeding, the "last in a series" and last in the "process."

B. The context confirms the ordinary usage of "final" in Section 1252(b)(1).

1. Congress understood the traditional concept of finality from decades of precedent.

The consistency with which this Court has understood the concept of finality, across many different contexts—appellate review of district courts, circuit-court review of agency orders, the APA—goes beyond establishing a body of precedent governing the Court's interpretation of "final order of removal" today. That body of law informed Congress when it used the term in IIRIRA.

"When a statutory term is 'obviously transplanted from another legal source,' it 'brings the old soil with it.'" *Taggart* v. *Lorenzen*, 587 U.S. 554, 560 (2019). *Taggart* used that principle to conclude that a provision stating a bankruptcy court's discharge order "operates as an injunction" carried with it the "'potent weapon' of civil contempt" and the "traditional standards in equity" for civil contempt. *Id.* at 560–561. *Hall* v. *Hall* used the same principle to import, into the word "consolidate" in the Federal Rules, pre-Rules doctrines about consolidation. 584 U.S. 59, 72–73 (2018).

Similarly, what makes a decision "final" was well-understood, through cases like *Chicago Southern* and *Port of Boston*, when Congress enacted Section 1252(b)(1). Indeed, just one year before IIRIRA, the Court issued an extensive discussion of the concept of finality in the INA. *Stone*, 514 U.S. at 395–396. *Stone* discussed whether a motion for reconsideration renders an agency decision nonfinal, and explained that the traditional answer is yes under both the APA and the Hobbs Act. *Id.* at 392–393. The Court further noted that because the INA generally incorporates Hobbs Act procedures, the traditional answer would apply were there no "further qualification" in the statute. *Id.* There was a "further qualification" as to reconsideration. *Id.* at 395–396. But Congress was on notice that absent such qualification, traditional Hobbs Act principles (which are consistent with APA finality) would govern interpretations of the INA.

Taggart teaches that in IIRIRA, Congress presumably intended a term like "final" to carry the meaning that was well-established in Hobbs Act and APA cases. IIRIRA confirms that teaching: After *Stone* invoked Hobbs Act principles, IIRIRA included language expressly invoking the Hobbs Act. 8 U.S.C. 1252(a)(1). And the post-1996 INA contains no qualification pointing away from the traditional meaning of "final."

2. The structure of Section 1252 confirms Congress meant "final order" in the ordinary sense.

First, Section 1252(d) specifies that "[a] court may review a final order of removal only if . . . the alien has exhausted all administrative remedies." 8 U.S.C. 1252(d)(1). It would make no sense to require a

noncitizen to exhaust administrative remedies if the order becomes final before that exhaustion can be completed. Rather, Congress must have expected that the order becomes final only after the noncitizen has the opportunity to attempt administrative remedies. That understanding is consistent with the ordinary meaning of finality, in which the order becomes final at the end of the administrative process.

When petitioner received the FARO, administrative remedies were available to him, namely requesting adjudication of his fear of torture.[8] While the IJ found him removable, the IJ provided the protection he requested and the FARO remained on hold while DHS appealed the IJ's decision. Had Congress intended the FARO to count as "final" while further administrative process remained available, Section 1252 would be internally incoherent.

Second, the zipper clause requires all judicial review, in "any . . . proceeding brought to remove [a noncitizen]," to be conducted through "judicial review of a final order under this section." 8 U.S.C. 1252(b)(9). This provision means "a noncitizen's various challenges arising from the removal proceeding must be 'consolidated in a petition for review.'" *Nasrallah*, 590 U.S. at 580. "Congress intended the

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[8] Paragraph (d)(1) demands exhaustion of "all administrative remedies available to the alien as of right." It does not limit or qualify that scope to remedies altering the conclusion as to removability or affecting the validity of the removability decision. "All" is an encompassing word; and seeking CAT relief was an administrative remedy available to petitioner by right.

zipper clause to 'consolidate judicial review of immigration proceedings into one action in the court of appeals.'" *Guerrero-Lasprilla*, 589 U.S. at 230. Since Congress has also said that CAT claims are to be reviewed as part of the "review of a final order of removal," FARRA § 2242(d), it surely contemplated that the order of removal and the CAT order would become final at the same time. Otherwise, the zipper clause and the judicial review prescribed by section (a)(4) would be mutually incompatible. DOJ could simply issue a CAT-only decision more than 30 days after the last decision with a removability dispute,[9] so that either there would have to be two separate cases—undermining the zipper clause—or alternatively the zipper clause would defeat judicial review of the CAT decision. Congress could not have intended that result, given the REAL ID Act simultaneously amended the zipper clause to block habeas cases and clarified that circuit courts review CAT decisions alongside removal orders.

Third, after *Stone* alerted Congress that Hobbs Act doctrines would apply to the INA absent contrary indications, IIRIRA reiterated Congress's reference to the Hobbs Act and identified specific exceptions. Per Section 1252(a)(1), the Hobbs Act generally governs review of final orders of removal, "except as provided in subsection (b)." 8 U.S.C. 1252(a)(1). Subsection (b) alters the Hobbs Act timeline for judicial review (30 days after the final order); it changes the venue and the means for service upon the government; it adjusts the standard of review; and it mandates consolidating

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[9] This would be possible for any case, not just for a noncitizen undergoing Section 1228 removal, such as so-called "mixed cases." See *infra* n.11.

a petition from a motion to reconsider with the petition from the original order, repeating the qualification on which *Stone* relied. 8 U.S.C. 1252(b)(1)–(4), (6). Nothing in subsection (b) signals other changes to what constitutes a final order.

Particularly, neither subsection (b) nor anything else in Section 1252 establishes an exception to finality for Section 1228(b) proceedings, comparable to the (b)(6) alteration for reconsideration motions addressed in *Stone*. Congress could, for example, have said review of a CAT order "shall be consolidated" with review of an administrative-removal order, thus signaling these are two petitions filed at different times. But Congress chose differently, and "it is not for us to rewrite the statute," *Hall* v. *United States*, 566 U.S. 506, 523 (2012).

Congress specified how Section 1252 deviates from Hobbs Act principles and said those were the only departures. So the traditional, ordinary concept of finality is all the more imperative.

3. The definition of "order of deportation" does not displace the ordinary meaning of "final."

That Section 1101 says an "order of deportation" "shall become final'" upon a Board decision "affirming such order" or the expiration of a noncitizen's time to seek Board appeal, 8 U.S.C. 1101(a)(47)(B), does not alter this conclusion. The paragraph (47)(B) statement is consistent with ordinary principles of finality and does not necessitate a departure from them. The

Board is the final decisionmaking body in many removal proceedings, so naturally an order becomes final upon the Board's decision.[10]

While statutory definitions are "virtually conclusive," *Garland* v. *Cargill*, 602 U.S. 406, 428, n.9 (2024), paragraph (47)(B) is not actually a *definition*. Unlike most other clauses in Section 1101, (47)(B) does not say a term "means" something or "includes" a set of things. Indeed, paragraph (47)(B) stands next to (47)(A) that says "order of deportation" "means" a certain type of order, 8 U.S.C. 1101(a)(47)(A), yet (47)(B) does not use the "means" formulation. "[W]here [a] document has used one term in one place, and a materially different term in another, the presumption is that the different term denotes a different idea." *Southwest Airlines Co.* v. *Saxon*, 596 U.S. 450, 457–458 (2022) (citation omitted). That presumption is all the stronger here, because "Congress well knows the difference" between a definition and a substantive provision. *Cyan* v. *Beaver County Employees Retirement Fund*, 583 U.S. 416, 418 (2018). Thus, while paragraph (47)(A) defines the term "order of deportation," clause (B) simply mandates two circumstances in which such an order becomes final. It does not purport to *define* finality for judicial-review purposes. In fact, it cannot because the two circumstances identified—a Board decision "affirming" or the expiration of

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[10] These realities do not make paragraph (47) superfluous. If nothing else, regulations, not statutes created the Board, 8 C.F.R. 1003.1(a); so absent paragraph (47), DOJ could eliminate the Board and render the next lower decisionmaker final.

the deadline without an appeal—do not cover situations (such as this case) when the noncitizen prevails before the IJ and DHS appeals and obtains a reversal.

C. Nothing in Section 1252 overrides the presumption of judicial review.

"Congress rarely intends to prevent courts from enforcing its directives to federal agencies." *Mach Mining, LLC* v. *EEOC*, 575 U.S. 480, 486 (2015). Consequently "[t]his Court has long recognized a 'strong presumption' in favor of judicial review of final agency action." *American Hospital Assn.* v. *Becerra*, 596 U.S. 724, 733 (2022). Because that presumption is "'well-settled,' . . . the Court assumes that 'Congress legislates with knowledge of' the presumption." *Kucana* v. *Holder*, 558 U.S. 233, 251–252 (2010). "[T]he burden for rebutting it is heavy," *Smith*, 587 U.S. at 483, and it "can only be overcome by 'clear and convincing evidence' of congressional intent to preclude judicial review." *Guerrero-Lasprilla*, 589 U.S. at 229. The Court has "consistently applied that interpretive guide to legislation regarding immigration, and particularly to questions concerning the preservation of federal-court jurisdiction." *Kucana*, 558 U.S. at 251.

Thus, Congress intended courts to review the executive branch's decisions about eligibility for CAT protection. There is unquestionably a "meaningful standard" to be reviewed, cf. *Weyerhaeuser Co.* v. *United States Fish and Wildlife Serv.*, 586 U.S. 9, 23 (2018) (holding APA exception for "matters committed to agency discretion" is "read . . . quite narrowly"). If a noncitizen proves he will likely be tortured in the designated country of removal, FARRA and DOJ regulations prohibit deporting him there. 8 C.F.R. 1208.16(d), 1208.17(a). DOJ "has no discretion to

deny [CAT] relief to a noncitizen who establishes his eligibility." *Moncrieffe*, 569 U.S. at 187, n.1. Consequently, a determination that a noncitizen failed the legal test is "the sort of routine dispute that federal courts regularly review." *Weyerhaeuser*, 586 U.S. at 23.

"Independent judicial review" is particularly justified "in an area where administrative decisions can mean the difference between freedom and oppression and, quite possibly, life and death." *Rodriguez-Roman* v. *INS*, 98 F.3d 416, 432 (9th Cir. 1996) (Kozinski, J., concurring). Administrative errors do occur. Over 10,500 Board decisions have been remanded by circuit courts since 2014. *Adjudication Statistics: Circuit Court Remands Filed*, Executive Office for Immigration Review (July 19, 2024). *Argueta-Hernandez* v. *Garland*, 87 F.4th 698 (5th Cir. 2023), corrected an error about CAT protection, because the Board disregarded "sustained" and "credible" death threats. *Id.* at 708. The Fourth Circuit too has found errors in CAT decisions. *E.g.*, *Zavaleta-Policiano* v. *Sessions*, 873 F.3d 241, 248 (4th Cir. 2017) ("[T]he IJ and [Board] failed to appreciate, or even address, critical evidence in the record."). Such errors, when uncorrected, place the United States in violation of its international obligations under CAT and of Congress's stated policy against delivering individuals to face torture. For issues "critical to determining whether the noncitizen is likely to be tortured if returned, it makes some sense that Congress would provide an opportunity for judicial review." *Nasrallah*, 590 U.S. at 586.

There is no indication—much less "clear and convincing evidence"—that Congress intended to bar such review. In fact, Congress twice said the opposite.

"Section 2242(d) of FARRA . . . expressly provides for judicial review of CAT claims together with the review of final orders of removal." *Nasrallah*, 590 U.S. at 586. Then the REAL ID Act "provide[d] for direct review of CAT orders in the courts of appeals." *Id.* Section 1252 restricts judicial review in other ways. 8 U.S.C. 1252(a)(2)(A), (B), (D). "It would be easy enough for Congress to preclude judicial review" of withholding decisions, just as it imposed those other restrictions. *Nasrallah*, 590 U.S. at 583. Congress "has not done so," *id.*, and the Court must therefore interpret Section 1252 to allow judicial review of those decisions.

Interpreting "final order of removal" to occur before the completion of the administrative process would contravene the presumption by "foreclosing review of CAT orders" for whole categories of removal cases, particularly for noncitizens who are ineligible for other relief or protection. *F.J.A.P.*, 94 F.4th at 635. It would make the "promise of judicial review of agency action" "illusory" given the structure of the administrative proceedings which make it "impossible" to seek review within 30 days of the FARO. See *Inestroza-Tosta*, 105 F.4th at 514. Once a FARO is issued and a noncitizen expresses a fear of returning to the designated country, the immigration officer has 10 days to carry out the reasonable-fear interview. 8 C.F.R. 1208.31(a)–(b), (g). So there can easily be 10 days from the FARO before the IJ hearing even starts. After the IJ, either party can appeal to the Board, and that appeal must be filed within 30 days. 8 C.F.R. 1003.3(a)(1)–(2), 1003.38(b). After the Board receives the IJ's record, DHS and the noncitizen have 21 days to file their briefs. 8 C.F.R. 1003.3(c)(1). This sched-

ule makes it impossible to have a decision about withholding, to be judicially reviewed, within 30 days of the FARO. And that leaves out the time for the Board to decide the appeal.

Moreover, as a practical matter "withholding and CAT proceedings often take months or even years to conclude," so that many noncitizens "cannot obtain judicial review" under the Fourth Circuit's approach. *Martinez*, 86 F.4th at 574 (Floyd, J., concurring). Petitioner's case illustrates the timelines. He received the FARO on January 28, 2021. The IJ granted CAT protection on July 27, six months later; and DHS filed its appeal on August 25. The Board's decision was 10 months later, on May 31, 2022. That timeframe was quite ordinary. For example, in *Tadeo* v. *Garland*, the Board's decision came 11 months after the FARO. No. 22-60462, 2024 WL 2780230, at *1 (5th Cir. May 30, 2024). In *Sanabria Morales* v. *Barr*, the gap was 26 months. 967 F.3d 15, 16 (1st Cir. 2020). Thus, concluding that an order of removal becomes "final" when DHS issues the FARO would preclude judicial review of the decision that the Board subsequently makes about withholding.[11]

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[11] Interpreting finality to occur before completion of the administrative process would create problems in many other circumstances. For example, the Board sometimes affirms the conclusion that a noncitizen is removable but remands to the IJ for further proceedings on withholding of removal. See, *e.g.*, *Chupina* v. *Holder*, 570 F.3d 99, 103–104 (2d Cir. 2009) (*per curiam*). Necessarily, the Board's decision about withholding would come after the conclusion of the remand

This Court has repeatedly applied the presumption of judicial review to ensure "meaningful judicial review" before the removal of noncitizens. *Guerrero-Lasprilla*, 589 U.S. 230. *Guerrero-Lasprilla* interpreted "questions of law" to encompass mixed questions of law and fact. 589 U.S. 221. The Court did so because "interpreting the Limited Review Provision to exclude mixed questions would effectively foreclose judicial review of the Board's determinations so long as it announced the correct legal standard." *Id.* at 229–230. *Kucana* explained that "[s]eparation-of-powers concerns . . . caution us against reading legislation, absent clear statement, to place in executive hands authority to remove cases from the Judiciary's domain." 558 U.S. at 237. Interpreting "final order of removal" to mean an early stage of the administrative process would run against these teachings. A withholding claim presents a dispute about the application of a binding legal standard to a given individual's case. Congress did not intend to eliminate judicial review on such matters simply because DOJ regulations—or even agency workload—cause this dispute to take longer than the 30-day deadline for seeking review.

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proceeding. If the Board's remand order (the last decision with a removability dispute) were the "final order of removal," the subsequent withholding decision would be more than 30 days later. The Court should "hesitate before finding that Congress vested the executive branch with the authority to shape the scope of . . . review so drastically." *F.J.A.P.*, 94 F.4th at 637, n.10.

D. *Nasrallah* does not require the Court to reject the ordinary meaning of "final."

While most lower courts have applied the ordinary meaning of "final" to determine when the 1252(b)(1) clock starts, the Fourth Circuit rejected that approach based on a misinterpretation of *Nasrallah*. Nothing in *Nasrallah* supports, much less requires, treating an intermediate, inferior agency decision as the final order of removal.

1. An order can mark the final removal order while also deciding CAT protection.

Nasrallah explained the difference between an "order of removal" and a CAT order. An "order of removal" is an order "concluding that the alien is deportable or ordering deportation." 590 U.S. at 581 (citing 8 U.S.C. 1101(a)(47)(A)).[12] A CAT order, by contrast,

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[12] *Nasrallah* also said "final orders of removal encompass only the rulings made by the immigration judge or Board of Immigration Appeals that affect the validity of the final order of removal." 590 U.S. at 582. This sentence is circular and cannot logically be a holding about what constitutes a final order of removal. "'[T]he language of an opinion is not always to be parsed as though we were dealing with language of a statute,'" but rather must be "read with a careful eye to context" about what "discrete case[] or controvers[y]" was addressed. *National Pork Producers Council* v. *Ross*, 598 U.S. 356, 373–374 (2023). *Nasrallah* was explaining the difference between removal and CAT orders, rather than determining what makes an order final or ruling that only an IJ or the Board can issue a final order of removal.

"means only that . . . the noncitizen may not be removed to the designated country of removal, at least until conditions change." *Id.* at 582. In that respect, the two types of decision do not merge for purposes of the Section 1252(a)(2)(C) limitation on judicial review. *Ibid*; see also *Guzman Chavez*, 594 U.S. at 539 (explaining removal and withholding are "distinct questions" that "end in two separate orders").

That these two orders are "separate" in a logical sense does not mean a document denying CAT protection cannot also include or coincide with a "final order of removal." The Fourth Circuit thinks a given decision must be either a final removal order or a CAT order, but not both. That false dichotomy contradicts both *Nasrallah*'s reasoning and DOJ's protocols.

Indeed, *Nasrallah* rejected the contention that a single document must be one thing or the other. The Court analogized removal and withholding proceedings to a criminal case. That both the conviction and the sentence must be completed before the defendant can appeal does not mean the conviction is the same as the sentence. 590 U.S. at 583. A conviction and sentence are finalized in a single document of judgment; in the same way, DOJ determinations on removability and withholding do not merge but may be contained in a single document.

That functional approach is borne out by DOJ regulations and protocol. In full-dress removal proceedings, the adjudicator's decisions with respect to both removability and CAT withholding (if requested) are detailed in a single order that is both a "final order of removal" and a CAT order. See generally 8 C.F.R. 1240.11; 8 C.F.R. 1240.15. Board precedent requires

that an order of removal accompany a withholding decision. *Matter of I-S- & C-S-*, 24 I. & N. Dec. at 434 ("[W]hen an Immigration Judge decides to grant withholding of removal, an explicit order of removal must be included in the decision.").

2. The resolution of a withholding claim also marks the final removal order.

An immigration officer issues a FARO that (1) finds the noncitizen removable, and (2) "designate[s] the country of removal." 8 C.F.R. 238.1(f)(2). That second aspect of the FARO triggers the process to request withholding or deferral as to the designated country. That application halts the order and entitles the noncitizen to a proceeding before an IJ and potentially before the Board. 8 C.F.R. 1208.5(a) (noncitizen "shall not be excluded, deported, or removed before a decision is rendered on his or her asylum application"); 8 C.F.R. 1003.6(a) (no decision "shall . . . be executed while an appeal is pending" before the Board). *Guzman Chavez* observed that during this process a FARO "remains in full force," and DHS retains the statutory authority to eventually deport a noncitizen to a different country. 594 U.S. at 536; 8 C.F.R. 1208.16(f) (grant of withholding or deferral does not "prevent [DHS] from removing" to a different country not covered by the withholding or deferral). But the FARO, though in force, is on hold, 8 C.F.R. 1208.5(a); and before removing to a different country DHS would need to amend the FARO or otherwise designate that other country, 8 C.F.R. 238.1(f)(2) (thus ensuring the noncitizen's opportunity to raise grounds for withholding or deferral about that country).

If the process ends in a denial of CAT relief, that outcome allows the removal to proceed. While that

denial is not itself a decision about the validity of removal, it is, in such cases, a necessary predicate for the removal to be carried out as ordered. A removal order that cannot be carried out because of ongoing administrative adjudication is not "final," any more than a conviction is "final" before the sentence is decided.

DOJ followed precisely that process in petitioner's case. The immigration officer issued a FARO ordering petitioner removed to Jamaica. App. 7a. Petitioner then applied for withholding, which halted the order of removal under 8 C.F.R. 1208.5(a). The IJ granted petitioner's request for deferral under CAT; but on appeal the Board reversed and "ordered [petitioner] removed from the United States to Jamaica." Pet. App. 14a.

Consistent with *Nasrallah*, the Board's order was a single document that encompassed both removal and withholding. It was the agency's final decision on CAT protection. At the same time, the Board's decision rendered the original order of removal (the FARO) "final," because the Board's decision was the necessary step to bring the FARO to fruition. The Board's order was also itself an "order of removal" because it was a document "ordering deportation," 590 U.S. at 581 (citing 8 U.S.C. 1101(a)(47)(a)). It did so explicitly. But even without that language, the removal order would still be implicit, because the Board's decision ended the stay of petitioner's removal under 8 C.F.R. 1003.6(a). There is no inconsistency in holding there was no final order of removal until this point even though the denial of CAT protection was not, in itself, such an order.

E. *Guzman Chavez* did not decide when an order of removal is "final" for purposes of judicial review.

The Fourth Circuit leans heavily on *Guzman Chavez* in concluding that DHS administrative orders are "final" upon issuance. *Martinez*, 86 F.4th at 569. That reliance is erroneous because *Guzman Chavez* expressly disclaimed any position about Section 1252 and interpreted a term different from "final order of removal."

Guzman Chavez decided which of two statutes governs the detention of noncitizens subject to reinstated removal orders who then pursue withholding-only relief. The Court chose 8 U.S.C. 1231(a)(1)(B), which "authorizes detention 'when [a noncitizen] is ordered removed" and the order has "become[] administratively final.'" 594 U.S. at 533. The reinstated removal order is "administratively final" because the noncitizen is not entitled to contest removal further. *Id.*

The Court acknowledged the phrase "administratively final" is "different language" from what appears in Section 1252, and addresses a different function, namely detention rather than judicial review. 594 U.S. at 535, n.6. Consequently, the Court said it "express[ed] no view" about the proper interpretation of "final order of removal" in Section 1252. *Id.*

"Holding that a reinstated removal order is final for purposes of an IJ's consideration of detention does not answer whether it is final for purposes of circuit court review of the outcome of withholding-only proceedings." *Arostegui-Maldonado* v. *Garland*, 75 F.4th 1132, 1143 (10th Cir. 2023). The difference in statu-

tory language suggests the opposite. The word "administratively" in Section 1231(a)(1)(B) must have meaning. "Equating finality in § 1231 with § 1252(b)(1) renders 'administratively' superfluous." *F.J.A.P.*, 94 F.4th at 632. Conversely, under the "meaningful-variation canon," Congress's deliberate omission of "administratively" in Section 1252 necessarily "denotes a different idea." See *Southwest Airlines*, 596 U.S. at 457–458.

The notion that a decision can be "administratively final" without being final for judicial review is familiar in administrative law. For example, *Fritsch* v. *ICC* considered an agency decision that was "administratively final" but was subject to a request for reopening. 59 F.3d 248, 250 (D.C. Cir. 1995). That reopening request made the case non-final for purposes of judicial review under this Court's precedents, and the D.C. Circuit held that it could review the substance of the decision on reopening. *Id.* at 252. Thus, "administratively final" was a status within the administrative process, not a determination about finality for judicial review. *Guzman Chavez* said the same about Section 1231(a)(1)(B): "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." 594 U.S. at 534. By contrast, "[w]hether an administrative decision is final" for purposes of judicial review "is determined not 'by the administrative agency's characterization of its action, but rather by a realistic assessment of the nature and effect of the order sought to be reviewed,'" *Adenariwo* v. *Federal Maritime Comm'n*, 808 F.3d 74, 78 (D.C. Cir. 2015)—an assessment governed by the traditional understanding of finality in this Court's precedents.

A FARO is "administratively final" in that the agencies have concluded a pertinent stage in their administrative process. It is not final for judicial review because there are, nonetheless, further administrative processes to be carried out.

F. The Fourth Circuit's interpretation of finality upends the orderly process of judicial review.

Noncitizens could attempt to preserve judicial review of withholding/deferral claims by first filing a placeholder petition for review within 30 days of the initial administrative order, which the court could then hold in abeyance, then filing a second petition after the Board decision on withholding, and later seeking to consolidate the second petition with the first. Or a noncitizen could, upon receiving a decision denying withholding, file a request that DHS reissue the administrative-removal order, so as to retrigger the 30-day clock for the Fourth Circuit.

Even assuming a noncitizen can obtain judicial review by these techniques, these would be absurdly inefficient if pursued across the board. "It would lead to an increase in filings, as petitioners would inevitably have to file a petition for review to preserve the possibility of judicial review, even when unsure if they would need to, or even choose to, challenge the decision in the future," which in turn "would require [the courts of appeals] to dedicate resources to tracking and closing moot or abandoned petitions" and "to establish a system of holding petitions for review in abeyance for years at a time." *Alonso-Juarez*, 80 F.4th at 1053.

The REAL ID Act was supposed to make judicial review more efficient, not less. See *Guerrero-Lasprilla*, 589 U.S. at 235–236. Congress wanted one consolidated review of all issues at the end of a given removal proceeding. *Nasrallah*, 590 U.S. at 580. An interpretation that requires premature placeholder appeals or widespread motions to reissue administrative orders undermines that legislative goal and "would be immensely resource intensive" for the judiciary, the government, and noncitizens. *Alonso-Juarez*, 80 F.4th at 1053.[13] Indeed, that model raises many of the same concerns as the government's proposal (on a different issue) that *Santos-Zacaria* rejected: It "presents a world of administrability headaches for courts, traps for unwary noncitizens, and mountains of [petitions] for the [courts of appeals] (filed out of an abundance of caution by noncitizens unsure of the need to [petition for appeal])." 598 U.S. at 430. Congress mandated that review of CAT orders should be available. The Court should eschew a construction of Section 1252 that respects that mandate only by massively multiplying the nation's immigration dockets.

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[13] Nor is there evidence that Congress intended to impose this process. Section 1252 points the opposite direction, expressly calling for separate petitions, then to be consolidated, for one particular administrative circumstance (a motion to reopen). Had Congress wanted piecemeal review petitions from other stages in the administrative process, Section 1252 would have said so.

CONCLUSION

The Court should reverse the Fourth Circuit's judgment and remand for further proceedings.

Respectfully submitted,

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APPENDIX

APPENDIX CONTENTS

Treaty:

Statutes:

Regulations:

The United Nations Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, Dec. 10, 1984, S. Treaty Doc. No. 100-20 (1988), 1465 U.N.T.S. 85, provides, in relevant part:

* * *

Article 3

1. 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 U.S.C. 1101(a)(47), Definitions, provides:

(a) As used in this chapter—

(47)

(A) The term "order of deportation" means the order of the special inquiry officer, or other such administrative officer to whom the Attorney General has delegated the responsibility for determining whether an alien is deportable, concluding that the alien is deportable or ordering deportation.

(B) The order described under subparagraph (A) shall become final upon the earlier of—

(i) a determination by the Board of Immigration Appeals affirming such order; or

(ii) the expiration of the period in which the alien is permitted to seek review of such order by the Board of Immigration Appeals.

The Illegal Immigration Reform and Immigrant Responsibility Act of 1996, Section 309(d), 110 Stat. 3009-627 (1996), provides:

(d) Transitional References. — For purposes of carrying out the Immigration and Nationality Act, as amended by this subtitle—

> **(1)** any reference in section 212(a)(1)(A) of such Act to the term "inadmissible" is deemed to include a reference to the term "excludable", and
>
> **(2)** any reference in law to an order of removal shall be deemed to include a reference to an order of exclusion and deportation or an order of deportation.

8 U.S.C. 1228, Expedited removal of aliens convicted of committing aggravated felonies, provides:

(a) Removal of criminal aliens

(1) In general. The Attorney General shall provide for the availability of special removal proceedings at certain Federal, State, and local correctional facilities for aliens convicted of any criminal offense covered in section 1227(a)(2)(A)(iii), (B), (C), or (D) of this title, or any offense covered by section 1227(a)(2)(A)(ii) of this title for which both predicate offenses are, without regard to the date of their commission, otherwise covered by section 1227(a)(2)(A)(i) of this title. Such proceedings shall be conducted in conformity with section 1229a of this title (except as otherwise provided in this section), and in a manner which eliminates the need for additional detention at any processing center of the Service and in a manner which assures expeditious removal following the end of the alien's incarceration for the underlying sentence. Nothing in this section shall be construed to create any substantive or procedural right or benefit that is legally enforceable by any party against the United States or its agencies or officers or any other person.

(2) Implementation. With respect to an alien convicted of an aggravated felony who is taken into custody by the Attorney General pursuant to section 1226(c) of this title, the Attorney General shall, to the maximum extent practicable, detain any such felon at a facility at which other such aliens are detained. In the selection of such facility, the Attorney General shall make reasonable efforts to ensure that the alien's access to counsel

and right to counsel under section 1362 of this title are not impaired.

(3) Expedited proceedings

(A) Notwithstanding any other provision of law, the Attorney General shall provide for the initiation and, to the extent possible, the completion of removal proceedings, and any administrative appeals thereof, in the case of any alien convicted of an aggravated felony before the alien's release from incarceration for the underlying aggravated felony.

(B) Nothing in this section shall be construed as requiring the Attorney General to effect the removal of any alien sentenced to actual incarceration, before release from the penitentiary or correctional institution where such alien is confined.

(4) Review

(A) The Attorney General shall review and evaluate removal proceedings conducted under this section.

(B) The Comptroller General shall monitor, review, and evaluate removal proceedings conducted under this section. Within 18 months after the effective date of this section, the Comptroller General shall submit a report to such Committees concerning the extent to which removal proceedings conducted under this section may adversely affect the ability of such aliens to contest removal effectively.

(b) Removal of aliens who are not permanent residents

(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.

(c)[1] Presumption of deportability. An alien convicted of an aggravated felony shall be conclusively presumed to be deportable from the United States.

* * *

[1] So in original. Two subsecs. (c) have been enacted.

8 U.S.C. 1252, Judicial review of orders of removal provides, in relevant part:

(a) Applicable provisions

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

(2) Matters not subject to judicial review

(A) Review relating to section 1225(b)(1). 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, no court shall have jurisdiction to review—

(i) except as provided in subsection (e), any individual determination or to entertain any other cause or claim arising from or relating to the implementation or operation of an order of removal pursuant to section 1225(b)(1) of this title,

(ii) except as provided in subsection (e), a decision by the Attorney General to invoke the provisions of such section,

(iii) the application of such section to individual aliens, including the determination made under section 1225(b)(1)(B) of this title, or

(iv) except as provided in subsection (e), procedures and policies adopted by the Attorney General to implement the provisions of section 1225(b)(1) of this title.

(B) Denials of discretionary relief. 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, and except as provided in subparagraph (D), and regardless of whether the judgment, decision, or action is made in removal proceedings, no court shall have jurisdiction to review—

(i) any judgment regarding the granting of relief under section 1182(h), 1182(i), 1229b, 1229c, or 1255 of this title, or

(ii) any other decision or action of the Attorney General or the Secretary of Homeland Security the authority for which is specified under this subchapter to be in the discretion of the Attorney General or the Secretary of Homeland Security, other than the granting of relief under section 1158(a) of this title.

(C) Orders against criminal aliens. 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, and except as provided in subparagraph (D), no court shall have jurisdiction to review any final order of removal against an alien

who is removable by reason of having committed a criminal offense covered in section 1182(a)(2) or 1227(a)(2)(A)(iii), (B), (C), or (D) of this title, or any offense covered by section 1227(a)(2)(A)(ii) of this title for which both predicate offenses are, without regard to their date of commission, otherwise covered by section 1227(a)(2)(A)(i) of this title.

(D) Judicial review of certain legal claims. Nothing in subparagraph (B) or (C), or in any other provision of this chapter (other than this section) which limits or eliminates judicial review, shall be construed as precluding review of constitutional claims or questions of law raised upon a petition for review filed with an appropriate court of appeals in accordance with this section.

(3) Treatment of certain decisions. No alien shall have a right to appeal from a decision of an immigration judge which is based solely on a certification described in section 1229a(c)(1)(B) of this title.

(4) Claims under the United Nations Convention. 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).

(5) Exclusive means of review. 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 an order of removal entered or issued under any provision of this chapter, except as provided in subsection (e). For purposes of this chapter, in every provision that limits or eliminates judicial review or jurisdiction to review, the terms "judicial review" and "jurisdiction to review" include habeas corpus review pursuant to section 2241 of title 28, or any other habeas corpus provision, sections 1361 and 1651 of such title, and review pursuant to any other provision of law (statutory or nonstatutory).

(b) Requirements for review of orders of removal. With respect to review of an order of removal under subsection (a)(1), the following requirements apply:

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

(2) Venue and forms. The petition for review shall be filed with the court of appeals for the judicial circuit in which the immigration judge completed the proceedings. The record and briefs do not have to be printed. The court of appeals shall review the proceeding on a typewritten record and on typewritten briefs.

(3) Service

(A) In general. The respondent is the Attorney General. The petition shall be served on the Attorney General and on the officer or employee of the Service in charge of the Service district in which the final order of removal under section 1229a of this title was entered.

(B) Stay of order. Service of the petition on the officer or employee does not stay the removal of an alien pending the court's decision on the petition, unless the court orders otherwise.

(C) Alien's brief. The alien shall serve and file a brief in connection with a petition for judicial review not later than 40 days after the date on which the administrative record is available, and may serve and file a reply brief not later than 14 days after service of the brief of the Attorney General, and the court may not extend these deadlines except upon motion for good cause shown. If an alien fails to file a brief within the time provided in this paragraph, the court shall dismiss the appeal unless a manifest injustice would result.

(4) Scope and standard for review. Except as provided in paragraph (5)(B)—

(A) the court of appeals shall decide the petition only on the administrative record on which the order of removal is based,

(B) the administrative findings of fact are conclusive unless any reasonable adjudicator would be compelled to conclude to the contrary,

(C) a decision that an alien is not eligible for admission to the United States is conclusive unless manifestly contrary to law, and

(D) the Attorney General's discretionary judgment whether to grant relief under section 1158(a) of this title shall be conclusive unless manifestly contrary to the law and an abuse of discretion.

No court shall reverse a determination made by a trier of fact with respect to the availability of corroborating evidence, as described in section 1158(b)(1)(B), 1229a(c)(4)(B), or 1231(b)(3)(C) of this title, unless the court finds, pursuant to subsection (b)(4)(B), that a reasonable trier of fact is compelled to conclude that such corroborating evidence is unavailable.

(5) Treatment of nationality claims

(A) Court determination if no issue of fact. If the petitioner claims to be a national of the United States and the court of appeals finds from the pleadings and affidavits that no genuine issue of material fact about the petitioner's nationality is presented, the court shall decide the nationality claim.

(B) Transfer if issue of fact. If the petitioner claims to be a national of the United States and the court of appeals finds that a genuine issue of material fact about the petitioner's nationality is presented, the court shall transfer the proceeding to the district court of the United States for the judicial district in which the petitioner resides for a new hearing on the nationality claim and a decision on that claim as if an action had been brought in the district court under section 2201 of title 28.

(C) Limitation on determination. The petitioner may have such nationality claim decided only as provided in this paragraph.

(6) Consolidation with review of motions to reopen or reconsider. When a petitioner seeks review of an order under this section, any review sought of a motion to reopen or reconsider the order shall be consolidated with the review of the order.

(7) Challenge to validity of orders in certain criminal proceedings

(A) In general. If the validity of an order of removal has not been judicially decided, a defendant in a criminal proceeding charged with violating section 1253(a) of this title may challenge the validity of the order in the criminal proceeding only by filing a separate motion before

trial. The district court, without a jury, shall decide the motion before trial.

(B) Claims of United States nationality. If the defendant claims in the motion to be a national of the United States and the district court finds that—

> **(i)** no genuine issue of material fact about the defendant's nationality is presented, the court shall decide the motion only on the administrative record on which the removal order is based and the administrative findings of fact are conclusive if supported by reasonable, substantial, and probative evidence on the record considered as a whole; or
>
> **(ii)** a genuine issue of material fact about the defendant's nationality is presented, the court shall hold a new hearing on the nationality claim and decide that claim as if an action had been brought under section 2201 of title 28.
>
> The defendant may have such nationality claim decided only as provided in this subparagraph.

(C) Consequence of invalidation. If the district court rules that the removal order is invalid, the court shall dismiss the indictment for violation of section 1253(a) of this title. The United States Government may appeal the dismissal to the court of appeals for the appropriate

circuit within 30 days after the date of the dismissal.

(D) Limitation on filing petitions for review. The defendant in a criminal proceeding under section 1253(a) of this title may not file a petition for review under subsection (a) during the criminal proceeding.

(8) Construction. This subsection—

(A) does not prevent the Attorney General, after a final order of removal has been issued, from detaining the alien under section 1231(a) of this title;

(B) does not relieve the alien from complying with section 1231(a)(4) of this title and section 1253(g) [1] of this title; and

(C) does not require the Attorney General to defer removal of the alien.

(9) Consolidation of questions for judicial review. 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. Except as otherwise provided in this section, no court shall have jurisdiction, by habeas corpus under section 2241 of title 28 or any other habeas corpus provision, by section 1361 or 1651 of such title, or by any other provision of law (statutory or

nonstatutory), to review such an order or such questions of law or fact.

* * *

(d) Review of final orders. A court may review a final order of removal only if—

(1) the alien has exhausted all administrative remedies available to the alien as of right, and

(2) another court has not decided the validity of the order, unless the reviewing court finds that the petition presents grounds that could not have been presented in the prior judicial proceeding or that the remedy provided by the prior proceeding was inadequate or ineffective to test the validity of the order.

* * *

The Foreign Affairs Reform and Restructuring Act of 1998 (FARRA), Pub. L. 105-277, 112 Stat. 2681-761, et seq. (1998) (codified at 8 U.S.C. § 1231 note) provides:

(a) Policy. It shall be the policy of the United States not to expel, extradite, or otherwise effect the involuntary return of any person to a country in which there are substantial grounds for believing the person would be in danger of being subjected to torture, regardless of whether the person is physically present in the United States.

(b) Regulations. Not later than 120 days after the date of enactment of this Act [Oct. 21, 1998], the heads of the appropriate agencies shall prescribe regulations to implement the obligations of the United States under Article 3 of the United Nations Convention Against Torture and Other Forms of Cruel, Inhuman or Degrading Treatment or Punishment, subject to any reservations, understandings, declarations, and provisos contained in the United States Senate resolution of ratification of the Convention.

(c) Exclusion of Certain Aliens. To the maximum extent consistent with the obligations of the United States under the Convention, subject to any reservations, understandings, declarations, and provisos contained in the United States Senate resolution of ratification of the Convention, the regulations described in subsection (b) shall exclude from the protection of such regulations aliens described in section 241(b)(3)(B) of the Immigration and Nationality Act (8 U.S.C. 1231(b)(3)(B)).

(d) Review and Construction. Notwithstanding any other provision of law, and except as provided

in the regulations described in subsection (b), no court shall have jurisdiction to review the regulations adopted to implement this section, and nothing in this section shall be construed as providing any court jurisdiction to consider or review claims raised under the Convention or this section, or any other determination made with respect to the application of the policy set forth in subsection (a), except as part of the review of a final order of removal pursuant to section 242 of the Immigration and Nationality Act (8 U.S.C. 1252).

(e) Authority To Detain. Nothing in this section shall be construed as limiting the authority of the Attorney General to detain any person under any provision of law, including, but not limited to, any provision of the Immigration and Nationality Act [8 U.S.C. 1101 et seq.].

(f) Definitions.

(1) Convention defined. In this section, the term 'Convention' means the United Nations Convention Against Torture and Other Forms of Cruel, Inhuman or Degrading Treatment or Punishment, done at New York on December 10, 1984.

(2) Same terms as in the convention. Except as otherwise provided, the terms used in this section have the meanings given those terms in the Convention, subject to any reservations, understandings, declarations, and provisos contained in the United States Senate resolution of ratification of the Convention.

8 C.F.R. 238.1(f), Proceedings under section 238(b) of the Act, provides:

(f) Executing final removal order of deciding Service officer—

(1) Time of execution. Upon the issuance of a Final Administrative Removal Order, the Service shall issue a Warrant of Removal in accordance with § 241.2 of this chapter; such warrant shall be executed no sooner than 14 calendar days after the date the Final Administrative Removal Order is issued, unless the alien knowingly, voluntarily, and in writing waives the 14–day period.

(2) Country to which alien is to be removed. The deciding Service officer shall designate the country of removal in the manner prescribed by section 241 of the Act.

(3) Withholding of removal. If the alien has requested withholding of removal under § 208.16 of this chapter, the deciding officer shall, upon issuance of a Final Administrative Removal Order, immediately refer the alien's case to an asylum officer to conduct a reasonable fear determination in accordance with § 208.31 of this chapter.

8 C.F.R. 1003.3, Notice of appeal, provides, in relevant part:

(a) Filing—

(1) Appeal from decision of an immigration judge. A party affected by a decision of an immigration judge which may be appealed to the Board under this chapter shall be given notice of the opportunity for filing an appeal. An appeal from a decision of an immigration judge shall be taken by filing a Notice of Appeal from a Decision of an Immigration Judge (Form EOIR–26) directly with the Board, within the time specified in § 1003.38. The appealing parties are only those parties who are covered by the decision of an immigration judge and who are specifically named on the Notice of Appeal. The appeal must reflect proof of service of a copy of the appeal and all attachments on the opposing party. An appeal is not properly filed unless it is received at the Board, along with all required documents, fees or fee waiver requests, and proof of service, within the time specified in the governing sections of this chapter. A Notice of Appeal may not be filed by any party who has waived appeal pursuant to § 1003.39.

(2) Appeal from decision of a DHS officer. A party affected by a decision of a DHS officer that may be appealed to the Board under this chapter shall be given notice of the opportunity to file an appeal. An appeal from a decision of a DHS officer shall be taken by filing a Notice of Appeal to the Board of Immigration Appeals from a Decision of a DHS Officer (Form EOIR–29) directly with the DHS office having administrative control over the

record of proceeding within 30 days of the service of the decision being appealed. An appeal is not properly filed until it is received at the appropriate DHS office, together with all required documents, and the fee provisions of § 1003.8 are satisfied.

(3) General requirements for all appeals. The appeal must be accompanied by a check, money order, or fee waiver request in satisfaction of the fee requirements of § 1003.8. If the respondent or applicant is represented, pursuant to 8 CFR 1003.38(g)(1), a Form EOIR–27, Notice of Entry of Appearance as Attorney or Representative Before the Board, must be filed with the Notice of Appeal. If the respondent or applicant receives document assistance from a practitioner with the appeal, pursuant to 8 CFR 1003.38(g)(2), a Form EOIR–60 must be filed with the Notice of Appeal. The appeal and all attachments must be in English or accompanied by a certified English translation.

* * *

(c) Briefs—

(1) Appeal from decision of an immigration judge. Briefs in support of or in opposition to an appeal from a decision of an immigration judge shall be filed directly with the Board. In those cases that are transcribed, the briefing schedule shall be set by the Board after the transcript is available. In cases involving noncitizens in custody, the parties shall be provided 21 days in which to file simultaneous briefs unless a shorter period is specified by the Board. Reply briefs shall be permitted only by leave of the

Board and only if filed within 21 days of the deadline for the initial briefs. In cases involving noncitizens who are not in custody, the appellant shall be provided 21 days in which to file a brief, unless a shorter period is specified by the Board. The appellee shall have the same period of time in which to file a reply brief that was initially granted to the appellant to file their brief. The time to file a reply brief commences from the date upon which the appellant's brief was due, as originally set or extended by the Board. The Board, upon written motion, may extend the period for filing a brief or a reply brief for up to 90 days for good cause shown. In its discretion, the Board may consider a brief that has been filed out of time. In its discretion, the Board may request supplemental briefing from the parties after the expiration of the briefing deadline. All briefs, filings, and motions filed in conjunction with an appeal shall include proof of service on the opposing party.

(2) Appeal from decision of a DHS officer. Briefs in support of or in opposition to an appeal from a decision of a DHS officer shall be filed directly with DHS in accordance with the instructions in the decision of the DHS officer. The applicant or petitioner and DHS shall be provided 21 days in which to file a brief, unless a shorter period is specified by the DHS officer from whose decision the appeal is taken, and reply briefs shall be permitted only by leave of the Board. Upon written request of the noncitizen, the DHS officer from whose decision the appeal is taken or the Board may extend the period for filing a brief for good cause shown. The Board may authorize the

filing of briefs directly with the Board. In its discretion, the Board may consider a brief that has been filed out of time. All briefs and other documents filed in conjunction with an appeal, unless filed by a noncitizen directly with a DHS office, shall include proof of service on the opposing party.

* * *

8 C.F.R. 1003.6(a), Stay of execution of decision, provides:

(a) Except as provided under § 236.1 of this chapter, § 1003.19(i), and paragraph (b) of this section, the decision in any proceeding under this chapter from which an appeal to the Board may be taken shall not be executed during the time allowed for the filing of an appeal unless a waiver of the right to appeal is filed, nor shall such decision be executed while an appeal is pending or while a case is before the Board by way of certification.

8 C.F.R. 1003.38(b), Appeals, provides:

(b) The Notice of Appeal from a Decision of an Immigration Judge (Form EOIR–26) shall be filed directly with the Board of Immigration Appeals within 30 calendar days after the stating of an immigration judge's oral decision or the mailing or electronic notification of an immigration judge's written decision. If the final date for filing falls on a Saturday, Sunday, or legal holiday, this appeal time shall be extended to the next business day. A Notice of Appeal (Form EOIR–26) may not be filed by any party who has waived appeal.

8 C.F.R. 1208.1(a), General, provides, in relevant part:

(a) Applicability—

(1) In general. Unless otherwise provided in this chapter V, this subpart A shall apply to all applications for asylum under section 208 of the Act or for withholding of deportation or withholding of removal under section 241(b)(3) of the Act, or under the Convention Against Torture, whether before an asylum officer or an immigration judge, regardless of the date of filing. For purposes of this chapter V, withholding of removal shall also mean withholding of deportation under section 243(h) of the Act, as it appeared prior to April 1, 1997, except as provided in § 1208.16(d). Such applications are hereinafter referred to as "asylum applications." The provisions of this part shall not affect the finality or validity of any decision made by a district director, an immigration judge, or the Board of Immigration Appeals in any such case prior to April 1, 1997. No asylum application that was filed with a district director, asylum officer, or immigration judge prior to April 1, 1997, may be reopened or otherwise reconsidered under the provisions of this part except by motion granted in the exercise of discretion by the Board of Immigration Appeals, an immigration judge, or an asylum officer for proper cause shown. Motions to reopen or reconsider must meet the requirements of sections 240(c)(6) and (c)(7) of the Act, and 8 CFR parts 1003 and 1103, where applicable.

* * *

8 C.F.R. 1208.2(c)(3)(i), Jurisdiction, establishes:

(c) Certain aliens not entitled to proceedings under section 240 of the Act—

(3) Rules of procedure—

(i) General. Except as provided in this section, proceedings falling under the jurisdiction of the immigration judge pursuant to paragraph (c)(1) or (2) of this section shall be conducted in accordance with the same rules of procedure as proceedings conducted under 8 CFR part 1240, subpart A. The scope of review in proceedings conducted pursuant to paragraph (c)(1) of this section shall be limited to a determination of whether the alien is eligible for asylum or withholding or deferral of removal, and whether asylum shall be granted in the exercise of discretion. The scope of review in proceedings conducted pursuant to paragraph (c)(2) of this section shall be limited to a determination of whether the alien is eligible for withholding or deferral of removal. During such proceedings, all parties are prohibited from raising or considering any other issues, including but not limited to issues of admissibility, deportability, eligibility for waivers, and eligibility for any other form of relief.

8 C.F.R. 1208.5(a), Special duties toward aliens in custody of DHS sets out, in relevant part:

(a) General. When an alien in the custody of DHS requests asylum or withholding of removal, or expresses a fear of persecution or harm upon return to his or her country of origin or to agents thereof, DHS shall make available the appropriate application forms and shall provide the applicant with the information required by section 208(d)(4) of the Act, including in the case of an alien who is in custody with a positive credible fear determination under 8 CFR 208.30 or a reasonable fear determination pursuant to 8 CFR 208.31, and except in the case of an alien who is in custody pending a credible fear determination under 8 CFR 208.30 or a reasonable fear determination pursuant to 8 CFR 208.31. Although DHS does not have a duty in the case of an alien who is in custody pending a credible fear or reasonable fear determination under either 8 CFR 1208.30 or 8 CFR 1208.31, DHS may provide the appropriate forms, upon request. Where possible, expedited consideration shall be given to applications of detained aliens. Except as provided in paragraph (c) of this section, such alien shall not be excluded, deported, or removed before a decision is rendered on his or her asylum application. * * *

8 C.F.R. 1208.16, Withholding of removal under section 241(b)(3)(B) of the Act and withholding of removal under the Convention Against Torture provides, in relevant part:

(d) Approval or denial of application—

(1) General. Subject to paragraphs (d)(2) and (d)(3) of this section, an application for withholding of deportation or removal to a country of proposed removal shall be granted if the applicant's eligibility for withholding is established pursuant to paragraphs (b) or (c) of this section.

(2) Mandatory denials. Except as provided in paragraph (d)(3) of this section, an application for withholding of removal under section 241(b)(3) of the Act or under the Convention Against Torture shall be denied if the applicant falls within section 241(b)(3)(B) of the Act or, for applications for withholding of deportation adjudicated in proceedings commenced prior to April 1, 1997, within section 243(h)(2) of the Act as it appeared prior to that date. For purposes of section 241(b)(3)(B)(ii) of the Act, or section 243(h)(2)(B) of the Act as it appeared prior to April 1, 1997, an alien who has been convicted of a particularly serious crime shall be considered to constitute a danger to the community. If the evidence indicates the applicability of one or more of the grounds for denial of withholding enumerated in the Act, the applicant shall have the burden of proving by a preponderance of the evidence that such grounds do not apply.

*** * ***

(f) Removal to third country.

(1) Nothing in this section or § 1208.17 shall prevent the Department of Homeland Security from removing an alien requesting protection to a third country other than a country to which removal is currently withheld or deferred.

(2) If an alien requests withholding or deferral of removal to the applicable home country or another specific country, nothing in this section or § 1208.17 precludes the Department of Homeland Security from removing the alien to a third country prior to a determination or adjudication of the alien's initial request for withholding or deferral of removal if, after being notified of the identity of the prospective third country of removal and provided an opportunity to demonstrate that he or she is more likely than not to be tortured in that third country, the alien fails to establish that they are more likely than not to be tortured there. However, such a removal shall be executed only if the alien was:

> **(i)** Advised at the time of requesting withholding or deferral of removal of the possibility of being removed to a third country prior to a determination or adjudication of the same under the conditions set forth in this paragraph, and
>
> **(ii)** Provided, but did not accept, an opportunity to withdraw the request for withholding or deferral of removal in order to prevent such removal and, instead, proceed to removal pursuant to section 241(b) of the Act, as appropriate.

8 C.F.R. 1208.17, Deferral of removal under the Convention Against Torture, provides, in relevant part:

> (**a) Grant of deferral of removal.** An alien who: has been ordered removed; has been found under § 1208.16(c)(3) to be entitled to protection under the Convention Against Torture; and is subject to the provisions for mandatory denial of withholding of removal under § 1208.16(d)(2) or (d)(3), shall be granted deferral of removal to the country where he or she is more likely than not to be tortured.
>
> **(b) Notice to alien.**
>
> **(1)** After an immigration judge orders an alien described in paragraph (a) of this section removed, the immigration judge shall inform the alien that his or her removal to the country where he or she is more likely than not to be tortured shall be deferred until such time as the deferral is terminated under this section. The immigration judge shall inform the alien that deferral of removal:
>
> **(i)** Does not confer upon the alien any lawful or permanent immigration status in the United States;
>
> **(ii)** Will not necessarily result in the alien being released from the custody of the Service if the alien is subject to such custody;
>
> **(iii)** Is effective only until terminated; and
>
> **(iv)** Is subject to review and termination if the immigration judge determines

that it is not likely that the alien would be tortured in the country to which removal has been deferred, or if the alien requests that deferral be terminated.

(2) The immigration judge shall also inform the alien that removal has been deferred only to the country in which it has been determined that the alien is likely to be tortured, and that the alien may be removed at any time to another country where he or she is not likely to be tortured.

*** * ***

8 C.F.R. 1208.18, Implementation of the Convention Against Torture, establishes, in relevant part:

* * *

(e) Judicial review of claims for protection from removal under Article 3 of the Convention Against Torture

(1) 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.

8 C.F.R. 1208.31, Reasonable fear of persecution or torture determinations involving noncitizens ordered removed under section 238(b) of the Act and noncitizens whose removal is reinstated under section 241(a)(5) of this Act, effective January 11, 2021 to December 26, 2024, provides:

(a) Jurisdiction. This section shall apply to any alien ordered removed under section 238(b) of the Act or whose deportation, exclusion, or removal order is reinstated under section 241(a)(5) of the Act who, in the course of the administrative removal or reinstatement process, expresses a fear of returning to the country of removal. The Service has exclusive jurisdiction to make reasonable fear determinations, and EOIR has exclusive jurisdiction to review such determinations.

(b) Initiation of reasonable fear determination process. Upon issuance of a Final Administrative Removal Order under § 238.1 of this chapter, or notice under § 1241.8(b) of this chapter that an alien is subject to removal, an alien described in paragraph (a) of this section shall be referred to an asylum officer for a reasonable fear determination. In the absence of exceptional circumstances, this determination will be conducted within 10 days of the referral.

(c) Interview and procedure. The asylum officer shall conduct the interview in a non-adversarial manner, separate and apart from the general public. * * * The asylum officer shall create a written record of his or her determination, including a summary of the material facts as stated by the applicant, any additional facts relied on by the officers, and the officer's determination of whether, in light of such facts, the alien has established a reasonable fear of persecution

or torture. The alien shall be determined to have a reasonable fear of persecution or torture if the alien establishes a reasonable possibility that he or she would be persecuted on account of his or her race, religion, nationality, membership in a particular social group or political opinion, or a reasonable possibility that he or she would be tortured in the country of removal. For purposes of the screening determination, the bars to eligibility for withholding of removal under section 241(b)(3)(B) of the Act shall not be considered.

(d) Authority. Asylum officers conducting screening determinations under this section shall have the authority described in § 1208.9(c).

(e) Referral to Immigration Judge. If an asylum officer determines that an alien described in this section has a reasonable fear of persecution or torture, the officer shall so inform the alien and issue a Form I–863, Notice of Referral to the Immigration Judge, for full consideration of the request for withholding of removal only. Such cases shall be adjudicated by the immigration judge in accordance with the provisions of § 1208.16. Appeal of the immigration judge's decision shall lie to the Board of Immigration Appeals.

(f) Removal of aliens with no reasonable fear of persecution or torture. If the asylum officer determines that the alien has not established a reasonable fear of persecution or torture, the asylum officer shall inform the alien in writing of the decision and shall inquire whether the alien wishes to have an immigration judge review the negative decision, using the Record of Negative Reasonable Fear Finding and Request for Review by Immigration Judge, on which the alien must indicate whether he or she desires such review. If the alien refuses to make an indication,

DHS shall consider such a response as a decision to decline review.

(g) Review by Immigration Judge. The asylum officer's negative decision regarding reasonable fear shall be subject to review by an immigration judge upon the alien's request. If the alien requests such review, the asylum officer shall serve him or her with a Notice of Referral to the Immigration Judge. The record of determination, including copies of the Notice of Referral to the Immigration Judge, the asylum officer's notes, the summary of the material facts, and other materials upon which the determination was based shall be provided to the immigration judge with the negative determination. In the absence of exceptional circumstances, such review shall be conducted by the immigration judge within 10 days of the filing of the Notice of Referral to the Immigration Judge with the immigration court. Upon review of the asylum officer's negative reasonable fear determination:

(1) If the immigration judge concurs with the asylum officer's determination that the alien does not have a reasonable fear of persecution or torture, the case shall be returned to DHS for removal of the alien. No appeal shall lie from the immigration judge's decision.

(2) If the immigration judge finds that the alien has a reasonable fear of persecution or torture, the alien may submit an Application for Asylum and for Withholding of Removal. Such application shall be considered de novo in all respects by an immigration judge regardless of any determination made under this paragraph.

(i) The immigration judge shall consider only the alien's application for withholding of removal under 8 CFR 1208.16 and shall determine whether the alien's removal to the country of removal must be withheld or deferred.

(ii) Appeal of the immigration judge's decision whether removal must be withheld or deferred lies with the Board of Immigration Appeals. If the alien or DHS appeals the immigration judge's decision, the Board shall review only the immigration judge's decision regarding the alien's eligibility for withholding or deferral of removal under 8 CFR 1208.16.

8 C.F.R. 1238.1(f), Proceedings under section 238(b) of the Act, establishes:

(f) Executing final removal order of deciding Service officer—

(1) Time of execution. Upon the issuance of a Final Administrative Removal Order, the Service shall issue a Warrant of Removal in accordance with § 1241.2 of this chapter; such warrant shall be executed no sooner than 14 calendar days after the date the Final Administrative Removal Order is issued, unless the alien knowingly, voluntarily, and in writing waives the 14–day period.

(2) Country to which alien is to be removed. The deciding Service officer shall designate the country of removal in the manner prescribed by section 241 of the Act.

(3) Withholding of removal. If the alien has requested withholding of removal under § 1208.16 of this chapter, the deciding officer shall, upon issuance of a Final Administrative Removal Order, immediately refer the alien's case to an asylum officer to conduct a reasonable fear determination in accordance with § 1208.31 of this chapter.