

No. 23-1270

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**In the Supreme Court of the United States**

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PIERRE YASSUE NASHUN RILEY,  
*Petitioner,*

*v.*

MERRICK B. GARLAND, U.S. ATTORNEY GENERAL,  
*Respondent.*

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*On Writ Of Certiorari  
To The United States Court Of Appeals  
For The Fourth Circuit*

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**BRIEF OF PACIFIC LEGAL  
FOUNDATION AS AMICUS CURIAE  
IN SUPPORT OF PETITIONER**

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## INTEREST OF AMICUS CURIAE<sup>1</sup>

Founded in 1973, Pacific Legal Foundation (PLF) is a nonprofit, tax-exempt California corporation established to litigate matters affecting the public interest. PLF defends Americans' liberties when threatened by government overreach. It is the most experienced public interest legal nonprofit, both as lead counsel and amicus curiae, in cases vindicating the right to meaningful judicial review of government action. *See, e.g., Wilkins v. United States*, 598 U.S. 152 (2023); *Pakdel v. City & Cnty. of San Francisco*, 594 U.S. 474 (2021); *Knick v. Township of Scott*, 588 U.S. 180 (2019); *Weyerhaeuser Co. v. U.S. Fish & Wildlife Serv.*, 586 U.S. 9 (2018); *U.S. Army Corps of Eng'rs v. Hawkes Co.*, 578 U.S. 590 (2016); *Sackett v. EPA*, 566 U.S. 120 (2012); *Suitum v. Tahoe Reg'l Plan. Agency*, 520 U.S. 725 (1997).

This amicus brief supports Petitioner's argument that the Immigration and Nationality Act permits judicial review of Convention Against Torture (CAT) determinations when petitions are filed within 30 days of the Board of Immigration Appeals' decision on CAT relief, even where, as here, the decision comes many months after the initial removal order. PLF has an interest in this issue because it implicates fundamental questions about the timing and availability of judicial review of agency action.

This brief brings a unique perspective by showing how the Fourth Circuit's interpretation conflicts with this Court's established framework for review of

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<sup>1</sup> No party's counsel authored any part of this brief. No person or entity, other than Amicus Curiae and its counsel, paid for the brief's preparation or submission.

agency decisions, frustrates Congress’s express provision for review of CAT claims, and undermines the judiciary’s vital role in checking agency power—a role PLF has long defended across numerous contexts, including environmental law and securities regulation.

## INTRODUCTION AND SUMMARY OF THE ARGUMENT

This amicus brief addresses only the second question presented, restated as: whether a person can obtain judicial review of the Board of Immigration Appeals’ denial of protection under the Convention Against Torture by filing a petition within 30 days of that decision, even though the underlying removal order was issued at an earlier date. The timing of judicial review directly implicates this Court’s precedents about when parties can challenge significant agency determinations in federal court, particularly when those determinations affect fundamental liberties and Congress has expressly provided for judicial review.

The Immigration and Nationality Act’s provision for judicial review of Convention Against Torture determinations must be interpreted to permit review when petitions are filed within 30 days of the Board’s final decision, even where, as here, the decision comes many months after the initial removal order. This reading aligns with this Court’s precedents requiring meaningful rather than illusory judicial review of significant agency determinations.

This Court has consistently rejected interpretations that would effectively preclude review of consequential agency action, as demonstrated in cases such as *Weyerhaeuser Co. v. U.S. Fish & Wildlife Service*, 586 U.S. 9 (2018), *Sackett v. EPA*, 566 U.S. 120 (2012), *U.S. Army Corps of Engineers v. Hawkes Co.*, 578 U.S.

590 (2016), and *Axon Enterprise, Inc. v. FTC*, 598 U.S. 175 (2023). The Fourth Circuit’s contrary approach—requiring petitions within 30 days of the initial removal order rather than the final CAT determination—makes judicial review practically impossible in many cases. This undermines Congress’s express provision for review of CAT claims and conflicts with this Court’s longstanding precedents protecting meaningful judicial oversight of agency power.

The timing of judicial review implicates core separation of powers concerns that transcend immigration law. When agencies make determinations affecting fundamental rights, courts must be able to exercise their essential oversight role at a meaningful time and in a meaningful manner. An interpretation that effectively requires petitioners to file for review before the agency has even made its CAT determination—or risk losing their right to review entirely—imposes significant barriers to judicial oversight that cannot be squared with these constitutional principles or with Congress’s clear intent to provide for judicial review of CAT claims.

These same considerations have led this Court to preserve meaningful judicial review in a variety of regulatory contexts, from environmental determinations to financial regulation to the structure and procedures of independent agencies. The same principles should govern here, ensuring that individuals facing removal have a genuine opportunity to obtain court review of agency decisions that could result in torture or death.

## ARGUMENT

### **I. The Immigration And Nationality Act Requires Meaningful Judicial Review Of Final CAT Determinations**

Petitioner’s brief persuasively demonstrates how the Fourth Circuit’s interpretation conflicts with the Immigration and Nationality Act’s text and the strong presumption of judicial review in immigration cases. *See* Pet. Br. at 40-44. Building on those arguments, Amicus PLF explains how this case reflects a broader pattern of administrative agencies attempting to evade court oversight. The statutory framework here illustrates why courts must vigilantly protect access to review at a meaningful time and in a meaningful manner.

#### **A. Congress expressly provided for judicial review of CAT claims**

The Act contains two key provisions that, read together, establish a comprehensive framework for court oversight. First, Congress specified in 8 U.S.C. § 1252(a)(4) that “a petition for review filed with an appropriate court of appeals in accordance with this section shall be the sole and exclusive means for judicial review of any cause or claim under the United Nations Convention Against Torture.” Second, Congress enacted a comprehensive “zipper clause” in 8 U.S.C. § 1252(b)(9), requiring that all questions “arising from any action taken or proceeding brought to remove an alien” be consolidated for review after the Board issues its final order.

This framework reflects Congress’s deliberate choice to channel review through the courts of appeals while ensuring such review occurs after the agency completes its decision-making process. The structure



makes eminent sense: judicial review would be both premature and inefficient before the Board reaches its final determination on a CAT claim.

**B. The Fourth Circuit’s interpretation severely constrains meaningful review**

By holding that the 30-day review period runs from the initial removal order rather than the Board’s final CAT determination, the Fourth Circuit has created a severe practical barrier to judicial review. Because CAT proceedings before the agency invariably extend beyond 30 days,<sup>2</sup> petitioners must either forfeit their right to review or file premature protective petitions challenging CAT determinations that haven’t yet been made. App. 4a-5a (dismissing petition because petitioner “did not petition for review within 30 days of the January 26, 2021, Final Administrative Removal Order,” even though the BIA did not deny CAT relief until May 31, 2022).

Such a reading undermines Congress’s express provision for judicial review. While theoretically preserving review through protective filings, it creates an awkward and inefficient procedure that conflicts with both statutory text and fundamental canons of construction. This Court has long disfavored interpretations that create internal contradictions within a statute or produce absurd results. *See FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 133 (2000) (courts must interpret statutes “as a symmetrical and

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<sup>2</sup> *See, e.g., F.J.A.P. v. Garland*, 94 F.4th 620, 635 (7th Cir. 2024), acknowledging that these proceedings take much longer than 30 days. *See also Martinez v. Garland*, 86 F.4th 561, 574 (4th Cir. 2023) (Floyd, J., concurring) (noting that “withholding and CAT proceedings often take months or even years to conclude”).

coherent regulatory scheme” and “fit, if possible, all parts into a harmonious whole” (citations omitted)).

And, this Court has consistently rejected interpretations that would make judicial review unnecessarily burdensome or impractical. See *Abbott Laboratories v. Gardner*, 387 U.S. 136, 153 (1967). Specifically, the Court has rejected statutory interpretations that would force parties to choose between undertaking costly compliance or risking severe penalties to obtain review. See *Free Enterprise Fund v. PCAOB*, 561 U.S. 477, 490 (2010) (rejecting procedures that would require regulated parties to “bet the farm” by violating the law to test its validity); cf. *Thunder Basin Coal Co. v. Reich*, 510 U.S. 200, 218 (1994) (emphasizing the need to preserve review where compliance costs are prohibitive). The Fourth Circuit’s interpretation here presents a similar barrier to effective review—while not completely foreclosing review, it imposes procedural requirements that significantly impair the meaningful judicial oversight Congress intended.

## **II. This Court’s Precedents Require Review At A Meaningful Time**

### **A. The Court has consistently protected access to judicial review**

This Court has long recognized that the timing of judicial review must ensure meaningful oversight of agency action. Through a series of landmark decisions, the Court has rejected interpretations that would effectively deny review by making it practically inaccessible.

In *Sackett*, property owners challenged an EPA compliance order finding that their land contained wetlands subject to federal jurisdiction. 566 U.S. at 124-25. The agency argued that the Sacketts could

not seek judicial review of the compliance order until EPA brought an enforcement action, meaning they would have to risk daily fines of up to \$75,000 to test EPA's jurisdiction. *Id.* at 127. This Court unanimously rejected that interpretation, explaining that such a scheme would place landowners in an impossible position: either they must risk ruinous penalties or be denied their day in court entirely. *Ibid.* The Court refused to read the Clean Water Act in a way that would make review practically unavailable, noting that Congress could not have intended to create such an unjust scheme. *Id.* at 129-30.

Similarly, in *Hawkes*, this Court addressed when parties could challenge the Corps' determination that their property contained "waters of the United States." 578 U.S. at 594. The Corps argued that landowners had to either complete the permit process or proceed without a permit and risk enforcement. *Id.* at 599. The Court rejected this argument, noting that both options were unreasonably burdensome—the permitting process was prohibitively expensive and time-consuming, while proceeding without a permit carried the unacceptable risk of significant penalties. *Id.* at 595-99. The Court explained that such a scheme would effectively deprive landowners of meaningful access to judicial review, as they would have to choose between two unsatisfactory options without the ability to challenge the Corps' determination before facing enforcement. *Id.* at 599. In ruling that the Corps' jurisdictional determination is reviewable, the Court emphasized that Congress intended for judicial review to be practically accessible and not an illusory remedy. *Ibid.*

**B. Pre-enforcement review is essential when agency decisions have immediate consequences**

When administrative decisions threaten immediate and grave consequences, pre-enforcement review becomes not just important but essential to due process. *See Abbott Labs.*, 387 U.S. at 153. This principle takes on particular urgency in the CAT context, where the consequences of delayed review could be irreparable and even fatal.

In *Axon*, 598 U.S. 175, this Court reaffirmed these principles by preserving district court jurisdiction over structural constitutional challenges, recognizing that meaningful review cannot be delayed until after an agency concludes its proceedings. The Court emphasized that where Congress has provided a statutory review scheme, courts must ensure that the scheme provides a meaningful opportunity for review of constitutional claims. *Id.* at 189-90. This case presents similar concerns about the practical availability of review. But unlike the structural challenges in *Axon*, the harm in this case involves torture or death, where meaningful review is not just important but essential to prevent irreparable harm.

In *Axon*, this Court preserved immediate judicial review of structural constitutional challenges because waiting until after agency proceedings would effectively deny meaningful review—the constitutional harm of being subjected to an unconstitutionally structured agency process would already have occurred. 598 U.S. at 190. CAT claims present an even stronger case for immediate review upon final agency determination. Like structural constitutional claims,

CAT claims are “wholly collateral” to the merits of removal—they don’t challenge removability itself but rather raise distinct claims about the consequences of removal. See *Thunder Basin Coal Co.*, 510 U.S. at 212-13 (claims are “wholly collateral” when they are not “of the type Congress intended to be reviewed within th[e] statutory structure”).

The Court’s precedents in other contexts similarly demonstrate that timing of review must align with the nature and gravity of the threatened harm. In *Free Enterprise Fund*, 561 U.S. at 490-91, the Court permitted a pre-enforcement challenge to an agency’s constitutional structure, recognizing that regulated parties should not have to risk severe penalties and potential ruin to obtain judicial review of agency action. In *Knick v. Township of Scott*, 588 U.S. 180 (2019), the Court eliminated the state-litigation requirement for takings claims, recognizing that forcing property owners to first pursue state court remedies unconstitutionally barred access to federal courts. And, in *Suitum v. Tahoe Regional Planning Agency*, 520 U.S. 725 (1997), the Court refused to allow agencies to indefinitely postpone judicial review of takings claims by requiring property owners to first attempt selling development rights before challenging regulatory restrictions. Similarly, in *Pakdel v. City & County of San Francisco*, 594 U.S. 474 (2021), the Court rejected attempts to impose additional administrative exhaustion requirements before property owners could access federal courts, emphasizing that such novel procedural requirements cannot be used to foreclose judicial review. Continuing this trend, in *Wilkins v. United States*, 598 U.S. 152 (2023), the Court reaffirmed these principles by rejecting the government’s attempt to bar judicial review of a property

dispute through a “jurisdictional” reading of the Quiet Title Act’s statute of limitations.

These decisions reflect the Court’s longstanding commitment to ensuring that procedural hurdles do not become insurmountable barriers to judicial review.

### **C. The timing of review implicates core separation of powers concerns**

When agencies make determinations affecting fundamental rights, courts must be able to exercise their essential oversight role at a meaningful time and in a meaningful manner. This principle is deeply rooted in separation of powers doctrine. *See Free Enterprise Fund*, 561 U.S. at 513 (rejecting interpretation that would require parties to incur sanctions before obtaining judicial review); *Stern v. Marshall*, 564 U.S. 462, 483 (2011) (explaining that Article III courts must retain meaningful authority to check executive power when fundamental rights are at stake).

Indeed, the constitutional necessity of preserving meaningful access to judicial review is supported by both case law and scholarly analysis. *See* Henry J. Friendly, “*Some Kind of Hearing*,” 123 U. Pa. L. Rev. 1267, 1311-15 (1975) (examining how timing of review affects its constitutional adequacy); Thomas W. Merrill, *Article III, Agency Adjudication, and the Origins of the Appellate Review Model of Administrative Law*, 111 Colum. L. Rev. 939, 953-63 (2011) (discussing the Court’s recognition of judicial review as essential to maintaining the separation of powers and protecting individual rights from administrative overreach).

The Constitution’s separation of powers requires effective judicial oversight not just as a matter of individual rights, but as a structural safeguard against

executive overreach. When Congress creates a statutory right to judicial review, as it has for CAT claims, courts play a vital constitutional role in ensuring that the right is effective. The executive branch cannot, through its procedural choices or timing requirements, effectively nullify Congress's decision to provide for judicial oversight.

This constitutional understanding flows directly from Article III's vesting of the judicial power in independent courts. While agencies may structure their internal procedures, they cannot do so in ways that frustrate the courts' fundamental duty to check administrative power. *See Commodity Futures Trading Comm'n v. Schor*, 478 U.S. 833, 850 (1986) (examining whether agency procedures impermissibly encroach on Article III judicial power); *N. Pipeline Constr. Co. v. Marathon Pipe Line Co.*, 458 U.S. 50, 58 (1982) (discussing constitutional limits on congressional power to restrict Article III review).

The Fourth Circuit's interpretation would allow agencies to strategically time their decisions to evade court oversight—precisely the type of executive encroachment on judicial power that the separation of powers is designed to prevent. When Congress provides for judicial review of agency action, that review must be structured to allow courts to fulfill their constitutional role as an independent check on executive authority. This structural principle is especially important where, as here, the consequences of inadequate review could be severe and irreparable.

### **III. The Court Should Hold That Review Becomes Available Upon Final BIA CAT Determinations**

#### **A. Final agency action occurs when decision-making is complete**

The Fourth Circuit’s interpretation, which starts the 30-day review period at the initial removal order rather than the final CAT determination, creates significant tension with this Court’s finality doctrine and expands agency power at the expense of judicial oversight. As this Court explained in *Sackett*, proper oversight of agency action requires that parties have a genuine opportunity to challenge final agency action in court. 566 U.S. at 127. While the Fourth Circuit’s interpretation technically permits review through protective filings, requiring petitioners to challenge CAT determinations months before they are made undermines the principles of meaningful review.

This Court’s precedents establish that agency action becomes final and reviewable when the agency has “completed its decisionmaking process,” *Franklin v. Massachusetts*, 505 U.S. 788, 797 (1992), and the action is “one by which rights or obligations have been determined.” *Bennett v. Spear*, 520 U.S. 154, 177-78 (1997) (cleaned up). The BIA’s CAT determination unquestionably meets these criteria—it represents the culmination of the agency’s process and definitively resolves whether removal must be withheld. The Fourth Circuit’s interpretation would create precisely the type of practically “unreviewable” agency power this Court has consistently rejected. *See Hawkes*, 578 U.S. at 599-600.



### **B. Delayed review serves no legitimate purpose**

The Fourth Circuit’s interpretation serves no valid administrative or regulatory purpose. While agencies sometimes justify delaying judicial review based on enforcement efficiency—as EPA attempted in *Sackett*, 566 U.S. at 128-29—no such rationale exists here. There is no administrative benefit to requiring petitions to be filed within 30 days of the initial removal order when the CAT determination, which directly affects their claims, has not yet been made.

Congress specifically created a review mechanism for CAT claims, distinct from the general removal review framework. See 8 U.S.C. § 1252(a)(4). Courts must interpret such review provisions to effectuate rather than frustrate congressional intent. See *Bowen v. Michigan Acad. of Family Physicians*, 476 U.S. 667, 670-71 (1986) (requiring “clear and convincing evidence” before concluding Congress meant to preclude judicial review). The Fourth Circuit’s interpretation would render Congress’s express provision for CAT review meaningless—a result this Court has consistently rejected across various administrative contexts. When Congress provides a specific avenue for judicial review of agency action, courts cannot interpret procedural requirements in a way that makes that review impossible to obtain.

## CONCLUSION

The Fourth Circuit's holding that petitions must be filed within 30 days of the initial removal order, rather than the final CAT determination, effectively precludes judicial review while expanding unreviewable agency power. The Court should reject this jurisdictional barrier and hold that review of a CAT determination is available even where, as here, the BIA's final decision on CAT relief was made more than 30 days after the initial removal order. Such a holding would preserve both meaningful judicial review and proper constitutional checks on executive power.

Respectfully submitted,

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