No. 23-1270

In the Supreme Court of the United States

PIERRE YASSUE NASHUN RILEY, PETITIONER,

v.

MERRICK B. GARLAND, ATTORNEY GENERAL

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

BRIEF OF ADMINISTRATIVE LAW PROFESSORS AS *AMICI CURIAE* IN SUPPORT OF PETITIONER

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BRIEF OF ADMINISTRATIVE LAW PROFESSORS AS *AMICI CURIAE* IN SUPPORT OF PETITIONER

INTEREST OF *AMICI CURIAE*[1]

Amici curiae are legal scholars who teach and write about administrative law, civil procedure, and constitutional law. *Amici* have a strong interest in the proper development and application of administrative law principles. *Amici* are participating solely in their individual capacities; their academic affiliations are listed solely for identification purposes. *Amici* are:

[1] No counsel for a party authored this brief in whole or in part, and no person or entity other than *amici* and their counsel made a monetary contribution to its preparation or submission. S. Ct. Rule 37.6.

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SUMMARY OF ARGUMENT

Congress has provided detailed substantive and procedural protections to ensure that no person is removed to a country where it is likely they will be tortured or killed. Even when a noncitizen has been ordered removed from the United States and administrative review of the removal decision itself is barred, the noncitizen can still seek relief under the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment ("CAT"), art. 3, *adopted* Dec. 10, 1984, S. Treaty Doc. No. 20, 100th Cong., 2d Sess. (1988), 1465 U.N.T.S. 85, not to be removed to a particular country because of the risk of torture or death there. If CAT relief is denied in those proceedings—called "withholding-only" proceedings because there is no opportunity to challenge the order of removal itself—the noncitizen can obtain judicial review of that denial: "[T]he sole and exclusive means for judicial review" of a

CAT order is via a petition for review filed in the appropriate court of appeals. 8 U.S.C. 1252(a)(4); see Foreign Affairs Reform and Restructuring Act of 1998, Pub. L. No. 105-277, Div. G, § 2242(d), 112 Stat. 2681–822 (note following 8 U.S.C. 1231) ("[P]rovid[ing] for judicial review of CAT claims 'as part of the review of a final order of removal pursuant to … 8 U.S.C. § 1252.'"). The noncitizen may file only a single petition for review, covering all issues to be reviewed. 8 U.S.C. 1252(b)(9).

Notably, Congress required that, before seeking judicial review, the noncitizen first must "exhaust[] all administrative remedies available … as of right," 8 U.S.C. 1252(d)(1), and must file the petition for review "not later than 30 days after the date of the final order of removal," 8 U.S.C. 1252(b)(1).

In the decision below, the Fourth Circuit held that a noncitizen who seeks judicial review of a CAT order in a withholding-only proceeding must file a petition for review within 30 days after a Department of Homeland Security ("DHS") officer issues the underlying "Final Administrative Removal Order," ("FARO"), *i.e.*, the conclusive administrative order that an aggravated felon be removed from the United States. See 8 U.S.C. 1228(b); 8 C.F.R. 238.1(d).

For a noncitizen in withholding-only proceedings, however, such an order marks the start—not the end—of the relevant administrative process. The initiation of withholding-only proceedings stays removal to the country at issue, see 8 C.F.R. 1208.5(a), and the immigration judge and Board of Immigration Appeals ("BIA") need to make and then review the CAT determination, see 8 C.F.R. 208.31(e).

The Fourth Circuit's rule would thus require a noncitizen to file a petition for review before the immigration judge has issued even a *preliminary* ruling on the CAT application, much less a final one denying CAT relief. The Fourth Circuit's rule would likewise require noncitizens to file a petition for review before they could possibly have exhausted available administrative remedies, which include an appeal to the BIA. Under the Fourth Circuit's approach, a noncitizen seeking judicial review of a CAT order thus must file a petition for review essentially as a placeholder, to preserve the right to obtain judicial review in the future if the agency later denies CAT relief.

That rule is inconsistent with the statutory text and scheme, as petitioner and the government explain. See Pet. Br. 29–44; U.S. Br. 25–40. *Amici* write to emphasize that it is also inconsistent with bedrock principles of administrative law, which Congress is presumed to have followed when providing for judicial review and requiring "final[ity]" and "exhaust[ion]." 8 U.S.C. 1252(b)(1), (d)(1); see, *e.g.*, *Sekhar* v. *United States*, 570 U.S. 729, 733 (2013) ("[I]f a word is obviously transplanted from another legal source, whether the common law or other legislation, it brings the old soil with it." (citation omitted)).

First, it is well settled that litigants generally must exhaust their administrative remedies before pursuing judicial review of agency action. That requirement protects an agency's decisionmaking power and expertise, and also enhances judicial efficiency.

Second, as a matter of both administrative law and civil procedure more generally, orders are ordinarily not subject to judicial review until they are "final," meaning

that the order conclusively adjudicates the litigant's relevant rights and in turn becomes sufficiently ripe for judicial review of the agency's decision. Again, this principle promotes judicial efficiency and avoids unnecessary or premature judicial intrusion.

Together, these two principles powerfully support petitioner and the government: Congress did not require noncitizens to file a petition for review of a CAT order before they have exhausted their administrative remedies and before the agency has issued a final decision on the CAT application. Rather, the 30-day clock starts once the administrative process is complete and the underlying proceedings have become final for purposes of judicial review.

ARGUMENT

I. The Fourth Circuit's Rule Contravenes Settled Principles of Exhaustion and Finality

A. Exhaustion and finality are fundamental principles of judicial review

Two related, but distinct, principles of judicial review should inform this Court's understanding and interpretation of the relevant provisions of the Immigration and Nationality Act of 1952 ("INA"), 8 U.S.C. 1101 *et seq.* The first is exhaustion, which generally requires—even in the absence of express congressional direction—that a litigant must exhaust administrative remedies before seeking judicial review of agency action. The second is finality, which limits judicial review to actions or decisions that actually determine rights and obligations and in turn are ripe for judicial review.

1. Administrative exhaustion is a settled rule that protects agency authority and enhances judicial efficiency

"This Court long has acknowledged the general rule that parties exhaust prescribed administrative remedies before seeking relief from the federal courts." *McCarthy* v. *Madigan*, 503 U.S. 140, 144–145 (1992). Indeed, this Court had recognized exhaustion as a "long-settled" rule by 1938. *Myers* v. *Bethlehem Shipbuilding Corp.*, 303 U.S. 41, 50–51 (1938). That is well before Congress enacted the Administrative Orders Review Act of 1950 (Hobbs Act), ch. 1189, 64 Stat. 1129, which now governs petitions for review in immigration matters. See 8 U.S.C. 1252(a)(1). Exhaustion has been the default rule for judicial review of administrative action since the early 1900s, when Congress began creating more administrative boards of review. See James E. Dunlap, *Administrative Law—Exhaustion of Administrative Remedies as a Prerequisite to Judicial Review—Discretionary Treatment By Federal Courts*, 44 Mich. L. Rev. 1034, 1036 (1946); see also *Fed. Power Comm'n* v. *Colo. Interstate Gas Co.*, 348 U.S. 492, 500 (1955) (noting the "time-honored doctrine of exhaustion of administrative remedies"). And this Court has since recognized that the INA imposes an exhaustion requirement, describing exhaustion as a "quintessential claim-processing rule." *Santos-Zacaria* v. *Garland*, 598 U.S. 411, 417 (2023).

Requiring exhaustion advances two "twin purposes": "protecting administrative agency authority and promoting judicial efficiency." *McCarthy*, 503 U.S. at 145; *Woodford* v. *Ngo*, 548 U.S. 81, 89 (2006) (same).

As to the first goal—protecting agency authority—this Court has emphasized that an agency is "created

for the purpose of applying a statute in the first instance," so "it is normally desirable to let the agency develop the necessary factual background upon which decisions should be based." *McKart* v. *United States*, 395 U.S. 185, 194 (1969); see also William Funk, *Exhaustion of Administrative Remedies—New Dimensions Since* Darby, 18 Pace Envir. L. Rev. 1, 2 (2000). "[S]ince agency decisions are frequently of a discretionary nature or frequently require expertise, the agency should be given the first chance to exercise that discretion or to apply that expertise." *McKart*, 395 U.S. at 194. In other words:

> Exhaustion is generally required as a matter of preventing premature interference with agency processes, so that the agency may function efficiently and so that it may have an opportunity to correct its own errors, to afford the parties and the courts the benefit of its experience and expertise, and to compile a record which is adequate for judicial review.

Weinberger v. *Salfi*, 422 U.S. 749, 765 (1975). Exhaustion therefore ensures "that the agency has had the opportunity to bring its expertise to bear and to correct any errors it may have made at an earlier stage." Jeffrey S. Lubbers, *Fail to Comment at Your Own Risk: Does Issue Exhaustion Have a Place in Judicial Review of Rules?*, 70 Admin L. Rev. 109, 111 (2018).

As to the second goal—enhancing judicial efficiency—exhaustion keeps "premature" actions out of court entirely. *McKart*, 395 U.S. at 193. Claims can sometimes be "settled at the administrative level," and sometimes "the proceedings before the agency convince the losing party not to pursue the matter in federal court." *Woodford*, 548 U.S. at 89. And "[c]laims gener-

ally can be resolved much more quickly and economically" in agency proceedings rather than in federal court. *Ibid.* Requiring exhaustion therefore can help eliminate the need for an expensive and time-consuming Article III proceeding altogether. See *McKart*, 395 U.S. at 195; see also Katherine A. Macfarlane, *The Improper Dismissal of Title VII Claims on "Jurisdictional" Exhaustion Grounds: How Federal Courts Require that Allegations be Presented to an Agency Without the Resources to Consider Them*, 21 Geo. Mason U. Civ. Rts. L.J. 213, 219–220 (2011). And even where a matter ultimately proceeds to federal court, exhaustion allows for development of a complete factual record before the agency. See *Carr* v. *Saul*, 593 U.S. 83, 89, 90 (2021).

This Court has long required administrative exhaustion even when a statute does not expressly require it. *E.g., McCarthy*, 503 U.S. at 144; see also *Ross* v. *Blake*, 578 U.S. 632, 640 (2016) (discussing judge-made exhaustion). Congress also frequently codifies the requirement of administrative exhaustion in various statutory review schemes. For example, the Prison Litigation Reform Act of 1995, 42 U.S.C. 1997e(a), at issue in *Ross*, bars covered suits "until such administrative remedies as are available are exhausted." *Ibid.* And before filing a Title VII lawsuit in court, a plaintiff must first file a discrimination claim with the Equal Employment Opportunity Commission and obtain a right-to-sue letter. See 42 U.S.C. 2000e-5(e); see also 29 U.S.C. 626(d) (similar for age discrimination).

Administrative exhaustion is therefore the default rule for judicial review of agency action. And the requirement carries particular force when Congress has expressly required exhaustion in a statute. See *Ross*,

578 U.S. at 640. As noted above, it has done so here. See 8 U.S.C. 1252(d)(1).

2. Finality is a core principle of administrative law and judicial review more broadly

Finality is a fundamental principle of administrative law, and judicial review more generally. "[T]he finality requirement is concerned with whether the initial decisionmaker has arrived at a definitive position on the issue that inflicts an actual, concrete injury[.]" *Darby* v. *Cisneros*, 509 U.S. 137, 144 (1993) (citation omitted). Like exhaustion, the finality requirement in administrative law was well settled before Congress adopted the Hobbs Act, the INA, or the specific provisions at issue here. *E.g.*, *Chicago & S. Air Lines, Inc.* v. *Waterman S.S. Corp.*, 333 U.S. 103, 112–114 (1948). The Administrative Procedure Act, 5 U.S.C. 701 *et seq.*, allows for judicial review only of "final agency action." 5 U.S.C. 704. And the INA provision applicable here likewise permits judicial review only of "final" agency action. See 8 U.S.C. 1252(b)(1), (d).

In the administrative context, finality has two elements. First, "the action must mark the 'consummation' of the agency's decisionmaking process," and second, "the action must be one by which 'rights or obligations have been determined,' or from which 'legal consequences will flow.'" *Bennett* v. *Spear*, 520 U.S. 154, 177–178 (1997) (citations omitted); see also *Abbott Labs.* v. *Gardner*, 387 U.S. 136, 149 (1967). For example, this Court has held that action that merely *initiates* further administrative process is not "final." *FTC* v. *Standard Oil Co. of Cal.*, 449 U.S. 232, 240–241 (1980).

Finality is also fundamental to civil litigation more broadly. "Finality as a condition of review is an historic characteristic of federal appellate procedure. It was

written into the first Judiciary Act and has been departed from only when observance of it would practically defeat the right to any review at all." *Cobbledick* v. *United States*, 309 U.S. 323, 324–325 (1940) (footnotes omitted). The finality requirement is currently codified in 28 U.S.C. 1291. Under the final judgment rule, a "final" decision is "typically one 'by which a district court disassociates itself from a case.'" *Mohawk Indus., Inc.* v. *Carpenter*, 558 U.S. 100, 106 (2009) (citation omitted). This Court in turn "routinely require[s] litigants to wait until after final judgment to vindicate" their right of appellate review. *Id.* at 108–109.

The rationale for finality is similar in both contexts: Requiring final action before judicial review promotes efficient judicial administration. See *Eisen* v. *Carlisle & Jacquelin*, 417 U.S. 156, 170 (1974). "This final-judgment rule … preserves the proper balance between trial and appellate courts, minimizes the harassment and delay that would result from repeated interlocutory appeals, and promotes the efficient administration of justice." *Microsoft Corp.* v. *Baker*, 582 U.S. 23, 36–37 (2017). "Pretrial appeals may cause disruption, delay, and expense for the litigants; they also burden appellate courts by requiring immediate consideration of issues that may become moot or irrelevant[.]" *Stringfellow* v. *Concerned Neighbors in Action*, 480 U.S. 370, 380 (1987); see Maurice Rosenberg, *Solving the Federal Finality-Appealability Problem*, 47 Duke L. Rev. 171, 171 (1984).

The finality requirement also implicates fundamental concerns of Article III justiciability. By preventing review until the dispute between the regulated party and the agency is fully ripe, finality helps to "prevent

the courts, through premature adjudication, from entangling themselves in abstract disagreements." *Thomas* v. *Union Carbide Agric. Prods. Co.*, 473 U.S. 568, 580 (1985) (citation omitted); see also *Warth* v. *Seldin*, 422 U.S. 490, 499 n.10 (1975) (ripeness concerns "whether the harm asserted has matured sufficiently to warrant judicial intervention"). Indeed, if an agency has not actually denied an application for relief and the denial is not "imminent," there may not even be a "case" or "controversy" between the applicant and the agency. See *Lujan* v. *Defs. of Wildlife*, 504 U.S. 555, 560 (1992).

B. The Fourth Circuit's rule would contravene these principles by requiring a person to seek review of non-final orders and unexhausted claims

The Fourth Circuit's rule requiring the filing of a petition for judicial review before a noncitizen has exhausted their administrative remedies *and* before the agency has decided the application for CAT relief is inconsistent with both of these fundamental principles. Under the Fourth Circuit's rule, the 30-day clock for seeking judicial review of a CAT order starts ticking at the very beginning of withholding-only proceedings: when DHS enters the underlying order of removal (the FARO). But when the asylum officer finds that a noncitizen has a reasonable fear, that starts full withholding-only proceedings before an immigration judge with a later appeal to the BIA. See 8 C.F.R. 208.31(e); 8 C.F.R. 208.31(g)(2). By definition, that process cannot be finished on the date the underlying order of removal is entered: the administrative process for the CAT claim has only just begun. The Fourth Circuit's rule therefore dispenses with both exhaustion and finality, notwithstanding that Congress has expressly required both.

The policy concerns underlying administrative exhaustion are at their zenith here. Protection of the agency's power to make difficult policy judgments is crucial in the context of CAT proceedings, which often require a nuanced understanding of foreign affairs and country conditions abroad, which are issues uniquely within the expertise of DHS, immigration judges, and the BIA. See D. Bruce Janzen Jr., *First Impressions and Last Resorts: The Plenary Power Doctrine, the Convention Against Torture, and Credibility Determinations in Removal Proceedings*, 67 Emory L. J. 1235, 1237 (2018). Courts—and especially appellate courts—are poorly positioned to make those determinations in the first instance. "[W]hen it comes to collecting evidence and drawing factual inferences in th[ese] area[s], 'the lack of competence on the part of the courts is marked.'" *Holder* v. *Humanitarian L. Project*, 561 U.S. 1, 34 (2010) (citation omitted).

Likewise, dispensing with administrative exhaustion, as the Fourth Circuit's rule in effect does, would impair judicial efficiency and result in a "scheme [that] is freakish and inconsistent in its application." Howard B. Eisenberg & Alan B. Morrison, *Discretionary Appellate Review of Non-Final Orders: It's Time to Change the Rules*, 1 J. App. Prac. & Process 285, 291 (1999). For example, to satisfy the Fourth Circuit's deadline, petitioner would have had to file his petition for review contemporaneously with his initial filing for CAT relief itself—16 months before the BIA issued its final decision after petitioner exhausted his administrative remedies.

The Fourth Circuit then, although met with a document purporting to be a "petition for review," would have no relevant record or decision to "review" at all.

The court thus would have to hold the petition in abeyance until at least the immigration judge and the BIA have ruled. That sequence of filing, abeyance, administrative exhaustion, a final decision, and then reopening of appellate proceedings would mark a sharp "intrusion into the ordinary processes of administration and judicial review." *Nken* v. *Holder*, 556 U.S. 418, 427 (2009).

Requiring noncitizens to file their petitions for review before there is a CAT order to review also runs headlong into the finality principle. At the time the 30-day clock would begin to run, the agency would not have issued any decision *at all* on the CAT application, much less a final one representing "the 'consummation' of the agency's decisionmaking process" and determining "'rights or obligations.'" *Bennett*, 520 U.S. at 178–178 (citations omitted). Not only would that be nonsensical—because there would be no agency action for the court to "review"—but also it would contravene the rule that courts of appeals are "court[s] of review, not of first view." *Cutter* v. *Wilkinson*, 544 U.S. 709, 718 n.7 (2005).

The requirements of the Hobbs Act lay bare the irrationality of this procedure and its inconsistency with the statutory scheme. For example, the Hobbs Act requires the petitioner to attach "the order, report, or decision of the agency" to the petition for review. 28 U.S.C. 2344. But under the Fourth Circuit's rule, there would be no way to attach the relevant "decision" or "order," because the CAT application would still be pending. Likewise, the Hobbs Act requires the agency to certify the administrative "record on review." 28 U.S.C. 2346. But the agency would only just be starting the development of the administrative record on the CAT claim, so there would be no way for the agency to certify the relevant "record" until the underlying proceedings are complete.

The Hobbs Act's requirements thus weigh heavily against the Fourth Circuit's rule.

Contrary to the Fourth Circuit's ruling, this Court's decision in *Nasrallah* v. *Barr*, 590 U.S. 573 (2020), does not render these background principles inapplicable to the INA. In *Nasrallah*, this Court held that "a CAT order is distinct from a final order of removal and does not affect the validity of the final order of removal," and that a "CAT order therefore does not merge into the final order of removal" for purposes of the "limitation on the scope of judicial review" set forth in 8 U.S.C. 1252(a)(2)(C) and (D). *Id.* at 583. But that reasoning does not require the clock for reviewing a CAT order to start ticking when the agency enters the FARO and has started but not yet completed withholding-only proceedings. Although ongoing withholding-only proceedings do not "affect the *validity*" of the FARO—because the order of removal will remain in place no matter the outcome of those proceedings—withholding-only proceedings plainly affect the finality of the order *for purposes of starting the clock to initiate judicial review*. *Ibid.* (emphasis added). The order of removal must be reviewed together with the CAT order in a single appellate proceeding, see 8 U.S.C. 1252(a)(4), but the CAT proceedings are still ongoing and indeed will only have just begun. Because both orders must be reviewed together, neither order is yet final for purposes of appellate review.

In *Nasrallah,* the Court gave a hypothetical of a statute that "furnishes appellate review of convictions and sentences in a single appellate proceeding," but limits review of certain factual challenges to the sentence. 590 U.S. at 583. The Court explained that such a statute

would not bar review of factual challenges to the conviction "just because the conviction and sentence are reviewed together." *Ibid.* Such a statute similarly would not require the defendant who wants to challenge only his sentence to file a notice of appeal after he has pled guilty, but before he has been sentenced. The sentence would not affect the *validity* of the conviction, because the conviction would remain valid regardless of the sentence. But the ongoing sentencing proceedings would render the conviction non-final for purposes of starting the clock for seeking appellate review, because the sentence and conviction must be reviewed together and the sentencing proceedings would not yet be complete.

As petitioner and the government explain, see Pet. Br. 25–30, U.S. Br. 38–40, the definition in 8 U.S.C. 1101(a)(47)(B) does not apply here because a FARO is not appealable to the BIA and thus could never become "final" within the meaning of that provision. Rather, the relevant definition of finality comes from background principles of finality in administrative law and civil procedure. And under those principles, as set forth above, the order does not become "final" for purposes of appellate review until the end of the withholding-only proceedings, when the BIA affirms the order denying CAT relief.

* * *

Congress explicitly provided for judicial review of CAT orders together with the underlying order of removal. Congress also explicitly required noncitizens to exhaust their administrative remedies before pursuing such relief. This Court should hold that the time for initiating review of a CAT order begins after both the removal order and the final CAT order have been entered, thus at the conclusion of the administrative process and

giving the individual the opportunity to exhaust, as Congress has required.

CONCLUSION

The judgment of the court of appeals should be reversed.

Respectfully submitted.

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