No. 23-1270

In the Supreme Court of the United States

PIERRE YASSUE NASHUN RILEY,
Petitioner,

v.

MERRICK B. GARLAND, ATTORNEY GENERAL,
Respondent.

On Writ of Certiorari to the
United States Court of Appeals for the Fourth Circuit

BRIEF OF CIVIL PROCEDURE AND FEDERAL COURTS PROFESSORS AS *AMICI CURIAE* IN SUPPORT OF PETITONERS

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INTEREST OF AMICI CURIAE

Amici are civil procedure and federal courts professors. *See* Appendix. They teach and write about jurisdiction, judicial review, and procedural rules, including in the immigration context. Amici have an interest in ensuring that procedural statutes are interpreted consistent with their text and towards the goal of ensuring the orderly, efficient, and fair course of litigation. Mistakenly treating procedural provisions as jurisdictional threatens to undercut Congress's purpose, causing harsh consequences for litigants and a waste of judicial resources. Amici therefore file this brief in support of Petitioner.[1]

INTRODUCTION AND SUMMARY OF ARGUMENT

Over the last decade and a half, this Court has repeatedly warned against elevating garden-variety claim-processing rules to jurisdictional status. One set of rules tells parties to file their briefs on time. The other reflects a weighty decision by Congress to withdraw a class of claims from judicial review.

Mixing up these rules, and mistakenly treating a claim-processing rule as jurisdictional, undermines the very reason Congress creates claim-processing rules. The purpose of claim-processing rules is to promote fair and orderly litigation, such as by providing deadlines for important milestones in the litigation. Jurisdictional rules, on the other hand, limit the power of the court. And while claim-processing rules may be forfeited or excused,

[1] Amici are all individuals, and no non-governmental corporation, party, or counsel for any party contributed funds or authored this brief in whole or in part. No one other than amici and their counsel contributed funding for the preparation and submission of this brief.

jurisdictional rules may be raised at any time—even post-trial and even when those arguments have been explicitly waived. That upends the fair, efficient, orderly system that claim-processing rules are enacted to protect.

The thirty-day deadline to appeal a final order of removal in 8 U.S.C. § 1252(b)(1) is a claim processing rule, not a restriction on the court's jurisdiction. It tells noncitizens when to appeal. Nowhere does it suggest that it limits courts' power.

Not only does that mean that the deadline cannot be jurisdictional, it also informs when the deadline begins to run. Because its purpose is to facilitate efficient claim-processing, it would make no sense for the deadline to start running before the agency's withholding proceedings are completed. Requiring an appeal before the agency has ruled would short circuit the well-established agency first, court second framework that governs judicial review of administrative decisions. Noncitizens would have to appeal before they even knew whether an appeal would be necessary—and before they could comply with the statutory requirement to exhaust their claims. And the courts of appeals would have to either review agency proceedings before they'd even been decided or keep appeals dormant on the books for months or years awaiting an agency decision. If, on the other hand, the deadline begins to run once the agency has finished withholding proceedings, all of these problems go away—and noncitizens' withholding claims proceed in an orderly fashion from agency to court.

Interpreting the deadline to run before the completion of agency proceedings would not only undermine its claim-processing function, it could prevent many noncitizens from obtaining judicial review of withholding claims at all.

But, again, Congress limits courts' power to review agency decisions by explicitly restricting their subject-matter jurisdiction, not merely by enacting a filing deadline.

The deadline should therefore be read to run at the completion of withholding proceedings at the agency.

ARGUMENT

I. The deadline to appeal from a final order of removal is not jurisdictional.

This Court has repeatedly "emphasized the distinction between limits on the classes of cases a court may entertain (subject-matter jurisdiction) and nonjurisdictional claim-processing rules, which seek to promote the orderly progress of litigation by requiring that the parties take certain procedural steps at certain specified times." *Wilkins v. United States*, 598 U.S. 152, 157 (2023).[2]

This is not simply a technicality: The conceptual distinction between subject-matter jurisdiction and claim-processing rules goes to the heart of why Congress creates these two kinds of rules—and the importance of judicial review in our legal system. Policing this line avoids a world where courts render statutes self-defeating by taking filing deadlines that Congress created to keep litigation running efficiently, and treating them as jurisdictional objections that can be raised at any time—even after a party has lost on the merits or expressly waived reliance on such limits. Carefully distinguishing these kinds of limitations also reflects the general presumption in favor of judicial review. This Court does

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[2] Unless otherwise indicated, all internal citations, quotation marks, and alterations are omitted.

not lightly assume that Congress intended a mere claim-processing rule to have jurisdictional significance. To the contrary, a clear statement is needed.

The deadline to appeal a final order of removal has no such clear statement. It is not, therefore, jurisdictional.

A. This Court has repeatedly made clear that claim-processing rules should not be confused with jurisdictional ones.

1. A court's jurisdiction is its "statutory or constitutional *power* to adjudicate [a] case." *Steel Co. v. Citizens for a Better Env't*, 523 U.S. 83, 89 (1998). "When Congress enacts a 'jurisdictional' requirement, it marks the bounds of a court's power." *Harrow v. Dep't of Def.*, 601 U.S. 480, 480 (2024) (cleaned up). Jurisdictional statutes thus represent Congress's weighty decision to limit "the classes of cases a court may entertain." *Fort Bend Cnty. v. Davis*, 587 U.S. 541, 542–43 (2019). They "speak to the power of the court rather than to the rights or obligations of the parties." *Landgraf v. USI Film Prods.*, 511 U.S. 244, 274 (1994).

Jurisdictional rules are mandatory: Courts may not overstep the bounds of their authority. *Santos-Zacaria v. Garland*, 598 U.S. 411, 416 (2023). So "[h]arsh consequences attend the jurisdictional brand." *Id.* If a rule is jurisdictional, there are no "equitable exceptions." *Id.* Courts must abide by jurisdictional rules, even if the parties explicitly waive them. *Id.* And because jurisdictional limits "deprive[]" the court of its "adjudicative authority," they "may be raised at any time." *Hamer v. Neighborhood Hous. Servs. of Chicago*, 583 U.S. 17, 20 (2017). "[P]arties can disclaim [a jurisdictional] objection, only to resurrect it when things go poorly for them on the merits." *Wilkins*, 598 U.S. at

158. And if the court, in fact, lacks jurisdiction, it has no choice but to dismiss the case. *See id.*

2. While jurisdictional rules mark "the bounds of the court's adjudicatory authority," claim-processing rules "govern how courts and litigants operate within those bounds." *Santos-Zacaria*, 598 U.S. at 416. Claim-processing rules are procedural provisions that "seek to promote the orderly progress of litigation by requiring that the parties take certain procedural steps at certain specified times." *Id.* Ordinarily, these rules "speak to a party's procedural obligations," not the court's power. *Fort Bend*, 587 U.S. at 551. Filing deadlines, for example, "are quintessential claim-processing rules." *Henderson ex rel. Henderson v. Shinseki*, 562 U.S. 428, 435 (2011). So too are statutes of limitations, *Wilkins*, 598 U.S. at 159, and exhaustion requirements, *Santos-Zacaria*, 598 U.S. at 421.

Although these procedural requirements often "read as categorical commands," they are rarely "as strict as they seem." *Harrow*, 601 U.S. at 483. Congress enacts procedural obligations "against the backdrop of judicial doctrines creating exceptions, and typically expects those doctrines to apply." *Id.* "So," for example, "a court will not enforce a procedural rule" if it has been "forfeited or waived." *Id.* at 483–84. And courts may excuse noncompliance with procedural rules "for equitable reasons." *Id.* at 484.

3. Of course, Congress may choose to make a procedural requirement jurisdictional—that is, it may choose to condition the court's power on the parties' compliance with a claim-processing rule. But as this Court has explained time and again, Congress rarely makes that choice. *See, e.g.*, *Henderson*, 562 U.S. at 441 ("[T]he deadline for filing a notice of appeal with the Veterans

Court does not have jurisdictional attributes."); *United States v. Wong*, 575 U.S. 402, 412 (2015) ("The time limits in the FTCA are just time limits, nothing more."); *Hamer*, 583 U.S. at 27 ("30–day limitation on extensions of time to file a notice of appeal" is nonjurisdictional). And "[l]oosely treating procedural requirements as jurisdictional," when Congress has not done so, "risks undermining the very reason Congress enact[s]" claim-processing rules in the first place. *Wilkins,* 598 U.S. at 157.

The whole point of claim-processing rules is "to promote the orderly progress of litigation." *Santos-Zacaria*, 598 U.S. at 416. Jurisdictional rules, on the other hand, "have a unique potential to *disrupt* the orderly course of litigation." *Wilkins*, 598 U.S. at 157 (emphasis added).

A court can spend months or years adjudicating a case, only for that work to be "wasted" by an "eleventh-hour jurisdictional objection[]." *Id.* at 157–58. Parties may wait to raise a jurisdictional objection "until after an entire round of appeals all the way to the Supreme Court," *Fort Bend*, 587 U.S. at 547, or after "explicitly represent[ing]" that they will not do so, *MOAC Mall Holdings LLC v. Transform Holdco LLC*, 598 U.S. 288, 294 (2023). And still the court must consider it. *See id.*

According jurisdictional status to a rule that "Congress enacted to keep things running smoothly and efficiently" thus defeats the purpose of the rule. *Wilkins,* 598 U.S. at 158. And, in the process, it imposes "[h]arsh consequences" on litigants that Congress did not intend. *Santos-Zacaria*, 598 U.S. at 416.

"Mindful of those repercussions, this Court will treat a procedural requirement as jurisdictional only if Congress clearly states that it is." *Harrow*, 601 U.S. at 484. It is "the province and duty of the judicial department to say what

the law is." *Marbury v. Madison*, 5 U.S. 137, 177 (1803). And "[t]his Court has long recognized a strong presumption in favor of judicial review of final agency action." *Am. Hosp. Ass'n v. Becerra*, 596 U.S. 724, 733 (2022). If Congress seeks to upend this presumption—especially if it seeks to do so through an otherwise run-of-the-mill filing deadline—it will clearly say so.

B. The deadline to appeal a final order of removal is a quintessential claim-processing rule.

The deadline to appeal from a final order of removal is a paradigmatic claim-processing rule. 8 U.S.C. § 1252(b)(1). The statute provides that a "petition for review must be filed not later than 30 days after the date of the final order of removal." *Id.* That is not a clear statement that the failure to meet the deadline will have jurisdictional consequences. To the contrary, the deadline speaks in terms of the noncitizen's procedural obligations. It "does not speak in jurisdictional terms." *Henderson*, 562 U.S. at 438. Nothing suggests that—unlike virtually every other deadline to appeal from an agency decision—this deadline might affect the court's jurisdiction.

But if more were needed, this Court recently held that a neighboring statutory provision is also not jurisdictional—for reasons that apply equally here. *Santos-Zacaria*, 598 U.S. at 417–19 (discussing 8 U.S.C. § 1252(d)(1)). First, this Court held that the neighboring provision, an exhaustion provision, is a "quintessential claim-processing rule." *Id.* at 417. So too are "[f]iling deadlines." *Henderson*, 562 U.S. at 435. "It would therefore be aberrant for" a deadline to appeal a final order of removal "to be characterized as jurisdictional." *Santos-Zacaria*, 598 U.S. at 418. Congress may, for some reason, have chosen to make this deadline jurisdictional.

"But to be confident Congress took that unexpected tack, we would need unmistakable evidence, on par with express language addressing the court's jurisdiction." *Id.* Nothing anywhere "close appears here." *Id*

Second, while both the deadline to appeal a final order of removal and the neighboring exhaustion provision lack "jurisdictional language," Congress explicitly provided that other provisions in the same section are jurisdictional. *Id.* at 418–19. "The contrast between the text of [the appeal deadline] and the unambiguous jurisdictional terms in related provisions shows that Congress would have spoken in clearer terms if it intended for [the appeal deadline] to have similar jurisdictional force." *Id.* at 419.

Nevertheless, the Fourth Circuit believed that this Court's decision in *Stone* required it to conclude that the deadline to appeal a final order of removal is jurisdictional. *Stone* made a passing assertion that "statutory provisions specifying the timing of review … are … mandatory and jurisdictional." *Stone v. I.N.S.*, 514 U.S. 386, 405 (1995). But *Stone*'s loose usage of the term jurisdiction "predate[d] [this Court's] cases … that bring some discipline to the use of the term jurisdictional." *Santos-Zacaria*, 598 U.S. at 421. As this Court has already explained, *Stone* did not "attend[] to the distinction between 'jurisdictional' rules (as we understand them today) and nonjurisdictional but mandatory ones." *Id.*

This Court should reiterate that neither *Stone*—nor any other "drive-by" jurisdictional ruling—is binding on the lower courts. *Arbaugh v. Y&H Corp.*, 546 U.S. 500, 511 (2006) ("We have described such unrefined dispositions as 'drive-by jurisdictional rulings' that should be accorded no precedential effect."). As this Court has said time and time again, a clear statement is needed.

II. The deadline to appeal the denial of withholding of removal expires thirty days after the Board of Immigration Appeals' decision.

Properly understanding that the deadline to appeal a final order of removal is a claim-processing rule also helps interpret when the deadline begins to run—especially in cases where a noncitizen seeks withholding of removal. Most circuits have held that the clock starts after the agency has finished adjudicating a noncitizen's withholding claim. *See, e.g., Inestroza-Tosta v. Attorney General*, 105 F.4th 499, 514 (3d Cir. 2024); *Argueta-Hernandez v. Garland*, 87 F.4th 698, 705 (5th Cir. 2023). That is entirely consistent with the provision's status as a claim-processing rule that ensures the orderly course of litigation by requiring parties to take certain steps at certain times.

In contrast, the Fourth Circuit's interpretation below threatens to effectively foreclose an entire class of claims—which is the work of subject-matter limitations, not filing deadlines. It also scrambles the ordinary course of proceedings by requiring premature petitions for review of unexhausted claims.

Santos-Zacaria rejected just such a reading of another claim-processing rule in the same section as incoherent and putting the statute at war with itself. If anything more were needed, the strong presumption of judicial review makes it inconceivable that Congress would use a claim-processing rule to categorically foreclose such claims.

A. The majority rule follows directly from (b)(1)'s status as a claim-processing rule.

The majority of courts of appeals to have addressed this question have interpreted (b)(1) in a manner that follows from the provision's status as a claim-processing rule: Noncitizens exhaust their withholding claims before the agency and *then* they appeal. *See Inestroza-Tosta*, 105 F.4th at 514–15; *Argueta-Hernandez*, 87 F.4th at 705; *Kolov v. Garland*, 78 F.4th 911, 916 (6th Cir. 2023); *Alonso-Juarez v. Garland*, 80 F.4th 1039, 1043 (9th Cir. 2023); *Arostegui-Maldonado v. Garland*, 75 F.4th 1132, 1137 (10th Cir. 2023).

Exhaustion before the agency followed by judicial review is not just the norm, it is required by the governing statutory framework. Under § 1252(d), "[a] court may review a final order of removal only if—(1) the [noncitizen] has exhausted all administrative remedies available to the [noncitizen] as of right."

This familiar requirement promotes efficient and orderly adjudication. "Exhaustion gives an agency an opportunity to correct its own mistakes with respect to the programs it administers before it is haled into federal court." *Woodford v. Ngo*, 548 U.S. 81, 89 (2006). It also "promotes efficiency," as "[c]laims generally can be resolved much more quickly and economically in proceedings before an agency than in litigation in federal court." *Id.* And "proceedings before the agency [can] convince the losing party not to pursue the matter in federal court." *Id.*

In addition, the statute requires that "the court of appeals shall decide the petition [for review] only on the administrative record." § 1252(b)(4)(A). This has long

been the norm in judicial review of agency adjudication. *See, e.g.*, *Camp v. Pitts*, 411 U.S. 138, 142 (1973) ("[T]he focal point for judicial review should be the administrative record already in existence, not some new record made initially in the reviewing court.").

This record is built through testimony and evidence entered before the immigration judge, who provides a trial-style hearing and rules on evidentiary matters: "The IJ whose decision the Board reviews, unlike an Article III judge, is not merely the fact finder and adjudicator but also has an obligation to establish the record." *Roman v. Garland*, 49 F.4th 157, 169 (2d Cir. 2022). This again promotes efficiency by ensuring that time-consuming fact-finding will occur before the agency, not the reviewing court.

The claim-processing rules in § 1252 therefore establish a familiar agency-first, court-second framework. A party *first* exhausts their claims before the agency and creates a record, and (b)(1) *then* sets the deadline for seeking judicial review.

B. The minority rule short-circuits the ordinary course of litigation, which is inconsistent with (b)(1)'s status as a claim-processing rule.

In contrast, the minority rule cannot be squared with (b)(1)'s status as a claim-processing rule. That reading short-circuits the ordinary and orderly course of litigation by requiring parties to take premature steps at illogical times.

Under the minority reading, "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." *Alonso-Juarez*, 80 F.4th at 1053; *see also Argueta-Hernandez*, 87 F.4th at 706 n.5. This flood of "premature petitions for review" before the noncitizen had exhausted their claims for relief would be "immensely resource intensive" and disrupt the normal course of judicial review. *Alonso-Juarez*, 80 F.4th at 1053.

This Court, in *Santos-Zacaria*, rejected an interpretation of the neighboring exhaustion requirement on just these grounds. In explaining why the exhaustion provision did not require noncitizens to first file petitions for review and *then* exhaust those very same claims before the BIA, the Court explained that this "would [] flood the courts with pointless premature petitions." *Santos-Zacaria*, 598 U.S. at 428–29. The result would be "a world of administrability headaches for courts" and "traps for unwary noncitizens" who are "already navigating a complex bureaucracy, often *pro se* and in a foreign language." *Id.* at 430. This would be entirely at cross-purposes with a rule meant to ensure the orderly and efficient course of litigation. The Court therefore "decline[d] to interpret the statute to be so at war with itself." *Id.* at 429.

Once again, the same goes for (b)(1). Requiring noncitizens to file premature petitions with unexhausted claims would "undermin[e] the very reason Congress enacted" a claim-processing rule. *Wilkins*, 598 U.S. at 157. And it would undercut all the long-recognized benefits of exhaustion requirements. *See Woodford*, 548 U.S. at 89. Instead of allowing "an agency an opportunity to correct its own mistakes … before it is haled into federal court," *id.*, noncitizens would be required to file petitions for review before they know whether the agency will change

course and grant relief, rendering judicial review unnecessary.

Nor is this the only way that the minority circuits' reading would upend "the orderly progress of litigation." *Santos-Zacaria*, 598 U.S. at 416. As the Fifth Circuit explained, "[i]t cannot be the case that a petitioner may only seek review … without a full administrative record." *Argueta-Hernandez*, 87 F.4th at 706. Indeed, § 1252(b)(4)(A) mandates review based on the administrative record developed before the immigration courts. Yet the minority rule requires noncitizens to file petitions for review before an immigration judge has even finished adjudicating their claims. It is implausible that Congress used a filing deadline to *sub silentio* depart from exhaustion—a basic feature of not just § 1252 but of judicial review of administrative decision making in general.

C. The minority rule risks foreclosing judicial review of an entire class of claims, which is the work of a subject-matter limitation, not a filing deadline.

There is another fundamental problem. As the Government explains, the minority rule "would foreclose judicial review of many statutory-withholding and CAT claims" because the deadline to appeal would lapse before the agency had even rendered a decision. Gov't Br. 37–38. In other words, interpreted this way, the appeal deadline would serve as a "limit[] on the classes of cases a court may entertain." *Wilkins*, 598 U.S. at 157. And this limitation would apply equally to constitutional claims, which this Court has long held would raise a "serious constitutional

question."[3] *Webster v. Doe*, 486 U.S. 592, 603 (1988). But, again, a limitation on the kinds of cases courts may review is the work of a congressional decision to limit a court's "subject-matter jurisdiction," not a filing deadline. *Wilkins*, 598 U.S. at 157.

And the structure of section 1252 itself illustrates that Congress did not intend the (b)(1) deadline to limit judicial review. Section 1252 contains both provisions that explicitly limit courts' jurisdiction and nonjurisdictional rules of the road. For example, the statute includes an entire set of provisions entitled "[m]atters not subject to judicial review." § 1252(a)(2). These are limitations on the classes of claims that a court has authority to hear—hence the "unambiguous jurisdictional terms." *Santos-Zacaria*, 598 U.S. at 419.

Section 1252 *also* includes a whole range of other rules "merely prescribing the method by which the jurisdiction

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[3] Removal proceedings must comport with due process, *Reno v. Flores*, 507 U.S. 292, 306 (1993), and noncitizens often raise constitutional claims when the agency fails to meet the Fifth Amendment's guarantees. *See, e.g.*, *Malets v. Garland*, 66 F.4th 49 (2d Cir. 2023) (immigration judge violated due process when he "truncated the hearing and ruled that no further evidence concerning Malets's religious convictions was required" and then relied on evidentiary gap to deny asylum); *Oshodi v. Holder*, 729 F.3d 883 (9th Cir. 2013) (due process required opportunity for testimony in proceeding that turned on asylum applicant's credibility); *Rabiu v. I.N.S.*, 41 F.3d 879, 883 (2d Cir. 1994) (due process violated where counsel's performance "impinged upon the fundamental fairness of the proceeding").

If the agency adjudication of a withholding claim does not comply with due process, but a noncitizen cannot appeal because the deadline is construed to run before the agency has rendered its decision, the noncitizen will be effectively barred from raising this constitutional claim.

granted the courts by Congress is to be exercised." *Id.* In addition to the appeal deadline and exhaustion requirement, other "[e]xamples abound," such as a requirement that the "court of appeals … review the proceeding on a typewritten record and on typewritten briefs." *Id.* at 420 (quoting § 1252(b)(2)). It's no accident that these provisions lack jurisdictional language. Congress did not seek to limit "the classes of cases a court may entertain," *Wilkins*, 598 U.S. at 157, based on the typeface used in briefing. Nor did it seek to do so by creating a garden-variety requirement that parties file their briefs on time.

Section 1252(b)(1)'s status as a claim-processing rule simply cannot be squared with a reading of that deadline that would effectively foreclose review entirely over large swaths of withholding decisions. Both the nature of claim-processing rules and the statutory structure indicate that while some provisions of § 1252 set limits on the classes of cases courts can review, (b)(1) is not one of them. For that reason, too, this Court should read it like any other sensible claim-processing appeal deadline: as beginning to run *after* the agency has rendered the decision being appealed.

CONCLUSION

For the reasons stated above, this Court should clarify that 1252(b)(1) is a claims-processing provision that begins to run after the agency's resolution of a noncitizen's withholding claim. This Court should therefore reverse the judgment of the United States Court of Appeals for the Fourth Circuit and remand for further proceedings.

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Respectfully submitted,

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APPENDIX

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