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 U.S. Court of Appeals for the Fourth Circuit

BRIEF OF *AMICI CURIAE* IMMIGRATION LEGAL SERVICE PROVIDERS SUPPORTING PETITIONER

AIMEE MAYER-SALINS
SAMANTHA HSIEH
AMICA CENTER FOR IMMIGRANT RIGHTS
1025 Connecticut Ave. NW, Suite 701
Washington, D.C. 20036

MELISSA CROW
CENTER FOR GENDER & REFUGEE STUDIES
1121 14th Street NW, Suite 200
Washington, DC 20005

ROBERT PAUW
CENTER FOR GENDER & REFUGEE STUDIES
C/O GIBBS HOUSTON PAUW
1000 Second Ave. #1600
Seattle, WA 98104

TOBIAS S. LOSS-EATON
Counsel of Record
SCOTT LOWDER
SIDLEY AUSTIN LLP
1501 K Street NW
Washington, D.C. 20005
(202) 736-8000
tlosseaton@sidley.com

CHARLES ROTH
NATIONAL IMMIGRANT JUSTICE CENTER
111 W. Jackson Blvd., Suite 800
Chicago, IL 60604

Counsel for Amici Curiae

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INTERESTS OF *AMICI CURIAE*

Amici are nonprofit organizations whose missions include advocating for and on behalf of immigrants, refugees, and asylum seekers.[1] *Amici* frequently assist noncitizens in pursuing appellate review of removal orders—both at the agency level before the Board of Immigration Appeals and in federal court under 8 U.S.C. § 1252. Because there is no right to government-funded counsel in removal proceedings, *amici* also devote significant resources to advising *pro se* litigants in the immigration appeals process. Drawing from and informed by their practical litigation experience, *amici* share an interest in ensuring that noncitizens facing removal from the United States have a fair and meaningful opportunity to obtain judicial review of errors made in agency adjudications. *Amici* include:

- The Advocates for Human Rights
- American Gateways
- Americans for Immigrant Justice
- Amica Center for Immigrant Rights
- Black Alliance for Just Immigration (BAJI)
- Center for Gender and Refugee Studies
- Co-Counsel NYC
- Florence Immigrant & Refugee Rights Project
- Immigrant Defenders Law Center (ImmDef)
- Immigrant Legal Defense

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[1] No counsel for a party authored this brief in whole or in part, and no entity or person, other than amici curiae, their members, and their counsel, made a monetary contribution intended to fund the preparation or submission of this brief.

- La Raza Centro Legal
- Legal Aid Justice Center
- Make the Road New York
- Mission Action
- National Immigrant Justice Center
- National Immigration Project of the National Lawyers Guild (National Immigration Project)
- New York Legal Assistance Group (NYLAG)
- Northwest Immigrant Rights Project
- Pangea Legal Services
- Public Counsel
- Public Law Center
- Rocky Mountain Immigrant Advocacy Network
- Tahirih Justice Center

SUMMARY OF ARGUMENT

Amici agree with petitioner that the Fourth Circuit's interpretation of 8 U.S.C. § 1252(b)(1) is erroneous. *Amici* write separately to explain that their practical experience representing noncitizens in removal proceedings further confirms why the judgment below should be reversed. The Fourth Circuit's rule creates an irrational, bifurcated review system that will produce duplicative filings, confuse noncitizens and their attorneys, and prevent many noncitizens from obtaining judicial review of their reasonable-fear and withholding-only proceedings.

1. Because the Fourth Circuit's approach is counterintuitive, many noncitizens will lack adequate notice

of its requirements. Under the decision below, noncitizens in pending reasonable-fear and withholding-only proceedings must file petitions for review within thirty days of their reinstatement or final administrative removal order (FARO). Noncitizens, who are often detained and largely *pro se*, have no reason to expect that they must appeal a ruling that has not yet been made in proceedings that may not even have begun. And even if they were adequately informed of this strange requirement, financial and administrative burdens make it unlikely that many noncitizens will be able to preserve their rights in this way. The decision below thus risks foreclosing judicial review for people seeking protection from persecution and torture.

2. The Fourth Circuit's rule would be highly resource intensive, requiring unnecessary filings for litigants and federal courts. To protect their right to judicial review, noncitizens would be forced to file premature, prophylactic petitions for review before their claims are exhausted and pay the required fees. These petitions would clog the courts of appeals with needless administrative paperwork and may linger for years until reasonable-fear and withholding-only proceedings are completed. Some cases will be resolved or abandoned before the completion of these proceedings, mooting the petition and all subsequent filings.

This approach also turns a generally straightforward determination of proper venue into one that is inefficient and unpredictable. Instead of following the statutory provision that links venue to the immigration judge's decision, the Fourth Circuit's rule effectively requires the petition to be filed in the circuit where the FARO or reinstatement order was issued, regardless of where the immigration judge may be located. The rule thus contradicts the statutory scheme

and creates confusion. Experience in the Fourth and Second Circuits illustrates these problems.

The Court should reverse the decision below.

ARGUMENT

I. The Fourth Circuit's decision adds to a complex and demanding procedural scheme.

Before considering the myriad problems that the decision below produces, it is important to understand the procedural requirements and "practical realities" of the immigration system where the rule applies. See *Garland* v. *Aleman Gonzalez*, 596 U.S. 543, 569 (2022) (Sotomayor, J., concurring in the judgment in part and dissenting in part).

Under the Immigration and Nationality Act, a person may be subject to summary administrative removal proceedings if they have been convicted of what Immigration and Customs Enforcement believes is an "aggravated felony." 8 U.S.C. § 1228(b). Despite the high stakes, the noncitizen does not appear before an immigration judge and has no right to an administrative appeal to the Board of Immigration Appeals. See 8 C.F.R. § 238.1. Instead, the proceedings are conducted by a Department of Homeland Security immigration officer, often with no opportunity for meaningful participation by the noncitizen. See *id.* § 238.1(a)–(c). Within minutes of questioning, the noncitizen is handed a piece of paper (Form I-851, the Notice of Intent to Issue a Final Administrative Removal Order) written in English—a language they often do not understand. This form is served alongside dozens of other documents in the same unfamiliar language. The noncitizen then has 10 days from the date of the notice to submit a written response rebutting the allegations in English along with supporting evidence.

See *id.* § 238.1(c). If the officer determines that the noncitizen's removability is clearly established by the evidence in the record, they will issue a FARO, which is yet another unfamiliar form in an unfamiliar language. *Id.* § 238.1(d).

A noncitizen who fears persecution or torture if removed to the country named in the removal order may request to be heard on that issue. They will then receive an interview with an asylum officer. 8 C.F.R. § 208.31(a)–(b). During this interview, usually conducted by phone, the officer asks questions to determine whether the noncitizen qualifies for one of two forms of protection: withholding of removal, 8 U.S.C. § 1231(b)(3)(A), or protection under Article 3 of the Convention Against Torture, see Convention Against Torture and Other Cruel, Inhuman, or Degrading Treatment or Punishment, *adopted* Dec. 10, 1984, S. Treaty Doc. No. 20, 100th Cong., 2d Sess. (1988), 1565 U.N.T.S. 114; 8 C.F.R. §§ 208.16–208.17, 1208.16–1208.17 (implementing regulations).

To qualify for withholding, a person must show that they are likely to be persecuted based on a protected ground (race, religion, nationality, membership in a particular social group, or political opinion) if removed to the designated country. 8 U.S.C. § 1231(b)(3)(A). To qualify for CAT protection, a person must show that they are likely to be tortured upon removal to the designated country. *Nasrallah* v. *Barr*, 590 U.S. 573, 582 (2020) (citing 8 C.F.R. § 1208.17(b)(2)). There are two types of CAT protection, withholding and deferral, which we refer to together as "CAT protection." See 8 C.F.R. §§ 1208.17 (deferral), 1208.16 (withholding). The noncitizen must understand the requirements for these forms of protection, which can be complicated even for trained attorneys, before the interview begins.

If the asylum officer finds that the noncitizen has established a reasonable fear of persecution or torture, the noncitizen is entitled to seek withholding of removal or CAT protection in proceedings before an immigration judge and, if necessary, to appeal to the Board. 8 C.F.R. §§ 208.16, .31(e), .31(g)(2). If the asylum officer does not so find, the noncitizen may request that an immigration judge review the negative decision. *Id.* § 208.31(f). The review consists of a short hearing, typically 30 minutes or less, where the immigration judge may question the noncitizen about their fear, evaluate credibility, and consider relevant documents about conditions in the person's home country. See *id.* § 208.31(g). If the immigration judge reverses the determination, the person will have withholding-only proceedings before an immigration judge, where they can apply for withholding or CAT protection. *Id.* But if the immigration judge agrees with the asylum officer's negative determination, the noncitizen has limited options for relief. See *id.* The person may file a request for reinterview with the asylum officer in exceptional circumstances, which may be denied in the exercise of discretion. 8 C.F.R. § 208.30(g)(1)(i). Or they may file a petition for review in a federal court of appeals.

These same proceedings also apply to people who are found to have reentered the country unlawfully after having been previously removed. For a person in this situation, the "prior order of removal is reinstated from its original date and is not subject to being reopened or reviewed" and the person is "not eligible and may not apply for" asylum—but they may still seek withholding or CAT protection under the procedures described here. 8 U.S.C. § 1231(a)(5); see also *Johnson* v. *Guzman Chavez*, 594 U.S. 523 (2021); Pet. 20, *Martinez* v. *Garland*, No. 23-7678.

In immigration proceedings, there is no right to appointed counsel. 8 U.S.C. § 1362. The representation rate for noncitizens is very low, particularly for people in detention.[2] While Legal Orientation Program providers (including some *amici*) assist *pro se* detained noncitizens by sharing basic information, they are not substitutes for counsel and serve only a limited number of detained people.[3] Moreover, LOP is limited to providing information about agency proceedings and does not provide legal information concerning federal court proceedings such as those regarding petitions for review. Even finding paid counsel can be challenging because many ICE detention facilities are located in rural areas, far from major cities with accessible attorneys or legal service providers.[4]

Additionally, throughout these proceedings, language barriers can significantly inhibit a noncitizen's ability to understand and comply with filing requirements. Even though interpreters are provided during immigration court hearings, detained *pro se* noncitizens otherwise lack meaningful language access and interpretation services. They therefore may misunderstand immigration law processes that do not occur in

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[2] *See, e.g.*, *Too Few Immigration Attorneys: Average Representation Rates Fall from 65% To 30%*, Transactional Records Access Clearinghouse (Jan. 24, 2024), https://shorturl.at/D7kD9; Ingrid Eagly & Steven Shafer, *Access to Counsel in Immigration Court*, Am. Immigr. Council (Sept. 2016), https://shorturl.at/t0ghB.

[3] *Compare Legal Orientation Program*, Acacia Ctr. for Just., https://shorturl.at/wYMeF (last visited Jan. 9, 2025) (serving 35 detention facilities in-person and providing hotline-only support in an additional 35), *with Detention Facilities*, U.S. Immigr. & Customs Enf't, https://shorturl.at/KmSCu (last updated Mar. 30, 2023) (listing over 100 total facilities).

[4] *See* Yuki Noguchi, *Unequal Outcomes: Most ICE Detainees Held in Rural Areas Where Deportation Risks Soar*, NPR (Aug. 15, 2019), https://shorturl.at/6Kb6o.

the courtroom. This is particularly true for the streamlined removal proceedings described above. For detained *pro se* noncitizens who do not speak English, problems related to language access and interpretation can severely impede their ability to understand, prepare for, and participate in their removal proceedings and their ability to timely file a prophylactic petition for review.

II. The Fourth Circuit's rule severely burdens noncitizen petitioners by imposing counter-intuitive and impractical demands.

The Fourth Circuit's approach is not just legally unsound, as Petitioner explains; it also imposes counter-intuitive obstacles to judicial review. Noncitizens often flee to the United States precisely because they trust in this nation's historic commitment to protect those "yearning to breathe free." Emma Lazarus, *The New Colossus* (1883), *reprinted in America Forever New: A Book of Poems* (John E. Brewton & Sara W. Brewton eds., 1968). This rule in effect asks refugees to assume error or unfairness on the part of immigration authorities even before they have lost.

Under the decision below (and the Second Circuit's parallel holding in *Bhaktibhai-Patel* v. *Garland*, 32 F.4th 180, 192 (2d Cir. 2022)), the 30-day deadline to file a petition seeking review of the denial of withholding or CAT protection would run from the issuance of a FARO or reinstatement order—even if the fear-based proceedings to adjudicate these claims will continue for months or years after that date. See, *e.g.*, *Martinez* v. *Larose*, 968 F.3d 555, 558 (6th Cir. 2020) (noncitizen detained for over twenty-eight months while awaiting withholding-only eligibility determination). In the vast majority of cases, the decision below will require a noncitizen to file a petition challenging

the results of fear-based proceedings before those proceedings have even begun. See*, e.g.*, *Bhaktibhai-Patel*, 32 F.4th at 185–86 (asylum officer did not conduct reasonable-fear interview until three months after reinstatement order issued).

Applying this rule to vulnerable noncitizens, who are mostly detained and *pro se*, "risks depriving many . . . of any meaningful opportunity to protect their rights." *Aleman Gonzalez*, 596 U.S. at 569 (Sotomayor, J., concurring in the judgment in part and dissenting in part). Noncitizens would need to navigate a system that—contrary to the normal judicial process and basic intuition—requires appeals to be filed before the challenged ruling has even been issued. Indeed, they would need to file petitions very quickly after a cursory interaction with a Homeland Security immigration officer, well before they present their fear claims. Even trained attorneys are likely to be confused and misled by this illogical dual-track approach. For unrepresented noncitizens, who often face language barriers, administrative and financial burdens in detention, and educational limitations, this procedural maze may well prevent access to review. Given that "[i]mmigration law can be complex, and . . . a legal specialty of its own," *Padilla* v. *Kentucky*, 559 U.S. 356, 369 (2010), the Fourth Circuit's rule adds a needless hurdle to an already opaque process.

A. Noncitizens would not reasonably expect that they must seek review of withholding-only proceedings before those proceedings end (or even begin).

The decision below treats the *beginning* of withholding-only proceedings for these noncitizens as the *final* order for purposes of 1252(b)(1)'s thirty-day deadline—however long that process will continue thereafter. FARO and reinstatement orders are usually issued

soon after a noncitizen arrives in ICE detention, when they are shocked, traumatized, and confused. See M. von Werthern et al., *The Impact of Immigration Detention on Mental Health: A Systematic Review*, BMC Psychiatry (Dec. 6, 2018), https://shorturl.at/qOop0; 8 C.F.R. § 238.1(g) (authorizing detention for FARO proceedings); 8 U.S.C. § 1231(a)(2), (6) (authorizing detention for noncitizens subject to reinstatement); 8 C.F.R. § 241.8(f) (same). Even noncitizens fortunate enough to eventually obtain counsel often lack representation at such an early stage. See 8 C.F.R. § 238.1(b)(2)(i) (specifying that a "Notice of Intent" starts removal proceedings for FAROs); *id.* § 241.8(a), (e) (discussing reinstatement orders).

Nor can other officials involved in the removal process be expected to explain the Fourth Circuit's rule. Homeland Security immigration officers—non-lawyers with adverse interests—are poorly situated to explain the need to simultaneously prosecute fear-based claims and file a petition for review that may be held in abeyance for months or years, see *infra* § III.A. And without proper notice, many noncitizens will fail to understand this illogical system. There is also no reason to suppose that the small number of noncitizens who will understand the system are those most likely to merit immigration relief. To the contrary, noncitizens who have suffered the most at the hands of their persecutors are the most likely to suffer from PTSD and other physical or mental challenges that inhibit their ability to proactively appeal before losing their case.

For those noncitizens who receive a reasonable-fear interview, many will not have concluded their proceedings within thirty days of a FARO or reinstatement order. To do so, they must first be referred for a reasonable-fear interview, undergo the reasonable-fear interview, and then be referred to the immigration judge

(whether for full withholding-only proceedings or for review of a negative reasonable-fear determination). See 8 C.F.R. § 208.31(b) (noncitizens should receive reasonable-fear determination within ten days of Homeland Security's referral after FARO or reinstatement order is issued absent exceptional circumstances); *id.* § 208.31(e) (providing for immigration judge adjudication of withholding-only proceedings after noncitizen is found to have reasonable fear without mention of deadline); *id.* § 208.31(g) (providing for immigration judge review of negative reasonable-fear determination within ten days after Notice of Referral is filed absent exceptional circumstances).

U.S. Citizenship and Immigration Services asylum officers, who conduct reasonable-fear interviews, *id.* § 208.31(c), are also not well-situated to inform noncitizens of the need to file prophylactic petitions for review; many are not attorneys, and as neutral arbiters, they are not in a position to give legal advice to the individuals appearing before them. The nature of the asylum officer's role would make this information even more confusing: The officer, having found that a noncitizen has a plausible protection claim, would advise the noncitizen to file an appeal in federal court in case an immigration judge or the Board later denies the claim.

Compounding these problems is the fundamentally counterintuitive nature of the Fourth Circuit's rule. No U.S. court requires a criminal defendant to notice an appeal immediately after they are charged with a crime, before they have an opportunity to consult with counsel and before they know if they want to go to trial. Nor does the Administrative Procedure Act require (or allow) a party to seek review of an interlocutory agency decision to preserve the ability to challenge a later ruling that ends the agency proceedings.

See 5 U.S.C. § 704. Yet that is what the decision below requires for noncitizens. Even people who are "[]familiar with English and the habits of American bureaucracies," *Niz-Chavez* v. *Garland*, 593 U.S. 155, 170 (2021), would not expect a requirement to appeal before any claims for relief have been developed, let alone adjudicated—and many noncitizens are not so familiar, see *id.*

With no one to explain the process, many noncitizens—who often do not understand what it means to have a prior removal order reinstated or to receive a FARO—will fail to understand the Fourth Circuit's rule and the consequences of noncompliance. As a result, many noncitizens are likely to unknowingly forfeit the opportunity for judicial review of their fear-based claims. *Cf. Cook County* v. *Wolf*, 962 F.3d 208, 228 (7th Cir. 2020) (rejecting the government's interpretation of an immigration statute in part because it "set[s] a trap for the unwary" that "many immigrants are not sophisticated enough" to avoid).

B. Noncitizens face significant logistical barriers to complying with the decision below.

Even if noncitizens were adequately apprised of the Fourth Circuit's rule, longstanding procedural hurdles would frequently prevent judicial review of withholding-only proceedings.

Lack of necessary information. At the moment when noncitizens must file a prophylactic petition for review under the decision below, they will lack information necessary to do so. Since no fear-based claims will yet be adjudicated, noncitizens cannot advise the court of the issues on appeal. They also may not know which circuit to file in. A withholding-only proceeding may conclude in a different immigration court than

where it started, making it impossible to predict which circuit will ultimately serve as the proper venue for review. See 8 C.F.R. § 1003.20 (permitting change of venue from one immigration court to another); *infra* section III.B. And people in this situation cannot yet know if agency officials or the Board will ultimately deny relief or commit reversible error at all. See *Argueta-Hernandez* v. *Garland*, 87 F.4th 698, 706 n.5 (5th Cir. 2023). Requiring an appeal at this early stage and "without a full administrative record" makes no sense and would have "disastrous consequences on the immigration and judicial systems." *Id.* at 706.

Delayed service of process and documents lost in transfer. The text of § 1252(b)(1) focuses on "the date of the final order of removal," rather than the date of service or receipt. See 8 U.S.C. § 1252(b)(b1). Yet in *amici's* experience, FAROs and reinstatement orders are often served late, with some arriving months after being issued. For example, *amici* know of one FARO that was dated March 9, 2024. However, the Notice of Intent to Issue was dated April 12, 2024, and the Certificate of Service was dated October 15, 2024. The noncitizen subject of the FARO reports that she received a copy only after requesting it at her immigration judge hearing.[5]

Under the Fourth Circuit's rule, noncitizens who receive their FARO or reinstatement order more than thirty days after issuance have *already* missed the deadline to preserve their right to judicial review of their CAT or withholding claims. Noncitizens who are *pro se* typically do not know to ask for a copy of their FARO or reinstatement order and do not have an attorney to request it for them. Similarly, noncitizens

[5] A copy of these documents are on file with counsel.

who receive their orders late are likely unaware of the implications.

What's more, ICE frequently transfers noncitizens from one detention facility to another in the middle of the night, without any advance notice. Noncitizens are woken up and forced to quickly gather their belongings in a disoriented state, and they often leave behind important legal documents like FAROs or reinstatement orders. Even if a noncitizen realizes that they have left important documents at a prior facility, in *amici*'s experience, the prior facility is extremely unlikely to forward the documents to the noncitizen at the new facility. See *Cut Off: How ICE Detention Facilities Block Communication*, UC San Diego Innovation Law Lab, at 10–11 (Aug. 2021), https://shorturl.at/lZ4VG ("Transfers cause confusion, loss of information, and isolation from family, lawyers, and advocates who could help migrants' legal cases.").

Without a copy of the order, immigration attorneys and *pro se* litigants cannot tell when the 30-day deadline ends or in which circuit to file a prophylactic petition; noncitizens frequently do not remember the date of the order or the location of issuance. Compounding this problem, FAROs and reinstatement orders are sometimes incomplete, omitting the date of service, date of issuance, and name of the deportation officer who allegedly served the document. These details are nearly impossible to confirm before the expiration of the 30-day deadline without such orders. Unlike removal proceedings in immigration court, there is no website where counsel or a noncitizen's family members can review the status of FARO proceedings, including the notice of intent to issue the FARO or even the dates of such orders. See *Automated Case Information*, Exec. Off. for Immigr. Rev., https://acis.eoir.justice.gov/en/ (last visited Jan. 9,

2025). Detainees or their counsel may seek a copy from busy government officials, if they happen to return a voicemail message; but in *amici*'s experience, it is often difficult or impossible to obtain such copies promptly.

Financial burdens of prophylactic filings. The current petition filing fee of $600[6] is cost prohibitive for many noncitizens—especially if two separate filings are required. See *Alonso-Juarez* v. *Garland*, 80 F.4th 1039, 1053 (5th Cir. 2023). They would need to seek *in forma pauperis* status to preserve judicial review. Yet the *pauperis* rules require an indigent person to describe, under penalty of perjury, the "issues that the party intends to present on appeal," Fed. R. App. P. 24(a)(1)(C); again, a *pro se* noncitizen can hardly swear to the issues or errors in adjudicating her withholding-only case when those proceedings have not ended, or even started, when the *pauperis* filing is due.[7]

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[6] *Court of Appeals Miscellaneous Fee Schedule*, U.S. Courts, https://shorturl.at/6CtO4 (last visited Dec. 13, 2024).

[7] For that matter, the *in forma pauperis* application is very detailed and often confusing even for noncitizens who can read English. *See Application to Appeal In Forma Pauperis*, U.S. Ct. of Appeals for the Fourth Circuit, https://shorturl.at/CiGGu (last visited Jan. 9, 2025); Andrew Hammond, *Pleading Poverty in Federal Court*, 128 Yale L.J. 1478, 1503–04 (2019). And in some circuits, it is difficult to qualify as *in forma pauperis* even if the $600 filing fee would cause significant financial hardship to the petitioner. *Cf.* Hammond, *supra*, at 1501.

III. The decision below will pointlessly burden the federal courts.

A. Requiring prophylactic petitions for review will burden the courts of appeals with unnecessary paperwork.

The Fourth Circuit's rule creates an irrational, counterintuitive system of judicial review that undermines the immigration laws' goal of "promot[ing] efficiency." *Woodford* v. *Ngo*, 548 U.S. 81, 89 (2006). Its requirements will lead to an influx of unnecessary filings with no countervailing benefit.

As explained, the 30-day deadline to file a petition almost always expires before the withholding and CAT claims are ripe—and sometimes before the claims are even raised—and the petition must be filed whether or not the petitioner wants to challenge the underlying FARO or reinstatement order. The court of appeals receiving the petition must then open a case that it is unable to adjudicate pending the outcome of proceedings before an immigration judge or the Board. See 8 U.S.C. § 1252(b)(4)(A) (requiring the petition to be decided "only on the administrative record on which the order of removal is based" and thus precluding courts of appeals from reviewing until withholding-only proceedings conclude). If the immigration judge or Board ultimately grants withholding or CAT protection, the court of appeals—after potentially having spent months to years with the petition on its docket—must simply dismiss the case. See*, e.g.*, *Larose*, 968 F.3d at 558; *Bhaktibhai-Patel*, 32 F.4th at 185–86. If withholding or CAT protection is denied, the noncitizen will have to seek review of that decision by taking the dormant case out of abeyance.

The decision below does not explain how the courts of appeals should proceed after the agency reaches a

reasonable fear review/withholding-only determination. In practice, petitioners in different circuits may take varying approaches. Some might move to supplement the administrative record or move to return a prophylactic petition to the active docket. Others seeking to challenge the reasonable fear/withholding-only decision may file a second petition that supersedes the first filing.

At each juncture, the courts will be inundated with needless administrative paperwork. While cases are held in abeyance, courts frequently require regular status reports. *E.g.*, 4th Cir. R. 12(d) ("During the period of time a case is held in abeyance the appeal remains on the docket" and "[t]he parties will be required to make periodic status reports"). That means for the entire duration of reasonable-fear and withholding-only proceedings, petitioners and/or the government may need to file status reports, which the courts will have to process—even for cases that are later resolved or abandoned. See *Argueta-Hernandez*, 87 F.4th at 706 n.5 (noting that the Fourth Circuit's rule "'would require [the] court 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.'" (quoting *Alonso-Juarez*, 80 F.4th at 1053)). This is a tedious waste of resources for noncitizens, the executive, and the judiciary.

And as previously discussed, the government often transfers people from one detention facility to another. If a person is transferred while their petition is held in abeyance, the courts will face more administrative headaches. For example, the noncitizen must send a notification each time they are moved. *E.g.*, 9th Cir. R. 46-3 (requiring *pro se* litigants to update the court with any change in address); 1st Cir. R. 25(c)(3) (same

for ECF filers). If the address change is not reflected in the court's system, the noncitizen will not receive notice of any deadlines. As noncitizens lose and regain contact with the court after transfers and while withholding-only proceedings are ongoing, they risk dismissal of their cases for failure to prosecute. See*, e.g.*, Fed. R. Civ. P. 41(b); 4th Cir. R. 45; 5th Cir. R. 42.3; 9th Cir. R. 42-1. And so on. All this back-and-forth burdens parties and courts alike and serves no purpose.

B. The Fourth Circuit's rule conflicts with the statutory venue provisions and Congress's intent for efficient removal proceedings.

The Fourth Circuit mandates filing a petition for review before an immigration judge has finished adjudicating a case. But § 1252(b)(2) requires a petition to be "filed with the court of appeals for the judicial circuit in which the *immigration judge completed* the proceedings." 8 U.S.C. § 1252(b)(2) (emphasis added). In other words, Congress explicitly made venue dependent on the immigration judge's location. This is strong evidence that a petition should not be filed *until* there is an immigration judge order—that is, a withholding-only/reasonable-fear determination from an immigration judge. Indeed, it would be strange for Congress to require filing a petition in a specific venue before it is clear what that venue is.

But the Fourth Circuit requires precisely that. Under the decision below, a petitioner must file a petition before withholding-only/reasonable-fear proceedings have ended. Yet at that point, it is at best unclear where the final immigration judge will sit. As explained above, immigration detainees are frequently transferred between different detention facilities, and such transfers often affect which immigration court

adjudicates their cases. Often, a FARO or reinstatement order will be entered in one state, while immigration court proceedings arise in another state, including states in a different federal circuit. To preserve jurisdiction under the decision below, a noncitizen must first file a petition in the circuit where their FARO or reinstatement order was issued. Then, months or years later, an immigration judge may deny protection, and the BIA may affirm that denial. The statute mandates that the withholding-only proceeding be considered as part of the earlier-filed appeal. See 8 U.S.C. § 1252(b)(9) (reflecting congressional intent to channel all challenges into one consolidated proceeding rather than multiple separate proceedings).

But proceeding on that earlier-filed petition seems inconsistent with Congress's venue choice. While the parties could move to transfer the case to the circuit where the immigration judge completed the proceedings, this workaround does not address the impropriety of the initial filing.

The lower court's approach is not only wasteful; it also contravenes Congress's intent to promote judicial efficiency in removal proceedings. Section 1252(b)(9) requires that "[j]udicial review of all questions of law and fact . . . arising from any action taken or proceeding brought to remove [a noncitizen] . . . shall be available only in judicial review of a *final order* under this section" (emphasis added). This language makes clear Congress's intent to consolidate review of the final agency decision into one appeal, which tracks the general principles of appellate review in civil matters. See *Reno* v. *Am.-Arab Anti-Discrimination Comm.*, 525 U.S. 471, 482–83 (1999) (emphasizing that § 1252(b)(9)'s "zipper clause" is meant to consolidate

all judicial review of removal proceedings into one action in the court of appeals); *Guerrero-Lasprilla* v. *Barr*, 589 U.S. 221, 230 (2020) (same); 28 U.S.C. § 1291 (requiring a final judgment for civil appellate review); 5 U.S.C. § 704 (requiring final agency action for judicial review).

Moreover, Congress explicitly rejected bifurcated review of removal proceedings in passing the REAL ID Act, which eliminated all habeas review of final orders of removal. See Pub. L. No. 109-13, 119 Stat. 231 (2005). Courts of appeals previously reviewed threshold issues regarding criminal grounds of removability separately from claims for discretionary relief from removal, which were decided in habeas proceedings. See 151 Cong. Rec. H2813, H2873 (daily ed. May 3, 2005). Congress criticized this bifurcated review system as "result[ing] in piecemeal review, uncertainty, lack of uniformity, and a waste of resources both for the judicial branch and Government lawyers—the very opposite of what Congress tried to accomplish in 1996." *Id.* The decision below recreates similar problems by splintering review of removal cases and requiring appeals before the agency proceedings are over.

CONCLUSION

For the reasons above and in Petitioner's briefs, the Court should reverse the judgment below.

Respectfully submitted,

AIMEE MAYER-SALINS
SAMANTHA HSIEH
AMICA CENTER FOR
IMMIGRANT RIGHTS
1025 Connecticut Ave.
NW, Suite 701
Washington, D.C. 20036

MELISSA CROW
CENTER FOR GENDER &
REFUGEE STUDIES
1121 14th Street NW,
Suite 200
Washington, DC 20005

ROBERT PAUW
CENTER FOR GENDER &
REFUGEE STUDIES
C/O GIBBS HOUSTON PAUW
1000 Second Ave. #1600
Seattle, WA 98104

TOBIAS S. LOSS-EATON
Counsel of Record
SCOTT LOWDER
SIDLEY AUSTIN LLP
1501 K Street NW
Washington, D.C. 20005
(202) 736-8000
tlosseaton@sidley.com

CHARLES ROTH
NATIONAL IMMIGRANT
JUSTICE CENTER
111 W. Jackson Blvd.,
Suite 800
Chicago, IL 60604

Counsel for Amici Curiae

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