No. 23-1270

IN THE

Supreme Court of the United States

PIERRE YASSUE NASHUN RILEY,

Petitioner,

v.

PAMELA BONDI, ATTORNEY GENERAL,

Respondent.

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

BRIEF OF COURT-APPOINTED *AMICUS CURIAE* IN SUPPORT OF THE JUDGMENT BELOW

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QUESTIONS PRESENTED

1. Whether the 30-day deadline in 8 U.S.C. 1252(b)(1) for filing a petition for review of an order of removal is jurisdictional.

2. Whether a noncitizen satisfies the deadline in Section 1252(b)(1) by filing a petition for review challenging an agency order denying withholding of removal or protection under the Convention Against Torture within 30 days of the issuance of that order.

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INTEREST OF *AMICUS CURIAE*

By order dated December 3, 2024, this Court invited Stephen J. Hammer to brief and argue this case as *amicus curiae* in support of the judgment below.

STATUTORY AND REGULATORY PROVISIONS INVOLVED

Relevant statutory and regulatory provisions are reproduced in the appendix to this brief. App., *infra*, 1a-48a.

STATEMENT

For decades, Congress has repeatedly acted to expedite the removal of aliens convicted of aggravated felonies from the United States. While such aliens may seek country-specific relief from removal under regulations implementing the Convention Against Torture, Congress has barred courts from reviewing those claims except on a petition for review of a final order of removal. Under 8 U.S.C. § 1252(b)(1), such a petition must be filed "not later than 30 days after the date of the final order of removal." That rule forecloses judicial review of petitioner Pierre Riley's CAT claim.

As an aggravated felon, Riley was subject to expedited removal proceedings that resulted in a Final Administrative Removal Order in January 2021. Alleging a fear of torture in his native country of Jamaica, Riley sought CAT relief, which the Board of Immigration Appeals denied in May 2022. Riley petitioned for review of the Board's CAT order a few days later.

The court of appeals dismissed his petition for lack of jurisdiction. It held that the 30-day deadline is jurisdictional, and it concluded that Riley failed to comply with that deadline because he did not petition

for review within 30 days of his Final Administrative Removal Order.

This Court should affirm. This Court already determined in *Stone* v. *INS*, 514 U.S. 386 (1995), that the statutory deadline for filing a petition for review is jurisdictional. *Stone* made clear that its ruling was truly jurisdictional by attaching to it a true jurisdictional consequence—the unavailability of equitable tolling. Congress's subsequent adoption of the current 30-day deadline, far from abrogating *Stone*'s holding, further tightened judicial review. And this Court's decision in *Santos-Zacaria* v. *Garland*, 598 U.S. 411 (2023), did not disturb the deadline's jurisdictional status.

The Court should also hold that Riley failed to comply with the deadline. The only order of removal in this case is Riley's Final Administrative Removal Order—the Board's CAT order does not qualify. Statutory text and context make clear that his Final Administrative Removal Order was final when issued. And the proceedings on Riley's CAT claim did not suspend that order's finality because they could not affect its validity. Because Riley filed his petition for review more than 16 months after his Final Administrative Removal Order, he violated the 30-day deadline, and the court of appeals correctly dismissed his petition as untimely.

A. Legal Background

1. Before the adoption of the Immigration and Nationality Act of 1952, aliens could challenge final orders of deportation only through habeas corpus. See *Heikkila* v. *Barber*, 345 U.S. 229, 235 (1953). After the INA was enacted, this Court held that deportation orders were also reviewable under the Administrative

Procedure Act. See *Shaughnessy* v. *Pedreiro*, 349 U.S. 48, 51-52 (1955).

Meritless suits filed "solely for the purpose of preventing or delaying indefinitely [aliens'] deportation" began to proliferate. H.R. Rep. No. 87-565, at 2 (1961). One notorious case involved New Orleans mob boss Carlos Marcello, whose deportation proceedings "lasted more than thirty years without government success." Daniel Kanstroom, *The Long, Complex, and Futile Deportation Saga of Carlos Marcello*, in *Immigration Stories* 113, 117 (David A. Martin & Peter H. Schuck eds., 2005). "[D]isturbed" by the "flagrant abuse of judicial review of deportation orders" by criminal aliens in particular, H.R. Rep. No. 87-1086, at 22-23 (1961), Congress in 1961 amended the INA to provide that a petition for review filed in the court of appeals within six months of a "final order[] of deportation" is the "sole and exclusive procedure" for judicial review of such an order, Pub. L. No. 87-301, § 5(a), 75 Stat. 651 (originally codified at 8 U.S.C. § 1105a(a) (1964)).

That amendment failed to assuage congressional concerns over delays in the deportation of criminal aliens. So in the Violent Crime Control and Law Enforcement Act of 1994, Congress went one step further—authorizing an expedited deportation process for non-permanent-resident aliens convicted of aggravated felonies that dispensed with the need for a hearing before an immigration judge. Pub. L. No. 103-222, § 130004(a), 108 Stat. 2026-27 (originally codified at 8 U.S.C. § 1252a(b) (1994); now codified as amended at *id.* § 1228(b)).

Despite these measures, Congress remained dissatisfied with the inefficiency of deportation proceedings. In 1996, it adopted two statutes to further expedite the removal of criminal aliens: the Antiterrorism and Effective Death Penalty Act, Pub. L. No. 104-132, 110 Stat. 1214, and the Illegal Immigration Reform and Immigrant Responsibility Act, Pub. L. No. 104-208, Div. C., 110 Stat. 3009-546.

AEDPA defined the term "final order of deportation" across the INA. An "order of deportation" means an order entered by certain officials "concluding that the alien is deportable or ordering deportation." 8 U.S.C. § 1101(a)(47)(A). And such an order "shall become final upon the earlier of—(i) a determination by the Board of Immigration Appeals affirming such order; or (ii) the expiration of the period in which the alien is permitted to seek review of such order by the Board." *Id.* § 1101(a)(47)(B).

IIRIRA, adopted a few months later, reorganized the INA and made its judicial-review scheme "significantly more restrictive." *Reno* v. *Am.-Arab Anti-Discrimination Comm.*, 525 U.S. 471, 475 (1999). It changed the term "final order of deportation" to "final order of removal" throughout the INA (though not in the definition added by AEDPA). *E.g.*, 8 U.S.C. § 1252(b)(1). It cut the length of time to file a petition for review—which Congress had already reduced from six months to 90 days—to just "30 days after the date of the final order of removal." *Ibid.* It also adopted a provision, known as the "zipper clause," establishing that judicial review of all questions "arising from any action taken or proceeding brought to remove an alien * * * shall be available only in judicial review of a final order under [Section 1252]." *Id.* § 1252(b)(9). And for

aliens who illegally reenter, it required the reinstatement of prior orders of removal without reopening or review. *Id.* § 1231(a)(5).

2. While Congress has repeatedly sought to speed up removal proceedings, it has also allowed certain aliens to seek various forms of relief from removal, including withholding of removal. Withholding (or deferral) of removal prohibits the government from removing an alien "to the country designated in the removal order unless the order of withholding is terminated." *Johnson* v. *Guzman Chavez*, 594 U.S. 523, 531 (2021). But it does not prevent the removal of an alien "to a third country other than the country to which removal has been withheld or deferred." *Id.* at 531-32 (citation omitted).

Two years after IIRIRA, Congress provided for withholding of removal pursuant to the 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), 1465 U.N.T.S. 85. Congress implemented Article 3 of CAT in the Foreign Affairs Reform and Restructuring Act of 1998, which made it federal policy not to return an alien to a country "in which there are substantial grounds for believing the person would be in danger of being subjected to torture" and called for regulations to carry out that policy. Pub. L. No. 105-277, Div. G., § 2242(a)-(b), 112 Stat. 2681-822. FARRA stressed that "nothing in this section shall be construed as providing any court jurisdiction to consider or review claims raised under the Convention or this section * * * except as part of the review of a final order

of removal pursuant to [Section 1252]." § 2242(d), 112 Stat. 2681-822.[1]

3. After FARRA, Congress continued to restrict the availability of judicial review in the REAL ID Act of 2005, Pub. L. No. 109-13, Div. B., 119 Stat. 302. Congress adopted the Act following *INS* v. *St. Cyr*, 533 U.S. 289 (2001), which held that neither AEDPA nor IIRIRA eliminated district-court review of constitutional or legal challenges to final orders of removal through habeas actions. *Id.* at 308-14. The Act responded to *St. Cyr* by clarifying that a petition for review is the "sole and exclusive means for judicial review of an order of removal." 8 U.S.C. § 1252(a)(5). It also provided that "a petition for review filed * * * in accordance with this section shall be the sole and exclusive means for judicial review of any" CAT claim. *Id.* § 1252(a)(4).

4. As amended, the INA and its implementing regulations lay out different procedures for the adjudication of withholding claims depending on whether they are raised in standard or certain expedited removal proceedings.

Standard removal proceedings are held before an immigration judge, who generally conducts a hearing to "decide whether [the] alien is removable from the United

[1] Congress has also provided for statutory withholding, which prohibits the removal of an alien to a country where the alien's life or freedom would be threatened due to the "alien's race, religion, nationality, membership in a particular social group, or political opinion." 8 U.S.C. § 1231(b)(3)(A). Except where otherwise specified, this brief collectively refers to requests for statutory withholding and CAT withholding or deferral as withholding claims.

States." 8 U.S.C. § 1229a(c)(1)(A). If the alien seeks withholding and is found to have a reasonable fear, the immigration judge adjudicates that request during the removal proceedings. 8 C.F.R. § 1240.1(a)(1)(iii). At the end of the proceedings, the immigration judge simultaneously rules on removal and withholding. See *Matter of I-S- & C-S-*, 24 I. & N. Dec. 432, 433-34 (BIA 2008).

The alien may seek review of both the removal order and withholding order by the Board of Immigration Appeals. 8 U.S.C. § 1229a(c)(5); 8 C.F.R. §§ 1003.38(a), 1240.15. After Board review, the alien may file in the court of appeals a petition for review of the removal order, which also allows for review of the withholding order. *Nasrallah* v. *Barr*, 590 U.S. 573, 583 (2020).

In addition to standard removal proceedings, Congress has created expedited removal proceedings for certain classes of aliens whose prompt removal it deemed especially critical.

Unlike aliens in standard removal proceedings, non-permanent-resident aliens convicted of aggravated felonies are not entitled to a removal hearing before an immigration judge. See 8 U.S.C. § 1228(b). Instead, an immigration officer conducts written removal proceedings and, if the officer determines that the alien has been convicted of an aggravated felony, issues a "Final Administrative Removal Order." 8 C.F.R. § 238.1(b)-(d). The alien may not seek review of that order by an immigration judge or the Board. See *id.* § 238.1. But the alien may file a petition for review of the Final Administrative Removal Order in the court of appeals. 8 U.S.C. § 1228(b)(3); see, *e.g.*, *Sharma* v. *Garland*, 67 F.4th 1, 2 (1st Cir. 2023);

Gomez-Velazco v. *Sessions*, 879 F.3d 989, 992 (9th Cir. 2018).

Aliens who have reentered the United States without authorization after having been removed are also subject to expedited removal proceedings. If an immigration officer determines that an alien falls into this class, "the prior order of removal is reinstated from its original date and is not subject to being reopened or reviewed." 8 U.S.C. § 1231(a)(5).

In both contexts, the alien may seek withholding. 8 C.F.R. §§ 238.1(b)(2), 241.8(e). If the alien does so, then upon issuance of the Final Administrative Removal Order or reinstated removal order, the immigration officer must refer the alien's case to an asylum officer to determine whether the alien reasonably fears persecution or torture. *Id.* §§ 208.31(b), 238.1(f)(3), 241.8(e).

If the asylum officer or an immigration judge determines that the alien has a reasonable fear, the alien enters "withholding-only" proceedings before an immigration judge. 8 C.F.R. § 208.31(e), (g). Those proceedings are "limited to a determination of whether the alien is eligible for withholding or deferral of removal," and "all parties are prohibited from raising or considering any other issues, including *** deportability." *Id.* § 1208.2(c)(3)(i). The immigration judge's withholding order is subject to Board review. *Id.* § 1208.31(e).

B. Procedural Background

Petitioner Pierre Yassue Nashun Riley, a native and citizen of Jamaica, was admitted to the United States on a six-month tourist visa in 1995. J.A. 54.

After overstaying his visa for more than a decade, Riley was indicted in 2006 for conspiring to distribute 1,000 kilograms or more of marijuana and possessing a firearm in furtherance of that conspiracy. Pet. App. 2a. A jury found him guilty on both counts, and he was sentenced to 25 years' imprisonment. *Ibid.* In 2021, the district court granted Riley compassionate release due to COVID-19. *Ibid.*; J.A. 3-5.

Because Riley had been convicted of an aggravated felony, he was subject to expedited removal proceedings. On January 28, 2021, an immigration officer issued a Final Administrative Removal Order finding Riley deportable and ordering him removed to Jamaica or any authorized alternative country. J.A. 7-8.

Riley requested withholding of removal to Jamaica, expressing a fear he would be harmed by a person from the neighborhood where he grew up who had allegedly killed two of his cousins. J.A. 53, 55, 66-67. An asylum officer concluded that Riley had not established a reasonable fear, but an immigration judge disagreed and placed him in withholding-only proceedings. J.A. 9-10, 59. After a hearing, an immigration judge granted Riley CAT deferral. Pet. App. 3a.

The Department of Homeland Security appealed to the Board, which vacated the immigration judge's CAT order on May 31, 2022. Pet. App. 3a. It held that the immigration judge's finding that Riley would likely be tortured in Jamaica was clearly erroneous because Riley offered only "speculative assertions" and "no objective corroborating evidence" that the person he named had killed his cousins. *Id.* at 9a-11a. On June 3, 2022, Riley filed a petition for review of the Board's CAT order. *Id.* at 3a.

The court of appeals dismissed Riley's petition for lack of jurisdiction. Pet. App. 2a. It applied circuit precedent holding that Section 1252(b)(1)'s requirement that a petition for review "must be filed not later than 30 days after the date of the final order of removal" is jurisdictional under *Stone*. *Id.* at 4a. It also concluded that an order denying CAT relief is not itself a final order of removal. *Ibid.* Because Riley failed to petition for review within 30 days of the only final order of removal in his case—the Final Administrative Removal Order issued in January 2021—the court held that it lacked jurisdiction to review the Board's CAT order. *Id.* at 4a-5a.

SUMMARY OF ARGUMENT

I. *Stone* v. *INS*, 514 U.S. 386 (1995), held that the INA's statutory deadline for filing a petition for review is jurisdictional. Neither Congress nor this Court has ever disturbed that holding, and there is no sound basis for overruling it.

A. Since *Arbaugh* v. *Y&H Corp.*, 546 U.S. 500 (2006), this Court has usually required a clear statement from Congress that the violation of a statutory time bar deprives the court of jurisdiction. But statutory *stare decisis* applies in the jurisdictional context no less than in any other. See *John R. Sand & Gravel Co.* v. *United States*, 552 U.S. 130, 138-39 (2008).

Stone is a jurisdictional precedent by every measure. The Court resolved a conflict over the INA's filing deadline that was framed in jurisdictional terms. It held that a reconsideration motion did not suspend the finality of a deportation order or strip the court of appeals of jurisdiction over that order. Because the

alien petitioned for review only after the reconsideration denial and not within 90 days of his deportation order, the Court thus held that the court of appeals lacked jurisdiction to review that order. The Court made clear that its ruling carried a classic jurisdictional consequence (the unavailability of equitable tolling of the deadline), identified a broader goal of combatting delay across the immigration system that befits a jurisdictional rule, and analogized the INA's filing deadline to other statutory filing deadlines that this Court has treated as jurisdictional since *Arbaugh*. All told, *Stone* is a definitive interpretation of the filing deadline's jurisdictional nature.

Far from disturbing *Stone*, Congress's reenactment of the INA's filing deadline in IIRIRA only bolstered *Stone*'s strict treatment of the deadline. In adopting Section 1252(b)(1), IIRIRA's only relevant changes to the provision at issue in *Stone* were to alter "may be filed not later than" to "must be filed not later than" and to cut the deadline from 90 to 30 days. Those changes did not clearly express an intent to abrogate *Stone*.

B. Riley writes off *Stone* as a jurisdictional drive-by, but he fails to grapple with how *Stone* attached its jurisdictional label to a true jurisdictional consequence—exactly what this Court looks for in assessing whether a prior ruling was jurisdictional.

Riley and the government also contend that, whatever *Stone* meant, this Court already held in *Santos-Zacaria* v. *Garland*, 598 U.S. 411 (2023), that *Stone* was not a true jurisdictional precedent. But *Santos-Zacaria* presented a much narrower issue—whether

the INA's separate exhaustion provision was jurisdictional. And it held only that *Stone*'s pre-*Arbaugh* analysis should not be extended to that provision, which *Stone* never even addressed.

Riley alone asks the Court to overrule *Stone*. But he offers nothing close to the "superspecial justification" necessary to overcome the "superpowered" force of statutory *stare decisis*. *Kimble* v. *Marvel Ent., LLC*, 576 U.S. 446, 458 (2015). This Court should therefore hold that an alien's failure to petition for review of a final order of removal within Section 1252(b)(1)'s 30-day deadline deprives the court of appeals of jurisdiction.

II. Riley failed to satisfy that deadline because he petitioned for review over 30 days after the only final order of removal in his case—his Final Administrative Removal Order.

A. The INA defines an order of removal as an order "concluding that the alien is deportable or ordering deportation." 8 U.S.C. § 1101(a)(47)(A). In expedited removal proceedings under Section 1228(b), the only order meeting that definition is the Final Administrative Removal Order. Riley's assertion that the Board's CAT order is itself an order of removal goes nowhere because—as this Court has twice explained—a CAT order resolves only *where* an alien may be removed and says nothing about *whether* the alien is to be removed.

Statutory text and context confirm that Riley's Final Administrative Removal Order was a final order of removal when issued, starting the 30-day clock to file a petition for review. Section 1228(b) expressly states that a removal order issued under it is a "final

order of removal" subject to immediate judicial review. 8 U.S.C. § 1228(b)(3), (4)(F). The INA's statutory definition provides that an order of removal becomes final when an alien has no opportunity for further administrative review of that order, which occurs the moment a Final Administrative Removal Order issues. And Section 1231 establishes that a Final Administrative Removal Order is (as Riley and the government concede) an "administratively final" order of removal—a term Congress used interchangeably with "final order of removal" in the INA.

Riley's withholding-only proceedings did not suspend his Final Administrative Removal Order's finality. *Johnson* v. *Guzman Chavez*, 594 U.S. 523 (2021), held that because withholding-only relief does not affect a removal order's validity, "an alien's initiation of withholding-only proceedings does not render non-final" a reinstated removal order that is "otherwise 'administratively final'" under Section 1231. *Id.* at 540. That conclusion applies equally to removal orders that are otherwise final under Section 1252(b)(1)—including Riley's Final Administrative Removal Order. Section 1228(b)(3) confirms the point by prohibiting the execution of a Final Administrative Removal Order for 14 days after its issuance "in order that the alien has an opportunity to apply for judicial review under section 1252." If withholding-only proceedings suspended a Final Administrative Removal Order's finality, that temporary bar on removal would not serve its stated purpose of facilitating prompt judicial review. And the INA's statutory definition provides further confirmation by defining a removal order as final based on the completion of administrative review of the removal order itself—not any withholding claim.

B. Riley and the government contend that an alien satisfies the deadline by filing a petition for review within 30 days of a Board order denying CAT relief—even if that petition comes more than 30 days after a Final Administrative Removal Order. But their arguments fail to overcome the INA's plain text.

Riley and the government argue that his Final Administrative Removal Order did not become final until the Board issued its order denying CAT relief. They invoke general principles of finality, but those are inapposite given the INA's specific text and context. Regardless, neither set of principles they propose supports them. Riley says that APA finality principles should apply, but a Final Administrative Removal Order is final under those principles because it marks the consummation of the agency's decisionmaking process and determines the alien's rights and the government's obligations with respect to removability. The government offers an analogue to the final-judgment rule, but *Nasrallah* v. *Barr*, 590 U.S. 573 (2020), rejected the merger principle on which that rule depends. And even under the inapposite final-judgment rule, withholding-only proceedings do nothing to disturb a Final Administrative Removal Order's finality. Riley's reliance on the INA's exhaustion provision is also off-point because it addresses only remedies that bear on the validity of final orders of removal, which withholding-only relief does not. And Riley's and the government's attempts to evade *Nasrallah* and *Guzman Chavez* fail to contend with those cases' clear application here.

Riley and the government also argue that CAT orders must be judicially reviewable based on the zipper clause, Section 1252(a)(4), FARRA § 2242(d), and

Nasrallah, as well as the general presumption of judicial review. But as *Nasrallah* explained, those provisions establish that a CAT order can be reviewed alongside a final order of removal that is *properly* before a court. They offer no basis to review a CAT order when a final order of removal is *not* properly before a court—as is the case here. And neither party contends that the decision below creates an absolute bar to judicial review of orders concluding withholding-only proceedings, so the presumption of reviewability is not implicated.

Riley and the government warn that affirmance will induce aliens who hope to seek review of such orders to flood courts with protective petitions for review. But policy objections can never justify rewriting a statute, and their concerns are overstated in all events.

ARGUMENT

I. SECTION 1252(B)(1)'S 30-DAY DEADLINE TO FILE A PETITION FOR REVIEW OF A FINAL ORDER OF REMOVAL IS JURISDICTIONAL.

The first question presented was asked and answered in *Stone* v. *INS*, 514 U.S. 386 (1995). There, this Court held that the statutory filing deadline for a petition for review is jurisdictional. *Id.* at 405. That ruling squarely addressed the deadline's jurisdictional status and has never been disturbed by Congress or this Court. And Riley provides no sound basis for this Court to overrule *Stone*. The current 30-day deadline therefore is and should remain jurisdictional.

A. The Court has already held that the time limit for seeking judicial review of a removal order is jurisdictional.

This Court now applies a demanding clear-statement test for jurisdictional requirements. But earlier definitive jurisdictional rulings deserve the same *stare decisis* weight as any other statutory precedent. That principle means that *Stone*'s interpretation of the predecessor statutory deadline, as recodified in IIRIRA with minor linguistic changes, establishes that an alien's failure to petition for review within 30 days of a final removal order deprives the court of appeals of jurisdiction.

1. *Stare decisis* applies equally to decisions on jurisdiction.

Article III courts are "courts of limited jurisdiction, defined (within constitutional bounds) by federal statute." *Badgerow* v. *Walters*, 596 U.S. 1, 7 (2022). "Because Congress decides whether federal courts can hear cases at all, it can also determine when, and under what conditions, federal courts can hear them." *Bowles* v. *Russell*, 551 U.S. 205, 212-13 (2007). Congress thus has the power to "prohibit[] federal courts from adjudicating an otherwise legitimate 'class of cases'" when a litigant invokes their jurisdiction in an untimely fashion. *Id.* at 213 (citation omitted). And when Congress adopts a jurisdictional deadline, the "jurisdictional consequences" are that compliance can be neither "waived" nor tolled "even if equitable considerations would support extending the prescribed time period." *United States* v. *Kwai Fun Wong*, 575 U.S. 402, 409-10 (2015).

Since *Arbaugh* v. *Y&H Corp.*, 546 U.S. 500 (2006), this Court has typically demanded a "clear statement" from Congress that the violation of a statutory time bar deprives the court of jurisdiction. *Wong*, 575 U.S. at 410. The clear-statement rule does not require Congress to "incant magic words," but the "traditional tools of statutory construction must plainly show that Congress imbued a procedural bar with jurisdictional consequences." *Boechler, P.C.* v. *Comm'r*, 596 U.S. 199, 203 (2022) (citations omitted). The track record under *Arbaugh* has revealed that "most time bars are nonjurisdictional." *Harrow* v. *Dep't of Def.*, 601 U.S. 480, 484 (2024) (citation omitted).

At the same time, when the Court has provided "a definitive earlier interpretation" that a statutory time bar is jurisdictional, a party cannot take a fresh run at the question under *Arbaugh*. *John R. Sand & Gravel Co.* v. *United States*, 552 U.S. 130, 138 (2008). A party instead must overcome the especially strong form of statutory *stare decisis* that applies when "Congress remains free to"—yet has not chosen to—"alter what [the Court] ha[s] done." *Id.* at 139 (citation omitted); see *Bowles*, 551 U.S. at 209-10. The importance of abiding by past statutory decisions is particularly acute in this context, because clear and stable jurisdictional rules "promote greater predictability" and allow courts to "readily assure themselves of their power to hear a case." *Hertz Corp.* v. *Friend*, 559 U.S. 77, 94 (2010). This Court thus adheres to decisions holding statutory provisions jurisdictional absent a "superspecial justification" to overturn them. *Kimble* v. *Marvel Ent., LLC*, 576 U.S. 446, 458 (2015); see *John R. Sand & Gravel*, 552 U.S. at 139.

2. *Stone* is a definitive jurisdictional ruling on the deadline for petitions for review.

In *Stone*, this Court considered whether failure to comply with the 90-day deadline to seek judicial review of a final order of deportation under 8 U.S.C. § 1105a(a)(1) (Supp. V 1993) foreclosed tolling while a motion for reconsideration remained pending with the Board. The conflict the Court resolved was framed in jurisdictional terms. The Court marked the deadline as jurisdictional in holding that it was not susceptible to equitable tolling. The Court understood the deadline to serve systemic goals that warranted treating it as jurisdictional. And the Court analogized the deadline to other statutory deadlines the Court has recognized as jurisdictional since *Arbaugh*. From start to finish, *Stone* is "a definitive earlier interpretation" of the deadline's jurisdictional character. *John R. Sand & Gravel*, 552 U.S. at 138.

The Sixth Circuit's decision in *Stone* deepened a conflict over whether a motion for reconsideration could toll the deadline for seeking review of a final order of deportation. Some courts had endorsed tolling. *E.g.*, *Attoh* v. *INS*, 606 F.2d 1273, 1275 n.15 (D.C. Cir. 1979) (per curiam). But the Sixth Circuit joined the camp that treated the deadline as a "jurisdictional statute" not subject to tolling or estoppel. 13 F.3d 934, 939 (6th Cir. 1994) (citation omitted); see, *e.g.*, *White* v. *INS*, 6 F.3d 1312, 1317-18 (8th Cir. 1993) (rejecting equitable argument to "waive" deadline because "[t]he timeliness requirement set forth in the INA is 'mandatory and jurisdictional'") (citation omitted). The

Sixth Circuit accordingly dismissed the alien's untimely petition "for want of jurisdiction." 13 F.3d at 939 (formatting altered).

This Court granted review and affirmed. It held that filing a timely motion for reconsideration did not suspend the finality of the deportation order, strip the appellate court of jurisdiction over that order, or otherwise toll the deadline for filing a petition for review. 514 U.S. at 394-401. The Court analogized the filing deadline to the deadline to notice an appeal from a district-court judgment. *Id.* at 401. It explained that post-judgment motions generally do not "divest the appellate court of jurisdiction" over a final judgment, *id.* at 402, which supported its conclusion that the reconsideration motion similarly did not strip the court of appeals of jurisdiction over the deportation order, *id.* at 396. This Court therefore strictly enforced the deadline against the alien on the principle that "statutory provisions specifying the timing of review" "must be construed with strict fidelity to their terms" because they are "'mandatory and jurisdictional'" and "not subject to equitable tolling." *Id.* at 405 (quoting *Missouri* v. *Jenkins*, 495 U.S. 33, 45 (1990)). The bottom line was that the court of appeals "lacked jurisdiction" because the alien's petition was untimely. *Id.* at 406.

Stone "turn[ed] on th[e] characterization" of the time limit as jurisdictional. *Arbaugh*, 546 U.S. at 512. This Court has frequently recognized that insusceptibility to equitable tolling is a consequence of a true jurisdictional rule. *E.g.*, *Wilkins* v. *United States*, 598 U.S. 152, 161 (2023); *Wong*, 575 U.S. at 408-09; *Sebelius* v. *Auburn Reg'l Med. Ctr.*, 568 U.S. 145, 154 (2013); *John R. Sand & Gravel*, 552 U.S. at 136. And

Stone pegged the unavailability of equitable tolling to the statutory deadline's jurisdictional status. 514 U.S. at 405. *Stone* thus recognized the consequences of using a jurisdictional label—and did so anyway.

Stone also articulated a "broader system-related goal" of the sort this Court has recognized as justifying jurisdictional treatment of a statutory deadline. *John R. Sand & Gravel*, 552 U.S. at 133-34. Nonjurisdictional deadlines "protect a defendant's case-specific interest in timeliness" while jurisdictional deadlines often have systemic aims, "such as facilitating the administration of claims" or "promoting judicial efficiency." *Ibid.* In *Stone*, the Court stressed that strict enforcement of the time bar would combat "dilatory tactics in the courts," where "every delay works to the advantage of the deportable alien who wishes merely to remain in the United States." 514 U.S. at 399-400 (citations omitted). That congressional objective operates at the level of the overall system containing millions of removal proceedings, not through the Attorney General's case-by-case concerns about timeliness.[2] *Stone*'s jurisdictional treatment of the statute was thus consistent with its understanding of Congress's aims in adopting the deadline.

Stone underscored the jurisdictional nature of the deadline by analogizing it to the deadline for noticing an appeal from a district-court decision and by citing *Jenkins*'s jurisdictional treatment of the deadline for seeking a writ of certiorari in civil cases. 514 U.S. at 401, 405. This Court has treated both of those other statutory deadlines as jurisdictional since *Arbaugh*.

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[2] See Cong. Rsch. Serv., *Immigration Courts: Decline in New Cases at the End of FY2024*, at 1 (Nov. 26, 2024), bit.ly/4hktnbO.

Bowles, 551 U.S. at 209-13; see also, *e.g.*, *Salazar* v. *Buono*, 559 U.S. 700, 712 (2010). *Stone*'s analogy of the INA's deadline to those acknowledged jurisdictional deadlines only confirms that its holding was cast in true jurisdictional terms.

In sum, result and reasoning alike confirm that *Stone* is a definitive earlier interpretation of the statutory deadline's jurisdictional nature.

3. IIRIRA only strengthened *Stone*.

Congress's reenactment of the INA's timeliness requirement for petitions for review in IIRIRA left *Stone* undisturbed. To abrogate a prior decision that a statutory provision is jurisdictional, Congress must "clearly express[]" its intent to do so. *John R. Sand & Gravel*, 552 U.S. at 136 (citation omitted). An amendment that "mean[s] about the same thing" does not suffice under *that* clear-statement rule—the only one applicable here. *Ibid.*

Far from clearly expressing an intent to abrogate *Stone*, IIRIRA only bolstered *Stone*'s jurisdictional treatment of the statutory deadline. Before IIRIRA, the INA provided that "a petition for review may be filed not later than 90 days after the date of the issuance of the final deportation order" (and not later than 30 days for aggravated felons). 8 U.S.C. § 1105a(a)(1) (Supp. V 1993). After IIRIRA, the INA now provides that "[t]he petition for review must be filed not later than 30 days after the date of the final order of removal" (for everyone, including aggravated felons like Riley). *Id.* § 1252(b)(1).

Congress thus made the phrasing *more* mandatory and *tightened* the generally applicable deadline from 90 days to 30. Those changes reinforced the

deadline's core objective to prevent "delayed review" and could not be understood as a congressional attempt to open new opportunities for delay under waiver or tolling principles. *Stone*, 514 U.S. at 400. Proving the point, virtually every court of appeals understood *Stone* to resolve that the recodified deadline in Section 1252(b)(1) was "a true limit on subject-matter jurisdiction." *Tapia-Lemos* v. *Holder*, 696 F.3d 687, 690 (7th Cir. 2012); see Pet. 16 (collecting cases).

Because Section 1252(b)(1)'s deadline is jurisdictional under *Stone*, the court of appeals lacked jurisdiction unless Riley petitioned for review of a final order of removal within 30 days of that order.

B. Riley's and the government's attempts to avoid *Stone* are unavailing.

Riley (at 22) and the government (at 22-24) do not meaningfully dispute that this Court's interpretation of the predecessor statutory deadline in *Stone* carries over to Section 1252(b)(1) under *John R. Sand & Gravel*. Riley instead argues that this Court can disregard *Stone* as a "drive-by jurisdictional ruling." *Wilkins*, 598 U.S. at 160 (brackets and citation omitted). Riley, along with the government, also contends that this Court already held that *Stone* was not a jurisdictional ruling in *Santos-Zacaria* v. *Garland*, 598 U.S. 411 (2023). And Riley, alone again, urges this Court to overrule *Stone* if all else fails. None of those arguments has merit.

1. *Stone* was not a drive-by ruling on jurisdiction.

Riley starts in the right place. He acknowledges that the question is whether "anything in [*Stone*] 'turn[ed] on th[e] characterization'" of the statutory

deadline as jurisdictional. Pet. Br. 22 (quoting *Wilkins*, 598 U.S. at 160). He also accepts that a hallmark consequence of a jurisdictional rule is a "court's inability to 'grant equitable exceptions.'" *Id.* at 17 (quoting *Santos-Zacaria*, 598 U.S. at 416); accord Gov't Br. 17-18. The problem for Riley is that *Stone* aces that test. At every level, *Stone* was a jurisdictional decision, from its pairing of jurisdictional language with a jurisdictional consequence to its decretal language. See pp. 18-21, *supra*.

In attempting to discard *Stone* as a "passing remark" on jurisdiction, Riley singles out one statement: the characterization of the deadline as "'mandatory and jurisdictional.'" Pet. Br. 23 (quoting 514 U.S. at 405). But Riley nowhere faces up to how *Stone* held that the deadline, because of its jurisdictional character, had a true jurisdictional consequence—the unavailability of "equitable tolling." 514 U.S. at 405. That is the precise sign that this Court seeks in determining whether a prior ruling was "technically jurisdictional." *Wilkins*, 598 U.S. at 160 (citation omitted).

Riley shifts his focus from the actual opinion in *Stone* to a hypothetical one the Court could have written. He contends (at 23) that "[r]ejecting the petition was warranted whether on jurisdictional or merely procedural grounds" because the government had "consistently argued that the noncitizen's petition was untimely against the original order." His argument appears to be that, if a mandatory claim-processing rule could have supported the same result as a jurisdictional rule, then the use of jurisdictional language is a drive-by.

The question is what the Court *did*, not what it *could* have done. This Court is "particularly reluctant to disrupt precedents interpreting language that Congress has since reenacted," even when litigants complain that a decision "is incongruous with the 'modern era' of statutory interpretation." *Georgia* v. *Public.Resource.Org, Inc.*, 590 U.S. 255, 270 (2020). Although some claim-processing rules foreclose equitable tolling, Gov't Br. 24 n.7 (citing *Nutraceutical Corp.* v. *Lambert*, 586 U.S. 188, 192-93 (2019)), that does not mean that parties have license to rewrite an opinion that held that equitable tolling is unavailable on the express ground that a deadline is jurisdictional, see *Stone*, 514 U.S. at 405.

2. *Santos-Zacaria* did not disturb *Stone*'s holding that the filing deadline is jurisdictional.

Riley also argues (at 24) that, whatever the best reading of *Stone*, this Court already held in *Santos-Zacaria* that *Stone* was not a definitive jurisdictional ruling on the statutory deadline. Joining Riley, the government appears to stake everything on the theory that, "following *Santos-Zacaria*, *Stone* 'cannot be read to establish' that Section 1252(b)(1) is 'jurisdictional.'" Gov't Br. 23 (quoting *Santos-Zacaria*, 598 U.S. at 422). But both misstate the narrow issue before the Court in *Santos-Zacaria*: whether the INA's separate exhaustion provision in Section 1252(d)(1) was jurisdictional. And both overstate what the Court held: only that *Stone*'s pre-*Arbaugh* analysis should not be *extended* to subsection (d)(1).

In *Santos-Zacaria*, this Court addressed whether the exhaustion provision in Section 1252(d)(1) "ranks as jurisdictional." 598 U.S. at 416. The Court reasoned

that "[t]wo aspects of § 1252(d)(1), taken together," established that "this statutory provision lacks the clear statement necessary to qualify as jurisdictional" under *Arbaugh*. *Id.* at 417. The first was that "an exhaustion requirement * * * is a quintessential claim-processing rule." *Ibid.* And the second was that Section 1252(d)(1)'s "language differs substantially from more clearly jurisdictional language in related statutory provisions." *Id.* at 418.

The Court also rejected the government's argument that *Stone* "established that the predecessor exhaustion provision was jurisdictional." *Santos-Zacaria*, 598 U.S. at 421. According to the government, "this Court treated the prior version of the INA's exhaustion requirement and its surrounding provisions as jurisdictional" in *Stone*, which supposedly held that the whole package of "'judicial review provisions of the INA'" was "'jurisdictional in nature.'" Gov't Br. at 20, *Santos-Zacaria*, 598 U.S. 411 (No. 21-1436) (quoting *Stone*, 514 U.S. at 405). The Court rightly rejected the government's buy-one-get-one-free approach to *stare decisis*. As the Court explained, *Stone* did not "address[] the exhaustion requirement specifically" and "merely mentioned the section of the [INA] that housed the exhaustion requirement." *Santos-Zacaria*, 598 U.S. at 421-22. *Stone*, the Court concluded, "therefore cannot be read to establish the predecessor exhaustion requirement as jurisdictional." *Id.* at 422.

Riley (at 24) and the government (at 22) both highlight this Court's statement that *Stone* did not "attend[] to the distinction between 'jurisdictional' rules (as we understand them today) and nonjurisdictional but mandatory ones." *Santos-Zacaria*, 598 U.S. at 421. The Court elaborated that *Stone* "predate[d]

[the Court's] cases, starting principally with *Arbaugh* in 2006, that 'bring some discipline to the use of th[e] term' 'jurisdictional.'" *Ibid.* (citation omitted). But an earlier decision's failure to apply the modern clear-statement test has never been enough to undercut a definitive jurisdictional holding. In *John R. Sand & Gravel*, for example, the Court followed *Kendall* v. *United States*, 107 U.S. 123, 125 (1883), which had attached a true jurisdictional consequence (no equitable tolling) to the statute of limitations in the predecessor to the Tucker Act. 552 U.S. at 134-36. The Court later refused to extend *Kendall* to a similarly worded statute of limitations that did not satisfy the clear-statement test because *stare decisis* applied only to the deadline addressed in *Kendall*. *Wong*, 575 U.S. at 413, 416. *Stone* thus continues to govern the filing deadline even if this Court need not extend its reasoning elsewhere.

Riley (at 24) and the government (at 23) also note this Court's remark that, in *Stone*, "whether the provision[] w[as] jurisdictional 'was not central to the case.'" *Santos-Zacaria*, 598 U.S. at 421 (citation omitted). But that "sentence's account of [*Stone*] is incomplete." *Thryv, Inc.* v. *Click-To-Call Techs., LP*, 590 U.S. 45, 59 (2020). *Santos-Zacaria* had no cause to address whether *Stone* turned on its jurisdictional characterization of the statutory deadline for filing a petition for review because *Santos-Zacaria* implicated only the exhaustion provision, as the Court itself stressed. 598 U.S. at 421-22. As a result, Riley and the government are wrong to read *Santos-Zacaria* to "reach out to decide today's question in that case." *Campos-Chaves* v. *Garland*, 602 U.S. 447, 464 (2024). The Court should therefore "look to the statute and

[*Stone*]," which already held that the filing deadline for petitions for review is jurisdictional. *Thryv*, 590 U.S. at 59.

Precedent forecloses the parties' attempted use of *Santos-Zacaria* to leapfrog the binding effect of *Stone*. In *Bowles*, the dissent argued against jurisdictional treatment of a statutory deadline for much the same reasons as the parties do here. 551 U.S. at 215-16 (Souter, J., dissenting). The Court had held in *United States* v. *Robinson*, 361 U.S. 220 (1960), that the timely filing of a notice of appeal from a district-court decision is "mandatory and jurisdictional." *Id.* at 229. This Court later refused to apply *Robinson*'s "less than meticulous" reasoning to *different* deadlines. *Kontrick* v. *Ryan*, 540 U.S. 443, 454 (2004). But the majority in *Bowles* held that later critiques of *Robinson* in "some dicta in [the Court's] recent opinions" did not provide a basis to discard its jurisdictional ruling as to the *same* provision setting the deadline for notices of appeals. 551 U.S. at 209 n.2.

Respect for precedent means respecting both a decision's holding and its limits. Just as the government was wrong in *Santos-Zacaria* to overread *Stone*'s jurisdictional ruling on the statutory deadline as covering the exhaustion provision, Riley and the government are wrong in this case to contend that *Santos-Zacaria*'s anti-jurisdictional ruling on the exhaustion provision ricocheted back on the statutory deadline that *Stone* definitively interpreted.

3. There is no sufficient basis to overrule *Stone*.

Riley, but not the government, asks (at 25-26) this Court to overrule *Stone*. The Court should deny that

request. Riley does not address the correct standard for statutory *stare decisis*. And he comes nowhere close to justifying scrapping *Stone* after almost three decades in which Congress has chosen not to act.

Riley overlooks the applicable standard. He relies (at 25) on *Janus* v. *American Federation of State, County & Municipal Employees*, 585 U.S. 878 (2018), but that case described *stare decisis* "at its weakest" ebb in the context of constitutional interpretation. *Id.* at 917 (citation omitted). Because this case is about the interpretation of a statute, not the Constitution, this Court applies a "superpowered form of *stare decisis*" that requires "a superspecial justification" to overrule *Stone*. *Kimble*, 576 U.S. at 458. This heightened standard applies to jurisdictional rulings, as to any other statutory decision. See *John R. Sand & Gravel*, 552 U.S. at 139. And all the factors applicable here—workability, reliance interests, and subsequent legal developments—disfavor Riley's overruling request.

To begin with, Riley has not established the sort of "unworkability" that is a "'traditional justification' for overruling precedent." *Kimble*, 576 U.S. at 459 (citation omitted). He argues that *Stone* is unworkable because its jurisdictional ruling has "harsh consequences." Pet. Br. 25 (citation omitted). But *Stone* adopted an exceptionally workable rule—the statutory deadline is fixed and admits of no exceptions. 514 U.S. at 405. There is no room for free-wheeling policy judgments about whether jurisdictional rules are unfairly harsh when Congress adopts such rules to *limit* judicial authority. See *Bowles*, 551 U.S. at 212-13.

Reliance interests further support leaving *Stone* in place. See *Kimble*, 576 U.S. at 457. Riley argues

(at 26) that no reliance interests exist because the Justice Department currently "agrees Section 1252(b)(1) is not jurisdictional." But the relevant actor here is Congress, not the Executive. *Stone* rested its interpretation on its view that "Congress' 'fundamental purpose'" in crafting the judicial-review provisions "was 'to abbreviate the process of judicial review'" and thereby prevent "'dilatory tactics in the courts.'" 514 U.S. at 399 (citation omitted). Congress relied on *Stone* in reenacting (and tightening) the deadline in IIRIRA. See pp. 21-22, *supra*. The Justice Department's former suggestion that it might waive the 30-day deadline in this case and others like it only underscores why Congress might have preferred a jurisdictional rule to protect its objectives, no matter whether the Executive disagreed with congressional priorities. Gov't Cert. Br. 7, 16. And aside from Congress's specific reliance interests, discarding any statutory precedent "could itself threaten to substitute disruption, confusion, and uncertainty for necessary legal stability" provided by a strong rule of statutory *stare decisis*. *John R. Sand & Gravel*, 552 U.S. at 139.

Riley also has not shown that *Stone*'s "statutory and doctrinal underpinnings" have been "eroded over time." *Kimble*, 576 U.S. at 458. Congress's amendments to the statutory deadline have only strengthened *Stone* by implementing (as Riley admits) a "significantly more restrictive" scheme for judicial review. Pet. Br. 26 (citation omitted). *Stone* also is not a "legal last-man-standing," *Kimble*, 576 U.S. at 458, because this Court has treated other statutory deadlines as jurisdictional even after *Arbaugh*, see *John R. Sand & Gravel*, 552 U.S. at 136; *Bowles*, 551 U.S. at 213. To be sure, the Court has treated a similarly worded

deadline for seeking review of agency action as a claim-processing rule. *Harrow*, 601 U.S. at 489; see Pet. Br. 26; Gov't Br. 20. But "[a]ny anomaly" that *Harrow* and *Stone* "together create is not critical" in the *stare decisis* analysis because they address different deadlines serving different purposes. *John R. Sand & Gravel*, 552 U.S. at 139.

Ultimately, Riley's overruling request boils down to "just an argument that [*Stone*] was wrongly decided." *Halliburton Co.* v. *Erica P. John Fund, Inc.*, 573 U.S. 258, 266 (2014). He observes (at 26) that the Court has "adopted the *Arbaugh* principle since then, and also established that time limits are ordinarily not jurisdictional." But Riley has to show much more than that *Stone* might have come out differently under the Court's current "clear statement inquiry." *Hilton* v. *S.C. Pub. Rys. Comm'n*, 502 U.S. 197, 206 (1991). The Court should reject Riley's unsupported overruling request and hold that an alien's failure to petition for review within Section 1252(b)(1)'s 30-day deadline deprives the court of appeals of jurisdiction.

II. RILEY FAILED TO SATISFY SECTION 1252(B)(1)'S DEADLINE BECAUSE HE FILED HIS PETITION FOR REVIEW OVER 30 DAYS AFTER HIS FINAL ADMINISTRATIVE REMOVAL ORDER.

The Court should also hold that Riley failed to satisfy the 30-day deadline. Section 1252(b)(1) provides that a "petition for review must be filed not later than 30 days after the date of the final order of removal." The Final Administrative Removal Order was Riley's "final order of removal." Riley's withholding-only proceedings did not affect the validity of that order or render it non-final. Because Riley did not file his petition for review within 30 days of his Final Administrative

Removal Order, the court below correctly dismissed his petition as untimely.

Riley and the government contend that his petition for review was timely because he filed it within 30 days of the Board's order denying him CAT relief. But none of their arguments establish that Riley's withholding-only proceedings suspended his Final Administrative Removal Order's finality, or that Congress provided for judicial review of CAT claims under these circumstances.

A. A Final Administrative Removal Order is a final order of removal that triggers the 30-day deadline regardless of withholding-only proceedings.

In expedited removal proceedings under Section 1228(b), the only order of removal is the Final Administrative Removal Order, which establishes the alien's removability and orders removal. That order is final for purposes of judicial review the moment it issues, starting the 30-day clock to file a petition for review. And withholding-only proceedings do not forestall that order's finality.

1. A Final Administrative Removal Order is an order of removal; a CAT order is not.

Riley's case involves only one "order of removal": his Final Administrative Removal Order. The INA defines an "order of deportation"—synonymous with an order of removal, see IIRIRA, Pub. L. No. 104-208, Div. C., § 309(d)(2), 110 Stat. 3009-627—as an order issued by certain officials "concluding that the alien is deportable or ordering deportation." 8 U.S.C. § 1101(a)(47)(A). In expedited removal proceedings under Section 1228(b),

the only order that meets this definition is the Final Administrative Removal Order, in which an immigration officer "determine[s] the deportability of [the] alien." *Id.* § 1228(b)(1); see 8 C.F.R. § 238.1(d).

By contrast, this Court has already explained—twice over—that the Board's CAT order is not an "order of removal" because it "is not an order 'concluding that the alien is deportable or ordering deportation.'" *Nasrallah* v. *Barr*, 590 U.S. 573, 582 (2020) (quoting 8 U.S.C. § 1101(a)(47)(A)); see *Johnson* v. *Guzman Chavez*, 594 U.S. 523, 540 (2021). That follows from the "distinct" nature of "removal orders" and "withholding-only proceedings." *Guzman Chavez*, 594 U.S. at 537, 539. A withholding order resolves only "*where* an alien may be removed" and "says nothing * * * about the antecedent question *whether* an alien is to be removed from the United States." *Id.* at 536. Accordingly, a withholding order is entirely "separate" from an "order of removal." *Id.* at 539.

The Board's CAT order also "does not merge into" the Section 1228(b) removal order. *Nasrallah*, 590 U.S. at 582. Only "[t]he rulings that affect the validity of" the removal order "merge into" that order "for purposes of judicial review." *Ibid.* Because the Board's CAT order relates only to where Riley will be removed, it does not "affect the validity of" his Final Administrative Removal Order and therefore does not merge into that order. *Ibid.*

Riley nevertheless insists (at 14, 16, 34, 47-48) that the Board's CAT order is an order of removal from which he can petition for review because it states that "the applicant is ordered removed from the United

States to Jamaica." Pet. App. 14a. But as the government recognizes (at 42), that view is foreclosed by *Nasrallah*. Riley's withholding-only proceedings were "limited to a determination of whether" Riley was "eligible for withholding or deferral of removal"—his "deportability" was not up for debate. 8 C.F.R. § 1208.2(c)(3)(i). Because the Board's CAT order resolved only *where* Riley would be removed—to Jamaica—it cannot qualify as an order of removal. Riley's Final Administrative Removal Order is the only order of removal in his case.

2. A Final Administrative Removal Order is final when issued.

Section 1228(b), the INA's statutory definition, and Section 1231 all demonstrate that a Final Administrative Removal Order is—as its name indicates—a *final* order of removal when issued, starting Section 1252(b)(1)'s 30-day clock to file a petition for review.

Section 1228(b) expressly states that a removal order issued under that subsection is a "final order of removal." Section 1228(b) authorizes the Secretary of Homeland Security to "determine the deportability" of, and "issue an order of removal" for, non-permanent-resident aliens convicted of aggravated felonies using expedited proceedings. 8 U.S.C. § 1228(b)(1).[3] The statute also requires the adoption of regulations establishing procedures for those proceedings. *Id.*

[3] Although Section 1228(b) refers to the Attorney General, it is now "deemed to refer" to the Secretary of Homeland Security, 6 U.S.C. § 557, because Congress has transferred responsibility for implementing it to the Secretary, *id.* § 251(2). See *Nielsen* v. *Preap*, 586 U.S. 392, 397 n.2 (2019).

§ 1228(b)(4). Among other requirements, those regulations must ensure that "the *final order of removal* is not adjudicated by the same person who issues the charges." *Id.* § 1228(b)(4)(F) (emphasis added). The governing regulations accordingly specify that the "Final Administrative Removal Order" is issued by a "deciding Service officer" who must not be the same person as the "issuing Service officer" who gave notice of the charges. 8 C.F.R. § 238.1(a), (d). Section 1228(b)(4)(F) thus makes clear that a Final Administrative Removal Order is a "final order of removal."

The "normal rule of statutory interpretation" is that "identical words used in different parts of the same statute are generally presumed to have the same meaning." *IBP, Inc.* v. *Alvarez*, 546 U.S. 21, 34 (2005). That a Final Administrative Removal Order is a "final order of removal" under Section 1228(b)(4)(F) thus strongly indicates that it is also a "final order of removal" under Section 1252(b)(1) for purposes of judicial review.

Section 1228(b) confirms that presumption by providing that a Final Administrative Removal Order is subject to immediate judicial review under Section 1252. Section 1228(b)(3) prohibits the execution of a Final Administrative Removal Order for "14 calendar days *** from the date that such order was issued *** in order that the alien has an opportunity to apply for judicial review under section 1252." Under Section 1252, judicial review of a Final Administrative Removal Order is available only if it is a "final order of removal" within the meaning of that section. 8 U.S.C. § 1252(a)(1); see *id.* § 1252(a)(5). The reference in Section 1228(b)(3) to judicial review upon issuance thus establishes that a Final Administrative

Removal Order is a "final order of removal" under Section 1252(b)(1).

The INA's statutory definition further demonstrates that a Final Administrative Removal Order is a "final order of removal." Under the INA, an order of removal "shall become final upon the earlier of—(i) a determination by the Board * * * affirming such order; or (ii) the expiration of the period in which the alien is permitted to seek review of such order by the Board." 8 U.S.C. § 1101(a)(47)(B). Neither the INA nor its regulations authorize review of a Section 1228(b) removal order by the Board (or an immigration judge). *Id.* § 1228(b); 8 C.F.R. § 238.1. So "the period in which the alien is permitted to seek [Board] review" of a Section 1228(b) removal order "expir[es]" the moment that order issues. 8 U.S.C. § 1101(a)(47)(B)(ii). That means a Final Administrative Removal Order is a "final order of removal" when issued—just as Section 1228(b)(4)(F) states.

Section 1231 reinforces that a Section 1228(b) removal order is a "final order of removal." That provision requires the government to detain aliens during the "removal period," which begins at the earliest on "[t]he date the order of removal becomes administratively final." 8 U.S.C. § 1231(a)(1)(B)(i). *Guzman Chavez* held that reinstated removal orders in expedited removal proceedings for illegal reentrants are "administratively final" under Section 1231 because "the *agency's* review proceedings" with respect to those orders have concluded upon their issuance. 594 U.S. at 534. By the same measure, the agency's review proceedings with respect to Section 1228(b) orders have concluded upon their issuance because no further agency review of them is available.

Riley (at 51) and the government (at 46 n.15) thus concede that Section 1228(b) removal orders are "administratively final" orders of removal under Section 1231.

That Section 1228(b) removal orders are "administratively final" orders of removal under Section 1231 confirms that they are "final orders of removal" under Section 1252(b)(1). The INA's statutory definition provides that a removal order becomes final after the completion of *administrative* review of that order, see 8 U.S.C. § 1101(a)(47)(B), so the conclusion that a removal order is "administratively final" necessarily means it is a "final order of removal" under the statute.

Congress made that connection unmistakable by using the two terms interchangeably in the INA. Section 1252(b) states that "[t]his subsection * * * does not prevent the [Secretary], after a final order of removal has been issued, from detaining the alien under section 1231(a)." 8 U.S.C. § 1252(b)(8)(A). So under Section 1252(b), the issuance of a "final order of removal" marks the earliest time an alien can be detained under Section 1231(a). Section 1231(a), in turn, provides that the earliest time an alien can be detained under that provision is "[t]he date the order of removal becomes administratively final." *Id.* § 1231(a)(1)(B)(i); see *id.* § 1231(a)(1)(A), (2)(A). By using both terms to denote the start of the same period, Congress made clear that an "administratively final" order of removal under Section 1231—such as a Section 1228(b) removal order—is also a "final order of removal" under Section 1252(b)(1).

Because Riley's Final Administrative Removal Order was a final order of removal when issued on

January 28, 2021, it triggered Section 1252(b)(1)'s 30-day deadline to file a petition for review as of that date.

3. Withholding-only proceedings do not suspend the finality of a Final Administrative Removal Order.

Guzman Chavez, Section 1228(b), and the INA's statutory definition confirm that Riley's subsequent withholding-only proceedings did not suspend his Final Administrative Removal Order's status as a final order of removal triggering the 30-day deadline.

Guzman Chavez made clear that withholding-only proceedings do not suspend otherwise final removal orders. This Court explained that "the finality of the order of removal does not depend in any way on the outcome of the withholding-only proceedings." 594 U.S. at 539. Even if an alien obtains withholding-only relief, the removal order "is not vacated or otherwise set aside *** and DHS retains the authority to remove the alien to any other country authorized by the statute." *Id.* at 536. Given that withholding-only relief has no bearing on removability, orders granting or denying that relief "'d[o] not disturb the final order of removal,' 'affect the validity of the final order of removal,' or otherwise 'merge into the final order of removal.'" *Id.* at 540 (quoting *Nasrallah*, 590 U.S. at 582-83).

Because withholding-only relief does not affect removal orders' validity, *Guzman Chavez* held that "an alien's initiation of withholding-only proceedings *does not render non-final*" a reinstated removal order that is "otherwise 'administratively final'" under Section 1231. 594 U.S. at 540 (emphasis added). A Section

1228(b) removal order is concededly an "administratively final" order of removal under Section 1231, and an "administratively final" order of removal under Section 1231 is synonymous with a "final order of removal" under Section 1252(b)(1). See pp. 35-36, *supra*. So *Guzman Chavez*'s conclusion that withholding-only proceedings "do[] not render non-final" a removal order that is otherwise administratively final under Section 1231 applies with equal force to removal orders that are otherwise final under Section 1252(b)(1)—including Section 1228(b) removal orders. 594 U.S. at 540.[4]

Section 1228(b)(3) confirms that withholding-only proceedings do not suspend a Final Administrative Removal Order's finality. If withholding-only proceedings suspended a Final Administrative Removal Order's finality for purposes of judicial review, an alien would lack the "opportunity to apply for judicial review under section 1252" within 14 days of that order's issuance as promised by the statute, and the temporary bar on removal would not serve its stated purpose of facilitating prompt judicial review. 8 U.S.C. § 1228(b)(3). Concluding that withholding-only proceedings do not suspend a Final Administrative Removal Order's finality "ensure[s] that the statutory scheme is coherent and consistent." *Ali* v. *Fed. Bureau of Prisons*, 552 U.S. 214, 222 (2008).

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[4] Withholding-only proceedings do not suspend the finality of reinstated removal orders for the same reason. Some courts have questioned whether a reinstatement decision counts as a *new* final order of removal that restarts the 30-day clock or simply reinstates a *preexisting* final order of removal for which the deadline has long run. See, *e.g.*, *Bhaktibhai-Patel* v. *Garland*, 32 F.4th 180, 195 (2d Cir. 2022). This case does not present that issue.

The INA's statutory definition leads to the same conclusion. By defining a removal order as final based on the completion of administrative review of the removal order itself—not any withholding claim—it makes clear that withholding-only proceedings do not suspend a Final Administrative Removal Order's finality. See 8 U.S.C. § 1101(a)(47)(B).

* * *

Under Section 1252(b)(1), an alien must file a petition for review "not later than 30 days after the date of the final order of removal." Riley's Final Administrative Removal Order was a final order of removal that triggered the deadline when issued, and its finality was not suspended by withholding-only proceedings. Because Riley did not file his petition for review until 16 months after his Final Administrative Removal Order issued, he failed to satisfy Section 1252(b)(1)'s 30-day deadline.

B. Riley's and the government's arguments that a petition is timely if filed within 30 days of a CAT order fall flat.

Riley and the government contend that an alien satisfies Section 1252(b)(1)'s deadline by filing a petition for review within 30 days of a Board order denying CAT relief—even if that petition comes more than 30 days after a Final Administrative Removal Order. They offer three arguments for that theory. Riley and the government both contend that a Section 1228(b) removal order does not become final until the conclusion of withholding-only proceedings. They further argue that Congress provided for judicial review of CAT orders in general. And they finally fall back on

policy concerns. None of those arguments overcome the plain statutory text.

1. The finality of a Final Administrative Removal Order is not contingent on withholding-only proceedings.

Riley and the government contend that the Final Administrative Removal Order did not become final until the Board issued its order denying CAT relief. They invoke general principles of finality and the INA's exhaustion provision while insisting that *Nasrallah* and *Guzman Chavez* are not to the contrary. Those arguments lack merit.

First, Riley (at 29-35) and the government (at 25-33) argue that general principles of finality indicate that a Section 1228(b) removal order does not become a final order of removal until the conclusion of withholding-only proceedings. That argument falters at the outset because—as the government itself explained in *Guzman Chavez*—"'[w]hen a statute includes an explicit definition,' as the INA does for finality of removal orders, a court 'must follow that definition'—not resort to some other 'general definition.'" Gov't Br. at 28, *Guzman Chavez*, 594 U.S. 523 (No. 19-897) (first quoting *Digit. Realty Tr., Inc.* v. *Somers*, 583 U.S. 149, 160 (2018); second citation omitted). Section 1101 is entitled "Definitions," and Section 1101(a) applies to the entirety of "this chapter" (the INA). "When Congress want[s] to refer only to a particular subsection or paragraph"—instead of an entire chapter—"it sa[ys] so." *NLRB* v. *SW Gen., Inc.*, 580 U.S. 288, 300 (2017).

Riley (at 38-40) and the government (at 26-30) are wrong to argue that the definition is incompatible with Section 1228(b) removal orders because they are

not subject to Board review. By providing that an order of removal "become[s] final upon * * * the expiration of the period in which the alien is permitted to seek [Board] review" of that order, 8 U.S.C. § 1101(a)(47)(B)(ii), Congress established that an order of removal would become final when issued if there is no "period in which the alien is permitted to seek [Board] review" of that order. By analogy, if a company had a policy stating that "a new hire shall become eligible for health-care benefits upon the expiration of the probationary period," but exempted one new hire from the probationary period, he would naturally conclude that he was immediately eligible for health-care benefits under the policy. The INA definition works the same way.

The government also argues (at 27-28) that the statutory definition is inapplicable because Congress eliminated Board review of Final Administrative Removal Orders *after* it enacted the definition in AEDPA. That gets the history backwards. The expedited removal provision now in Section 1228(b) was originally adopted in the Violent Crime Control and Law Enforcement Act of 1994—not IIRIRA—and stated that an order entered under that subsection was a "final order of deportation" subject to immediate judicial review. Pub. L. No. 103-222, § 130004(a), 108 Stat. 2027. The Justice Department adopted regulations implementing that provision—and not allowing Board review of deportation orders entered under it—in 1995. See 60 Fed. Reg. 43,954, 43,954-55, 43,959-60 (Aug. 24, 1995). Because this Court "assume[s] that Congress is aware of existing law when it passes legislation," *Miles* v. *Apex Marine Corp.*, 498 U.S. 19, 32 (1990), Congress's subsequent adoption of the INA's

statutory definition of a final order of deportation in AEDPA in 1996 thus demonstrates that it views that definition and Section 1228(b) as consistent and mutually reinforcing.

Even if Riley and the government were right that Section 1101(a)(47)(B) is inapplicable in this context, Section 1228(b)(3) and (4)(F) alone would still make clear that Congress viewed a Final Administrative Removal Order as a "final order of removal" when issued that is subject to immediate "judicial review under section 1252." There is no reason to resort to general principles of finality to determine whether Final Administrative Removal Orders are, in fact, final when the specific text and context of Section 1228(b) leaves no doubt that they are.

In any event, the parties' resort to general principles of finality fails on its own terms. They cannot even agree about which set of general principles of finality should govern—which only confirms the danger in departing from the statutory definition as confirmed by Section 1228(b). And neither set of principles offers any sound basis to conclude that Riley's petition was timely.

Riley says (at 30-32) that APA principles of finality should apply. He contends (at 35, 37-38) that these principles govern because they are "consistent with" "traditional Hobbs Act principles," and because *Stone* put the Congress that enacted Section 1252(b)(1) in IIRIRA "on notice" that Hobbs Act principles would apply to the INA "absent contrary indications." Even if that assumption were right, however, between *Stone* and IIRIRA, Congress enacted a specific INA-wide definition of a final order of deportation in

AEDPA, displacing any contrary understandings of finality under the INA. See *Nasrallah*, 590 U.S. at 584.

Regardless, APA principles of finality support the decision below. Agency action is final under the APA if it "mark[s] the consummation of the agency's decisionmaking process" and is "one by which rights or obligations have been determined, or from which legal consequences will flow." *Bennett* v. *Spear*, 520 U.S. 154, 178 (1997) (citations and internal quotation marks omitted). A Section 1228(b) removal order marks the consummation of the agency's decisionmaking process because "DHS has definitively determined that the noncitizen is removable." Gov't Br. 7 n.3. A Section 1228(b) removal order also determines the alien's rights and the government's obligations and carries legal consequences because, in addition to subjecting the alien to detention under Section 1231, it authorizes DHS to remove the alien regardless of withholding-only proceedings. See *id.* at 46 n.15; *Guzman Chavez*, 594 U.S. at 545-46 ("DHS retains its authority during withholding-only proceedings to remove the alien to any country other than the country that is the subject of those proceedings."). Indeed, the government correctly argued in *Guzman Chavez* that "a reinstated removal order is final even under the general definition of administrative finality" for these same reasons. Gov't Br. at 28, *Guzman Chavez*, *supra* (No. 19-897).

For its part, the government contends (at 30-32) that the Court should apply an analogue to the "traditional final-judgment rule." But that rule is a mismatch with the INA's judicial-review scheme. The final-judgment rule, which generally requires a party to raise all claims of error by a district court in a single

appeal following final judgment on the merits, is premised on the "merge[r]" of interlocutory orders "into the final judgment." *Dupree* v. *Younger*, 598 U.S. 729, 735 (2023); see *Firestone Tire & Rubber Co.* v. *Risjord*, 449 U.S. 368, 374 (1981). In *Nasrallah*, the government relied on the final-judgment rule's merger principle to argue that "[t]he denial of a CAT claim is a constituent part of the final order of removal for purposes of judicial review." Gov't Br. at 18, *Nasrallah*, 590 U.S. 573 (No. 18-1432). But this Court squarely rejected that argument, holding that an order denying CAT relief "does not merge into the final order of removal." 590 U.S. at 582. Because the INA forecloses the merger principle on which the final-judgment rule depends, that rule provides no basis for interpreting "final order of removal" under Section 1252(b)(1).

Moreover, the government is incorrect to argue (at 32-33) that a Final Administrative Removal Order does not satisfy the final-judgment rule during withholding-only proceedings because it cannot be executed with respect to the designated country of removal at that time. The mere fact that a court's final judgment cannot be executed does not render it nonfinal. For example, district courts routinely stay their own judgments, making those judgments temporarily ineffective. See Fed. R. Civ. P. 62; Fed. R. App. P. 8(a)(1)(A); *Coleman* v. *Tollefson*, 575 U.S. 532, 539 (2015). Such a stay does not render a judgment nonfinal and therefore unappealable. See, *e.g.*, 11 Charles Alan Wright et al., *Federal Practice & Procedure* § 2902 (3d ed. 2024) (Fed. R. Civ. P. 62(a) stay "only prevents enforcement of the judgment" and "does not affect appealability of the judgment"). Even under the

inapposite final-judgment rule, withholding-only proceedings do nothing to disturb a Section 1228(b) removal order's finality.

Second, Riley invokes (at 35-36) the INA's exhaustion provision to contend that a Final Administrative Removal Order cannot "count as 'final'" if "administrative process remain[s] available" *as to the CAT claim*. See also Gov't Br. 32. That is incorrect.

Section 1252(d)(1) states that "[a] court may review a final order of removal only if * * * the alien has exhausted all administrative remedies available to the alien as of right." Because Section 1252(d) sets out prerequisites to judicial review of a final order of removal, its exhaustion provision addresses only those remedies that affect the validity of those orders—and therefore bear on their review by a court. See *Solaka* v. *Wilkinson*, 844 F. App'x 797, 800-01 (6th Cir. 2021); *Singh* v. *Garland*, 2022 WL 782661, at *4 (10th Cir. Mar. 15, 2022). CAT relief does not fit into that category, because it "does not affect the validity of a final order of removal." *Solaka*, 844 F. App'x at 801 (quoting *Nasrallah*, 590 U.S. at 587). And if Riley were correct, aliens "would need to seek" withholding-only relief from the Board "before obtaining judicial review in every case," *Santos-Zacaria*, 598 U.S. at 428, which would be "a truly bizarre outcome," Former U.S. Att'ys Gen. Amici Br. 18.

Third, Riley (at 45-51) and the government (at 40-48) contend that *Nasrallah* and *Guzman Chavez* do not establish that the finality of removal orders is unaffected by withholding-only proceedings. But both cases refute their position.

Riley (at 45-47) and the government (at 42-44) contend that *Nasrallah* sheds no light on when a removal order becomes final but merely established that a CAT order is not a final order of removal. But *Nasrallah* held that a CAT order "does not affect the validity of the final order of removal" or "merge into the final order of removal," 590 U.S. at 582, so a CAT order cannot disturb the finality of an order of removal. As the government correctly explained in *Guzman Chavez,* "*Nasrallah* thus forecloses the * * * conclusion that an alien's request for protection resets the finality of a reinstated removal order"—or (as here) a Final Administrative Removal Order. Gov't Br. at 29, *Guzman Chavez*, *supra* (No. 19-897).

Riley (at 49-51) and the government (at 44-48) also argue that *Guzman Chavez* is immaterial because it reserved decision on the meaning of Section 1252 and interpreted the term "administratively final" order of removal rather than "final order of removal." See 594 U.S. at 535 n.6. But the Court's reservation of a question is not an invitation to ignore its reasoning. Nor does the statute support any distinction between the two terms.

Given that Riley and the government concede that Section 1228(b) removal orders are "administratively final" orders of removal under Section 1231, their position turns on establishing that such orders are different from "final orders of removal" under Section 1252(b)(1). But text and context demonstrate that an "administratively final" order of removal in Section 1231 is synonymous with a "final order of removal" in Section 1252(b)(1). The INA defines a final order of removal based on the completion of administrative review of that order, and Section 1252(b)(8)(A) draws a

direct link between a "final order of removal" in Section 1252(b) and an "administratively final" order of removal in Section 1231. See pp. 35-36, *supra*.

Riley argues (at 50) that reading Section 1252 consistently with Section 1231 would make the word "administratively" surplusage. But Congress had good reason to use different language in Section 1231. The word "administratively" was needed to distinguish *the agency's* final removal order in Section 1231(a)(1)(B)(i) from the *court's* final order after judicial review of a removal order in Section 1231(a)(1)(B)(ii). See *Guzman Chavez*, 594 U.S. at 534-35. Because filing a petition for review necessarily precedes the court of appeals' final order, the "final order of removal" in Section 1252(b)(1) could refer to nothing other than the administratively final order that unlocks the door to judicial review.

2. The channeling provisions for judicial review of CAT orders do not alter the filing deadline.

Riley and the government also argue that several statutory provisions and *Nasrallah*, as well as the presumption of judicial review, show that Congress intended for judicial review of CAT orders. But the reviewability of CAT orders in general is beside the point because the INA's text makes clear that such review is unavailable when a petition for review is not timely filed—as Riley's was not here.

Riley (at 36-37, 41-42) and the government (at 31-32, 34, 40, 42-44, 46) contend that the zipper clause, Section 1252(a)(4), FARRA § 2242(d), and *Nasrallah* demonstrate that Congress made CAT orders judicially reviewable. The zipper clause provides that judicial

review of all questions "arising from any action taken or proceeding brought to remove an alien * * * shall be available only in judicial review of a final order under this section." 8 U.S.C. § 1252(b)(9). Section 1252(a)(4) establishes that a petition for review filed "in accordance with this section" is "the sole and exclusive means for judicial review of any" CAT claim. And FARRA § 2242(d) states that it does not provide any court jurisdiction to review CAT claims "except as part of the review of a final order of removal pursuant to" Section 1252. Pub. L. No. 105-277, Div. G., 112 Stat. 2681-822. Summarizing the effect of these provisions, *Nasrallah* stated that "CAT orders may be reviewed together with final orders of removal in a court of appeals." 590 U.S. at 581.

As *Nasrallah* explains, these channeling provisions establish that a CAT order can be reviewed alongside a final order of removal that is *properly* before a court. But they provide no support for the notion that a CAT order can be reviewed even when a final order of removal is *not* properly before a court. A petition for a review filed more than 30 days after issuance of a Final Administrative Removal Order is not "in accordance with" Section 1252, so it provides no basis for judicial review of a CAT order. 8 U.S.C. § 1252(a)(4).

Lacking support in the INA, Riley (at 40-44) and the government (at 36-40) resort to the general presumption that administrative action is subject to judicial review. But that presumption never comes into play because neither party argues that the decision below creates an absolute bar to judicial review of orders concluding withholding-only proceedings. Indeed, both Riley (at 51-52) and the government (at 35-36)

propose various methods by which aliens *could* preserve such review even under the Fourth Circuit's rule—such as by moving the court of appeals to hold a timely petition for review in abeyance pending the completion of withholding-only proceedings. And even if the statute disallowed the methods the parties suggest, that would only mean that the presumption of judicial review was "overcome by specific language" and "the statutory scheme as a whole." *Patel* v. *Garland*, 596 U.S. 328, 347 (2022) (citation omitted). Either way, the Court has "no reason to resort to the presumption of reviewability" given the plain meaning of the filing deadline. *Ibid.*

3. Policy concerns do not justify departing from the statutory text.

Riley (at 51-52) and the government (at 35-36) urge the Court to adopt their reading of the deadline because otherwise aliens may attempt to preserve judicial review of orders concluding withholding-only proceedings through protective petitions for review or other means, which the parties warn would be "disjointed," "absurdly inefficient," and even "disastrous." (Citation omitted).

It is by now a truism, however, that "pleas of administrative inconvenience" can "never 'justify departing from the statute's clear text.'" *Niz-Chavez* v. *Garland*, 593 U.S. 155, 169 (2021) (citation omitted). The INA makes clear that the issuance of a Final Administrative Removal Order triggers the 30-day deadline to file a petition for review, and "no amount of policy-talk can overcome" that "plain statutory command." *Id.* at 171.

Regardless, the parties' policy concerns are overstated. The Second and Fourth Circuits have applied the INA's filing deadline according to its plain meaning since 2022 and 2023 respectively, see *Bhaktibhai-Patel* v. *Garland*, 32 F.4th 180 (2d Cir. 2022); *Martinez* v. *Garland*, 86 F.4th 561 (4th Cir. 2023), but neither Riley nor the government offers any reason to believe that either circuit has fallen into chaos. On the contrary, one of Riley's amici has published a practice alert for immigration attorneys explaining that after *Bhaktibhai-Patel* the government and immigration organizations "worked with the Second Circuit Clerk's Office to formalize a procedure" for aliens to obtain judicial review of orders concluding withholding-only proceedings.[5] Those efforts indicate that the courts of appeals are well equipped to handle any routine docket management tasks that may arise as a result of sustaining the decision below.

* * *

Through amendment after amendment, Congress has made clear in the INA that it views the expedited removal of aliens convicted of aggravated felonies from the United States as a critical priority. The INA's filing deadline—which Congress only tightened after this Court held it jurisdictional in *Stone*—serves that end by requiring aliens to promptly seek judicial review after receiving their final orders of removal.

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[5] Nat'l Immigr. Litig. All., *Practice Alert: Protecting Judicial Review in the Fourth and Second Circuits for Noncitizens with Reinstatement or 238(b) Orders Who Have Fear-Based Claims* 2 (May 9, 2024), bit.ly/4jOQyN6.

This Court should uphold Congress's design by applying the filing deadline according to its plain text and affirming the dismissal of Riley's untimely petition.

CONCLUSION

The judgment of the court of appeals should be affirmed.

Respectfully submitted.

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STATUTORY AND REGULATORY APPENDIX

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1. 8 U.S.C. § 1101(a)(47) provides:

Definitions

(a) As used in this chapter—

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

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

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

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

2. 8 U.S.C. § 1228 provides:

Expedited removal of aliens convicted of committing aggravated felonies

(a) Removal of criminal aliens

(1) In general

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

(2) Implementation

With respect to an alien convicted of an aggravated felony who is taken into custody by the Attorney General pursuant to section 1226(c) of this title, the Attorney General shall, to the maximum

extent practicable, detain any such felony at a facility at which other such aliens are detained. In the section of such facility, the Attorney General shall make reasonable efforts to ensure that the alien's access to counsel and right to counsel under section 1362 of this title are not impaired.

(3) Expedited proceedings

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

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

(4) Review

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

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

(b) Removal of aliens who are not permanent residents.

(1) The Attorney General may, in the case of an alien described in paragraph (2), determine the deportability of such alien under section 1227(a)(2)(A)(iii) of this title (relating to conviction of an aggravated felony) and issue an order of removal pursuant to the procedures set forth in this subsection or section 1229a of this title.

(2) An alien is described in this paragraph if the alien—

(A) was not lawfully admitted for permanent residence at the time at which proceedings under this section commenced; or

(B) had permanent resident status on a conditional basis (as described in section 1186a of this title) at the time that proceedings under this section commenced.

(3) The Attorney General may not execute any order described in paragraph (1) until 14 calendar days have passed from the date that such order was issued, unless waived by the alien, in order that the alien has an opportunity to apply for judicial review under section 1252 of this title.

(4) Proceedings before the Attorney General under this subsection shall be in accordance with such regulations as the Attorney General shall prescribe. The Attorney General shall provide that—

(A) the alien is given reasonable notice of the charges and of the opportunity described in subparagraph (C);

(B) the alien shall have the privilege of being represented (at no expense to the government) by such counsel, authorized to practice in such proceedings, as the alien shall choose;

(C) the alien has a reasonable opportunity to inspect the evidence and rebut the charges;

(D) a determination is made for the record that the individual upon whom the notice for the proceeding under this section is served (either in person or by mail) is, in fact, the alien named in such notice;

(E) a record is maintained for judicial review; and

(F) the final order of removal is not adjudicated by the same person who issues the charges.

(5) No alien described in this section shall be eligible for any relief from removal that the Attorney General may grant in the Attorney General's discretion.

(c)[1] Presumption of deportability

An alien convicted of an aggravated felony shall be conclusively presumed to be deportable from the United States.

(c)[1] Judicial removal

(1) Authority

Notwithstanding any other provision of this chapter, a United States district court shall have jurisdiction to enter a judicial order of removal at

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

the time of sentencing against an alien who is deportable, if such an order has been requested by the United States Attorney with the concurrence of the Commissioner and if the court chooses to exercise such jurisdiction.

(2) Procedure

(A) The United States Attorney shall file with the United States district court, and serve upon the defendant and the Service, prior to commencement of the trial or entry of a guilty plea a notice of intent to request judicial removal.

(B) Notwithstanding section 1252b[2] of this title, the United States Attorney, with the concurrence of the Commissioner, shall file at least 30 days prior to the date set for sentencing a charge containing factual allegations regarding the alienage of the defendant and identifying the crime or crimes which make the defendant deportable under section 1227(a)(2)(A) of this title.

(C) If the court determines that the defendant has presented substantial evidence to establish prima facie eligibility for relief from removal under this chapter, the Commissioner shall provide the court with a recommendation and report regarding the alien's eligibility for relief. The court shall either grant or deny the relief sought.

(D)(i) The alien shall have a reasonable opportunity to examine the evidence against him or her, to present evidence on his or her own behalf,

[2] See References in Text note below.

and to cross-examine witnesses presented by the Government.

(ii) The court, for the purposes of determining whether to enter an order described in paragraph (1), shall only consider evidence that would be admissible in proceedings conducted pursuant to section 1229a of this title.

(iii) Nothing in this subsection shall limit the information a court of the United States may receive or consider for the purposes of imposing an appropriate sentence.

(iv) The court may order the alien removed if the Attorney General demonstrates that the alien is deportable under this chapter.

(3) Notice, appeal, and execution of judicial order of removal

(A)(i) A judicial order of removal or denial of such order may be appealed by either party to the court of appeals for the circuit in which the district court is located.

(ii) Except as provided in clause (iii), such appeal shall be considered consistent with the requirements described in section 1252 of this title.

(iii) Upon execution by the defendant of a valid waiver of the right to appeal the conviction on which the order of removal is based, the expiration of the period described in section 1252(b)(1) of this title, or the final dismissal of an appeal from such conviction, the order of removal shall become final and shall be executed at the end of the prison term in accordance with the terms of the order. If the

conviction is reversed on direct appeal, the order entered pursuant to this section shall be void.

(B) As soon as is practicable after entry of a judicial order of removal, the Commissioner shall provide the defendant with written notice of the order of removal, which shall designate the defendant's country of choice for removal and any alternate country pursuant to section 1253(a)[3] of this title.

(4) Denial of judicial order

Denial of a request for a judicial order of removal shall not preclude the Attorney General from initiating removal proceedings pursuant to section 1229a of this title upon the same ground of deportability or upon any other ground of deportability provided under section 1227(a) of this title.

(5) Stipulated judicial order of removal

The United States Attorney, with the concurrence of the Commissioner, may, pursuant to Federal Rule of Criminal Procedure 11, enter into a plea agreement which calls for the alien, who is deportable under this chapter, to waive the right to notice and a hearing under this section, and stipulate to the entry of a judicial order of removal from the United States as a condition of the plea agreement or as a condition of probation or supervised release, or both. The United States district court, in both felony and misdemeanor cases, and a United States magistrate judge in misdemeanor cases, may accept such a stipulation and shall

[3] See References in Text note below.

have jurisdiction to enter a judicial order of removal pursuant to the terms of such stipulation.

3. 8 U.S.C. § 1231(a)-(b) provides:

Detention and removal of aliens ordered removed

(a) Detention, release, and removal of aliens ordered removed

(1) Removal period

(A) In general

Except as otherwise provided in this section, when an alien is ordered removed, the Attorney General shall remove the alien from the United States within a period of 90 days (in this section referred to as the "removal period").

(B) Beginning of period

The removal period begins on the latest of the following:

(i) The date the order of removal becomes administratively final.

(ii) If the removal order is judicially reviewed and if a court orders a stay of the removal of the alien, the date of the court's final order.

(iii) If the alien is detained or confined (except under an immigration process), the date the alien is released from detention or confinement.

(C) Suspension of period

The removal period shall be extended beyond a period of 90 days and the alien may remain in detention during such extended period if the alien fails or refuses to make timely application in good

faith for travel or other documents necessary to the alien's departure or conspires or acts to prevent the alien's removal subject to an order of removal.

(2) Detention

(A) In general

During the removal period, the Attorney General shall detain the alien. Under no circumstances during the removal period shall the Attorney General release an alien who has been found inadmissible under section 1182(a)(2) or 1182(a)(3)(B) of this title or deportable under section 1227(a)(2) or 1227(a)(4)(B) of this title.

(B) Enforcement by attorney general of a State

The attorney general of a State, or other authorized State officer, alleging a violation of the detention requirement under subparagraph (A) that harms such State or its residents shall have standing to bring an action against the Secretary of Homeland Security on behalf of such State or the residents of such State in an appropriate district court of the United States to obtain appropriate injunctive relief. The court shall advance on the docket and expedite the disposition of a civil action filed under this subparagraph to the greatest extent practicable. For purposes of this subparagraph, a State or its residents shall be considered to have been harmed if the State or its residents experience harm, including financial harm in excess of $100.

(3) Supervision after 90-day period

If the alien does not leave or is not removed within the removal period, the alien, pending removal, shall be subject to supervision under regulations prescribed by the Attorney General. The regulations shall include provisions requiring the alien—

(A) the appear before an immigration officer periodically for identification;

(B) to submit, if necessary, to a medical and psychiatric examination at the expense of the United States Government;

(C) to give information under oath about the alien's nationality, circumstances, habits, associations, and activities, and other information the Attorney General considers appropriate; and

(D) to obey reasonable written restrictions on the alien's conduct or activities that the Attorney General prescribes for the alien.

(4) Aliens imprisoned, arrested, or on parole, supervised release, or probation

(A) In general

Except as provided in section 259(a)[1] of title 42 and paragraph (2),[2] the Attorney General may not remove an alien who is sentenced to imprisonment until the alien is released from imprisonment. Parole, supervised re-

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[1] See References in Text note below.

[2] So in original. Probably should be "subparagraph (B),".

lease, probation, or possibility of arrest or further imprisonment is not a reason to defer removal.

(B) Exception for removal of nonviolent offenders prior to completion of sentence of imprisonment

The Attorney General is authorized to remove an alien in accordance with applicable procedures under this chapter before the alien has completed a sentence of imprisonment—

(i) in the case of an alien in the custody of the Attorney General, if the Attorney General determines that (I) the alien is confined pursuant to a final conviction for a nonviolent offense (other than an offense related to the smuggling or harboring of aliens or an offense described in section 1101(a)(43)(B), (C), (E), (I), or (L) of this title[3] and (II) the removal of the alien is appropriate and in the best interest of the United States; or

(ii) in the case of an alien in the custody of a State (or a political subdivision of a State), if the chief State official exercising authority with respect to the incarceration of the alien determines that (I) the alien is confined pursuant to a final conviction for a nonviolent offense (other than an offense described in section 1101(a)(43)(C) or (E) of this title), (II) the

[3] So in original. Probably should be followed by a closing parenthesis.

removal is appropriate and in the best interest of the State, and (III) submits a written request to the Attorney General that such alien be so removed.

(C) Notice

Any alien removed pursuant to this paragraph shall be notified of the penalties under the laws of the United States relating to the reentry of deported aliens, particularly the expanded penalties for aliens removed under subparagraph (B).

(D) No private right

No cause or claim may be asserted under this paragraph against any official of the United States or of any State to compel the release, removal, or consideration for release or removal of any alien.

(5) Reinstatement of removal orders against aliens illegally reentering

If the Attorney General finds that an alien has reentered the United States illegally after having been removed or having departed voluntarily, under an order of removal, the prior order of removal is reinstated from its original date and is not subject to being reopened or reviewed, the alien is not eligible and may not apply for any relief under this chapter, and the alien shall be removed under the prior order at any time after the reentry.

(6) Inadmissible or criminal aliens

An alien ordered removed who is inadmissible under section 1182 of this title, removable under section 1227(a)(1)(C), 1227(a)(2), or 1227(a)(4) of

this title or who has been determined by the Attorney General to be a risk to the community or unlikely to comply with the order of removal, may be detained beyond the removal period and, if released, shall be subject to the terms of supervision in paragraph (3).

(7) Employment authorization

No alien ordered removed shall be eligible to receive authorization to be employed in the United States unless the Attorney General makes a specific finding that—

(A) the alien cannot be removed due to the refusal of all countries designated by the alien or under this section to receive the alien, or

(B) the removal of the alien is otherwise impracticable or contrary to the public interest.

(b) Countries to which aliens may be removed

(1) Aliens arriving at the United States

Subject to paragraph (3)—

(A) In general

Except as provided by subparagraphs (B) and (C), an alien who arrives at the United States and with respect to whom proceedings under section 1229a of this title were initiated at the time of such alien's arrival shall be removed to the country in which the alien boarded the vessel or aircraft on which the alien arrived in the United States.

(B) Travel from contiguous territory

If the alien boarded the vessel or aircraft on which the alien arrived in the United States in a foreign territory contiguous to the United States, an island adjacent to the United States, or an island adjacent to a foreign territory contiguous to the United States, and the alien is not a native, citizen, subject, or national of, or does not reside in, the territory or island, removal shall be to the country in which the alien boarded the vessel that transported the alien to the territory or island.

(C) Alternative countries

If the government of the country designated in subparagraph (A) or (B) is unwilling to accept the alien into that country's territory, removal shall be to any of the following countries, as directed by the Attorney General:

(i) The country of which the alien is a citizen, subject, or national.

(ii) The country in which the alien was born.

(iii) The country in which the alien has a residence.

(iv) A country with a government that will accept the alien into the country's territory if removal to each country described in a previous clause of this subparagraph is impracticable, inadvisable, or impossible.

(2) Other aliens

Subject to paragraph (3)—

(A) Selection of country by alien

Except as otherwise provided in this paragraph—

(i) any alien not described in paragraph (1) who has been ordered removed may designate one country to which the alien wants to be removed, and

(ii) the Attorney General shall remove the alien to the country the alien so designates.

(B) Limitation on designation

An alien may designate under subparagraph (A)(i) a foreign territory contiguous to the United States, an adjacent island, or an island adjacent to a foreign territory contiguous to the United States as the place to which the alien is to be removed only if the alien is a native, citizen, subject, or national of, or has resided in, that designated territory or island.

(C) Disregarding designation

The Attorney General may disregard a designation under subparagraph (A)(i) if—

(i) the alien fails to designate a country promptly;

(ii) the government of the country does not inform the Attorney General finally, within 30 days after the date the Attorney General first inquires, whether the

government will accept the alien into the country;

(iii) the government of the country is not willing to accept the alien into the country; or

(iv) the Attorney General decides that removing the alien to the country is prejudicial to the United States.

(D) Alternative country

If an alien is not removed to a country designated under subparagraph (A)(i), the Attorney General shall remove the alien to a country of which the alien is a subject, national, or citizen unless the government of the country—

(i) does not inform the Attorney General or the alien finally, within 30 days after the date the Attorney General first inquires or within another period of time the Attorney General decides is reasonable, whether the government will accept the alien into the country; or

(ii) is not willing to accept the alien into the country.

(E) Additional removal countries

If an alien is not removed to a country under the previous subparagraphs of this paragraph, the Attorney General shall remove the alien to any of the following countries:

(i) The country from which the alien was admitted to the United States.

(ii) The country in which is located the foreign port from which the alien left for the United States or for a foreign territory contiguous to the United States.

(iii) A country in which the alien resided before the alien entered the country from which the alien entered the United States.

(iv) The country in which the alien was born.

(v) The country that had sovereignty over the alien's birthplace when the alien was born.

(vi) The country in which the alien's birthplace is located when the alien is ordered removed.

(vii) If impracticable, inadvisable, or impossible to remove the alien to each country described in a previous clause of this subparagraph, another country whose government will accept the alien into that country.

(F) Removal country when United States is at war

When the United States is at war and the Attorney General decides that it is impracticable, inadvisable, inconvenient, or impossible to remove an alien under this subsection because of the war, the Attorney General may remove the alien—

(i) to the country that is host to a government in exile of the country of which the alien is a citizen or subject if the government of the host country will permit the alien's entry; or

(ii) if the recognized government of the country of which the alien is a citizen or subject is not in exile, to a country, or a political or territorial subdivision of a country, that is very near the country to which the alien is a citizen or subject, or, with the consent of the government of the country of which the alien is a citizen or subject, to another country.

(3) Restriction on removal to a country where alien's life or freedom would be threatened

(A) In general

Notwithstanding paragraphs (1) and (2), the Attorney General may not remove an alien to a country if the Attorney General decides that the alien's life or freedom would be threatened in that country because of the alien's race, religion, nationality, membership in a particular social group, or political opinion.

(B) Exception

Subparagraph (A) does not apply to an alien deportable under section 1227(a)(4)(D) of this title or if the Attorney General decides that—

(i) the alien ordered, incited, assisted, or otherwise participated in the

persecution of an individual because of the individual's race, religion, nationality, membership in a particular social group, or political opinion;

(ii) the alien, having been convicted by a final judgment of a particularly serious crime is a danger to the community of the United States;

(iii) there are serious reasons to believe that the alien committed a serious nonpolitical crime outside the United States before the alien arrived in the United States; or

(iv) there are reasonable grounds to believe that the alien is a danger to the security of the United States.

For purposes of clause (ii), an alien who has been convicted of an aggravated felony (or felonies) for which the alien has been sentenced to an aggregate term of imprisonment of at least 5 years shall be considered to have committed a particularly serious crime. The previous sentence shall not preclude the Attorney General from determining that, notwithstanding the length of sentence imposed, an alien has been convicted of a particularly serious crime. For purposes of clause (iv), an alien who is described in section 1227(a)(4)(B) of this title shall be considered to be an alien with respect to whom there are reasonable grounds for regarding as a danger to the security of the United States.

(C) Sustaining burden of proof; credibility determinations

In determining whether an alien has demonstrated that the alien's life or freedom would be threatened for a reason described in subparagraph (A), the trier of fact shall determine whether the alien has sustained the alien's burden of proof, and shall make credibility determinations, in the manner described in clauses (ii) and (iii) of section 1158(b)(1)(B) of this title.

4. 8 U.S.C. § 1252 provides:

Judicial review of orders of removal

(a) Applicable provisions

(1) General orders of removal

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

(2) Matters not subject to judicial review

(A) Review relating to section 1225(b)(1)

Notwithstanding any other provision of law (statutory or nonstatutory), including section 2241 of title 28, or any other habeas corpus provision, and sections 1361 and 1651 of such title, no court shall have jurisdiction to review—

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

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

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

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

(B) Denials of discretionary relief

Notwithstanding any other provision of law (statutory or nonstatutory), including section 2241 of title 28, or any other habeas corpus provision, and sections 1361 and 1651 of such title, and except as provided in subparagraph (D), and regardless of whether the judgment, decision, or action is made in removal proceedings, no court shall have jurisdiction to review—

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

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

(C) Orders against criminal aliens

Notwithstanding any other provision of law (statutory or nonstatutory), including section 2241 of title 28, or any other habeas corpus provision, and sections 1361 and 1651 of such title, and except as provided in subparagraph (D), no court shall have jurisdiction to review any final order of removal against an alien who is removable by reason of having committed a criminal offense covered in section 1182(a)(2) or 1227(a)(2)(A)(iii), (B), (C), or (D) of this title, or any offense covered by section 1227(a)(2)(A)(ii) of this title for which both predicate offenses are, without regard to their date of commission, otherwise covered by section 1227(a)(2)(A)(i) of this title.

(D) Judicial review of certain legal claims

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

(3) Treatment of certain decisions

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

(4) Claims under the United Nations Convention

Notwithstanding any other provision of law (statutory or nonstatutory), including section 2241 of title 28, or any other habeas corpus provision, and sections 1361 and 1651 of such title, a petition for review filed with an appropriate court of appeals in accordance with this section shall be the sole and exclusive means for judicial review of any cause or claim under the United Nations Convention Against Torture and Other Forms of Cruel, Inhuman, or Degrading Treatment or Punishment, except as provided in subsection (e).

(5) Exclusive means of review

Notwithstanding any other provision of law (statutory or nonstatutory), including section 2241 of title 28, or any other habeas corpus provision, and sections 1361 and 1651 of such title, a petition for review filed with an appropriate court of appeals in accordance with this section shall be the sole and exclusive means for judicial review of an order of removal entered or issued under any provision of this chapter, except as provided in subsection (e). For purposes of this chapter, in every provision that limits or eliminates judicial review or jurisdiction to review, the terms "judicial review" and "jurisdiction to review" include habeas corpus review pursuant to section 2241 of title 28, or any other habeas corpus provision, sections 1361 and 1651 of such title, and review pursuant to any other provision of law (statutory or nonstatutory).

(b) Requirements for review of orders of removal

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

(1) Deadline

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

(2) Venue and forms

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

(3) Service

(A) In general

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

(B) Stay of order

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

(C) Alien's brief

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

(4) Scope and standard for review

Except as provided in paragraph (5)(B)—

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

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

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

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

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

(5) Treatment of nationality claims

(A) Court determination if no issue of fact

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

(B) Transfer if issue of fact

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

(C) Limitation on determination

The petitioner may have such nationality claim decided only as provided in this paragraph.

(6) Consolidation with review of motions to reopen or reconsider

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

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

(A) In general

If the validity of an order of removal has not been judicially decided, a defendant in a criminal proceeding charged with violating section 1253(a) of this title may challenge the validity of the order in the criminal proceeding only by filing a separate motion before trial. The district court, without a jury, shall decide the motion before trial.

(B) Claims of United States nationality

If the defendant claims in the motion to be a national of the United States and the district court finds that—

(i) no genuine issue of material fact about the defendant's nationality is presented, the court shall decide the motion only on the administrative record on which the removal order is based and the

administrative findings of fact are conclusive if supported by reasonable, substantial, and probative evidence on the record considered as a whole; or

(ii) a genuine issue of material fact about the defendant's nationality is presented, the court shall hold a new hearing on the nationality claim and decide that claim as if an action had been brought under section 2201 of title 28.

The defendant may have such nationality claim decided only as provided in this subparagraph.

(C) Consequence of invalidation

If the district court rules that the removal order is invalid, the court shall dismiss the indictment for violation of section 1253(a) of this title. The United States Government may appeal the dismissal to the court of appeals for the appropriate circuit within 30 days after the date of the dismissal.

(D) Limitation on filing petitions for review

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

(8) Construction

This subsection—

(A) does not prevent the Attorney General, after a final order of removal has been issued,

from detaining the alien under section 1231(a) of this title;

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

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

(9) Consolidation of questions for judicial review

Judicial review of all questions of law and fact, including interpretation and application of constitutional and statutory provisions, arising from any action taken or proceeding brought to remove an alien from the United States under this subchapter shall be available only in judicial review of a final order under this section. Except as otherwise provided in this section, no court shall have jurisdiction, by habeas corpus under section 2241 of title 28 or any other habeas corpus provision, by section 1361 or 1651 of such title, or by any other provision of law (statutory or nonstatutory), to review such an order or such questions of law or fact.

(c) Requirements for petition

A petition for review or for habeas corpus of an order of removal—

(1) shall attach a copy of such order, and

(2) shall state whether a court has upheld the validity of the order, and, if so, shall state the

[1] See References in text note below.

name of the court, the date of the court's ruling, and the kind of proceeding.

(d) Review of final orders

A court may review a final order of removal only if—

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

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

(e) Judicial review of orders under section 1225(b)(1)

(1) Limitations on relief

Without regard to the nature of the action or claim and without regard to the identity of the party or parties bringing the action, no court may—

(A) enter declaratory, injunctive, or other equitable relief in any action pertaining to an order to exclude an alien in accordance with section 1225(b)(1) of this title except as specifically authorized in a subsequent paragraph of this subsection, or

(B) certify a class under Rule 23 of the Federal Rules of Civil Procedure in any action for which judicial review is authorized under a subsequent paragraph of this subsection.

(2) Habeas corpus proceedings

Judicial review of any determination made under section 1225(b)(1) of this title is available in habeas corpus proceedings, but shall be limited to determinations of—

(A) whether the petitioner is an alien,

(B) whether the petitioner was ordered removed under such section, and

(C) whether the petitioner can prove by a preponderance of the evidence that the petitioner is an alien lawfully admitted for permanent residence, has been admitted as a refugee under section 1157 of this title, or has been granted asylum under section 1158 of this title, such status not having been terminated, and is entitled to such further inquiry as prescribed by the Attorney General pursuant to section 1225(b)(1)(C) of this title.

(3) Challenges on validity of the system

(A) In general

Judicial review of determinations under section 1225(b) of this title and its implementation is available in an action instituted in the United States District Court for the District of Columbia, but shall be limited to determinations of—

(i) whether such section, or any regulation issued to implement such section, is constitutional; or

(ii) whether such a regulation, or a written policy directive, written policy

guideline, or written procedure issued by or under the authority of the Attorney General to implement such section, is not consistent with applicable provisions of this subchapter or is otherwise in violation of law.

(B) Deadlines for bringing actions

Any action instituted under this paragraph must be filed no later than 60 days after the date the challenged section, regulation, directive, guideline, or procedure described in clause (i) or (ii) of subparagraph (A) is first implemented.

(C) Notice of appeal

A notice of appeal of an order issued by the District Court under this paragraph may be filed not later than 30 days after the date of issuance of such order.

(D) Expeditious consideration of cases

It shall be the duty of the District Court, the Court of Appeals, and the Supreme Court of the United States to advance on the docket and to expedite to the greatest possible extent the disposition of any case considered under this paragraph.

(4) Decision

In any case where the court determines that the petitioner—

(A) is an alien who was not ordered removed under section 1225(b)(1) of this title, or

(B) has demonstrated by a preponderance of the evidence that the alien is an alien lawfully admitted for permanent residence, has been admitted as a refugee under section 1157 of this title, or has been granted asylum under section 1158 of this title, the court may order no remedy or relief other than to require that the petitioner be provided a hearing in accordance with section 1229a of this title. Any alien who is provided a hearing under section 1229a of this title pursuant to this paragraph may thereafter obtain judicial review of any resulting final order of removal pursuant to subsection (a)(1).

(5) Scope of inquiry

In determining whether an alien has been ordered removed under section 1225(b)(1) of this title, the court's inquiry shall be limited to whether such an order in fact was issued and whether it relates to the petitioner. There shall be no review of whether the alien is actually inadmissible or entitled to any relief from removal.

(f) Limit on injunctive relief

(1) In general

Regardless of the nature of the action or claim or of the identity of the party or parties bringing the action, no court (other than the Supreme Court) shall have jurisdiction or authority to enjoin or restrain the operation of the provisions of part IV of this subchapter, as amended by the Illegal Immigration Reform and Immigrant Responsibility Act of 1996, other than with respect

to the application of such provisions to an individual alien against whom proceedings under such part have been initiated.

(2) Particular cases

Notwithstanding any other provision of law, no court shall enjoin the removal of any alien pursuant to a final order under this section unless the alien shows by clear and convincing evidence that the entry or execution of such order is prohibited as a matter of law.

(3) Certain actions

Paragraph (1) shall not apply to an action brought pursuant to section 1225(b)(3) of this title, subsections (e) or (f) of section 1226 of this title, or section 1231(a)(2)(B) of this title.

(g) Exclusive jurisdiction

Except as provided in this section and notwithstanding any other provision of law (statutory or nonstatutory), including section 2241 of title 28, or any other habeas corpus provision, and sections 1361 and 1651 of such title, no court shall have jurisdiction to hear any cause or claim by or on behalf of any alien arising from the decision or action by the Attorney General to commence proceedings, adjudicate cases, or execute removal orders against any alien under this chapter.

5. Foreign Affairs Reform and Restructuring Act of 1998, Pub. L. No. 105-277, Div. G, § 2242, 112 Stat. 2681-822 provides:

SEC. 2242. UNITED STATES POLICY WITH RESPECT TO THE INVOLUNTARY RETURN OF PERSONS IN DANGER OF SUBJECTION TO TORTURE.

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

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

(c) EXCLUSION OF CERTAIN ALIENS.—To the maximum extent consistent with the obligations of the United States under the Convention, subject to any reservations, understandings, declarations, and provisos contained in the United States Senate resolution of ratification of the Convention, the regulations described in subsection (b) shall exclude from the protection of such regulations aliens described in section

241(b)(3)(B) of the Immigration and Nationality Act (8 U.S.C. 1231(b)(3)(B)).

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

(e) AUTHORITY TO DETAIN.—Nothing in this section shall be construed as limiting the authority of the Attorney General to detain any person under any provision of law, including, but not limited to, any provision of the Immigration and Nationality Act.

(f) DEFINITIONS.—

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

(2) SAME TERMS AS IN THE CONVENTION.—Except as otherwise provided, the terms used in this section have the meanings given those terms in the Convention, subject to any reservations, understandings, declarations, and provisos contained in the United States Senate resolution of ratification of the Convention.

6. 8 C.F.R. § 238.1 provides:

§ 238.1 Proceedings under section 238(b) of the Act.

(a) *Definitions*. As used in this part the term:

Deciding Service officer means a district director, chief patrol agent, or another immigration officer designated by a district director, chief patrol agent, the Deputy Executive Associate Commissioner for Detention and Removal, or the Director of the Office of Juvenile Affairs, so long as that person is not the same person as the Issuing Service Officer.

Issuing Service officer means any Service officer listed in § 239.1 of this chapter as authorized to issue notices to appear.

(b) *Preliminary consideration and Notice of Intent to Issue a Final Administrative Deportation Order; commencement of proceedings—*

(1) *Basis of Service charge*. An issuing Service officer shall cause to be served upon an alien a Form I-851, Notice of Intent to Issue a Final Administrative Deportation Order (Notice of Intent), if the officer is satisfied that there is sufficient evidence, based upon questioning of the alien by an immigration officer and upon any other evidence obtained, to support a finding that the individual:

(i) Is an alien;

(ii) Has not been lawfully admitted for permanent residence, or has conditional permanent resident status under section 216 of the Act;

(iii) Has been convicted (as defined in section 101(a)(48) of the Act and as demonstrated by any of the documents or records listed in § 1003.41 of this chapter) of an aggravated felony and such conviction has become final; and

(iv) Is deportable under section 237(a)(2)(A)(iii) of the Act, including an alien who has neither been admitted nor paroled, but who is conclusively presumed deportable under section 237(a)(2)(A)(iii) by operation of section 238(c) of the Act ("Presumption of Deportability").

(2) *Notice*.

(i) Removal proceedings under section 238(b) of the Act shall commence upon personal service of the Notice of Intent upon the alien, as prescribed by 8 CFR 103.8. The Notice of Intent shall set forth the preliminary determinations and inform the alien of the Service's intent to issue a Form I-851A, Final Administrative Removal Order, without a hearing before an immigration judge. The Notice of Intent shall constitute the charging document. The Notice of Intent shall include allegations of fact and conclusions of law. It shall advise that the alien: has the privilege of being represented, at no expense to the government, by counsel of the alien's choosing, as long as counsel is authorized to practice in removal proceedings; may request withholding of removal to a particular country if he or she fears persecution or torture in that country;

may inspect the evidence supporting the Notice of Intent; may rebut the charges within 10 calendar days after service of such Notice (or 13 calendar days if service of the Notice was by mail).

(ii) The Notice of Intent also shall advise the alien that he or she may designate in writing, within the rebuttal period, the country to which he or she chooses to be deported in accordance with section 241 of the Act, in the event that a Final Administrative Removal Order is issued, and that the Service will honor such designation only to the extent permitted under the terms, limitations, and conditions of section 241 of the Act.

(iii) The Service must determine that the person served with the Notice of Intent is the person named on the notice.

(iv) The Service shall provide the alien with a list of available free legal services programs qualified under 8 CFR part 3 and organizations recognized pursuant to 8 CFR part 292, located within the district or sector where the Notice of Intent is issued.

(v) The Service must either provide the alien with a written translation of the Notice of Intent or explain the contents of the Notice of Intent to the alien in the alien's native language or in a language that the alien understands.

(c) *Alien's response*—

(1) *Time for response*. The alien will have 10 calendar days from service of the Notice of Intent or 13 calendar days if service is by mail, to file a response to the Notice of Intent. In the response, the alien may: designate his or her choice of country for removal; submit a written response rebutting the allegations supporting the charge and/or requesting the opportunity to review the Government's evidence; and/or submit a statement indicating an intention to request withholding of removal under 8 CFR 208.16 of this chapter, and/or request in writing an extension of time for response, stating the specific reasons why such an extension is necessary.

(2) *Nature of rebuttal or request to review evidence*.

(i) If an alien chooses to rebut the allegations contained in the Notice of Intent, the alien's written response must indicate which finding(s) are being challenged and should be accompanied by affidavit(s), documentary information, or other specific evidence supporting the challenge.

(ii) If an alien's written response requests the opportunity to review the Government's evidence, the Service shall serve the alien with a copy of the evidence in the record of proceeding upon which the Service is relying to support the charge. The alien may, within 10 calendar days following service of the Government's evidence (13 calendar days if ser-

vice is by mail), furnish a final response in accordance with paragraph (c)(1) of this section. If the alien's final response is a rebuttal of the allegations, such a final response should be accompanied by affidavit(s), documentary information, or other specific evidence supporting the challenge.

(d) *Determination by deciding Service officer—*

(1) *No response submitted or concession of deportability*. If the deciding Service officer does not receive a timely response and the evidence in the record of proceeding establishes deportability by clear, convincing, and unequivocal evidence, or if the alien concedes deportability, then the deciding Service officer shall issue and cause to be served upon the alien a Final Administrative Removal Order that states the reasons for the deportation decision. The alien may, in writing, waive the 14-day waiting period before execution of the final order of removal provided in a paragraph (f) of this section.

(2) *Response submitted—*

(i) *Insufficient rebuttal; no genuine issue of material fact*. If the alien timely submits a rebuttal to the allegations, but the deciding Service officer finds that deportability is established by clear, convincing, and unequivocal evidence in the record of proceeding, the deciding Service officer shall issue and cause to be served upon the alien a Final Administrative Removal Order that states the reasons for the decision of deportability.

(ii) *Additional evidence required*.

(A) If the deciding Service officer finds that the record of proceeding, including the alien's timely rebuttal, raises a genuine issue of material fact regarding the preliminary findings, the deciding Service officer may either obtain additional evidence from any source, including the alien, or cause to be issued a notice to appear to initiate removal proceedings under section 240 of the Act. The deciding Service officer may also obtain additional evidence from any source, including the alien, if the deciding Service officer deems that such additional evidence may aid the officer in the rendering of a decision.

(B) If the deciding Service officer considers additional evidence from a source other than the alien, that evidence shall be made a part of the record of proceeding, and shall be provided to the alien. If the alien elects to submit a response to such additional evidence, such response must be filed with the Service within 10 calendar days of service of the additional evidence (or 13 calendar days if service is by mail). If the deciding Service officer finds, after considering all additional evidence, that deportability is established by clear, convincing, and unequivocal evidence in the record of proceeding, the deciding Service officer shall issue and cause to be

served upon the alien a Final Administrative Removal Order that states the reasons for the decision of deportability.

(iii) *Conversion to proceedings under section 240 of the Act*. If the deciding Service officer finds that the alien is not amenable to removal under section 238 of the Act, the deciding Service officer shall terminate the expedited proceedings under section 238 of the Act and shall, where appropriate, cause to be issued a notice to appear for the purpose of initiating removal proceedings before an immigration judge under section 240 of the Act.

(3) *Termination of proceedings by deciding Service officer*. Only the deciding Service officer may terminate proceedings under section 238 of the Act, in accordance with this section.

(e) *Proceedings commenced under section 240 of the Act*. In any proceeding commenced under section 240 of the Act which is based on deportability under section 237 of the Act, if it appears that the respondent alien is subject to removal pursuant to section 238 of the Act, the immigration judge may, upon the Service's request, terminate the case and, upon such termination, the Service may commence administrative proceedings under section 238 of the Act. However, in the absence of any such request, the immigration judge shall complete the proceeding commenced under section 240 of the Act.

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

(1) Time of execution. Upon the issuance of a Final Administrative Removal Order, the Service

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

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

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

(g) *Arrest and detention*. At the time of issuance of a Notice of Intent or at any time thereafter and up to the time the alien becomes the subject of a Warrant of Removal, the alien may be arrested and taken into custody under the authority of a Warrant of Arrest issued by an officer listed in § 287.5(e)(2) of this chapter. The decision of the Service concerning custody or bond shall not be administratively appealable during proceedings initiated under section 238 of the Act and this part.

(h) *Record of proceeding*. The Service shall maintain a record of proceeding for judicial review of the Final Administrative Removal Order sought by any petition for review. The record of proceeding shall include, but not necessarily be limited to: the charging document (Notice of Intent); the Final Administrative

Removal Order (including any supplemental memorandum of decision); the alien's response, if any; all evidence in support of the charge; and any admissible evidence, briefs, or documents submitted by either party respecting deportability. The executed duplicate of the Notice of Intent in the record of proceedings shall be retained as evidence that the individual upon whom the notice for the proceeding was served was, in fact, the alien named in the notice.