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 *AMICUS CURIAE* IMMIGRATION REFORM LAW INSTITUTE IN SUPPORT OF THE JUDGMENT BELOW

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TABLE OF CONTENTS

TABLE OF CITED AUTHORITIES

Page

Cases

Cited Authorities

Page

Cited Authorities

Statutes

Cited Authorities

Other Authorities

INTEREST OF *AMICUS CURIAE*[1]

Amicus curiae Immigration Reform Law Institute (IRLI) is a non-profit 501(c)(3) public interest law firm dedicated to litigating immigration-related cases on behalf of, and in the interests of, United States citizens, and also organizations and communities seeking to control illegal immigration. IRLI has litigated or filed *amicus curiae* briefs in a wide variety of immigration-related cases before federal courts (including this Court) and administrative bodies, including *Trump v. Hawaii*, 585 U.S. 667 (2018); *United States v. Texas*, 599 U.S. 670 (2023); *Ariz. Dream Act Coalition v. Brewer*, 855 F.3d 957 (9th Cir. 2017); *Wash. All. Tech Workers v. U.S. Dep't Homeland Security*, 50 F.4th 164 (D.C. Cir. 2022); and *Matter of Silva-Trevino*, 26 I. & N. Dec. 826 (B.I.A. 2016).

SUMMARY OF ARGUMENT

Petitioner claims—and the government agrees—that the clear 30-day statutory deadline for filing a petition for review of a removal order in a circuit court is not jurisdictional, but subject to equitable tolling, and that a denial of withholding relief tolls this deadline. These positions, if adopted, would invite endless litigation, prevent enforcement of immigration laws, and burden the courts with dilatory claims such as the one here—outcomes that Congress, again and again, has sought to foreclose.

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

In their arguments, both petitioner and the government ignore vital distinctions, long recognized by this Court, between aliens and citizens. The Constitution does not afford aliens the same protections as it gives to U.S. citizens, and Congress regularly makes rules for aliens that would be unacceptable if applied to citizens. Accordingly, there are distinctive jurisdictional requirements in the immigration context, where Congress has pointedly sought to streamline procedures and limit delay.

Indeed, this Court has already held that the statutory deadline for filing a petition for review is jurisdictional. Congress reaffirmed this jurisdictional limitation with the introduction of a 30-day deadline for filing petitions, which remains in effect. Petitioner and the government offer no convincing ground to reverse this Court's prior holding. Contrary to the government's claim, a later decision of this Court outside of the immigration context does not provide such a ground. The presumption of reviewability that guided that decision should not apply in the immigration context, where, under the Constitution, aliens' procedural rights are limited to those Congress has chosen to afford, and where Congress has repeatedly sought finality and expedition in removal procedures.

Similarly, a denial of withholding relief by the Board of Immigration Appeals does not toll the 30-day deadline for filing a petition for review in a circuit court. Petitioner's and the government's position would create a procedural loophole permitting aliens to reset their opportunity for judicial review by strategically reentering the United States and being apprehended—an outcome

fundamentally incompatible with the goals of immigration law. Accordingly, this Court should affirm the decision below.

ARGUMENT

I. This Court should not overturn its holding that 8 U.S.C. § 1252(b)(1) is jurisdictional

As the Court-appointed *amicus* persuasively argues, this Court's decision in *Stone v. INS*, 514 U.S. 386 (1995), was that 8 U.S.C. § 1252(b)(1)'s 30-day deadline is jurisdictional. Court-Appointed Amicus Br. at 20-21. The government relies on *Santos-Zacaria v. Garland*, 598 U.S. 405, 422 (2023), to support its contrary contention, Gov't Br. at 13, but the Court in that case did not address whether the 30-day deadline is jurisdictional, and therefore did not overrule *Stone*. Nor should this Court do so now.

Despite the government's reliance on *Harrow v. Department of Defense*, 601 U.S. 480, 483 (2024), Gov't Br. at 17, that case is insufficient to support overturning *Stone*. *Harrow* held that time bars are generally not jurisdictional, and that the 60-day deadline for appealing Merit Systems Protection Board decisions under the Civil Service Reform Act fell under this general rule. *Harrow*, 601 U.S. at 480. Crucially, however, *Harrow* did not involve immigration law, where Congress has imposed strict limits on judicial review. Aliens seeking review of removal orders are not in the same position as federal employees challenging agency decisions, and immigration

proceedings do not carry the same presumption of judicial review that applies in other legal contexts.

Courts have long recognized that Congress has plenary power over immigration and can impose strict limits on judicial review. *Fiallo v. Bell*, 430 U.S. 787, 792 (1977). Since at least 1893, this Court has upheld Congress's authority to regulate immigration with minimal judicial interference. *See Fong Yue Ting v. United States*, 149 U.S. 698, 713, 731 (1893) (holding that the judiciary may not "express an opinion upon the wisdom, the policy or the justice of the measures enacted by Congress" in regulating the admission of aliens). The Court has consistently held that aliens—especially those facing removal—do not enjoy the same procedural protections as citizens in other legal contexts. *Shaughnessy v. United States ex rel. Mezei*, 345 U.S. 206, 210 (1953). In 1996, Congress enacted the Illegal Immigration Reform and Immigrant Responsibility Act (IIRIRA) to limit judicial review further and expedite removals. H.R. Rep. No. 104-828, at 219 (1996) (Conf. Rep.). More recently, this Court reaffirmed that aliens do not have the same right to judicial review as U.S. citizens. *Department of Homeland Security v. Thuraissigiam*, 140 S. Ct. 1959, 1982 (2020) ("'[a]liens seeking initial entry have no constitutional rights regarding their applications.'") (quoting *Landon v. Plasencia*, 459 U.S. 21, 32 (1982))). The Court also noted that "[e]ven without the added step of judicial review, the credible-fear process and abuses of it can increase the burdens currently 'overwhelming our immigration system.'" *Thuraissigiam*, 140 S. Ct. at 1967 (quoting 84 Fed. Reg. 33,841 (2019)). Given this history, it would be anomalous to read statutory deadlines in the immigration context as other than strict limits on judicial power.

The statute at issue in *Harrow* arose in the employment law context, where judicial review is presumed, but that rule has not been, and should not be, established in immigration law. The presumption in favor of judicial review emanates from the judiciary's role in maintaining checks and balances and protecting individual rights. *Abbott Labs. v. Gardner*, 387 U.S. 136, 140 (1967). But aliens do not enjoy the same constitutional protections as U.S. citizens. *Landon v. Plasencia*, 459 U.S. 21, 32 (1982) ("An alien seeking initial admission to the United States requests a privilege and has no constitutional rights regarding his application."). This Court has recognized that "[i]n the exercise of its broad power over naturalization and immigration, Congress regularly makes rules that would be unacceptable if applied to citizens." *Mathews v. Diaz*, 426 U.S. 67, 79–80 (1976). In contrast with citizens and lawful permanent residents, aliens have no inherent right to enter or remain in the United States, and whatever procedural protections they receive are those Congress chooses to grant. *Knauff v. Shaughnessy*, 338 U.S. 537, 542 (1950). Aliens seeking admission are entitled only to the process Congress deems appropriate, not the full spectrum of rights afforded to citizens and lawful permanent residents. *Id.*

The judiciary's role in immigration is limited because the Constitution entrusts Congress with managing admission, exclusion, and removal. *Fiallo v. Bell*, 430 U.S. 787, 792 (1977). And expansive judicial review would invite endless litigation, frustrate enforcement, and burden the courts with meritless claims designed to delay removal, *INS v. St. Cyr*, 533 U.S. 289, 308 (2001)—outcomes the opposite of those Congress has sought. The purpose of IIRIRA was to expedite immigration adjudication, and

illegal immigration has only increased, drastically, since it was passed. Because the presumption in favor of judicial review accordingly should not apply in the immigration context, cases relying on that presumption in other contexts do not provide a basis to overturn *Stone*'s holding that § 1252(b)(1)'s 30-day deadline is jurisdictional.

II. The petition for review was not timely

A. The Immigration and Nationality Act's definition of finality applies in 8 U.S.C. § 1228(b) proceedings.

Petitioners and the government deny that a removal order under 8 U.S.C. § 1228(b) is final once issued, and instead urge that its finality depends on the completion of withholding proceedings. According to the government, the expedited process of § 1228(b) is fundamentally incompatible with the definition of finality established in 8 U.S.C. § 1101(a)(47)(B), which applies to a system that includes Board of Immigration Appeals (BIA) review. Gov't Br. at 28. It argues that this incompatibility precludes the application of the § 1101(a)(47)(B) definition of finality to removal orders under § 1228(b), leaving a gap in the statutory treatment of finality for aggravated felony removals. *Id.* at 28-29.

The fact that removal orders in ordinary proceedings are appealable to the BIA, while removal orders under § 1228(b) are not, does not mean that the definition of finality in § 1101(a)(47)(B) should not apply to § 1228(b) proceedings. The government notes that a statutory definition can have different meanings across different provisions of the Act, depending on context. Gov't Br. at 29

(citing *Utility Air Regulatory Grp. v. EPA*, 573 U.S. 302, 321 (2014); *Environmental Def. v. Duke Energy Corp.*, 549 U.S. 561, 569 (2007)). It argues that the definition of finality in § 1101(a)(47)(B) cannot "sensibly" be applied in the context of § 1228(b) removal orders. *Id.* But the government disregards its own point regarding the importance of context. The entire structure of § 1228(b) proceedings—which created a more expedited process for aliens convicted of aggravated felonies—shows that Congress intended to treat this class of aliens with greater urgency. The Immigration and Nationality Act (INA) imposes stricter procedural restraints on aggravated felons than on those in standard removal proceedings. *E.g.*, 8 U.S.C. § 1226(c) (imposing mandatory detention); § 1229b(a)(3) (barring cancellation of removal). Congress expressly differentiated § 1228(b) proceedings from standard removal processes to prioritize efficiency for aggravated felons. Under § 1228(b)(5), aliens are "conclusively presumed deportable," with no right to discretionary relief or appeal to the BIA. And the statute mandates that proceedings "shall be conducted in a manner which assures expeditious removal." § 1228(b)(1). The government's position would suggest that Congress intended to apply a more lenient deadline to aggravated felons under § 1228(b) than to those in regular proceedings under § 1229(a), despite the heightened urgency surrounding the former class of aliens in all other areas of the law.

The term "final order of removal" in 8 U.S.C. § 1252(b)(1) must be interpreted in conjunction with 8 U.S.C. § 1231(a)(1)(B)(i), which defines administrative finality as the date when the Department of Homeland Security (DHS) reinstates a removal order. *Johnson v. Guzman*

Chavez, 594 U.S. 523, 534 (2021). Withholding-only proceedings under 8 U.S.C. § 1228(b) do not negate this finality, as they pertain solely to where the alien will be removed to—that he will be removed has already been determined. *Id.* at 536. Congress's use of "administratively final" in § 1231(a)(1) and "final order of removal" in § 1252(b)(1) reflects a cohesive statutory scheme: finality for judicial review attaches when the agency concludes that an alien is removable, and does not depend on collateral matters such as withholding.

In *Nasrallah v. Barr*, 590 U.S. 573, 582 (2020), this Court held that Convention Against Torture (CAT) orders "do not affect the validity of a final order of removal" and are reviewed separately. This separateness indicates that withholding proceedings are ancillary to the finality of the removal order. *Nasrallah* explicitly permits judicial review of CAT claims alongside final removal orders under 8 U.S.C. § 1252(a)(4), but it does not delay the triggering of § 1252(b)(1)'s deadline. *Guzman Chavez* affirmed that administrative finality under 8 U.S.C. § 1231(a)(1) occurs when DHS reinstates a removal order, regardless of pending withholding claims. *Guzman Chavez*, 594 U.S. at 534–35. The Court reserved the question of § 1252(b)(1)'s finality, *id.* at 535 n.6, but its reasoning aligns with § 1231(a)(1): withholding proceedings "relate only to where an alien may be removed," not to whether removal is proper. *Id.* at 536 (emphasis added).

B. Conditioning the finality of removal orders on the completion of withholding only proceedings would create a procedural loophole.

This Court has held that statutory interpretation must avoid absurd results that frustrate the purpose of the statute. *United States v. American Trucking Assns., Inc.*, 310 U.S. 534, 543 (1940). Treating a reinstated removal order as non-final for purposes of judicial review under 8 U.S.C. § 1252(b)(1) would lead to perverse outcomes fundamentally at odds with IIRIRA. For example, the Ninth Circuit's rule from *Alonso-Juarez v. Garland*, 80 F.4th 1039 (9th Cir. 2023), permits petitions years after reinstatement due to withholding proceedings, and indeed allows aliens to delay judicial review indefinitely, in violation of Congress's intent that immigration proceedings be efficiently resolved.

The Ninth Circuit's approach to finality in reinstated removal orders under 8 U.S.C. § 1252(b)(1) invites aliens to delay their removal by filing Convention Against Torture (CAT) claims. According to that circuit's reasoning, a reinstated removal order is not final for judicial review until withholding-only proceedings are completed, not upon reinstatement. *Alonso-Juarez*, 80 F.4th at 1048. By delaying finality, the Ninth Circuit effectively allows aliens to trigger withholding-only proceedings (which can take months or years to resolve) after reinstatement of the removal order, and then to petition for review after the withholding decision.

This creates a gap between reinstatement and finality, keeping the alien in the country for months or years. An alien could reenter unlawfully, triggering

reinstatement, then claim a "reasonable fear" of torture to start withholding-only proceedings. The process of filing and appealing could delay removal indefinitely. Compare that to the Fourth and Second Circuits, where the 30-day clock starts at reinstatement. If an alien's CAT claim is denied six months later, their window to petition for review has already closed in those circuits. *Martinez v. Garland*, 86 F.4th 561, 567 (4th Cir. 2023); *Bhaktibhai-Patel*, 32 F.4th 180, 193 (2d Cir. 2022). This administrative loophole is precisely what Congress sought to avoid via IIRIRA, especially for aliens convicted of aggravated felonies like Petitioner. And this Court has warned about the burdens on the immigration system caused by the exponential growth in credible-fear claims since 2008. *Thuraissigiam,* 140 S. Ct. at 1967. This Court should avoid similar consequences in the realm of CAT proceedings by foreclosing interpretations of finality, such as the Ninth Circuit's, that condition finality upon the completion of withholding-only proceedings.

CONCLUSION

For the foregoing reasons, this Court should affirm the judgment below.

Respectfully submitted,

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