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

REPLY BRIEF FOR PETITIONER

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TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

Page(s)

Cases

Cases—Continued

Cases—Continued

Statutes

Regulations

Other Authorities

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All parties evidently agree section 1252(b)(1) contains no clear statement of jurisdictional intent. Pet. Br. 17–21; Gov't Br. 20–22. That is the standard for determining whether a limitation is jurisdictional, *Boechler* v. *Commissioner*, 596 U.S. 199, 203 (2022); and the court-appointed amicus does not argue section 1252(b)(1) meets it. Amicus Br. 16–22. The debate is solely whether *Stone* v. *INS*, 514 U.S. 386 (1995), is one of the rare, exceptional precedents

establishing a time limit as jurisdictional—and, if so, whether it should be overruled.

Amicus's reading of *Stone* as a holding about jurisdiction is based on a categorical error: He assumes *Stone* decided the INA deadline for judicial review is not subject to equitable tolling. Had *Stone* made such a decision, that would not show *Stone* found the deadline jurisdictional; *Wilkins* v. *United States* rejected exactly that argument about a different precedent. 598 U.S. 152, 164 (2023). But *Stone* was not about equitable tolling. The Court considered a different concept, namely that a motion for reconsideration can make a decision non-final. Under that doctrine, the reconsideration motion restarts the appeal clock, rather than generating an exception to or altering the deadline. Consequently, the non-finality concept works the same for jurisdictional and non-jurisdictional deadlines. Characterizing the deadline as jurisdictional could not have been essential to *Stone*'s reasoning because it would not have made a difference to the question *Stone* actually addressed.

Amicus's argument that petitioner sought review too late depends on unnatural, awkward readings of the INA. Assuming the FARO is the pertinent order of removal, amicus insists it becomes final pursuant to section 1101(a)(47)(B)(2), which applies at the expiration of the time in which a noncitizen is permitted a BIA appeal. Petitioner was not permitted such an appeal on his removability. Instead of simply accepting paragraph (47)(B) does not govern, amicus proposes petitioner had an imaginary appeal right that arose and expired immediately. Similarly, section 1252(b)(8)(A) says a noncitizen detained

pursuant to section 1231 is not automatically entitled to release "after a final order of removal is issued." The structure—an "administratively final" order leading to detention under section 1231, then a final order of removal that, per this provision, does not end detention—implies those steps are conceptually distinct. Instead, amicus insists this shows they are the same.

Ordinarily, an administrative decision is not final until the administrative process is complete. Section 1252 reinforces that approach by invoking the Hobbs Act as background law. The routine process leaves a FARO unsettled until the agency completes its decision whether the FARO can be carried out as written. Amicus's alternative means a noncitizen is authorized to seek judicial "review" of withholding claims before even presenting his evidence to the agency. Finality is usually interpreted to ensure that judicial review "will not disrupt the orderly process of adjudication." *Port of Boston Marine Terminal Assn.* v. *Rederiaktiebolaget Transatlantic*, 400 U.S. 62, 71 (1970). Nothing in the INA favors the inversion that amicus's interpretation would produce.

I. Section 1252(b)(1) does not state a jurisdictional prerequisite.

A. *Stone* did not hold section 1252(b)(1) is jurisdictional.

1. Jurisdictional character was not important in Stone.

Amicus suggests *Stone* "asked and answered" whether the INA's judicial-review deadline was jurisdictional. Amicus Br. 15. In truth, that question was not even asked. *Stone* decided "whether the filing

of a timely motion for reconsideration of a [BIA] decision . . . tolls the running of the 90-day period for seeking judicial review." 514 U.S. at 388. That question needed no determination whether the 90-day period was jurisdictional, because the "tolling" at issue in *Stone* applies to both jurisdictional and non-jurisdictional deadlines.

Amicus's arguments depend on a fundamental misunderstanding that *Stone* decided the availability of *equitable* tolling. Amicus Br. 18 ("The Court marked the deadline as jurisdictional in holding that it was not susceptible to equitable tolling."). It did not. Tolling from a reconsideration motion is not an exception to the pertinent deadline. Rather, the reconsideration motion "renders the underlying order nonfinal," making the subsequent appeal "timely if filed" within the relevant deadline after "the reconsideration denial." *Stone*, 514 U.S. at 390–91.

That misunderstanding is at the core of amicus's analysis, because amicus insists the "jurisdictional" character of the 90-day deadline led *Stone* to reject tolling. That cannot be correct, because non-finality applies equally for jurisdictional and non-jurisdictional deadlines. *Missouri* v. *Jenkins*, 495 U.S. 33, 45–47 (1990) (holding petitions for panel rehearing restart the clock for seeking certiorari, a jurisdictional deadline for civil cases); *Stone*, 514 U.S. at 402 (recalling Rule 59 reconsideration motions restart the jurisdictional timeline for appealing district-court civil judgments); *United States* v. *Dieter*, 429 U.S. 6, 8–9 (1976) (same for criminal judgments); *ICC* v. *Locomotive Engineers*, 482 U.S. 270, 284–85 (1987) (same for the Hobbs Act deadline the Court has never held jurisdictional).

Stone clearly was not determining equitable tolling. Equitable tolling generally requires a litigant "pursuing his rights diligently," with "some extraordinary circumstance [that] stood in his way." *Pace* v. *DiGuglielmo*, 544 U.S. 408, 418 (2005). In contrast, non-finality needs no special showing. The rule, where applicable, is routine and automatic for every case. *See United States* v. *Ibarra*, 502 U.S. 1, 7 (1991) ("[I]t is far better that all such motions be subsumed under one general rule."). *Stone* nowhere suggested the petitioner attempted any equitable showing.[1] Rather, "[p]etitioner contends that a timely motion to reconsider renders the underlying order nonfinal." 514 U.S. at 390. Throughout, *Stone* focused on precedents involving non-finality, particularly *Locomotive Engineers*.[2]

2. Stone*'s analysis had nothing to do with subject-matter jurisdiction.*

Stone's "jurisdictional" characterization was a passing mention at the end of the opinion, an unusual

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[1] *Stone* never described the "tolling" under consideration as "equitable." In nearly its last sentence, *Stone* observed that jurisdictional deadlines "are not subject to equitable tolling." 514 U.S. at 405. It does not follow *Stone* was deciding the availability of equitable tolling, given that nothing earlier in the opinion mentioned equity and the "tolling" being proposed was an automatic, non-equitable doctrine that applies for jurisdictional deadlines, *see id.* at 402.

[2] Amicus is not the first to confuse equitable tolling and non-finality. The Court has repeatedly had to remind courts and parties of the difference. *See*, *e.g.*, *Nutraceutical Corp.* v. *Lambert*, 586 U.S. 188, 198 (2019) (reiterating that non-finality from a timely reconsideration motion "is not a matter of tolling"); *United States* v. *Ibarra*, 502 U.S. 1, 4, n.2 (1991) (summarily reversing circuit court that treated non-finality as equitable tolling).

location were that concept as essential as amicus claims. The Court ordinarily "resist[s] reading a single sentence unnecessary to the decision as having done so much work." *Arkansas Game & Fish Comm'n* v. *United States*, 568 U.S. 23, 35 (2012).

Stone's reasoning turned on a particular provision that required consolidation of two petitions—one from the BIA's primary decision and another from the denial of reconsideration. That instruction necessarily presupposed there would be two petitions. 514 U.S. at 394–95, 403–05. Whether the deadline was jurisdictional was irrelevant to that analysis.

Amicus highlights that *Stone* analogized to appellate review of district-court decisions. Amicus Br. 19. In fact, *Stone* reminded readers that Rule 59 motions *do* "toll" the deadline for appealing from district-court judgments. 514 U.S. 401–02. The actual analogy was that a motion for BIA "reconsideration" is not comparable to a Rule 59 motion, and is more like a Rule 60 motion, which does not render a district-court judgment non-final. *Id.* Nothing in *Stone*'s analogy involved the "jurisdictional" character of the appeal deadline.

Thus, *Stone*'s statement about jurisdiction was neither necessary nor sufficient for the decision. It was simply a "general expression[]," of the sort that "go[es] beyond the case," and "may be respected, but ought not to control." *Cohens* v. *Virginia*, 6 Wheat. 264, 399 (1821).

3. Stone *fails the Court's rubric for identifying jurisdictional precedents.*

The Court scrutinizes a precedent carefully before concluding it held a given limitation jurisdictional.

Santos-Zacaria v. *Garland* already determined *Stone* falls short of that mark. 598 U.S. 411, 421 (2023). The Court asks "if the prior decision addressed whether a provision . . . truly operates as a limit on a court's subject-matter jurisdiction." *Wilkins*, 598 U.S. at 160. *Santos-Zacaria* explained that *Stone* did not "attend[] to the distinction between 'jurisdictional'" and non-jurisdictional rules. 598 U.S. at 421. As to the second *Wilkins* question, whether anything turned on the jurisdictional characterization, 598 U.S. at 160, *Santos-Zacaria* explained that "whether the provision[] w[as] jurisdictional 'was not central to [*Stone*]," *Id.* at 421.

Amicus identifies no basis for rejecting those conclusions. Amicus deprecates *Santos-Zacaria* because it assessed section 1252(d)(1)'s exhaustion requirement rather than section 1252(b)(1). Amicus Br. 24. That was an additional observation in *Santos-Zacaria*. 598 U.S. at 421–22. But the Court's primary response to *Stone* was more direct: "Neither *Stone* nor *Nken* attends to the distinction between 'jurisdictional' rules (as we understand them today) and non-jurisdictional but mandatory ones." *Id.* at 421. Amicus, contradicting that simple, clear statement, bleeds ink for pages insisting *Stone* actually was about that distinction.

Amicus pretends *Santos-Zacaria* just explained that *Stone* did not apply the current-day "clear-statement" rule for identifying jurisdictional provisions. Amicus Br. 25–26. Amicus has it backwards. Under *Wilkins*, the question is not whether an old precedent found a "clear statement" in a statutory provision, but whether that old case itself "definitively" interpreted the provision as

jurisdictional. 598 U.S. at 165. *Stone* did not, which is what *Santos-Zacaria* observed.

Asking the Court to evaluate *Stone* again, amicus presents arguments that fail under *Wilkins*.

First, amicus relies on the notion that *Stone* rejected equitable tolling. Amicus Br. 19–20, 23. As discussed above, that premise is wrong. It would be inadequate even if it were correct. *Wilkins* assessed a precedent that actually found equitable tolling unavailable for a given deadline, and that holding did not amount to a holding about jurisdiction. 598 U.S. at 164.

Second, amicus says *Stone* "articulated a 'broader system-related goal.'" Amicus Br. 20. Amicus is glossing *Stone*; the opinion did not distinguish this as a goal "at the level of the overall system" as amicus claims, *ibid*. Regardless, *Wilkins* does not accept an opinion's implicit, unstated thoughts as jurisdictional holdings.

Third, amicus notes *Stone* analogized to two other known "jurisdictional" provisions. Amicus Br. 20–21. That is exactly the unthinking use of the word that *Wilkins* said is not enough. The *Wilkins* inquiry is whether the prior decision "addressed" the truly jurisdictional character of its decision. *Stone* did not.

Finally, amicus contends *Bowles* v. *Russell*, 551 U.S. 205 (2007), bars the Court from reading *Stone* carefully. Amicus Br. 27. *Bowles* noted the Court "has long held that the taking of an appeal within the prescribed time is 'mandatory and jurisdictional,'" 551 U.S. at 209; and *Bowles* then adhered to that rule. Amicus appears to believe that after *Bowles*, any decision using the phrase "mandatory and

jurisdictional" must be a jurisdictional precedent. Amicus Br. 27.

The Court previously rejected that notion. "[T]his Court once used that phrase in a 'less than meticulous' manner," and "[t]hose earlier statements did not necessarily signify that the rules at issue were formally 'jurisdictional.'" *Nutraceutical*, 586 U.S. at 192, n.3. Moreover, the Court already restricted the scope of *Bowles*: It "governs statutory deadlines to appeal 'from one Article III court to another,'" but the "*Bowles* exception" does not apply to appeals "from an agency." *Harrow* v. *Department of Defense*, 601 U.S. 480, 489 (2024). *Bowles* was "exceptional," partly by resting on "a line of precedents." *Id.* at 488. Indeed, that the deadline for appeals from district courts is jurisdictional is a doctrine of ancient lineage. *Bowles*, 551 U.S. at 210 (quoting *United States* v. *Curry*, 6 How. 106 (1848)). *Stone*'s one-off dictum lacks that pedigree.

B. Were *Stone* a jurisdictional holding, the Court should overrule it.

1. IIRIRA did not codify Stone.

Amicus suggests that the Illegal Immigration Reform and Immigrant Responsibility Act ("IIRIRA"), the 1996 overhaul of the INA, preserved *Stone*'s supposed jurisdictional holding, because a different case—*John R. Sand & Gravel Co.* v. *United States*, 552 U.S. 130 (2008)—concluded a 1948 recodification preserved the jurisdictional character of the six-year deadline for Court of Claims suits. Amicus Br. 21. *John R. Sand* relied on characteristics particular to the 1948 enactment of Title 28 as positive law. 552 U.S. at 134–36. Amicus expands that statute-specific

observation into a novel doctrine upending settled principles of statutory interpretation.

The 1948 recodification was meant to "codify, not substantively modify, existing law." *Id.* at 136 (citing committee report). Consequently, "no changes of law or policy are to be presumed from changes of language in the [1948] revision unless an intent to make such changes is clearly expressed." *Fourco Glass Co.* v. *Transmirra Products Corp.*, 353 U.S. 222, 227 (1957); *see John R. Sand*, 552 U.S. at 136 (citing *Fourco*).

From those precedents specific to the 1948 enactment of Title 28, amicus creates a broader rule about evaluating statutory change overall: "[t]o abrogate a prior decision that a statutory provision is jurisdictional, Congress must 'clearly express[]' its intent to do so." Amicus Br. 21 (alteration in original). Amicus's proposed new clear-statement principle has no basis in *John R. Sand* or anywhere else. To the contrary, "[w]hen Congress amends legislation, courts must 'presume it intends [the change] to have real and substantial effect.'" *Ross* v. *Blake*, 578 U.S. 632, 641–42 (2020) (second alteration in original).

Moreover, IIRIRA was not a recodification. It "repealed the old judicial-review scheme . . . and instituted a new . . . one." *Reno* v. *American-Arab Anti-Discrimination Comm.*, 525 U.S. 471, 475 (1999). Were clear intentions to modify the law required, that intent shines through IIRIRA in every pore.

Amicus thinks IIRIRA reinforces *Stone*'s supposed precedential weight, because IIRIRA replaced "may" with "must." Amicus Br. 21–22. "That [a] deadline is stated in mandatory terms" has "'no consequence' [for] the jurisdictional issue." *Harrow*, 601 U.S. at 485.

IIRIRA also shortened the deadline to 30 days; but shorter does not mean more jurisdictional. The Court has rejected jurisdictional status for timing requirements ranging from 12 years, *Wilkins*, 598 U.S. 152, to 30 days, *Boechler*, 596 U.S. 199.

2. Stare decisis *does not warrant preserving the* Stone *dictum.*

Amicus demands a "superpowered form of *stare decisis*" purportedly derived from *Kimble* v. *Marvel Entertainment, LLC*, 576 U.S. 446 (2015). Amicus Br. 28. Amicus omits *Kimble*'s actual justification for that "superpowered form": The decision *Kimble* left undisturbed was "at the intersection of . . . property . . . and contracts," and "[in] 'cases involving property and contract rights' . . . considerations favoring *stare decisis* are 'at their acme.'" 576 U.S. at 457. "[T]he opposite is true in cases . . . involving procedural and evidentiary rules," *Payne* v. *Tennessee*, 501 U.S. 808, 828 (1991), a bucket in which *Stone* certainly fits.

> "[W]here statutory precedents have been overruled, the primary reason . . . has been the intervening development of the law, through either the growth of judicial doctrine or further action taken by Congress. Where such changes have removed or weakened the conceptual underpinnings from the prior decision, . . . or where the later law has rendered the decision irreconcilable with competing legal doctrines or policies, . . . the Court has not hesitated to overrule an earlier decision."

> *Patterson* v. *McLean Credit Union*, 491 U.S. 164, 173 (1989) (citations omitted).

All those justifications are present here. The *Arbaugh* principle is certainly a "growth of judicial doctrine" "weaken[ing] the conceptual underpinning" of *Stone*'s statement that timelines are jurisdictional.

Amicus says petitioner simply complains *Stone* was incorrect. Amicus Br. 30. Actually, *Santos-Zacaria* already observed that *Stone* is in tension with the proper understanding of jurisdiction developed since *Arbaugh*. *See* 598 U.S. at 421–22.

Amicus asserts it is workable, in the relevant sense, for the INA deadline to be jurisdictional. Amicus Br. 28. By contrast, *Knick* v. *Township of Scott* overruled a settled interpretation of 42 U.S.C. § 1983 precisely because it often barred federal lawsuits that the statute was intended to allow. 588 U.S. 180, 204 (2019).

Finally, amicus's contention that Congress relied on *Stone* is pure speculation. When Congress overhauled the INA, it restructured the judicial review provisions and changed the wording of the deadline. Congress can only be said to ratify an interpretation if it "reenacts [the relevant provision] without change." *Jama* v. *Immigration and Customs Enforcement*, 543 U.S. 335, 349 (2005). Nothing about IIRIRA suggests Congress was contemplating whether the old deadline was jurisdictional, much less relied on *Stone* to make it so. Congress "*might* have preferred a jurisdictional rule," as amicus hypothesizes, Amicus Br. 29 (emphasis added); but it might not, or it might not have had a preference.

II. Petitioner filed within 30 days of a final order of removal.

Amicus's arguments that the FARO was final when issued misread *Nasrallah* and *Guzman Chavez* and over-extrapolate from scraps of statute taken out of context.

A. Petitioner's FARO became final at the time of the BIA decision.

Amicus insists a BIA order denying CAT relief cannot also mark the finality of an order of removal. Amicus Br. 33. *Nasrallah* v. *Barr*, 590 U.S. 573 (2020), said no such thing. *Nasrallah* held only that the decision on CAT relief is not itself a decision on removal. *Id.* at 582. It did not say a document granting or denying CAT relief cannot also include a grant or denial of relief from removal. A statement like that would have made nonsense of the record before the Court: The BIA's *Nasrallah* decision determined removability and denied CAT relief, and a single document both ordered removal and denied withholding. Pet. App. 13a, 21a, *Nasrallah* v. *Barr*, 590 U.S. 573 (2020)

Here, petitioner's FARO issued in January 2021 was an order of deportation. But it did not become final for purposes of judicial review until the BIA resolved whether the order could be carried out on its stated terms.

Nasrallah was rooted in respect for Congress's decision to allow judicial review of CAT claims. Had *Nasrallah* determined that CAT decisions cannot also make removal orders final, *Nasrallah* would have contained the seeds of destruction for the very policy (set forth in the statute) that informed the decision.

The Court would have proclaimed CAT decisions reviewable in theory while simultaneously blocking that review for a wide variety of them.

Amicus cites two provisions purportedly making the FARO the final order of removal. Amicus Br. 33–34. But neither provision shows *when* the order becomes final, which is the question here. And neither makes the FARO final immediately upon issuance.

Amicus's first provision simply specifies that whoever adjudicates a "final order of removal" in administrative-removal proceedings cannot be the same one who "issues the charges." Amicus Br. 33–34 (quoting 8 U.S.C. § 1228(b)(4)(F)). That the FARO was not final until the BIA decision is consistent with that restriction.

Second, the statute bars the government from "execut[ing] any order of removal" issued under such proceedings "until 14 calendar days have passed, . . . in order that the alien has an opportunity to apply for judicial review." Amicus Br. 34 (quoting 8 U.S.C. § 1228(b)(3)). This does not make a FARO "subject to immediate judicial review" as amicus claims. Section 1228(b)(3) does not itself authorize judicial review; if it did, that would be an unusual exception to the scheme of section 1252. Rather, section 1228(b)(3) provides limited protection by mandating a short pause on execution, for a stated purpose ("in order that").

That purpose may be fully accomplished in many cases by a 14-day pause after the FARO. For example, the regulations allow a noncitizen to "designate his or her choice of country for removal." 8 C.F.R.

§ 238.1(c)(1). Someone who chooses a given country presumably does not fear persecution or torture there. Many others may simply not have grounds for withholding, or other issues needing further administrative decisionmaking.

That does not mean the FARO is always "final" for judicial review at the moment it issues. DHS's and DOJ's regulations say the FARO must identify the country of removal, 8 C.F.R. § 238.1(f)(2), § 1238.1(f)(2); if the noncitizen requests withholding the case must include a reasonable-fear determination and further proceedings if warranted, 8 C.F.R. § 238.1(f)(3), § 1238.1(f)(3); and the noncitizen "shall not be . . . removed" while that process is pending, 8 C.F.R. § 208.5(a), § 1238.5(a). Those proceedings may well make it impermissible (due to a grant of withholding) to execute the FARO as written, precisely because the FARO must designate the country of removal. Pet. Br. 32. Yet again, that the statute suggests a FARO can become a final order teaches nothing about *when* it becomes final. Finality requires the "consummation of the administrative process" by "dispos[ing] of all issues as to all parties." Pet. Br. 30 (quoting *Chicago & Southern Air Lines* v. *Waterman S.S. Corp.*, 333 U.S. 103 (1948); *Natural Resources Defense Council, Inc.* v. *NRC*, 680 F.2d 810 (D.C. Cir. 1982)).

Amicus insists that because of section 1228(b)(3), the Court must interpret the INA so every noncitizen can seek judicial review of a FARO within 14 days of issuance. Amicus Br. 38. But Congress "need not address all aspects of a problem in one fell swoop," *TikTok Inc.* v. *Garland*, 145 S. Ct. 57, 70 (2025), and section 1228(b)(3) gives no hint that was the goal.

Certainly amicus cannot contend section 1228(b)(3) was meant to alter or override the 30-day deadline in section 1252(b)(1). Section 1228(b)(3) provides a minimum protection that may help some noncitizens; while for others, a bar against removal to countries that might persecute or torture them comes from other sources, such as 8 U.S.C. § 1231(b)(3) or FARRA. That Congress provided the short 1228(b)(3) window does not obligate agencies to conclude their administrative process within that window, nor determine that all removal orders are necessarily final for judicial review when that window starts.

B. The definition of "order of deportation" does not determine finality here.

While amicus argues in passing, and incorrectly,[3] that section 1101(a)(47)(B) defines "final" for a removal order, amicus admits, as he must, that neither circumstance recited in paragraph (B) comes

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[3] Amicus relies on the fact that section 1101 is entitled "Definitions." But the Court has repeatedly explained that "[a] title or heading should never be allowed to override the plain words of a text." *Fulton* v. *Philadelphia*, 593 U.S. 522, 536 (2021). Furthermore, section 1101 contains other provisions that, like paragraph (47)(B), are clearly not definitions. *E.g.*, 8 U.S.C. § 1101(e)(2) (a "presumption" of affiliation); 8 U.S.C. § 1101(f) (disqualification from being considered to have "good moral character"); 8 U.S.C. § 1101(g) (when a departure is considered "in pursuance of law"); 8 U.S.C. § 1101(i) (requiring DHS to refer noncitizens to certain nongovernmental assistance organizations).

Even if paragraph (47)(B) defined "final"—contrary to its text—the putative definition would not apply here; it simply does not fit because petitioner's removal order would *never* be final. "[A] statutory term—even one defined in the statute—may take on distinct characters" where the context necessitates. *Utility Air Regulatory Group* v. *EPA*, 573 U.S. 302, 320 (2014).

to pass in an administrative-removal proceeding—because there is no right to appeal removability to the BIA in such a matter. Amicus Br. 35.

The implication straightforwardly follows that paragraph (B) does not instruct the Court when an order becomes final in this sort of case. Consequently, the Court must interpret that word using the ordinary tools of interpretation, as set forth in petitioner's brief. Pet. Br. 38.

To avoid that result, amicus twists paragraph (B) to cover a situation it does not fit. Amicus theorizes that petitioner's period for seeking BIA review expired instantaneously upon issuance of the FARO. Amicus Br. 35.[4] Like the virtual quantum particles that theoretically pop into and out of existence in a vacuum, the review period apparently arose and immediately ended, with no observable effect besides the destruction of judicial review.[5]

But statutory interpretation is not quantum physics. Paragraph (B)(2) says an order becomes final upon expiration of the "period in which the [noncitizen] *is permitted* to seek review" from the BIA.

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[4] Amicus hypothesizes a corporate policy making health-insurance benefits available "upon the expiration of the probationary period," with the company then "exempt[ing] one new hire from the probationary period." Amicus Br. 41. The analogy fails, because it presupposes the company offers no other way to qualify for benefits; whereas here it is obvious how a decision could become final without resort to paragraph (47)(B). Also, if a company established entire categories of hires without probation—like Congress established the administrative-removal process—the company would surely revise its benefits policy if it was meant to exhaustively detail the path to benefits.

[5] *See* W. Schmitz, *Particles, Fields, and Forces*, 126–135 (2019).

8 U.S.C. § 1101(a)(47)(B)(2) (emphasis added). Cases in which a noncitizen is not permitted to seek review are not covered by that clause.

The Court need not stretch paragraph (B) as amicus does, because there is no indication Congress meant paragraph (B) to cover the waterfront. The statute simply mandates what happens in two situations. Ordinary English and background principles of administrative law are ample sources for understanding what happens outside those two.

C. "Administratively final" is not the same as "final."

Amicus relies heavily on *Johnson* v. *Guzman Chavez*, 594 U.S. 523 (2021). But that case addressed when an order is "administratively final" under section 1231 and expressly left open the question of when an order is "final" for section 1252. 594 U.S. at 535, n.6. Amicus's insistence on collapsing these terms is unsupported by *Guzman Chavez* and contravenes the "meaningful-variation canon," *Southwest Airlines Co.* v. *Saxon*, 596 U.S. 450, 457–458 (2022).

Amicus plucks out two places where *Guzman Chavez* said a withholding proceeding does not make the removability decision "non-final" or affect its "finality." *Amicus* Br. 37.[6] His error is one the Court often criticizes: "[I]t is a mistake to parse terms in a judicial opinion with the kind of punctilious exactitude due statutory language." *Goldman Sachs Group, Inc.* v. *Arkansas Teachers Retirement System*,

[6] As in the opening brief, petitioner uses "withholding" to refer to withholding or deferral of removal.

594 U.S. 113, 135 (2021) (Gorsuch, J., concurring in part) (citing *Reiter* v. *Sonotone Corp.*, 442 U.S. 330 (1979)). In the context of what *Guzman Chavez* decided, the Court meant administrative finality. The Court stated it was not deciding what makes an order "final," 594 U.S. at 535, n.6; and the opinion cannot be read to contradict itself simply because it omitted the word "administratively" in two instances.

Moreover, that additional agency processes do not alter the conclusion about removability does not erase the distinction between "administratively final" and "final." It is commonplace for a decision to be administratively final but not final for judicial review. The effect of reconsideration motions, discussed above, is one way. Indeed, *Locomotive Engineers* addressed an agency's refusal to reconsider its decision. "[A]n order which merely denies rehearing," the Court explained, "is not itself reviewable," precisely because absent that rehearing the underlying decision was unalterable. 482 U.S. at 280. Surely the underlying order was administratively final (though *Locomotive Engineers* did not use that terminology). Yet, in line with ordinary practice, that order was not final until the petition for reconsideration was resolved. *Id.* at 285. Non-finality from a motion for reconsideration is not at issue here. But as *Locomotive Engineers* illustrates, it is ordinary and unsurprising for a decision to be administratively final, yet not final for judicial review.

Amicus offers no good reason to disregard the usual presumption that adding a distinct word in "administratively final" gives that term a different

meaning from "final order" in section 1252.[7] He says Congress used the terms "interchangeably," Amicus Br. 36, but gives only a lone example—an example, moreover, that actually confirms the different meaning. "Nothing in this subsection," amicus notes, "prevent[s] the Attorney General, after a final order of removal has been issued, from detaining the alien under section 1231(a)." *Id.* (citing 8 U.S.C. § 1252(b)(8)(A)). Amicus suggests "final order" must therefore be the same as "administratively final," since the latter is the section 1231(a) trigger. Amicus Br. 36. But "after a final order" would then be superfluous. Section 1231(a) already does not authorize detention until there is an administratively final removal order. 8 U.S.C. § 1231(a)(2)(B)(i). A more sensible reading is that section 1252(b)(8)(A), focused on judicial review, clarifies that for a noncitizen in section 1231(a) detention—thus necessarily already having an administratively final order—detention does not have to stop "after a final order" just because judicial review is available. Thus, far from using the terms interchangeably, section 1252(b)(8)(A) contemplates that "administratively final" happens earlier than "final."

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[7] Amicus proposes Congress used the word "administratively" in section 1231(a) to distinguish between the agency's order and a court's order after judicial review. Amicus Br. 47. But section 1231(a) calls the latter "the court's final order." The agency's order is called "the order of removal." 8 U.S.C. § 1231(a)(1)(B). The two could not possibly be confused; after all, as amicus points out elsewhere, Amicus Br. 21, "order of removal" clearly means a "deportation order" which the statute defines to be an agency order. Redoubling—or retripling—the distinction by adding the word "administratively" would be genuine surplusage.

D. Under the ordinary meaning of "final," petitioner's removal order was final only upon the BIA decision.

Amicus criticizes petitioner for invoking doctrines of finality under the Hobbs Act. Amicus Br. 42. But the Hobbs Act doctrines, like those under 28 U.S.C. § 1291, result from the ordinary meaning of the word. Pet. Br. 30–31. The word "final" has also acquired a well-understood meaning from decades of precedent, particularly under the Hobbs Act. It would hardly be novel for the Court to rely on that meaning, given section 1252(a)(1) says expressly that review is generally governed by the Hobbs Act. That petitioner and the government focused on different contexts in which the ordinary meaning of finality has been elaborated, *see* Amicus Br. 42–45, does not matter. The concept is the same for Hobbs Act review as for appeal from district courts, as petitioner already pointed out. Pet. Br. 31.

Amicus notes that DHS "retains its authority," during withholding proceedings, to remove a noncitizen to another country not named in the removal order. Amicus Br. 43. That statement is incomplete, in ways *Guzman Chavez* did not discuss because they were irrelevant. Namely, before removing a person to a different country, DHS would have to revise the removal order to identify that country. That obligation follows from section 1231(b)(3) (for statutory withholding) and from FARRA and CAT. Tr. of Oral Arg. in *Johnson* v. *Guzman Chavez*, No. 19-897, pp. 20–21 (Jan. 11, 2021). Moreover, regardless whether the government has *authority* to carry out a removal, the government's processes prohibit it from doing so until it has

addressed any raised objections that the designated destination is impermissible. That is the difference between removability being "administratively final" and the removal order being "final" for judicial review. Until withholding proceedings are completed, the removal order may need to be revised, so the administrative process remains incomplete.

Resisting the government's analogy to district-court proceedings, amicus says a district court might stay its judgment pending appeal but that stay does not make the judgment less final. Amicus Br. 44–45. Amicus has mixed his metaphors. The BIA is part of the administrative process. For the administrative body to pause its decision pending its own internal review would be like a district court's issuing an order with a statement that parties do not need to comply until the court determines whether the order needs revision. That order would be interlocutory, not final. Even more so if, rather than the court's deciding to pause an order on a case-by-case equitable basis, a rule stated that such an order cannot be enforced until the district court decides all aspects of it are proper.

E. Section 1252's structure and context confirm an order of removal is final only when all agency proceedings are completed.

Petitioner pointed out that the exhaustion requirement and the zipper clause require one complete case at the end of the administrative process. To think that complete case must be initiated within 30 days of the FARO would mean either a court reviews a withholding decision the agency has not even made yet—an absurd result—or a noncitizen

cannot obtain review of a CAT decision, contrary to the REAL ID Act.

Amicus thinks section 1252(d)(1)'s exhaustion requirement cannot be relevant. First, he says the requirement covers only administrative remedies regarding removability. Amicus Br. 45. But paragraph (d)(1) refers to "all administrative remedies available . . . as of right," without the qualification that amicus wants to insert. Second, amicus suggests petitioner's argument would mean every noncitizen must request withholding in every case. Amicus Br. 45. But not every noncitizen has a plausible basis for requesting withholding. Meanwhile, amicus's interpretation of section 1252 (and of its exhaustion requirement) means a noncitizen is not just forced, but also *allowed* to seek judicial review of his withholding claim before he has even presented his evidence to the agency. It is unlikely Congress intended such a topsy-turvy manner of judicial "review."

Amicus stresses the zipper clause only allows judicial review of timely petitions. Amicus Br. 48. True. But amicus sidesteps the point. When Congress specifies that judicial review is available for CAT orders, *and* says judicial review of those orders must be part of judicial review of a final order of removal, *and* makes a petition due within 30 days of the final order, that combination strongly suggests the removal order does not become final until it is possible to seek judicial review of the full package of administrative decisions.

Amicus does not deny the timing restrictions petitioner previously set forth, Pet. Br. 40–42, make it

impossible to file a petition that is both within 30 days of the FARO and after the withholding decision. That fact means the Fourth Circuit's (and amicus's) interpretation denies judicial review of withholding claims for anyone in administrative-removal proceedings. Amicus also does not deny such a denial would contravene the presumption of judicial review. Amicus Br. 48.

Amicus's only response is to suggest petitioner conceded review is not literally impossible—because petitioner hypothesized ways a noncitizen could try to get review despite the contradictions. Amicus Br. 48–49. The Court has not required a showing of absolute impossibility before being informed by the presumption of judicial review. To the contrary, an interpretation that effectively forecloses review is also disfavored. *Kucana* v. *Holder*, 558 U.S. 233, 251–252 (2010).

Regardless, petitioner showed that review is actually impossible. Pet. Br. 42–43. Petitioner's speculations about what alternatives a noncitizen might try simply illustrates that such efforts would be ineffective, unworkable, or require the government's grace. The attempts discussed by the National Immigration Litigation Alliance, which amicus cites, Amicus Br. 50, n.5, have the same character. One noncitizen asked DHS to reissue a removal order thereby generating a fresh order for the Fourth Circuit to deem final. Nothing obligates DHS to grant such kindness. Another noncitizen reached agreement with the government that he could file a petition for review, then have the government stipulate to its dismissal without prejudice and refiling after the eventual BIA decision. This solution

is also contingent on the government's grace. Review that is only available if the agency decides to allow it is not true judicial review. "Separation-of-powers concerns . . . caution us against reading legislation, absent clear statement, to place in executive hands authority to remove cases from the Judiciary's domain." *Kucana*, 558 U.S. at 237.

CONCLUSION

For these reasons and those stated in the opening brief, the Court should reverse the Fourth Circuit's judgment and remand for further proceedings.

Respectfully submitted,

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