No. 23-1270

IN THE
Supreme Court of the United States

PIERRE YASSUE NASHUN RILEY, *Petitioner,*

v.

MERRICK B. GARLAND, U.S. ATTORNEY GENERAL,
Respondent.

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

BRIEF *AMICI CURIAE* OF FORMER U.S. ATTORNEYS GENERAL IN SUPPORT OF NEITHER PARTY

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INTEREST OF *AMICI CURIAE*[1]

Respondent has stated that he agrees with Petitioner on both questions presented. *See* Br. for Resp. 6–7 (Sept. 13, 2024) (agreeing "Petitioner is correct" on both questions).

Amici curiae are William P. Barr, Jefferson B. Sessions III, and Michael B. Mukasey, former United States Attorneys General whose terms spanned three presidential administrations. They respectfully submit this brief in support of the judgment below. *Amici* have unique insights into the nation's immigration system, *see* 6 U.S.C. § 521 (immigration courts are "subject to the direction and regulation of the Attorney General"), and they also filed a brief opposing a grant of certiorari in this case. They are the only ones supporting the judgment below.

To ensure adversarial argument and defense of the judgment below, *Amici* intend to seek leave to present oral argument. Their counsel was previously appointed in the Second Circuit to defend that court's precedent, which is identical to the Fourth Circuit's precedent (at issue here) on the questions presented.

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[1] No counsel for any party has authored this brief in whole or in part, and no entity or person, aside from *Amici*'s counsel, made any monetary contribution intended to fund the preparation or submission of this brief.

SUMMARY OF THE ARGUMENT

"Policies pertaining to the entry of aliens and their right to remain here" are "entrusted exclusively to Congress." *Galvan v. Press*, 347 U.S. 522, 531 (1954). In 1996, frustrated with delays in the immigration system, Congress enacted the Illegal Immigration Reform and Immigrant Responsibility Act, which "toed a harder line" against illegal reentrants and aliens with aggravated felony convictions (like Petitioner). *Fernandez-Vargas v. Gonzales*, 548 U.S. 30, 34 (2006).

Congress subjected such aliens to expedited removal, shortened the time for criminal aliens to seek judicial review (and narrowed the bases for doing so), and mandated that illegal reentrants are "not eligible and may not apply for *any* relief under this chapter." 8 U.S.C. §§ 1228(b), 1231(a)(5) (emphasis added), 1252(a)(2)(C)–(D).

Congress could not have been clearer that it was ending the loopholes and incentives for delay *in the exact circumstances* raised by Petitioner here. The number of aliens in the system has only grown since 1996, yet in the proceedings below, the government adopted Petitioner's position and refused to defend the Fourth Circuit's caselaw foreclosing review of Petitioner's challenge to the BIA's denial of relief under the Convention Against Torture ("CAT").[2] The

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[2] Gov't Rule 28(j), *Riley v. Garland*, No. 22-1609 (4th Cir. Aug. 14, 2023) (abandoning prior positions and supporting Petitioner).

government has even separately called for the Second Circuit's similar precedent to be overturned.[3]

This Court should affirm. On the first question presented—whether the 30-day deadline in 8 U.S.C. § 1252(b)(1) is jurisdictional—statutory *stare decisis* strongly favors adhering to this Court's nearly 30-year-old precedent in *Stone v. INS*, 514 U.S. 386 (1995), which expressly held that § 1252(b)(1) is "mandatory and jurisdictional," *id.* at 405. Although this Court has since moved away from *Stone*'s general framework, the Court has never expressly overruled its specific holding on § 1252(b)(1), and none of the factors for overruling statutory caselaw are present here.

On the second question presented—whether an alien satisfies § 1252(b)(1)'s deadline by filing a petition for judicial review within 30 days of a freestanding order denying withholding of removal or CAT relief—the Fourth Circuit got it exactly right. This Court's recent precedents confirm that freestanding orders denying withholding-of-removal or CAT relief (collectively referred to as "withholding-only" relief) do not merge with nor toll the time to seek review of the *underlying* removal order. This makes perfect sense: Congress singled out illegal reentrants and aggravated criminals (like Petitioner) for extraordinarily streamlined removal and review. They may receive executive-branch review of their

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[3] Br. for Resp't, *Castejon-Paz v. Garland*, No. 22-6024 (2d Cir. Jan 10, 2024); Br. for Resp't, *Cerrato-Barahona v. Garland*, No. 22-6349 (2d Cir. Jan. 10, 2024).

withholding-only claims, but they are not necessarily entitled to judicial review of those claims, as well.

Given that Petitioner and Respondent agree on the merits, *Amici* intend to ask this Court to grant leave to participate in oral argument and ensure the judgment below is properly defended.

ARGUMENT

I. *Stare Decisis* Dictates That Section 1252(b)(1) Remains Jurisdictional.

Petitioner and Respondent argue that 8 U.S.C. § 1252(b)(1)'s 30-day filing deadline is no longer jurisdictional. But most circuits disagree because this Court held nearly 30 years ago that § 1252(b)(1) is jurisdictional, *Stone*, 514 U.S. at 405, a holding this Court has gone out of its way to avoid overruling despite changing the general framework for evaluating whether deadlines are jurisdictional. Nor does this issue satisfy any of the *stare decisis* elements for overruling a statutory interpretation precedent. The Court should accordingly adhere to its longstanding view that § 1252(b)(1)'s deadline is jurisdictional.

A. The Court Has Avoided Overruling *Stone*'s Holding on Section 1252(b)(1).

In *Stone*, this Court held that the filing deadline in § 1252(b)(1) is "mandatory and jurisdictional." *Stone*, 514 U.S. at 405. At the time *Stone* was decided, the provision was codified at 8 U.S.C. § 1105a(a)(1) and imposed a 90-day deadline in most circumstances but otherwise is materially identical to the current

§ 1252(b)(1). "This Court does not infer that Congress, 'in revising and consolidating the laws, intended to change their policy, unless such an intention be clearly expressed.'" *Oklahoma v. Castro-Huerta*, 597 U.S. 629, 645 (2022). Accordingly, *Stone*'s holding on the jurisdictional nature of the filing deadline for a petition for review under the INA still stands, despite the minor changes in the statute in the intervening years.

To be sure, in the years since *Stone*, this Court has moved away from the notion that *Stone* imposed a rigid jurisdictional rule for *other* statutory requirements. *See, e.g.*, *Santos-Zacaria v. Garland*, 598 U.S. 411, 421 (2023); *Henderson ex rel. Henderson v. Shinseki*, 562 U.S. 428, 437 (2011). But the Court has carefully avoided overruling *Stone*'s specific holding on § 1252(b)(1).

For example, this Court conspicuously declined to list § 1252(b)(1) among provisions in the INA that are "nonjurisdictional in nature." *Santos-Zacaria*, 598 U.S. at 420. That omission is especially telling because the Court *did* list the very next subsection (i.e., § 1252(b)(2)). Although *Santos-Zacaria* says that *Stone* cannot stand as precedent on whether the "*exhaustion requirement* [in § 1252(d)(1) is] jurisdictional," 598 U.S. at 422 (emphasis added), it does not say *Stone* is overruled regarding § 1252(b)(1)'s *filing deadline* requirement. It would have been easy to say *Stone* was overruled *in toto*, yet *Santos-Zacaria* went out of its way to avoid saying so.

Indeed, in its pro-petitioner briefing at the Second Circuit on these issues, even the government

admitted that "*Santos-Zacaria* did not consider or discuss whether the timing of the petitioner's petition for judicial review in the court of appeals might have presented a separate jurisdictional defect," confirming *Santos-Zacaria* did not overrule—indeed, did not even address—*Stone*'s holding on § 1252(b)(1). Gov't Br. 23–24, *Castejon-Paz v. Garland*, No. 22-6024 (2d Cir.).

In its cert-stage response brief (Br. for Resp. 9–10), the government claimed that *Harrow v. Dep't of Defense*, 601 U.S. 480 (2024), confirms *Stone* is no longer good law even for § 1252(b)(1), but the government carefully avoids claiming that *Stone*'s specific holding has actually been overruled. Further, *Harrow* said only that time limits "are *generally* non-jurisdictional," but not *always*. 601 U.S. at 489 n.* (emphasis added).

Given all this, it should come as no surprise that most circuit courts have held that this Court has not overruled *Stone*'s holding on § 1252(b)(1), despite the Court's change in approach to questions of jurisdictionality. *See, e.g., Allen v. U.S. Att'y Gen.*, No. 23-13044, 2024 WL 164403, at *2 (11th Cir. Jan. 16, 2024); *FJAP v. Garland*, 94 F.4th 620, 626 (7th Cir. 2024); *Kolov v. Garland*, 78 F.4th 911, 917 (6th Cir. 2023); *Arostegui-Maldonado v. Garland*, 75 F.4th 1132, 1140 (10th Cir. 2023); *Valderamos-Madrid v. Garland*, No. 21-6221, 2023 WL 5423960, at *1 (2d Cir. Aug. 23, 2023); *Salgado v. Garland*, 69 F.4th 179, 181 n.1 (4th Cir. 2023).[4] The fact that some of these

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[4] The Fifth Circuit has issued conflicting decisions on the issue. *Compare Quintanilla-Benitez v. Garland*, No. 22-60289, 2023

opinions are unpublished shows the issue was so obvious that it was not even debatable.[5]

As demonstrated next, adhering to *Stone*'s holding accords with *stare decisis* and this Court's treatment of other jurisdictionality holdings.

B. *Stare Decisis* Strongly Favors Adhering to *Stone*'s Holding on Section 1252(b)(1).

This Court looks to several factors when determining whether to overrule its precedent: "the nature of the[] error, the quality of the[] reasoning, the 'workability' of the rules … imposed on the country, the[] disruptive effect on other areas of the law, and the absence of concrete reliance." *Dobbs v. Jackson Women's Health Org.*, 597 U.S. 215, 268 (2022). None of these factors favors overruling *Stone*'s specific holding on § 1252(b)(1).

Nature of the Error. Parties asking this Court to overrule statutory interpretations face an especially daunting task. "[*S*]*tare decisis* carries enhanced force when a decision … interprets a statute" because "critics of our ruling can take their objections across the street, and Congress can correct any mistake it

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WL 8519115, at *1 (5th Cir. Dec. 8, 2023), *with Argueta-Hernandez*, 87 F.4th 698, 705 (5th Cir. 2023).

[5] *See United States v. Montague*, 67 F.4th 520, 535 n.4 (2d Cir. 2023) (Menashi, J.) ("[N]onprecedential decisions should be used only when the legal issue is clear enough that all reasonable judges will come out the same way," meaning the issue was "so 'clear or obvious, rather than subject to reasonable dispute,' that an opinion addressing the issue would [have] serve[d] no jurisprudential purpose.").

sees." *Kimble v. Marvel Ent., LLC*, 576 U.S. 446, 456 (2015). That alone warrants adhering to *Stone*'s holding on § 1252(b)(1). Moreover, *Stone*'s holding did not "address a question of profound moral and social importance," *Dobbs*, 597 U.S. at 269, but rather presents a textbook example of a holding on an "arcane corner of the law," *id.* at 268. Thus, even assuming *Stone* was wrongly decided, it is hardly a momentous error of the sort addressed in a case like *Dobbs*.

Quality of the Reasoning. *Stone* did not need to provide a lengthy rationale because then-existing caselaw already made its holding so obvious. Most notably, *Stone* cited *Missouri v. Jenkins*, 495 U.S. 33, 45–50 (1990), which spent a significant amount of time explaining the jurisdictional nature of the filing deadline in that case. This obviated the need for a lengthy explanation in *Stone* itself. The Court may have since moved away from that framework, but that does not mean it was poorly reasoned. Indeed, as discussed below (see the discussion of *Bowles v. Russell*), this Court still holds that some deadlines are jurisdictional.

Workability of the Rule. This factor strongly favors adhering to *Stone*'s holding on § 1252(b)(1), which provides a crystal-clear rule: file within the deadline, or your case will be dismissed. By contrast, ruling that § 1252(b)(1) is a claims-processing rule or subject to tolling would risk turning every missed deadline into a fact-intensive inquiry that also turns, at least in part, on whether the government is willing to forgive the untimeliness.

Predictability with deadlines is especially important because "no adjudicative system can function effectively without imposing some orderly structure on the course of its proceedings." *Woodford v. Ngo*, 548 U.S. 81, 90–91 (2006). And even more so in the context of judicial review of immigration decisions, which number well into the thousands every year, as explained further next.

Disruptive Effect and Reliance. This factor likewise strongly favors adhering to *Stone*'s holding on § 1252(b)(1). Petitioner's position would impose extraordinary burdens on the lower courts and incentivize delays—the very things Congress sought to eliminate in 1996 by enacting the Illegal Immigration Reform and Immigrant Responsibility Act ("IIRIRA").

Before IIRIRA, aliens would "exploit[] administrative delays to 'buy time'" and "manipulate or delay removal proceedings." *Pereira v. Sessions*, 585 U.S. 198, 219 (2018). Such delays ripple through the immigration system, "delay[ing] the adjudication of meritorious" cases, "caus[ing] the release of many inadmissible aliens into States and localities that must shoulder the resulting costs," and "divert[ing] Department resources from protecting the border." *DHS v. Thuraissigiam*, 591 U.S. 103, 112 n.9.

Frustrated with those delays and loopholes, Congress enacted IIRIRA, which carefully "crafted a system" for "expeditiously removing" certain classes of aliens, *id.* at 106, and thereby eliminating their "incentive to delay things," *Niz-Chavez v. Garland*, 593 U.S. 155, 158 (2021).

Most notably, IIRIRA established a fair and expedited scheme for removing aliens with convictions for aggravated felonies (like Petitioner) and also those with reinstated removal decisions, even expressly stating that aliens in the latter category are "not eligible and may not apply for any relief under this chapter." 8 U.S.C. §§ 1228(b), 1231(a)(5), 1252(a)(2)(C)–(D). Congress also eliminated the automatic stays of removal that many aliens received pre-IIRIRA. *See Nken v. Holder*, 556 U.S. 418, 435 (2009).

But allowing judicial-review petitions to be filed months or even years after the deadline Congress imposed would eviscerate this scheme by once again rewarding delay and diverting scarce resources. And it would do so in the very scenarios where Congress went out of its way to ensure expedited treatment: aliens with aggravated convictions and aliens who have already been previously removed.

The consequences would be felt most intensely by the circuit courts. The government has been more than willing to waive untimeliness across the board, even when the circuit-court petitions are based on removal orders issued years earlier. The only thing preventing a flood of untimely petitions is the fact that the lower courts largely still deem the filing deadline to be jurisdictional—and thus unable to be waived despite the government's best efforts.

The circuit courts are already underwater on review of immigration petitions. *See* Admin. Off. of the U.S. Courts, *Table B-5—U.S. Courts of Appeals Statistical Tables for the Federal Judiciary* (Mar. 31,

2024), https://tinyurl.com/44hbdvr3; Admin. Off. of the U.S. Courts, *Federal Judicial Caseload Statistics 2023*, https://tinyurl.com/5n8sw9wk. And now Petitioner—with support from the government—proposes diverting those scarce judicial resources away from timely immigration cases brought by individuals who have just recently received a final order of removal, and towards untimely ones brought by individuals who were ordered removed long ago but then illegally reentered, or who forwent their opportunity for expedited judicial review when it was provided.

The concerns about delay are heightened in courts like the Second Circuit, which typically issues a temporary stay of removal before there has been an adjudication on the merits, regardless of whether the case shows any merit. Such stays violate IIRIRA, which "eliminated the reason for categorical stays," *Nken*, 556 U.S. at 435, precisely because they provide a strong incentive to seek judicial review even when months or years late.

Despite all this delay and draining of judicial resources, the odds of the aliens ultimately prevailing on the underlying merits of these kinds of cases are vanishingly low. Just look at the procedural history here. The government fully supports Petitioner on timeliness and jurisdiction yet argued below that he should still lose on the merits. *See* Br. for Resp't at 58, *Riley*, No. 22-1609 (4th Cir. Jan. 13, 2023) (if court finds it has jurisdiction, it "should deny Petitioner's petition for review"). The government has filed similar briefs in a bevy of cases across the lower courts.

In 1996, when immigration levels were substantially lower than now, Congress went out of its way to eliminate dilatory petitions, yet now Petitioner and the government ask this Court to greenlight the very thing Congress expressly forbade, with no substantial benefits—all while overruling the Court's precedent to do so. The Court should decline the invitation and adhere to *Stone*.

C. The Court Can Maintain Its New Framework Moving Forward While Still Adhering to *Stone*'s Holding on Section 1252(b)(1).

In other contexts, the Court has preserved its prior rulings that *specific* filing deadlines are jurisdictional, while acknowledging the Court's shift in framework going forward.

Most significantly, the Court has declined to overrule its holding in *Bowles v. Russell*, 551 U.S. 205 (2007), which held that the deadline to appeal from a district court to a circuit court is jurisdictional. The Court has held instead that there is a special exception for deadlines for moving from one Article III court to another. *See Harrow*, 601 U.S. at 488–89. If anything, logic would dictate the opposite rule—i.e., once someone is properly in an Article III court, the deadlines to appeal to another Article III court would be more flexible, while there would be a strictly construed deadline to move from an agency to an Article III court in the first instance. The Court's willingness to create an exception—and, respectfully, a somewhat tenuous one, at that—to preserve *Bowles*

confirms the strength of statutory *stare decisis* in this realm.

Outside the context of jurisdictionality rulings, this Court employed the same approach in *Loper Bright Enterprises v. Raimondo*, which held that even though the *Chevron* deference framework is eliminated going forward, prior Supreme Court decisions relying on *Chevron* deference to conclude that "specific agency actions are lawful … are still subject to statutory *stare decisis* despite our change in interpretive methodology." *Loper Bright Enterprises v. Raimondo*, 144 S. Ct. 2244, 2273 (2024).

The same logic applies to *Stone*'s specific holding on § 1252(b)(1) despite the Court's subsequent change in methodology. The Court should hold that the filing deadline in § 1252(b)(1) remains jurisdictional.

II. An Alien Cannot Trigger Judicial Review Simply by Filing a Petition Within Thirty Days of a Freestanding Withholding-Only Determination.

Petitioner and Respondent also agree that a circuit court can review withholding-only determinations whenever a circuit court petition was filed within thirty days of the completion of the withholding-only proceedings. That is directly inconsistent with this Court's precedent, which the Fourth Circuit properly construed below.

This Court should affirm because Petitioner filed his petition for review in the Fourth Circuit on June 3, 2022, which was far more than thirty days after his

final order of removal was issued on January 26, 2021. *See* Br. for Resp. 4.

A. Background on Withholding-Only Determinations.

This issue arises in the context of aliens whose final removal orders are issued well before there is an adjudication of their requests for withholding or CAT relief (together, commonly referred to as "withholding-only" relief). The most common scenario is an illegal reentrant, i.e., an alien determined removable and deported, who then illegally reenters the United States, is apprehended, and asks for withholding-only relief. Such individuals' prior removal orders are automatically reinstated and cannot be challenged, 8 U.S.C. § 1231(a)(5), meaning the aliens must be removed, but the executive branch allows them to ask for withholding-only relief which, if successful, means they would be removed to a third country rather than to their country of origin. In such cases, the withholding-only determination is necessarily made after the final order of removal was issued, sometimes months or years later.

The same scenario can arise for aliens like Petitioner, who have aggravated felony convictions. They are likewise subject to expedited removal determinations, 8 U.S.C. §§ 1228, 1252(a)(2)(C)–(D), which can be completed well before withholding-only proceedings are completed.

There is a reason this issue arises for illegal reentrants and aliens with aggravated convictions: those are the two primary categories for whom Congress imposed expedited removal procedures in

IIRIRA after becoming especially frustrated with delays in adjudications and removal.

This issue almost never arises where an alien is first determined removable and does not have an aggravated felony conviction. In those cases, which comprise a sizable portion of all immigration proceedings, the removability determination and any withholding-only claims are typically resolved together by the BIA. Both components of that decision can thus be challenged together in a single circuit-court petition (see more below in the discussion of the "zipper" clause), assuming all other procedural requirements are satisfied.

B. This Court's Holdings in *Nasrallah* and *Guzman Chavez* Confirm the Fourth Circuit's Holding Is Correct.

Two of this Court's recent decisions—*Nasrallah v. Barr*, 590 U.S. 573 (2020), and *Johnson v. Guzman Chavez*, 594 U.S. 523 (2021)—confirm that the Fourth Circuit's holding below is correct. *Nasrallah* and *Guzman Chavez* explain that freestanding withholding-only determinations do not merge with a final order of removal (i.e., the trigger for the 30-day clock in § 1252(b)(1)), nor do they toll that clock. Taken together, that means the petition for judicial review must be filed within 30 days of the underlying order of removal, not from a subsequent, freestanding withholding-only determination.

Freestanding Withholding-Only Rulings Are Not Final Orders of Removal and Do Not "Merge" with Final Orders of Removal. For judicial review, there must be a final order of removal. 8 U.S.C.

§ 1252. In *Nasrallah*, this Court defined "final orders of removal" as "encompass[ing] only the rulings made by the immigration judge or Board of Immigration Appeals that affect the validity of the final order of removal." *Nasrallah*, 590 U.S. at 582. And, to be sure, any subsequent "rulings that affect the validity of the final order of removal merge into the final order of removal for purposes of judicial review." *Id.*

But "a CAT claim does not affect the validity of the final order of removal"—i.e., the alien will still be removed, just perhaps not to his country of origin—and therefore the decision on such a claim is not itself a final order of removal, nor does it "merge into the final order of removal." *Id.*

This Court then held in *Guzman Chavez* that the exact same applies for withholding claims, which (as the name indicates) likewise address only *where* an alien will be removed, not *whether* he will be removed. *Guzman Chavez*, 594 U.S. at 540 ("[T]he validity of removal orders is not affected by the grant of withholding-only relief.").

This means a freestanding withholding-only ruling cannot itself serve as the final order of removal necessary to trigger judicial review, nor does it merge with the underlying final order.

Freestanding Withholding-Only Rulings Do Not "Zipper" with the Final Order of Removal. Some aliens have pointed to 8 U.S.C. § 1252(b)(9)—the so-called "zipper clause"—as supporting their view that a challenge to a withholding-only determination is forced into the same judicial

proceedings as a challenge to the underlying removal order.

But *Nasrallah* rejected that, too. The Court held that "§ 1252(b)(9) simply establish[es] that a CAT order may be *reviewed together* with the final order of removal, not that a CAT order is the same as, or affects the validity of, a final order of removal." *Nasrallah*, 590 U.S. at 583 (emphasis added).

The zipper clause often applies in cases where an alien is first subjected to removal proceedings, and he asserts withholding-only claims. As explained above, in such cases the immigration judge and BIA typically address both removability and withholding-only together, and the zipper clause says that those issues can both go up to the circuit court together. According to this Court, that is all the zipper clause does. It does not apply when the final order of removal and the withholding-only determinations are made far apart in time.

This same reasoning also rebuts the view that Congress must have intended for judicial review of *all* CAT claims simply because it allows for judicial review of *some* of them. *See* 8 U.S.C. § 1252(a)(4). Courts can review CAT claims that are properly "zipped" in a final order of removal, but not CAT claims that are freestanding.

In a variant of this "merger" argument, Petitioner also claims that under 8 U.S.C. § 1252(d), he cannot seek judicial review at all "until the administrative process is complete (i.e., a BIA decision)." Pet. 5, 29–30, 35. He seems to mean that he could not challenge his underlying removal order until his withholding-

only determination was final. That is wrong. Section 1252(d)(1) states only that an alien cannot seek review of a "final order of removal" until he "has exhausted all administrative remedies available to [him] as of right" *as to* the "final order of removal" itself—which (as explained above) is distinct from withholding-only proceedings. 8 U.S.C. § 1252(d)(1). In other words, an alien cannot seek judicial review of a final order of removal until he has exhausted non-discretionary mechanisms to invalidate that order, but a withholding-only decision can never invalidate a removal order and thus does not qualify. *Nasrallah*, 590 U.S. at 582. Moreover, if Petitioner were right, it would mean that aliens would be *obligated* "to seek [withholding-only relief] before obtaining judicial review *in every case*," a truly bizarre outcome "incompatible" with the INA. *Santos-Zacaria*, 598 U.S. at 428.

Petitioner next suggests aliens could forcibly merge the withholding-only and removal orders by filing "premature" petitions in court. Pet. 29. That would ostensibly require the alien first to file a circuit court petition challenging the underlying final order of removal within 30 days of its issuance, then later file another petition for review from the freestanding withholding-only determination more than 30 days after the underlying removal order was issued, then ask the circuit court to "merge" the two petitions together. But the withholding-only determination is not a final order of removal (as explained above), and thus it is unclear how a separate petition can be filed challenging it, given that § 1252 provides jurisdiction

only over petitions challenging final orders of removal.[6]

Even if Petitioner were right about this "forcible merger" theory, there is nothing unusual about the INA requiring multiple petitions to be filed, especially in the context of aliens whom Congress wanted removed as quickly as possible. In *Stone*, for example (in a part that nobody disputes is still binding), this Court held that Congress required aliens to file *separate* petitions for review from the final order of removal *and* from any order denying reconsideration of that order. 514 U.S. at 405. This reduced delays in judicial review of removal orders, even though it dragged out the ultimate completion of all judicial review.

Freestanding Withholding-Only Rulings Do Not "Toll" the Final Order of Removal. This Court in *Guzman Chavez* also rejected the argument that the finality of the underlying removal order is somehow tolled or delayed "until the withholding-only proceedings conclude." *Guzman Chavez*, 594 U.S. at 539.

That is because "the finality of the order of removal"—and thus the time to seek judicial review—"does not depend in any way on the outcome of the withholding-only proceedings." *Id.* In other words,

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[6] As discussed in Part III below, Petitioner's argument even more obviously fails for aliens who are illegal reentrants, as their reinstatement orders do not qualify as final orders of removal at all, and thus any accompanying withholding-only determinations are unreviewable regardless of how an alien times his judicial petitions.

"[i]t makes no sense for finality of an order to depend on a separate order that can't change the first one." *Ruiz-Perez v. Garland*, 49 F.4th 972, 985 (5th Cir. 2022) (Oldham, J., dissenting). Whatever happens in withholding-only proceedings, the decision to remove the alien is already set in stone. Its finality therefore cannot be tolled pending completion of withholding-only proceedings.

To be sure, *Guzman Chavez* addressed finality in the context of § 1231(a)(1)(B)(i), rather than § 1252(b) at issue here, but that makes no difference. There is only one definition of finality in the INA, and it ties finality to completion of agency review of the order of removal itself: "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." 8 U.S.C. § 1101(a)(47)(B). Once the underlying removal order itself is finished with administrative review, it immediately becomes final, without having to wait for completion of any subsequent withholding-only determinations.[7]

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[7] In his petition, Petitioner claimed that § 1101(a)(47)'s definition means "an order of removal does not become 'final' until the conclusion of BIA processes." Pet. 6. That is not what the statute says. It says an order of removal is final when the BIA "affirm[s] such order" or the time to seek such review has expired. 8 U.S.C. § 1101(a)(47)(B). But a withholding-only determination does not "affirm" a removal order. *See Nasrallah*, 590 U.S. at 582.

Further, even though *Guzman Chavez* addressed § 1231, it still indirectly relied on § 1101(a)(47)'s finality definition. That is because *Guzman Chavez* invoked *Nasrallah*'s view of finality, *see* 594 U.S. at 540, which in turn came directly from § 1101(a)(47): "a 'final order of removal' is a final order 'concluding that the alien is deportable or ordering deportation,'" *Nasrallah*, 590 U.S. at 579 (quoting § 1101(a)(47)(A)).

One lower court has concluded that "§ 1231 uses 'administratively final,' while § 1252 uses 'final order of removal,'" and thus "[e]quating finality in § 1231 with § 1252(b)(1) renders 'administratively' superfluous." *FJAP*, 94 F.4th at 632. But that is the wrong conclusion for several reasons. As noted just above, the INA's definition of finality expressly turns on when *administrative* review is final, so the INA itself defines "finality" as meaning "administrative finality." The two are interchangeable as a matter of statutory definition. In other words, "an order of removal [under § 1252(b)(1)] is final when it has completed all due administrative process," which is to say it is "'administratively final'" (i.e., the term used in § 1231). *FJAP*, 94 F.4th at 648 (Brennan, J., concurring in part and dissenting in part).

So why then did Congress add "administratively" to "final" in part of § 1231? It is because that provision addresses two different kinds of orders—ones from the BIA, and ones from Article III courts—and Congress wanted to be excessively clear what each one meant. As relevant here, § 1231(a)(1)(B) says that an alien may be removed as early as: (i) "The date the order of removal becomes administratively final," or (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." 8 U.S.C. § 1231(a)(1)(B)(i)–(ii). Congress added "administratively" to "order of removal" in the first provision to make pellucidly clear that it did not require a final order of a *court*, unlike the "final order" referenced in the very next subsection.

Judge Brennan has aptly explained the point: "The INA often uses language to differentiate between [1] when there is a final order of removal—as an agency's process is complete, and judicial review may be allowed—and [2] when there is a final order of the court *after* judicial review." *FJAP*, 94 F.4th at 648 (Brennan, J., concurring in part and dissenting in part). "In § 1231, the modifier 'administratively' reiterates that an order of removal becomes final under the INA when all due administrative process ends—in accord with the definition in § 1101(a)(47)(A) for when an order of removal becomes final." *Id.* "That is distinct from a later final order issued by a court, if judicial review is allowed. The Court in *Guzman Chavez* states this expressly: 'By using the word administratively, Congress focused our attention on the *agency*'s review proceedings, separate and apart from any judicial review proceedings that may occur in a court.'" *Id.*[8]

Thus, Congress added "administratively" to *avoid* any confusion or ambiguity—not to *create* it, as the

[8] It appears that Chief Judge Sykes and Judges Easterbrook and Kirsch agreed with Judge Brennan on these points. *See FJAP*, 94 F.4th at 624 n.2.

majority in *FJAP* concluded and then seized upon to disregard altogether the INA's definition of "final."

The error of *FJAP*'s majority opinion is reinforced by the fact that the court had to go looking for other definitions of "finality" because it refused to follow the INA's definition, which the majority labeled "inapposite." *Id.* at 633 (majority op.). That led the majority to look to generic definitions of finality from dictionaries and APA caselaw to conclude that the withholding-only determination tolled the finality of the underlying removal order, even though that is incompatible with the INA's definition. *See id.* at 632, 635 (majority op.); Pet. 37 (also citing dictionaries). But Congress already provided a unique and very specific definition of finality in the INA itself. If a particular set of facts does not satisfy the statutory definition of "finality," that does not somehow render the definition itself "inapposite," but rather dictates that there is no finality. Courts cannot ignore the statutory definition and then import a completely different one just because they think it yields a nicer outcome. *See Nasrallah*, 590 U.S. at 584 ("[T]he INA has defined final 'order of deportation' more narrowly than this Court interpreted the term" before the 1996 amendments).

The far better view is that finality for § 1231(a)(1)(B)(i) is equivalent to finality for § 1252(b), and thus *Guzman Chavez*'s holding on "tolling" directly controls here. Indeed, many courts "have never recognized 'tiers' of finality [in the INA] pursuant to which the finality which permits judicial review [under § 1252] is different from the finality which permits the alien's detention under 8 U.S.C.

§ 1231(a).” *Bhaktibhai-Patel v. Garland*, 32 F.4th 180, 193 (2d Cir. 2022) (Menashi, J.) (citing prior Second Circuit caselaw); *see Martinez v. Garland*, 86 F.4th 561, 569 (4th Cir. 2023) (citing prior Fourth Circuit caselaw); *see also Arostegui-Maldonado*, 75 F.4th at 1150 (Tymkovich, J., concurring).

* * *

Taken together, this Court’s holdings in *Nasrallah* and *Guzman Chavez* establish that withholding-only denials (1) are not themselves final orders, (2) do not merge or “zip” with a final order, and (3) do not toll the finality of any final order. That is exactly what the Fourth Circuit held below. This Court should adhere to its precedent and affirm the decision below.[9]

C. The Fourth Circuit’s Interpretation Makes Perfect Sense.

Petitioner and the government have argued that adopting the Fourth Circuit’s interpretation of when the 30-day deadline begins may largely foreclose judicial review of freestanding withholding-only

[9] Although several circuits have declined to follow the Fourth Circuit’s approach, they have largely done so on the basis that their prior circuit precedent was not irreconcilable with *Guzman Chavez* and *Nasrallah*. *See, e.g.*, *Alonso-Juarez v. Garland*, 80 F.4th 1039, 1049 (9th Cir. 2023); *Kolov*, 78 F.4th at 919; *Inestroza-Tosta v. Att’y Gen.*, No. 22-1667, 2024 WL 3078270, at *7 (3d Cir. June 21, 2024). *Amici* disagree, but the point remains: few courts affirmatively advocate for Petitioner’s interpretation. Rather, they typically note it is in tension—sometimes significant tension—with *Nasrallah* and *Guzman Chavez*, but say they will adhere to their own precedent until further direction from this Court.

determinations made against illegal reentrants and those convicted of aggravated felonies.

But that statutory regime makes perfect sense. As explained above, in 1996 Congress "toed a harder line" against two particular classes of aliens: illegal reentrants and those with aggravated criminal convictions. *Fernandez-Vargas*, 548 U.S. at 34. Congress did so by imposing an expedited process for those with reinstated removal decisions, saying they are "not eligible [for] and may not apply for any relief under" the INA and face summary removal "under the prior order at any time after the reentry." 8 U.S.C. § 1231(a)(5). Congress imposed a similar process for those (like Petitioner) with aggravated criminal convictions, who are given a shortened window to seek narrow judicial review under § 1252 before they can be promptly removed (Petitioner apparently did not pursue that route when it was available). 8 U.S.C. §§ 1228(b), 1252(a)(2)(C)–(D).

Although the executive branch has provided these aliens with administrative review of a narrow class of claims, *see Bhaktibhai-Patel*, 32 F.4th at 198, there is no statutory obligation to provide *judicial* review of all such claims. Indeed, it has never been clear what statute authorizes the executive branch to provide even *administrative* review. "When the United States Senate gave advice and consent to ratification of the Convention Against Torture, it made a declaration that Articles 1 through 16 were not self-executing"—and thus would require implementing legislation—but DOJ has nonetheless "sought to conform its practices to the Convention by ensuring compliance with Article 3 in the case of aliens who are subject to

removal from the United States." *Regulations Concerning the Convention Against Torture*, 64 Fed. Reg. 8478, 8479 (Feb. 19, 1999). At the very least, this cloudy authority militates strongly against insisting on judicial review of all such claims and thereby upending the requirements that Congress *did* expressly lay out by statute.

To be sure, there is often a presumption of review of agency determinations, but "[t]he presumption favoring judicial review of administrative action is just that—a presumption." *Block v. Cmty. Nutrition Inst.*, 467 U.S. 340, 349 (1984). "Congress can foreclose judicial review" and has done so on many occasions, especially in the realm of immigration law. *FJAP*, 94 F.4th at 651 (Brennan, J., concurring in part and dissenting in part).

Judge Menashi's opinion for the unanimous Second Circuit in *Bhaktibhai-Patel* includes an especially persuasive rebuttal to claims that the court's holding would improperly foreclose judicial review. The presumption of review does not apply where a "'statute's language or structure forecloses judicial review,'" and—as explained above—"the language and structure of §§ 1101(a)(47) and 1252 foreclose judicial review of withholding-only decisions." *Bhaktibhai-Patel*, 32 F.4th at 196. *Bhaktibhai-Patel* further explained there is no concern about "deny[ing] any judicial forum for a colorable constitutional claim," *Webster v. Doe*, 486 U.S. 592, 603 (1988), because "an illegal reentrant challenging a withholding-only decision does not have a 'colorable constitutional claim,'" *Bhaktibhai-Patel*, 32 F.4th at 196. As most relevant here, there is

longstanding precedent that "a protectable interest cannot be based on the United Nations Protocol Relating to the Status of Refugees or the CAT." *Id.* at 198 (collecting authorities).

Because presumptions of review are, at most, interpretation tools, they cannot overcome the text and structure of the INA nor this Court's recent and persuasive interpretation of that text and structure in *Guzman Chavez* and *Nasrallah*.

* * *

The decision below flows directly from this Court's precedents. The Court should affirm.

III. There Is an Additional Basis to Deny Judicial Review in Cases Involving Illegal Reentrants.

The government acknowledged in its cert-stage response brief that "the same principles apply in the context of administrative removal orders under Section 1228(b) [for aliens with aggravated criminal convictions] and reinstatement determinations under Section 1231(a)(5) [for illegal reentrants]." Br. for Resp. 13. Accordingly, if this Court holds that Petitioner's challenge was untimely, that ruling would apply with equal effect to aliens who have reinstated removal orders.

But the Court should keep in mind that there is an additional reason to deny judicial review to those with reinstated removal orders: a reinstatement decision is not a final order of removal for purposes of 8 U.S.C. § 1252, and thus there is no judicial review of those aliens' accompanying withholding-only

determinations, regardless of whether § 1252(b)(1)'s deadline is jurisdictional and regardless of when that deadline begins.

Section 1252 requires a "final order of removal" to trigger a circuit court's jurisdiction. As the Second Circuit explained in *Bhaktibhai-Patel*, there are very strong reasons to conclude after *Nasrallah* and *Guzman Chavez* that a reinstatement decision is not a final order of removal. *See* 32 F.4th at 195–96. A reinstatement decision does precisely what its name says: it reinstates a "*prior* order of removal," 8 U.S.C. § 1231(a)(5) (emphasis added), but it does not qualify as "the issuance of a new one," *Bhaktibhai-Patel*, 32 F.4th at 195. Further, the reinstatement is mandatory because "§ 1231(a)(5) does not authorize the agency to make a discretionary decision." *Id.* And that order is reinstated "from its original date," 8 U.S.C. § 1231(a)(5), confirming beyond any doubt that there is no *new* removal order. There is only the original removal decision, from perhaps years earlier.

Moreover, as explained above, this Court held in *Guzman Chavez* and *Nasrallah* that a decision cannot qualify as a final order of removal unless it affects the underlying removal decision, but a reinstatement decision (just like a withholding-only decision) necessarily "does not disturb the final order of removal." *Nasrallah*, 590 U.S. at 582. In fact, it does just the opposite: it reinstates *in toto* the pre-existing final removal order, which Congress expressly barred reentrants from challenging. 8 U.S.C. § 1231(a)(5).

"[I]t's not as if Congress gave us jurisdiction over things that are not-quite-but-perhaps-related-to

removal orders. … 'An order is either a final order of removal or it is not. Reinstatement decisions are not.'" *Ruiz-Perez*, 49 F.4th at 983 (Oldham, J., dissenting); *see also FJAP*, 94 F.4th at 644 (Brennan, J., concurring in part and dissenting in part) ("A reinstatement decision does not fit within the statutory definition of a removal order.").

The petitioner in a related case involving an illegal reentrant suggested it would be odd to require aliens to file "unripe" petitions for circuit court review promptly after the removal order is reinstated but *before* the withholding-only proceedings end. Pet. 23–24, 29, *Martinez v. Garland*, No. 23-7678. But there is a simple answer: under the INA, the reinstatement decision is not a final order in the first place, so no judicial review can be sought from it or its subsequent withholding-only proceedings, regardless of when the petition is filed with a circuit court.

As explained above, this statutory regime makes perfect sense. Congress imposed an expedited process for those with reinstated removal decisions and even expressly precluded them from receiving judicial review. *See* 8 U.S.C. § 1231(a)(5) ("[T]he alien is not eligible and may not apply for any relief under this chapter.").

Because illegal reentrants' reinstatement orders are not final orders of removal, they cannot provide jurisdiction for a circuit court to review those aliens' challenges, regardless of whether § 1252(b)(1) is jurisdictional, and regardless of when § 1252(b)(1)'s 30-day deadline begins. This provides an additional basis for denying judicial review of freestanding

withholding-only determinations against illegal reentrants, who comprise the sizable majority of aliens for whom these issues arise.

CONCLUSION

The Court should affirm.

Respectfully submitted,

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