No. 18-1432

In the Supreme Court of the United States

NIDAL KHALID NASRALLAH,

Petitioner,

v.

WILLIAM P. BARR, ATTORNEY GENERAL,

Respondent.

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

PETITIONER'S REPLY BRIEF

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PETITIONER'S REPLY BRIEF

Section 1252(a)(2)(C) bars judicial review of "order[s] of removal" entered against noncitizens with certain criminal convictions. When Congress enacted this provision in AEDPA, it explicitly confined the phrase to those orders concluding that a noncitizen is "deportable or ordering deportation." 8 U.S.C. 1101(a)(47)(A). An order denying CAT relief does neither—and thus is not an "order of removal."

The government has no direct reply. It does not argue that an order denying CAT relief fits the statutory definition. To the contrary, in a recently filed petition, the government itself explains that a "grant of withholding or deferral * * * leaves the final order of removal undisturbed." Pet. for Cert., at 3, *Albence* v. *Guzman Chavez*, No. 19-897. The statute's plain text conclusively resolves this case.

The government's three responses lack merit. First, relying on cases that predate AEDPA, the government would define an "order of removal" more broadly than the express statutory definition. To state this argument is to refute it. In any event, the government's authority yields a simple rule: Section 1252(a)(2)(C) bars judicial review over a claim that would invalidate an order of removal. Success on a CAT claim, however, does not invalidate the removal order.

Second, the government insists that, because judicial review over CAT claims occurs via a Section 1252 petition for review, Section 1252(a)(2)(C)'s jurisdiction-stripping necessarily applies. That misreads the statutory text. Section 1252(a)(2)(C) bars review of specific orders, not the whole petition.

Third, the government claims that our construction would deprive courts of jurisdiction to review a CAT claim. Not so. Congress enacted Section 1252(a)(4) specifically to provide jurisdiction over CAT claims.

A. Per the statutory text, an order denying CAT relief is outside the scope of Section 1252(a)(2)(C).

1. AEDPA specifically defined a "final order of removal"—and an order denying CAT relief does not qualify.

Section 1252(a)(2)(C) strips "jurisdiction to review any *final order of removal* against an alien who is removable by reason of having committed" certain "criminal offense[s]." 8 U.S.C. 1252(a)(2)(C) (emphasis added). The critical question posed, then, is whether the order denying petitioner's request for CAT relief qualifies as a "final order of removal." It does not.

a. The analysis must begin with how Congress defined "final order of removal" for the specific purpose of Section 1252(a)(2)(C).

As we explained (Pet'r Br. 25-26), Congress first enacted what is now Section 1252(a)(2)(C) in the Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA). Pub. L. No. 104-132, § 440, 110 Stat. 1214, 1276-1277. Section 440 of AEDPA was titled "criminal alien removal." Subsection 440(a) (subtitled "judicial review") barred review of "[a]ny final order of deportation against an alien who is deportable by reason of having committed" certain criminal offenses. The very next provision, Subsection 440(b) (subtitled "final order of deportation defined"), expressly defined the prior subsection's scope: An "order of deportation" is an order "concluding that the alien is deportable or ordering deportation." *Id*. § 440(b) (codified at 8 U.S.C. 1101(a)(47)).[1]

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[1] In IIRIRA, Congress changed "deportation" in Section 1252(a)(2)(C) to "removal," but did not make a corresponding change to Section 1101(a)(47). The Court has nonetheless under-

There can be no meaningful debate about the reach of Section 1252(a)(2)(C) because Congress defined the crucial term specifically with respect to its use in that section.

And, for reasons we have described (Pet'r Br. 26-28), an order denying a CAT claim neither "conclud[es] that the alien is deportable" nor "order[s] deportation." 8 U.S.C. 1101(a)(47)(A). The government does not disagree. To repeat: The government makes no argument that an order denying a CAT claim fits within the plain terms of the statutory definition.

In fact, in a pending petition for certiorari (postdating the government's merits brief), the government argues that a CAT claim "does not address whether an alien is ordered removed;" rather, "that has already been determined" by the removal order. *Guzman-Chavez* Pet. 10 (quotations omitted). When CAT relief is granted, the government explains, "the final order of removal" is "undisturbed." *Id*. at 3.

In sum, Congress enacted Section 1101(a)(47) to define the scope of Section 1252(a)(2)(C). An order denying a CAT claim is outside that statutory definition, a point the government fails to rebut. This alone resolves the question presented.

b. Additionally, Congress has unmistakably distinguished an order resolving "any cause or claim" under the CAT from "an order of removal."

In the REAL ID Act, Congress sought to eliminate district-court habeas review of certain immigration claims, placing judicial review instead with the courts of appeals. See Pet'r Br. 28-29. To achieve this, the REAL ID Act's Section 106(a)(1)(B) enacted two, mate-

stood that the express definition Congress provided in AEDPA governs the reach of Section 1252(a)(2)(C). See Pet'r Br. 26 n.14. The government agrees. See Gov't Br. 13, 19, 22; Opp. 12.

rially identical provisions. See Pub. L. No. 109-13, § 106(a)(1)(B). The first, codified at 8 U.S.C. 1252(a)(4), provides that a petition for review under Section 1252 is the exclusive form of judicial review for "any cause or claim under the [CAT]." The second, codified in the neighboring 8 U.S.C. 1252(a)(5), provides that a petition under Section 1252 is the exclusive means for review of "an order of removal." Far from being mere "redundancies across statutes" (Gov't Br. 33), these simultaneously-enacted, adjacent subsections provide decisive evidence that resolution of "any cause or claim under the [CAT]" is distinct from "an order of removal." See Pet'r Br. 28-30.

The government's only response (at 33) is that "Section 1252(a)(4) forecloses review of CAT claims made *outside* of removal proceedings," such as in extradition or military-transfer proceedings.[2] This argument proves our main point. That a CAT claim may arise *outside* of a removal proceeding—indeed, outside immigration altogether—bolsters our contention that an order resolving a CAT claim is not accurately described as an "order of removal."[3]

Moreover, the government's argument misses the mark. The surplusage canon we invoke is, ultimately, a tool to understand what Congress meant by the words it used. Congress unequivocally intended for Section 1252(a)(4) to have effect in the immigration context. Congress placed the provision in the middle of Section 1252, the centerpiece of judicial review of immigration

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[2] But see *Trinidad y Garcia* v. *Thomas*, 683 F.3d 952, 956 (9th Cir. 2012) (en banc) (finding Section 1252(a)(4) inapplicable to extradition).

[3] Neither *Ortiz-Franco* v. *Holder*, 782 F.3d 81, 89 (2d Cir. 2015), nor *Lovan* v. *Holder*, 574 F.3d 990, 998 (8th Cir. 2009), addressed the crucial distinction between Subsections 1252(a)(4) and (a)(5).

proceedings. Congress enacted it in Section 106 of the REAL ID Act, which, as a whole, addressed immigration. The Conference report squarely tied this provision to immigration. See H.R. Conf. Rep. 109-72, at 176 (2005). The government even acknowledges (at 31) that Congress designed Section 1252(a)(4) for immigration.

Congress plainly intended for Section 1252(a)(4) to have effect in immigration proceedings—and that its effect would differ from that of Section 1252(a)(5). This is conclusive textual evidence that, for purposes of Section 1252, an order denying a CAT claim cannot be "an order of removal." Whether Section 1252(a)(4) also has implications for more exotic, non-immigration proceedings is immaterial to what it demonstrates about Congress's specific use of language in Section 1252 itself.

c. The agencies responsible for enforcing the immigration laws have routinely distinguished orders resolving CAT relief from orders of removal. See Pet'r Br. 31-32. The government does not respond.

An IJ addresses CAT deferral after the "[IJ] orders an alien * * * removed." 8 C.F.R. 1208.17(b)(1). Likewise, CAT relief explicitly occurs after the entry of an expedited order of removal. *Id.* § 1238.1(f)(3). The Attorney General has delegated to IJs his authority to issue "orders of removal" (*id.* § 1240.1(a)(1)(i)) and, separately, authority to issue orders regarding "withholding of removal * * * pursuant to the [CAT]" (*id.* § 1240.1(a)(1)(iii)). And the regulations governing CAT relief—as well as the relevant preambles—repeatedly distinguish CAT orders from orders of removal. See Pet'r Br. 31-32. The government does not attempt to reconcile any of this with its position.

2. The government's effort to escape the statutory definition lacks merit.

The government offers three rejoinders to our textual argument: that Section 1101(a)(47) is not relevant (Gov't Br. 23-26); that an order resolving a CAT claim merges into a final order of removal (*id*. at 18); and that pre-AEDPA case law counsels against our reading (*id*. at 19-23).

Each argument is incorrect for effectively the same reason. The jurisdictional bar in Section 1252(a)(2)(C) extends to any argument raised in a petition for review that attacks the validity of an order of removal. But a CAT claim does not attack the validity of an order of removal.

a. The government's effort (at 23-26) to avoid the definition in Section 1101(a)(47) lacks merit.

The government first contends that the statutory definition "addresses the *finality* of the IJ's order rather than its scope or constituent parts." Gov't Br. 23-24. This argument is difficult to parse. It is true that Section 1101(a)(47)(B) describes when the "order of deportation" "shall become final." But the portion relevant here, Section 1101(a)(47)(A), states that "[t]he term 'order of deportation' means the order * * * concluding that the alien is deportable or ordering deportation." The statute thus identifies the "scope and constituent parts" (Gov't Br. 23-24) of a final order of removal with unmistakable clarity. *Cf. Burgess* v. *United States*, 553 U.S. 124, 131 (2008) ("[A] [statutory] definition which declares what a term 'means' excludes any meaning that is not stated.").

The government is also wrong to claim that Section 1101(a)(47) does not "speak to the scope of judicial review." Gov't Br. 24. That was the very purpose of its enactment. Congress adopted the jurisdiction-stripping

provision now codified at 8 U.S.C. 1252(a)(2)(C) in AEDPA's Section 440(a), and then immediately defined its reach via Section 440(b). In the whole of AEDPA, the term "order of deportation" is used solely in Section 440. See 110 Stat. 1276-1277. Congress designed this tailored definition to delineate Section 1252(a)(2)(C)'s scope. See pages 2-3, *supra*.

Our argument is not, as the government asserts (at 24-25), that "a 'final order of deportation' for purposes of judicial review encompasse[s] *only* that part of the administrative decision concluding that the alien is deportable." Rather, the judicial-review bar in Section 1252(a)(2)(C) extends to Section 1101(a)(47)'s entire definition, which in turn maps onto the mechanics of removal.

In a removal proceeding, the government first determines whether the individual is "removable" (that is, "deportable"). If the individual is "removable," the government determines whether it will "order removal"—or whether it will grant discretionary relief from removal. Such discretionary relief includes (now-repealed) Section 212(c) waiver of deportation and Section 1229b cancellation of removal.[4] See Pet'r Br. 3-5 & n.3, 33-34. When discretionary relief is granted, no order of removal is entered. See *Foti* v. *INS*, 375 U.S. 217, 223 (1963) ("[W]hen suspension is granted, no deportation order is rendered at all, even if the alien is in fact found to be deportable.").[5]

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[4] In IIRIRA, Congress eliminated Section 212(c) waiver of deportation and Section 244(a) suspension of deportation, replacing them with cancellation of removal under 8 U.S.C. 1229b. See Pub. L. No. 104-208, §§ 304, 308(b)(7), 110 Stat. 3009-546.

[5] Regarding cancellation of removal, see *In Re Carlos R. Rivera*, 2005 WL 698295, at *2 (B.I.A. 2005), and *In Re Luis Everardo Araiza-Ortega*, 2004 WL 2943515, at *1 (B.I.A. 2004). Regarding

Section 1252(a)(2)(C) jurisdiction-stripping applies to both steps. The first determines whether the "alien is deportable" and the second determines whether to "order[] deportation." 8 U.S.C. 1101(a)(47)(A).

This structure answers the government's invocation (at 25) of *INS* v. *St. Cyr*, 533 U.S. 289, 295 (2001), which addressed a noncitizen's request for a Section 212(c) waiver of deportation. As we just explained, this form of discretionary relief is part of the IJ's determination whether to order the noncitizen deported. Simply put, the claim in *St. Cyr* attacked the removal order's validity; victory for petitioner meant vacatur of that order.

By contrast, a successful petition for review of a denied CAT claim does not invalidate the order of removal. Notwithstanding a grant of CAT relief, the order of removal remains in effect and the government may execute it—just not to the specific country where torture is likely. See Pet'r Br. 26-28. This central point is not in dispute: The government agrees that "an order of removal remains in effect even if CAT protection is granted." Gov't Br. 26.

Even more recently, the government has confirmed that "[a] grant of withholding or deferral of removal * * * leaves the final order of removal undisturbed and leaves the government free to remove the alien to another country." *Guzman Chavez* Pet. 3. Success on a CAT claim, the government agrees, leaves the removal order "undisturbed." *Ibid*.

The proceedings below illustrate the point. The IJ granted petitioner CAT relief, yet expressly cautioned that, because the removal order remained effective, pe-

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waiver of deportation, see *Tilley* v. *Gonzales*, 228 F. App'x 585, 588 (6th Cir. 2007), and *In Re Solon*, 24 I. & N. Dec. 239, 239 (B.I.A. 2007).

titioner may "be removed at any time to another country where he is not likely to be tortured." Pet. App. 47a.

b. The government's merger argument is similarly misplaced. A CAT claim is not, as the government would have it (at 18), "a constituent part of the final order of removal."

Chadha, which the government invokes repeatedly (at 20-23), identifies which orders merge into a final order of removal: A "final order[] of deportation" "includes all matters on which the validity of the final order is *contingent*." *INS* v. *Chadha*, 462 U.S. 919, 938 (1983) (emphasis added).

Chadha yields a commonsense rule: If success on a claim would invalidate an order of removal, that issue may be thought of as fairly merging with the order of removal and therefore subject to Section 1252(a)(2)(C). But appellate success challenging the denial of CAT relief has no bearing whatever on the validity of the order of removal, a premise the government endorses. See Gov't Br. 26; *Guzman Chavez* Pet. 3. Indeed, courts often vacate the BIA's denial of CAT relief, while simultaneously denying the petition for review with respect to the removal order.[6] The "validity" of the removal order is not "contingent" on the resolution of a CAT claim. *Chadha*, 462 U.S. at 938.

c. The government's pre-AEDPA authority (at 19-23) is not to the contrary.

The government relies on cases construing a different statutory provision (the predecessor to 8 U.S.C.

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[6] See, *e.g.*, *Vinh Tan Nguyen* v. *Holder*, 763 F.3d 1022, 1033 (9th Cir. 2014); *Zelaya* v. *Holder*, 668 F.3d 159, 168 (4th Cir. 2012); *Singh* v. *Ashcroft*, 398 F.3d 396, 407 (6th Cir. 2005); *Sivakaran* v. *Ashcroft*, 368 F.3d 1028, 1029 (8th Cir. 2004); *Ramsameachire* v. *Ashcroft*, 357 F.3d 169, 186 (2d Cir. 2004).

1252(a)(1)), and that were issued long prior to the enactment of AEDPA, which introduced Sections 1252(a)(2)(C) and 1101(a)(47)(A). See Gov't Br. 19-23. The government argues that they are relevant by asserting that "Congress has operated against that background understanding." *Id*. at 19.

But given the clarity of the statutory definition in Section 1101(a)(47), there is no work for such "background understanding" to do. When "a statute includes an explicit definition, [the Court] must follow that definition, even if it varies from a term's ordinary meaning." *Digital Realty Tr., Inc.* v. *Somers*, 138 S. Ct. 767, 776-777 (2018). If there were any material divergence between AEDPA's statutory definition and the pre-AEDPA case law (though, as we describe below, there is not), the statutory text must govern.

The government attempts to invoke the ratification canon, which applies when Congress "re-enacts a statute without change." *Lorillard* v. *Pons*, 434 U.S. 575, 580 (1978). Here, however, Congress *did* change the statute. Congress had not previously defined the term "order of deportation." In AEDPA, Congress did so specifically for the purpose of delineating the scope of jurisdiction-stripping. See pages 2-3, *supra.* In arguing that "Section 1252 uses 'the materially same language' as the prior statutory provision for judicial review," the government (at 22) disregards AEDPA's new and precise definition for what the crucial statutory term "means." 8 U.S.C. 1101(a)(47)(A); see *Burgess*, 553 U.S. at 131.

In any event, the government's pre-AEDPA authority is consistent with our construction.

i. *Foti* held that a noncitizen's request for suspension of deportation was within the ambit of a "final order[] of deportation." 375 U.S. at 219. "Significant[]" to

this conclusion was that, "when suspension is granted, no deportation order is rendered at all, even if the alien is in fact found to be deportable." *Id*. at 223. That is, suspension of deportation works just like Section 212(c) waiver of deportation (at issue in *St. Cyr*) and Section 1229b cancellation of removal (see pages 7-8, *supra*)—all are discretionary forms of relief that, when granted, "effectively terminate[] the [deportation] proceeding." *Foti*, 375 U.S. at 224. See Pet'r Br. 33-34.

Foti thus rested on the conclusion that there is "one final order of deportation," which addresses both the determination of "deportability" and the "application for discretionary relief" from deportation. 375 U.S. at 223. This accords with the two-part definition Congress later adopted in Section 1101(a)(47). Our argument adheres to *Foti*'s holding—and the government does not seem to disagree.

The government nonetheless claims that our construction "is inconsistent with this Court's *reasoning* in *Foti*." Gov't Br. 25 (emphasis added). It asserts that the "rationale" of *Foti* "extended to 'all determinations made during' the deportation proceedings." *Ibid*. The government focuses on *Foti*'s remark that this sweeps in "orders denying the withholding of deportation under § 243(h)." 375 U.S. at 229. For several reasons, *Foti* does not support the government's preferred construction.

To begin with, the quoted language from *Foti* was dicta. *Foti* did not involve a claim for statutory withholding, and the language has never been relied on by the Court.

What is more, *Foti* rested on the Court's view that "the meaning of the phrase 'final orders of deportation'" was not "so clear and unambiguous as to be susceptible" to only a single construction. 375 U.S. at 224. As a

result of that capacious language, the Court "inevitably turn[ed] to the purpose of Congress in enacting this legislation." *Ibid*. However compelling such purpose-driven analysis may have been, Congress has subsequently supplied the "clear and unambiguous" definition that was missing in 1963. See *Digital Realty Tr., Inc.*, 138 S. Ct. at 776-777; *Burgess*, 553 U.S. at 131.

Notably, Congress did not ratify the snippet from *Foti* on which the government relies—that an order of deportation extends to "all determinations made" in the course of a removal proceeding. *Foti*, 375 U.S. at 229. It instead defined that term more precisely and more narrowly.

Even if *Foti*'s policy-driven analysis still had weight, our construction remains correct. *Foti* sought to avoid "[b]ifurcation of judicial review of deportation proceedings." 375 U.S. at 232. As we have explained (Pet'r Br. 34-36), the REAL ID Act precludes bifurcated review of CAT claims.

The *Foti* dicta, moreover, addressed *statutory* withholding, not CAT relief. 375 U.S. at 230. However the Court may construe an order denying statutory withholding, the evidence is overwhelming that an order denying a CAT claim is not an "order of removal."[7]

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[7] Although the parties properly focus on CAT relief, the government (at 21) is wrong to assume that an order resolving a request for statutory withholding under 8 U.S.C. 1231(b)(3) is "an integral part of the final order of removal." No decision from this Court has held as much, and most of the arguments presented by petitioner here apply equally to statutory withholding. See also *Matter of I-S- & C-S-*, 24 I. & N. Dec. 432, 433 (B.I.A. 2008) ("It is axiomatic that in order to withhold removal there must first be an order of removal that can be withheld.").

Judicial review does not depend on a statutory withholding order qualifying as an "order of removal." *Cf.* Gov't Br. 21, 26. First, because nothing limits Section 1252 to review of only final orders

Section 1252(a)(4), which stands in sharp contrast to Section 1252(a)(5), is CAT-specific. See pages 4-5, *supra*. Likewise, the government admits that a CAT claim does not itself challenge the validity of a removal order. See Gov't Br. 26; *Guzman Chavez* Pet. 3.

Finally, *Foti* did not address the presumption favoring judicial review of agency action. In *Foti*, judicial review existed; the sole question was which forum was proper. At bottom, *Foti*'s dicta says little about whether AEDPA's specific text (enacted 33 years later) bars judicial review over the denial of CAT claims with the clarity necessary to overcome the presumption of judicial review.

ii. *Cheng Fan Kwok* v. *INS*, 392 U.S. 206, 213-214 (1968)—which held that the denial of an application to stay deportation was outside the scope of a "final order[] of deportation"—supports our position. The Court explained that the stay application "assumed the prior existence of an order of deportation," "did not attack the deportation order itself," and sought "relief not inconsistent" with the deportation order. *Id*. at 213 (quotations omitted). See also *Chadha*, 462 U.S. at 938-939 (explaining that *Cheng Fan Kwok*'s "holding * * * was based on the fact that the alien 'did not attack the de-

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of removal (see pages 16-18, *infra*), statutory withholding claims may be included in petitions seeking review of a final order of removal. Second, Section 1252(b)(9) provides for "judicial review of a final order" "arising from any action taken or proceeding brought to remove an alien from the United States." 8 U.S.C. 1252(b)(9). Because the withholding order itself is a "final order," it may alone support a petition for review. Third, alternatively, these would qualify as "now-or-never" claims, which remain subject to review. See *E.O.H.C.* v. *Secretary U.S. Dep't Homeland Sec.*, 2020 WL 728629 (3d Cir. Feb. 13, 2020). Fourth, the Administrative Procedure Act may also supply jurisdiction. See, *e.g.*, *Perez* v. *USCIS*, 774 F.3d 960 (11th Cir. 2014); *Hosseini* v. *Johnson*, 826 F.3d 354 (6th Cir. 2016).

portation order itself but instead sought relief not inconsistent with it'" (alteration adopted)). An order denying CAT relief has these very same qualities.

And, like *Foti*, *Cheng Fan Kwok* observed that construing the scope of the term "final order[] of deportation" was "a choice between uncertainties." 392 U.S. at 215 (quotations omitted). AEDPA's express definition has eliminated this ambiguity.

iii. *Chadha* embraces a straightforward rule: The term "final order[] of deportation" extends to "all matters on which the validity of the final order is *contingent*." 462 U.S. at 938 (emphasis added; quotations omitted). The challenge in *Chadha* qualified because the petitioner "directly attack[ed] the deportation order itself and the relief he [sought]—cancellation of deportation—is plainly inconsistent with the deportation order." *Id*. at 939. But we have already explained that success on a CAT claim "leaves the final order of removal undisturbed." *Guzman Chavez* Pet. 3.

3. Neither CAT's implementing regulations nor the REAL ID Act subject CAT claims to Section 1252(a)(2)(C).

The government cannot find support in either CAT's implementing regulations (Gov't Br. 26-29) or the REAL ID Act (*id*. at 29-33). Both arguments take the same form: An order denying a CAT claim is reviewed via a petition governed by Section 1252, the government says, and thus Section 1252(a)(2)(C) operates to strip jurisdiction. The first point is correct, but not the second.

As to the first, we agree that noncitizens obtain judicial review of an order denying CAT relief via a petition for review under Section 1252. Indeed, Section 1252(a)(4) requires that expressly.

The government, however, errs in arguing that Section 1252(a)(2)(C) strips judicial review of *anything* contained in a petition for review governed by Section 1252. Section 1252(a)(2)(C) bars judicial review of the "final order of removal." 8 U.S.C. 1252(a)(2)(C). It does not, for example, apply to the whole "petition for review." Where, as here, a Section 1252 petition challenges both a "final order of removal" and an order denying CAT relief, Section 1252(a)(2)(C) strips jurisdiction as to the former, but not the latter.

We predicted the government's argument in our opening brief and already answered it. See Pet'r Br. 36. For its part, the government fails to join issue; it does not explain how its theory that Section 1252(a)(2)(C) applies indiscriminately to a petition for review is consistent with the statutory text.

For these reasons, the government's contentions that CAT review occurs within "the framework of Section 1252" (Gov't Br. 27) and that "CAT claims are subject to review pursuant to Section 1252" (*id*. at 28) are consistent with our argument. The government (at 28) gets no further with 8 C.F.R. 1208.18(e)(1), which provides that FARRA does not establish judicial review that is otherwise "restricted or prohibited by the Act." Our argument is not that FARRA trumps Section 1252(a)(2)(C); it is that Section 1252(a)(2)(C) jurisdiction-stripping does not apply by its own terms.

Similarly, we do not deny that "[a] petition for review of a CAT claim is filed 'in accordance' with Section 1252 * * * only if it conforms to the limitations of Section 1252." Gov't Br. 30. And we agree that "[t]he REAL ID Act was plainly intended to foreclose district-court review" of "CAT claims denied in removal proceedings." *Id*. at 31.

Put differently, while Section 1252(a)(2)(C) may be said to "apply" to any petition for review filed under Section 1252, its effect is to bar judicial review of a "final order of removal." No more. Try as it might, the government cannot expand the scope of Section 1252(a)(2)(C) beyond its text.[8]

4. Appellate jurisdiction does not depend on construing a CAT order as a "final order of removal."

The government is wrong to contend (at 34) that our argument would "be self-defeating" because "it would deprive the courts of appeals of any jurisdictional basis to review the alien's CAT claim in the first place."

The government's key mistake is asserting that "Section 1252(a)(1) authorizes the courts of appeals to exercise Hobbs Act jurisdiction * * * *only* with respect to a petition for review of a 'final order of removal.'" Gov't Br. 34 (emphasis added) (quoting 8 U.S.C. 1252(a)(1)). The government misreads this provision. Section 1252(a)(1) says that "[j]udicial review of a final order of removal" is available "only" under the Hobbs Act, 28 U.S.C. 2342. Accordingly, to obtain review over a "final order of removal," a noncitizen must bring a petition under Section 1252, which in turn incorporates the Hobbs Act. The statute does *not* say that a petition

[8] Section 106(c) of the REAL ID Act (119 Stat. 311) directed transfer of certain then-pending habeas cases to the courts of appeals. The government maintains (at 32) that a CAT claim must have been within the ambit of "a final administrative order of removal, deportation, or exclusion." But the text does not provide for that result. *Ishak* v. *Gonzales*, 422 F.3d 22 (1st Cir. 2005), did not expressly address the issue; indeed, the opinion offers no indication that Ishak even pursued his CAT claim via habeas.

for review under Section 1252 is limited to a claim challenging a final order of removal.

In fact, Section 1252(a)(4) expressly establishes jurisdiction to review the denial of a CAT claim. It provides that "a petition for review filed with an appropriate court of appeals in accordance with this section" is the mechanism "for judicial review of any cause or claim under the United Nations Convention Against Torture." 8 U.S.C. 1252(a)(4). Its plain text establishes judicial review.[9]

For Section 1252(a)(4) to accomplish its purpose—foreclosing CAT-based habeas claims (see Gov't Br. 30-31)—it *had* to provide jurisdiction. Prior to the REAL ID Act, some courts allowed CAT-based habeas claims pursuant to *St. Cyr*. See Gov't Br. 31 n.4. This stemmed from the premise that there was no other basis for judicial review of certain CAT claims because of FARRA § 2242(d)'s requirement that review of a CAT claim be coupled to review of a final order of removal. See, *e.g.*, *Cadet* v. *Bulger*, 377 F.3d 1173, 1181-1183 & n.8 (11th Cir. 2004). Congress sought to foreclose habeas claims by addressing the Suspension Clause concerns; Section 1252(a)(4) thus expanded jurisdiction beyond the earlier-in-time FARRA § 2242(d), decoupling review of a CAT claim from review of a final order of removal. Indeed, the Conference Report identified that the purpose of Section 1252(a)(4) was to "allow aliens in [S]ection 240 removal proceedings to seek

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[9] See, *e.g.*, *Maldonado* v. *Lynch*, 786 F.3d 1155, 1160 (9th Cir. 2015) (en banc) (identifying Section 1252(a)(4) as the source of "jurisdiction to review petitions for relief under CAT"); *Subrata* v. *Attorney Gen. of U.S.*, 378 F. App'x 226, 228 (3d Cir. 2010) ("Section 1252(a)(4) provides us with exclusive jurisdiction over claims under the CAT."); *Chen* v. *U.S. Dep't of Justice*, 144 F. App'x 147, 149 (2d Cir. 2005).

review" of the denial of CAT claims. H.R. Conf. Rep. 109-72, at 176.

To put it simply, Section 1252(a)(4) establishes jurisdiction, and that jurisdiction is not contingent on review of a final order of removal. For this reason, there is jurisdiction in the CAT-claim-only scenarios that the government (at 35-36) identifies.[10]

In any event, in this case, the petition for review did address a final order of removal. See Pet. App. 6a-10a. And, because of 8 U.S.C. 1252(b)(9), review of the two orders occurred in the same proceeding.

B. In the event of ambiguity, the presumption in favor of judicial review governs.

The presumption of judicial review over administrative agency action stems from core separation-of-powers principles. Pet'r Br. 37. By constitutional design, the Judiciary traditionally reviews actions taken by administrative agencies. "The 'check' the judiciary provides to maintain our separation of powers is enforcement of the rule of law through judicial review." See *Department of Transp.* v. *Association of Am. Railroads*, 575 U.S. 43, 76 (2015) (Thomas, J., concurring in judgment).

In response, the government (at 37-38) rehashes its merits position, arguing that Congress "unambiguous[ly]" stripped jurisdiction. Needless to say, we disagree. In our accounting, the statutory text is unambiguous in petitioner's favor.

Ultimately, the government's response misses the point. If the Court concludes that neither party's arguments "carry the day," then "the presumption does

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[10] Alternatively, jurisdiction in these cases would stem from the "now-or-never" line of authority. See *E.O.H.C.*, 2020 WL 728629.

the work." Oral Arg. Tr. at 51 (Kagan, J.), *Guerrero-Lasprilla* v. *Barr*, No. 18-776. That result accords with fundamental principles governing the balance of authority between the Judiciary and administrative agencies.

The government (at 38-39) belittles the role of judicial review, saying it offers only "marginal benefit." That contention is hard to countenance. The stakes here could not be any more serious: When the agency gets it wrong, the result is that the United States removes an individual to a place where he or she is likely to be tortured or killed.

And the BIA sometimes does get it wrong. As *amici* Legal Service Providers (at 8-13) document, the "immigration system is gravely overburdened," resulting in "errors and inconsistencies pervad[ing] the immigration system." As the former immigration judges explain, each IJ is now expected to resolve 700 cases annually—an enormous burden many IJs say they are unequipped to handle; meanwhile, the BIA is streamlining its appellate review in ways that only heighten the risk of mistake. *Amicus* Br. of Former Immigration Judges, at 18-22. Some have opined that "adjudication" of immigration "cases at the administrative level has fallen below the minimum standards of legal justice." *Benslimane* v. *Gonzales*, 430 F.3d 828, 830 (7th Cir. 2005).

These errors may result in profound human consequences. One recent report identified 138 individuals who, after being deported to El Salvador, were subsequently killed. *Deported to Danger*, Human Rights Watch (Feb. 5, 2020), https://perma.cc/L8CN-PSEG.

Judicial review—including review of agency fact-finding—matters. Notwithstanding the substantial-evidence test (Gov't Br. 38), courts of appeals regularly

reverse agency fact-finding underlying the denial of CAT relief. See, *e.g.*, *Lin Zheng* v. *Sessions*, 728 F. App'x 56, 58 (2d Cir. 2018) ("[S]ubstantial evidence does not support the agency's finding that Zheng did not credibly demonstrate past persecution in China."); *Kamar* v. *Sessions*, 875 F.3d 811, 820 (6th Cir. 2017); *Amicus* Br. of Former Immigration Judges, at 13-15.

In this context, judicial review—a cornerstone of the Constitution's allocation of powers—is anything but "marginal." The BIA will invariably make mistakes, and courts of appeals have proven capable of rectifying those mistakes. Review can mean the difference between life and death.

C. The government's construction defies essential policies embodied in the INA.

With respect to the legislative purposes at issue, the government (at 36-37) has little to say.

Congress tethered Section 1252(a)(2)(C)'s jurisdiction-stripping to the judicial review that a noncitizen already received with respect to the cause of removal—the criminal conviction. See Pet'r Br. 40-41. That rationale does not extend to CAT claims. The government replies that the purpose of stripping jurisdiction was broader, but it has no evidence to support that contention.

Congress, moreover, knowingly designed CAT to reach criminal noncitizens—it protects even Nazi persecutors, to whom no other forms of relief are available. Pet'r Br. 41-42. And unbroken Executive practice demonstrates CAT's essential role. *Id*. at 42-44. When all else is stripped away, CAT relief remains to protect noncitizens from likely torture or death upon removal. It is for good reason that, in Section 1252(a)(2)(C), Congress barred judicial review over "orders of removal"—but not orders denying CAT claims.

* * *

1. Below, the government did not assert that Section 1252(a)(2)(C) barred judicial review. See Pet'r Br. 18 n.12; Gov't Br. 11-12 n.2. Rather, the court of appeals invoked Section 1252(a)(2)(C) *sua sponte*. Pet. App. 8a-11a.

In the petition, we argued that Section 1252(a)(2)(C) does not preclude review of CAT claims. In its opposition, the government contended that "[t]he court of appeals correctly determined that it lacked jurisdiction to review factual challenges to the denial of petitioner's requests for withholding and deferral of removal under the CAT." Opp. 9. See also *id*. at 10.

Now, however, the government agrees that the court below erred in invoking Section 1252(a)(2)(C), but for a different reason—that petitioner was found removable pursuant to 8 U.S.C. 1227(a)(2)(A)(i). Gov't Br. 11-12 & n.2. Indeed, multiple courts have explained that Section 1252(a)(2)(C) does not attach in these circumstances. See *Yeremin* v. *Holder*, 738 F.3d 708, 713 (6th Cir. 2013); *Wanjiru* v. *Holder*, 705 F.3d 258, 262-263 (7th Cir. 2013); *Lee* v. *Gonzales*, 410 F.3d 778, 781-782 (5th Cir. 2005). By contrast, the court below has not articulated a basis for its holding. See *Keungne* v. *U.S. Atty. Gen.*, 561 F.3d 1281, 1283 (11th Cir. 2009).

Because a court "has a virtually unflagging obligation to exercise" available "jurisdiction" (*Mata* v. *Lynch*, 135 S. Ct. 2150, 2156 (2015)), it would be appropriate, at minimum, for the Court to vacate and remand this issue for resolution. The Court has discretion to address the government's change of position, and these unusual circumstances warrant doing so. See *Yee* v. *City of Escondido*, 503 U.S. 519, 535 (1992) (noting that waiver rules are "prudential"). Indeed, in view of the government's concession, this qualifies as a

"plain error" that is "evident from the record and otherwise within [the Court's] jurisdiction to decide." S. Ct. R. 24.1(a).

The government's confession of error is not an obstacle to review of the question presented. It simply identifies a second, distinct error committed below.

2. Additionally, if the Court holds that Section 1252(a)(2)(C) does bar review, it should vacate and remand for the court of appeals to address whether petitioner's claims are within Section 1252(a)(2)(D) as construed by the forthcoming decision in *Guerrero-Lasprilla*. See Pet'r Br. 45. The government does not deny that this Court's opinion may be at odds with the Section 1252(a)(2)(D) analysis employed below. The government's assertion (at 42 n.6) that we "relinquished" this position conflicts with "the general rule * * * that an appellate court must apply the law in effect at the time it renders its decision." *Henderson* v. *United States*, 568 U.S. 266, 271 (2013). That is especially so with respect to changes in the law that postdate the petition for certiorari. See *Sure-Tan, Inc.* v. *NLRB*, 467 U.S. 883, 896 n.7 (1984).

Respectfully submitted.

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