No. 19-897

IN THE

Supreme Court of the United States

TONY H. PHAM, Senior Official Performing the Duties of the Director of U.S. Immigration and Customs Enforcement, *et al.*,

Petitioners,

v.

MARIA ANGELICA GUZMAN CHAVEZ, *et al.*,

Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF FOR AMICI CURIAE NATIONAL IMMIGRATION LITIGATION ALLIANCE, NORTHWEST IMMIGRANT RIGHTS PROJECT, CATHOLIC LEGAL IMMIGRATION NETWORK, INC., FLORENCE IMMIGRANT & REFUGEE RIGHTS PROJECT, AND PUBLIC COUNSEL IN SUPPORT OF RESPONDENTS

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INTEREST OF AMICI CURIAE[1]

Amici are immigration advocacy organizations who represent detained individuals in "withholding-only" proceedings such as those at issue. Amici submit this brief to aid the Court in understanding how withholding-only proceedings operate in practice and to explain how, based on amici's extensive real-world experience, the court of appeals correctly determined that detention of noncitizens in withholding-only proceedings is subject to 8 U.S.C. § 1226, which affords bond hearings for some of these individuals.

The **National Immigration Litigation Alliance** (NILA) is a non-profit organization that seeks to realize systemic change in the immigrants' rights arena through federal court litigation. NILA engages in impact litigation to extend the rights of noncitizens and to eliminate systemic obstacles they or their counsel routinely face. In addition, NILA builds the capacity of social justice attorneys to litigate in federal court by co-counseling individual federal court cases and by providing strategic advice and assistance to its members.

The **Northwest Immigrant Rights Project** (NWIRP) is a nonprofit legal organization dedicated to the defense and advancement of noncitizens' legal rights. NWIRP provides community education, legal consultations, and direct representation to low-income immigrants placed in removal proceedings, as well as other noncitizens seeking immigration benefits.

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[1] No counsel for a party authored this brief in whole or in part, and no entity or person, other than amici curiae, their members, and their counsel, made a monetary contribution intended to fund the preparation or submission of this brief. All parties have consented to the filing of this brief.

Catholic Legal Immigration Network, Inc. ("CLINIC") is the largest charitable legal immigration network in the United States. Its network affiliates represent immigrants in immigration courts across the country. CLINIC's mission, which derives from its broader purpose of embracing the Gospel value of welcoming the stranger, is to promote the dignity and protect the rights of immigrants in partnership with its network affiliates. CLINIC implements its mission by providing substantive legal and program management training and support for its network affiliates, including organizations engaged in providing legal orientation to asylum-seekers; representing immigrants in bond proceedings; and completing affirmative and defensive applications for asylum and withholding of removal.

The **Florence Immigrant & Refugee Rights Project** ("Florence Project") provides free legal and social services to immigrant men, women, and children detained in immigration custody in Arizona. In 2019, the Florence Project provided free legal and social services to over 10,000 noncitizens facing removal in Arizona. The Florence Project regularly works with people who have reinstated removal orders and are either awaiting their reasonable fear interview or have passed that screening and are in withholding-only proceedings. The Florence Project has seen firsthand how lack of clarity about the detention authority for persons in withholding-only proceedings results in unnecessarily prolonged detention of people with valid claims for relief.

Public Counsel, based in Los Angeles, California, represents indigent immigrants from around the world in their claims for immigration relief, including those in withholding-only proceedings. Public Counsel has provided legal services to thousands of immigrants de-

tained by the Department of Homeland Security, including through legal orientations, pro se assistance, direct representation, and impact litigation. Public Counsel is committed to advancing transparency, equality, and justice in our nation's immigration system.

SUMMARY OF ARGUMENT

This case concerns the liberty interests of a small number of noncitizens who are placed in "withholding-only" immigration proceedings each year. Each of these individuals has already demonstrated—to the satisfaction of an asylum officer or an immigration judge—a "reasonable fear" of persecution or torture in the country to which the government seeks to remove them. Respondents (and others who are similarly situated) have thus already demonstrated a strong likelihood that they will not be removed from the United States, as U.S. law prohibits the removal of a noncitizen to a country where it is more likely than not that she will face persecution or torture. Although it is theoretically possible for the government to deport individuals granted protection in withholding-only proceedings, in amici's experience, this rarely occurs. The vast majority of individuals granted protection in withholding-only proceedings are never removed from the United States.

The government, however, insists that individuals in withholding-only proceedings must remain in immigration incarceration during the many months, sometimes years, they pursue their protection claims without the opportunity for release on bond. This position—if adopted—would needlessly subject many people likely to never be removed to years of confinement. Amici have witnessed the toll that such confinement

takes on these individuals. Congress did not impose such a senseless deprivation of liberty, and the government's interpretation is at odds with the text of the relevant detention statutes and their application in other contexts. Notably, the government itself has taken the position that a removal order is not "final" for purposes of judicial review when a withholding-only proceeding is pending. Indeed, some individuals in these circumstances have had their removal orders judicially stayed, such that the statutory "removal period" has not even begun, meaning that the detention provision the government invokes, which applies only "during the removal period" and "beyond the removal period," cannot apply.

The government invokes the statute's "context and structure," but amici's experience with persons in both withholding-only proceedings and standard removal proceedings demonstrates that the statutory context and structure actually reinforce the court of appeals' view that 8 U.S.C. § 1226 governs respondents' detention, not the government's view that 8 U.S.C. § 1231(a) controls. Amici's experience likewise demonstrates that the court of appeals' interpretation of the statutes is anything but "patently unworkable" (Pet. Br. 34); it is in fact entirely consistent with the statutory detention framework. And to the extent that the Court considers such policy arguments in interpretating the statutes at issue, amici respectfully submit that it should also consider the toll of long-term detention on noncitizens who have already demonstrated a bona fide claim for protection from removal.

The Court should affirm the judgment of the court of appeals.

ARGUMENT

I. THIS CASE INVOLVES A NARROW CATEGORY OF INDIVIDUALS WHO, THOUGH SUBJECT TO A REINSTATEMENT ORDER, HAVE ALREADY SHOWN THAT THEY ARE LIKELY ENTITLED TO PROTECTION FROM REMOVAL

8 U.S.C. § 1231(a)(5) provides that the Department of Homeland Security (DHS) may issue summary removal orders, called reinstatement orders, to noncitizens who reenter the country after having been previously ordered removed. But not all individuals with prior removal orders are placed in these "reinstatement" proceedings. Certain categories of individuals are statutorily exempt.[2] And DHS sometimes opts to place individuals with prior removal orders into standard removal proceedings, by issuing a notice to appear ("NTA") before an immigration judge ("IJ"), as opposed to a reinstatement order. *See Perez-Guzman* v. *Lynch*, 835 F.3d 1066, 1081 (9th Cir. 2016) ("[T]he government has discretion to forgo reinstatement and instead place an individual in ordinary removal proceedings."). Individuals previously ordered removed who are placed in standard removal proceedings may advance the same defenses against removal before the IJ

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[2] *See* Legal Immigration Family Equity Act (LIFE Act), Pub. L. No. 106-553, § 1104(b), 114 Stat. 2762A-142 (2000), as amended by LIFE Act Amendments of 2000, Pub. L. No. 106-554, § 1503(a)(3), 114 Stat. 2763A-324 (certain individuals filing for adjustment of status under the LIFE Act); *id.* §§ 1505(a)(1), 1505(c), 1505(b)(1) (certain Nicaraguan, Cuban, Salvadoran, Guatemalan, Eastern European, and Haitian noncitizens filing for relief under the Nicaraguan Adjustment and Central American Relief Act of 1997 (NACARA) and the Haitian Refugee Immigration Fairness Act of 1998 (HRIFA)).

that are available to noncitizens who were not previously removed.[3]

Noncitizens who are placed in reinstatement proceedings, on the other hand, face summary removal based solely on an order issued by a DHS officer, i.e., without a hearing before an IJ. *See* 8 C.F.R. §§ 241.8(a), 1241.8(a). These individuals are generally not eligible for traditional forms of immigration relief from deportation. There is one important exception, however: if a noncitizen in reinstatement proceedings indicates a fear of return, DHS must refer the noncitizen to an asylum officer to determine whether she can show a "reasonable fear of persecution or torture." *Id.* §§ 208.31, 1208.31 (describing the process for "[r]easonable fear of persecution or torture determinations involving ... aliens whose removal is reinstated"); *id.* §§ 241.8(e), 1241.8(e) (outlining the withholding of removal exception for those in reinstatement proceedings). Noncitizens who demonstrate such a "reasonable fear" are then placed in "withholding-only proceedings" before an IJ, where they can apply for withholding of removal under 8 U.S.C. § 1231(b)(3)(A) and/or protection under the United States Convention Against Torture (CAT). *See* 8 C.F.R. §§ 208.31(e), 1208.31(e) (providing that if an asylum officer determines that a noncitizen has a reasonable fear, the officer shall refer the person to withholding-only proceedings); *id.* §§ 208.2(c)(2), 1208.2(c)(2) (granting exclusive jurisdiction to IJs over withholding-only proceedings); *id.* §§ 208.16, 1208.16 (setting the standard and procedure for adjudicating applications filed in withholding-only proceedings). These procedures ensure compliance

[3] These defenses include, for example, adjustment of status and cancellation of removal. *See* 8 U.S.C. §§ 1229b, 1255.

with the United States' statutory and treaty-based obligations not to return any person to a country where that person would face persecution or torture. *See* 8 U.S.C. § 1231(b)(3)(A); Foreign Affairs Reform and Restructuring Act of 1998, Pub. L. No. 105-277, § 1242, 112 Stat. 2681.[4]

If an individual is granted withholding of removal or relief under the CAT, DHS may not remove the person to the country to which removal has been withheld (or deferred). And while the government may theoretically seek to remove the noncitizen to a third country, in amici's experience, it only rarely does so. *See Kumarasamy* v. *Attorney Gen.*, 453 F.3d 169, 171 n.1 (3d Cir. 2006) ("[I]n practice ... non-citizens who are granted [withholding of] removal are almost never removed from the U.S." (quoting Weissbrodt & Danielson, *Immigration Law and Procedure* 303 (5th ed. 2005))); *accord Patpanathan* v. *Attorney Gen.*, 553 F. App'x 261, 263 n.3 (3d Cir. 2014); *de Souza Neto* v. *Smith*, 272 F.

[4] A noncitizen in "withholding-only" proceedings may pursue three forms of protection from removal: withholding of removal under the Immigration and Nationality Act (INA) (*see* 8 U.S.C. § 1231(b)(3); 8 C.F.R. § 1208.16(b)); withholding of removal under the CAT (*see* 8 C.F.R. § 1208.16(c)); and deferral of removal under the CAT (*see id.* § 1208.17). To be granted withholding of removal under the INA, a noncitizen must show that it is more likely than not that his or her life or freedom would be threatened in the proposed country of removal on account of race, religion, nationality, membership in a particular social group, or political opinion. 8 U.S.C. § 1231(b)(3)(A); 8 C.F.R. § 1208.16. To be granted either withholding of removal or deferral of removal under the CAT, a noncitizen must show that it is more likely than not that he or she would be tortured if removed to the designated country. 8 C.F.R. §§ 1208.16(c)(2), 1208.17(a). Additionally, to be granted withholding of removal (as opposed to deferral of removal) under the CAT, a noncitizen must not have certain disqualifying convictions or bars to relief. *Id.* § 1208.16(d)(2).

Supp. 3d 228, 230 (D. Mass. 2017). According to documents disclosed by the government in response to a Freedom of Information Act request, just 21 recipients of withholding of removal were removed from the United States during all of 2017.[5] That represented a tiny fraction (approximately 0.0175%) of the approximately 120,000 people removed that year pursuant to the reinstatement of removal process, and an even smaller share (approximately 0.007%) of the total number of people removed.[6]

Establishing "reasonable fear," as needed to qualify for withholding-only proceedings, is difficult: it is equivalent to establishing a "well-founded fear," the standard that governs a discretionary *grant* of asylum. *See* U.S. Citizenship and Immigration Services, *Reasonable Fear of Persecution and Torture Determinations Lesson* 11, *reprinted in* Mem. From John Lafferty, Chief, Asylum Division to All Asylum Office Personnel (Feb. 13, 2017), https://www.aila.org/File/DownloadEmbeddedFile/70908. Between October 1, 2019 and October 15, 2020, for example, asylum officers adjudicated a total of 7,670 reasonable fear cases and found just 1,034 people (approximately 13.5%) to meet

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[5] American Immigration Council and National Immigrant Justice Center, *The Difference Between Asylum and Withholding of Removal* 7, https://www.americanimmigrationcouncil.org/sites/default/files/research/the_difference_between_asylum_and_withholding_of_removal.pdf (visited Nov. 11, 2020).

[6] U.S. Immigration and Customs Enforcement, *Annual Report, Immigration Enforcement Actions: 2017*, at 9 (Mar. 2019), https://www.dhs.gov/sites/default/files/publications/enforcement_actions_2017.pdf (noting that approximately 300,000 individuals were removed during FY 2017, of which approximately 40% (or approximately 120,000 people) were removed pursuant to the reinstatement of removal process).

the standard to be referred to withholding-only proceedings.[7] The noncitizens this case concerns, therefore, are a small and select group of people who have already demonstrated a bona fide basis for protection from removal.

Amici submit that Congress intended for these individuals, who have already demonstrated "reasonable fear" and are in "withholding-only" proceedings, to have the opportunity to have an IJ decide whether they may be released from immigration detention while they pursue their fear-based claims. If their detention is governed by 8 U.S.C. § 1226, as the court of appeals held, they may receive a bond hearing (as long as they are not otherwise subject to mandatory detention under § 1226(c), which applies to persons with qualifying criminal conduct). Of course, qualifying for a bond hearing does not guarantee that an individual will be released from immigration custody; it merely provides noncitizens with the opportunity to ask a neutral decision-maker to assess and determine whether they present a danger or risk of flight.

However, if detention is governed by 8 U.S.C. § 1231(a), as the government contends, then individuals in withholding-only proceedings would never receive a bond hearing. In the government's view, the only detention-review process available is an administrative custody review, which otherwise applies only to detainees with *final* orders of removal.[8] *See* 8 C.F.R. § 241.4

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[7] U.S. Citizenship and Immigration Services, *Semi-Monthly Credible Fear and Reasonable Fear Receipts and Decisions* (Nov. 5, 2020), https://www.uscis.gov/tools/reports-and-studies/semi-monthly-credible-fear-and-reasonable-fear-receipts-and-decisions.

[8] Some circuits have interpreted § 1231 as requiring a bond hearing once detention becomes prolonged, generally at the six-

(setting forth the process for detaining those with final removal orders beyond 90 days after a final removal order, known as the removal period); *id.* § 241.13 ("establish[ing] special review procedures for those … who are subject to a final order of removal and are detained under the custody review procedures provided at § 241.4 after the expiration of the removal period, where the alien has provided good reason to believe there is no significant likelihood of removal"). In amici's experience, these administrative custody reviews result in perfunctory denials, without any meaningful opportunity to seek release during the lengthy process, and cannot meaningfully be compared to individualized bond determinations made by an IJ. Administrative custody reviews do not provide for an in-person hearing or the right to appeal. *See, e.g.*, *Guerrero-Sanchez* v. *Warden York Cty. Prison*, 905 F.3d 208, 226-227 (3d Cir. 2018); *Diouf* v. *Napolitano*, 634 F.3d 1081, 1091 (9th Cir. 2011). Critically, the decision regarding continued detention is made "by DHS employees who are not ostensibly neutral decision makers such as immigration judges." *Guerrero-Sanchez*, 905 F.3d at 227.

In amici's experience, withholding-only proceedings usually take at least months and often take years. *See, e.g.*, *Guerrero-Sanchez*, 905 F.3d at 212 (53-month period between start of original detention and withholding hearing); *Mendoza-Ordonez* v. *Lowe*, 273 F. Supp. 3d 528, 529 (M.D. Pa. 2017) (noncitizen detained for "almost two years … pending his ongoing withholding-of-removal proceedings"). Accordingly, when a noncitizen is held in detention for the duration of her

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month mark. *See Guerrero-Sanchez* v. *Warden York Cty. Prison*, 905 F.3d 208, 219-220 (3d Cir. 2018); *Diouf* v. *Napolitano*, 634 F.3d 1081, 1091-1092 (9th Cir. 2011); *see also* Pet. Br. 7 n.2.

withholding-only proceedings, detention can be lengthy indeed.

II. SECTION 1226 GOVERNS THE DETENTION OF INDIVIDUALS IN WITHHOLDING-ONLY PROCEEDINGS, BECAUSE A DECISION IS STILL "PENDING … ON WHETHER" THEY WILL BE REMOVED

8 U.S.C. § 1226 provides that a noncitizen "may be arrested and detained *pending a decision on whether the alien is to be removed from the United States*," but that "the Attorney General … may release the alien on a bond of at least $1,500 with security approved by, and containing conditions prescribed by, the Attorney General." 8 U.S.C. § 1226(a)(2) (emphasis added). The government has implemented this statute by permitting noncitizens detained under Section 1226 to request bond before an immigration judge. Pet. Br. 6-7. As the court of appeals ruled, this category includes people in "withholding-only" proceedings, as the "decision on whether the alien is to be removed from the United States" remains "pending." Pet. App. 22a.

The government disagrees, arguing that: (1) withholding-only proceedings consider only "where" a person should be removed, not "whether" they should be removed (Pet. Br. 16); and (2) the requisite "decision" on "whether the alien is to be removed from the United States" is the initial order of removal, rather than any order subsequently issued at the conclusion of withholding-only proceedings (*id.*). Based on amici's extensive experience working with noncitizens in removal proceedings (including thousands each year who are detained), both arguments are inconsistent with how removal proceedings actually work and with the government's application of the relevant detention statutes in other immigration contexts.

A. For Individuals In Withholding-Only Proceedings, A Decision Whether Their Removal Should Be Withheld Is Almost Always A Decision Whether They Will Be Removed At All

Removal orders are country-specific. They do not direct removal into the air, but rather specify removal to a particular country—typically the person's country of citizenship. *E.g.*, *Nasrallah* v. *Barr*, 140 S. Ct. 1683, 1688 (2020) (BIA "vacate[d] the order granting CAT relief and ordered Nasrallah removed to Lebanon"); *Jennings* v. *Rodriguez*, 138 S. Ct. 830, 838 (2018) (petitioner "ordered … deported to Mexico"); *Zadvydas* v. *Davis*, 533 U.S. 678, 684 (2001) (petitioner "ordered deported to Germany"); *see also Hadera* v. *Gonzales*, 494 F.3d 1154, 1156 (9th Cir. 2007) ("After determining that a noncitizen is removable, an IJ must assign a country of removal."). Because the BIA has held that "in order to withhold removal there must first be an order of removal that can be withheld," *Matter of I-S- & C-S-*, 24 I. & N. Dec. 432, 433 (BIA 2008), when an IJ grants withholding of removal, the IJ will issue a final removal order directing removal to a particular country, but then state in the same order that removal to that country is being withheld. *See* 8 C.F.R. § 208.16(d) (explaining the criteria for granting an application for withholding of removal "to a country of proposed removal"); *id.* § 208.31 (explaining the criteria for determining whether "removal to the country of removal must be withheld or deferred" when a noncitizen is subject to a reinstated removal order). A grant of withholding of removal thus means that an individual cannot be removed to the country to which the government has sought to remove the person.

While theoretically the government could later seek to remove a person to the originally designated

country in limited circumstances—such as if conditions in that country were to change, or based on a showing of fraud in the original application or the commission of certain criminal offenses—the government would need to provide notice to the noncitizen and an opportunity to be heard, and would also need to prove, by preponderance of the evidence, that there existed a ground for terminating the grant of withholding. *See* 8 C.F.R. § 1208.24(f); *Gutierrez* v. *Holder*, 730 F.3d 900 (9th Cir. 2013) (per curiam). Of course, this is no different from the government's authority to terminate an asylee's status on similar bases. *See* 8 U.S.C. § 1158(c)(2). And on the rare occasion that the government seeks to remove a noncitizen granted withholding of removal to a third country—something that happened only 21 times in all of 2017, *see supra* p. 8, and in amici's experience almost always involves dual nationals—the government must allow the individual the option of seeking withholding of removal or protection under the CAT as to *that* country. *Andriasian* v. *INS*, 180 F.3d 1033, 1041 (9th Cir. 1999); *Kossov* v. *INS*, 132 F.3d 405, 408 (7th Cir. 1998); *see also Aden* v. *Nielsen*, 409 F. Supp. 3d 998, 1009 (W.D. Wash. 2019) ("A noncitizen must be given sufficient notice of a country of deportation [such] that, given his capacities and circumstances, he would have a reasonable opportunity to raise and pursue his claim for withholding of deportation.").

In other words, absent additional process initiated by the government, a decision withholding removal (or "deferring" removal under the CAT) to the sole country (or countries) designated for removal by the government is a decision on "whether" an individual will be removed. *See* Letter from U.S. Immigration and Customs Enforcement to Chudier Banguot (Oct. 21, 2019) ("DHS intends to seek a travel document to remove

you to South Sudan .... If you believe you will face torture in South Sudan, you may request protection from removal ....").[9] The government is not legally authorized to remove a noncitizen to a country to which removal has been withheld.[10]

For individuals in withholding-only proceedings, then, removal itself is far from certain. That makes Section 1231's detention provisions inapplicable, as they are meant to ensure that a noncitizen is detained while—in the government's own words—the government "tackles the practicalities of removal." Pet. Br. 22. Withholding-only proceedings are obviously not one of the "practicalities of removal." They involve lengthy legal proceedings before immigration judges that determine substantive rights, and the proceedings often include fact testimony by the noncitizen, family members, and other witnesses; sometimes expert testimony regarding conditions in the proposed country of removal; review of documentation and country conditions information; and administrative appeals. And they often conclude in an order forbidding removal at all to the sole country that the government has designated.

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[9] A copy of this letter is on file with amicus NWIRP. Amici are prepared to lodge the document pursuant to S. Ct. R. 32.3 should the Court request it.

[10] In light of this reality, the regulations entitle persons granted withholding of removal to obtain employment authorization. 8 C.F.R. § 274a.12(a)(10).

B. Individuals In Withholding-Only Proceedings Have Not Yet Received A Final "Decision" Whether They Will Be Removed

Individuals in withholding-only proceedings are also still awaiting the issuance of a final "decision" whether they will be removed from the United States, placing their detention within the ambit of Section 1226, not Section 1231(a). *See* 8 U.S.C. § 1226(a). Notwithstanding their prior removal orders, individuals in withholding-only proceedings do not fall within the categories of people "ordered removed" whose detention is authorized by Section 1231(a). Section 1231(a) authorizes detention only in two specific circumstances: "[d]uring the removal period," 8 U.S.C. § 1231(a)(2), and "beyond the removal period," *id.* § 1231(a)(6). Neither category covers the time period in which a noncitizen is in withholding-only proceedings, because the statute defines the "removal period" as beginning on the latest of three events:

> (i) The date an order of removal becomes administratively final. (ii) If the removal order is judicially reviewed and if a court orders a stay of the removal of the alien, the date of the court's final order. (iii) If the alien is detained or confined (except under an immigration process), the date the alien is released from detention of confinement.

Id. § 1231(a)(1)(B). For individuals in withholding-only proceedings, the statutory trigger for the "removal period" has not yet occurred, for two reasons.

First, while individuals in withholding-only proceedings may have previously been "ordered removed" (Pet. App. 23), their prior orders of removal are not "administratively final" for purposes of 8 U.S.C.

§ 1231(a)(1)(B)(i) once they are placed in withholding-only proceedings. "Courts have routinely held—and the government has agreed—that a reinstated order of removal is not 'final' for purposes of judicial review until [the government] completes adjudication of a noncitizen's request for withholding of removal." Pet. App. 27a; *see also Jimenez-Morales* v. *U.S. Attorney Gen.*, 821 F.3d 1307, 1308 (11th Cir. 2016) ("We agree with the Ninth and Tenth Circuits that, where an alien pursues a reasonable fear proceeding following DHS' initial reinstatement of a prior removal order, the reinstated removal order does not become final until the reasonable fear proceeding is completed."). There is no reason why the definition of administrative finality should be different for purposes of judicial review than for purposes of beginning the "removal period" to which detention under Section 1231 is tied. The government's brief offers no explanation for why such a distinction would exist.[11]

Second, there are many individuals in withholding-only proceedings for whom a court has stayed removal, thus postponing the alternative statutory trigger. *See* 8 U.S.C. § 1231(a)(1)(B)(ii) ("the removal period begins on the latest of … (ii) … if a court orders a stay of the removal of the alien, the date of the court's final or-

[11] That Section 1231 governed the detention of the petitioners in *Zadvydas* v. *Davis*, 533 U.S. 678 (2001) is irrelevant. Pet. Br. 25. *Zadvydas* concerned individuals who had been issued final orders of removal that were legally valid, but which the government was unable to "effectuate," "because the designated countries of removal refused to accept them." *Id.* (citing *Zadvydas*, 533 U.S. at 688-689, 699-701). In contrast, this case concerns individuals whom the government cannot remove because they have sought withholding of removal—an application that may result in an order with the "legal effect" of "preclud[ing] removal" (Pet. Br. 33) to the sole country that the government has designated.

der"). Amici have worked with scores of individuals in withholding-only proceedings whose removal has been judicially stayed pending the conclusion of those proceedings and any subsequent appeal. *See, e.g.*, *Mendez* v. *Barr*, 794 F. App'x 68, 71 (2d Cir. 2019) (vacating previously issued stay of removal pending review of denial of withholding application); *Mendoza-Ordonez*, 273 F. Supp. 3d at 529 ("The United States Court of Appeals for the Third Circuit has granted a stay of removal as it considers Mendoza's petition for review of the Board of Immigration Appeals' (BIA) decision denying his application for withholding of removal."). Such applicants are neither in the "removal period" nor "beyond the removal period" under either 8 U.S.C. § 1231(a)(1)(B)(i) or (ii), and thus cannot be subject to detention under § 1231.

The government seeks to avoid engaging with Section 1231(a)(1)(B)'s "removal period" definition by arguing that, for individuals in withholding-only proceedings, the only order that matters is the original order of removal that is subject to reinstatement. Pet. Br. 27-28. But that view cannot be reconciled with the government's prior (and repeated) admission that, at least for purposes of judicial review, a reinstated order of removal is not "administratively final" once the recipient of that order is placed in withholding-only proceedings. *See, e.g.*, *Ponce-Osorio* v. *Johnson*, 824 F.3d 502, 503, 505-506 (5th Cir. 2016) (per curiam) (agreeing with "both sides" that case should be dismissed for lack of jurisdiction because there was no final order to review where "withholding-of-removal proceedings remain ongoing"); *Luna-Garcia* v. *Holder*, 777 F.3d 1182, 1183 (10th Cir. 2015) ("The government has moved to dismiss the petition for review for lack of jurisdiction, ar-

guing that the ongoing reasonable fear proceedings render the reinstated removal order nonfinal.").

Moreover, the government's view that "the reinstated removal order is itself the 'decision on whether the alien is to be removed from the United States'" for purposes of 8 U.S.C. § 1226, Pet. Br. 16, is belied by the fact that some individuals who come into contact with DHS after having been previously issued final orders of removal are never placed in "reinstatement" proceedings at all, but are instead placed in standard removal proceedings before an IJ under 8 U.S.C. § 1229a. *Perez-Guzman*, 835 F.3d at 1081. In amici's experience, the government has never even asserted, let alone prevailed in demonstrating, that noncitizens with prior removal orders who subsequently reenter are subject to detention under § 1231(a) if the government places them in standard removal proceedings under § 1229a. Instead, they are uniformly detained pursuant to § 1226, which retains the possibility of release on bond (if they are not subject to mandatory detention under § 1226(c)). There is no reason why the government's detention authority should depend on an official's arbitrary decision to place a noncitizen in full removal proceedings rather than in reinstatement proceedings.

III. The Context And Structure Of The INA Support Affirmance

Congress's decision to "locate the reinstatement and the statutory withholding provisions in Section 1231" does not somehow suggest that "Congress meant for the detention of aliens who have reinstated removal orders and who are in withholding-only proceedings to be governed by that section." Pet. Br. 17. Section 1231(b)(3) governs withholding of removal for *all* noncitizens who seek statutory withholding, many of whom are not sub-

ject to a reinstated removal order. *See, e.g.*, *Velasquez-Banegas* v. *Lynch*, 846 F.3d 258, 261 (7th Cir. 2017); *Fadiga* v. *Attorney Gen.*, 488 F.3d 142, 163 (3d Cir. 2007). In fact, the same regulation detailing the process for withholding-only proceedings for individuals with reinstated orders of removal also applies to individuals who are not in reinstatement proceedings, but who are subject to removal under 8 U.S.C. § 1228(b) (which provides for the expedited removal of certain noncitizens who are not lawful permanent residents). *See* 8 C.F.R. § 208.31. A separate regulation provides that individuals who arrived in the United States at the Commonwealth of the Northern Mariana Islands prior to January 1, 2014 and claim a fear of return may pursue withholding of removal (and protection under the CAT) in very similar proceedings. *See id.* § 1235.6(a)(ii). And of course, many noncitizens concede removability in standard removal proceedings and opt to pursue only withholding of removal or protection under the CAT. In amici's experience, the government has never taken the position that individuals in any of these groups are subject to detention without bond under Section 1231(a) simply because they have conceded removability and the only form of relief that they are pursuing is withholding of removal or CAT protection.

Nor is amici's position at odds with the "purpose" of Section 1231(a). Nothing in the statute indicates that Congress intended to "streamline the procedure for removing" individuals who are seeking withholding of removal and have already established a reasonable fear of persecution to an asylum officer's or IJ's satisfaction. Pet. Br. 20. The INA in fact forbids DHS from removing an individual to a country to which removal has been withheld, including when the person would otherwise be subject to reinstatement of removal. It

would make little sense for the statute to encourage the "streamline[d]" removal of individuals while an adjudication was pending on whether they should be removed to the designated country at all.

It makes sense that Congress expressly provided individuals who had previously been removed and are now subject to reinstatement the chance to pursue withholding of removal or protection under the CAT, because there are many reasons why an individual previously ordered removed may not have had the opportunity to raise a genuine fear of persecution or torture during the earlier proceeding. Conditions in the country of origin (or the noncitizen's personal circumstances—as was the case with respondent Rodriguez Zometa, *see* Resp. Br. 8) may have changed since the initial order of removal was issued, prompting new fears of persecution or torture. *E.g.*, *Garcia* v. *Holder*, 756 F.3d 885, 887-889 (5th Cir. 2014) (withholding applicant targeted in the country of removal for extortion by police officers who threatened and beat him so severely he was hospitalized for a week post-removal); *Sisiliano-Lopez* v. *Attorney Gen.*, 717 F. App'x 155, 157 (3d Cir. 2017) (withholding applicant threatened by MS-13 after he returned to El Salvador and helped his sister obtain a divorce from an individual affiliated with the gang). Or they may not have received notice of the prior proceedings, resulting in the issuance of an initial order of removal in absentia. *E.g.*, *Bibiano* v. *Lynch*, 834 F.3d 966, 969 (9th Cir. 2016). The government has not explained why Congress would have wanted individuals in this position—who had already established a reasonable fear of harm upon return—to be detained without any chance of release on bond.

IV. A Rule That Section 1226 Governs The Detention Of Individuals In Withholding-Only Proceedings Is Readily Workable

Finally, notwithstanding the government's assertion (Pet. Br. 34), the INA's detention scheme can readily accommodate bond hearings for people in withholding-only proceedings. The number of people in respondents' position—who are subject to a reinstatement order but have proven to an asylum officer or immigration judge that they have a "reasonable fear" of persecution or torture in the country of removal—is extremely small. In FY 2019, for example, the immigration courts received just 3,652 withholding-only cases, amounting to just 0.6% of the 543,997 cases received that year.[12]

The government's complaint that the court of appeals' ruling would cause the INA's detention scheme to "vary from alien to alien" (Pet. Br. 34) is strange, because the decision to place an individual in reinstatement proceedings, as opposed to standard immigration proceedings under 8 U.S.C. § 1229a, already varies from person to person. *See supra* pp. 5, 18. Moreover, "[t]he statutory scheme governing the detention of aliens in removal proceedings is not static; rather, the Attorney General's authority over an alien's detention shifts as the alien moves through different phases of administrative and judicial review." *Casas-Castrillon* v. *DHS*, 535 F.3d 942, 945 (9th Cir. 2008). 8 U.S.C. § 1225(b), for example, authorizes the detention of certain noncitizens seeking admission to the United States. *See Jennings*, 138 S. Ct. at 837. Section 1226

[12] American Immigration Council and National Immigrant Justice Center, *The Difference Between Asylum and Withholding of Removal* 4, *supra* note 5.

"generally governs the process of arresting and detaining … aliens pending their removal." *Id.* And Section 1231 "authorizes the detention of aliens who have already been ordered removed from the country" (*id.* at 843), during an initial 90-day "removal period" (8 U.S.C. § 1231(a)(1)(A)), and, for certain noncitizens, "beyond the removal period" (8 U.S.C. § 1231(a)(6)).

Those general detention categories are themselves riddled with "case-by-case" (Pet. Br. 34) exceptions. For example, under Section 1226, most noncitizens are eligible for bond hearings, but some (those who are removable based on certain criminal offenses) are generally subject to mandatory detention, i.e., they have no right to a bond hearing and may only be released from detention if doing so is "necessary to provide protection to a witness, a potential witness, a person cooperating with an investigation into major criminal activity … and the alien satisfies the Attorney General that the alien will not pose a danger to the safety of other persons or property and is likely to appear for any scheduled proceeding." 8 U.S.C. § 1226(c)(2). Under Section 1231(a)(1)(C), the 90-day "removal period" may be "extended" in the event that "the alien fails or refuses to make timely application in good faith for travel or other documents necessary to the alien's departure or conspires or acts to prevent the alien's removal." And certain noncitizens are subject to detention "beyond the removal period," and, if released, are subject to an order of supervision, if the government determines that they are "unlikely to comply with the order of removal" or are a "risk to the community." 8 U.S.C. § 1231(a)(6).

In sum, DHS's detention authority is based upon a statutory scheme that already requires "case-by-case" considerations. There is no reason to believe that the court of appeals' holding that respondents' detention is

governed by Section 1226, not Section 1231, is creating a more "unworkable" detention structure. Affirmance would simply ensure that Section 1226 governs the detention of the small number of individuals placed in withholding-only proceedings until the conclusion of those proceedings, as Congress intended. If a noncitizen's application for withholding of removal is denied and the noncitizen is ordered removed to the designated country, then and only then would the noncitizen be subject to detention under Section 1231.[13]

Finally, to the extent that the government's invocation of policy considerations is even relevant to the Court's interpretation of this clear statutory provision, the Court should consider the impact of long-term detention on noncitizens who have already demonstrated a bona fide claim for protection from removal. Numerous studies have documented the harmful effects of long-term immigration detention for individuals who have previously faced and fled trauma in their home countries.[14] Nothing in the INA indicates that Congress intended to subject these individuals, who have faced such persecution that affords them right to obtain protection,

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[13] In the extremely rare occasion that the government sought to remove a noncitizen granted withholding of removal to a new country not originally designated (from which removal had not also been withheld), the government would initiate removal proceedings again. Such a situation, to the extent that it is any more than an edge case, is no more complicated than the current detention scheme.

[14] *See, e.g.*, U.S. Commission on Civil Rights, *Trauma at the Border: The Human Cost of Inhumane Immigration Policies* (Oct. 2019), https://www.usccr.gov/pubs/2019/10-24-Trauma-at-the-Border.pdf; von Werthern et al., *The Impact of Immigration Detention on Mental Health: A Systematic Review*, 18 BMC Psychiatry 382 (2018), https://rdcu.be/cahZu.

to months or years of detention while they await a determination whether they will be removed at all.

CONCLUSION

The judgment of the court of appeals should be affirmed.

Respectfully submitted.

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NOVEMBER 2020