No. 23-1270

IN THE

Supreme Court of the United States

PIERRE RILEY,

Petitioner,

v.

MERRICK GARLAND, U.S. ATTORNEY GENERAL,

Respondent.

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

REPLY TO RESPONDENT'S BRIEF

KEITH BRADLEY
Counsel of Record
KAYLA MARIE MENDEZ
717 17th Street, Suite 1825
Denver, CO 80202
(303) 830-1776
keith.bradley@squirepb.com

ELIZABETH F. PROFACI
CAROLINE M. SPADARO
2500 M Street NW
Washington, DC 20037

JEFFREY WALKER
2000 Huntington Center
41 South High Street
Columbus, OH 43215

SQUIRE PATTON BOGGS (US) LLP

Counsel for Petitioner

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INTRODUCTION

The government agrees with petitioner that the circuits are split on each question presented. The government agrees that the Fourth Circuit, and courts sharing its view on the questions presented, are in error. The government does not dispute that this case is a good vehicle for resolving both questions presented. Given this broad agreement and the importance of the questions that petitioners raised—and the government acknowledges—the Court should grant certiorari and reverse the Fourth Circuit on both issues. The government's confession of error is

no obstacle; the Court can appoint an *amicus* to defend the Fourth Circuit's decision, as it has regularly done in such situations.

The government asks that instead, the Court grant certiorari solely to vacate the erroneous judgment and remand for reconsideration in light of *Harrow* v. *Department of Defense*, 601 U.S. 480 (2024). That step would certainly be warranted if the Court were disinclined to hear the case on the merits.

Still, a merits review of the questions presented in this case would be more sensible. *Harrow* is pertinent only to the first question presented. The government hopes the Second Circuit might revise its doctrine on the second question presented, but that hypothetical development would not address the Fourth Circuit's erroneous precedents affecting petitioner. And even on the first question presented, the Fourth Circuit may not conclude that *Harrow* abrogated *Stone* v. *INS*, 514 U.S. 386 (1995), especially after the circuit held that the express denigration of *Stone* in *Santos-Zacaria* v. *Garland*, 598 U.S. 411 (2023), did not have that effect.

ARGUMENT

The Fourth Circuit's decision depended on two doctrines, each of which deviates from multiple circuits to address those issues, namely (1) whether the 30-day deadline in 8 U.S.C. 1252 is a jurisdictional bar to judicial review of an order of the Board of Immigration Appeals (BIA); and (2) whether the 30-day deadline runs from the BIA's decision on withholding-only relief, or starts at an earlier point such that judicial review of withholding-only relief is

effectively unavailable. The government does not defend the Fourth Circuit's decision on either question. The Court should not be distracted by the government's suggestion that these questions will become less important if the Court declines to hear the case on the merits. On the first question, there are four circuits perpetuating a doctrine about court jurisdiction the government admits is erroneous. On the second question, the government hypothesizes that the Second Circuit might reverse course. But that outcome would leave the Fourth Circuit in error. Even under the government's most optimistic outcome, the right to judicial review in a wide range of immigration cases will still depend on the geographical happenstance of where the government has chosen to detain a given noncitizen. The government offers no justification for not correcting that split.

I. THE FOURTH CIRCUIT HAS INDICATED IT WILL TREAT SECTION 1252(B)(1) AS A JURISDICTIONAL BAR UNTIL THIS COURT RULES DIRECTLY ON THE ISSUE.

Petitioner and the government agree that under this Court's jurisprudence, filing a petition for judicial review within 30 days of a final order—the deadline in Section 1252(b)(1)—is not a jurisdictional prerequisite. Pet. 22; Br. in Opp. 6. In *Santos-Zacaria*, the Court held that a different limitation in Section 1252(d), the requirement to exhaust administrative remedies, is not jurisdictional. 598 U.S. 411. In that case, the government relied on *Stone* v. *INS*, 514 U.S.

386 (1995), as its principal authority that such a prescription is jurisdictional. But this Court said "[n]either *Stone* nor *Nken* [another of the government's authorities] attends to the distinction between 'jurisdictional' rules (as we understand them today) and nonjurisdictional but mandatory ones." 598 U.S. at 421. The Court also observed that "whether the provisions were jurisdictional 'was not central to [*Stone*].'" *Id.*

Nonetheless, the Fourth Circuit subsequently held that *Stone* is binding precedent obligating lower courts to treat Section 1252(b)(1) as a jurisdictional requirement. *Salgado* v. *Garland*, 69 F.4th 179 (4th Cir. 2023). The Fourth Circuit reached that conclusion "[b]ecause the holding in *Santos-Zacaria* is limited to §1252(d)(1) and the Supreme Court has not overruled *Stone*." *Id.* at 181 n.1. Two other circuits (the Seventh and the Eleventh) adhere to similar views, despite and after *Santos-Zacaria*. Pet. 18-19.[1]

In *Harrow*, several months ago, the Court considered a 60-day deadline for appeals from the Merit Systems Protection Board, under 5 U.S.C. 7703(b)(1). 601 U.S. 480. The Court reiterated that it "treat[s] a procedural requirement as jurisdictional only if Congress 'clearly states' that it is," and "most time bars are nonjurisdictional." *Id.* at 484.

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[1] The government acknowledges the Seventh Circuit's position but not the Eleventh Circuit's. Br. in Opp. 10. The Eleventh Circuit's pertinent decisions are unpublished. Nonetheless, it insists *Santos-Zacaria* did not disturb *Stone* or prior circuit precedent, reiterating that conclusion just days ago. *Jean-Baptiste* v. *U.S. Att'y Gen.*, No. 23-11046, 2024 WL 4298132 (11th Cir. Sept. 26, 2024).

The government agrees with petitioner that under these cases, and this Court's other precedents predating them, Section 1252(b)(1) is not a jurisdictional limitation. Br. in Opp. 7-10. But the government contends the Court should grant certiorari only to vacate and remand so that the Fourth Circuit can reevaluate its doctrine considering *Harrow*.

Petitioner agrees that vacatur and remand, at a minimum, is warranted, because the Fourth Circuit imposed on petitioner a jurisdictional bar the government admits was improper and erroneous. It is conceivable that after a vacatur and remand for reconsideration in light of *Harrow*, and based on the record developed in this Court, the Fourth Circuit will revise its view of Section 1252(b)(1) and accept the government's waiver of the 30-day deadline.

But the better course would be to grant certiorari and decide the question presented. Even if the Fourth Circuit reverses course in this case, the split will persist. The Seventh and Eleventh Circuits continue to maintain (the former in published, binding precedent; the latter in unpublished but repeated, consistent decisions) that Section 1252(b)(1) is jurisdictional under *Stone*, and that *Santos-Zacaria* did not alter *Stone*'s effect. The government offers no reason to expect those courts will change because of *Harrow*. *Santos-Zacaria* already said a procedural requirement is jurisdictional "only if Congress clearly states that it is." 598 U.S. at 416. It already said that *Stone* is inconsistent with the current, proper way to assess which limitations are jurisdictional. *Id.* at 421-22. Further,

Santos-Zacaria held that older lower-court cases "interpreting a related provision are not enough to make clear that a rule is jurisdictional." *Id.* at 422. *Stone* involved a predecessor provision, not Section 1252(b)(1) itself, Pet. 15, so this statement in *Santos-Zacaria* gave the Fourth, Seventh, and Eleventh Circuits yet another reason not to follow *Stone*. *Harrow* states that "most time bars are nonjurisdictional." 601 U.S. at 484. But *Harrow* quoted that statement from *United States* v. *Kwai Fun Wong*, 575 U.S. 402 (2015), a precedent the deviant circuits could already have followed. Meanwhile *Harrow* did not mention *Stone* or say anything further about it. The Seventh and Eleventh Circuits—having determined that *Stone* binds them to treat Section 1252(b)(1) as jurisdictional notwithstanding *Santos-Zacaria*—are unlikely to conclude that *Harrow* abrogated or overruled *Stone*.

Perhaps the Fourth Circuit will perceive a vacatur and remand in this case—with instructions to reconsider in light of *Harrow*—as a signal that *Stone* is indeed not binding precedent that Section 1252(b)(1) states a jurisdictional requirement. Petitioner will certainly argue to that effect. Yet the government, while asking to give the Fourth Circuit the opportunity to reconsider "with the benefit of . . . *Harrow*," offers no argument that *Harrow* would motivate the Fourth Circuit to a different result. Br. in Opp. 10-11. And the Seventh and Eleventh Circuits would persist in error, thus perpetuating the split identified by both sides in this case. This Court has long held that "[i]f a precedent of this Court has direct application in a case, yet appears to rest on reasons rejected in some other line of decisions, the Court of Appeals should follow the case which directly controls, leaving to this

Court the prerogative of overruling its own decisions." *Agostini* v. *Felton*, 521 U.S. 203, 237 (1997) (alteration in original; citation omitted). While petitioner disagrees that *Stone* has "direct application," the circuits in error have held that it does. This Court must exercise its "prerogative" to undo the legacy of *Stone*.

II. A CHANGE IN THE SECOND CIRCUIT WILL NOT ELIMINATE THE SPLIT ON THE SECOND QUESTION PRESENTED.

The second question presented asks when the 30-day clock begins, in a case where the BIA's eventual decision did not address removability because that issue was resolved earlier in the proceedings. Petitioner and the government both agree that the Fourth Circuit erred in holding the 30 days begins at that earlier point, when overall administrative proceedings are still underway. Pet. 35-38; Br. in Opp. 11-12. The government agrees with petitioner that there is a squarely-established split on this question. Br. in Opp. 14-16. It does not deny the manifest importance of this question.

Instead, the government hypothesizes that the split might resolve itself because a panel of the Second Circuit asked two noncitizens to brief whether *Santos-Zacaria* "calls into question" the Second Circuit precedent regarding the start of the 30-day clock (*Bhaktibhai-Patel* v. *Garland*, 32 F.4th 180 (2d Cir. 2022)). Br. in Op. 16 (citing 22-6024 Doc. 25.1, *Castejon-Paz* v. *Garland* (July 12, 2023); 22-6349 Doc. 23.1, *Cerrato-Barahona* v. *Garland* (July 12, 2023)).

The government's speculation that this briefing order will heal the split is wholly unsupported. The

government offers no explanation why *Santos-Zacaria* might undermine *Bhaktibhai-Patel*. That the Second Circuit instructed the parties to brief that question does not, of course, mean the court will reverse *Bhaktibhai-Patel* or hold that it has been abrogated. Furthermore, even if the Second Circuit comes into line with the majority of circuits on the second question presented, the Fourth Circuit will remain in error. The government suggests that *if* the Second Circuit "retreats from its erroneous position," then the Fourth Circuit "*could* well do the same." Br. in Opp. 16 (emphasis added). There is no reason to expect that outcome. The Fourth Circuit has not even, as far as petitioner is aware, issued a briefing order like the ones cited from the Second Circuit. It reached its own conclusions, erroneous but reasoned, in *Martinez* v. *Garland*, 86 F.4th 561 (4th Cir. 2023), and in this case. These decisions were informed by *Bhaktibhai-Patel* but not obligated by it. The Fourth Circuit would similarly not be bound by whatever the Second Circuit *might* do in the pending cases on which the government places its hopes. *Cf. Virginia Soc'y for Hum. Life, Inc.* v. *Fed. Election Comm'n*, 263 F.3d 379, 383 (4th Cir. 2001) ('[A] federal court of appeals's [sic] decision is only binding within its circuit.") (citation omitted).

Indeed, the Fourth Circuit has historically not been shy about disagreeing with other circuits. In 2023, the Fourth Circuit rejected the views of its sister circuits in numerous cases. *See Laufer* v. *Naranda Hotels, LLC*, 60 F.4th 156, 170-173 (4th Cir. 2023) (rejecting the Second, Fifth, and Tenth Circuits' reasoning); *In re Graham*, 61 F.4th 433, 438 (4th Cir. 2023) (refusing to adopt the Second, Third, Fifth, Seventh,

Eighth, and Eleventh Circuits' holdings); *United States* v. *Jones*, 60 F.4th 230, 233 n. 2 (4th Cir. 2023) (rejecting the Fifth, Sixth, Seventh, and Eighth Circuits' reasoning).

It is improbable that the Fourth Circuit will reconsider *Martinez* and this case given that the court denied rehearing *en banc* in *Martinez*, after *Santos-Zacaria*—a denial that the government does not mention; ignored the government's request to revisit the issue in this very case; and disregarded that the Fifth Circuit had reversed its views. The government informed the court below about the Second Circuit's briefing orders and that it would be arguing to the Second Circuit that *Bhaktibhai-Patel* is incorrect. Not. of Suppl. Auth., *Riley* v. *Garland*, No. 22-1609, ECF 40 (4th Cir. Aug. 14, 2023). The Fourth Circuit ignored that information and denied the government's proposal for supplemental briefing on the point. *Riley* v. *Garland*, No. 22-1609, 2024 WL 1826979 at *2 (4th Cir. Apr. 26, 2024). Further, *Martinez* had placed itself in agreement with the Second and the Fifth Circuits, because at the time the Fifth Circuit held that a withholding-only decision by the BIA is not a final order of removal. *Martinez*, 86 F.4th at 570 (discussing *Argueta- Hernandez* v. *Garland*, 73 F.4th 300 (5th Cir. 2023)). Subsequently, the Fifth Circuit panel reconsidered and reversed its own decision on the question at issue. Pet. 24 (explaining the course of *Argueta-Hernandez*). Petitioner notified the Fourth Circuit that the Fifth Circuit had changed, and the Second Circuit was reconsidering. Not. of Suppl. Auth., *Riley* v. *Garland*, No. 22-1609, ECF 43 (4th Cir. Jan. 9, 2024). The Fourth Circuit did not revisit its conclusions even though one of the two remaining circuits to

agree with it had rejoined the majority. So, it is unlikely that a change in the Second Circuit—speculative and hypothetical as that outcome is on its own—would motivate any change in the Fourth Circuit.

Every split might, in theory, be resolved over time by changes at the circuits on one side or the other. The government has repeatedly asked this Court to wait for such developments on various other questions, and the Court has sensibly granted certiorari regardless. *E.g.,* Br. in Opp. at 14, *Bouarfa* v. *Mayorkas*, __ U.S. __, 144 S. Ct. 1455 (2024) (No. 23-583), *cert. granted* (Apr. 29, 2024); Br. in Opp. at 14, *Niz-Chavez* v. *Garland*, 593 U.S. 155 (2021) (No. 19-863) ("circuits may resolve the conflict on their own"); Br. in Opp. at 13, *Kucana* v. *Holder*, 558 U.S. 233 (2010) (No. 08-911) (similar). The Fourth Circuit's proceedings show that the split on the second question here is fully entrenched and demands this Court's intervention.

III. THE GOVERNMENT'S INTENT TO WAIVE THE 30-DAY DEADLINE DOES NOT DIMINISH THE SECOND QUESTION'S IMPORTANCE.

The government seeks to avoid certiorari by representing that it "intends" to waive the 30-day deadline, so that judicial review is available in all circuits. Br. in Opp. 16. Consequently, it suggests, "the importance of the question would be diminished." *Id.*

That notion is incorrect regarding the importance of the question both to the immigration system and judicial review and to this case. Even the premise is incorrect. The government implicitly assumes all cir-

cuits will correctly regard the 30-day deadline as nonjurisdictional, so that the government's "intend[ed]" waiver will be effective. But that is not the case in six circuits besides the Fourth, Pet. 18-19, two of which have clear views that *Santos-Zacaria* did not change matters. Vacatur and remand in this case will not make Section 1252(b)(1) nonjurisdictional, and enable the government's waiver, in those other circuits. Thus, the government's hypothesis of diminished importance depends on a counterfactual that its own proposal prevents from coming into reality.

Even in a circuit that regards Section 1252(b)(1) as nonjurisdictional, the erroneous precedents in the Second and Fourth Circuits regarding the start of the 30-day deadline would mean that in each case seeking withholding-only relief, the availability of judicial review would depend on whether the government actually waives the 30-day deadline in that particular case. Petitioner appreciates the government's willingness to waive the deadline as against him. But the government's professed intent would not seem to bind future administrations to waive the deadline in every case.[2] And leaving the courthouse doors locked, with the government holding the keys with discretion when to allow and when to block review, is contrary to bedrock principles of judicial review. *Cf. Guerro-Lasprilla* v. *Barr*, 589 U.S. 221, 229 (2020) (noting

[2] *Cf.* Memorandum for All Assistant Attorneys General and All United States Attorneys, from Edwin Meese III, Attorney General, Re• Department Policy Regarding Consent Decrees and Settlement Agreements, p.4 (Mar. 13, 1986) (in settlements in which an agency "agrees to exercise his discretion in a particular way," the "sole remedy . . . should be the revival of the suit"; requiring approval from at least the Associate Attorney General for any deviation).

that "traditional understandings and basic principles" of American law require "that executive determinations generally are subject to judicial review." (quoting *Kucana*, *supra*, at 251)).

Even in this case, the government's stated intention to waive the 30-day deadline is open to doubt. The government changed its position throughout these proceedings. *Compare* Not. of Suppl. Auth., *Riley* v. *Garland*, No. 22-1609, ECF 40 (4th Cir. Aug. 14, 2023) (urging the court of appeals to conclude petition for review was timely and reviewable) *with* Not. of Suppl. Auth., *Riley* v. *Garland*, No. 22-1609, ECF 50 (4th Cir. Apr. 2, 2024) (urging the court of appeals to conclude petition for review was *not* timely and reviewable). If the government changes again after a vacatur and remand and decides not to grant petitioner the promised waiver, petitioner would be left to depend on the Fourth Circuit to hold the government to its previously stated intention. Yet the Fourth Circuit ordinarily applies estoppel "only . . . if ever, in the presence of affirmative misconduct by government agents." *Dawkins* v. *Witt*, 318 F.3d 606, 612 (4th Cir. 2003). The government's professed intentions would not be enough to moot a case, were mootness the claim. *See United States* v. *W.T. Grant Co.*, 345 U.S. 629, 632 (1953) (holding voluntary cessation of challenged conduct "does not make the case moot" (citations omitted)). They should not dissuade the Court from review in this case either.

CONCLUSION

The Court should grant certiorari and hear this case on the merits. Given the government's agreement with petitioner on the merits of both

questions presented, the Court could appoint an *amicus* to defend the Fourth Circuit's judgment, as is regularly done when the government confesses error. *E.g., Erlinger* v. *U.S.*, __ U.S. __, 144 S. Ct. 1840 (2024).

If the Court nonetheless declines to hear the merits of the questions, a vacatur and remand of the case considering *Harrow* is warranted.

Respectfully submitted.

KEITH BRADLEY
Counsel of Record
KAYLA MARIE MENDEZ
717 17th Street, Suite 1825
Denver, CO 80202
(303) 830-1776
keith.bradley@squirepb.com

ELIZABETH F. PROFACI
CAROLINE M. SPADARO
2500 M Street NW
Washington, DC 20037

JEFFREY WALKER
2000 Huntington Center
41 South High Street
Columbus, OH 43215

SQUIRE PATTON BOGGS (US) LLP

Counsel for Petitioner

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