No. 23-1270

In the Supreme Court of the United States

PIERRE YASSUE NASHUN RILEY,
PETITIONER

v.

PAMELA BONDI, ATTORNEY GENERAL

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

REPLY BRIEF FOR THE RESPONDENT SUPPORTING PETITIONER

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Under the Immigration and Nationality Act (INA), 8 U.S.C. 1101 *et seq.*, an alien seeking judicial review of questions arising from removal proceedings must file a "petition for review" in the appropriate court of appeals "not later than 30 days after the date of the final order of removal." 8 U.S.C. 1252(b)(1). This case raises two questions about Section 1252(b)(1)'s filing deadline.

First is whether Section 1252(b)(1)'s deadline is a jurisdictional rule or a claim-processing rule. This Court's cases dictate the answer: the latter. Last Term, the Court held that, for "all" statutory deadlines to appeal from an agency to a court, it "demand[s] a 'clear statement'" before finding a deadline jurisdictional. *Harrow* v. *Department of Def.*, 601 U.S. 480, 489 (2024) (citation omitted). A series of earlier cases found time bars non-jurisdictional under the clear-statement test. Gov't Br.

18-19. And amicus is incorrect that *Stone* v. *INS*, 514 U.S. 386 (1995), requires a different answer. In *Santos-Zacaria* v. *Garland*, 598 U.S. 411 (2023), the Court recognized that *Stone*'s passing mention of "'jurisdiction'" did not refer to "a court's adjudicatory authority." *Id.* at 421 (brackets and citation omitted).

The second question is whether an alien's petition for review is timely under Section 1252(b)(1) if it is filed more than 30 days after the issuance of an administrative removal order under 8 U.S.C. 1228(b), but within 30 days of an order denying withholding-only protection. From the aftermath of Congress's 1996 INA amendments until recently, the government and courts alike had concluded that an alien like petitioner could obtain judicial review by filing within 30 days of a withholding-only ruling, even if the underlying removal order issued beforehand. That conclusion applied to removal orders under Section 1228(b) and to those reinstated under 8 U.S.C. 1231(a)(5). But aliens could still be detained during withholding-only proceedings—as this Court held in *Johnson* v. *Guzman Chavez*, 594 U.S. 523 (2021).

The government's longstanding position has now come into question, starting with *Bhaktibhai-Patel* v. *Garland*, 32 F.4th 180 (2d Cir. 2022). The government acknowledged in January 2021 that allowing judicial review of withholding-only decisions ultimately requires the term "final" to mean different things in different provisions of the INA, see Gov't Br. 45 (quoting Oral Arg. Tr. at 24, *Guzman Chavez*, *supra* (No. 19-897))—which can concededly be an unfavorable point in a statutory-construction case, unless there is evidence to support the different reading. This Court reserved the second question presented here in *Guzman Chavez*. 594 U.S. at 535 n.6. The Second Circuit in *Bhaktibhai-Patel*, and

the Fourth Circuit below, rejected the government's reading. And the amicus appointed by this Court has now articulated additional textual arguments.

The second question presented is legitimately a close call. We discuss in Part II below the justifications for the government's position. But we acknowledge the plausibility of amicus's argument that the INA's plain language forecloses judicial review of withholding-only decisions in the context of Section 1228(b) removal orders. If the Court endorses that position, however, it should embrace that conclusion fully and reject the suggestion, raised at the tail end of amicus's brief, that courts and litigants may obtain review of withholding-only claims through a system of protective petitions and lengthy abeyances. If Congress has foreclosed judicial review of withholding-only decisions in this context, then the Court should make clear that aliens cannot use procedural machinations to circumvent that result.

I. THE FILING DEADLINE IN SECTION 1252(b)(1) IS NOT JURISDICTIONAL

"[T]his Court will 'treat a procedural requirement as jurisdictional only if Congress "clearly states" that it is.'" *Harrow*, 601 U.S. at 484 (citation omitted). Section 1252(b)(1) contains no such clear statement. It provides that "[t]he petition for review must be filed not later than 30 days after the date of the final order of removal." 8 U.S.C. 1252(b)(1). It neither "speaks to a court's authority to hear a case" nor references "jurisdiction, whether generally or over untimely claims." *Harrow*, 601 U.S. at 485-486. Section 1252(b)(1) is therefore "not a jurisdictional requirement." *United States* v. *Kwai Fun Wong*, 575 U.S. 402, 412 (2015).

Amicus does not contend that Section 1252(b)(1) satisfies the Court's "demanding clear-statement test," Br.

16, and instead argues that the test does not apply because this Court purportedly held in *Stone* that a predecessor to Section 1252(b)(1) was jurisdictional. See 8 U.S.C. 1105a(a)(1) (Supp. V 1993). But this Court will "treat a requirement as 'jurisdictional'" without reference to the clear-statement rule only when its own prior "'decisions left undisturbed by Congress' attached a jurisdictional label to the prescription." *Fort Bend County* v. *Davis*, 587 U.S. 541, 548 (2019) (citation omitted). Even then, the Court has recognized that previous decisions "have more than occasionally misused the term 'jurisdictional' to refer to nonjurisdictional prescriptions." *Wilkins* v. *United States*, 598 U.S. 152, 159 (2023) (citation omitted). It therefore asks "if the prior decision addressed whether a provision is 'technically jurisdictional'—whether it truly operates as a limit on a court's subject-matter jurisdiction—and whether anything in the decision 'turned on that characterization.'" *Id.* at 160 (brackets and citation omitted).

A. *Santos-Zacaria* Forecloses Amicus's Reliance On *Stone*

Just two years ago, the Court determined that *Stone* did not use the term "jurisdictional" in the strict sense.

1. In *Santos-Zacaria*, the Court considered whether the INA's exhaustion provision, 8 U.S.C. 1252(d)(1), is jurisdictional. See 598 U.S. at 416. The government argued that it is jurisdictional in part because *Stone* described a prior version of the INA's judicial-review provision—which contained both the exhaustion requirement and the filing deadline—"as 'jurisdictional in nature.'" Gov't Br. at 20, *Santos-Zacaria*, *supra* (No. 21-1436) (quoting *Stone*, 514 U.S. at 405).

This Court rejected that argument. It explained that *Stone* was merely another case in which the Court used the term "'jurisdictional'" to "describe rules beyond those

governing a court's adjudicatory authority." *Santos-Zacaria*, 598 U.S. at 421 (citation omitted). *Stone* did not "attend[] to the distinction between 'jurisdictional' rules (as we understand them today) and nonjurisdictional but mandatory ones." *Ibid.* Moreover, the jurisdictional nature of the provision "was not central to the case" in *Stone*. *Ibid.* (citation omitted). *Santos-Zacaria* thus confirmed the Court's earlier description of *Stone*'s language as only a passing mention of jurisdiction "without elaboration." *Henderson* v. *Shinseki*, 562 U.S. 428, 437 (2011).

2. Amicus attempts to distinguish (Br. 24) *Santos-Zacaria* on the ground that it addressed the exhaustion requirement in Section 1252(d)(1), not the filing deadline in Section 1252(b)(1). But *Stone* stated that "[j]udicial review provisions * * * are jurisdictional in nature." 514 U.S. at 405. If that meant "jurisdictional" in the strict sense, then *Stone* would have controlled the result in *Santos-Zacaria*—because the exhaustion requirement was part of the INA's judicial-review provision. See 8 U.S.C. 1105a(c) (1994). Thus, *Santos-Zacaria* necessarily found that *Stone* used "jurisdictional" in the looser sense. That determination also applies here, because the INA's filing deadline was in the same judicial-review provision as the exhaustion requirement.

Indeed, *Santos-Zacaria* is unequivocal. The Court explained that when *Stone* used the term "jurisdictional"—in the part of the opinion on which amicus relies (Br. 19)—*Stone* had not distinguished between rules governing "a court's adjudicatory authority" and "mandatory" claim-processing rules. *Santos-Zacaria*, 598 U.S. at 421. That means *Stone* cannot provide "a 'definitive earlier interpretation' of a statutory provision as jurisdictional," *Wilkins*, 598 U.S. at 159 (citation

omitted)—a conclusion that applies equally to Subsections (b)(1) and (d)(1) of Section 1252.

To be sure, *Santos-Zacaria* also stated that "[o]n top of all that"—meaning, on top of *Stone*'s failure to invoke the technical meaning of jurisdiction—*Stone* did not "address[] the exhaustion requirement specifically." 598 U.S. at 421-422; see Amicus Br. 25. But as the Court's transition phrase indicates, that exhaustion-specific rationale provided only a complementary—not a primary—basis for the determination that *Stone* did not control.

Santos-Zacaria also precludes amicus's suggestion (Br. 21) that the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (IIRIRA), Pub. L. No. 104-208, Div. C, 110 Stat. 3009-546, later "strengthened *Stone*." IIRIRA did shorten the INA's filing deadline from 90 to 30 days and modestly amended its language. Compare 8 U.S.C. 1105a(a)(1) (Supp. V 1993), with 8 U.S.C. 1252(b)(1). Congress thus "altered the formulation that, according to [amicus], had been understood as a jurisdictional rule" in *Stone*. *Santos-Zacaria*, 598 U.S. at 422. "And having gone to the trouble of rewriting the provision, Congress *still* chose not to use the more expressly jurisdictional formulation that it utilized elsewhere" in Section 1252 and the INA. *Ibid.*; see Gov't Br. 21. IIRIRA is therefore "inconsistent with the * * * theory that Congress understood the predecessor provision to be jurisdictional and carried that forward in § 1252[(b)](1)." *Santos-Zacaria*, 598 U.S. at 422.

B. Amicus Misreads *Stone*'s Reference To Jurisdiction

Regardless, amicus offers no sound basis for reading *Stone* as a definitive jurisdictional ruling.

1. *Stone* held that "the filing of a timely motion for reconsideration of a decision by the Board" does not "toll[] the running of the 90-day period for seeking judicial re-

view of the decision." 514 U.S. at 388. The Court based that holding principally on an INA provision "contemplat[ing] two petitions for review"—one from a removal order and another from a denial of reconsideration—"and direct[ing] the courts to consolidate the matters." *Id.* at 394. That provision "indicate[d]" that "the action to review the underlying [removal] order remains active and pending before the court," and that Congress thus intended removal orders "to be reviewed in a timely fashion after issuance, irrespective of the later filing of a motion to reopen or reconsider." *Ibid.*

Only at the end of its opinion—in Part II.F—did the Court briefly add that "statutory provisions specifying the timing of review" are "'mandatory and jurisdictional.'" *Stone*, 514 U.S. at 405 (citation omitted). But the Court never explained *why* the INA's filing deadline would "truly operate[] as a limit on a court's subject-matter jurisdiction." *Wilkins*, 598 U.S. at 160. That "fleeting statement" about jurisdiction "'should be accorded no precedential effect' as to whether" the deadline "is jurisdictional." *Id.* at 160-161 (citation omitted).

2. Amicus contends (Br. 18) that *Stone* definitively established the filing deadline's "jurisdictional character" because the Court found that the deadline was "not susceptible to equitable tolling," and "understood the deadline to serve systemic goals." But those features of *Stone* are equally consistent with treating the filing deadline as a mandatory claim-processing rule.

First, contrary to amicus's suggestion (Br. 19), "insusceptibility to equitable tolling" does not definitively mark a jurisdictional rule. Mandatory claim-processing rules "lack[] jurisdictional force" but are "not susceptible of" equitable tolling. *Nutraceutical Corp.* v. *Lambert*, 586 U.S. 188, 192 (2019). So *Stone*'s conclusion that

the INA's filing deadline was "not subject to equitable tolling" is consistent with treating it as a mandatory claim-processing rule. 514 U.S. at 405. By contrast, decisions that establish a provision's jurisdictional character ordinarily reach that issue *sua sponte* despite a party's "waiver or abandonment." *John R. Sand & Gravel Co.* v. *United States*, 552 U.S. 130, 135 (2008) (citing *Finn* v. *United States*, 123 U.S. 227 (1887)). That is because only jurisdictional rules—and not mandatory claim-processing rules—are fully immune from "waiver and forfeiture." *Nutraceutical*, 586 U.S. at 192.

Second, deeming Section 1252(b)(1) a mandatory claim-processing rule serves the same "system-related goal[s]" as deeming it jurisdictional. Amicus Br. 20 (citation omitted). By categorically precluding equitable tolling, mandatory claim-processing rules—just like jurisdictional rules—"promot[e] judicial efficiency" and "combat 'dilatory tactics.'" *Ibid.* (citations omitted). The only practical difference would arise if the government were to waive or forfeit reliance on Section 1252(b)(1)'s deadline. But that will rarely occur.

II. THE PETITION FOR REVIEW WAS TIMELY

Whether or not Section 1252(b)(1) is jurisdictional, the government's longstanding position is that orders finding aliens removable under Section 1228(b) do not become final for judicial-review purposes until the conclusion of withholding-only proceedings. To be sure, that position requires reading "final" in Section 1252 to mean something different from "administratively final" in Section 1231, but reasonable grounds support doing so. Amicus contends that withholding-only proceedings are not separately reviewable, which he notes serves Congress's desire to truncate proceedings against criminal aliens. If the Court adopts that position, it should

not countenance the suggestion that litigants may still use procedural tactics to obtain judicial review, which would thwart the administrability of amicus's approach.

A. Section 1228(b) Removal Orders Are Final For Judicial Review When Withholding-Only Proceedings End

1. Section 1252(b)(1) requires an alien to file a petition for review within "30 days after the date of the final order of removal." 8 U.S.C. 1252(b)(1). Amicus and the government agree that the relevant "order of removal" is the Section 1228(b) removal order issued by the Department of Homeland Security (DHS). See Gov't Br. 25; Amicus Br. 31-32. The question is when that order became "final" for purposes of the 30-day deadline.

The government has long viewed such an order as becoming final only once withholding-only proceedings conclude, rather than when the Section 1228(b) removal order issues. Under 8 U.S.C. 1252(a)(1), "[j]udicial review of a final order of removal" is "governed * * * by [the Hobbs Act, 28 U.S.C. 2341 *et seq.*]"—which grants courts of appeals jurisdiction to review certain agency "final orders," 28 U.S.C. 2342(1). A "final order" under the Hobbs Act is "'one that disposes of all issues as to all parties.'" *CSX Transp., Inc.* v. *Surface Transp. Bd.*, 774 F.3d 25, 29 (D.C. Cir. 2014) (citation omitted). That mirrors the traditional rule for appellate review of district-court judgments, under which a "judgment becomes final" only when the district court "disassociates itself from the case, leaving nothing to be done at the court of first instance save execution of the judgment." *Clay* v. *United States*, 537 U.S. 522, 527 (2003).

Under that rule, when an alien is ordered removed under Section 1228(b) and then raises a withholding-only claim, the agency does not dispose of all issues until it resolves the withholding-only claim. Withholding-

only proceedings determine whether the alien may be removed to the country designated in the removal order. If withholding protection is granted, "DHS may not remove the alien to th[at] country." *Guzman Chavez*, 594 U.S. at 530-531. While withholding-only proceedings are ongoing, the tribunal "of first instance" has yet to make rulings that affect implementation of the removal order. *Clay*, 537 U.S. at 527. Judicial review should be "deferred" so that all "claims of * * * error" can be resolved on a "single" petition for review. *Digital Equip. Corp.* v. *Desktop Direct, Inc.*, 511 U.S. 863, 868 (1994).

Section 1252's zipper clause reinforces the point. It provides: "Judicial review of all questions of law and fact * * * arising from any * * * proceeding brought to remove an alien from the United States under this subchapter shall be available only in judicial review of a final order under this section." 8 U.S.C. 1252(b)(9). Amicus accepts that a challenge to a Board withholding-only ruling would "aris[e] from" a removal proceeding. *Ibid.* Under the zipper clause, such a challenge "must be 'consolidated in a petition for review [to be] considered by the court[] of appeals.'" *Nasrallah* v. *Barr*, 590 U.S. 573, 580 (2020) (citation omitted). Judicial review works that way in ordinary removal proceedings under 8 U.S.C. 1229a. An immigration judge resolves removal and withholding arguments in one decision, the alien may appeal both rulings to the Board, and may then seek judicial review after the Board's decision. Gov't Br. 26. Judicial review should not work differently when the agency resolves removal and withholding claims at distinct times.

Amicus contends (Br. 44) that the final-judgment-rule analogy fails because a Convention Against Torture (CAT) order does not merge into a removal order and the final-judgment rule "depends" on the so-called

"merger principle." But that rule does not rest on the merger principle; rather, the rule's "object and policy" are "sav[ing] the expense and delays of repeated appeals in the same suit" and "hav[ing] the whole case and every matter in controversy in it decided in a single appeal." *McLish* v. *Roff*, 141 U.S. 661, 665-666 (1891). Indeed, the "final judgment rule * * * prohibits appellate review until conviction and imposition of sentence," *Flanagan* v. *United States*, 465 U.S. 259, 263 (1984) (citation omitted)—not because the conviction and sentence merge, but because the litigation "terminates" only after sentencing, *Berman* v. *United States*, 302 U.S. 211, 213 (1937) (citation omitted). As *Nasrallah* noted, just as an unmerged conviction and sentence are "reviewed together," a CAT order and removal order are "reviewed together" even though the CAT order "does not merge into the final order of removal." 590 U.S. at 583.

2. Under amicus's interpretation, there is no judicial review of withholding-only claims in the context of a Section 1228(b) removal order. If such an order becomes "final for purposes of judicial review the moment it issues," Amicus Br. 31, then the alien must petition for review within 30 days—at which point any withholding-only proceedings will not be completed and issues in those proceedings could not be timely raised. *Id.* at 2; Gov't Br. 37.[1]

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[1] In addition, amicus does not dispute that under his position, aliens would in some instances be unable to timely seek review of withholding claims in ordinary removal proceedings under Section 1229a. Gov't Br. 38-39 & n.11. Specifically, if the Board affirms a removability determination but vacates and remands on a withholding claim, there might be no way to timely challenge the agency's decision on the remanded claim. The "affirm[ance]" on removability would create a "final" order of removal under amicus's understanding of 8 U.S.C. 1101(a)(47)(B)(i)—thus requiring a petition for re-

Amicus primarily rests (Br. 33) his position on the "INA's statutory definition" of final removal order. But when an "Act-wide definition" cannot "sensibly" be applied in the "context" of a particular "operative provision[]," this Court applies a "context-appropriate meaning." *Utility Air Regulatory Grp.* v. *EPA*, 573 U.S. 302, 316, 319 (2014).

Here, the INA's definition provides that a removal order "shall become final upon the earlier of" a Board decision "affirming such order" or "the expiration of the period in which the alien is permitted to seek review of such order by the Board." 8 U.S.C. 1101(a)(47)(B). That definition neatly applies to ordinary removal proceedings in which a removal order, and any withholding ruling, may be appealed to the Board as of right. See 8 U.S.C. 1229a. But, as amicus admits, Section 1228(b) removal orders are not appealable to the Board. Amicus nonetheless maintains that "'the period in which the alien is permitted to seek [Board] review' of a Section 1228(b) removal order 'expir[es]' the moment that order issues." Br. 35 (citation omitted; brackets in original). But under the statute and regulations, there is no "period in which the alien is permitted to seek [Board] review" of a Section 1228(b) removal order. 8 U.S.C. 1101(a)(47)(B)(ii). A nonexistent period of time that never began running does not "expir[e]," *ibid.*—it does not "come to an end" or "become void through the passage of time," *Webster's Third New International Dictionary* 801 (1993).

Amicus reads (Br. 36) the INA's definition as providing that "a removal order becomes final after the com-

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view within 30 days of that affirmance. If the Court adopts amicus's position, it should clarify whether its holding extends to those circumstances, or whether the Court is instead reserving the question.

pletion of *administrative* review of that order." That theory substitutes the general concept of administrative review for the statute's actual language, which ties the order's finality to *the Board's* affirmance of the removal order or the end of the period for seeking review "by the Board." 8 U.S.C. 1101(a)(47)(B).

To be sure, under the government's reading, the INA's definition fails to address the finality issue here. But Congress enacted the definition before the regulations governing withholding-only proceedings were promulgated, which may be why Congress did not directly confront that issue. See 64 Fed. Reg. 8478, 8485 (Feb. 19, 1999). Accordingly, this Court should construe "final order of removal" in Section 1252(b)(1) based on other textual and structural clues.[2]

Here, the statutory structure reinforces courts' longstanding practice. See p. 2, *supra*. The INA directly addresses review of many categories of administrative decisions. Gov't Br. 39-40 & n.12. And a separate provision expressly contemplates judicial review of CAT claims. See 8 U.S.C. 1252(a)(4). It is therefore unlikely that Congress would have employed a generic 30-day filing deadline as a means of addressing reviewability of withholding-only claims.

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[2] In 1994, Congress created a mechanism for expedited removal of certain aliens with aggravated-felony convictions. See Pub. L. No. 103-322, § 130004(a), 108 Stat. 2026-2027. Regulations then restricted Board review of those expedited removal orders. See 60 Fed. Reg. 43,954, 43,959-43,960 (Aug. 24, 1995). But that chronology need not suggest that Congress intended the 1996 statutory definition of final removal order to govern removal orders that are not subject to Board review. Contra Amicus Br. 41-42. Had Congress so intended, it presumably would not have tied finality to the timing of Board review.

3. Amicus is correct (Br. 35) that Section 1231 requires the detention of certain aliens once "the order of removal becomes administratively final." 8 U.S.C. 1231(a)(1)(B)(i). In *Guzman Chavez*, this Court held that a reinstated removal order becomes administratively final under Section 1231 as soon as DHS issues it—thus allowing detention even while withholding-only proceedings are ongoing. 594 U.S. at 535.

But "[f]inality is variously defined" in different areas of the law, and "its precise meaning depends on context." *Clay*, 537 U.S. at 527. The Court just recognized that "finality" means something different under Federal Rule of Civil Procedure 60(b) than "in the field of appellate jurisdiction." *Waetzig* v. *Halliburton Energy Servs., Inc.*, No. 23-971 (Feb. 26, 2025), slip op. 9. And it previously held that the term "'final'" in an immigration statute was "ambiguous" and referred only to "finality in administrative procedure" not finality for purposes of "judicial review." *Shaughnessy* v. *Pedreiro*, 349 U.S. 48, 51 (1955).

Section 1231 references *administrative* finality, thus "focus[ing] [the Court's] attention on the *agency's* review proceedings, separate and apart from any judicial review proceedings." *Guzman Chavez*, 594 U.S. at 534. From the agency's perspective, a Section 1228(b) removal order (or a Section 1231(a)(5) reinstated removal order) is administratively final during withholding-only proceedings because it conclusively determines that the alien is removable, requires his detention, and allows his removal to a "third country other than the country" at issue in withholding-only proceedings. 8 C.F.R. 208.16(f).

By contrast, Section 1252(b)(1) references finality for purposes of *judicial* review in the courts of appeals.

See 8 U.S.C. 1252 ("[j]udicial review of orders of removal"). In that context, the term "final" is naturally understood "against the background of the final judgment rule." *Kolov* v. *Garland*, 78 F.4th 911, 928 (6th Cir. 2023) (Murphy, J., concurring). So an order becomes final only when the agency has resolved *all* claims—including withholding-only claims.

Amicus cites (Br. 36) Section 1252(b)(8)(A), which states that a petition for review "does not prevent [DHS], after a final order of removal has been issued, from detaining the alien under section 1231(a)." 8 U.S.C. 1252(b)(8)(A). That provision confirms that DHS may detain aliens while judicial review of final removal orders is pending. It does not speak to *when* removal orders become final for purposes of judicial review.

4. Amicus relies (Br. 33-34) on Section 1228(b)(4)(F), which states that regulations must specify that "the final order of removal is not adjudicated by the same person who issues the charges." 8 U.S.C. 1228(b)(4)(F). And amicus cites Section 1228(b)(3), which provides that DHS "may not execute" a Section 1228(b) removal order until 14 days after "such order was issued, unless waived by the alien, in order that the alien has an opportunity to apply for judicial review under section 1252." 8 U.S.C. 1228(b)(3).

True, those provisions show that Congress viewed some Section 1228(b) removal orders as "final order[s] of removal" subject to judicial review when issued. But there is a plausible explanation for that: In many cases involving Section 1228(b) removal orders, the alien does not seek withholding of removal. If so, the removal order is final when issued for judicial-review purposes, and Section 1228(b)(3) stays removal for 14 days to allow for judicial review. That does not necessarily mean

that *all* such removal orders are final for judicial-review purposes—including those followed by withholding-only requests, which did not exist when Congress enacted Section 1228(b) in 1996.

5. Amicus next invokes this Court's recent precedents. Amicus primarily relies (Br. 37) on *Guzman Chavez*, which "express[ed] no view" on the issue here. 594 U.S. at 535 n.6. *Guzman Chavez*'s holding is limited to administrative finality for purposes of detention. Gov't Br. 44-48. In that context, Congress sensibly concluded that an alien should be detained immediately once a removal order becomes administratively final because at that point the alien may have incentives to "abscond." *Guzman Chavez*, 594 U.S. at 544. But the Court acknowledged that finality in the context of "judicial review of removal orders" presents a distinct issue—especially since Section 1252(b)(1) has "different language" from Section 1231. *Id.* at 535 n.6.

Amicus relies (Br. 46) on *Nasrallah*, which stated that a CAT order "does not affect the validity of" or "merge into" "the final order of removal." 590 U.S. at 582. Thus, a grant of CAT protection "does not disturb" a removal order, *ibid.*, because removal is still permitted —just not to the country where torture is likely. While withholding-only proceedings do not affect a removal order's *validity*, they do affect its *finality* for judicial-review purposes. Further, *Nasrallah* explains that "a CAT order may be reviewed together with the final order of removal," which suggests that the two orders become final at the same time so that they can be consolidated into one petition. *Id.* at 583; see *id.* at 585.

6. Finally, amicus invokes Congress's view that the "expedited removal of aliens convicted of aggravated felonies from the United States [i]s a critical priority."

Br. 50. The government fully agrees with that critical priority, which underscores the need to expeditiously resolve all proceedings. But aggravated felons are permitted to raise withholding-only claims before the agency, see *Guzman Chavez*, 594 U.S. at 530, meaning that the only practical issue at stake concerns the time needed for courts to address any challenges involving withholding-only claims. Such review will often be straightforward—particularly where the agency resolves a withholding-only claim solely on the written record. See 8 C.F.R. 208.31(f) and (g). And critically, during withholding-only proceedings and any subsequent judicial review, aliens can be detained. See *Guzman Chavez*, 594 U.S. at 535; 8 U.S.C. 1252(b)(8)(A).

B. If It Affirms, The Court Should Reject The Use Of Procedural Tactics To Preserve Judicial Review

In the end, this case presents a binary question of statutory interpretation: Either Congress intended to foreclose judicial review of withholding-only rulings issued after a Section 1228(b) removal order, or it did not. If the Court agrees with amicus that Congress intended to foreclose judicial review, it should reject the suggestion at the tail end of amicus's brief (at 49-50) that litigants could still use procedural maneuvers to preserve judicial review of withholding-only decisions.

Amicus notes (Br. 50) that, since *Bhaktibhai-Patel*, the Second Circuit has permitted aliens to file petitions for review within 30 days of their removal orders, stipulate to dismissal without prejudice, and then reinstate the earlier petitions after the conclusion of withholding-only proceedings. The Fourth Circuit has also held protective petitions for review in abeyance for months to allow withholding-only proceedings to conclude.

Such procedures incentivize aliens to file meritless petitions for review of Section 1228(b) removal orders simply to preserve the possibility that they might secure review of later denials of withholding-only claims. In certain cases, the government supported the use of those practices while it was opposing the correctness of the Second and Fourth Circuit's reasoning. Even so, the prospect of their global use is untenable. Gov't Br. 35-36.

Tolerating the continuation of those practices would be inconsistent with the statutory framework. If amicus's view of the statute is correct, then such practices contravene Congress's clear design. And they place unjustified burdens on the government and the courts—requiring them to take administrative steps to preserve (and later complete) judicial review over claims that Congress did not make reviewable. Thus, if the Court agrees with amicus's position, the Court should simply foreclose judicial review of withholding-only claims in the context of Section 1228(b) removal orders. And it should make that consequence clear and reject the availability of procedures designed to circumvent it.

* * * * *

For the foregoing reasons, the judgment of the court of appeals should be reversed.

Respectfully submitted.

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