No. 22-1319

In the

United States Court of Appeals

for the

Fourth Circuit

MARCO ANTONIO MIRANDA SANCHEZ,

Petitioner,

– v. –

MERRICK GARLAND, Attorney General,

Respondent.

On petition for review of a final order
of the Board of Immigration Appeals
Agency No. A076-620-748

BRIEF OF THE TAHIRIH JUSTICE CENTER AS *AMICUS CURIAE* IN SUPPORT OF PETITIONER

Paul W. Hughes
Andrew A. Lyons-Berg
McDermott Will & Emery LLP
500 North Capitol Street NW
Washington, DC 20001
(202) 756-8000

Counsel for Amicus Curiae

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Cases—continued

Statutes

Other authorities

CORPORATE DISCLOSURE STATEMENT

Pursuant to Fed. R. App. P. 29(a)(4)(A) and 26.1(a), *amicus* Tahirih Justice Center states that it is a non-partisan, tax-exempt 501(c) charitable organization. Tahirih has no parent corporation, and no publicly held corporation owns 10% or more of its stock. Tahirih is not aware of any other publicly held corporation with a direct financial interest in the outcome of the case, within the meaning of Local Rule 26.1(a)(2)(C).

INTRODUCTION AND INTEREST OF THE *AMICUS CURIAE*[1]

Noncitizens seeking protection from removal under the Immigration and Nationality Act (INA) or the U.N. Convention against Torture (CAT) face the harshest possible consequences if their claims are erroneously denied. By definition, these individuals claim that they will be tortured or persecuted—often killed—if returned to their homelands. *See, e.g.*, *Albathani v. INS*, 318 F.3d 365, 378 (1st Cir. 2003) ("[I]mmigration decisions, especially in asylum cases, may have life or death consequences, and so the costs of error are very high."). As it was once put vividly, "[Immigration] Judges say they must handle 'death penalty' cases in a traffic court setting, with inadequate budgets and grueling caseloads." Maria Sacchetti & Carolyn Van Houten, *Death Is Waiting for Him*, Wash. Post (Dec. 6, 2018), perma.cc/VR2C-VGEU.

Errors in agency adjudications thus occur—and with horrifying frequency. *See, e.g.*, David Hausman, *The Failure of Immigration Appeals*, 164 U. Pa. L. Rev. 1177 (2016); Human Rights Watch, *Deported to Danger* (Feb. 5, 2020) (identifying 138 individuals who, after being deported to El Salvador, were subsequently killed), perma.cc/L8CN-PSEG.

---

[1] No party or party's counsel either authored this brief in whole or in part, or contributed money intended to fund preparing or submitting this brief. No person, other than *amicus curiae*, its members, or its counsel, contributed money intended to fund the preparation or submission of the brief. Fed. R. App. P. 29(a)(4)(E).

Judicial review of the immigration agency's decisions in withholding-of-removal cases is therefore of the utmost importance. In this case, however, the government advances a novel argument that jurisdiction for that judicial review is lacking—not only for this petitioner, but for potentially thousands of similarly situated noncitizens every year. But its argument is squarely foreclosed by Supreme Court precedent interpreting the INA's jurisdictional provision; it misreads other binding precedents; and it would result in both impossibility and absurd results. This Court should not hesitate to reject it, confirming that jurisdiction is proper here.

The Tahirih Justice Center is the largest multi-city direct services and policy advocacy organization specializing in assisting immigrant survivors of gender-based violence. In five cities across the country, Tahirih offers legal and social services to women, girls, and other immigrants fleeing all forms of gender-based violence, including human trafficking, forced labor, domestic violence, rape and sexual assault, and female genital mutilation/cutting. Since its beginning in 1997, Tahirih has provided free legal assistance to more than 31,000 individuals, many of whom have experienced the significant psychological and neurobiological effects of trauma. Through direct legal and social services, policy advocacy, and training and education, Tahirih protects immigrant survivors and promotes a world where they can live in safety and dignity.

Tahirih thus has a strong institutional interest in ensuring that the government is not permitted to erect specious jurisdictional bars to judicial review of immigrants' claims to relief from removal, as it attempts to do here.[2]

ARGUMENT

I. Brief statutory background.

a. In general, when the government seeks to remove a noncitizen from the country, agency adjudicators must determine—and the noncitizen is entitled to contest—both whether the noncitizen is removable in the first place, and also whether he or she is entitled to discretionary relief from removal, such as asylum.

However, "Congress has established a streamlined process for removal of noncitizens who return illegally to this country after a previous removal order has been entered against them." *Tomas-Ramos v. Garland*, 24 F.4th 973, 976 (4th Cir. 2022). That is the situation applicable to the petitioner here. "In such cases, . . . [t]he 'prior order of removal is reinstated from its original date,' and is 'not subject to being reopened or reviewed.' Nor may the noncitizen pursue discretionary relief, like asylum." *Id.* (quoting 8 U.S.C. §1231(a)(5)) (citation omitted).

---

[2] Counsel for *amicus*—who argued *Nasrallah*, *Guerrero-Lasprilla,* and *Guzman Chavez* at the Supreme Court—also has significant interest in the correct application of those authorities here.

Notwithstanding the bar on asylum and the inability to "otherwise challenge a reinstated removal order," a noncitizen subject to such an order "still may pursue two forms of relief to prevent removal to a particular country: withholding of removal under § 1231(b)(3)(A)"—also known as statutory withholding—"and protection under the CAT." *Tomas-Ramos*, 24 F.4th at 977; *see also Johnson v. Guzman Chavez*, 141 S. Ct. 2271, 2282 (2021). Because statutory and CAT withholding are the only forms of relief available, the subsequent administrative litigation is known as withholding-only proceedings.

b. Meanwhile, 8 U.S.C. § 1252 gives the courts of appeals jurisdiction to review "a final order of removal," and sets a 30-day jurisdictional deadline for a noncitizen to petition for review. *Id.* § 1252(a)(1), (b)(1). Section 1252(b)(9), the so-called zipper clause, provides that "[j]udicial review of all questions of law and fact . . . arising from any action taken or proceeding brought to remove an alien from the United States . . . shall be available only in judicial review of a final order under this section." *Id.* § 1252(b)(9).

Finally, Section 1252(a)(4), enacted as part of the 2005 REAL ID Act, provides that "a petition for review filed with an appropriate court of appeals in accordance with this section" is the "means for judicial review of any cause or claim under the United Nations Convention Against Torture." 8 U.S.C. § 1252(a)(4).

II. The government's jurisdictional argument is wrong.

The government's argument that jurisdiction is lacking over petitioner's CAT claims, purportedly because petitioner did not file a petition for review within 30 days of his 2019 reinstatement order, is flat wrong as a matter of law.

The government's argument proceeds as follows. First, Section 1252(a)(1) provides for court-of-appeals jurisdiction over a petition for review of a final order of removal, which must be filed within 30 days of that order. Gov't Br. 12 (citing 8 U.S.C. § 1252(a)(1), (b)(1)). Second, the government contends, *Nasrallah v. Barr*, 140 S. Ct. 1683 (2020), makes clear that an order denying CAT relief is not a final order of removal—with the result that Section 1252(a)(1) itself does not provide for jurisdiction to challenge a CAT order. Gov't Br. 13-14. Normally, that is no problem, because under the Foreign Affairs Reform and Restructuring Act of 1998 (FARRA) and the zipper clause, "a CAT order may be reviewed together with the final order of removal." Gov't Br. 14 (quoting *Nasrallah*, 140 S. Ct. at 1691).

But a problem occurs, in the government's view, in the case of a noncitizen with a reinstated removal order and withholding-only proceedings. Under those circumstances, "the *reinstatement* order is the final reviewable order of removal"—and, the government asserts, reinstatement orders become final immediately under the Supreme Court's *Guzman Chavez*

decision. Gov't Br. 14, 16. Thus, the 30-day deadline for petitioning for review starts on the date of the reinstatement order, even though that date represents the beginning, not the end, of a noncitizen's withholding-only proceedings. And if a petition is not filed within those 30 days, the argument goes, the noncitizen is forever barred from seeking review of her withholding-only claims, because jurisdiction over CAT claims exists only where that review is coupled with timely review of a final removal order.

That argument is wrong, for at least two reasons.

First, the Supreme Court held in *Nasrallah* that, after the 2005 REAL ID Act's amendments, Section 1252(a)(4) of the INA provides for "direct review" of CAT orders, untethered to review of the underlying order of removal. *Nasrallah*, 140 S. Ct. at 1693. So whether petitioner filed a petition for review of his reinstatement order—years before his CAT claims were even decided—is irrelevant under the Supreme Court's binding precedent.

Second, even if that were not the case, the government misreads *Guzman Chavez* as holding that a reinstatement order becomes reviewable—and thus the 30-day clock for petitioning a court for review begins—immediately upon issuance, even if the noncitizen initiates withholding-only proceedings. *Guzman Chavez* holds no such thing, and therefore does not upset the preexisting consensus among the courts of appeals that the proper

time for petitioning for review of withholding-only proceedings is after those proceedings have completed.

A. As *Nasrallah* held, Section 1252(a)(4) provides an independent font of jurisdiction over CAT orders.

The first fundamental flaw in the government's reasoning is its assumption that courts have jurisdiction to review CAT orders *only* when paired with timely review of a final order of removal. As the Supreme Court held in *Nasrallah*, that is simply not the case.

To the contrary, the *Nasrallah* Court explained, "as a result of the 2005 REAL ID Act, § 1252(a)(4) now provides for *direct* review of CAT orders in the courts of appeals." 140 S. Ct. at 1693 (emphasis added); *see* 8 U.S.C. § 1252(a)(4) (providing that "a petition for review filed with an appropriate court of appeals" is the proper "means for judicial review of any cause or claim under the [CAT]."). This "direct review" is in addition to the preexisting route of "judicial review of CAT claims together with the review of final orders of removal" under FARRA. *Nasrallah*, 140 S. Ct. at 1693. That is, since the passage of the REAL ID Act in 2005, review of CAT orders no longer needs to piggyback on review of final orders of removal via FARRA and the zipper clause; instead, Section 1252(a)(4) provides for "direct review." *Id.*[3]

[3] As the petitioner in *Nasrallah* explained, it made perfect sense for Congress to provide for independent review of CAT claims in the REAL ID Act. *See* Reply Br. 16-18 & n.9, *Nasrallah v. Barr*, No. 18-1432 (Feb. 14,

If the *Nasrallah* majority were not clear enough, the dissent in that case makes the majority's holding even more explicit. As Justice Thomas wrote in dissent, "the majority views § 1252(a)(4) as *a specific grant of jurisdiction* over CAT claims." *Nasrallah*, 140 S. Ct. at 1696 (Thomas, J., dissenting) (emphasis added). The majority did not object to that characterization. In other words, the *Nasrallah* majority's holding that Section "1252(a)(4) now provides for direct review of CAT orders in the courts of appeals" (140 S. Ct. at 1693) was an explicit *rejection* of Justice Thomas's contrary view that "a final order of removal is required if a court is to review a CAT order at all" (*id.* at 1697 (Thomas, J., dissenting)).

2020). The REAL ID Act was a response to the Supreme Court's decision in *INS v. St. Cyr*, 533 U.S. 381 (2001), and follow-on circuit precedents, which had held that noncitizens subject to the criminal bar—and therefore precluded from obtaining review of their immigration proceedings in the courts of appeals—could nevertheless obtain review via habeas petitions in district court. The Act therefore *expanded* direct court-of-appeals review in order to eliminate the Suspension Clause concerns that had animated *St. Cyr*'s holding that district-court habeas petitions were permitted. *See generally* H.R. Conf. Rep. 109-72, at 172-176. And one line of *St. Cyr* follow-on cases had held that district-court habeas review of CAT orders was available precisely because court-of-appeals review of such orders was unavailable without review of the underlying removal order, which noncitizens subject to the criminal bar could not obtain. *See, e.g.*, *Cadet v. Bulger*, 377 F.3d 1173, 1183 n.8 (11th Cir. 2004). The REAL ID Act solved this problem by enacting Section 1252(a)(4), thus enabling review of CAT orders independently of removal orders. *Nasrallah*, 140 S. Ct. at 1693.

Yet that premise of Justice Thomas's—which the *Nasrallah* majority, by contrast, soundly rejected—forms the foundation of the government's argument here. Since, under *Nasrallah*, Section 1252(a)(4) "provides for direct review of CAT orders in the courts of appeals" (*Nasrallah*, 140 S. Ct. at 1693), untethered to review of a final order of removal, the fact that petitioner here did not petition for review within 30 days of his reinstatement order is irrelevant.

The government's principal authority breezes past this problem by misstating what *Nasrallah* said about Section 1252(a)(4). *See Bhaktibhai-Patel v. Garland*, 32 F.4th 180, 190 n.13 (2d Cir. 2022) (asserting that "Section 1252(a)(4) . . . simply establishes that 'a CAT order is reviewable *as part of* the review of a final order of removal under 8 U.S.C. § 1252.'") (quoting *Nasrallah*, 140 S. Ct. at 1691). That quote from *Nasrallah*, though, is not about Section 1252(a)(4) at all; it is instead what "FARRA provides" (*Nasrallah*, 140 S. Ct. at 1691)—indeed, the "as part of" language that *Bhaktibhai-Patel* emphasizes and attributes to Section 1252(a)(4) is actually a direct quote from FARRA, a completely separate and earlier-enacted statute (*id.*). *See* FARRA § 2242(d), Pub. L. 105-277, 112 Stat. 2681-822 (codified at 8 U.S.C. § 1231 note).

Bhaktibhai-Patel thus does not engage with *Nasrallah*'s holding that Section 1252(a)(4) is an independent source of jurisdiction over CAT orders,

and gives no support to the government's position on this point. In sum, and as *Nasrallah* holds, no petition for review of the reinstatement order is required, because Section 1252(a)(4) permits this Court to review the CAT order "direct[ly]." *Nasrallah*, 140 S. Ct. at 1693.

B. Even absent Section 1252(a)(4), a reinstatement order is not reviewable until withholding-only proceedings have completed.

Second, even disregarding the independent font of jurisdiction in Section 1252(a)(4), many courts of appeals have held (and this Court has recognized) that the time for petitioning for review of a reinstatement order does not begin running until withholding-only proceedings are complete—another basis on which petitioner's petition here is timely.

As this Court explained in *Guzman Chavez v. Hott*, "courts routinely have held—and the government has agreed—that a reinstated order of removal is not 'final' for purposes of judicial review until the agency completes adjudication of a noncitizen's request for withholding of removal." 940 F.3d 867, 880 (4th Cir. 2019) (collecting cases), *rev'd on other grounds*, 141 S. Ct. 2271; *see also, e.g.*, *Ponce-Osorio v. Johnson*, 824 F.3d 502, 505-506 (5th Cir. 2016); *Luna-Garcia v. Holder*, 777 F.3d 1182, 1184-1186 (10th Cir. 2015); *Ortiz-Alfaro v. Holder,* 694 F.3d 955, 958 (9th Cir. 2012).

Indeed, this was the government's view, too, until recently. *See Guzman Chavez*, 940 F.3d at 880 ("The government does not dispute that a removal

order is 'final' under § 1252's judicial review provisions only when withholding-only proceedings end."); Gov't Br. 12. Now, however, the government takes the position that the Supreme Court's *Guzman Chavez* decision has upset this line of precedent by holding that "'a [reinstated] removal order' . . . becomes administratively final once the agency has completed its own review proceedings," regardless of whether "the withholding-only proceedings [have] conclude[d]." *Id.* at 14 (quoting *Guzman Chavez*, 141 S. Ct. at 2284-2285).

That assertion is based on a fundamental misunderstanding of *Guzman Chavez*. The Supreme Court there was answering a different question: when a reinstated removal order becomes "*administratively* final" within the meaning of Section 1231(a)(1)(B), which has consequences regarding detention authority, not judicial review. *Guzman Chavez*, 141 S. Ct. at 2284-2285 (emphasis added); *see* 8 U.S.C. § 1231(a)(1)(B)(i), (a)(2) (providing that "the removal period," during which "the Attorney General shall detain the alien," generally begins when "the order of removal becomes administratively final").

Indeed, the Supreme Court *explicitly declined* to disturb the circuit cases noted above—which hold that finality for purposes of judicial review under Section 1252 occurs only when withholding-only proceedings are complete—on the basis that Section 1252 and Section 1231 "use[] different

language" and have different subject matter: "We *express no view* on whether the lower courts are correct in their interpretation of § 1252, which uses different language than § 1231 and relates to judicial review of removal orders rather than detention." *Guzman Chavez*, 141 S. Ct. at 2285 n.6 (emphasis added); *see* Respondents' Br. 25, *Johnson v. Guzman Chavez*, No. 19-897 (Nov. 4, 2020) (discussing *Luna-Garcia*, *Ortiz-Alfaro*, and others).[4]

Because *Guzman Chavez* explicitly did not overturn the circuit consensus that reinstated removal orders become final for purposes of judicial review only when withholding-only proceedings are complete (*see* 141 S. Ct. at 2285 n.6), the Supreme Court's decision does nothing to undermine their strong persuasive authority—or, to the extent adopted by this Court's *Guzman Chavez* decision, that case's binding effect on this panel. *Guzman Chavez*, 940 F.3d at 880 (noting that "[t]he government does not dispute that a removal order is 'final' under § 1252's judicial review provisions only when

[4] Moreover, the government in *Guzman Chavez* directly invited the Supreme Court to resolve the case this way. Gov't Reply Br. 12-13, *Johnson v. Guzman Chavez*, No. 19-897 (Dec. 4, 2020) (arguing that "the court need not resolve" when reinstated removal orders become final for judicial review, because "the provisions at issue here . . . have nothing to do with judicial review"). Having obtained a favorable decision in *Guzman Chavez* on that ground, the government's reversal here—purportedly based on *Guzman Chavez* itself—is remarkable. *Cf., e.g.*, *New Hampshire v. Maine*, 532 U.S. 742, 749 (2001) ("[W]here a party assumes a certain position in a legal proceeding, and succeeds in maintaining that position, he may not thereafter, simply because his interests have changed, assume a contrary position.").

withholding-only proceedings end," and incorporating that concession into this Court's ultimate conclusion); *see, e.g.*, *Cent. Pines Land Co. v. United States*, 274 F.3d 881, 893 & n. (5th Cir. 2001) (holding that "our panel opinion in [a previous case] binds us on [an] issue [decided therein], despite its reversal by the Supreme Court . . . on other grounds"). To the extent *Bhaktibhai-Patel* breaks from this precedent, it creates a circuit split without justification.

Guzman Chavez thus provides no support for the government's newfound position, which is wrong on this independent basis, too—even setting aside the freestanding jurisdictional grant in Section 1252(a)(4).[5]

[5] As petitioner notes (Reply Br. 3) the government's position in this case is also surprising given the Solicitor General's concession to the Supreme Court—in a brief filed roughly a month after the government's brief in this case—that *statutory* withholding claims "*are* subject to judicial review under the provisions governing 'final orders of removal' because Section 1252(b)(4) expressly references" the INA's statutory withholding provision, even where the petitioner "did not ask the court of appeals to review the reinstatement of her removal order." Gov't Br. 9-10 n.9, *Santos-Zacaria v. Garland*, No. 21-1436 (Dec. 19, 2022) (emphasis added). That concession is further reason to doubt the government's position as to the CAT claims at issue here, because it would require that Congress simultaneously intended to enable judicial review of the statutory withholding component of a noncitizen's withholding-only proceedings, but bar judicial review of the CAT component.

C. The government's contrary position results in impossibility and absurdity.

Finally, as this Court and others have recognized, the upshot of the government's position is that withholding-only proceedings would become effectively unreviewable—a result that is to be avoided as a fundamental matter of administrative law.

1. In short, the problem is that withholding-only proceedings will almost never be completed within 30 days of the reinstatement order as a practical matter, rendering it impossible to petition for review of those proceedings within that timeframe. As the petitioner here points out, he did not even receive a scheduling hearing for his withholding-only claims until 97 days after his reinstatement order—more than three times the deadline for petitioning for review—and those proceedings were not completed for over two years. *See* Reply Br. 4. In *amicus*'s experience, that kind of timeline is completely normal; it is unheard of for the government to issue a decision on a noncitizen's withholding-only claims within 30 days. *Accord, e.g.*, *Guzman Chavez*, 141 S. Ct. at 2294 (Breyer, J., dissenting) (collecting studies that "have found that [withholding-only] procedure often takes over a year, with some proceedings lasting well over two years before eligibility for withholding-only relief is resolved.").

Thus, if "a reinstated removal order becomes 'final' for purposes of judicial review under § 1252 before withholding-only proceedings conclude,

[that] presumably would render the withholding-only determination nonreviewable." *Guzman Chavez*, 940 F.3d at 880 n.10; *accord, e.g.*, *Ortiz-Alfaro,* 694 F.3d at 958 ("If Ortiz's removal order became final when it was reinstated, then . . . [a]ll petitions filed by Ortiz [thereafter], which would necessarily include petitions for review of any yet-to-be-issued IJ decisions denying Ortiz relief . . . would be dismissed as untimely.").

That result would be contrary to the "well-settled and strong presumption" "favoring judicial review of administrative action," which the Supreme Court has "consistently applied . . . to immigration statutes." *Guerrero-Lasprilla v. Barr*, 140 S. Ct. 1062, 1069 (2020) (quotation marks omitted). This "presumption can only be overcome by 'clear and convincing evidence' of congressional intent to preclude judicial review." *Id.* Such clear and convincing evidence is missing here, and the government's interpretation should thus be avoided if possible—which, as discussed above, it certainly is.[6]

---

[6] It is no answer to say that these noncitizens already had an opportunity for judicial review at the time of their original removal orders. First, the facts giving rise to a noncitizen's claim for withholding may well have occurred only after she was removed pursuant to the original order. *See, e.g.*, *Tomas-Ramos*, 24 F.th at 979 (describing exactly this circumstance). And second, it is *amicus*'s experience that a large number of noncitizens subject to reinstated removal orders were originally removed pursuant to Section 1225(b)(1)'s expedited removal provisions, and thus—as the Supreme Court recently held in *DHS v. Thuraissigiam*, 140 S. Ct. 1959 (2020)—were not entitled to judicial review of their withholding claims at that point, either.

2. The government attempts to disavow the natural results of its position, asserting that "a court . . . vested of jurisdiction through a timely filed petition for review of a reinstatement order possesses authority to consider the final determinations made in any subsequent withholding-only proceedings." Gov't Br. 17.

To begin with, the case on which the government principally relies—the Second Circuit's decision in *Bhaktibhai-Patel*—explicitly rejects this position. There, the court stated that "[o]ur holding forecloses judicial review of agency decisions in withholding-only proceedings" *unless* "the withholding-only proceedings conclude within 30 days of DHS's reinstatement decision." *Bhaktibhai-Patel*, 32 F.4th at 187-188 & n.9, 195 n.21. As noted above, such speedy processing is a practical impossibility. The middle ground the government attempts to walk here was thus rejected by the only court to adopt its preferred reasoning.[7]

---

[7] The Supreme Court in *Guzman Chavez*, too, appears to have held that "administrative finality" occurs not when a reinstatement order is entered, but when the underlying removal order originally became final. 141 S. Ct. at 2285; *see id.* at 2297 (Breyer, J., dissenting) ("The time when the majority says the reinstated removal order became 'administratively final' is the time at which the original order of removal became final."). Thus, if administrative finality is the same as finality for judicial review (*but see* pages 10-13, *supra*), then review of withholding-only proceedings is not only practically but also literally impossible, because the 30-day deadline would have started at the time of a noncitizen's *original* removal, often years prior to the withholding-only proceedings.

Even if the government were right and the Second Circuit were wrong, however, the government's position would still lead to colossal waste and judicial inefficiency—and would set a trap for unwary litigants—as petitioner points out. *See* Reply Br. 4-5.

That is, the government would require every noncitizen wishing to assert a withholding claim to file a protective appeal of her reinstatement order—notwithstanding that reinstatement orders will almost never contain an error meriting judicial review. *See, e.g.*, *Ponce-Osorio*, 824 F.3d at 504-505 (to properly reinstate a removal order, government must only find "(1) [that] the alien has been subject to a prior order of removal; (2) the identity of the alien; and (3) [that] the alien reentered the United States illegally"); *Mejia v. Sessions*, 866 F.3d 573, 588-590 (4th Cir. 2017) (noncitizen may not challenge validity of underlying removal order through review of reinstatement order).

That would not only be an extreme burden on the courts (*see* Reply Br. 5 n.2 (over 70,000 reinstatement orders entered in 2022)), but it also would only solve the government's lack-of-reviewability problem if the courts chose to stay these meritless petitions for years to wait for the withholding-only proceedings to catch up, rather than simply dismissing them summarily. Otherwise, there would be no active, jurisdictionally proper action for review of the withholding-only claims to be "folded into." Gov't Br. 15.

The government's construction would also serve as a potent trap for unwary noncitizens. *See, e.g.*, *Cook County v. Wolf*, 962 F.3d 208, 228 (7th Cir. 2020) (rejecting "DHS's interpretation" of an immigration statute in part because it "set[s] a trap for the unwary" that "many immigrants are not sophisticated enough" to avoid); *Darby v. Cisneros*, 509 U.S. 137, 147 (1993). It is extremely counterintuitive that—in order to preserve appellate rights as to a withholding-only procedure that has not even *started*—one must file a frivolous appeal of a reinstatement order that contains no errors. Particularly given the practical inaccessibility of counsel to many noncitizens in removal proceedings (*see, e.g.*, *Garland v. Aleman Gonzalez*, 142 S. Ct. 2057, 2076 (2022) (Sotomayor, J., concurring in part)), this trap is likely to ensnare many, with the most dire possible results. *Cf., e.g.*, *Quintero v. Garland*, 998 F.3d 612, 627 (4th Cir. 2021) (noting "the gravity of the interests at stake . . . for individuals seeking protection from persecution or torture.").

For these reasons, too, the Court should reject the government's newfound jurisdictional argument—which lacks any legal basis in any event.

CONCLUSION

For the foregoing reasons, the Court should conclude that it has jurisdiction over this case.

Respectfully submitted,

/s/ *Andrew A. Lyons-Berg*

Paul W. Hughes
Andrew A. Lyons-Berg
McDermott Will & Emery LLP
500 North Capitol Street NW
Washington, DC 20001
(202) 756-8000

Counsel for Amicus Curiae

Dated: February 28, 2023

CERTIFICATE OF COMPLIANCE

Pursuant to Federal Rule of Appellate Procedure 32(a)(7)(C), the undersigned counsel for *amicus* certifies that this brief:

(i) complies with the type-volume limitation of Rule 29(a)(5) because it contains 4,279 words, including footnotes and excluding the parts of the brief exempted by Rule 32(f); and

(ii) complies with the typeface requirements of Rule 32(a)(5) and the type style requirements of Rule 32(a)(6) because it has been prepared using Microsoft Office Word 2016 and is set in New Century Schoolbook font in a size equivalent to 14 points or larger.

Dated: February 28, 2023 /s/ *Andrew A. Lyons-Berg*

CERTIFICATE OF SERVICE

I certify that that on February 28, 2023, I caused the foregoing brief to be served electronically on all parties via the Court's CM/ECF system.

Dated: February 28, 2023 /s/ *Andrew A. Lyons-Berg*