

The Finality of Reinstated Orders of Removal Under 8 U.S.C. § 1252

Jonah Klausner[†]

Federal law authorizes the reinstatement of a prior removal order when a noncitizen “reenter[s] the United States without authorization after having already been removed.” It further provides an “expedited process” for doing so, denying to such noncitizens the right to contest before an immigration judge their removability or inadmissibility. The question whether a noncitizen is removable is thus definitively settled immediately upon reinstatement. But the question to where the noncitizen will be removed is less certain. This is because noncitizens subject to reinstated orders of removal retain the right to pursue “withholding-only” relief, which precludes removal to the noncitizen’s home country when extreme dangers await them there.

This lag—between when removability, on one hand, and the country of removal, on the other, are determined—has exposed an ambiguity in the statute providing for judicial review of a “final order of removal,” 8 U.S.C. § 1252. Specifically, § 1252(b)(1) requires that a noncitizen file a petition for review within thirty days of the final order of removal. But when does a reinstated order of removal become final? Specifically, does finality attach when the prior removal order is reinstated (such that removability is determined) or when the administrative process for adjudicating claims for withholding-only relief has concluded (such that the country of removal is determined)? On this question, the courts of appeals are divided.

This Comment contends that the soundest construction of § 1252 deems reinstated orders of removal final when withholding-relief proceedings conclude. Such a construction is consistent with Supreme Court precedent, is more faithful to the statutory text, and better comports with the framework established by § 1252.

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[†] B.A. 2020, University of Michigan; J.D. Candidate 2025, The University of Chicago Law School. Thank you to the *University of Chicago Law Review* editors for their tireless work and invaluable contributions, Professor Nicole Hallett for her guidance and oversight, and my family and partner for their unwavering support and unconditional love.

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INTRODUCTION

In 2009, Jonny Vasquez-Rodriguez was allegedly suffering pervasive abuse at the hands of the state while living with his uncle in San Vicente, El Salvador.¹ According to Vasquez-Rodriguez, local police officers began physically abusing him because of an erroneous belief that he was in a gang.² His alleged plight worsened when the mayor and his allies in the police department retaliated against Vasquez-Rodriguez after he volunteered for his uncle’s mayoral campaign.³ This time, they not only beat him but accused him of a marijuana offense; Vasquez-Rodriguez pleaded guilty to secure his release from jail but later insisted the charge was fabricated.⁴ Vasquez-Rodriguez maintains that the police continued to attack and harass him after his release.⁵ He reported the offic-

¹ Vasquez-Rodriguez v. Garland, 7 F.4th 888, 891–92 (9th Cir. 2021).

² *Id.* at 892.

³ *Id.*

⁴ *Id.*

⁵ *Id.*

ers, first to the police department and then to a human rights organization, but to no avail.⁶ Because the attacks were unrelenting, Vasquez-Rodriguez escaped to the United States, from which he had already been removed twice.⁷

In 2013, Vasquez-Rodriguez was removed to El Salvador for a third time.⁸ Because his earlier release from jail on the marijuana charge was conditioned upon his not leaving El Salvador, he was arrested upon his return to the country.⁹ The detaining officers then turned Vasquez-Rodriguez over to San Vicente officers, who Vasquez-Rodriguez claimed picked up where they left off by beating and jailing him.¹⁰ One of the officers even raped him.¹¹ Helpless, Vasquez-Rodriguez fled to the United States yet again after spending a year in hiding in the mountains.¹² In 2018, however, Vasquez-Rodriguez's prior removal order was reinstated after he pleaded guilty to misdemeanor domestic battery.¹³

Federal law authorizes the reinstatement of a prior removal order when a noncitizen "reenter[s] the United States without authorization after having already been removed."¹⁴ It further provides an "expedited process" for doing so, limiting the substantive and procedural rights available to the removable noncitizen.¹⁵ Notwithstanding these limitations, noncitizens subject to reinstated orders of removal may seek either statutory withholding of removal under 8 U.S.C. § 1231(b)(3)(A) or withholding under the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (CAT).¹⁶ Statutory withholding is appropriate when the noncitizen is likely to face, in the proposed country of removal, persecution threatening their "life or freedom . . . because of the alien's race, religion, nationality, membership in a particular social group, or political opinion."¹⁷ Withholding under the CAT, on the other hand, applies to noncitizens likely to

⁶ *Vasquez-Rodriguez*, 7 F.4th at 892.

⁷ *Id.* at 891–92.

⁸ *Id.* at 892. This removal was likely due to Vasquez-Rodriguez's unlawful entry into the United States.

⁹ *Id.*

¹⁰ *Id.*

¹¹ *Vasquez-Rodriguez*, 7 F.4th at 892.

¹² *Id.*

¹³ *Id.*

¹⁴ *Johnson v. Guzman Chavez*, 594 U.S. 523, 529 (2021).

¹⁵ *See id.*; HILLEL R. SMITH, CONG. RSCH. SERV., IF11736, REINSTATEMENT OF REMOVAL: AN INTRODUCTION (2021).

¹⁶ Dec. 10, 1984, 1465 U.N.T.S. 85; *see Guzman Chavez*, 594 U.S. at 530–31.

¹⁷ 8 U.S.C. § 1231(b)(3)(A); *see* 8 C.F.R. § 208.16(b) (2023).

be tortured in that country “by, or at the instigation of, or with the consent or acquiescence of, a public official acting in an official capacity or other person acting in an official capacity.”¹⁸ Withholding relief, however, is “country-specific.”¹⁹ This means that the noncitizen may argue only against being removed *to a particular country*; when a reinstated order of removal is issued, the antecedent question of *whether they are removable* is not subject to review.²⁰

Upon the reinstatement of his prior removal order in 2018, Vasquez-Rodriguez exercised his right to seek withholding, applying for both statutory and CAT relief in an effort to avoid being removed to El Salvador.²¹ The immigration judge (IJ) rejected both claims.²² Vasquez-Rodriguez’s failure to establish past persecution or a well-founded fear of future persecution owing to a protected characteristic doomed his statutory withholding claim.²³ His CAT claim fared no better because the IJ found Vasquez-Rodriguez capable of safely relocating within El Salvador due to his abilities to “speak[] Spanish fluently” and “find work throughout” the country.²⁴ The Board of Immigration Appeals (BIA), which sits within the Department of Justice (DOJ) and hears appeals from IJ decisions,²⁵ affirmed the IJ’s denial of relief.²⁶

But the adverse IJ and BIA decisions did not seal Vasquez-Rodriguez’s fate. Because 8 U.S.C. § 1252 provides for judicial review of a “final order of removal,”²⁷ including “questions . . . arising from any” removal proceeding,²⁸ Vasquez-Rodriguez could appeal his case to the United States Court of Appeals for the Ninth

¹⁸ 8 C.F.R. § 1208.18(a)(1) (2023). Persecution and torture can overlap, and noncitizens often pursue both routes to relief. *See, e.g., Iraheta-Martinez v. Garland*, 12 F.4th 942, 945 (9th Cir. 2021). They are not, however, identical. In addition to persecution’s unique requirement that it be based on a particular characteristic and torture’s unique requirement of official responsibility, the two sources of relief are trained on different substantive behaviors. Whereas persecution is behavior that threatens one’s “life or freedom,” 8 C.F.R. § 208.16(b) (2023), torture is constituted by “any act by which severe pain or suffering, whether physical or mental, is intentionally inflicted,” 8 C.F.R. § 1208.18(a)(1) (2023).

¹⁹ *Guzman Chavez*, 594 U.S. at 536.

²⁰ *See id.*

²¹ *Vasquez-Rodriguez*, 7 F.4th at 892.

²² *Id.*

²³ *Id.*

²⁴ *Id.* at 899.

²⁵ *Board of Immigration Appeals*, U.S. DEP’T OF JUST. EXEC. OFF. FOR IMMIGR. REV., <https://perma.cc/Z2CC-E9E4> (last updated Apr. 16, 2024).

²⁶ *Vasquez-Rodriguez*, 7 F.4th at 892.

²⁷ 8 U.S.C. § 1252(a)(1).

²⁸ *Id.* § 1252(b)(9).

Circuit. This judicial review proved decisive: the Ninth Circuit vacated the BIA's decision and remanded for further proceedings.²⁹ With regard to the CAT claim, it did so because "the Board's determination that [Vasquez-Rodriguez] is ineligible for such relief is not supported by substantial evidence."³⁰ The court explained that the BIA's proffered rationales for denying relief were either "contradicted" by other BIA determinations or "irrelevant."³¹ The BIA further erred by ignoring significant evidence favoring Vasquez-Rodriguez.³² As for the IJ, the court found that they erroneously relied on facts that did not bear on the relevant question, which is whether Vasquez-Rodriguez could "safely reside in a place in which he was for years abused by the police."³³ Moreover, the IJ "identified no evidence" supporting their finding "that Vasquez-Rodriguez could safely relocate" within El Salvador—a finding which "is [] impossible to reconcile with Vasquez-Rodriguez's testimony," found credible by the BIA.³⁴

Judicial review thus saved Vasquez-Rodriguez from potentially life-threatening danger. And every year, thousands of others whose prior removal orders are reinstated may have a similar need for judicial review of their withholding-relief claims. In 2021, for example, the Department of Homeland Security (DHS) completed eighty-nine thousand removals of noncitizens.³⁵ Of these, 35% (thirty-one thousand) were based on the reinstatement of a prior removal order.³⁶ When zoomed out, the decade from 2012 through 2021 saw 1.2 million noncitizen removals attributable to reinstatement of a prior removal order.³⁷ Relatively speaking, reinstatements are the second-most common type of removal.³⁸

But recent legal developments threaten the availability of judicial review for noncitizens similarly situated to Vasquez-Rodri-

²⁹ *Vasquez-Rodriguez*, 7 F.4th at 899.

³⁰ *Id.* at 898.

³¹ *Id.*

³² *See id.* at 899.

³³ *Id.*

³⁴ *Vasquez-Rodriguez*, 7 F.4th at 899.

³⁵ SEAN LEONG, DEP'T OF HOMELAND SEC., IMMIGRATION ENFORCEMENT ACTIONS: 2021, at 14 (2022).

³⁶ *Id.*

³⁷ *Id.*

³⁸ *Id.* The most common type of removal is an "expedited removal," which is authorized "for certain arriving aliens and aliens who recently entered the United States without inspection." HILLEL R. SMITH, CONG. RSCH. SERV., IF11357, EXPEDITED REMOVAL OF ALIENS: AN INTRODUCTION (2022).

guez. A circuit split has emerged regarding when a reinstated order of removal becomes “final” for purposes of § 1252—the statute providing for judicial review of a “final order of removal”³⁹—thus beginning a thirty-day window in which noncitizens may petition for federal circuit court review.⁴⁰ The precise date of a removal order’s finality may seem trivial, but significant consequences hang on the dispute: a petition for review filed thirty-one days after the removal order becomes final will be dismissed for lack of jurisdiction.⁴¹ And because the proceedings to adjudicate withholding relief often take more than thirty days,⁴² declaring the reinstated removal order final before withholding-relief proceedings take place—as some courts have⁴³—effectively forecloses judicial review for substantial numbers of noncitizens. As one court succinctly explained, the “decision regarding *when* an order of removal becomes final will determine *what* can be reviewed.”⁴⁴

Vasquez-Rodriguez makes clear that such a denial of judicial review could have life-threatening consequences. Indeed, erroneously rejecting a CAT or statutory withholding claim means that the United States will remove a noncitizen to a country where they are likely to be persecuted or tortured. The stakes of this circuit split are further amplified by congressional dysfunction on immigration reform,⁴⁵ making exceedingly unlikely a statutory clarification that resolves the dispute.

On this question of finality, the federal courts of appeals have adopted three approaches. The Sixth Circuit has held that the determination of whether the noncitizen is entitled to withholding of removal *is itself* a final order of removal subject to judicial review.⁴⁶ Somewhat similarly, the Fifth,⁴⁷ Seventh,⁴⁸ Ninth,⁴⁹ and

³⁹ 8 U.S.C. § 1252(a)(1).

⁴⁰ *See id.* § 1252(b)(1).

⁴¹ *See id.*; *see, e.g.*, *Bhaktibhai-Patel v. Garland*, 32 F.4th 180, 200 (2d Cir. 2022) (dismissing for lack of jurisdiction a petition for review filed more than thirty days after the noncitizen’s reinstated removal order became final).

⁴² *See infra* notes 203–13 and accompanying text.

⁴³ *See infra* Part III.C.

⁴⁴ *F.J.A.P. v. Garland*, 94 F.4th 620, 635 (7th Cir. 2024) (emphasis in original).

⁴⁵ *See, e.g.*, Suzanne Gamboa, *Congress Has Failed for More Than Two Decades to Reform Immigration—Here’s a Timeline*, NBC NEWS (Jan. 7, 2023), <https://perma.cc/7NLP-E8H7>.

⁴⁶ *Kolov v. Garland*, 78 F.4th 911, 919 (6th Cir. 2023).

⁴⁷ *Argueta-Hernandez v. Garland*, 87 F.4th 698, 706 (5th Cir. 2023).

⁴⁸ *F.J.A.P.*, 94 F.4th at 637.

⁴⁹ *Alonso-Juarez v. Garland*, 80 F.4th 1039, 1047–51 (9th Cir. 2023).

Tenth⁵⁰ Circuits have held that the reinstated order of removal does not *become* final until the withholding-of-removal determination has been made. Under these two approaches, the thirty-day clock begins ticking at the same time, but for a different reason—either because the withholding-relief decision is itself a final order of removal (and therefore triggers its own filing window) or because finality does not attach to the earlier-issued order of removal until that decision is rendered. This distinction may appear trivial given the two constructions’ identical results, but this Comment will show that recent Supreme Court caselaw has undermined the former’s analytical foundations, leaving it untenable as an interpretation of finality. Finally, the Second⁵¹ and Fourth⁵² Circuits have held that reinstated orders of removal are final for purposes of judicial review when they are issued, regardless of any pending withholding-of-removal proceedings. Under this view, the thirty-day clock is likely to expire while those proceedings unfold, meaning that the window to petition for review may close before the withholding decision to be challenged exists.⁵³

The remainder of this Comment proceeds as follows. Part I provides the legal background necessary to understand and analyze the question of when a reinstated order of removal becomes final. Part II summarizes the two recent Supreme Court decisions—*Nasrallah v. Barr*⁵⁴ and *Johnson v. Guzman Chavez*⁵⁵—that sparked the circuit split on finality. The federal circuit courts began diverging on the finality of reinstated orders of removal only after these two cases were handed down. Part III then outlines that circuit split, describing the three camps into which the federal courts of appeals have coalesced. Finally, Part IV argues in favor of the Fifth, Seventh, Ninth, and Tenth Circuits’ conclusion that reinstated orders of removal do not become final until

⁵⁰ *Arostegui-Maldonado v. Garland*, 75 F.4th 1132, 1141–43 (10th Cir. 2023).

⁵¹ *Bhaktibhai-Patel*, 32 F.4th at 192–93. In dicta, the Second Circuit suggested that the reinstated order of removal itself may not be a final order of removal for purposes of § 1252. *See id.* at 191. On that view, only the *original* removal order could ever serve as the final order of removal for purposes of judicial review. This would entirely bar judicial review of withholding-relief orders arising from reinstated orders of removal, which would never be issued within thirty days of the original removal order. But neither of the Second and Fourth Circuits—the courts with the most restrictive interpretations of the availability of judicial review—went that far. *See id.*; *Martinez v. Garland*, 86 F.4th 561, 568 (4th Cir. 2023).

⁵² *Martinez*, 86 F.4th at 568.

⁵³ *See infra* Part IV.B.2.

⁵⁴ 590 U.S. 573 (2020).

⁵⁵ 594 U.S. 523 (2021).

withholding-relief proceedings conclude. It does so first by demonstrating that the Sixth Circuit's view that withholding-relief determinations are themselves final orders of removal runs counter to the Supreme Court's holding in *Nasrallah*. Part IV then rejects the Second and Fourth Circuits' view that finality attaches immediately upon reinstatement with original statutory analysis.

Because most of the courts to hold that reinstated orders of removal become final upon the conclusion of withholding-relief proceedings have defended their conclusion by relying on constitutional concerns, presumptions favoring judicial review, and ordinary meaning, they left open a gap this Comment seeks to fill by engaging in thorough statutory interpretation to arrive at the same conclusion. This interpretation begins by explaining, as some courts have, that the statutory definition of finality—on which the Second and Fourth Circuits rely to hold that finality is immediate—cannot be applied to reinstated orders of removal. It then engages in an ordinary meaning analysis that, unlike those of the courts, explicitly considers questions of statutory audience. The Comment next takes a close look at § 1252, thoroughly analyzing its text and structure to determine whether immediate finality, or finality only after withholding-relief proceedings, is the sounder construction. Ultimately, this examination favors the latter approach, which more seamlessly and sensibly comports with § 1252's framework for judicial review of removal orders. In stark contrast, the immediate-finality approach throws a wrench into this scheme, severely curtailing judicial review in an arbitrary set of cases and in a manner incompatible with the broader statute.

I. LEGAL BACKGROUND: REMOVAL, WITHHOLDING RELIEF, AND JUDICIAL REVIEW

This Part provides the legal background required to understand and answer the question of when reinstated orders of removal become final for purposes of judicial review. Finality, as a reminder, triggers a thirty-day clock for judicial-review petitions, making its precise date critically important. Part I.A outlines the statutory and regulatory scheme governing removal, reasonable-fear, and withholding-only proceedings. Then, Part I.B addresses the timing, scope, and limits of judicial review of these proceedings.

A. Removal, Reasonable-Fear, and Withholding-Only Proceedings

Enacted in 1952, the Immigration and Nationality Act⁵⁶ (INA) establishes procedures for removing noncitizens⁵⁷ from the United States. As amended, the statute (and related regulations) provides noncitizens with distinct sets of procedural and substantive rights depending on whether it is their first time being removed.⁵⁸ And it is these differences that reveal the ambiguity at the heart of this circuit split. To that end, this Section provides a brief overview of how removal proceedings work for both first-time orders of removal and reinstated orders of removal.

Upon discovering for the first time that a noncitizen is residing unlawfully in the United States, the Department of Homeland Security (DHS) may initiate removal proceedings by sending them a “notice to appear.”⁵⁹ Next, an IJ is required to “conduct proceedings for deciding the inadmissibility or deportability” of the noncitizen.⁶⁰ To make this determination, the IJ receives testimonial and documentary evidence.⁶¹ At this same hearing, the noncitizen facing removal may “apply[] for relief or protection from removal,”⁶² such as asylum or withholding of removal.⁶³ “If the immigration judge decides that the alien is inadmissible or deportable and that the alien is not entitled to any of the relief or protection that he requested, the immigration judge will issue an order of removal.”⁶⁴ In such a case, the noncitizen is entitled to

⁵⁶ Pub. L. No. 82-414, 66 Stat. 163 (1952) (codified as amended at 8 U.S.C. §§ 1101-1537).

⁵⁷ This Comment uses the term “noncitizen” as synonymous with the statutory term “alien.” See 8 U.S.C. § 1101(a)(3); *Nasrallah*, 590 U.S. at 578 n.2 (explaining its similar use of the term “noncitizen”).

⁵⁸ Compare 8 U.S.C. § 1229a, and 8 C.F.R. § 1240 (2023), with 8 U.S.C. § 1231(a)(5), and 8 C.F.R. § 1241.8 (2023).

⁵⁹ See 8 U.S.C. §§ 1229(a), 1229a. “Although many of the provisions at issue” here “refer to the Attorney General, Congress has also empowered the Secretary of Homeland Security to enforce the Immigration and Nationality Act.” *Guzman Chavez*, 594 U.S. at 527 n.1.

⁶⁰ 8 U.S.C. § 1229a(a)(1). Noncitizens who have not been admitted into the United States—for example, one arriving at a port of entry—are assessed for inadmissibility. By contrast, for those who have already been lawfully admitted, the question is whether they are removable. “Generally, persons already within the United States whom the government believes are here illegally are placed in removal proceedings before an immigration judge where they can either show that they are admissible or defend themselves against charges of deportability.” IMMIGRANT LEGAL RES. CTR., INADMISSIBILITY & DEPORTABILITY (2019).

⁶¹ See 8 U.S.C. § 1229a(b)(1).

⁶² *Id.* § 1229a(c)(4)(A).

⁶³ 8 C.F.R. § 1240.11(c) (2023).

⁶⁴ *Guzman Chavez*, 594 U.S. at 528 (citing 8 U.S.C. § 1229a(c)(5)).

file a motion to reconsider,⁶⁵ file a motion to reopen,⁶⁶ or appeal to the BIA.⁶⁷ An adverse BIA decision may be reviewed by a federal court of appeals upon the noncitizen's petition, subject to certain constraints.⁶⁸

By contrast, federal law provides an “expedited process” for removing noncitizens “who reenter the United States without authorization after having already been removed.”⁶⁹ Specifically, 8 U.S.C. § 1231(a)(5) provides:

If the Attorney General finds that an alien has reentered the United States illegally after having been removed or having departed voluntarily, under an order of removal, the prior order of removal is reinstated from its original date and is not subject to being reopened or reviewed, the alien is not eligible and may not apply for any relief under this chapter, and the alien shall be removed under the prior order at any time after the reentry.⁷⁰

DHS regulations set forth a simple process for reinstating an order of removal.⁷¹ An immigration officer: (1) ascertains that the noncitizen “has been subject to a prior order of removal” by “obtain[ing] the prior order”;⁷² (2) ensures that the noncitizen in question “is in fact, an alien who was previously removed”;⁷³ and (3) determines “[w]hether the alien unlawfully reentered the United States.”⁷⁴ If these criteria are met, the immigration officer notifies the noncitizen of the determination and permits them to contest it—the only form of “review” permitted for the decision to reinstate an order of removal.⁷⁵ Unless the noncitizen shows that one of the three conditions described above is not met, they “shall be removed under the previous order of exclusion, deportation, or removal in accordance with” relevant provisions of the INA.⁷⁶ And

⁶⁵ 8 U.S.C. § 1229a(c)(6).

⁶⁶ *Id.* § 1229a(c)(7). Whereas motions to reconsider assert legal or factual error in the rendered decision, *id.* § 1229a(c)(6)(C), motions to reopen call attention to newly emerged evidence, *id.* § 1229a(c)(7)(B).

⁶⁷ 8 C.F.R. § 1240.15 (2023).

⁶⁸ 8 U.S.C. § 1252.

⁶⁹ *Guzman Chavez*, 594 U.S. at 529.

⁷⁰ 8 U.S.C. § 1231(a)(5).

⁷¹ For more details on reinstatement of removal, see HILLEL R. SMITH, CONG. RSCH. SERV., IF11736, REINSTATEMENT OF REMOVAL: AN INTRODUCTION (2021).

⁷² 8 C.F.R. § 241.8(a)(1) (2023).

⁷³ *Id.* § 241.8(a)(2).

⁷⁴ *Id.* § 241.8(a)(3).

⁷⁵ *Id.* § 241.8(b).

⁷⁶ *Id.* § 241.8(c).

unlike when a first-time removal order is issued, noncitizens subject to reinstated removal orders “ha[ve] no right to a hearing before an immigration judge.”⁷⁷

Though they lack the right to contest their removability before an IJ, noncitizens subject to reinstated orders of removal may pursue so-called withholding of removal.⁷⁸ Withholding of removal prevents DHS from removing the noncitizen *to a particular country*, but it does not preclude removal entirely.⁷⁹ There are two substantive avenues to such relief. The first, statutory withholding, bars the government from “remov[ing] an alien to a country if . . . the alien’s life or freedom would be threatened in that country because of the alien’s race, religion, nationality, membership in a particular social group, or political opinion.”⁸⁰ The second, codified in regulations implementing the CAT,⁸¹ “prohibits removal of an alien to a country where the alien is likely to be tortured.”⁸²

Because withholding of removal does not prevent the noncitizen’s removal, it constitutes a more limited form of relief than those available to noncitizens in first-time removal proceedings, who may—in addition to seeking withholding—contend before an IJ that they are admissible or not removable. Thus, a noncitizen whose prior removal order was reinstated and wins withholding of removal may still be removed—but only to a country other than the one with respect to which relief was won.⁸³ Such third-country removals, however, are exceedingly rare: whereas international law imposes a duty on countries to welcome back their own citizens, third-country removals require the consent of the recipient country.⁸⁴ As a result, data obtained by the American Immigration Council “reveal[] that in FY 2017, just . . . 1.6 percent of the [] people granted withholding of removal” were in fact removed to a third country.⁸⁵ The other 98.4% of people granted withholding of removal—unable to be removed to their countries of origin and without a third country accepting them—must remain in the United States.

⁷⁷ 8 C.F.R. § 241.8(a) (2023).

⁷⁸ *Id.* § 241.8(e).

⁷⁹ See *INS v. Cardoza-Fonseca*, 480 U.S. 421, 428 n.6 (1987).

⁸⁰ 8 U.S.C. § 1231(b)(3).

⁸¹ Dec. 10, 1984, 1465 U.N.T.S. 85.

⁸² *Guzman Chavez*, 594 U.S. at 531.

⁸³ See 8 C.F.R. § 208.16(f) (2023).

⁸⁴ See *The Difference Between Asylum and Withholding of Removal*, AM. IMMIGR. COUNCIL (Oct. 6, 2020), <https://perma.cc/97RM-GMCP>.

⁸⁵ *Id.*

Procedurally, applying for withholding of removal looks different for noncitizens facing reinstated orders of removal than it does for those subject to first-time removal orders. In the case of first-time removal, the noncitizen simply applies for withholding relief during the removal proceedings described above and both issues are adjudicated simultaneously, including in any appeals that take place. However, “because an alien subject to a reinstated order of removal will not have any removal proceedings, the process begins for him only if he expresses a fear to DHS of returning to the country of removal.”⁸⁶

If a noncitizen does so, the withholding-relief proceedings begin. These proceedings have two distinct, successive components—first, reasonable-fear proceedings, and then withholding-only proceedings—both of which the noncitizen must clear to obtain the relief they seek. Both reasonable-fear and withholding-only proceedings address the same broader issue: the likelihood, in the proposed country of removal, of persecution on account of a protected characteristic or torture. These two threats—persecution and torture—track the two distinct protections afforded to noncitizens under statutory withholding and the CAT. But reasonable-fear proceedings, which are less procedurally intensive than withholding-only proceedings, set a lower threshold for success, thereby acting as a mechanism to screen out particularly poor claims with ease. To that end, reasonable-fear proceedings ask simply whether persecution or torture is a “reasonable possibility,”⁸⁷ whereas withholding-only proceedings ask whether the statutory and regulatory thresholds—for persecution, that one’s “life or freedom would be threatened,”⁸⁸ and for torture, that “it is more likely than not that [the noncitizen] would be tortured”⁸⁹—are met.

Reasonable-fear proceedings afford noncitizens up to two chances to convince an administrative adjudicator that they have a reasonable fear of persecution or torture. First is the asylum officer to whom they are initially referred if they express a fear of returning to the country of removal. If the asylum officer finds the noncitizen’s fear reasonable, reasonable-fear proceedings end and

⁸⁶ *Guzman Chavez*, 594 U.S. at 531.

⁸⁷ 8 C.F.R. § 1208.31(c) (2023).

⁸⁸ 8 U.S.C. § 1231(b)(3)(A).

⁸⁹ 8 C.F.R. § 208.16(c)(2) (2023).

the officer refers the matter to an IJ for withholding-only proceedings.⁹⁰ However, if the asylum officer's reasonable-fear decision goes against the noncitizen, the noncitizen gets another chance—they may request review by an IJ.⁹¹ If this IJ finds that the noncitizen has established a reasonable fear of persecution or torture, the noncitizen enters withholding-only proceedings.⁹² But if the IJ agrees with the asylum officer that the noncitizen failed to establish a reasonable fear, no further administrative appeals are permitted—there is no third bite at the administrative apple. Instead, the noncitizen never makes it to withholding-only proceedings because they failed to establish that they had a reasonable fear of persecution or torture, a necessary predicate to ultimately attaining withholding relief.⁹³ A noncitizen with an administratively final negative reasonable-fear determination may, however, seek judicial review in a federal court of appeals consistent with 8 U.S.C. § 1252.

Obviously, the noncitizen's goal is to make it out of reasonable-fear proceedings and into withholding-only proceedings by securing a favorable reasonable-fear decision from either the asylum officer or, if necessary, the IJ. As the name suggests, in withholding-only proceedings “all parties are prohibited from raising or considering any other issues, including but not limited to issues of admissibility, deportability, eligibility for waivers, and eligibility for any other form of relief.”⁹⁴ To win statutory withholding-only relief, the noncitizen must “establish that his or her life or freedom would be threatened in the proposed country of removal on account of” a protected characteristic.⁹⁵ For withholding-only relief to be granted under the CAT, the noncitizen must “establish that it is more likely than not that he or she would be tortured if removed to the proposed country of removal.”⁹⁶ The IJ's withholding-only determination may be appealed to the BIA.⁹⁷

For a summary of the reasonable-fear and withholding-only proceedings that the noncitizen hopes will culminate in withholding of removal, see Figure 1 below. This Comment will refer to

⁹⁰ *Id.* § 208.31(e).

⁹¹ *Id.* § 208.31(g).

⁹² *Id.* § 208.31(g)(2).

⁹³ *See id.* § 208.31(g)(1).

⁹⁴ 8 C.F.R. § 208.2(c)(3)(i) (2023).

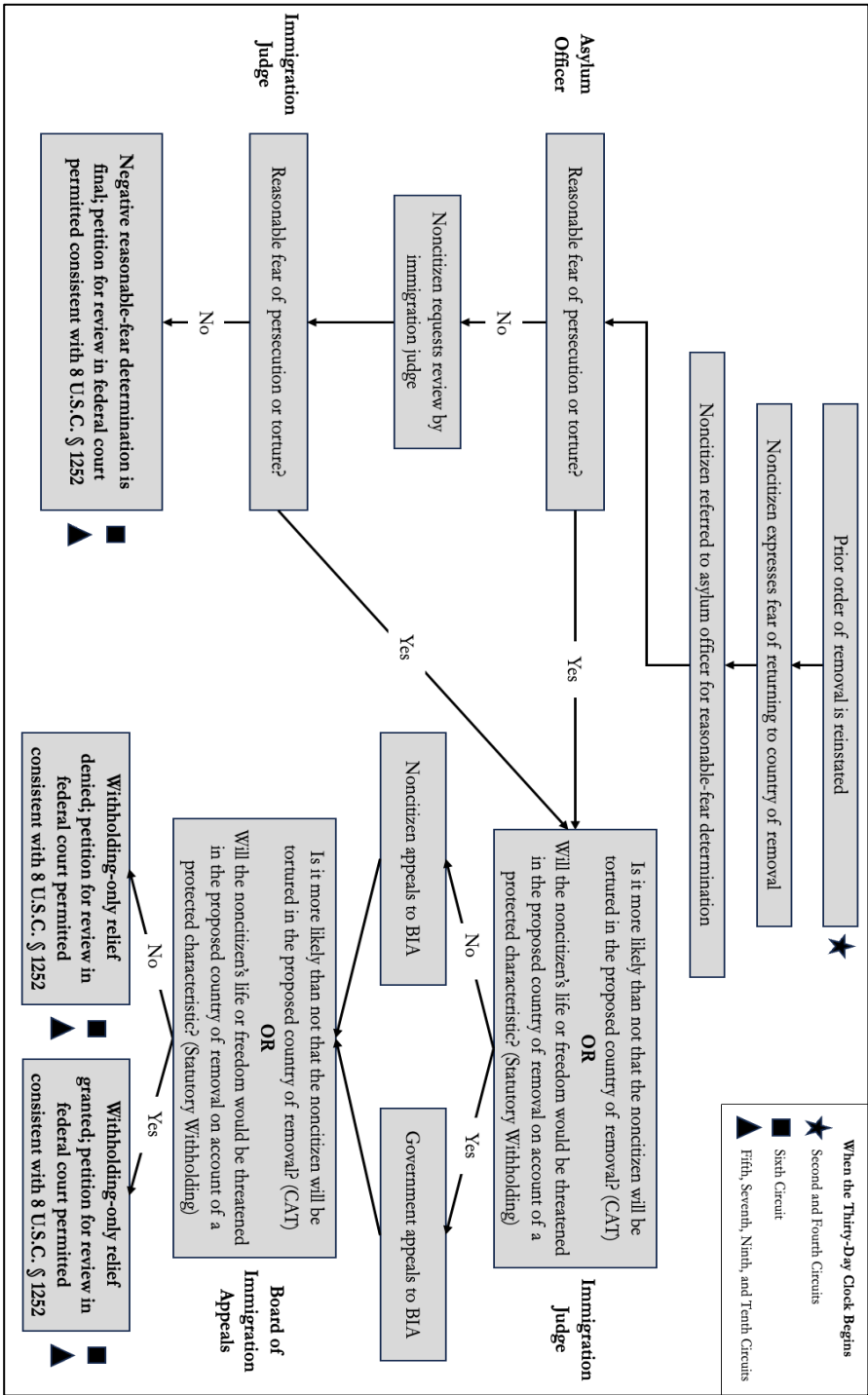
⁹⁵ *Id.* § 208.16(b).

⁹⁶ *Id.* § 208.16(c)(2).

⁹⁷ *Id.* § 208.31(e).

these successive reasonable-fear and withholding-only proceedings jointly as withholding-relief proceedings, as noncitizens must prevail in both—on either their statutory argument or their CAT argument—to be granted withholding of removal. Further, when this Comment refers to a withholding-relief determination, it refers to one of the three possibilities represented by the boxes with boldface text at the bottom of Figure 1: (1) both the asylum officer and IJ find that the noncitizen’s fear is not reasonable, so the noncitizen never reaches withholding-only proceedings and therefore cannot win withholding relief; (2) the noncitizen reaches withholding-only proceedings but loses; and (3) the noncitizen reaches withholding-only proceedings and wins.

FIGURE 1: WITHHOLDING-RELIEF PROCEEDINGS



B. Judicial Review of Final Orders of Removal

Withholding-relief determinations are not the end of the story, for the INA provides for judicial review of a “final order of removal” by a federal court of appeals.⁹⁸ As defined by the statute, an order of removal is an administrative order “concluding that the alien is deportable or ordering deportation.”⁹⁹ And the statute provides that such an order “become[s] final upon the earlier of [] a determination by the Board of Immigration Appeals affirming such order; or [] the expiration of the period in which the alien is permitted to seek review of such order by the Board of Immigration Appeals.”¹⁰⁰

While the statute provides for judicial review of a “final order of removal,” 8 U.S.C. § 1252(b)(9) clarifies that this review includes “[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 under this subchapter.”¹⁰¹ Thus, § 1252(b)(9) provides that a withholding-relief determination—as a “question[] . . . arising from” a removal action—may be judicially reviewed, notwithstanding the fact that the reinstated order of removal itself may not be.¹⁰² Even so, judicial review of a withholding-relief decision is available “only in judicial review of a final order under [§ 1252].”¹⁰³ In other words, all matters for judicial review arising out of a removal must be consolidated into a single action.¹⁰⁴ For this reason, § 1252(b)(9) has been dubbed the “zipper clause.”¹⁰⁵ All of this means that as a literal matter, free-standing judicial review of a withholding-relief determination is

⁹⁸ 8 U.S.C. § 1252(a)(1).

⁹⁹ *Id.* § 1101(a)(47)(A). Technically, that subsection defines the term “order of deportation,” the language used when a statutory definition was added by the Antiterrorism and Effective Death Penalty Act, Pub. L. No. 104-132, § 440(b), 110 Stat. 1214, 1277 (1996) (codified at 8 U.S.C. § 1101(a)(47)(A)). Later in 1996, in the Illegal Immigration Reform and Immigrant Responsibility Act, Pub. L. No. 104-208, 110 Stat. 3009-546, 3009-607 to -612, Congress “changed the language in the provisions [governing judicial review of orders of deportation] from ‘final order of *deportation*’ to ‘final order of *removal*.’” *Kolov v. Garland*, 78 F.4th 911, 923–24 (6th Cir. 2023) (Murphy, J., concurring) (emphasis in original). Puzzlingly, Congress left untouched the statutory definition in 8 U.S.C. § 1101(a)(47)(A), which still refers to “deportation.” Courts, though, have read “order of deportation” and “order of removal” as synonymous. *See, e.g., Nasrallah*, 590 U.S. at 581.

¹⁰⁰ 8 U.S.C. § 1101(a)(47)(B).

¹⁰¹ *Id.* § 1252(b)(9).

¹⁰² *See id.*; *Nasrallah*, 590 U.S. at 583 (citing 8 U.S.C. § 1252(b)(9) for the proposition that “a CAT order may be reviewed together with the final order of removal”).

¹⁰³ 8 U.S.C. § 1252(b)(9).

¹⁰⁴ *See id.*

¹⁰⁵ *See, e.g., Nasrallah*, 590 U.S. at 589 (Thomas, J., dissenting).

not possible; rather, the noncitizen must use their reinstated order of removal as the vehicle through which to obtain review of their withholding-relief claim.

The INA imposes important procedural constraints on the availability of judicial review. First, and at the crux of this Comment, noncitizens must file petitions for review “not later than 30 days after the date of the final order of removal.”¹⁰⁶ Because, as noted above, all removal-related questions for judicial review must be consolidated into one such petition, any decision rendered more than thirty days after the finalization of the removal order cannot be challenged. Second, the noncitizen must “exhaust[] all administrative remedies available to the alien as of right” before judicial review is permitted.¹⁰⁷ Finally, putting aside one exception not relevant here, the federal circuit courts provide “the sole and exclusive means for judicial review of an order of removal” and associated withholding-relief decisions; these claims therefore bypass federal district court review.¹⁰⁸

* * *

To summarize the framework described in this Part: In ordinary removal proceedings, the noncitizen simultaneously argues against their removability and in favor of their eligibility for withholding relief. The IJ then decides these questions together. The noncitizen may appeal an adverse decision to the BIA, and if the BIA, too, decides against the noncitizen, they have thirty days to file a petition for judicial review in the appropriate federal circuit court. But the removability of a noncitizen subject to a reinstated order of removal is determined before, and separately from, the determination of their eligibility for withholding relief. The lag between these two decisions exposes a statutory ambiguity: When does a reinstated order of removal become “final” and the thirty-day filing clock begin to tick?¹⁰⁹ Because of two recent Supreme

¹⁰⁶ 8 U.S.C. § 1252(b)(1).

¹⁰⁷ *Id.* § 1252(d)(1).

¹⁰⁸ *Id.* § 1252(a)(5); *see also id.* § 1252(b)(9).

¹⁰⁹ In 1995, the Supreme Court held that § 1252(b)(1)’s thirty-day filing deadline is jurisdictional. *Stone v. I.N.S.*, 514 U.S. 386, 405 (1995). Jurisdictional rules are those that “set[] the bounds of the ‘court’s adjudicatory authority.’” *Santos-Zacaria v. Garland*, 598 U.S. 411, 416 (2023) (quoting *Kontrick v. Ryan*, 540 U.S. 443, 455 (2004)). Accordingly, “[h]arsh consequences attend the jurisdictional brand.” *Id.* (quoting *Fort Bend Cnty. v. Davis*, 139 S. Ct. 1843, 1849 (2019)). Such consequences include, for example, a court’s inability to “grant equitable exceptions to jurisdictional rules.” *Id.* Thus, if the thirty-day

Court decisions addressing adjacent statutory questions—*Nasrallah* and *Guzman Chavez*—circuit courts are split on this question.

II. *NASRALLAH* AND *GUZMAN CHAVEZ*: THE SUPREME COURT SETS IN MOTION THE CIRCUIT SPLIT

Nasrallah and *Guzman Chavez*, decided in 2020 and 2021, respectively, have triggered the circuit split on the finality of reinstated orders of removal. It was only after these two cases—and because of these two cases—that a circuit court held that reinstated orders of removal are final upon their reinstatement.¹¹⁰ And every circuit to opine on that question has had to grapple with the extent to which *Nasrallah* and *Guzman Chavez* determine the correct answer.

Nasrallah considered the situation where a noncitizen is removed from the United States for committing a crime enumerated in § 1252(a)(2)(C), such as an aggravated felony.¹¹¹ In such cases, noncitizens may not receive judicial review of factual challenges to the final order of removal.¹¹² The question presented was whether that same constraint limits courts of appeals from reviewing a noncitizen’s factual challenges to a CAT order arising out of that order of removal.¹¹³ The question arose because Nidal Khalid Nasrallah, being removed after a conviction for receiving stolen property, sought withholding relief under the CAT to avoid being removed to Lebanon.¹¹⁴ The BIA rejected Nasrallah’s CAT claim, prompting him to challenge its factual findings in

filing deadline is a jurisdictional rule, it has more teeth—under no circumstances may a court look past it. In 2023, however, the Court—while holding that a neighboring provision of § 1252 was not jurisdictional—noted that *Stone* “predates our cases . . . that ‘bring some discipline to the use of th[e] term’ ‘jurisdictional.’” *Santos-Zacaria*, 598 U.S. at 421 (quoting *Henderson ex rel Henderson v. Shinseki*, 562 U.S. 428, 435 (2011)). Considering itself untethered from *Stone*, the Ninth Circuit became the first to hold that § 1252(b)(1)’s thirty-day deadline is nonjurisdictional. *Alonso-Juarez v. Garland*, 80 F.4th 1039, 1047 (9th Cir. 2023). The Fifth Circuit has since joined it. *See Argueta-Hernandez v. Garland*, 87 F.4th 698, 705 (5th Cir. 2023). But all other circuits to address the matter since *Santos-Zacaria* was handed down have continued to consider *Stone* dispositive and have ruled that the thirty-day deadline is jurisdictional. *See, e.g., Kolov*, 78 F.4th at 917; *F.J.A.P. v. Garland*, 94 F.4th 620, 626 (7th Cir. 2024); *see also Arostegui-Maldonado v. Garland*, 75 F.4th 1132, 1140 (10th Cir. 2023).

¹¹⁰ *See Bhaktibhai-Patel v. Garland*, 32 F.4th 180, 189–93 (2d Cir. 2022).

¹¹¹ *See Nasrallah*, 590 U.S. at 576; 8 U.S.C. §§ 1227(a)(2)(A)(iii), 1252(a)(2)(C).

¹¹² *Nasrallah*, 590 U.S. at 576; *see also* 8 U.S.C. § 1252(a)(2)(C)–(D).

¹¹³ *Nasrallah*, 590 U.S. at 576.

¹¹⁴ *Id.* at 576–77.

the Eleventh Circuit.¹¹⁵ The Eleventh Circuit, however, insisted that § 1252(a)(2)(C) prohibited such review, holding that the provision's bar on factual challenges to the order of removal extended to the associated CAT order.¹¹⁶ The Supreme Court disagreed; it held instead that the courts of appeals may review factual challenges to CAT orders arising out of removals based on the crimes enumerated in § 1252(a)(2)(C).¹¹⁷

In reaching this conclusion, the Court first reasoned that a CAT order is not itself an order of removal.¹¹⁸ Quoting from the statutory definition for an order of removal—and therefore making clear that definition's applicability to § 1252's provision for judicial review of a “final order of removal”—the Court wrote, “[a] CAT order is not itself a final order of removal because it is not an order ‘concluding that the alien is deportable or ordering deportation.’”¹¹⁹ Moreover, “a CAT order does not disturb the final order of removal” and “means only that . . . the noncitizen may not be removed to the designated country of removal.”¹²⁰ The Court then added that CAT orders do not merge into final orders of removal because they do not “affect the validity of the final order of removal.”¹²¹ Thus, because a CAT order is not an order of removal nor merges into one, the Court concluded that § 1252(a)(2)(C)—which bars factual review of orders of removal for noncitizens being removed for committing particular crimes—does not bar factual challenges to associated CAT orders.¹²²

One year later, in *Guzman Chavez*, the Supreme Court considered which of two sections—8 U.S.C. §§ 1226 or 1231—governs the availability of a bond hearing when noncitizens subject to reinstated removal orders are detained while pursuing withholding-only relief.¹²³ Section 1226 provides for a bond hearing and applies “pending a decision on whether the alien is to be removed from the United States.”¹²⁴ Section 1231, by contrast, mandates detention¹²⁵ and controls as soon as the noncitizen's removal order

¹¹⁵ *Id.* at 577.

¹¹⁶ *Id.* at 577–78.

¹¹⁷ *Id.* at 581.

¹¹⁸ *Nasrallah*, 590 U.S. at 582.

¹¹⁹ *Id.* (quoting 8 U.S.C. § 1101(a)(47)(A)).

¹²⁰ *Id.*

¹²¹ *Id.*

¹²² *See id.* at 583.

¹²³ *Guzman Chavez*, 594 U.S. at 526.

¹²⁴ 8 U.S.C. § 1226(a).

¹²⁵ *See id.* § 1231(a)(2); *Guzman Chavez*, 594 U.S. at 533.

becomes “administratively final.”¹²⁶ The dispute arose because noncitizens whose removal orders had been reinstated sought to be released from detention while their withholding-only proceedings played out, which would be possible only if their reinstated removal orders were not “administratively final.”¹²⁷ The Court held that the reinstated removal orders were “administratively final” even while withholding-only proceedings unfolded, explaining that “[b]y using the word ‘administratively,’ Congress focused our attention on the *agency’s* review proceedings, separate and apart from any judicial review proceedings that may occur in a court.”¹²⁸ Thus, given that no further BIA review of the removal order was possible, the reinstated orders of removal were administratively final.¹²⁹

In reaching its conclusion, the Court rejected the argument that administrative finality does not attach until the conclusion of withholding-relief proceedings.¹³⁰ This followed from the fact that removal and withholding concern different questions, such that the decision whether to remove a noncitizen cannot be changed by a grant of withholding relief.¹³¹ Recognizing that its analysis was butting up against the issue of finality for purposes of judicial review, however, the Court clarified that it took no position on finality for purposes of § 1252, the statute providing for judicial review of final removal orders, which it acknowledged “uses different language than § 1231 and relates to judicial review of removal orders rather than detention.”¹³²

Nasrallah and *Guzman Chavez*, in addressing judicial review of CAT orders and the administrative finality of removal orders for detention purposes, respectively, touched on issues adjacent to the finality of reinstated orders of removal for purposes of judicial review. *Nasrallah*, for its part, clarified that CAT orders are not orders of removal and do not merge into them for purposes of judicial review—a holding that this Comment later argues undermines the Sixth Circuit’s position that withholding-relief determinations are themselves final orders of removal for purposes of § 1252, the judicial-review statute.¹³³ *Guzman Chavez*, on the

¹²⁶ See 8 U.S.C. § 1231(a)(1)(B).

¹²⁷ See *Guzman Chavez*, 594 U.S. at 533–34.

¹²⁸ *Id.* at 534 (emphasis in original).

¹²⁹ See *id.* at 534–35.

¹³⁰ See *id.* at 539.

¹³¹ See *id.*

¹³² *Guzman Chavez*, 594 U.S. at 535 n.6.

¹³³ See *infra* Part IV.A.

other hand, addressed the question of a removal order’s “administrative[]”¹³⁴ finality in the context of § 1231’s provision for detention and withholding-relief proceedings. In so doing, it explained that an “order of removal is separate from and antecedent to a grant of withholding of removal” and concluded that “[b]ecause the validity of removal orders is not affected by the grant of withholding-only relief, an alien’s initiation of withholding-only proceedings does not render non-final an otherwise ‘administratively final’ reinstated order of removal.”¹³⁵ While *Guzman Chavez* specifically analyzed the issue of detention, not judicial review, some circuits have read it to cast doubt on the possibility that a reinstated removal order’s finality for judicial-review purposes can be delayed by ongoing withholding-only proceedings. Thus, both *Nasrallah* and *Guzman Chavez* have shaped the way that circuit courts think about the finality of removal orders for purposes of judicial review and have caused the circuit split to which this Comment now turns.

III. CIRCUIT SPLIT ON FINALITY

Since *Nasrallah* and *Guzman Chavez* were handed down, the federal courts of appeals to have addressed the finality of reinstated orders of removal for purposes of judicial review have taken three distinct approaches, although two of them yield identical results. The Sixth Circuit has held that the withholding-relief determination *is itself* a final order of removal subject to judicial review.¹³⁶ Similarly, the Fifth,¹³⁷ Seventh,¹³⁸ Ninth,¹³⁹ and Tenth¹⁴⁰ Circuits have held that the reinstated order of removal does not *become* final until withholding-relief proceedings conclude. Under both these approaches, the thirty-day clock begins ticking at the same time—the conclusion of withholding-relief proceedings—but for a different reason: either because the withholding-relief decision is itself a final order of removal or because finality does not attach to the earlier-issued order of removal until that decision is rendered. To the noncitizen, this is a distinction

¹³⁴ 8 U.S.C. § 1231(a)(1)(B)(i).

¹³⁵ *Guzman Chavez*, 594 U.S. at 540.

¹³⁶ *Kolov v. Garland*, 78 F.4th 911, 919 (6th Cir. 2023).

¹³⁷ *Argueta-Hernandez v. Garland*, 87 F.4th 698, 706 (5th Cir. 2023).

¹³⁸ *F.J.A.P. v. Garland*, 94 F.4th 620, 637 (7th Cir. 2024).

¹³⁹ *Alonso-Juarez v. Garland*, 80 F.4th 1039, 1047–51 (9th Cir. 2023).

¹⁴⁰ *Arostegui-Maldonado v. Garland*, 75 F.4th 1132, 1141–43 (10th Cir. 2023).

without a difference; the two approaches are, in practical application, identical. But as Part IV will explain, the difference in their analytical foundations has important implications for their consistency with the statutory text and Supreme Court precedent.¹⁴¹ Finally, the Second¹⁴² and Fourth¹⁴³ Circuits have held that reinstated orders of removal are final for purposes of judicial review when they are issued, regardless of any pending withholding-relief proceedings. The thirty-day clock accordingly begins ticking while reasonable-fear and withholding-only proceedings unfold, and it is likely to expire before they conclude. This would mean that the window to petition for review closes before the decision that the noncitizen wants to challenge exists.

A. The Sixth Circuit: The Withholding-Relief Determination Arising Out of a Reinstated Order of Removal Is Itself a Judicially Reviewable Final Order of Removal

Prior to *Nasrallah* and *Guzman Chavez*, the Sixth Circuit had held that withholding-relief determinations are themselves reviewable final orders of removal. In *Perkovic v. I.N.S.*,¹⁴⁴ the court wrote that “[a]n ‘order of deportation’ includes . . . any denial of discretionary relief during a deportation proceeding, where such relief, if granted, would foreclose deportation.”¹⁴⁵ The court then concluded without explanation that a denial of withholding relief meets that definition and is therefore a judicially reviewable order of removal.¹⁴⁶ Notably, *Perkovic* predated Congress’s addition of a statutory definition for the term “order of deportation,” which this Comment later argues abrogated *Perkovic*.¹⁴⁷

After the Supreme Court issued the *Nasrallah* and *Guzman Chavez* opinions, the Sixth Circuit declined to overrule its precedents. *Nasrallah*, recall, posed a threat to the Sixth Circuit’s approach by making clear that a CAT order is not an “order of removal” under the statutory definition applicable to § 1252’s provision for judicial review of a “final order of removal.”¹⁴⁸ *Guzman Chavez*, for its part, suggested that finality for purposes of

¹⁴¹ See *infra* Part IV.

¹⁴² *Bhaktibhai-Patel v. Garland*, 32 F.4th 180, 192–93 (2d Cir. 2022).

¹⁴³ *Martinez v. Garland*, 86 F.4th 561, 568 (4th Cir. 2023).

¹⁴⁴ 33 F.3d 615 (6th Cir. 1994).

¹⁴⁵ *Id.* at 618.

¹⁴⁶ See *id.*

¹⁴⁷ See *infra* Part IV.A.

¹⁴⁸ See *supra* Part II.

§ 1252 is not delayed by ongoing withholding-relief proceedings.¹⁴⁹ Nonetheless, the Sixth Circuit held that its prior decisions were not “clearly”¹⁵⁰ inconsistent with *Nasrallah* and *Guzman Chavez*. This language reflects the circuit’s legal standard for overruling its prior decisions, absent en banc reconsideration, when the Supreme Court hands down decisions that call into question circuit case law.

The Sixth Circuit distinguished *Guzman Chavez* by explaining that the Supreme Court was analyzing the term “administratively final” in § 1231 (the detention statute) and expressly reserved the question at issue in this Comment: finality for purposes of judicial review.¹⁵¹ Importantly, the Sixth Circuit had previously distinguished between the meaning of “administratively final” in § 1231 and “final” in § 1252.¹⁵² Under its precedents, then, the court did not have to import *Guzman Chavez*’s understanding of finality into § 1252. Rather, it could stand by its view that “the reinstated removal order could be ‘administratively final’ for purposes of detention even if it ‘lacks finality for purposes of judicial review of [a noncitizen’s] withholding-only claim.’”¹⁵³ The majority did not, however, explain why *Nasrallah* was “not clearly inconsistent” with its precedents.¹⁵⁴

B. The Fifth, Seventh, Ninth, and Tenth Circuits: A Reinstated Order of Removal Becomes Final for Purposes of Judicial Review After Withholding-Relief Proceedings Conclude

Like the Sixth Circuit, the Fifth, Seventh, Ninth, and Tenth Circuits did not work on a clean slate. Rather, prior to *Nasrallah* and *Guzman Chavez*, all had precedents on the books—to which they have adhered—holding that finality does not attach to a reinstated order of removal until withholding-only proceedings conclude. These courts reached that conclusion through a combination of ordinary meaning, constitutional avoidance arguments predicated on the Suspension and Due Process Clauses, presumptions favoring judicial review, and statutory analysis.

¹⁴⁹ See *supra* Part II.

¹⁵⁰ *Kolov*, 78 F.4th at 919.

¹⁵¹ *Guzman Chavez*, 594 U.S. at 534, 535 n.6.

¹⁵² *Kolov*, 78 F.4th at 919 (citing *Martinez v. Larose*, 968 F.3d 555, 562–63 (6th Cir. 2020)).

¹⁵³ *Id.* (citing *Larose*, 968 F.3d at 562–63).

¹⁵⁴ *Id.*

The Tenth Circuit's pre-*Nasrallah* and *Guzman Chavez* precedent—*Luna-Garcia v. Holder*¹⁵⁵—turned to ordinary meaning to define finality. It did so because of the inapplicability of the statutory definition of “final,” which is trained on BIA review that, recall, does not occur for reinstated orders of removal.¹⁵⁶ Assessing the term's ordinary meaning, the court explained that “[t]he term ‘final’ in its usual legal sense means ‘ending a court action or proceeding leaving nothing further to be determined by the court or to be done except the administrative execution of the court’s finding, but not precluding an appeal.’”¹⁵⁷ Applying this definition to reinstated orders of removal, the Tenth Circuit held that finality does not attach until withholding-relief proceedings conclude because “the reinstated removal order . . . cannot be executed until” that point.¹⁵⁸ Moreover, because “the rights, obligations, and legal consequences of the reinstated removal order are not fully determined until the reasonable fear and withholding of removal proceedings are complete,” the order cannot become final until then.¹⁵⁹

In *Arostegui-Maldonado v. Garland*,¹⁶⁰ the Tenth Circuit distinguished *Nasrallah* and *Guzman Chavez* in adhering to its conclusion that reinstated orders of removal become final when withholding-relief proceedings end. As for *Nasrallah*, the Tenth Circuit explained that while the Supreme Court made clear that withholding-relief decisions are not *themselves* removal orders, the Court said nothing about *when* removal orders *become final*.¹⁶¹ Turning to *Guzman Chavez*, the court cabined that decision's analysis of finality to the detention context from which it arose and emphasized that the Supreme Court explicitly left open the question of finality for purposes of judicial review.¹⁶² Nevertheless, a concurrence speaking for two of the three judges on the panel noted the “tension” between *Luna-Garcia*, on one hand, and *Nasrallah* and *Guzman Chavez* on the other.¹⁶³ Because *Nasrallah* and *Guzman Chavez* set forth that removal orders and withholding-relief decisions are “two separate orders,”¹⁶⁴ and that the latter cannot “affect

¹⁵⁵ 777 F.3d 1182 (10th Cir. 2015).

¹⁵⁶ *Id.* at 1185.

¹⁵⁷ *Id.* (quoting WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY 851 (1993)).

¹⁵⁸ *Id.*

¹⁵⁹ *Id.*

¹⁶⁰ 75 F.4th 1132 (10th Cir. 2023).

¹⁶¹ *Id.* at 1142.

¹⁶² *See id.* at 1142–43.

¹⁶³ *Id.* at 1148 (Tymkovich, J., concurring).

¹⁶⁴ *Guzman Chavez*, 594 U.S. at 539.

the validity of a final order of removal,”¹⁶⁵ the concurrence suggested that the en banc Tenth Circuit consider whether to overrule *Luna-Garcia*¹⁶⁶—an invitation not yet taken up.

As for the Fifth Circuit, its controlling precedent was *Ponce-Osorio v. Johnson*.¹⁶⁷ There, the court held that finality does not attach to reinstated orders of removal until the conclusion of withholding-relief proceedings.¹⁶⁸ It reached this conclusion by expressly adopting the Tenth Circuit’s ordinary-meaning analysis, discussed above. After *Nasrallah* and *Guzman Chavez*, the Fifth Circuit had occasion to reconsider this position in *Argueta-Hernandez v. Garland*,¹⁶⁹ which arose out of an El Salvadoran’s request for withholding-only relief due to a fear of violence at the hands of the gang MS-13.¹⁷⁰ The court concluded that those Supreme Court cases did not abrogate its precedent.¹⁷¹ *Nasrallah* “did not address jurisdiction or reinstatement proceedings, and it declined to consider arguments regarding its impact on statutory withholding orders.”¹⁷² And *Guzman Chavez* considered only detention under § 1231, not judicial review under § 1252.¹⁷³

Turning to the Ninth Circuit, in *Ortiz-Alfaro v. Holder*,¹⁷⁴ the petitioner—whose prior removal order had been reinstated—challenged the legality of the regulation providing for reasonable-fear proceedings on the grounds that it prohibited him from applying for asylum.¹⁷⁵ In ascertaining its jurisdiction, the Ninth Circuit noted that the statutory definition of finality—which ties an order of removal’s finality to BIA review¹⁷⁶—is inconclusive as applied to reinstated orders of removal because the BIA cannot

¹⁶⁵ *Nasrallah*, 590 U.S. at 582.

¹⁶⁶ *Arostegui-Maldonado*, 75 F.4th at 1148 (Tymkovich, J., concurring).

¹⁶⁷ 824 F.3d 502 (5th Cir. 2016).

¹⁶⁸ *Argueta-Hernandez*, 87 F.4th at 705 (quoting *Ponce-Osorio*, 824 F.3d at 505–07).

¹⁶⁹ 87 F.4th 698 (5th Cir. 2023).

¹⁷⁰ *Id.* at 703–04.

¹⁷¹ *Id.* at 706. The Fifth Circuit first released an opinion holding that *Nasrallah* and *Guzman Chavez* “implicitly overruled” *Ponce-Osorio*’s reasoning and then reaching the Second and Fourth Circuits’ conclusion that reinstated orders of removal are final upon reinstatement. See *Argueta-Hernandez v. Garland*, 73 F.4th 300, 302–04 (5th Cir. 2023), *withdrawn and overruled by* 87 F.4th 698 (5th Cir. 2023). But the Fifth Circuit withdrew that opinion and released the one described above after a petition for rehearing.

¹⁷² *Argueta-Hernandez*, 73 F.4th at 706.

¹⁷³ See *id.*

¹⁷⁴ 694 F.3d 955 (9th Cir. 2012).

¹⁷⁵ *Id.* at 956.

¹⁷⁶ See 8 U.S.C. § 1101(a)(47)(B).

review such orders.¹⁷⁷ Given this disconnect, and because depriving noncitizens of the opportunity for judicial review raised constitutional concerns under the Suspension Clause,¹⁷⁸ *Ortiz-Alfaro* held that finality attaches only after withholding-relief proceedings conclude.¹⁷⁹ This interpretation mitigated the court's constitutional concerns because finality attaching after withholding-relief is adjudicated guarantees the noncitizen thirty days to petition for judicial review from the date of the decision they want to challenge—the denial of withholding relief. By contrast, should finality attach upon reinstatement of their prior removal order without regard to ongoing and sometimes years-long withholding-relief proceedings, the thirty-day clock may well expire before a withholding-relief decision exists, thereby depriving the noncitizen of the opportunity for federal appellate review. Constitutional avoidance thus served as the basis of the court's interpretation of “final.”

Revisiting *Ortiz-Alfaro* after *Nasrallah* and *Guzman Chavez* were decided, the Ninth Circuit reaffirmed its decision using similar logic but with reference to a different constitutional provision. In *Alonso-Juarez v. Garland*,¹⁸⁰ the court reviewed a petition from a Mexican citizen who faced a reinstated order of removal and lost in reasonable-fear proceedings. In assessing whether it had jurisdiction despite the fact that the petition for review was filed over thirty days after reinstatement of the order of removal, the court first determined that the recent Supreme Court caselaw was not “clearly irreconcilable” with its own by distinguishing *Nasrallah* and *Guzman Chavez* on similar bases as those already detailed.¹⁸¹ The Ninth Circuit then turned, again, to the Constitution. This time, the court worried that allowing finality to attach immediately upon reinstatement—given its consequences for curtailing judicial review—might run afoul of the Due Process Clause.¹⁸² The court also noted “that executive determinations” such as removal

¹⁷⁷ *Ortiz-Alfaro*, 694 F.3d at 958.

¹⁷⁸ U.S. CONST. art. I, § 9, cl. 2 (“The Privilege of the Writ of Habeas Corpus shall not be suspended, unless when in Cases of Rebellion or Invasion the public Safety may require it.”). This clause, according to the Ninth Circuit, demands a minimum level of judicial review in removal cases. *Alonso-Juarez*, 80 F.4th at 1048.

¹⁷⁹ *Ortiz-Alfaro*, 694 F.3d at 959.

¹⁸⁰ 80 F.4th 1039 (9th Cir. 2023).

¹⁸¹ *Id.* at 1043.

¹⁸² *Id.* at 1052; see U.S. CONST. amend. XIV. The Ninth Circuit's Due Process Clause conclusion is contested; in *Bhaktibhai-Patel*, the Second Circuit rejected such an argument on its way to deeming reinstated orders of removal final upon reinstatement. See *Bhaktibhai-Patel*, 80 F.4th at 197–200.

and withholding relief determinations “generally are subject to judicial review” and pointed out that Congress has not expressly precluded such review here.¹⁸³

Finally, a divided Seventh Circuit also held that reinstated orders of removal become final for purposes of judicial review when withholding-relief proceedings conclude.¹⁸⁴ The court first explained, on grounds largely similar to those already detailed, why *Nasrallah* and *Guzman Chavez* did not compel a conclusion to the contrary.¹⁸⁵ Then, rejecting the statutory definition as inapposite, the court “t[ook] a fresh look” at § 1252, employing “common tools of statutory interpretation, including the ordinary understanding of [final], context, and statutory structure,” as well as the presumption of reviewability attached to administrative action.¹⁸⁶ With respect to ordinary meaning, “[t]he indeterminacy of [the country of removal], while CAT proceedings are pending”¹⁸⁷ suggested that both the legal meaning of final—as examined in *Luna-Garcia*¹⁸⁸—and its popular meanings of “leaving nothing to be looked for or expected” or “not to be [] *altered*” supported the Seventh Circuit’s view.¹⁸⁹ The court found further support in the presumption of review attending agency action and Congress’s provision of judicial review of CAT orders, which meant that “[a]n interpretation that forecloses review of CAT orders cannot stand.”¹⁹⁰ A construction contrary to the majority’s would foreclose such review due to the length of withholding-relief proceedings, which makes the “decision regarding *when* an order of removal becomes final [] determin[ative of] *what* can be reviewed.”¹⁹¹ And to the extent that denial of review could be prevented by noncitizens “fil[ing] premature and incomplete petitions seeking review of not-yet-complete withholding proceedings in order to meet § 1252(b)(1)’s 30-day filing deadline,” the resulting system would undercut the zipper clause’s command for consolidated, efficient review.¹⁹²

¹⁸³ *Alonso-Juarez*, 80 F.4th at 1053–54.

¹⁸⁴ *F.J.A.P.*, 94 F.4th at 637.

¹⁸⁵ *Id.* at 631–33.

¹⁸⁶ *Id.* at 633.

¹⁸⁷ *Id.*

¹⁸⁸ See *supra* notes 155–59 and accompanying text.

¹⁸⁹ *F.J.A.P.*, 94 F.4th at 633–34 (citing *Final*, OXFORD ENGLISH DICTIONARY (2d ed. 1989)).

¹⁹⁰ *Id.* at 635.

¹⁹¹ *Id.*

¹⁹² *Id.* at 636. Recall that the zipper clause requires all matters for judicial review arising out of a removal to be consolidated into a single action in the federal circuit court.

C. The Second and Fourth Circuits: A Reinstated Order of Removal Is Final When It Is Issued

In the wake of *Nasrallah* and *Guzman Chavez*, the Second and Fourth Circuits ruled that reinstated orders of removal are final when they are issued. Thus, these circuits held that—as is the case with respect to detention—ongoing withholding-relief proceedings have no bearing on finality for purposes of judicial review. Their decisions advance several strands of reasoning.

The first argument stems directly from the statutory definition of finality, which ties finality to either the BIA affirming the removal order or the noncitizen’s window to seek BIA review closing, whichever occurs first.¹⁹³ While recognizing that the definition could not be applied as-written to reinstatement decisions, which may not be appealed to the BIA, the Second Circuit reasoned that “[b]ecause the [statutory] definition . . . ties finality to the final stage of agency review available as of right to aliens in regular removal proceedings . . . a reinstatement decision becomes final once the agency’s review process is complete.”¹⁹⁴ Essentially, the Second Circuit took the statutory definition up a level of generality. While there is no BIA review available for reinstated orders of removal, 8 C.F.R. § 241.8(a)–(c) provides noncitizens with a limited right to contest the reinstatement determination’s propriety—for example, by arguing that they are not in fact the person identified in the prior order of removal.¹⁹⁵ Accordingly, the Second Circuit reasoned, when this “agency[] review process” is complete, the statutory definition is satisfied notwithstanding any ongoing withholding-relief proceedings.¹⁹⁶ The Fourth Circuit followed the Second Circuit’s lead, citing it in reaching the same conclusion.¹⁹⁷

Second, these circuits reasoned that *Nasrallah* and *Guzman Chavez* compel the conclusion that withholding-relief proceedings do not bear on the finality of the removal order. Because the Fourth Circuit had previously held that “final” for purposes of

See 8 U.S.C. § 1252(b)(9). Not only the statute stands in the way of such a system; as the Seventh Circuit explained, so too do Article III principles of ripeness and mootness. See *id.* (citing *McDonough v. Smith*, 139 S. Ct. 2149, 2158–59 (2019)).

¹⁹³ See 8 U.S.C. § 1101(a)(47)(B).

¹⁹⁴ *Bhaktibhai-Patel*, 32 F.4th at 192.

¹⁹⁵ See 8 C.F.R. § 241.8(a)–(c) (2023).

¹⁹⁶ *Bhaktibhai-Patel*, 32 F.4th at 192.

¹⁹⁷ *Martinez*, 86 F.4th at 568.

§ 1252 (judicial review) has the same meaning as “administratively final” in § 1231 (detention), this conclusion followed ineluctably from *Guzman Chavez*’s determination that administrative finality is not delayed by ongoing withholding-relief proceedings.¹⁹⁸ The Second Circuit, too, had previously defined “final” in § 1252 identically to “administratively final” in § 1231.¹⁹⁹ Moreover, *Nasrallah* made clear to the Second and Fourth Circuits that “[d]ecisions made during withholding-only proceedings cannot qualify as orders of removal” because they “do not determine whether ‘the alien is deportable or order[] deportation.’ Nor do those decisions ‘affect the validity’ of any determination regarding an alien’s deportability or deportation.”²⁰⁰

The Second and Fourth Circuits also saw no logical reason to distinguish *Nasrallah* and *Guzman Chavez* from this context. The courts conceded that neither decision directly addressed the question presented here, but they nonetheless found persuasive that those cases focused on the statutory definitions of “order of removal” and “final” found in § 1101, which also apply to § 1252.²⁰¹

In sum, the courts of appeals have divided into three camps over the question of when a reinstated order of removal becomes final for purposes of beginning the thirty-day clock under § 1252 for filing a petition for judicial review. The Fifth, Sixth, Seventh, Ninth, and Tenth Circuits all agree that finality attaches only after a final withholding-relief decision has been rendered. Under this view, the thirty-day clock will not begin ticking until the decision the noncitizen seeks to challenge—the withholding-relief decision—is issued, thereby guaranteeing the opportunity for judicial review. However, the Sixth Circuit comes to this conclusion by reasoning that the withholding-relief decision is *itself* an “order of removal” subject to review under § 1252. It would therefore trigger its own thirty-day filing period and would not rely on the reinstated removal order for judicial review. By contrast, the Fifth, Seventh, Ninth, and Tenth Circuits hold that the reinstated order of removal becomes final when the final withholding-relief order is handed down. While this distinc-

¹⁹⁸ *Id.* at 569.

¹⁹⁹ *Bhaktibhai-Patel*, 32 F.4th at 193–94.

²⁰⁰ *Id.* at 190 (citation omitted) (quoting 8 U.S.C. § 1101(a)(47)(A); *Nasrallah*, 590 U.S. at 582); see also *Martinez*, 86 F.4th at 570–71.

²⁰¹ *Martinez*, 86 F.4th at 569; *Bhaktibhai-Patel*, 32 F.4th at 194.

tion makes no practical difference, it makes a legal one—a *decisive* legal one, as this Comment argues in the next Part. On the other side of the spectrum entirely, the Second and Fourth Circuits hold that finality attaches to the reinstated order of removal upon its reinstatement, without regard to any pending withholding-relief proceedings. This approach has drastically different practical consequences; because withholding-relief proceedings often take more than thirty days, these courts' interpretation would foreclose judicial review to many noncitizens who claim that grave risk awaits them in their home countries.

IV. ANALYSIS

With the legal background now set out, this Comment turns to its analysis of the question dividing the circuits: When is a reinstated order of removal considered final for purposes of § 1252, the statute providing for judicial review of a “final order of removal”? This Part begins by addressing *Nasrallah* and *Guzman Chavez*'s impact on that question, concluding that the former forecloses the Sixth Circuit's interpretation that withholding-relief determinations are themselves final orders of removal. It then performs a thorough statutory analysis that compels the conclusion that finality attaches to reinstated orders of removal when withholding-relief proceedings end, not when the prior removal order is reinstated. Because the courts to hold that reinstated removal orders become final when withholding-relief proceedings conclude have largely relied on constitutional concerns, presumptions favoring judicial review, and ordinary meaning analysis, their opinions have tended to stay out of the statute's weeds. This has left untapped persuasive arguments, a gap that this Comment seeks to fill by advancing original statutory analysis that relies on a careful examination of § 1252.

A. How *Nasrallah* and *Guzman Chavez* Bear on This Question

I begin with *Nasrallah* and *Guzman Chavez*, the cases that triggered this circuit split. This Section concludes that *Nasrallah*'s application of the statutory definition of “order of removal” makes clear that withholding-relief decisions cannot be considered such orders, contrary to the position taken by the Sixth Circuit. However, neither *Nasrallah* nor *Guzman Chavez* settles the relationship between ongoing withholding-relief proceedings and a reinstated order of removal's finality for judicial-review purposes, leaving that question open for statutory interpretation.

1. *Nasrallah* forecloses the Sixth Circuit’s position.

To start, *Nasrallah* forecloses the position taken by the Sixth Circuit that the withholding-relief determination is *itself* a final order of removal.²⁰² To be sure, “*Nasrallah* did not involve the timing or availability of judicial review in withholding-only proceedings.”²⁰³ Indeed, the Supreme Court described the question before it as “narrow.”²⁰⁴ But neither of those facts dilutes the force with which *Nasrallah*’s reasoning applies to whether a withholding-relief decision is an order of removal, for *Nasrallah* turned on an application of the statutory definition of “order of removal, which applies as much to § 1252(b)(1) (which establishes the thirty-day clock) as it does to § 1252(a)(2)(C) (which was at issue in *Nasrallah*).

In applying that definition, the Court first concluded that a CAT order is not an order of removal “because it is not an order ‘concluding that the alien is deportable or ordering deportation.’”²⁰⁵ The Court then explained that CAT orders do not “merge into final orders of removal” because “[f]or purposes of this statute, final orders of removal encompass only the rulings made by the immigration judge or BIA that affect the validity of the final order of removal.”²⁰⁶

Nasrallah thus forecloses the Sixth Circuit’s position that the withholding-relief decision itself, such as a CAT order, may serve as the judicially reviewable final order of removal. The Sixth Circuit reasoned that “an order about withholding of removal functions as a reviewable final order because such relief could foreclose an avenue of deportation if granted.”²⁰⁷ But this rationale came from a Sixth Circuit precedent that predated the addition of a statutory definition of “order of deportation,” and *Nasrallah* made that definition’s applicability clear.²⁰⁸ Whether a grant of relief would foreclose an avenue of deportation is simply not the touchstone of an order of removal; instead, the question is whether “it is [] an

²⁰² Recall that the Sixth Circuit was not writing on a clean slate. Rather, it was determining whether *Nasrallah* and *Guzman Chavez* were “clearly inconsistent” with its precedents holding that withholding-only determinations are final orders of removal. *Kolov v. Garland*, 78 F.4th 911, 919 (6th Cir. 2023). This Comment is not similarly constrained.

²⁰³ *Duenas v. Att’y Gen.*, 2023 WL 6442601, at *3 (3d Cir. Oct. 3, 2023).

²⁰⁴ *Nasrallah*, 590 U.S. at 576.

²⁰⁵ *Id.* at 582 (quoting 8 U.S.C. § 1101(a)(47)(A)).

²⁰⁶ *Id.*

²⁰⁷ *Kolov*, 78 F.4th at 919.

²⁰⁸ See *Perkovic*, 33 F.3d at 618–19; *Nasrallah*, 590 U.S. at 584 (describing the 1996 revisions to the INA).

order ‘concluding that the alien is deportable or ordering deportation.’”²⁰⁹ And *Nasrallah* held that CAT orders, one of two forms of withholding relief, are not.²¹⁰

To be sure, statutory withholding under § 1231(b)(3)(A)—the other form of withholding relief—was not at issue in *Nasrallah*, but the case’s reasoning applies just the same. Statutory withholding orders, like CAT orders, do not “conclud[e] that the alien is deportable or order[] deportation.”²¹¹ Rather, each *follows* such an order and prevents the noncitizen from being removed *to* a particular country. Under *Nasrallah*’s reasoning, it therefore follows that withholding-relief determinations, regardless of whether the noncitizen seeks relief under the CAT or § 1231(b)(3)(A), may not themselves be considered judicially reviewable final orders of removal—contrary to the holding of the Sixth Circuit.²¹²

But *Nasrallah* does not go further; it does not address the question whether the reinstated order of removal’s *finality* depends on the conclusion of withholding-relief proceedings. Rather, *Nasrallah* is entirely concerned with the statutory definition of “order of deportation” and does not even mention the corresponding definition of finality. Courts should therefore decline to read it as disposing of a question that turns on whether and how this latter definition applies.²¹³

2. *Guzman Chavez* does not determine which of the two remaining viable interpretations is correct.

Unlike *Nasrallah*, *Guzman Chavez* more directly addresses the question of finality—and has potentially troubling language for the Fifth, Seventh, Ninth, and Tenth Circuits’ view that finality does not attach to a reinstated order of removal until withholding-relief proceedings conclude. Most notably, *Guzman Chavez* emphasized the differences between removal proceedings and withholding-only proceedings, noting that “they end in two separate orders, and the finality of the order of removal does not

²⁰⁹ *Nasrallah*, 590 U.S. at 584 (quoting 8 U.S.C. § 1101(a)(47)(A)).

²¹⁰ *Id.* at 581.

²¹¹ 8 U.S.C. § 1101(a)(47)(A).

²¹² See *Kolov*, 78 F.4th at 919.

²¹³ To be sure, *Nasrallah* frequently uses the statutory phrase “final order of removal.” See, e.g., *Nasrallah*, 590 U.S. at 582. But it did so because the statute precludes review of factual challenges to a “final order of removal,” and the case concluded that CAT orders fell outside of that scope because they do not meet the statutory definition for an order of removal. Finality was thus irrelevant to the Court’s decision.

depend in any way on the outcome of the withholding-only proceedings.”²¹⁴ It also concluded that “[b]ecause the validity of removal orders is not affected by the grant of withholding-only relief, an alien’s initiation of withholding-only proceedings does not render non-final an otherwise ‘administratively final’ reinstated order of removal.”²¹⁵

But *Guzman Chavez* does not necessarily spell doom for the argument that an order of removal is not final for purposes of judicial review until the conclusion of withholding-relief proceedings. First, the Court expressly reserved that question, explaining in a footnote that it “express[es] 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.”²¹⁶ But even putting that reservation to the side, § 1231 and detention can be distinguished from § 1252 and judicial review. As an initial matter, there is a textual difference: the former uses the term “administratively final,”²¹⁷ whereas the latter uses the term “final.”²¹⁸ It is therefore plausible that a removal order could be final for purposes of § 1231 without being final for purposes of § 1252, or vice versa, without running afoul of the presumption of consistent usage. The presumption of meaningful variation may even point in favor of such a distinction.

More than just textually plausible, it is logical for finality to attach earlier for purposes of detention than for purposes of judicial review. *Guzman Chavez* makes clear that § 1231 requires detention once a removal order is reinstated, without regard to pending withholding-only proceedings. This makes sense: Once a removal order is reinstated, the noncitizen indisputably and irrevocably loses the right to remain in the United States. Any pending withholding-relief proceedings will address only the country of removal. That Congress required the detention of these noncitizens is unsurprising. This definition of finality cannot influence the ultimate outcome of the removal proceeding, and its impingement on the noncitizen’s liberty is justified by the fact that their lack of freedom to remain in the United States has already been conclusively determined. As *Guzman Chavez* pointed

²¹⁴ *Guzman Chavez*, 594 U.S. at 539.

²¹⁵ *Id.* at 540.

²¹⁶ *Id.* at 535 n.6.

²¹⁷ 8 U.S.C. § 1231(a)(1)(B).

²¹⁸ *Id.* § 1252(b)(1).

out, this scheme simply reflects “Congress’s judgment regarding” the greater “risk[] of flight” for noncitizens “who have already been ordered removed” and whose “only apparent relief . . . is a grant of withholding-only relief, [which] they would seem to still have a chance to get . . . if they absconded and were again apprehended.”²¹⁹ Thus, finality for purposes of detention is tied to the “if”: if the noncitizen’s removal is conclusively determined, such as by reinstating their order of removal, detention is required.

But this logic does not apply to finality for purposes of judicial review. Section 1252 provides noncitizens facing reinstated orders of removal with the opportunity for judicial review of their withholding-relief decision.²²⁰ The question here, then, is the later one of “where”—to where will one be removed?—not the antecedent one of “if.” But if § 1231’s definition of finality is imported into § 1252, the latter’s thirty-day window to file a petition for review may close before an adverse withholding-relief decision even exists. As a result, and unlike with respect to detention, this definition of finality would have the potential to impact the bottom-line outcome of the removal proceeding by changing the country of removal. Consider, for example, *Vasquez-Rodriguez*, discussed in the Introduction, whose country of removal would have been El Salvador but for the judicial review that would have been denied if the court had used § 1231’s definition of finality. Accordingly, it is at least plausible that finality for purposes of § 1252 would attach later than it does for purposes of § 1231.

Statutory structure and context further support distinguishing between the definitions of finality for these two sections. Sections 1231 and 1252 are different statutes that establish different frameworks, and *Guzman Chavez*’s interpretation of the former was littered with references to, and informed by, various of its provisions.²²¹ Unlike § 1231, however, § 1252 supports tying finality to the conclusion of withholding-relief proceedings—an argument this Comment develops in the following Section.

²¹⁹ *Guzman Chavez*, 594 U.S. at 544.

²²⁰ See 8 U.S.C. § 1252(a)(1), (b)(9); *Nasrallah*, 590 U.S. at 583 (“A CAT order may be reviewed together with the final order of removal.”).

²²¹ See, e.g., *Guzman Chavez*, 594 U.S. at 541–42.

B. Statutory Interpretation Favors the Fifth, Seventh, Ninth, and Tenth Circuits' Approach

Nasrallah and *Guzman Chavez* leave open two of the circuits' three approaches: the Second and Fourth Circuits' view that reinstated removal orders are final upon reinstatement, and the Fifth, Seventh, Ninth and Tenth Circuits' view that they are final only after withholding-relief proceedings conclude. To resolve that dispute, this Comment turns to the statute, where two questions are presented. First, as a threshold question, should finality be defined by the statutory definition in § 1101(a)(47)(B) or by its ordinary meaning? Second, adding into the mix the broader framework of § 1252, which of the two definitions better comports with the statute's context and structure?

1. Defining finality: the statutory definition versus ordinary meaning.

The split between the Second and Fourth Circuits and the Fifth, Seventh, Ninth, and Tenth Circuits ultimately turns on a threshold question: Does § 1101(a)(47)(B)'s definition of finality apply? These two sets of circuits answer the question differently—the Second and Fourth in the affirmative; the Fifth, Seventh, Ninth, and Tenth in the negative—thereby setting off on distinct analytical tracks, never to converge again.

Recall that § 1101(a)(47)(B) provides that an order of removal:

[S]hall become final upon the earlier of—

(i) a determination by the Board of Immigration Appeals affirming such order; or

(ii) the expiration of the period in which the alien is permitted to seek review of such order by the Board of Immigration Appeals.²²²

Ordinarily, of course, courts apply statutory definitions to statutory terms.²²³ But this may not be an ordinary case, for the statutory definition of finality cannot be applied as written to reinstated orders of removal. That is because for reinstated orders of removal, the noncitizen may not appeal to the BIA.²²⁴ Thus,

²²² 8 U.S.C. § 1101(a)(47)(B).

²²³ See, e.g., *Burgess v. United States*, 553 U.S. 124, 129 (2008); *Steinberg v. Carhart*, 530 U.S. 914, 942 (2000).

²²⁴ See 8 C.F.R. § 241.8(a) (2023).

there *is no* “determination by the Board of Immigration Appeals” or “expiration of the period in which the alien is permitted to seek review of such order by the Board of Immigration appeals.”²²⁵

This incompatibility can be reconciled in one of two ways. First, the statutory definition can be modified so as to be applicable to reinstated orders of removal. This is the approach taken by the Second and Fourth Circuits, which bumped § 1101(a)(47)(B) up a level of generality, determining that because this subsection “ties finality to the final stage of *agency* [i.e., DHS] review available as of right to aliens in regular removal proceedings, [] we conclude that a reinstatement decision becomes final once the *agency’s* [i.e., DHS’s] review process is complete.”²²⁶ Of course, as noted above, the statutory definition does not simply tie finality to “agency” review—it refers specifically to *BIA* review. Recognizing this, the second possibility is to eschew the statutory definition altogether and apply the ordinary meaning of finality, an interpretive method more commonly reserved for terms left undefined by Congress.²²⁷

With ordinary meaning, a threshold question often overlooked—or at least not explicitly grappled with—by the courts is one of *audience*: Who is the ordinary reader of the statute?²²⁸ The relevant provisions of § 1252, which provides for judicial review of final orders of removal, suggest two relevant audiences. First are judges. Because § 1252 provides a framework for judicial review of removal orders and imposes various constraints on such review, judges must look to the statute to assure themselves of jurisdiction and determine which issues may or may not be reviewed. But § 1252(b)(1), which imposes the thirty-day filing deadline, might pull in a second relevant audience: the noncitizen being removed. The subsection—starting as it does with “[t]he petition for review must be filed . . .”²²⁹—reads as an instruction to noncitizens seeking judicial review. Importantly, these two audi-

²²⁵ 8 U.S.C. § 1101(a)(47)(B).

²²⁶ *Bhaktibhai-Patel v. Garland*, 32 F.4th 180, 192 (2d Cir. 2022) (emphasis added); see *Martinez v. Garland*, 86 F.4th 561, 568 (4th Cir. 2023).

²²⁷ See, e.g., *F.D.I.C. v. Meyer*, 510 U.S. 471, 476 (1994); *Wis. Cent. Ltd. v. United States*, 138 S. Ct. 2067, 2070 (2018).

²²⁸ For more on the role that considerations of audience play in statutory interpretation and ordinary meaning, see Anita S. Krishnakumar, *Metarules for Ordinary Meaning*, 134 HARV. L. REV. F. 167, 169–74 (2021), and see generally David S. Louk, *The Audiences of Statutes*, 105 CORNELL L. REV. 137 (2019).

²²⁹ 8 U.S.C. § 1252(b)(1).

ences could pull the ordinary meaning analysis in different directions given the differences between the average judge and the average noncitizen in removal proceedings, who is “already navigating a complex bureaucracy, often *pro se* and in a foreign language.”²³⁰

Because of the statute’s dual audiences, it is worth considering ordinary meaning from both perspectives. As for what “final” would mean to the extent it is directed at judges, the Tenth Circuit—which did not grapple with the question of audience—explained it well. As the court explained, “[t]he term ‘final’ in its usual legal sense means ‘ending a court action or proceeding leaving nothing further to be determined by the court or to be done except the administrative execution of the court’s finding, but not precluding an appeal.’”²³¹ Relatedly, “[i]n the civil context, a final decision is ‘one which ends the litigation on the merits and leaves nothing for the court to do but execute the judgment.’”²³² Likewise, “[w]ith regard to agency action generally, the Supreme Court has said that to be final, agency action must ‘mark the consummation of the agency’s decisionmaking process,’ and it must determine ‘rights or obligations’ or occasion ‘legal consequences.’”²³³ In view of these understandings, *Luna-Garcia*, the Tenth Circuit’s controlling case, concluded:

When an alien pursues reasonable fear proceedings, the reinstated removal order is not final in the usual legal sense because it cannot be executed until further agency proceedings are complete. And, although the reinstated removal order itself is not subject to further agency review, an IJ’s decision on an application for relief from that order is appealable to the BIA. Thus, the rights, obligations, and legal consequences of the reinstated removal order are not fully determined until the reasonable fear and withholding of removal proceedings are complete.²³⁴

What about the meaning of final when the ordinary reader is a noncitizen in removal proceedings? Although the relevant sources differ, the conclusion is the same: reinstated orders of re-

²³⁰ Santos-Zacaria v. Garland, 598 U.S. 411, 431 (2023).

²³¹ *Luna-Garcia*, 777 F.3d at 1185 (quoting WEBSTER’S THIRD NEW INTERNATIONAL DICTIONARY 851 (1993)).

²³² *Id.* (quoting *Catlin v. United States*, 324 U.S. 229, 233 (1945)).

²³³ *Id.* (quoting *Bennett v. Spear*, 520 U.S. 154, 178 (1997)).

²³⁴ *Id.*

moval are not “final” until withholding-only proceedings conclude. One popular dictionary defines “final” as “not to be altered or undone.”²³⁵ Another defines it as “completely decided, with no further changes.”²³⁶ But a reinstated order of removal *may* be “altered”²³⁷ or “change[d]”²³⁸ depending on how withholding-relief proceedings conclude, as the country of removal—obviously an important detail of removal—is not final until the noncitizen’s entitlement to withholding relief is adjudicated. This is the conclusion the Seventh Circuit reached in the portion of its plain-meaning analysis considering popular dictionaries.²³⁹ The reinstated order of removal would therefore not be final until those proceedings conclude.

Accordingly, whether considered from the perspective of a judge or a noncitizen, the ordinary meaning of final differs from the modified statutory definition adopted by the Second and Fourth Circuits. And it is the ordinary meaning that should control here. It is crucial to underscore that § 1101(a)(47)(B), the statutory definition of finality, cannot be applied as written to reinstated orders of removal. Modifying the definition in order to apply it runs afoul of the familiar notions that judges must “constru[e] a statute as faithfully as possible to its actual text,”²⁴⁰ and that “statutory language is to be enforced according to its terms.”²⁴¹ To that end, there is no reason to effectively alter the statute—a maneuver generally reserved to save a statute from unconstitutionality²⁴²—instead of employing the common method of ordinary meaning. The consideration of § 1101(a)(47)(B)’s applicability could end here, then, with the conclusion that because it is facially inapplicable to reinstated orders of removal it ought not be applied. In this context, the statutory definition is a square peg in a round hole.

That is often where the judicial analysis has stopped; ordinary meaning has been chosen over the statutory definition largely on these grounds.²⁴³ But the temptation to use a statutory

²³⁵ *Final*, MERRIAM-WEBSTER, <https://perma.cc/8C2A-2HFM>.

²³⁶ *Final*, CAMBRIDGE DICTIONARY, <https://perma.cc/GNT5-K8YJ>.

²³⁷ *Final*, MERRIAM-WEBSTER, <https://perma.cc/8C2A-2HFM>.

²³⁸ *Final*, CAMBRIDGE DICTIONARY, <https://perma.cc/GNT5-K8YJ>.

²³⁹ See *F.J.A.P. v. Garland*, 94 F.4th 620, 633–34 (7th Cir. 2024).

²⁴⁰ *DePierre v. United States*, 564 U.S. 70, 82 (2011).

²⁴¹ *Arkansas v. Farm Credit Servs. of Cent. Ark.*, 520 U.S. 821, 827 (1997).

²⁴² See, e.g., *Skilling v. United States*, 561 U.S. 358, 405, 412 (2010) (imposing a limiting construction on 8 U.S.C. § 1346 to save it from being voided for vagueness).

²⁴³ See, e.g., *Luna-Garcia*, 777 F.3d at 1185.

definition is strong given that “[s]tatutory definitions control the meaning of statutory words . . . in the usual case.”²⁴⁴ To that end, this Comment now turns to a consideration of whether ordinary meaning or its statutory counterpart better comports with the structure and framework set out by § 1252, as applied to reinstated orders of removal. After all, an acceptable statutory construction must be able to seamlessly “plug in” to the broader context of which it is one part. But the statutory definition of finality, far from smoothly operating within § 1252’s scheme, throws a wrench into it.

2. Assessing the potential definitions of finality in statutory context and structure.

It becomes clear that the statutory definition of finality cannot apply to reinstated orders of removal—and that ordinary meaning should apply instead—if one considers the broader statutory scheme provided by Congress. To see why, it is first important to consider the practical effect of this interpretation. Under the Second and Fourth Circuits’ view that finality attaches to a reinstated order of removal immediately, two possibilities emerge: If withholding-relief proceedings almost always take longer than thirty days, judicial review of the withholding determination is effectively barred for noncitizens subject to reinstated orders of removal. On the other hand, if withholding-relief proceedings often wrap up in fewer than thirty days, judicial review will be available more often. Bear in mind, however, that if withholding-relief proceedings take, say, twenty-nine days to run their course, the noncitizen would have just one day to file their petition for review.

Knowing the relative frequencies of these two possibilities would be helpful, but definitive, specific statistics are wanting. That said, Title 8’s implementing regulations offer a helpful starting point. On one hand, the regulations contemplate that once a noncitizen expresses a fear of returning to the designated country of removal and is referred to an asylum officer, the officer “will,” “[i]n the absence of exceptional circumstances,” determine “within 10 days of the referral” if that fear is reasonable.²⁴⁵ If the reasonable-fear determination is negative, the noncitizen may request review by an IJ whose decision “shall” come “within 10

²⁴⁴ *Lawson v. Suwanee Fruit & S.S. Co.*, 336 U.S. 198, 201 (1949).

²⁴⁵ 8 C.F.R. § 208.31(a)–(b) (2023).

days” of the case’s referral.²⁴⁶ A second negative reasonable-fear determination ends the administrative process; appeal to the BIA is prohibited.²⁴⁷ These ten-day deadlines suggest that a noncitizen whose reasonable-fear claim is rejected by both the asylum officer and the IJ would have their withholding-relief decision within twenty days, assuming the regulations are followed. This would give the noncitizen ten days from the date of the withholding-relief decision to petition for judicial review; however, the reality depends on how often “exceptional circumstances” delay the asylum officer and immigration judge’s determinations. And unfortunately, there is reason to suspect that the answer is “too often”: by the DOJ’s own admission, the backlog in immigration courts is “not sustainable” and has only worsened since the onset of the COVID-19 pandemic.²⁴⁸

No comprehensive data set clearly establishes the percentage of noncitizens whose reasonable-fear claim is rejected by both the asylum officer and the IJ—the set of circumstances most likely to allow for judicial review if reinstated orders of removal become final immediately—but DHS and DOJ data help shed light on the frequency of this scenario. In 2023, DHS issued 11,580 reasonable-fear decisions.²⁴⁹ Thirty-three percent of decisions found a reasonable fear, 43% of decisions found no reasonable fear, and 24% of cases were administratively closed²⁵⁰—“a docket management tool that is used to temporarily pause removal proceedings.”²⁵¹ Moving to the next step in the process, DOJ data show that in FY 2023, IJs affirmed DHS and found no reasonable fear in about

²⁴⁶ *Id.* § 208.31(g).

²⁴⁷ *See id.*

²⁴⁸ U.S. DEPT. OF JUST., *FY 2022 Budget Request: Reducing the Immigration Court Backlog* 1, <https://perma.cc/UP2D-XBNH>. For context, at the end of the government’s 2023 fiscal year (September 30, 2023), almost 2.1 million cases were pending in immigration courts. *See Historical Immigration Court Backlog Tool*, TRANSACTIONAL RECS. ACCESS CLEARINGHOUSE, <https://perma.cc/JY84-N3R7>. Moreover, the average immigration court processing time for a removal in the 2023 fiscal year was 829 days—a figure almost double the pre-COVID-19 average. *See Immigration Court Processing Time by Outcome*, TRANSACTIONAL RECS. ACCESS CLEARINGHOUSE, <https://perma.cc/BN3A-EGSJ>.

²⁴⁹ U.S. CITIZENSHIP & IMMIGR. SERVS., *Semi-Monthly Credible Fear and Reasonable Fear Receipts and Decisions: Congressional Semi-Monthly Report – January 1, 2023 – January 15, 2024*.

²⁵⁰ *Id.* Note that these figures reflect *all* reasonable-fear decisions, not only those rendered in reinstated removal order cases. It is not clear how, if at all, the statistics for reasonable-fear determinations in reinstated removal order cases would differ. It stands to reason that noncitizens who repeatedly flee their home countries are more likely to have reasonable fears of persecution or torture, but one can only speculate.

²⁵¹ W-Y-U, 27 I. & N. Dec. 17, 18 (B.I.A. 2017).

74% of cases.²⁵² Thus, the statistics make clear that a minority of cases result in both DHS and the IJ finding no reasonable fear. And, while piecing together the data from the DHS and DOJ reports is not a perfect science, the statistics suggest that this minority amounts to *approximately* 32% of noncitizens—74% of the 43% percent of cases where asylum officers find no reasonable fear. Thus, if reinstated orders of removal are final upon reinstatement, only about one-third of noncitizens are likely to have *a chance* (depending on how closely the adjudicators adhere to the above-described regulations) of having their withholding-relief determination reviewed by a federal court.

If either DHS or the IJ finds a reasonable fear of persecution or torture, withholding-relief proceedings are highly likely to extend more than thirty days past the reinstatement. The regulations provide that if DHS's initial determination is that the noncitizen has a reasonable fear of persecution or torture, it is to refer the matter to an IJ "for full consideration of the request for withholding of removal only."²⁵³ No ten-day deadline exists for this "full consideration," and the IJ's decision may be appealed to the BIA.²⁵⁴ If, on the other hand, DHS finds no reasonable fear but the IJ *does*, the noncitizen similarly enters withholding-only proceedings and the IJ's decision thereon may be appealed to the BIA.²⁵⁵ It is hard to imagine these three layers of administrative review concluding in fewer than thirty days. As examples, ten months separated reinstatement of the removal order from the BIA's disposition in the withholding proceedings in *Arostegui-Maldonado*;²⁵⁶ in *Argueta-Hernandez*, it was two and a half years.²⁵⁷

Note the glaring irony that the above analysis brings to the surface: When a noncitizen succeeds in convincing one of the adjudicators that their fear of returning to the country of removal is reasonable, the noncitizen assures that they will not be entitled to judicial review. By contrast, judicial review is most likely to be available (though still not assured) when neither the DHS officer nor the IJ finds the noncitizen to have established a reasonable fear. It stands to reason that the former set of cases involves the

²⁵² *Credible Fear Review and Reasonable Fear Review Decisions*, U.S. DEPT. OF JUST. EXEC. OFF. FOR IMMIGR. REV. (July 13, 2023), <https://perma.cc/CN7F-PXT3>.

²⁵³ 8 C.F.R. § 208.31(e) (2023).

²⁵⁴ *Id.*

²⁵⁵ 8 C.F.R. § 208.31(g)(2) (2023).

²⁵⁶ *Arostegui-Maldonado*, 75 F.4th at 1138–39.

²⁵⁷ *Argueta-Hernandez*, 73 F.4th at 301–02.

closer calls—the instances in which judicial review may be most needed and most likely to impact the outcome (by reversing the decision below)—while the latter set of cases are more clear-cut. But if reinstated orders of removal are final the day they are reinstated, judicial review becomes more likely to be available where it is less necessary and less likely to be available where it is most needed.

As is now clear, the two possibilities that emerge from the Second and Fourth Circuits' interpretation are that judicial review is foreclosed or that it is available only if administrative proceedings occur sufficiently quickly. Neither of these possibilities withstands careful scrutiny. As to the former, in § 1252(a)(2), just a few lines away from § 1252(b)(1)'s thirty-day filing deadline, Congress enumerated various matters that are, categorically, not subject to judicial review.²⁵⁸ For example, noncitizens subject to removal for committing certain criminal offenses²⁵⁹ or immediately upon arriving in the United States²⁶⁰ are denied access to the federal courts of appeals. That Congress explicitly barred judicial review for certain types of claims and left out withholding-relief decisions arising out of reinstated orders of removal therefore militates against a construction that will eliminate judicial review for large swaths of noncitizens facing reinstated removal orders. Indeed, *Nasrallah* emphasized this exact point:

It would be easy enough for Congress to preclude judicial review of factual challenges to CAT orders, just as Congress has precluded judicial review of factual challenges to certain final orders of removal. But Congress has not done so, and it is not the proper role of the courts to rewrite the laws passed by Congress and signed by the President.²⁶¹

The presumption that we ought to read into this congressional omission “is particularly true here, where”²⁶² Congress created the reinstatement of removal process *in the same act* as it added § 1252(a)(2)'s bars on judicial review. In the Illegal Immigration Reform and Immigrant Responsibility Act of 1996,²⁶³ Congress made these two changes simultaneously. If the 1996 Congress wanted to deny judicial review to noncitizens subject to

²⁵⁸ See 8 U.S.C. § 1252(a)(2).

²⁵⁹ See *id.* § 1252(a)(2)(C).

²⁶⁰ See *id.* § 1252(a)(2)(A).

²⁶¹ *Nasrallah*, 590 U.S. at 593.

²⁶² *Nken v. Holder*, 556 U.S. 418, 430 (2009).

²⁶³ Pub L. No. 104-208, 110 Stat. 3009-546 (codified as amended at 8 USC § 1101 et seq.).

reinstated removal orders, it would have. Against that backdrop, to construe “final” so as to deny many noncitizens that opportunity for judicial review is to deny Congress the deserved “presum[ption] that [it] acts intentionally and purposely.”²⁶⁴

The possibility that judicial review turns on the speed at which DHS, IJs, and the BIA operate is likewise untenable. For one reason, a precondition to petitioning for judicial review of a final order of removal is that the noncitizen has “exhausted all administrative remedies available to the alien as of right.”²⁶⁵ Working through the various layers of administrative review, from DHS to the BIA, is therefore a prerequisite to review. But the Second and Fourth Circuits’ view puts the noncitizen in a bind: the noncitizen must petition for review within thirty days of the reinstatement of their removal order, but the noncitizen may not petition for review until withholding-relief proceedings—which may take more than thirty days—have concluded. And keep in mind that due to § 1252(b)(9)’s zipper clause, which requires that “all questions . . . arising from” a removal be consolidated into one petition for judicial review, noncitizens are precluded from filing one petition for review before the withholding-relief process concludes and another one after. Thus, given that the statute obviously contemplates the ability to *both* exhaust administrative remedies *and* seek judicial review, applying the Second and Fourth Circuits’ understanding of finality is in tension with § 1252’s orderly framework. It is textually implausible that satisfying the exhaustion requirement, framed by the statute as a prerequisite to review, can actually eliminate the possibility of review.²⁶⁶

Tying judicial review to the speed of administrative processes also lets the fox guard the henhouse. Any DHS officer, IJ, or BIA

²⁶⁴ *Nken*, 556 U.S. at 430.

²⁶⁵ 8 U.S.C. § 1252(d)(1).

²⁶⁶ In the Ninth Circuit’s *Alonso-Juarez* opinion, the court discussed a workaround proposed by the government to reconcile this conflict. Specifically, a circuit adopting the Second and Fourth Circuits’ reasoning could allow noncitizens to “timely file petitions within thirty days of the reinstatement order even when their reasonable fear proceedings had not yet concluded,” a “petition for review [that] would ‘ripen’ by the time this court reviews the petition on the merits.” *Alonso-Juarez*, 80 F.4th at 1053. This placeholder-petition scheme is woefully inefficient, and the Ninth Circuit understandably rejected it as “unworkable” and “immensely resource intensive.” *Id.* It would force noncitizens to file petitions even when they might obtain a favorable decision; “require [courts] to dedicate resources to tracking and closing moot or abandoned petitions” and “establish a system of holding petitions for review in abeyance for years at a time,” and make an already-complicated immigration system yet more convoluted for the often pro se noncitizens navigating it. *Id.*

member who wishes to deny the noncitizen before them access to the federal courts has a straightforward blueprint to doing so: sit on their hands. By simply delaying their decision—and not by very much—they can simultaneously deny withholding relief *and* ensure that no appeal lies from that determination. Not only is such a result absurd, but empowering the administrative adjudicators to decide the availability of judicial review finds no support in the text of the statute. Indeed, barring judicial review when administrative agencies move too slowly would stand in stark contrast to § 1252's other restrictions on judicial review, which can be categorized as either (1) categorically barring a certain type of claim or (2) case-specifically denying review when the noncitizen fails to take certain actions over which they have control. As examples of the first category, § 1252 categorically denies the federal courts jurisdiction over “any judgment regarding the granting of relief under” certain sections of Title 8²⁶⁷ and “any final order of removal against an alien who is removable by reason of having committed” certain criminal offenses.²⁶⁸ As for the second group, § 1252 (of course) requires petitions for review to be filed by noncitizens within thirty days of the final order of removal²⁶⁹ and imposes the earlier-discussed exhaustion requirement.²⁷⁰

Both of these types of restrictions on judicial review are rational. It is perfectly reasonable for Congress to decide that the costs of judicial review for a noncitizen convicted of an aggravated felony outweigh its benefits. It is also unsurprising that a noncitizen must comply with certain claims-processing rules in order to receive judicial review. But it is quite different to insist that judicial review turns on how quickly the executive bureaucracy, not the noncitizen, moves. To be sure, Congress has the right to bar judicial review in any constitutionally permissible way. But the explicit, unambiguous restrictions that Congress placed on judicial review ought to inform whether an entirely different type of restriction is properly being read into ambiguity in a neighboring provision.

All of this helps expose the flaws in the Second and Fourth Circuits' view. By interpreting “final” in a way that both stretches the statutory definition beyond its limits and cannot be reconciled

²⁶⁷ 8 U.S.C. § 1252(a)(2)(B)(i).

²⁶⁸ *Id.* § 1252(a)(2)(C).

²⁶⁹ *Id.* § 1252(b)(1).

²⁷⁰ *Id.* § 1252(d)(1).

with the statute’s surrounding text and structure, these courts add a limit to the federal courts’ jurisdiction that Congress deliberately left out. By contrast, according “final” its ordinary meaning—and thereby ensuring that noncitizens have thirty days to petition for judicial review from the time their withholding-relief proceedings conclude—better comports with the statutory scheme.

CONCLUSION

What seems a simple question—when a reinstated order of removal becomes final for purposes of judicial review—turns out to be far from it. Lest the technical nature of this Comment’s arguments distract from this dispute’s grave stakes, recall the potentially life-threatening dangers that Jonny Vasquez-Rodriguez and similarly situated noncitizens hope to avoid. When the BIA makes an erroneous withholding-relief decision, it orders a noncitizen removed to a country where they are likely to be tortured or persecuted. Judicial review can correct such grave errors, and the best reading of § 1252 ensures the availability of such review by tying the finality of reinstated orders of removal to the conclusion of withholding-relief proceedings. Such a construction is consistent with Supreme Court precedent, more faithful to the statutory text, and better comports with the framework established by § 1252.

It is consistent with Supreme Court precedent because *Nasrallah* and *Guzman Chavez*—while making clear that a withholding-relief decision is not itself an “order of removal”—do not settle the point at which the reinstated order of removal becomes final for purposes of judicial review. It is more faithful to the statutory text because it declines to rewrite the statutory definition of finality, opting for ordinary meaning instead of forcing an inapplicable definition to apply. And it better comports with § 1252’s framework for judicial review because, in stark contrast to deeming reinstated removal orders immediately final, it meshes with the statute’s context and structure.