No. _____

In The Supreme Court of the United States

RAUL PADILLA-RAMIREZ,

Petitioner,

v.

ROBERT M. CULLEY; KIRSTJEN NIELSEN; JEFFERSON B. SESSIONS III; and MIKE HOLLINSHEAD,

Respondents.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether the Ninth Circuit erred in holding that a noncitizen placed in withholding of removal proceedings before an immigration judge is subject to detention under 8 U.S.C. § 1231(a)—the detention authority created by Congress for a person with a final order of removal that has not yet been executed—as opposed to 8 U.S.C. § 1226—the detention authority Congress created for a person awaiting a determination of whether they may remain in the United States.

PARTIES TO THE PROCEEDING

The parties to the proceeding below were the Petitioner Raul Padilla-Ramirez, and Respondents Robert M. Culley, in his official capacity as Director of U.S. Immigration and Customs Enforcement Salt Lake City Field Office; Kirstjen Nielsen, in her official capacity as Secretary for the Department of Homeland Security; Jefferson B. Sessions III, in his official capacity as Attorney General of the United States; and Mike Hollinshead, in his official capacity as Elmore County Sheriff.[1] There are no nongovernmental corporate parties requiring a disclosure statement under Supreme Court Rule 29.6.

[1] Officer Culley is substituted for Daniel A. Bible, Secretary Nielsen is substituted for Jeh Charles Johnson, Attorney General Sessions is substituted for Loretta Lynch, and Sheriff Hollinshead is substituted for Rick Layher pursuant to Supreme Court Rule 35.3.

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PETITION FOR A WRIT OF CERTIORARI

Petitioner Raul Padilla-Ramirez ("Mr. Padilla") respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Ninth Circuit in this case.

OPINIONS BELOW

The decision of the court of appeals is reported at 882 F.3d 826 and reprinted at Petition for Writ of Certiorari Appendix ("App.") 1-21. The order of the court of appeals denying the petition for panel rehearing and rehearing en banc. App. 22-23. The decision of the district court is unreported and reprinted at App. 24-35. The decision of the Board of Immigration Appeals remanding Petitioner's withholding of removal proceedings back to the immigration court is unreported and reprinted at App. 36-43.

JURISDICTION

The amended judgment of the Court of Appeals for the Ninth Circuit was entered on February 15, 2018. App. 22. This Court has jurisdiction over this timely filed petition pursuant to 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

8 U.S.C. § 1226(a), concerning the detention of a noncitizen in immigration proceedings, provides:

> (a) Arrest, detention, and release
>
> On a warrant issued by the Attorney General, an alien may be arrested and detained pending a decision on whether the alien is to be removed from the United States. Except as provided in subsection (c) and pending such decision, the Attorney General—
>
> (1) may continue to detain the arrested alien; and
>
> (2) may release the alien on—
>
> (A) bond of at least $1,500 with security approved by, and containing conditions prescribed by, the Attorney General; or
>
> (B) conditional parole;

8 U.S.C. §§ 1231(a)(1), (a)(2), and (a)(6), concerning the detention and removal of a noncitizen issued a final order of removal that has not yet been executed, provide:

> (a) Detention, release, and removal of aliens ordered removed
>
> (1) Removal period
>
> (A) In general
>
> Except as otherwise provided in this section, when an alien is ordered removed, the Attorney General shall remove the alien from the United States within a period of 90 days (in this section referred to as the "removal period").

(B) Beginning of period

The removal period begins on the latest of the following:

(i) The date the order of removal becomes administratively final.

(ii) If the removal order is judicially reviewed and if a court orders a stay of the removal of the alien, the date of the court's final order.

(iii) If the alien is detained or confined (except under an immigration process), the date the alien is released from detention or confinement.

(C) Suspension of period

The removal period shall be extended beyond a period of 90 days and the alien may remain in detention during such extended period if the alien fails or refuses to make timely application in good faith for travel or other documents necessary to the alien's departure or conspires or acts to prevent the alien's removal subject to an order of removal.

(2) Detention

During the removal period, the Attorney General shall detain the alien. Under no circumstance during the removal period shall the Attorney General release an alien who has been found inadmissible under section 1182(a)(2) or 1182(a)(3)(B) of this title or deportable under section 1227(a)(2) or 1227(a)(4)(B) of this title.

. . .

(6) Inadmissible or criminal aliens

An alien ordered removed who is inadmissible under section 1182 of this title, removable under section 1227(a)(1)(C), 1227(a)(2), or 1227(a)(4) of this title or who has been determined by the Attorney General to be a risk to the community or unlikely to comply with the order of removal, may be detained beyond the removal period and, if released, shall be subject to the terms of supervision in paragraph (3).

STATEMENT OF THE CASE

This case presents the question of which statute governs the detention of a noncitizen in withholding of removal proceedings before an immigration judge ("IJ") pursuant to 8 C.F.R. § 208.31(e)—specifically, whether their detention is governed by 8 U.S.C. § 1226, the statute authorizing the detention of a noncitizen in removal proceedings "pending a decision on whether the [noncitizen] is to be removed from the United States," or by § 1231(a), the statute authorizing the detention of a noncitizen who has a final order of removal that has not yet been executed. The resolution of this question determines whether a noncitizen like Mr. Padilla may request an individualized custody hearing before an IJ during withholding of removal proceedings.

A. Legal Framework

1. Reinstatement of Removal and Withholding-Only Proceedings

A noncitizen who unlawfully reenters the United States after having previously been ordered removed is potentially subject to a summary administrative removal process under 8 U.S.C. § 1231(a)(5) known as reinstatement of removal.[2] Pursuant to the implementing regulations, a person subject to reinstatement of removal is not provided an opportunity to appear in front of an IJ. 8 C.F.R. § 241.8(a). Instead, they undergo an expedited process whereby a Department of Homeland Security (DHS) officer issues a notice of intent to reinstate the previously executed order, provides the noncitizen with an opportunity to make a statement, and summarily signs off on the new reinstatement of removal order. *See* 8 C.F.R. § 241.8(b). The noncitizen is then physically removed from the country. *See* 8 C.F.R. § 241.8(c).

The regulations create an "[e]xception" to this summary process, however, if the person in reinstatement proceedings "expresses a fear of returning to the country designated in that order." 8 C.F.R. § 241.8(e); *see also Fernandez-Vargas v. Gonzales*, 548 U.S. 30, 35

[2] While a noncitizen may be subject to 8 U.S.C. § 1231(a)(5), the Department of Homeland Security (DHS) has the discretion to determine whether to initiate an enforcement action against them and, if so, whether to place them in standard removal proceedings under 8 U.S.C. § 1229a or reinstatement proceedings under § 1231(a)(5). *See Villa-Anguiano v. Holder*, 727 F.3d 873, 878-79 (9th Cir. 2013).

n.4 (2006) ("Notwithstanding the absolute terms in which the bar on relief is stated, even a [noncitizen] subject to [8 U.S.C. § 1231(a)(5)] may seek withholding of removal under 8 U.S.C. § 1231(b)(3)(A) . . . or under 8 CFR [sic] §§ 241.8(e) and 208.31 (2006). . . ."). If a person subject to reinstatement expresses such a fear of persecution or torture, they are then interviewed by an asylum officer "to determine whether the [noncitizen] has a reasonable fear of persecution or torture." 8 C.F.R. § 241.8(e). If the asylum officer determines that the noncitizen has a "reasonable fear of persecution or torture," they are no longer subject to the summary reinstatement process; instead, their case is transferred to an IJ for "full consideration" of their request for protection. 8 C.F.R. § 208.31(e).[3]

The scope of these proceedings is limited to applications for withholding of removal pursuant to 8 U.S.C. § 1231(b)(3), and withholding or deferral of removal under the Convention Against Torture (CAT). *See* 8 C.F.R. §§ 208.31(e), 208.16. Accordingly, they are commonly referred to as "withholding-only" proceedings. The implementing regulations further clarify these proceedings "shall be conducted in accordance with the same rules of procedure as proceedings conducted under 8 CFR [sic] part 240, subpart A." 8 C.F.R. § 208.2(c)(3)(i). As such, the noncitizen is entitled to the same procedural protections afforded in standard

[3] Similarly, if a noncitizen requests that the IJ review a negative reasonable fear determination by an asylum officer, and the IJ finds that the individual does have a reasonable fear, they are then placed into withholding-only proceedings. 8 C.F.R. § 208.31(g)(2).

removal proceedings pursuant to 8 U.S.C. § 1229a, including the right to present evidence in support of any application for relief as well as the right to examine and cross-examine evidence against them presented by the government. *See* 8 U.S.C. § 1229a(b)(4). If an application for withholding of removal is granted, the reinstatement order may no longer be executed. *See* 8 U.S.C. § 1231(b)(3)(A). If the IJ denies the application for protection, the noncitizen has the right to file an administrative appeal to the Board of Immigration Appeals (BIA). *See* 8 C.F.R. § 208.31(e). Thereafter, if the BIA denies the administrative appeal, the noncitizen may file a petition for review challenging the final agency decision pursuant to 8 U.S.C. § 1252(a).

2. Statutory Authority for Detention in Immigration Proceedings

There are three primary detention statutes under the Immigration and Nationality Act (INA): 8 U.S.C. §§ 1225(b), 1226, and 1231(a). Section 1225(b) governs the detention of "applicants for admission" into the United States. *See Jennings v. Rodriguez*, 138 S. Ct. 830, 837 (2018). In contrast, "[s]ection 1226 generally governs the process of arresting and detaining [noncitizens in the United States] pending their removal." *Id.* Finally, §§ 1231(a)(2) and (a)(6) govern the detention of a noncitizen who already has a final removal order, up until the order is executed. *See* 8 U.S.C. §§ 1231(a)(2), (a)(6). Mr. Padilla, like all persons subject to reinstatement of removal and then transferred to withholding-only proceedings, has already reentered the country,

and as such, is not an applicant for admission. The question presented is thus whether Mr. Padilla and others like him are detained subject to § 1226 or subject to § 1231(a).

Section 1226(a) authorizes the Attorney General to detain a noncitizen "pending a decision on whether the [noncitizen] is to be removed from the United States." The implementing regulations provide that the DHS district director renders the initial custody determination, but thereafter, the detained person may request an individualized custody hearing before the IJ. 8 C.F.R. § 236.1(d). Pursuant to the statute, the Attorney General may release the individual on a minimum bond of $1,500, or on conditional parole. 8 U.S.C. § 1226(a)(2).[4]

Subsections 1231(a)(2) and (a)(6), by contrast, govern the detention of a noncitizen who already has a final order of removal that has not yet been executed. The statute mandates that "the Attorney General shall remove the [noncitizen] from the United States within [the removal period]." 8 U.S.C. § 1231(a)(1)(A). Accordingly, under § 1231(a)(2), the noncitizen must be detained "[d]uring the removal period." The statute defines the removal period as a ninety-day period that "begins on the latest of the following":

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[4] The Attorney General's authority to release a noncitizen pending a decision on whether they will be removed from the United States is limited by §§ 1226(c)(1) and (c)(2), which provide for mandatory detention of any individual falling into an enumerated group of categories when released from criminal custody.

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

8 U.S.C. § 1231(a)(1)(B).

If DHS does not execute the removal order during the ninety-day removal period, § 1231(a)(3) requires that the noncitizen be released under supervision pending removal. However, § 1231(a)(6), provides that any such person found to be inadmissible under § 1182 or removable under §§ 1227(a)(1)(C), (a)(2), or (a)(4), "or who has been determined by the Attorney General to be a risk to the community or unlikely to comply with the order of removal, may be detained beyond the removal period."

Unlike a noncitizen detained under § 1226(a), the implementing regulations do not afford a person subject to discretionary detention under § 1231(a)(6) an opportunity to seek an individualized custody hearing before an IJ. Thus, "[w]here a [noncitizen] falls within this statutory scheme can affect whether his detention is mandatory or discretionary, as well as the kind of review process available to him if he wishes to contest

the necessity of his detention." *Prieto-Romero v. Clark*, 534 F.3d 1053, 1057 (9th Cir. 2008).

B. Facts and Procedural History

Mr. Padilla is a native and citizen of El Salvador. App. 36. Since he was a young child, he has been subjected to constant mental and physical cruelty in El Salvador, including abandonment, sexual assault, and other physical attacks, prompting him to seek refuge in the United States. App. 36-38. He originally entered the country in 1999, when he was nineteen years old, and was subsequently placed in removal proceedings in 2006. App. 3, 37. Although he applied for asylum, his application was denied and he was instead granted voluntary departure by an IJ. App. 3.[5] However, he did not depart the United States pursuant to the voluntary departure order, causing it to convert to an order of removal. *See* 8 C.F.R. § 1241.1(f). DHS apprehended Mr. Padilla in 2010 and removed him to El Salvador, where he was again physically assaulted, causing him to once again flee to the United States. App. 38.

In December 2015, DHS encountered Mr. Padilla while he was in criminal custody and reinstated his prior removal order. App. 24. Mr. Padilla's criminal proceedings were dismissed by the court, and in February

[5] Mr. Padilla has also filed a separate motion to reopen the 2006 proceedings on the basis that he received ineffective assistance of counsel. The BIA denied the motion to reopen. He then filed a petition for review of that order, which is currently pending. *Padilla v. Sessions*, Case No. 16-73583 (9th Cir. filed Nov. 9, 2016).

2016, he was transferred to DHS custody. *Id*. Because he had claimed a fear of returning to El Salvador, he was referred for a reasonable fear interview. App. 4; *see also* 8 C.F.R. § 241.8(e). Upon interviewing Mr. Padilla, the asylum officer determined he had established a reasonable fear of being tortured if returned to El Salvador. App. 4. Mr. Padilla's case was accordingly transferred before an IJ pursuant to 8 C.F.R. § 208.31(e) for withholding-only proceedings. *Id.* At that point, Mr. Padilla requested a bond hearing before an IJ. App. 4. The IJ, however, determined that Mr. Padilla was detained pursuant to § 1231(a), not § 1226(a), and thus, ruled that she did not have jurisdiction to conduct a bond hearing. App. 4. In response, Mr. Padilla filed a petition for habeas corpus with the federal District Court of Idaho. App. 4.

On April 15, 2016, the district court judge concluded that despite the ongoing immigration proceedings, Mr. Padilla had an administratively final order of removal and was detained pursuant to § 1231(a), not § 1226(a), and therefore was not entitled to a bond hearing. App. 34-35. The district court granted Respondents' motion to dismiss and denied Mr. Padilla's petition for writ of habeas corpus. App. 35. Mr. Padilla timely appealed to the Ninth Circuit Court of Appeals. *See* App. 1.

Notwithstanding the IJ and district court's determination that he was not eligible for a bond hearing under § 1226(a), on December 13, 2016, after six months in detention, he was granted a bond hearing under § 1231(a). *See* App. 5-6. At that time, bond

hearings were required in the Ninth Circuit when a noncitizen had been in DHS custody for six months regardless of whether they were detained pursuant to § 1226 or § 1231. *See Rodriguez v. Robbins*, 804 F.3d 1060 (9th Cir. 2015), *overruled by Jennings*, 138 S. Ct. 830 (2018); *Diouf v. Napolitano*, 634 F.3d 1081 (9th Cir. 2011).

On July 6, 2017, the court of appeals affirmed the judgment of the district court regarding the statutory authority for Mr. Padilla's detention. App. 1, 21. On August 19, 2017, Mr. Padilla filed a petition for panel rehearing and rehearing en banc, arguing that the panel decision directly conflicted with the Ninth Circuit's own precedent and unnecessarily created a circuit split in an area of exceptional importance that requires national uniformity. On February 15, 2018, the Ninth Circuit denied Mr. Padilla's petition for rehearing en banc and issued an amended opinion. That amended opinion is the subject of this petition for writ of certiorari.

REASONS FOR GRANTING THE PETITION

This Court should grant the instant petition for a writ of certiorari because the Ninth Circuit has created a conflict with the Second Circuit on an important and recurring issue of federal law: whether a noncitizen placed in withholding-only proceedings before an IJ is detained under the general detention statute for noncitizens "pending a decision on whether the [noncitizen] is to be removed from the United States," § 1226(a), or under the detention statute for persons

with a final yet unexecuted order of removal, § 1231(a). The answer to this question in turn determines whether the noncitizen has the opportunity to seek an individualized custody hearing before an IJ.

In addition, the Ninth Circuit's holding creates considerable tension with several other circuits' holdings, and even with Ninth Circuit precedent, as to the definition of what constitutes a final administrative order of removal for persons in withholding-only proceedings. The Ninth Circuit declined to apply the same definition of a final administrative order of removal as agreed upon by four other circuits in the context of determining when judicial review is available. This determination also directly conflicts with the Second Circuit's holding as to whether it is permissible to create a separate definition of finality for the same statutory provision depending solely on whether it is in the judicial review or detention context.

In addition to creating a direct conflict with the Second Circuit and significant tension with other circuits as to the definition of an administratively final removal order, the Ninth Circuit's decision is also incorrect. It ignores the clear statutory language defining a final administrative removal order, 8 U.S.C. § 1101(a)(47)(B), and similarly clear language that the definition be uniformly applied, § 1101(a). The Ninth Circuit's interpretation also violates the plain language of § 1231(a)(1) defining the "removal period," which triggers detention under that section. Under the plain language of the statute, the removal period has not yet commenced for persons in withholding-only

proceedings, and as such, § 1231(a)(2) and (a)(6) are inapplicable. Similarly, the interpretation adopted by the Ninth Circuit contradicts the plain language of § 1226(a), effectively ignoring that Mr. Padilla remains in proceedings to determine "whether [he] is to be removed from the United States."

A. This Court should resolve the conflict between the Ninth and Second Circuits with respect to this important and recurring issue of federal law.

1. The Ninth Circuit's decision created a direct conflict with the decision of the Second Circuit, the only other circuit to address the statutory basis for detaining individuals in withholding of removal proceedings.

As the Ninth Circuit acknowledged, its holding creates an irreconcilable and direct conflict with the prior interpretation issued by the Second Circuit in *Guerra v. Shanahan*, 831 F.3d 59 (2d Cir. 2016). While the panel stated it was "wary to create a circuit split" in an area of federal law that requires a uniform rule, it ultimately did just that, declaring that the Second Circuit "did not paint with a fine enough brush." App. 17. This circuit split is particularly significant, as it affects the liberty interest of thousands of individuals in the two circuits that hear the most immigration appeals. *See U.S. Courts of Appeals - Judicial Business 2017*, *available at* http://www.uscourts.gov/statistics-reports/us-courts-appeals-judicial-business-2017 (last

visited May 10, 2018) (noting that fifty-seven percent of immigration appeals were filed in the Ninth Circuit and fourteen percent were filed in the Second). In creating this division between the two circuits responsible for hearing the majority of immigration cases on appeal, the Ninth Circuit concluded that "[i]f uniformity is required, we are content to leave it to the Supreme Court to harmonize the resulting split of authority." App. 21.

Both circuit courts answered the very same question: whether § 1226 or § 1231 governs the detention of noncitizens in withholding-only proceedings. Both circuits, moreover, recognized that resolving this question required a determination of "whether a reinstated removal order is 'administratively final' during the pendency of withholding-only proceedings." *Guerra*, 831 F.3d at 62; *see* App. 7 ("The question before us, then, is whether Padilla-Ramirez's reinstated removal order is administratively final."). They each resolved the issue by examining the statutory language to determine congressional intent, *compare Guerra*, 831 F.3d at 62, *with Padilla-Ramirez*, App. 6, yet ultimately reached opposite conclusions. App. 21.

The Second Circuit clarified that § 1226(a) "does not speak to the case of whether the [noncitizen] is *theoretically* removable but rather to whether the [noncitizen] will *actually* be removed." *Guerra*, 831 F.3d at 62 (emphasis added). Rejecting *Guerra*'s reasoning, the Ninth Circuit instead focused on the theoretical possibility that Mr. Padilla could be removed to another country even if his application for withholding of

removal were granted, effectively dismissing the protection that withholding of removal provides. App. 11. As noted *infra*, Section C., the Ninth Circuit erred in minimizing the protection afforded to a noncitizen who is granted withholding of removal or protection under CAT.

As a result of the Ninth Circuit's break with *Guerra*, whether an individual in withholding-only proceedings is entitled to a custody determination before an IJ under § 1226 now turns solely upon where they are geographically located in the United States. Yet as the Ninth Circuit itself recognized, rules governing immigration "'are best applied uniformly,'" for the INA is "a comprehensive federal scheme that requires a nationally unified administration program." App. 21.

Finally, further development of caselaw among the other circuits is unlikely to aid this Court in addressing the question presented. There are only two possible statutory sources of authority for the detention of individuals in withholding-only proceedings, and two circuits have fleshed out the analysis for either approach. Accordingly, this issue is ripe for the Court's review, and the Court should grant certiorari to resolve the conflict.

2. The statutory authority for detention of persons in withholding-only proceedings is an important, recurring issue of federal law.

Certiorari is also warranted to resolve a recurring question that implicates significant humanitarian concerns. Statistics published by the Executive Office of Immigration Review (EOIR) demonstrate that that there were 3,249 withholding of removal cases filed before the immigration courts in fiscal year 2016. *See* EOIR Office of Planning, Analysis, and Statistics, *FY2016 Statistics Yearbook*, at B1, Table 3 (March 2017), *available at* https://www.justice.gov/eoir/page/file/fysb16/download. Thus, the issue presented impacts the custody status of thousands of individuals every year.

It is also noteworthy that withholding of removal is a mandatory form of relief for individuals who establish a clear probability of persecution or torture upon removal. *See Immigration and Naturalization Serv. v. Cardoza-Fonseca*, 480 U.S. 421, 429 (1987) (explaining withholding of removal as a "mandatory duty" where an individual establishes eligibility); *see also Immigration and Naturalization Serv. v. Aguirre-Aguirre*, 526 U.S. 415, 427 (1999) (explaining that the statutory provision for withholding of removal "parallels Article 33 [of the United Nations Refugee Convention], which provides that no Contracting State shall expel or return . . . a refugee in any manner whatsoever to the frontiers of territories where his life or freedom would be threatened on account of [a protected ground]") (internal quotation marks and alteration omitted). In

light of the substantial number of affected persons, as well as the nature of the relief they seek, the question of whether an individual in withholding-only proceedings may be detained without any opportunity to seek release under bond is a critical question that merits consideration by the Court.

Additionally, this case addresses a fundamental liberty interest for an especially vulnerable group: persons seeking protection after establishing a reasonable fear of persecution or torture.[6] Unlike a noncitizen in summary reinstatement proceedings, a noncitizen transferred to withholding-only proceedings faces the prospect of significant civil detention while their claim is adjudicated.[7] Such a person, like Mr. Padilla, has

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[6] These cases are the exception: unlike the overwhelming majority of individuals issued reinstated orders of removal—who are not entitled to withholding-only proceedings—DHS determined that Mr. Padilla established a reasonable fear determination, and was referred for administrative proceedings before the IJ to determine whether he is entitled to withholding of removal or CAT protection. In fiscal year 2015, the government removed 137,449 people through reinstatement proceedings. *See* Bryan Baker and Christopher Williams, DHS Office of Immigration Statistics, *Immigration Enforcement Actions: 2015*, at 8 (July 2017), *available at* https://www.dhs.gov/sites/default/files/publications/Enforcement_Actions_2015.pdf. In the same fiscal year, only 3,056 withholding-only cases were received in immigration court. *See* EOIR Office of Planning, Analysis, and Statistics, *FY2016 Statistics Yearbook*, B1, Table 3 (March 2017), *available at* https://www.justice.gov/eoir/page/file/fysb16/download.

[7] The reinstatement process is generally an expedited proceeding, often completed within twenty-four hours. The summary nature of reinstatement proceedings provides justification for DHS's refusal to allow noncitizens to seek release on bond, as the

their case transferred to an IJ for "full consideration" of their applications for withholding of removal and protection under CAT. 8 C.F.R. § 208.31(e). Indeed, as in standard removal proceedings under 8 U.S.C. § 1229a, the noncitizen may also seek administrative review from the BIA. *Id.* They are thereafter entitled to seek judicial review under 8 U.S.C. § 1252(a). A determination on the merits of the claim generally lasts a minimum of several months, and in many cases well over a year.

During this time, individuals in withholding-only proceedings languish in detention, as DHS "cannot execute the reinstated removal order" until the merits of the withholding of removal case are concluded. App. 10 (quoting *Luna-Garcia v. Holder*, 777 F.3d 1182, 1183 (10th Cir. 2015)). Freedom from imprisonment lies at the heart of the Due Process Clause of the Fifth Amendment. *Zadvydas v. Davis*, 533 U.S. 678, 690 (2001). It is therefore essential to determine whether Respondents' actions to deprive a noncitizen in withholding-only proceedings of the opportunity for an individualized custody hearing is derived from a correct interpretation of its obligations under the INA.

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individual is immediately scheduled to be physically removed from the United States.

B. The Ninth Circuit's decision also creates a related conflict with respect to what constitutes a final administrative order.

The Ninth Circuit created another conflict in adopting a definition of administrative finality that is at odds with its own caselaw as well as caselaw from four other circuits. Numerous Courts of Appeals have held that a reinstatement order is not final until the conclusion of withholding-only proceedings. *See Ortiz-Alfaro v. Holder*, 694 F.3d 955 (9th Cir. 2012) (finding no jurisdiction to review the reinstatement order because it "does not become final until the . . . withholding of removal proceedings are complete"); *Luna-Garcia*, 777 F.3d at 1185 (explaining that the reinstatement order is not final because noncitizen's "rights, obligations, and legal consequences . . . are not fully determined until the reasonable fear and withholding of removal proceedings are complete"); *Guerra*, 831 F.3d at 62 n.1, 63 (noting consensus that the reinstated removal order is not administratively final for judicial review purposes during the pendency of withholding-only proceedings); *Ponce-Osorio v. Johnson*, 824 F.3d 502, 507 (5th Cir. 2016) (finding the reinstated order of removal is not final while withholding-only proceedings are ongoing); *Jimenez-Morales v. U.S. Att'y Gen.*, 821 F.3d 1307, 1308 (11th Cir. 2016) (recognizing the reinstated removal order is not final

"because [it] cannot be executed . . . until the reasonable fear proceeding is over").[8]

To support its conclusion that a noncitizen in withholding-only proceedings is subject to detention under 8 U.S.C. § 1231(a), the Ninth Circuit distinguished its prior definition of a final removal order by cabining it to the context of judicial review. App. 21. This decision to adopt separate, context-specific definitions of what constitutes a final administrative order places the Ninth Circuit's analysis in direct conflict with that of the Second Circuit in *Guerra*, which explicitly rejected such a "bifurcated definition of [administrative] finality." *Guerra*, 831 F.3d at 63.

Significantly, the Ninth Circuit's analysis of finality conflicts with this Court's "pragmatic" approach to ascertaining finality of an agency action. *U.S. Army Corps of Eng'rs v. Hawkes Co.*, 136 S. Ct. 1807, 1815 (2016) (quoting *Abbott Laboratories v. Gardner*, 387 U.S. 136, 149 (1967)). This Court has clarified that an agency action is "final" when it meets two conditions: first, it "must mark the consummation of the agency's decisionmaking process," and second, must either determine "rights or obligations" or effectuate "legal consequences." *Bennett v. Spear*, 520 U.S. 154, 177-79 (1997) (citations omitted). For that reason, where there are ongoing proceedings which may affect the outcome of the agency's decision-making process, the decision is

[8] In a similar context, the Seventh Circuit found that a summary removal order issued pursuant to 8 U.S.C. § 1228(b) was not final until after reasonable fear proceedings were complete. *Eke v. Mukasey*, 512 F.3d 372, 377-78 (7th Cir. 2008).

not yet "final." The opinion below, despite acknowledging an individual in withholding-only proceedings is undergoing an agency proceeding that prevents the execution of the removal order, veers off this well-worn course of administrative law jurisprudence by accepting a formalistic designation of a reinstatement order as a "final" order notwithstanding the ongoing proceedings before the agency. By contrast, the Second Circuit defined an administratively final order by relying on the administrative principles established by this Court. *See Guerra*, 831 F.3d at 62-63 (drawing from prior caselaw regarding comparable proceedings, where the Second Circuit refused to "elevate form over substance" and assessed the finality of an IJ's decision by looking to its "effective[ ] . . . result").

C. The Ninth Circuit's decision errs in failing to apply the plain language of the statute.

The Ninth Circuit's decision has not only created an inter-circuit conflict with respect to recurring questions affecting the liberty of thousands of individuals—it is also incorrect.

First, the Ninth Circuit's decision cannot be reconciled with the plain language of § 1231(a)(1) defining the removal period. The purpose of the section is to make clear how a noncitizen with a final, but unexecuted, removal order should be treated. The statute mandates that "the Attorney General *shall* remove the [noncitizen] from the United States within a period of 90 days." 8 U.S.C. § 1231(a)(1)(A) (emphasis added).

Because the noncitizen is to be immediately removed, the statute requires they be detained during the ninety-day "removal period." 8 U.S.C. § 1231(a)(2). The statute then lays out the detention scheme which will follow if the removal order is not executed within that removal period. 8 U.S.C. § 1231(a)(6). Critically, it is the removal period—the period during which the government is tasked with actually effectuating physical removal—which triggers the detention authority under that statute. Section 1231 "authorizes detention in only two circumstances. '*During* the removal period,' the Attorney General 'shall' detain the [noncitizen]. *See* § 1231(a)(2) (emphasis added). '*[B]eyond* the removal period,' the Attorney General 'may' detain a [noncitizen] who falls within one of three categories specified by the statute. *See* § 1231(a)(6) (emphasis added)." *Prieto-Romero*, 534 F.3d at 1059. Thus, in order to determine whether a person is detained pursuant to § 1231(a), a court must necessarily determine where the person is in relation to the statutorily defined removal period.

The plain language of the statute makes clear that the removal period begins on the *latest* of the following:

> (i) The date the order of removal becomes administratively final.
>
> (ii) If the removal order is judicially reviewed and if a court orders a stay of the removal of the [noncitizen], the date of the court's final order.

> (iii) If the [noncitizen] is detained or confined (except under an immigration process), the date the [noncitizen] is released from detention or confinement.

8 U.S.C. § 1231(a)(1)(B). The Ninth Circuit determined that only subsection (i), the date of administrative finality, was at issue in Mr. Padilla's case. App. 6.

When assessing administrative finality, the Ninth Circuit erred in disregarding the plain language of the statute defining when an order of removal becomes final, *see* 8 U.S.C. § 1101(a)(47)(B), as well as Congress's specific mandate that this definition be applied uniformly throughout the Immigration and Nationality Act, *see* 8 U.S.C. § 1101(a) (directing that all definitions in this section are applicable to defined terms "[a]s used in this chapter"). There is simply no statutory basis for the court of appeals to adopt a separate definition of an administratively final order.

Section 1101(a)(47)(B) clearly states that a removal order "shall 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 [noncitizen] is permitted to seek review of such order by the Board of Immigration Appeals."[9] Accordingly, an order of removal is not

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[9] The Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (IIRIRA), Pub. L. No. 104–208, 110 Stat. 3009–546 (1996) makes clear that "any reference in law to an order of removal shall be deemed to include a reference to an order of exclusion and deportation or an order of deportation." IIRIRA § 309(d)(2).

administratively final if there are ongoing withholding of removal proceedings before an IJ or the BIA. Indeed, the Ninth Circuit itself acknowledged that DHS may not execute reinstatement orders until the withholding of removal application has been adjudicated and all avenues of administrative appeal have been exhausted. App. 10. The BIA order granting Mr. Padilla's appeal and remanding the proceedings to the IJ in the instant case dramatically underscores that a final order does not yet exist. *See* App. 43.

The Ninth Circuit justified its failure to give effect to the plain language of the statute by asserting the statutory provision "has limited utility in the context of reinstated removal orders because the prior underlying removal orders cannot be reopened or reviewed, except in circumstances not applicable here." App. 8. Yet the Ninth Circuit's consideration of the prior, underlying removal order to assess the finality of the current reinstatement order is misplaced, for that prior order was *already* executed and is thus no longer operative. Here, the reinstatement order cannot be executed while the proceedings before the agency are ongoing. Thus it is clear the removal period has not begun; by its very terms, § 1231 only authorizes detention during the period of time while the removal order may be executed. *See* 8 U.S.C. § 1231(a)(1)(A) ("[T]he Attorney General *shall* remove the [noncitizen] from the United States within . . . the 'removal period' ") (internal parentheses omitted). As such, § 1231 cannot provide the requisite detention authority for any period of time prior to when the reinstatement order may

be executed. The Ninth Circuit plainly erred in relying on the prior removal order that had already been executed to analyze the first prong of § 1231(a)(1). Instead, the analysis must examine the new removal order—the reinstatement order—that has not been executed and is not yet administratively final.

Second, the Ninth Circuit also failed to give effect to the plain language of the statute by disregarding § 1231(a)(1)(B)(ii) in its analysis, as the removal period is clearly defined to begin "on the latest of" the potentially triggering events. 8 U.S.C. § 1231(a)(1)(B). Subsection (ii) clarifies that the removal period would not commence even after a final administrative order if the noncitizen files a petition for review pursuant to § 1252(a)(1) and obtains a stay of removal during the judicial review. Because Mr. Padilla is not subject to a final removal order, the opportunity to seek judicial review has not even begun. *See* 8 U.S.C. § 1252(a) (providing for judicial review of "final" removal orders). Given that the proceedings have not even advanced to the stage where judicial review may be sought, it is all the more clear that the statutorily defined removal period has not yet commenced.

The Ninth Circuit brushes this factor aside, declaring that any judicial review sought by Mr. Padilla would be limited to the decision in his withholding-only proceedings, rather than the underlying order of removal, except in limited circumstances. App. 6-7. But this conclusion plainly disregards the fact that Mr. Padilla is nevertheless entitled to judicial review of the current reinstatement order, which would include any

decision to deny his application for withholding or protection under CAT. Indeed, if the Ninth Circuit were correct, an individual would be detained under § 1231(a)(1) while undergoing withholding-only proceedings before the IJ and BIA, but transferred to § 1226 detention upon seeking judicial review and obtaining a stay after the agency issues its final administrative order. *Compare* 8 U.S.C. § 1231(a)(1)(B)(i) *with* (B)(ii).

It is thus clear that the removal period has not commenced on the new reinstatement order and, accordingly, it is premature for the government to rely upon § 1231(a) to detain Mr. Padilla.

Third, the Ninth Circuit's decision cannot be reconciled with the plain language of § 1226(a), governing the detention of noncitizens "pending a decision on whether the [noncitizen] is to be removed from the United States." The Ninth Circuit found that the pending withholding-only proceedings do not really determine whether the noncitizen will be removed from the United States, reasoning that "[a]t most, a grant of withholding will only inhibit the order's execution with respect to a particular country. Even if [Mr. Padilla] were to prevail on his application, he still would be subject to removal pursuant to the reinstated order—the government simply would have to seek an alternate country to receive him." App. 11 (citing 8 U.S.C. § 1231(b)(2)). This interpretation fails to give effect to the plain language of § 1226(a) because it rests on the theoretical possibility that DHS may some day seek to remove Mr. Padilla to a third country even if his

application for protection is granted. In practice, however, a grant of withholding of removal provides an individual with substantial protection against removal from the United States. *See Kumarasamy v. Att'y Gen. of U.S.*, 453 F.3d 169, 171 n.1 (3d Cir. 2006), *as amended* (Aug. 4, 2006) ("Although withholding of removal (a.k.a. restriction on removal) only prevents removal to the specified country and does not preclude removal to a third country, commentators have noted that '[i]n practice, however, non-citizens who are granted restrictions on removal are almost never removed from the U.S.'") (quoting Weissbrodt, David & Laura Danielson, *Immigration Law and Procedure* 303 (5th ed. 2005)).

Perhaps even more importantly, the court of appeals' analysis fails to acknowledge that *all* orders of removal are directed to a specific country. *See* 8 C.F.R. § 1240.10(f) (IJ must designate a country or countries of removal in a removal order); 8 C.F.R. § 241.8(e) (addressing reasonable fear of returning to "the country designated in [removal] order"). Furthermore, DHS cannot unilaterally deport a noncitizen to a third country not specified by the removal order. It must first move to reopen the proceedings and then seek a new order of removal before the IJ, for the new designation must adhere to certain statutory requirements, *see* 8 U.S.C. § 1231(b)(2). The noncitizen must then be given an opportunity to contest removal to that country. *See, e.g.*, *Su Hwa She v. Holder*, 629 F.3d 958, 965 (9th Cir. 2010) (failure to provide notice and hearing regarding

the proposed country of removal "would constitute a due process violation").

Lastly, the court's analysis fails to acknowledge that many persons in standard removal proceedings under § 1229a are found removable, and are only eligible to seek withholding of removal or protection under CAT. If such individuals are denied relief and appeal their cases to the BIA, most are not challenging the removal order issued by the IJ, but only the denial of protection. This is evident by the fact that the agency makes clear that it issues a final order of removal even where the individual is granted withholding of removal. *Matter of I-S- & C-S-*, 24 I&N Dec. 432 (BIA 2008) (requiring IJ to enter a removal order before granting withholding of removal). Thus, a person in withholding-only proceedings under 8 C.F.R. § 208.31(e) is in the very same posture as a noncitizen in standard removal proceedings under § 1229a—for whom the government readily acknowledges the applicable detention statute is § 1226. This again demonstrates the Ninth Circuit erred by failing to give effect to the plain language of § 1226(a), which governs the detention of noncitizens "pending a decision on whether the [noncitizen] is to be removed from the United States."

CONCLUSION

The Ninth Circuit erred in parting ways from the Second Circuit's analysis of whether an individual in

withholding of removal proceedings is detained pursuant to 8 U.S.C. § 1231(a)—the detention authority for a noncitizen who already has a final order that has not been executed—or detained pursuant to 8 U.S.C. § 1226(a)—the general detention authority for a person "pending a decision on whether the [noncitizen] is to be removed from the United States." Review by this Court is thus appropriate and necessary to resolve a matter of exceptional importance: whether individuals like Mr. Padilla, who have all been screened and found eligible to apply for protection from persecution or torture, may be placed in mandatory detention during the months and sometimes years it takes to adjudicate their claims. For these reasons the petition for certiorari should be granted.

Respectfully submitted,

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