No. 22-____

IN THE

Supreme Court of the United States

RAUL GARCIA MARIN,

Petitioner,

v.

MERRICK B. GARLAND,
Attorney General of the United States,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether the government's removal of a noncitizen from the United States moots the noncitizen's challenge in a petition for review of the agency's denial in "withholding-only" immigration proceedings of deferral of removal or withholding of removal.

PARTIES TO THE PROCEEDING

Petitioner Raul Garcia Marin was the petitioner below.

Respondent Merrick B. Garland, Attorney General of the United States, was the respondent below.

RELATED PROCEEDINGS

The proceedings directly related to this petition are:

Garcia Marin v. *Garland*, No. 20-3393 (7th Cir. July 29, 2022).

In re Garcia Marin, A075-818-976 (Board of Immigration Appeals).

In re Garcia Marin, A075-818-976 (Chicago Immigration Court).

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INTRODUCTION

Petitioner Raul Garcia Marin, a noncitizen, was placed in "withholding-only" immigration proceedings—that is, proceedings in which an underlying removal order may not be challenged and the only relief that is available is deferral or withholding of removal. An immigration judge granted Mr. Garcia Marin deferral of removal after finding as fact that there is a substantial risk that he would be tortured upon removal to Mexico for having aided the U.S. government in an attempted sting operation against a powerful Mexican drug cartel. Deferral of removal, like withholding of removal, provides a noncitizen with mandatory protection from removal to the country where he would likely be tortured, permits him to reside in the United States, and entitles him to apply for authorization to be employed in the United States. The Board of Immigration Appeals, applying an incorrect standard of review of the immigration judge's factual findings, reversed the judge's decision and denied Mr. Garcia Marin deferral of removal.

After Mr. Garcia Marin filed a petition for judicial review, the government removed him from the United States. The government conceded before the court of appeals that the Board's decision was wrong on the merits. But the government argued that the petition for review was moot, asserting that a court cannot grant any effective relief to a noncitizen who seeks deferral of removal, cannot challenge the underlying removal order, and has been removed. The Seventh Circuit agreed, holding that "a petition for review of a decision in a withholding-only proceeding is mooted by" removal because obtaining relief in such a proceeding would not permit the noncitizen to reenter the United States. Pet. App. 6a.

In so holding, the Seventh Circuit joined the Fifth Circuit, which has likewise held that granting a removed noncitizen deferral or withholding of removal in the context of a withholding-only proceeding would not be effective relief. But the Seventh Circuit sharply split from other courts of appeals, which have held that removal does not moot a noncitizen's challenge to denial of deferral or withholding of removal because succeeding in such a challenge would facilitate the noncitizen's return to the United States. Had Mr. Garcia Marin's case arisen in one of those circuits, then the court of appeals would have decided his petition for review on the merits rather than dismissing it as moot—and (given the government's concession) would have decided in his favor.

The Seventh Circuit's mootness holding is wrong. Courts can grant effective relief in cases like this one in light of the government's own formal policy, known as the Return Directive, that provides that the government will facilitate return to the United States under certain circumstances for noncitizens who prevail on a petition for review. The government adopted the Return Directive in 2012 when it discovered that a prior representation the government had made to this Court about government facilitation of return of removed noncitizens who prevail in court, on which this Court had expressly relied in *Nken* v. *Holder*, 556 U.S. 418 (2009), was overstated.

The error in the Seventh Circuit's decision is underscored by the government's inconsistent positions across the courts of appeals. Before at least four courts of appeals, the government has argued that removal does *not* moot claims for deferral or withholding of re-

moval. For example, the government candidly conceded to the Ninth Circuit in a case with near-identical facts to this one that the prospect of return under the Return Directive "defeats any claim of mootness." *Del Cid Marroquin* v. *Lynch*, 823 F.3d 933, 941 (9th Cir. 2016).

The question presented in this case is also highly important, and this case is an excellent vehicle for resolving it. Allowing the government to moot petitions for review by removing as quickly as possible noncitizens who have been denied the type of relief available in withholding-only proceedings effectively shields from review agency decisions that are often erroneous and that create extraordinary hardship. That mootness rule also makes every denial of a request for a stay of removal in such a case into a final appellate adjudication, thereby distorting the stay process that this Court laid out in *Nken*. And it punishes removed persons who remain abroad to await a decision on a federal appeal rather than returning to the United States without authorization, thus undermining the rational functioning of the immigration laws.

Because the government conceded in this case that the agency was wrong on the merits, the mootness question is dispositive of Mr. Garcia Marin's petition for review. This Court should grant certiorari to restore uniformity among the courts of appeals and ensure that the availability of judicial review of petitions for review of denials of deferral or withholding of removal does not turn on a happenstance of geography.

OPINIONS BELOW

The opinion of the U.S. Court of Appeals for the Seventh Circuit (Pet. App. 1a) is published at 41 F.4th

947. The order of the court of appeals denying rehearing (Pet. App. 18a) is unpublished. The orders of the Board of Immigration Appeals (Pet. App. 15a) and the immigration judge (Pet. App. 7a) are unpublished.

JURISDICTION

The Seventh Circuit entered judgment on July 29, 2022, and denied petitioner's timely rehearing petition on October 19, 2022. Pet. App. 18a. On January 11, 2023, this Court extended the time to file this petition to March 17, 2023. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

PROVISIONS INVOLVED

Relevant provisions, including the Return Directive issued by the Department of Homeland Security (DHS), are reproduced in the appendix to the petition.

STATEMENT OF THE CASE

1. a. In the Foreign Affairs Reform and Restructuring Act of 1998, Congress codified the Convention Against Torture (CAT), to which the United States is a signatory, and instructed the Executive Branch to implement the CAT's provisions through regulation. See Pub. L. No. 105-277, div. G, § 2242, 112 Stat. 2681. The statute states that "[i]t shall be the policy of the United States not to expel, extradite, or otherwise effect the involuntary return of any person to a country in which there are substantial grounds for believing the person would be in danger of being subjected to torture, regardless of whether the person is physically present in the United States." Pub. L. No. 105-277, div. G, § 2242(a). That policy echoes the CAT's prohibitions. Convention Against Torture and Other Cruel,

Inhuman or Degrading Treatment or Punishment, Art. 3, Dec. 10, 1984, 1465 U.N.T.S. 85, 114.

Under the relevant regulations, two different kinds of CAT relief are available: deferral of removal and withholding of removal. See 8 C.F.R. 1208.16(c)(4). Those forms of relief are generally quite similar. Each provides mandatory protections for a noncitizen who can demonstrate that "it is more likely than not that he * * * would be tortured" in the country of removal. 8 C.F.R. 1208.16(c)(2); see 8 C.F.R. 1208.18(a)(1) (defining "torture" as "any act by which severe pain or suffering * * * is intentionally inflicted on a person * * * by, or at the instigation of, or with the consent or acquiescence of," a person acting in an "official capacity"). Each provides a noncitizen with protection from removal to the country where the torture would likely take place and permits him to be present in the United States. See 8 C.F.R. 1208.16; 8 C.F.R. 1208.17. And each entitles the noncitizen to apply for authorization to be employed in the United States. See 8 C.F.R. 274a.12(c)(18), 1208.17. It is, however, more difficult for the government to terminate withholding of removal than it is for the government to terminate deferral of removal. See, *e.g.*, 64 Fed. Reg. 8478, 8481-8482 (1999); 8 C.F.R. 1208.17(d)(1)-(3); 8 C.F.R. 1208.24(a)-(b), (f).

Statutory withholding of removal is also separately available (under somewhat different requirements) pursuant to 8 U.S.C. 1231(b)(3)(A), and that form of relief likewise provides mandatory protection from removal. See 8 U.S.C. 1231(b)(3)(A); 8 C.F.R. 1208.16(b). Statutory withholding of removal is a mechanism incorporated into U.S. law to comply with the obligations of the United States under the Refugee

Convention, which requires that "[n]o Contracting State shall expel or return ('refouler') a refugee in any manner whatsoever to the frontiers of territories where his life or freedom would be threatened on account of his race, religion, nationality, membership of a particular social group." *INS* v. *Stevic*, 467 U.S. 407, 416-417 (1984) (quoting United Nations Protocol Relating to the Status of Refugees, Nov. 6, 1968, 19 U.S.T. 6223, 6276) (internal quotation marks omitted).

Persons convicted of certain crimes are barred from seeking withholding of removal. See *Moncrieffe* v. *Holder*, 569 U.S. 184, 187 n.1 (2013). They are permitted to seek only deferral of removal. See 8 C.F.R. 1208.16(c)(4), (d)(2); *Moncrieffe*, 569 U.S. at 187 n.1.

b. Some noncitizens seek deferral or withholding of removal, often along with other relief, in removal proceedings under 8 U.S.C. 1229a—that is, in the very proceedings in which a removal order is entered in the first instance. Other noncitizens are placed into so-called "withholding-only proceedings," in which the *only* relief available is deferral or withholding of removal. In a withholding-only proceeding, a noncitizen cannot challenge an underlying removal order or request asylum or other forms of relief. See 8 C.F.R. 1208.31(e); 8 C.F.R. 1208.31(b)-(d); see also Pet. App. 32a-34a.

In either type of proceedings, entitlement to deferral or withholding of removal is decided by an immigration judge (IJ), with review of the IJ's decision available at the Board of Immigration Appeals (BIA). See, *e.g.*, 8 C.F.R. 1208.16(a). By regulation, the BIA may review an IJ's factual findings only for clear error, and the BIA is not entitled to make any factual find-

ings of its own. See, *e.g.*, 8 C.F.R. 1003.1(d)(3). Pursuant to Section 242 of the Immigration and Nationality Act, a noncitizen whose request for relief is rejected by the BIA may obtain judicial review by filing a petition for review of the BIA's decision in a federal court of appeals. See, *e.g.*, 8 C.F.R. 1208.18(e)(1); *Nasrallah* v. *Barr*, 140 S. Ct. 1683 (2020).

The government frequently seeks to remove noncitizens from the United States while their petitions for review are pending. In 2009, in *Nken* v. *Holder*, 556 U.S. 418 (2009), this Court adopted a four-part test to govern courts' adjudication of requests to stay removal. Under that test, courts are to assess the noncitizen's likelihood of success on the merits, irreparable injury to the noncitizen, injury to other parties, and the public interest. *Id.* at 434-436. In reliance on the government's representations, the Court explained that noncitizens "who are removed may continue to pursue their petitions for review, and those who prevail can be afforded effective relief by facilitation of their return, along with restoration of the immigration status they had upon removal." *Id.* at 435 (citing U.S. Br. 44).

In 2012, U.S. Immigration and Customs Enforcement (ICE) adopted a formal policy providing that under certain circumstances the government will "facilitate the return" of a noncitizen who was removed while his petition for review was pending. Pet. App. 36a. That policy, Immigration and Customs Enforcement Policy Directive 11061.1, is known as the "Return Directive."[1] As relevant here, the Return Directive

[1] The Return Directive is set forth in full at Pet. App. 36a. It is also available at https://www.ice.gov/doclib/foia/dro_policy_memos/11061.1_current_policy_facilitating_return.pdf.

states that the government will facilitate a noncitizen's return if he "prevails before the U.S. Supreme Court or a U.S. court of appeals" and (a) his "presence" in the United States "is necessary for continued administrative removal proceedings," and/or (b) he is ultimately granted immigration relief allowing him "to reside in the United States lawfully," including deferral of removal or withholding of removal under the CAT. Pet. App. 36a-37a (Return Directive §§ 2, 3.2); see *Del Cid Marroquin* v. *Lynch*, 823 F.3d 933, 939 (9th Cir. 2016).[2] "Facilitating" a removed noncitizen's "return" includes "parol[ing] the alien into the United States upon his or her arrival at a U.S. port of entry,"

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[2] The pertinent portion of the Return Directive states:

> Absent extraordinary circumstances, if an alien who prevails before the U.S. Supreme Court or a U.S. court of appeals was removed while his or her [petition for review (PFR)] was pending, *ICE will facilitate the alien's return to the United States if* either the court's decision restores the alien to lawful permanent resident (LPR) status, or *the alien's presence is necessary for continued administrative removal proceedings*. ICE will regard the returned alien as having reverted to the immigration status he or she held, if any, prior to the entry of the removal order and may detain the alien upon his or her return to the United States. If the presence of an alien who prevails on his or her PFR is not necessary to resolve the administrative proceedings, ICE will not facilitate the alien's return. However, *if, following remand by the court to the Executive Office for Immigration Review (EOIR), an alien whose PFR was granted and who was not returned to the United States is granted relief by EOIR or the Department of Homeland Security (DHS) allowing him or her to reside in the United States lawfully, ICE will facilitate the alien's return to the United States*.

Pet. App. 36a-37a (emphasis added).

even if the noncitizen is otherwise inadmissible. Pet. App. 37a; see *Del Cid Marroquin*, 823 F.3d at 939.[3]

As the Solicitor General's Office explained to this Court in a 2012 letter, the government adopted the Return Directive after discovering that the representation about return of removed noncitizens on which this Court had relied in *Nken* had overstated the effectiveness of the process for returning removed noncitizens to the United States. See Apr. 24, 2012 Ltr. from Michael R. Dreeben, *available at* https://www.justsecurity.org/wp-content/uploads/2018/05/SG_Letter-nken-v-holder.pdf. The Return Directive is intended "to ensure that aliens who prevail on judicial review are able to timely return to the United States," as the government had promised this Court in *Nken*. *Id.* at 4.

2. This case arises from Mr. Garcia Marin's application for deferral of removal under the CAT. Mr. Garcia Marin is a native and citizen of Mexico and has continuously resided in the United States since 2004. He has three children who are United States citizens. Pet. App. 8a.

a. After DHS located Mr. Garcia Marin and reinstated a prior removal order against him, he expressed that he was afraid of removal to Mexico. Pet. App. 8a. An asylum officer interviewed Mr. Garcia Marin, found that he had a credible fear of torture, and placed

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[3] The government maintains a "Frequently Asked Questions" page stating that "removal will not affect your right to continue to pursue your case before the court of appeals" and "does not preclude the court of appeals that is currently reviewing your petition for review from deciding your case." *FAQs: Facilitating Return for Lawfully Removed Aliens*, U.S. Immigration and Customs Enforcement (last visited Feb. 25, 2023), https://www.ice.gov/remove/facilitating-return.

him in withholding-only proceedings. Pet. App. 2a. Due to prior criminal convictions, Mr. Garcia Marin is not eligible for withholding of removal, but he is eligible for deferral of removal under the CAT. Pet. App. 2a-3a.

In proceedings before an IJ, Mr. Garcia Marin testified that he was afraid that the Sinaloa drug cartel would torture and kill him upon his removal to Mexico. Pet. App. 7a. He explained to the IJ that he had previously assisted DHS with a sting operation against a drug dealer with ties to the cartel. After the operation failed, he received several phone calls from the dealer's brother, who is a high-ranking member of the cartel, threatening to kill him. Pet. App. 8a. Mr. Garcia Marin also submitted reports explaining that the Sinaloa cartel is one of the oldest and most powerful drug trafficking organizations in Mexico. The reports described the cartel's extensive history of brutal violence and bribing government officials—most infamously when it orchestrated an escape for its former leader "El Chapo" from a Mexican maximum-security prison. Pet. App. 12a-13a; see, *e.g.*, June S. Beittel, Cong. Rsch. Serv., R41576, *Mexico: Organized Crime and Drug Trafficking Organizations* 24-26 (2022), https://sgp.fas.org/crs/row/R41576.pdf. The government did not offer any evidence of its own or contest Mr. Garcia Marin's cooperation in the DHS sting operation.

The IJ granted Mr. Garcia Marin's application for deferral of removal under the CAT. Based on Mr. Garcia Marin's testimony and the uncontested documentary evidence, the IJ found as fact that "there is a substantial risk, or that it is more likely than not, that

[Mr. Garcia Marin] will be tortured by the Sinaloa cartel, with the acquiescence of the Mexican government." Pet. App. 14a.

The IJ made a number of subsidiary factual findings in support of that conclusion. The IJ found that Mr. Garcia Marin "testified credibly[,] and with detail, about his interactions with the Department of Homeland Security to conduct undercover drug buys." Pet. App. 11a. The IJ found that the threatening phone calls indicated that the Sinaloa cartel knew of Mr. Garcia Marin's identity and actions. Pet. App. 11a-12a. Finally, the IJ found that the Sinaloa cartel had a long track record of brutality and that "government corruption by criminal organizations remains a pervasive problem" in Mexico. Pet. App. 11a-13a.

b. The BIA reversed. The BIA did not conclude that any of the IJ's factual findings were clearly erroneous. Instead, the BIA conducted its own review of the facts and stated that Mr. Garcia Marin "has not demonstrated that it is more likely than not, or that there is a substantial risk, that he would be tortured following his removal to Mexico." Pet. App. 16a.

c. i. Mr. Garcia Marin filed a petition for review of the BIA decision in the Seventh Circuit and sought a discretionary stay of removal from DHS. While the petition for review was pending, DHS denied Mr. Garcia Marin's request for a stay and removed him to Mexico. Pet. App. 2a. Mr. Garcia Marin's counsel did not learn of his removal until after it had occurred.

After removing Mr. Garcia Marin, the government argued that the removal rendered moot any appellate

review of the BIA's decision. Pet. App. 4a. The government failed to mention the Return Directive, which governs its treatment of removed noncitizens who subsequently prevail in a court of appeals on a petition for review of the agency's decision on CAT or other immigration-related relief. See U.S. C.A. Br. 11-21. Mr. Garcia Marin responded that the petition for review was not moot, noting that if he prevailed "he could * * * seek readmission to the United States." Pet. C.A. Reply Br. 4.

Notably, the government did not dispute that the BIA failed to properly apply the clear-error standard of review to the IJ's factual findings. Instead, the government affirmatively *conceded* that, unless the court of appeals deemed the petition for review to be moot, the court should vacate the BIA's decision denying Mr. Garcia Marin CAT relief and remand the case to the agency for further proceedings. U.S. C.A. Br. 21-22.

ii. The Seventh Circuit deemed Mr. Garcia Marin's petition for review to be moot and dismissed the petition. Pet. App. 2a.

The court of appeals held that "a petition for review of a decision in a withholding-only proceeding is mooted by the alien's removal." Pet. App. 6a. The court asserted that its holding is consistent with decisions of the Fifth and Ninth Circuits. Pet. App. 6a (citing *Mendoza-Flores* v. *Rosen*, 983 F.3d 845, 847-848 (5th Cir. 2020), and *Kaur* v. *Holder*, 561 F.3d 957, 959 (9th Cir. 2009)); but see *Del Cid Marroquin* v. *Lynch*, 823 F.3d 933, 936 (9th Cir. 2016).

The court of appeals based its holding on the premise that a petitioner in withholding-only proceedings is

not challenging an immigration "order with ongoing legal consequences that could be remedied by a favorable decision" from the court. Pet. App. 6a. Noting that Mr. Garcia Marin did not challenge his underlying removal order or his inadmissibility to the United States, the court of appeals stated that "a ruling in Garcia Marin's favor" as to entitlement to deferral of removal under the CAT "will not unwind his removal order, enable him to seek readmission, or have any other consequence beyond the limited form of relief at issue in the proceedings before the agency." Pet. App. 6a. Because Mr. Garcia Marin "sought only deferral of removal under the Convention and has already been removed," the court concluded that it could not "grant any effectual relief even if" it found "an error in the BIA's decision." Pet. App. 6a; see Pet. App. 5a (stating that "the action that Garcia Marin sought to prevent has already taken place"); Pet. App. 5a-6a (stating that a noncitizen's petition for review of a removal order or an order denying asylum is not mooted by removal, on the ground that wiping out a removal order or obtaining a grant of asylum would enable the successful petitioner to seek readmission to the United States).

iii. Mr. Garcia Marin timely petitioned for rehearing en banc. He explained that, if he prevailed in the Seventh Circuit, he would be eligible to return to the United States under the Return Directive. Pet. for Reh'g 7-8. The Seventh Circuit denied the petition. Pet. App. 18a.

REASONS FOR GRANTING THE PETITION

A. The courts of appeals are deeply divided over whether removal moots judicial review of a challenge to a denial of deferral or withholding of removal in withholding-only proceedings.

This Court's review is necessary to address an intractable divide between the courts of appeals. On one side, the court below and one other court of appeals hold that removal of a noncitizen from the United States moots judicial review of denial of deferral of removal under the CAT or denial of other remedies in withholding-only proceedings.[4] On the other, courts of appeals have concluded that they can grant effectual relief to removed noncitizens seeking deferral or withholding of removal in withholding-only proceedings and that removal therefore does not moot such a noncitizen's petition for review.[5]

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[4] Those remedies are deferral of removal under the CAT, withholding of removal under the CAT, and statutory withholding of removal. See p. 6, *supra*.

[5] To the extent that a noncitizen's petition for review of denial of relief in withholding-only proceedings is not mooted by removal because of the possibility that the government would facilitate the noncitizen's return to the United States if the petition were successful, a noncitizen's challenge to a denial of deferral or withholding of removal *outside* of withholding-only proceedings is also not mooted by removal, because facilitation of return to the United States is equally possible for such a noncitizen. However, noncitizens in the latter category are differently situated as to a mootness analysis in at least one respect: because they bring claims for deferral or withholding of removal *in their removal proceedings*, see p. 6, *supra*, a successful petition for review on one or both of those grounds that ends in vacatur of the agency's adverse

1. In the decision below, the Seventh Circuit held that a petition for review challenging an agency decision in withholding-only proceedings—here, denial of deferral of removal under the CAT—becomes moot when the petitioner is removed from the United States. See Pet. App. 5a-6a. The court acknowledged that a challenge to "a removal order or a denial of asylum" does not become moot when the petitioner is removed, on the ground that those orders carry collateral consequences that may be reversed if the petition for review is successful. *Ibid.* But the court concluded that withholding-only proceedings are different, because prevailing in a court of appeals on a petition for review in such proceedings cannot disturb the underlying removal order or result in a grant of asylum and would not otherwise change the petitioner's legal status so as to authorize him to return to the United States. See *ibid.*

The Fifth Circuit held the same thing in *Mendoza-Flores* v. *Rosen*, 983 F.3d 845 (5th Cir. 2020). There, the petitioner, like Mr. Garcia Marin, was placed in withholding-only proceedings, denied deferral of removal under the CAT (as well as statutory withholding of removal), and removed. See *id.* at 846. The Fifth Circuit dismissed the petition for review, holding that a claim for relief in a withholding-only proceeding, including a claim for deferral of removal under the CAT,

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decision also, as a technical matter, results in vacatur of the removal order. That provides an *additional* basis for such noncitizens to contend that removal does not moot their challenges to denial of deferral or withholding of removal. For that reason, the disagreement among the circuits as to whether removal moots a petition for review centers around cases in which the noncitizen is in withholding-only proceedings, which do not involve the issuance or validity of a removal order.

is moot once a noncitizen has been removed from the United States. See *id.* at 847-848. Because the petitioner did not challenge the underlying removal order against him and was thus "inadmissible to the United States," the Fifth Circuit concluded that granting him deferral or withholding of removal would not be effective relief because it would not permit him to reenter the country. *Ibid*.

2. The Ninth Circuit has reached exactly the opposite conclusion, holding that removal does not moot a petition for review challenging only denial of deferral of removal under the CAT or other withholding-only relief. If this case had arisen in the Ninth Circuit, that court would not have dismissed Mr. Garcia Marin's petition for review as moot; rather, the court would have decided the petition on the merits.

In *Del Cid Marroquin* v. *Lynch*, 823 F.3d 933 (9th Cir. 2016), the Ninth Circuit held that the availability of parole under the Return Directive makes it possible for a removed noncitizen seeking deferral of removal under the CAT to return to the United States and for the court to grant effectual relief. See *id.* at 936. *Del Cid Marroquin* and this case have virtually identical facts. Like Mr. Garcia Marin, Mr. Del Cid Marroquin was ineligible for all forms of relief except deferral of removal under CAT, was placed in withholding-only proceedings, was inadmissible under the removal order against him, and was removed before the court of appeals could decide his petition for review. See *id.* at 934. Under those circumstances, granting Mr. Del Cid Marroquin CAT protection would not disturb the reentry bar against him and would leave him inadmissible to the United States. See *id.* at 936. But the gov-

ernment conceded that if Mr. Del Cid Marroquin's appeal succeeded then the government would "facilitate [his] return" and parole him into the United States under the Return Directive. *Id.* at 936.[6] On that basis, the Ninth Circuit determined that "while granting Del Cid Marroquin's petition will not guarantee his return to the United States, it will at least increase his chances of being allowed to do so." *Id.* That increase in the probability of return led the Ninth Circuit to conclude that it could grant effectual relief and that the appeal was not moot. See *id.*

The Seventh Circuit incorrectly concluded in this case that its contrary holding was consistent with the approach taken by the Ninth Circuit, having neglected to account for *Del Cid Marroquin*. The Seventh Circuit stated that its decision reached the same conclusion as *Kaur* v. *Holder*, 561 F.3d 957 (9th Cir. 2009), which predates *Del Cid Marroquin* and the Return Directive's issuance in 2012. Pet. App. 6a. But *Del Cid Marroquin* cites *Kaur* and explains why it is no longer good law. See 823 F.3d at 939-940. And the Ninth Circuit has consistently applied *Del Cid Marroquin* since that decision issued, holding repeatedly that removal does not moot judicial review of a noncitizen's claim for deferral or withholding of removal because the Return Directive would allow for return to the United States if the petition for review were successful. See, *e.g.*, *Amaral-Lopez* v. *Garland*, 2022 WL 2287558, at *1 (9th Cir. June 24, 2022); *Corona Moreno* v. *Garland*, 860 F. App'x 486, 487 (9th Cir. 2021); *Chiluvane* v. *Barr*, 839 F. App'x 38, 40 n.2 (9th Cir. 2020).

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[6] The Ninth Circuit appended to its opinion a brief filed by the government setting forth its position in detail. See *id.* at 937-941.

3. The Tenth Circuit agrees with the Ninth Circuit that removal does not moot a petition for review of denial of deferral of removal under the CAT. The noncitizen in *Igiebor* v. *Barr*, 981 F.3d 1123 (10th Cir. 2020), was not in withholding-only proceedings. But the Tenth Circuit's reasoning dictates that it would necessarily reach the same result as to a removed noncitizen in withholding-only proceedings challenging a denial of deferral of removal under the CAT (or denial of some other form of withholding-only relief).

In *Igiebor*, the noncitizen conceded in his removal proceedings under 8 U.S.C. 1229a that he was removable and—like Mr. Garcia Marin—sought only deferral of removal under CAT. See *id.* at 1125. The noncitizen was removed while his petition for review was pending before the court of appeals and was inadmissible due to his prior criminal history. See *id.* at 1126. The government conceded that "the provisions of ICE Policy Directive 11061.1 render it not just possible, but instead likely," that "ICE would facilitate Igiebor's return to the United States should he prevail in any meaningful way in the instant appeal." *Id.* at 1129. Relying heavily on *Del Cid Marroquin*, the Tenth Circuit held that the Return Directive made it possible to grant effectual relief and that the petition for review was not moot. See *id.* at 1130; see also *ibid.* (noting that the possibility of return under the Return Directive for the noncitizen before the Tenth Circuit was even stronger than it was for the noncitizen in *Del Cid Marroquin*).

That reasoning necessarily dictates, in a way that would bind a future Tenth Circuit panel, that removal of a noncitizen who petitions for review of denial of relief in withholding-only proceedings would not moot

the petition. The Tenth Circuit leaned on *Del Cid Marroquin*, which *did* involve a noncitizen in withholding-only proceedings. And the Tenth Circuit did not suggest that the petition for review before it was saved from mootness by anything specific to the fact that the matter arose in removal proceedings under 8 U.S.C. 1229a. See n.5, *supra*. A noncitizen in withholding-only proceedings who succeeds in challenging a denial of deferral or withholding of removal under the CAT is also covered by the Return Directive—the only basis on which the Tenth Circuit decided that mootness did not exist.[7]

4. The sharp divide between the courts of appeals on the mootness question will not resolve on its own. Circuits on both sides of that divide continue to apply their conflicting mootness holdings in cases in which petitioners who challenge denial of deferral or withholding of removal are removed before their petitions for review can be decided. See, *e.g.*, *Amaral-Lopez*, 2022 WL 2287558, at *1; *Brenes-Lezama* v. *Garland*, 2021 WL 5409242, at *2-3 (5th Cir. Nov. 18, 2021). And Mr. Garcia Marin pointed out that split in authority to the Seventh Circuit in his petition for rehearing—which the Seventh Circuit denied.

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[7] *Pieschacon-Villegas* v. *Attorney General*, 671 F.3d 303 (3d Cir. 2011), *abrogated on other grounds by Nasrallah* v. *Barr*, 140 S. Ct. 1683 (2020), is analogous to *Igiebor*. The noncitizen in that case was not in withholding-only proceedings; rather, in his removal proceedings, he conceded removability and sought only deferral of removal under the CAT. The court of appeals concluded that removal did not moot the petition for review of the BIA's denial of protection because removal carried collateral consequences; the court assumed that a grant of CAT relief could redress at least some of those consequences. See *id.* at 309 n.5.

Noncitizens should not be subject to such disparate results based merely on the happenstance of which circuit their cases arise in. The evident and intractable disagreement between the courts of appeals warrants this Court's review.

B. The decision below is wrong.

1. a. Contrary to the decision below, noncitizens removed before final adjudication of their petitions for review challenging only denial of deferral or withholding of removal in withholding-only proceedings retain a concrete interest in the outcome of the judicial process because prevailing in court would make it more likely that they can return to the United States. Accordingly, their petitions for review are not mooted by removal. See, *e.g.*, *Del Cid Marroquin*, 823 F.3d at 941.

A case "becomes moot only when it is impossible for a court to grant any effectual relief whatever to the prevailing party." *Chafin* v. *Chafin*, 568 U.S. 165, 172 (2013). Critically, a case is not moot even if relief is far from certain: "As long as the parties have a concrete interest, *however small*, in the outcome of the litigation, the case is not moot." *Ibid.* (emphasis added and citation omitted); see generally *Uzuegbunam* v. *Preczewski*, 141 S. Ct. 792, 796 (2021).

The concrete interest at stake here is the ability to obtain refuge in the United States. The Return Directive provides that the government will, absent "extraordinary circumstances," "facilitate the * * * return" of a noncitizen who "was removed" while his petition for review under Section 242 of the Immigration and Nationality Act was pending and who "prevails be-

fore the U.S. Supreme Court or a U.S. court of appeals," so long as his "presence" in the United States "is necessary for continued administrative removal proceedings" or he is ultimately granted relief allowing him "to reside in the United States lawfully." Pet. App. 36a-37a (Return Directive §§ 2, 3.2); see pp. 7-8 & n.2, *supra* (setting forth key provision of Return Directive in full); *Del Cid Marroquin*, 823 F.3d at 939; *FAQs: Facilitating Return for Lawfully Removed Aliens*, U.S. Immigration and Customs Enforcement (last visited Mar. 5, 2023), https://www.ice.gov/remove/facilitating-return.

The Return Directive is applicable to a noncitizen who challenges in a federal court of appeals the BIA's denial of deferral or withholding of removal. Such a challenge is raised via a petition for review under Section 242. See, *e.g.*, 8 C.F.R. 1208.18(e)(1). Accordingly, if the noncitizen prevails before a court of appeals after being removed and either (a) is needed in the United States for continued immigration proceedings, or (b) ultimately receives deferral or withholding of removal, thus entitling him to be lawfully present in the United States, then the government would facilitate his return to the United States under the Return Directive. See *Del Cid Marroquin*, 823 F.3d at 940 (recounting ICE position that a noncitizen "with a grant of CAT deferral protection is permitted to be present in the United States pursuant to the regulations implementing the CAT * * * and, as such, would be eligible for return under ICE Policy Directive 11061.1"); 8 C.F.R. 1208.17 (permitting noncitizen who has obtained deferral of removal under the CAT to be present in the United States); see also 8 C.F.R. 274a.12(c)(18) (permitting noncitizen granted deferral of removal to seek authorization to work in the United States).

The decision below placed great weight on the notion that Mr. Garcia Marin is inadmissible to the United States, see Pet. App. 5a-6a—but the fact that a noncitizen seeking deferral or withholding of removal may be otherwise inadmissible to the United States does not change the analysis. The Return Directive expressly provides that the government will, "if warranted, parole the alien into the United States upon his or her arrival at a U.S. port of entry." Pet. App. 37a. It is black-letter law that parole into the United States is not an "admission"; admissibility is thus not a requirement for parole. 8 U.S.C. 1182(d)(5)(A) ("parole of such alien shall not be regarded as an admission of the alien"); cf. *Jennings* v. *Rodriguez*, 138 S. Ct. 830, 837 (2018); *Shaughnessy* v. *United States ex rel. Mezei*, 345 U.S. 206, 215 (1953). As the government has explained to the Ninth Circuit, parole may be "warranted" where a noncitizen who wins a petition for review of a denial of CAT protection is inadmissible under the removal order against him. See *Del Cid Marroquin*, 823 F.3d at 935-936; see also *Igiebor*, 981 F. 3d at 1130 & n.2. Removed, inadmissible noncitizens are thus eligible for parole into the United States under the Return Directive.

Once a previously removed noncitizen who has obtained deferral or withholding of removal returns to the United States, that protection has further significant benefits. Such noncitizens are shielded from future removal to a country where they face likely persecution or torture and cannot be removed to a third country unless another country agrees to accept them,

which happens only rarely.[8] They may also receive authorization to work in the United States. See 8 C.F.R. 274a.12(c)(18), 1208.17. A court of appeals decision that orders or otherwise facilitates a grant of such relief therefore advances the noncitizen's interests in a very concrete way after the noncitizen returns to the United States under the Return Directive.

b. The circumstances of this case, in which Mr. Garcia Marin sought only deferral of removal under the CAT, illustrate concretely how a favorable decision on the merits by a court of appeals could result in effectual relief. First, if the Seventh Circuit were to consider the BIA's denial in this case on the merits, then that court surely would not let that denial stand. Indeed, the government conceded in its Seventh Circuit brief that if the BIA's decision is reviewed on the merits then it must be vacated, explaining that the BIA erred by overturning the IJ's grant of CAT relief despite failing to find that "the immigration judge's finding regarding the likelihood of torture was clearly erroneous." *Estrada-Martinez* v. *Lynch*, 809 F.3d 886, 895-896 (7th Cir. 2015); see U.S. C.A. Br. 21-22.

Second, in the wake of such a Seventh Circuit decision, Mr. Garcia Marin would likely obtain deferral of removal under the CAT. The IJ's prior grant of deferral of removal, which the BIA erroneously displaced, was based on a close examination of the factual record and the factual conclusion that the unusual circumstance of Mr. Garcia Marin's cooperation with the

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[8] See https://policycommons.net/artifacts/2207338/aic-nijc_fact-sheet_withholding-of-removal_october/2963700/.

U.S. government's investigation of a Mexican drug cartel makes it likely that he will face torture in Mexico. Pet. App. 10a-14a. The IJ found, for instance, that Mr. Garcia Marin credibly testified about working with the United States government and receiving phone calls from a high-ranking Sinaloa cartel member threatening to kill him for his actions. Pet. App. 11a-12a. The IJ also relied on documentary evidence describing the Sinaloa cartel's brutality, nationwide reach, and corrupt access to the highest levels of the Mexican government. Pet. App. 12a-14a. And the government did not dispute Mr. Garcia Marin's testimony regarding his assistance to the U.S. government. See Pet. App. 8a-10a. Because the IJ's "account of the evidence is plausible in light of the record viewed in its entirety," the BIA is barred from reversing the IJ even if the BIA "would have weighed the evidence differently." *Anderson* v. *City of Bessemer*, 470 U.S. 564, 574-575 (1985); see 8 C.F.R. 1003.1(d)(3). Without any evidence contradicting either Mr. Garcia Marin's testimony or the documentary evidence on which the IJ relied, the IJ's factual findings cannot possibly constitute clear error. See *Anderson*, 470 U.S. at 575-576; *Estrada-Martinez*, 809 F.3d at 895, 897.

Third, if either or both of those two things came to pass, the government would "facilitate" Mr. Garcia Marin's "return" under the Return Directive. Pet. App. 36a-37a (Return Directive §§ 2, 3.2); see *Del Cid Marroquin*, 823 F.3d at 935-936, 939-940. After a favorable decision on the merits by the court of appeals, Mr. Garcia Marin's presence would be necessary for continued immigration proceedings, so that his counsel would have access to him and he would be available

for additional testimony as needed. And after a favorable decision in his immigration proceedings that he is entitled to deferral of removal under the CAT, Mr. Garcia Marin would be entitled to remain lawfully in the United States, unless the danger abated or removal to a third country became possible, pursuant to federal regulations implementing the CAT. See 8 C.F.R. 274a.12(c)(18), 1208.17.

It is therefore not only possible but likely that Mr. Garcia Marin's appeal in this case could result in effectual relief to him, even though his petition for review does not challenge his underlying removal order. His appeal is not moot, and the court below was wrong to hold otherwise.

2. Notably, the government has repeatedly conceded in cases arising in courts of appeals across the country that removal does *not* moot petitions for review of a denial of deferral or withholding of removal. Those concessions underscore the error in the decision below.

For example, in *Del Cid Marroquin*, a case involving a noncitizen seeking deferral of removal under the CAT in withholding-only proceedings, the government conceded to the Ninth Circuit that "the possibility of the alien's parole into the United States pursuant to ICE Policy Directive 11061.1 [the Return Directive] defeats any claim of mootness." *Del Cid Marroquin*, 823 F.3d at 941. The government has made a similar argument in cases involving petitioners challenging denials of deferral or withholding of removal in numerous other circuits, including the Eighth, Tenth, and Eleventh Circuits. See *Igiebor*, 981 F.3d at 1129; *Yusuf* v. *Garland*, 8 F.4th 738, 743 n.2 (8th Cir. 2021);

Stewart v. *U.S. Att'y Gen.*, 776 F. App'x 573, 575 n.2 (11th Cir. 2019). In each instance, the court of appeals in question accepted the government's concession that success on a petition for review could smooth the way for return and ruled that removal does not moot a noncitizen's pending petition for review.

Of course, as this case illustrates, the government has not always been consistent. The government pressed the opposite position below, before the Fifth Circuit in *Mendoza-Flores*, and even (unsuccessfully) before the Ninth Circuit after *Del Cid Marroquin* was decided. See, *e.g.*, *Chiluvane*, 839 F. App'x at 40 n.2. The government also is currently pressing the mootness argument in other circuits, relying on the decision in this case. See, *e.g.*, Br. for Respondent Garland at 23-30, *Lopez-Sorto* v. *Garland*, No. 21-2017 (4th Cir. Nov. 21, 2022) (citing the Seventh Circuit's opinion in this case).

That inconsistency is inexplicable and troubling. Nothing about the facts of the cases in which the government has argued against the position it took in *Del Cid Marroquin* dictates that the mootness analysis should come out any differently than it did in that case; the petitioners in each case, including Mr. Garcia Marin, were identically situated to each other for purposes of a mootness analysis. Nothing about the Return Directive or any other federal immigration statute, regulation, or policy pertinent to the mootness analysis has changed over the time period in which the relevant cases arose. The government's immigration work in the federal courts of appeals is done by a single office at the Department of Justice, the Office of Immigration Litigation, and so the government should have

no practical difficulty maintaining a consistent position.

Moreover, the Return Directive itself exists because of a prior inconsistency in government approach to return of removed noncitizens who prevail on judicial review. The government made a statement to this Court in *Nken*, on which the Court expressly relied, that "[a]liens who are removed may continue to pursue their petitions for review, and those who prevail can be afforded effective relief by facilitation of their return, along with restoration of the immigration status they had upon removal." *Nken*, 556 U.S. at 435 (citing U.S. Br. 44). As the government explained in a letter filed in 2012, the government later lost confidence "that the process for returning removed aliens, either at the time its [*Nken*] brief was filed or during the intervening three years, was as consistently effective as the statement in its brief in *Nken* implied," and therefore found it "appropriate both to correct its prior statement to this Court and to take steps going forward to ensure that aliens who prevail on judicial review are able to timely return to the United States." Apr. 24, 2012 Ltr. from Michael R. Dreeben, at 4, *available at* https://www.justsecurity.org/wp-content/uploads/2018/05/SG_Letter-nken-v-holder.pdf. Those steps consisted primarily of the 2012 issuance of the Return Directive. See *ibid.* (describing the Return Directive). The history behind the Return Directive makes it especially critical that the government make the courts of appeals aware of the existence of that directive—which it failed to do in this case—and craft its mootness arguments with the directive fully in mind.

In any event, the fact remains that the government has explained to federal courts of appeals on

many occasions that it would be wrong to rule exactly the way that the court below ruled in this case. That formal acknowledgement of the correctness of the decisions on the other side of the circuit split is highly meaningful.

C. This case is an excellent vehicle for resolving a highly important question of law.

The question presented is also of great practical significance, and this case is an excellent vehicle for resolving that question.

1. The question presented is highly important to the administration of the immigration laws, for a variety of reasons.

First, the mootness rule adopted by the court below and by the Fifth Circuit creates perverse incentives for the government to remove as quickly as possible noncitizens who have sought only the types of remedies afforded in withholding-only proceedings and have lost before the agency, including before their 30-day window to file a petition for review has lapsed, thus depriving them of any opportunity for a federal court to decide whether the agency's denial of that relief is legally supportable. By mooting any petition for review, such removal would short-circuit merits review by the court of appeals; it also could prevent the court from taking the time needed to adjudicate a preliminary request for a stay of removal. See generally *Nken*, 556 U.S. at 421 ("[i]t takes time to decide a case on appeal").

That would, in turn, give the agency essentially free rein to make decisions on deferral or withholding of removal, even though courts of appeals regularly determine that the agency's decisions as to those forms

of relief are erroneous in some way and even though the human cost of those erroneous decisions is extremely high. Removal from the United States is a "'particularly severe penalty'" in and of itself, *Lee* v. *United States*, 137 S. Ct. 1958, 1968 (2017) (citation omitted), that "may result in the loss 'of all that makes life worth living,'" *Knauer* v. *United States*, 328 U.S. 654, 659 (1946) (citation omitted). A noncitizen who would have received deferral or withholding of removal if a court of appeals heard his case not only has been unjustly deprived of a right to that protection (and associated benefits relating to the right to work in the United States) but also faces a likelihood of *persecution or torture* in the country to which he has been removed. See, *e.g.*, 8 C.F.R. 274a.12(c)(18); 8 C.F.R. 1208.17; Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, Art. 3, Dec. 10, 1984, 1465 U.N.T.S. 85, 114.

Second, to the extent that a noncitizen is able to file and a court of appeals is able to adjudicate a request for a stay of removal before removal is actually carried out, the mootness rule adopted by the court below and by the Fifth Circuit effectively transforms every denial of a stay motion in a case involving deferral or withholding of removal into a final appellate adjudication—a result that is inconsistent with the approach for adjudicating stay requests adopted in *Nken* v. *Holder*, 556 U.S. 418 (2009). Under *Nken*, a noncitizen may seek a stay of removal from the court of appeals (or this Court) based on the four traditional criteria for a stay: likelihood of success on the merits; irreparable injury to the applicant; injury to other parties; and the public interest. See *id.* at 434-436. No one of those factors is dispositive. See *ibid.* As that test reflects, before this Court decided *Nken*, Congress

had eliminated automatic stays of removal pending judicial review, thereby expressing its understanding that judicial review of immigration orders may continue even after a noncitizen is removed. See *id.* at 424-425; see also, *e.g.*, *Zazueta-Carrillo* v. *Ashcroft*, 322 F.3d 1166, 1170-1171 (9th Cir. 2003), *as amended* (Apr. 25, 2003).[9]

But if removal moots a noncitizen's case for deferral or withholding of removal, then stay requests cannot be responsibly adjudicated in the manner that *Nken* envisioned. To avoid being divested of jurisdiction by its own denial of a stay, a court would need, as a practical matter, "to decide the merits of each petition for review challenging" a denial of such relief "when resolving a motion to stay removal." *Del Cid Marroquin*, 823 F.3d at 941. That essentially "abrogate[s] the stay standard" in *Nken*, which "requires the alien to make a strong showing of likelihood of success on the merits, but does not require him to actually win his case at the stay litigation phase." *Ibid.* And it dictates hasty judicial review of the agency's decisions, without the full briefing and consideration that is called for when deciding the weighty question of whether U.S. immigration laws and treaty obligations

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[9] As noted above, in *Nken*, this Court stated, in reliance on the government's representations, that the mere fact of removal does not constitute irreparable injury, because noncitizens "who are removed may continue to pursue their petitions for review, and those who prevail can be afforded effective relief by facilitation of their return." 556 U.S. at 435. When it later emerged that such facilitation of return did not regularly occur, the government temporarily ceased to argue in the courts of appeals that the fact of removal did not constitute irreparable injury; the government then issued the Return Directive to ensure that such facilitation does indeed take place. See pp. 9, 27, *supra*.

require extending protections to a noncitizen who claims that he is likely to be persecuted or tortured in another country. See *Nken*, 556 U.S. at 424-425.

Third, the flawed mootness approach at issue here tends to distort the rational, orderly functioning of the immigration laws in another way: it punishes removed persons who remain abroad to await a decision on a federal appeal rather than returning to the United States without authorization. A court can grant effectual relief to a person seeking deferral or withholding of removal while that person is present in the United States, even if that person was previously removed. Cf. *Ramirez-Ortez* v. *Barr*, 782 F. App'x 318, 321 (5th Cir. 2019) (unpub.) (removed noncitizen's claim is not moot based on the mere fact of removal if the noncitizen has returned to the United States without authorization). And noncitizens fearing death, torture, or persecution may well return to the United States, preferring detention or imprisonment in this country, see 8 U.S.C. 1326 (punishing unlawful reentry), over that maltreatment abroad. The Return Directive exists, at least in part, to erase the incentive for a noncitizen to undermine the enforcement of the immigration laws in that way simply to obtain judicial review of an agency denial of immigration relief.

Finally, a decision from this Court that removal does not moot challenges to denial of relief in withholding-only proceedings would also affect noncitizens seeking deferral or withholding of removal outside of such proceedings. Although those noncitizens have arguments against mootness not available to those in withholding-only proceedings, a holding that removal does not moot a challenge to denial of relief in with-

holding-only proceedings would necessarily also establish that removal does not moot a challenge to denial of such relief outside of those proceedings. See n.5, *supra*.

2. This case is the perfect vehicle for this Court to resolve the existing circuit split implicating all of those practical issues. As noted, the government *conceded* in this case that Mr. Garcia Marin is entitled to win his petition for review on the merits, because the BIA did not apply the proper standard of review to the IJ's decision and instead engaged in impermissible fact-finding. See pp. 12, 23, *supra*. Accordingly, the Seventh Circuit's decision on mootness—which is the only issue the court addressed in the decision below—is entirely dispositive of Mr. Garcia Marin's petition for review.

It is also likely dispositive of Mr. Garcia Marin's whole future, in a deeply fundamental way. Because Mr. Garcia Marin already prevailed before the IJ, who found as fact that he satisfies the requirements for deferral of removal under the CAT, if his petition for review is permitted to proceed then he is highly likely to be deemed entitled to CAT protection from the torture to which the IJ found he will probably be subject in Mexico. See pp. 23-25, *supra*. Mr. Garcia Marin also plainly qualifies to return to the United States under the Return Directive if he ultimately prevails in his immigration proceedings, and before then if his presence in the United States is needed in the wake of a favorable decision on his petition for review.

This Court should grant plenary review to resolve the highly important question of law presented by this case. In the alternative, and especially given the

United States' frequent concessions in numerous federal courts that, in light of the existence of the government's policy to facilitate return of removed noncitizens under relevant circumstances, removal does not moot an appeal of an agency decision in a withholding-only proceeding, summary reversal of the decision below is warranted.

CONCLUSION

The petition for a writ of certiorari should be granted or, in the alternative, the decision below should be summarily reversed.

Respectfully submitted,

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March 2023

APPENDICES

APPENDICES

APPENDIX A

United States Court of Appeals
for the Seventh Circuit.

Raul GARCIA MARIN, Petitioner,

v.

Merrick B. GARLAND, Attorney General of the United States, Respondent.

No. 20-3393

Argued September 22, 2021

Decided July 29, 2022

Before SYKES, Chief Judge, and FLAUM and BRENNAN, Circuit Judges

Opinion

SYKES, Chief Judge.

Raul Garcia Marin, a native and citizen of Mexico, has a long history of illegal entry and removal from the United States. His most recent removal order was issued in 1997; he was removed the next year. But he repeatedly reentered and returned to Mexico in the years that followed and has lived in this country continuously and illegally since 2004. In 2019 the Department of Homeland Security ("DHS") located him in prison and reinstated the 1997 removal order.

Garcia Marin then applied for deferral of removal under the Convention Against Torture. After an asylum officer issued a favorable "reasonable fear" determination, he was placed in "withholding only" proceedings before an immigration judge. The judge granted deferral of removal, but the Board of Immigration Appeals ("BIA" or "the Board") reversed and ordered him removed pursuant to the reinstated 1997 order.

Garcia Marin petitioned for review but did not seek a stay of removal from this court. His request for an administrative stay from DHS was denied, and he was removed from the United States while his case has been before us. Because he seeks only deferral of removal in a withholding-only proceeding, his removal moots his claim for relief. We therefore dismiss the petition for review.

I. Background

Garcia Marin entered the United States illegally as a child in 1988 and was removed that same year. He illegally reentered sometime thereafter, was ordered removed in 1997, and was removed to Mexico in 1998. He illegally reentered, returned to Mexico, and reentered again—most recently in 2004. He remained in the United States after that reentry, accumulating a criminal record that includes convictions for residential burglary, domestic battery, illegal firearm possession, and four convictions for drunk driving.

In 2019 DHS located Garcia Marin in an Illinois prison and reinstated the 1997 order of removal. Because Garcia Marin has been convicted of residential burglary, an aggravated felony, he is inadmissible for 20 years. 8 U.S.C. § 1182(a)(9)(A)(i). The aggravated felony conviction also bars him from seeking withholding of removal under the Immigration and Nationality Act or the Convention Against Torture. *Id.* § 1231(b)(3)(B).

Garcia Marin sought deferral of removal under the Convention—the only form of relief potentially available to him. An asylum officer determined that he had a reasonable fear of torture and placed him in withholding-only proceedings before an immigration judge. A "withholding only" proceeding is a procedural track initiated by a reasonable-fear interview in which the

applicant may seek only withholding or deferral of removal (deferral being the more limited form of relief available to those who are ineligible for withholding) under the Immigration and Nationality Act or the Convention Against Torture. 8 C.F.R. § 1208.31(e).

To obtain deferral of removal under the Convention, Garcia Marin had the burden to establish that it is more likely than not that he would be tortured by or with the acquiescence of government officials if removed to Mexico. *Id.* §§ 1208.16(c)(4), 1208.18(a)(1); *Rodriguez-Molinero v. Lynch*, 808 F.3d 1134, 1135, 1138–39 (7th Cir. 2015). He argued that he would likely be subject to torture in Mexico by the Sinaloa cartel with the acquiescence of public officials.

The immigration judge heard his testimony, found him credible, and concluded that he had satisfied his burden. She first noted that Garcia Marin would be at risk of torture from the Sinaloa cartel because of his cooperation with DHS in a planned drug-sting operation targeting the organization. This risk was underscored, she ruled, by a threatening call that he had received from a high-ranking cartel member. She then recognized the wide reach of the Sinaloa cartel in Mexico and the extensive history of corrupt cooperation between the cartel and government officers. Accordingly, she determined that Garcia Marin would face a significant risk of torture with the acquiescence of Mexican officials and granted deferral of removal.

The BIA reversed. It rejected the immigration judge's conclusions that Garcia Marin faced a significant risk of torture, noting that he had no involvement with the Sinaloa cartel and that the planned sting operation did not actually occur. The Board also determined that certain facts, such as the threatening call from the cartel member, were insufficient to establish a significant likelihood of torture. On this basis the

Board found that Garcia Marin had not met his burden of proof under the Convention, vacated the immigration judge's decision, and ordered him removed to Mexico pursuant to the reinstated 1997 order.

Garcia Marin petitioned for review, relying on *Rodriguez-Molinero* and arguing that the Board misapplied the clear-error standard. He sought a discretionary stay of removal from DHS under 8 C.F.R. § 241.6 while he litigated his petition. But he did not move for a stay in this court. As a result, when DHS denied his stay request, he was removed to Mexico. The Attorney General moved to dismiss the petition as moot, and Garcia Marin filed a response in opposition. We issued an order indicating that we would take the motion with the case and directed the parties to address the jurisdictional question in their briefs.

II. Discussion

We begin, as we must, with the question of mootness. Federal courts have jurisdiction to resolve only live cases and controversies. *See* U.S. Const. art. III, § 2, cl. 1. A live case or controversy must exist throughout the course of the litigation. *Arizonans for Off. Eng. v. Arizona*, 520 U.S. 43, 67 (1997). Mootness doctrine implements this rule by limiting our jurisdiction to disputes in which we may grant effectual relief to a party with a personal interest in the action. *See Uzuegbunam v. Preczewski*, 141 S. Ct. 792, 796 (2021). Accordingly, if developments make it impossible for us to grant relief in a case, then we must dismiss it as moot. *Meza Morales v. Barr*, 973 F.3d 656, 660 (7th Cir. 2020). In the context of removal, we have applied this rule to hold that an alien's removal while his petition for review is pending moots the case unless the order at issue carries collateral legal consequences. *Peralta-Cabrera v. Gonzalez*, 501 F.3d 837, 842–43 (7th Cir. 2007).

Garcia Marin's 1997 removal order is not before us. His petition for review concerns only the BIA's ruling reversing the immigration judge's grant of deferral of removal under the Convention Against Torture. Garcia Marin did not ask us to stay his removal during the pendency of his petition for review. So when DHS denied his request for a discretionary administrative stay, he was removed from the United States.

That moots the petition for review. Garcia Marin is inadmissible by virtue of his unchallenged removal order and his criminal record. So even if we were to find an error in the BIA's decision reversing the immigration judge, the action that Garcia Marin sought to prevent has already taken place, and there are no possible collateral legal consequences.

It is important to distinguish an application for relief under the Convention Against Torture in a withholding-only proceeding like Garcia Marin's from a proceeding that also challenges a removal order or a denial of asylum. We have held that an already-removed alien may challenge his removal order if it also restricts readmission to the United States. *Id.* at 843. In *Peralta-Cabrera* we noted that a bar on readmission stemming from a removal order is a collateral consequence that keeps the controversy live and allows effectual relief. We have also permitted a removed alien's challenge to a denial of deferral of removal as part of a package of claims that includes review of an asylum decision. *See Singh v. Holder*, 720 F.3d 635, 638 (7th Cir. 2013). In *Singh* we noted that a live controversy remained because it would be possible for the petitioner to seek readmission on remand. *Id.* (citing *Peralta-Cabrera*, 501 F.3d at 842–43).

However, a petition for review by an already-removed alien seeking *only* deferral of removal under the Convention Against Torture does not present the same

opportunity for additional relief. When an alien enters withholding-only proceedings and seeks solely to defer removal under the Convention, he does not challenge an order that carries collateral legal consequences. Unlike *Peralta-Cabrera* and *Singh*, a ruling in Garcia Marin's favor will not unwind his removal order, enable him to seek readmission, or have any other consequence beyond the limited form of relief at issue in the proceedings before the agency. Because Garcia Marin sought only deferral of removal under the Convention and has already been removed, we cannot grant any effectual relief even if we find an error in the BIA's decision.

Peralta-Cabrera and *Singh* presented claims that included a challenge to an order with ongoing legal consequences that could be remedied by a favorable decision from us. Not so here. We therefore join our sister circuits in holding that a petition for review of a decision in a withholding-only proceeding is mooted by the alien's removal. *See Mendoza-Flores v. Rosen*, 983 F.3d 845, 847–48 (5th Cir. 2020); *Kaur v. Holder*, 561 F.3d 957, 959 (9th Cir. 2009). Garcia Marin's removal moots his petition for review of the BIA's decision rejecting his application for deferral of removal. Accordingly, the petition must be dismissed.

DISMISSED

APPENDIX B

UNITED STATES DEPARTMENT OF JUSTICE
EXECUTIVE OFFICE FOR IMMIGRATION
REVIEW IMMIGRATION COURT

CHICAGO, ILLINOIS

A075-818-976

In the Matter of

Gaul GARCIA MARIN,

Applicant.

IN WITHHOLDING-ONLY PROCEEDINGS

Date: April 21, 2020

APPLICATIONS:

8 C.F.R. § 1208.17 Deferral of Removal under the Convention Against Torture

DECISION OF THE IMMIGRATION JUDGE

I. BACKGROUND

Applicant is a native and citizen of Mexico who was last ordered removed from the United States on November 20, 1998. Ex. 1. On August 12, 2019, the Department of Homeland Security issued a Notice of Intent to Reinstate a Prior Removal Order, and Applicant expressed a fear of returning to Mexico. *Id.* After an interview to assess his fear, his case was referred to the Immigration Court. *Id.* On November 12, 2019, he filed an application for protection under the Convention Against Torture. Ex. 2. The Court conducted a hearing on the merits of the application on April 2, 2020. For the reasons set forth herein, the Court GRANTS the application for deferral of removal under the Convention Against Torture.[1]

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[1] All parties agree that Applicant is ineligible for withholding of removal under the INA and the Convention Against Torture,

II. CLAIM AND EVIDENCE PRESENTED

Applicant testified that he is a 43 year old native and citizen of Mexico who has been in the United States since 2004. He testified that he is not married, but that he has three United States citizen children. He testified that he is from Puebla, Mexico. He said his parents live in the United States, and they are United States citizens.

Applicant testified that he is afraid to go back to Mexico because he worked with the Department of Homeland Security in March 2015, for about a month and a half, to apprehend a Mexican drug trafficker. He said agents from the Department of Homeland Security approached him and explained that they could reinstate his earlier deportation order, but offered to "help him with his immigration status" if he helped them arrange "some drug deals." He said he agreed to help the agents, he "started calling people," and he eventually set up an arrangement for a drug buy with Roberto, an acquaintance from high school. Applicant testified that he had known Roberto since they were in high school together, and that he had occasionally seen him around town.

Applicant said the agents were present while he made the phone calls, and they bugged his phone so they could hear the arrangements, and he said they "recorded everything." He said the agents set him up with a black Cadillac with $30,000 cash on the front seat, and they showed him a secret compartment in the car where he could store the drugs after he purchased them. He said he drove the car to a Portillo's restaurant parking lot, and he watched Roberto pull up into the parking lot. He said Roberto seemed "spooked," and called Applicant and directed him to follow him, which Applicant did. Applicant

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based on his criminal history.

said they went to an apartment parking lot, and when Roberto asked Applicant to come into the apartment, the agents told him, through his phone, to abort the deal, and Applicant drove away.

Applicant testified that after that failed drug buy, the agents gave him a recording device and asked him to arrange another deal. He said he went to Roberto's house, but Roberto did not want to arrange a deal. Applicant testified that in the months thereafter, he started receiving calls from Roberto's brother, Juan, in Mexico. Juan invited Applicant to visit him in Mexico to "have fun." Applicant testified that he knew both Roberto and Juan, personally. Applicant testified that, at the beginning, Juan's calls were friendly, and not threatening, and Applicant just tried to put Juan off, because he "had a feeling that something was not right." After that, Applicant said, he did not see Roberto again.

Applicant testified that he "lost contact" with the agents when he moved from Schaumberg to Arlington Heights in 2015. He said he next encountered Department of Homeland Security agents when he was put in immigration proceedings in 2018. He said he tried to talk to the agents about the work he had done for them after he was detained, but that he was nervous to do so. Applicant testified that he had worked several other cases with the Department prior to the 2015 incident, and, at one point, they told him they were going to "put him on payroll."

After he moved to Arlington Heights in 2015, Applicant said, Juan called him and told him that he knew Applicant was trying to "set up" Roberto, and that he was going to kill Applicant. He said Juan threatened him on the phone again in October 2018, when Juan, sounding drunk, again told Applicant that he knew Applicant was trying to "fuck him over," and that he was "going to kill him."

Applicant testified that Juan will kill him if he goes back to Mexico. He testified that Juan lives in Durango, and that he is a "high-ranking member of the Sinaloa cartel," according to Roberto. Applicant testified that Roberto regularly bragged that Juan is a "big shot." Applicant testified that he is "pretty sure" Juan is still a member of the cartel, based on his high-ranking status. Applicant testified that Juan will find him "anywhere" in Mexico, and that he may not even be safe in the United States. Applicant testified that Department of Homeland Security agents told him that Robert is at large in the United States.

Applicant testified that he has not heard anything from Juan since 2018, and he has not received any other threats from Mexico since then. Applicant said Juan will find him in Mexico if he is deported because he has "money and power." Applicant testified that he does not believe that the Mexican government will help him because "these organizations pay a lot of money" to the government. He testified that he will be a target because he is a "US informant." Applicant testified in 2015, during the time that he was trying to organize a deal for the Department of Homeland Security, Roberto, told him about how Juan and the cartel had the Mexican government "in their pocket."

On cross-examination, Applicant testified that he worked for the Department on three other cases, trying to set up drug deals. He testified that he has not testified as a witness in a grand jury or in court, and that he does not know if he is registered as an informant, but her reiterated that, at one point, the agents said they wanted to "put him on payroll."

III. ANALYSIS

The Court grants Applicant's request for protection under the Convention Against Torture.

As a preliminary matter, the Court finds that

Applicant has testified credibly and with detail, about his interactions with the Department of Homeland Security to conduct undercover drug buys, with the belief that the Department would help him remediate his immigration problems. INA § 208(b)(l)(B)(iii).

Further, the Court finds that Respondent has demonstrated that there is a substantial risk, or that it is more likely than not, that he will be tortured with the Mexican government's acquiescence. 8 C.F.R. § 1208.l6(c); *Rodriguez-Molinero v. Lynch,* 808 F.3d 1134, 1136 (7th Cir. 2015). To that end, the Court notes that the instant case is similar to *Rodriguez-Molinero v. Lynch.* 808 F.3d 1134, 1139 (7th Cir. 2015). There, the Seventh Circuit remanded the petitioner's case to the agency, after determining that he had demonstrated eligibility for protection under the Convention Against Torture because of, *inter alia,* his involvement in drug trafficking with a Mexican cartel and his cooperation with law enforcement entities in the United States. 808 F.3d 1134, 1137 (7th Cir. 2015). Here, Respondent also cooperated with law enforcement authorities to apprehend a player in a large drug trafficking operation. That Roberto and Juan were not small-time dealers is clear from the amount of money-- $30,000-- the Department of Homeland Security provided to Respondent for the controlled buy. One point of divergence from the facts in *Rodriguez-Molinaro* is that there, it was unclear whether the Zetas actually knew that the petitioner had informed for the United States government. *Rodriguez-Molinero,* 808 F.3d at 1136 ("The Zetas may not know that he has informed against them, but they have only to read the opinions of the immigration judge and the Board of Immigration Appeals to discover it"). Here, Juan, a high-ranking member of the Sinaloa cartel, called Respondent from Mexico, and told him that he knew that Respondent was working with the Department

to trap Roberto in a drug transaction.

Also as in *Rodriguez-Molinaro,* the documentary record here makes clear the power, control and national reach of the Sinaloa cartel in Mexico.[2] *See id.,* at 1136-37. A report in the record, prepared by the Congressional Research Service in December 2019, explains that Sinaloa is the "oldest and most established" drug trafficking organization in Mexico, and that it is "comprised of a network of smaller organizations," led, until very recently, by "El Chapo" Guzman. Ex. 3 tab A at 17. According to the report, "Mexico's brutal drug-trafficking related violence ... has been dramatically punctuated by beheadings, public hanging of corpses, car bombs, and murders of dozens of journalists and public officials." *Id.* at 1. The report also states that "[v]iolence is an intrinsic feature of the trade in illicit drugs," and that "[t]raffickers use [violence] to settle disputes ... ," and that the Sinaloa cartel has a "national reach" in Mexico. *Id.* at 1, 28.

That report also details extensive corruption between drug trafficking organizations and the Mexican government. For example, the report states that in December 2019, a former top security minister in the Calderon administration was arrested in the United States and charged with accepting "enormous bribes" from the Sinaloa cartel. Ex. 3 at 1, 5. The report also notes that in 2015, the Sinaloa cartel was able to "orchestrate" an escape from prison for its leader, "El Chapo" Guzman, "through a mile-long tunnel from a maximum-security Mexican prison." *Id.* at 8. According to the 2019 Department of State Report on Human Rights in Mexico, "[o]rganized criminal groups reportedly continued to oversee illicit

[2] The government did not object to the documents submitted by Respondent in support of his application.

activities from within penitentiary walls."[3] Ex. 4 at 8.

Respondent also submitted a report from a blog post, prepared by Dr. Robert Kirkland. Therein Kirkland explains that, because of the procedures used to repatriate Mexican citizens, "no person can prevent drug cartels finding out where they live in the long term." Ex. 3 tab C at 1-5.

Finally, the State Department report states that "[s]ignificant human rights issues included reports of the involvement by police, military, and other government officials and illegal armed groups in unlawful or arbitrary killings, forced disappearance, and torture," and that impunity "remained a problem," with the Mexican governments statistics agency estimating that "94 percent of crimes were either unreported or not investigated." That report makes clear that government corruption by criminal organizations remains a pervasive problem, noting that "there were several reports government entities or their agents committed arbitrary or unlawful killings, often with impunity," and that "[o]rganized criminal groups were implicated in numerous killings, acting with impunity and at times in league with corrupt federal, state, local, and security officials." The Court notes, as the *Rodriguez-Molinaro* court did, that the record documents intimate that "the Mexican government may be trying, though apparently without much success, to prevent police from torturing citizens at the behest of drug gangs." *Rodriguez-Molinero,* at 808 F.3d at 1139. However, as there, that information is "irrelevant" here, because

[3] The Court takes administrative notice of the 2019 Department of States Human Rights Report for Mexico, and enters it into the record as Exhibit 4. *Meriyu v. Barr,* 950 F.3d 503, 507 (7th Cir. 2020) (agency "may take administrative notice of commonly known facts including current events or the contents of official documents"); 8 C.F.R. § 1003.l(d)(3)(iv).

> if public officials at the state and local level in Mexico would acquiesce in any torture [that Respondent] is likely to suffer, this satisfies [the Torture Convention's] requirement that a public official acquiesce in the torture, even if the federal government in Mexico would not similarly acquiesce.

Id. (citing *N.L.A. v. Holder,*744 F.3d 425, 440-42 (7th Cir. 2014) and *Madrigal v. Holder,* 716 F.3d 499, 509-10 (9th Cir. 2013)).

At bottom, based on his testimony and evidence, the Court finds that Respondent has demonstrated, through his credible testimony and the documentary evidence, that there is a substantial risk, or that it is more likely than not, that he will be tortured by the Sinaloa cartel, with the acquiescence of the Mexican government, if he is removed to Mexico. The Court grants his application for protection under the Convention Against Torture.

ORDER

IT IS HEREBY ORDERED that Respondent be removed to MEXICO.

IT IS FURTHER ORDERED that Respondent be GRANTED deferral of removal under the Convention Against Torture.

[s/ Kathryn I. DeAngelis]

Kathryn I. DeAngelis

Immigration Judge

APPENDIX C

UNITED STATES DEPARTMENT OF JUSTICE
EXECUTIVE OFFICE FOR IMMIGRATION REVIEW

BOARD OF IMMIGRATION APPEALS

File: A075-818-976 -- Chicago, IL

In re: Raul GARCIA MARIN[1]

IN ASYLUM AND/OR WITHHOLDING PROCEEDINGS

APPEAL

[Dated November 16, 2020]

APPLICATION: Convention Against Torture

The applicant is a native and citizen of Mexico.[2] The Department of Homeland Security ("DHS") appeals from the Immigration Judge's April 21, 2020, decision granting his request for deferral of removal under the Convention Against Torture.[3] *See* 8 C.F.R. §§ 1208.16-1208.18. The applicant opposes the appeal. The appeal will be sustained.

We review the findings of fact made by the Immigration Judge, including the determination of credibility,

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[1] The applicant has been identified as both Gaul Garcia Marin and Raul Garcia Marin. We will use Raul Garcia Marin, as reflected on the Notice of Referral (Exh. 1).

[2] The applicant was previously removed on November 20, 1998, and his removal was reinstated on August 12, 2019 (Exh. 1).

[3] The parties agreed that the applicant is ineligible for withholding of removal under the Immigration and Nationality Act and the Convention Against Torture due to his conviction for an aggravated felony (residential burglary) (IJ at n.l; Tr. at 13-14, 38). *See* 241(b)(3)(B)(ii) of the Act, 8 U.S.C. *§* 1231(b)(3)(B)(ii); 8 C.F.R. § 1208.16(d)(2).

for clear error. *See* 8 C.F.R. § 1003.l(d)(3)(i). We review all other issues, including questions of judgment, discretion, and law, de novo. *See* 8 C.F.R. § l003.l(d)(3)(ii).

We agree with the DHS that the applicant has not demonstrated that it is more likely than not, or that there is a substantial risk, that he would be tortured following his removal to Mexico, and that a "public official or other person acting in an official capacity" would likely acquiesce in torture or any harm which he fears from the Sinaloa cartel (DHS's Br. at 6-15). *See* 8 C.F.R. §§ 1208.16(c)(3), 1208.17(a); *Perez-Montes v. Sessions,* 880 F.3d 849, 850 (7th Cir. 2018) (the Seventh Circuit clarified that the phrase "substantial risk" was designed as a non-quantitative restatement of the "more likely than not" regulatory phrase); *Lopez v. Lynch,* 810 F.3d 484, 492 (7th Cir. 2016) (noting that the applicant bears the burden of demonstrating his e1igibility for deferral of removal).

On this record, the applicant has not demonstrated a substantial risk of torture if removed to Mexico. This case is factually distinguishable from *Rodriguez-Molinero v. Lynch,* 808 F.3d 1134 (7th Cir. 2015). In this case, the applicant had no involvement with the Sinaloa cartel. Instead, he attempted to work with the United States law enforcement in 2015 to set up a drug trafficking transaction, which ultimately never occurred (IJ at 2; Tr. at 42-49, 53; DHS's Br. at 10). The single instance of a threat over the phone in 2018 is insufficient to meet his burden of proof (IJ at 3; Tr. at 53-55; DHS's Br. at 11). As the applicant has not shown the requisite risk of torture, we need not make a further finding on government acquiescence. *See INS v. Bagamasbad,* 429 U.S. 24, *25* (1976) ("As a general rule courts and agencies are not required to make findings on issues the decision of which is unnecessary to the results they reach.").

Accordingly, the following orders are entered.

ORDER: The DHS's appeal is sustained.

FURTHER ORDER: The Immigration Judge's April 21, 2020, decision is vacated.

FURTHER ORDER: The applicant is ordered removed from the United States to Mexico.

NOTICE: If an applicant is subject to a final order of removal and willfully fails or refuses to depart from the United States pursuant to the order, to make timely application in good faith for travel or other documents necessary to depart the United States, or to present himself or herself at the time and place required for removal by the Department of Homeland Security, or conspires to or takes any action designed to prevent or hamper the applicant's departure pursuant to the order of removal, the applicant shall be subject to a civil monetary penalty of up to $813 for each day the applicant is in violation. *See* section 274D of the Immigration and Nationality Act, 8 U.S.C. § 1324d; 8 C.F.R. § 280.53(b)(l4).

[s/]
FOR THE BOARD

APPENDIX D

United States Court of Appeals
for the Seventh Circuit.

Raul Garcia MARIN, Petitioner,

v.

Merrick B. GARLAND, Respondent.

No. 20-3393

October 19, 2022

Petition for Review of an Order of the Board of Immigration Appeals. No. A075-818-976

Before DIANE S. SYKES, Chief Judge, JOEL M. FLAUM, Circuit Judge, MICHAEL B. BRENNAN, Circuit Judge

ORDER

On consideration of the petition for rehearing and for rehearing en banc, no judge in active service requested a vote on the petition for rehearing en banc,[1] and all judges on the original panel voted to deny rehearing. It is therefore ordered that the petition for rehearing en banc is DENIED.

[1] Circuit Judge Rovner did not participate in the consideration of this petition for rehearing.

APPENDIX E

U.S. Constitution, Article III states:

Section 1. The judicial Power of the United States, shall be vested in one supreme Court, and in such inferior Courts as the Congress may from time to time ordain and establish. The Judges, both of the supreme and inferior Courts, shall hold their Offices during good Behaviour, and shall, at stated Times, receive for their Services, a Compensation, which shall not be diminished during their Continuance in Office.

Section 2. The judicial Power shall extend to all Cases, in Law and Equity, arising under this Constitution, the Laws of the United States, and Treaties made, or which shall be made, under their Authority;--to all Cases affecting Ambassadors, other public Ministers and Consuls;--to all Cases of admiralty and maritime Jurisdiction;--to Controversies to which the United States shall be a Party;--to Controversies between two or more States;--between a State and Citizens of another State;--between Citizens of different States,--between Citizens of the same State claiming Lands under Grants of different States, and between a State, or the Citizens thereof, and foreign States, Citizens or Subjects.

In all Cases affecting Ambassadors, other public Ministers and Consuls, and those in which a State shall be Party, the supreme Court shall have original Jurisdiction. In all the other Cases before mentioned, the supreme Court shall have appellate Jurisdiction, both as to Law and Fact, with such Exceptions, and under such Regulations as the Congress shall make.

The Trial of all Crimes, except in Cases of Impeachment, shall be by Jury; and such Trial shall be held in the State where the said Crimes shall have been committed; but when not committed within any State, the

Trial shall be at such Place or Places as the Congress may by Law have directed.

Section 3. Treason against the United States, shall consist only in levying War against them, or in adhering to their Enemies, giving them Aid and Comfort. No Person shall be convicted of Treason unless on the Testimony of two Witnesses to the same overt Act, or on Confession in open Court.

The Congress shall have Power to declare the Punishment of Treason, but no Attainder of Treason shall work Corruption of Blood, or Forfeiture except during the Life of the Person attainted.

APPENDIX F

Relevant Regulations

a. 8 C.F.R. § 1208.16 states:

Withholding of removal under section 241(b)(3)(B) of the Act and withholding of removal under the Convention Against Torture.

Effective: May 31, 2022

(a) Consideration of application for withholding of removal. Consideration of eligibility for statutory withholding of removal and protection under the Convention Against Torture by a DHS officer is as provided at 8 CFR 208.16. In exclusion, deportation, or removal proceedings, an immigration judge may adjudicate both an asylum claim and a request for withholding of removal whether or not asylum is granted.

(b) Eligibility for withholding of removal under section 241(b)(3) of the Act; burden of proof. The burden of proof is on the applicant for withholding of removal under section 241(b)(3) of the Act to establish that his or her life or freedom would be threatened in the proposed country of removal on account of race, religion, nationality, membership in a particular social group, or political opinion. The testimony of the applicant, if credible, may be sufficient to sustain the burden of proof without corroboration. The evidence shall be evaluated as follows:

(1) Past threat to life or freedom.

(i) If the applicant is determined to have suffered past persecution in the proposed country of removal on account of race, religion, nationality, membership in a particular social group, or political opinion, it shall be presumed that the applicant's life or freedom would be threatened in the future in the

country of removal on the basis of the original claim. This presumption may be rebutted if an asylum officer or immigration judge finds by a preponderance of the evidence:

(A) There has been a fundamental change in circumstances such that the applicant's life or freedom would not be threatened on account of any of the five grounds mentioned in this paragraph upon the applicant's removal to that country; or

(B) The applicant could avoid a future threat to his or her life or freedom by relocating to another part of the proposed country of removal and, under all the circumstances, it would be reasonable to expect the applicant to do so.

(ii) In cases in which the applicant has established past persecution, the Service shall bear the burden of establishing by a preponderance of the evidence the requirements of paragraphs (b)(1)(i)(A) or (b)(1)(i)(B) of this section.

(iii) If the applicant's fear of future threat to life or freedom is unrelated to the past persecution, the applicant bears the burden of establishing that it is more likely than not that he or she would suffer such harm.

(2) Future threat to life or freedom. An applicant who has not suffered past persecution may demonstrate that his or her life or freedom would be threatened in the future in a country if he or she can establish that it is more likely than not that he or she would be persecuted on account of race, religion, nationality, membership in a particular social group, or political opinion upon removal to that country. Such an applicant cannot demonstrate that his or her life or freedom would be threatened if the asylum officer or immigration judge finds

that the applicant could avoid a future threat to his or her life or freedom by relocating to another part of the proposed country of removal and, under all the circumstances, it would be reasonable to expect the applicant to do so. In evaluating whether it is more likely than not that the applicant's life or freedom would be threatened in a particular country on account of race, religion, nationality, membership in a particular social group, or political opinion, the asylum officer or immigration judge shall not require the applicant to provide evidence that he or she would be singled out individually for such persecution if:

(i) The applicant establishes that in that country there is a pattern or practice of persecution of a group of persons similarly situated to the applicant on account of race, religion, nationality, membership in a particular social group, or political opinion; and

(ii) The applicant establishes his or her own inclusion in and identification with such group of persons such that it is more likely than not that his or her life or freedom would be threatened upon return to that country.

(3) Reasonableness of internal relocation. For purposes of determinations under paragraphs (b)(1) and (2) of this section, adjudicators should consider the totality of the relevant circumstances regarding an applicant's prospects for relocation, including the size of the country of nationality or last habitual residence, the geographic locus of the alleged persecution, the size, reach, or numerosity of the alleged persecutor, and the applicant's demonstrated ability to relocate to the United States in order to apply for withholding of removal.

(i) In cases in which the applicant has not established past persecution, the applicant shall bear the burden of establishing that it would not be reasonable for him or her to relocate, unless the persecutor is a government or is government-sponsored.

(ii) In cases in which the persecutor is a government or is government-sponsored, it shall be presumed that internal relocation would not be reasonable, unless the DHS establishes by a preponderance of the evidence that, under all the circumstances, it would be reasonable for the applicant to relocate.

(iii) Regardless of whether an applicant has established persecution in the past, in cases in which the persecutor is not the government or a government-sponsored actor, or otherwise is a private actor, there shall be a presumption that internal relocation would be reasonable unless the applicant establishes, by a preponderance of the evidence, that it would be unreasonable to relocate.

(iv) For purposes of determinations under paragraphs (b)(3)(ii) and (iii) of this section, persecutors who are private actors, including persecutors who are gang members, public official who are not acting under color of law, or family members who are not themselves government officials or neighbors who are not themselves government officials, shall not be considered to be persecutors who are the government or government-sponsored absent evidence that the government sponsored the persecution.

(c) Eligibility for withholding of removal under the Convention Against Torture.

(1) For purposes of regulations under Title II of the Act, "Convention Against Torture" shall refer to the United Nations Convention Against Torture and

Other Cruel, Inhuman or Degrading Treatment or Punishment, subject to any reservations, understandings, declarations, and provisos contained in the United States Senate resolution of ratification of the Convention, as implemented by section 2242 of the Foreign Affairs Reform and Restructuring Act of 1998 (Pub.L. 105–277, 112 Stat. 2681, 2681–821). The definition of torture contained in § 1208.18(a) of this part shall govern all decisions made under regulations under Title II of the Act about the applicability of Article 3 of the Convention Against Torture.

(2) The burden of proof is on the applicant for withholding of removal under this paragraph to establish that it is more likely than not that he or she would be tortured if removed to the proposed country of removal. The testimony of the applicant, if credible, may be sufficient to sustain the burden of proof without corroboration.

(3) In assessing whether it is more likely than not that an applicant would be tortured in the proposed country of removal, all evidence relevant to the possibility of future torture shall be considered, including, but not limited to:

(i) Evidence of past torture inflicted upon the applicant;

(ii) Evidence that the applicant could relocate to a part of the country of removal where he or she is not likely to be tortured;

(iii) Evidence of gross, flagrant or mass violations of human rights within the country of removal, where applicable; and

(iv) Other relevant information regarding conditions in the country of removal.

(4) In considering an application for withholding of removal under the Convention Against Torture, the immigration judge shall first determine whether the alien is more likely than not to be tortured in the country of removal. If the immigration judge determines that the alien is more likely than not to be tortured in the country of removal, the alien is entitled to protection under the Convention Against Torture. Protection under the Convention Against Torture will be granted either in the form of withholding of removal or in the form of deferral of removal. An alien entitled to such protection shall be granted withholding of removal unless the alien is subject to mandatory denial of withholding of removal under paragraphs (d)(2) or (d)(3) of this section. If an alien entitled to such protection is subject to mandatory denial of withholding of removal under paragraphs (d)(2) or (d)(3) of this section, the alien's removal shall be deferred under § 1208.17(a).

(d) Approval or denial of application—

(1) General. Subject to paragraphs (d)(2) and (d)(3) of this section, an application for withholding of deportation or removal to a country of proposed removal shall be granted if the applicant's eligibility for withholding is established pursuant to paragraphs (b) or (c) of this section.

(2) Mandatory denials. Except as provided in paragraph (d)(3) of this section, an application for withholding of removal under section 241(b)(3) of the Act or under the Convention Against Torture shall be denied if the applicant falls within section 241(b)(3)(B) of the Act or, for applications for withholding of deportation adjudicated in proceedings commenced prior to April 1, 1997, within section 243(h)(2) of the Act as it appeared prior to that

date. For purposes of section 241(b)(3)(B)(ii) of the Act, or section 243(h)(2)(B) of the Act as it appeared prior to April 1, 1997, an alien who has been convicted of a particularly serious crime shall be considered to constitute a danger to the community. If the evidence indicates the applicability of one or more of the grounds for denial of withholding enumerated in the Act, the applicant shall have the burden of proving by a preponderance of the evidence that such grounds do not apply.

(3) Exception to the prohibition on withholding of deportation in certain cases. Section 243(h)(3) of the Act, as added by section 413 of Pub.L. 104–132 (110 Stat. 1214), shall apply only to applications adjudicated in proceedings commenced before April 1, 1997, and in which final action had not been taken before April 24, 1996. The discretion permitted by that section to override section 243(h)(2) of the Act shall be exercised only in the case of an applicant convicted of an aggravated felony (or felonies) where he or she was sentenced to an aggregate term of imprisonment of less than 5 years and the immigration judge determines on an individual basis that the crime (or crimes) of which the applicant was convicted does not constitute a particularly serious crime. Nevertheless, it shall be presumed that an alien convicted of an aggravated felony has been convicted of a particularly serious crime. Except in the cases specified in this paragraph, the grounds for denial of withholding of deportation in section 243(h)(2) of the Act as it appeared prior to April 1, 1997, shall be deemed to comply with the Protocol Relating to the Status of Refugees, Jan. 31, 1967, T.I.A.S. No. 6577.

(e) [Reserved by 85 FR 67260]

(f) Removal to third country. Nothing in this section or § 1208.17 shall prevent the Service from removing an alien to a third country other than the country to which removal has been withheld or deferred.

b. 8 C.F.R. § 1208.17 states:

Deferral of removal under the Convention Against Torture.

(a) Grant of deferral of removal. An alien who: has been ordered removed; has been found under § 1208.16(c)(3) to be entitled to protection under the Convention Against Torture; and is subject to the provisions for mandatory denial of withholding of removal under § 1208.16(d)(2) or (d)(3), shall be granted deferral of removal to the country where he or she is more likely than not to be tortured.

(b) Notice to alien.

(1) After an immigration judge orders an alien described in paragraph (a) of this section removed, the immigration judge shall inform the alien that his or her removal to the country where he or she is more likely than not to be tortured shall be deferred until such time as the deferral is terminated under this section. The immigration judge shall inform the alien that deferral of removal:

(i) Does not confer upon the alien any lawful or permanent immigration status in the United States;

(ii) Will not necessarily result in the alien being released from the custody of the Service if the alien is subject to such custody;

(iii) Is effective only until terminated; and

(iv) Is subject to review and termination if the immigration judge determines that it is not likely that

the alien would be tortured in the country to which removal has been deferred, or if the alien requests that deferral be terminated.

(2) The immigration judge shall also inform the alien that removal has been deferred only to the country in which it has been determined that the alien is likely to be tortured, and that the alien may be removed at any time to another country where he or she is not likely to be tortured.

(c) Detention of an alien granted deferral of removal under this section. Nothing in this section shall alter the authority of the Service to detain an alien whose removal has been deferred under this section and who is otherwise subject to detention. In the case of such an alien, decisions about the alien's release shall be made according to part 241 of this chapter.

(d) Termination of deferral of removal.

(1) At any time while deferral of removal is in effect, the INS District Counsel for the District with jurisdiction over an alien whose removal has been deferred under paragraph (a) of this section may file a motion with the Immigration Court having administrative control pursuant to § 1003.11 of this chapter to schedule a hearing to consider whether deferral of removal should be terminated. The Service motion shall be granted if it is accompanied by evidence that is relevant to the possibility that the alien would be tortured in the country to which removal has been deferred and that was not presented at the previous hearing. The Service motion shall not be subject to the requirements for reopening in §§ 3.2 and 3.23 of this chapter.

(2) The Immigration Court shall provide notice to the alien and the Service of the time, place, and date of the termination hearing. Such notice shall

inform the alien that the alien may supplement the information in his or her initial application for withholding of removal under the Convention Against Torture and shall provide that the alien must submit any such supplemental information within 10 calendar days of service of such notice (or 13 calendar days if service of such notice was by mail). At the expiration of this 10 or 13 day period, the Immigration Court shall forward a copy of the original application, and any supplemental information the alien or the Service has submitted, to the Department of State, together with notice to the Department of State of the time, place and date of the termination hearing. At its option, the Department of State may provide comments on the case, according to the provisions of § 1208.11 of this part.

(3) The immigration judge shall conduct a hearing and make a de novo determination, based on the record of proceeding and initial application in addition to any new evidence submitted by the Service or the alien, as to whether the alien is more likely than not to be tortured in the country to which removal has been deferred. This determination shall be made under the standards for eligibility set out in § 1208.16(c). The burden is on the alien to establish that it is more likely than not that he or she would be tortured in the country to which removal has been deferred.

(4) If the immigration judge determines that the alien is more likely than not to be tortured in the country to which removal has been deferred, the order of deferral shall remain in place. If the immigration judge determines that the alien has not established that he or she is more likely than not to be tortured in the country to which removal has

been deferred, the deferral of removal shall be terminated and the alien may be removed to that country. Appeal of the immigration judge's decision shall lie to the Board.

(e) Termination at the request of the alien.

(1) At any time while deferral of removal is in effect, the alien may make a written request to the Immigration Court having administrative control pursuant to § 1003.11 of this chapter to terminate the deferral order. If satisfied on the basis of the written submission that the alien's request is knowing and voluntary, the immigration judge shall terminate the order of deferral and the alien may be removed.

(2) If necessary the immigration judge may calendar a hearing for the sole purpose of determining whether the alien's request is knowing and voluntary. If the immigration judge determines that the alien's request is knowing and voluntary, the order of deferral shall be terminated. If the immigration judge determines that the alien's request is not knowing and voluntary, the alien's request shall not serve as the basis for terminating the order of deferral.

(f) Termination pursuant to § 1208.18(c). At any time while deferral of removal is in effect, the Attorney General may determine whether deferral should be terminated based on diplomatic assurances forwarded by the Secretary of State pursuant to the procedures in § 1208.18(c).

c. 8 C.F.R. § 1208.31 states:

Reasonable fear of persecution or torture determinations involving aliens ordered removed under section

238(b) of the Act and aliens whose removal is reinstated under section 241(a)(5) of the Act.

Effective: January 11, 2021

(a) Jurisdiction. This section shall apply to any alien ordered removed under section 238(b) of the Act or whose deportation, exclusion, or removal order is reinstated under section 241(a)(5) of the Act who, in the course of the administrative removal or reinstatement process, expresses a fear of returning to the country of removal. The Service has exclusive jurisdiction to make reasonable fear determinations, and EOIR has exclusive jurisdiction to review such determinations.

(b) Initiation of reasonable fear determination process. Upon issuance of a Final Administrative Removal Order under § 238.1 of this chapter, or notice under § 1241.8(b) of this chapter that an alien is subject to removal, an alien described in paragraph (a) of this section shall be referred to an asylum officer for a reasonable fear determination. In the absence of exceptional circumstances, this determination will be conducted within 10 days of the referral.

(c) Interview and procedure. The asylum officer shall conduct the interview in a non-adversarial manner, separate and apart from the general public. At the time of the interview, the asylum officer shall determine that the alien has an understanding of the reasonable fear determination process. The alien may be represented by counsel or an accredited representative at the interview, at no expense to the Government, and may present evidence, if available, relevant to the possibility of persecution or torture. The alien's representative may present a statement at the end of the interview. The asylum officer, in his or her discretion, may place reasonable limits on the number of persons who may be present at the interview and the length of

the statement. If the alien is unable to proceed effectively in English, and if the asylum officer is unable to proceed competently in a language chosen by the alien, the asylum officer shall arrange for the assistance of an interpreter in conducting the interview. The interpreter may not be a representative or employee of the applicant's country or nationality, or if the applicant is stateless, the applicant's country of last habitual residence. The asylum officer shall create a summary of the material facts as stated by the applicant. At the conclusion of the interview, the officer shall review the summary with the alien and provide the alien with an opportunity to correct errors therein. The asylum officer shall create a written record of his or her determination, including a summary of the material facts as stated by the applicant, any additional facts relied on by the officers, and the officer's determination of whether, in light of such facts, the alien has established a reasonable fear of persecution or torture. The alien shall be determined to have a reasonable fear of persecution or torture if the alien establishes a reasonable possibility that he or she would be persecuted on account of his or her race, religion, nationality, membership in a particular social group or political opinion, or a reasonable possibility that he or she would be tortured in the country of removal. For purposes of the screening determination, the bars to eligibility for withholding of removal under section 241(b)(3)(B) of the Act shall not be considered.

(d) Authority. Asylum officers conducting screening determinations under this section shall have the authority described in § 1208.9(c).

(e) Referral to Immigration Judge. If an asylum officer determines that an alien described in this section has a reasonable fear of persecution or torture, the officer shall so inform the alien and issue a Form I–863,

Notice of Referral to the Immigration Judge, for full consideration of the request for withholding of removal only. Such cases shall be adjudicated by the immigration judge in accordance with the provisions of § 1208.16. Appeal of the immigration judge's decision shall lie to the Board of Immigration Appeals.

(f) Removal of aliens with no reasonable fear of persecution or torture. If the asylum officer determines that the alien has not established a reasonable fear of persecution or torture, the asylum officer shall inform the alien in writing of the decision and shall inquire whether the alien wishes to have an immigration judge review the negative decision, using the Record of Negative Reasonable Fear Finding and Request for Review by Immigration Judge, on which the alien must indicate whether he or she desires such review. If the alien refuses to make an indication, DHS shall consider such a response as a decision to decline review.

(g) Review by Immigration Judge. The asylum officer's negative decision regarding reasonable fear shall be subject to review by an immigration judge upon the alien's request. If the alien requests such review, the asylum officer shall serve him or her with a Notice of Referral to the Immigration Judge. The record of determination, including copies of the Notice of Referral to the Immigration Judge, the asylum officer's notes, the summary of the material facts, and other materials upon which the determination was based shall be provided to the immigration judge with the negative determination. In the absence of exceptional circumstances, such review shall be conducted by the immigration judge within 10 days of the filing of the Notice of Referral to the Immigration Judge with the immigration court. Upon review of the asylum officer's negative reasonable fear determination:

(1) If the immigration judge concurs with the asylum officer's determination that the alien does not have a reasonable fear of persecution or torture, the case shall be returned to DHS for removal of the alien. No appeal shall lie from the immigration judge's decision.

(2) If the immigration judge finds that the alien has a reasonable fear of persecution or torture, the alien may submit an Application for Asylum and for Withholding of Removal. Such application shall be considered de novo in all respects by an immigration judge regardless of any determination made under this paragraph.

(i) The immigration judge shall consider only the alien's application for withholding of removal under 8 CFR 1208.16 and shall determine whether the alien's removal to the country of removal must be withheld or deferred.

(ii) Appeal of the immigration judge's decision whether removal must be withheld or deferred lies with the Board of Immigration Appeals. If the alien or DHS appeals the immigration judge's decision, the Board shall review only the immigration judge's decision regarding the alien's eligibility for withholding or deferral of removal under 8 CFR 1208.16.

APPENDIX G

Return Directive

U.S. Immigration and Customs Enforcement Policy Directive 11061.1: Facilitating the Return to the United States of Certain Lawfully Removed Aliens

Issue Date: February 24, 2012

Effective Date: February 24, 2012

Superseded: N/A

Federal Enterprise Architecture Number: 306-112-002b

1. Purpose/Background. Under the Immigration and Nationality Act (INA), as amended, aliens who petition the circuit courts of appeals for review of their administrative removal orders may continue to litigate their petitions after their removal from the United States. Absent a court-ordered stay of removal, U.S. Immigration and Customs Enforcement (ICE) may lawfully remove such aliens while their petitions for review (PFRs) are pending. This Directive describes existing ICE policy for facilitating the return to the United States of certain lawfully removed aliens whose PFRs are granted by a U.S. court of appeals or the U.S. Supreme Court. This Directive applies only to supervisors in Enforcement and Removal Operations (ERO), Homeland Security Investigations (HSI), and the Office of the Principal Legal Advisor (OPLA). This Directive does not apply to bargaining unit employees.

2. Policy. Absent extraordinary circumstances, if an alien who prevails before the U.S. Supreme Court or a U.S. court of appeals was removed while his or her PFR was pending, ICE will facilitate the alien's return to the United States if either the court's decision

restores the alien to lawful permanent resident (LPR) status, or the alien's presence is necessary for continued administrative removal proceedings. ICE will regard the returned alien as having reverted to the immigration status he or she held, if any, prior to the entry of the removal order and may detain the alien upon his or her return to the United States. If the presence of an alien who prevails on his or her PFR is not necessary to resolve the administrative proceedings, ICE will not facilitate the alien's return. However, if, following remand by the court to the Executive Office for Immigration Review (EOIR), an alien whose PFR was granted and who was not returned to the United States is granted relief by EOIR or the Department of Homeland Security (DHS) allowing him or her to reside in the United States lawfully, ICE will facilitate the alien's return to the United States.

3. Definitions. The following definitions apply for purposes of this Directive only:

3.1. Facilitate an Alien's Return. To engage in activities which allow a lawfully removed alien to travel to the United States (such as by issuing a Boarding Letter to permit commercial air travel) and, if warranted, parole the alien into the United States upon his or her arrival at a U.S. port of entry. Facilitating an alien's return does not necessarily include funding the alien's travel via commercial carrier to the United States or making flight arrangements for the alien.

3.2. Petition for Review (PFR). A request for a U.S. court of appeals to review a removal order entered by ICE or EOIR under 8 U.S.C. § 1252, INA § 242. The U.S. courts of appeals' PFR decisions are subject to review by the U.S. Supreme Court through a petition for writ of certiorari.

3.3. Restore an alien to lawful permanent resident (LPR) status. To enter a judicial decision which renders non-final an administrative removal order against an LPR. *See Matter of Lok*, 18 I&N Dec. 101 (BIA 1981) (holding that an LPR retains such status until the entry of a final administrative order of removal), *aff'd*, 681 F.2d 107 (2d Cir. 1982). Practically speaking this means that, when a PFR is granted that returns a former LPR to the posture of a pre-order alien, the alien will once again, in contemplation of law, be an LPR even though removal proceedings may still be pending before EOIR on remand from the circuit court.

3.4. Stay of Removal. An order issued by EOIR or a federal court which prevents ICE from executing a removal order.

4. Responsibilities.

4.1. ERO, HSI, and OPLA supervisors must fully coordinate at the local, international, and Headquarters levels to effectuate this policy.

5. Procedures/Requirements. None

6. Authorities/References.

6.1. INA § 101(a)(20), 8 U.S.C. § 1101(a)(20).

6.2. INA § 212(d)(5), 8 U.S.C. § 1182(d)(5).

6.3. INA § 242, 8 U.S.C. § 1252.

6.4. 8 Code of Federal Regulations (CFR) § 212.5.

6.5. DHS Delegation Number 7030.2, "Delegation of Authority to the Assistant Secretary for the Bureau of Immigration and Customs Enforcement" (November 13, 2004).

6.6. Memorandum of Agreement (MOA) between United States Citizenship and Immigration Services

(USCIS), ICE, and Customs and Border Protection (CBP), "Coordinating the Concurrent Exercise by USCIS, ICE, and CBP, of the Secretary's Parole Authority Under INA § 212(d)(5)(A) with Respect to Certain Aliens Located Outside of the United States" (September 29, 2008).

6.7. MOA between ICE and CBP, "Significant Public Benefit Parole Protocol for U.S. Customs and Border Protection and U.S. Immigration and Customs Enforcement for Law Enforcement Purposes" (September 22, 2005).

6.8. *Matter of Lok*, 18 I&N Dec. 101 (BIA 1981), *aff'd*, 681 F.2d 107 (2d Cir. 1982).

7. Attachments. None

8. No Private Right. This Directive is not intended to, does not, and may not be relied upon to create any right or benefit, substantive or procedural, enforceable at law by any party in any administrative, civil, or criminal matter.

[s/ John Morton]

John Morton
Director
U.S. Immigration and Customs Enforcement