No. 18-1432

In the Supreme Court of the United States

NIDAL KHALID NASRALLAH,

Petitioner,

v.

WILLIAM P. BARR, ATTORNEY GENERAL,

Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit

BRIEF FOR PETITIONER

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QUESTION PRESENTED

Via federal statute, the United States has implemented the United Nations Convention Against Torture (CAT). CAT relief is the fundamental bulwark that ensures that the government's decision to deport an individual to a particular country does not result in torture or death.

The Immigration and Nationality Act (INA) provides that "no court shall have jurisdiction to review any final order of removal against an alien who is removable by reason of having committed" certain criminal offenses. 8 U.S.C. § 1252(a)(2)(C). The INA further defines the meaning of an "order of removal." *Id.* § 1101(a)(47)(A). Petitioner's central contention is that an order resolving a request for CAT relief is not an "order of removal," and thus Section 1252(a)(2)(C) does not apply.

The question presented is:

Whether 8 U.S.C. § 1252(a)(2)(C) applies to an order resolving a request for CAT relief.

TABLE OF CONTENTS

TABLE OF CONTENTS—CONTINUED

TABLE OF AUTHORITIES

Cases

Cases—continued

Cases—continued

Statutes, Rules, Regulations

Statutes, Rules, Regulations—continued

Statutes, Rules, Regulations—continued

Statutes, Rules, Regulations—continued

Other Authorities

Other Authorities—continued

BRIEF FOR PETITIONER

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-11a) is unpublished but available at 2019 WL 626456. The decision of the Board of Immigration Appeals (Pet. App. 12a-21a) and the decision of the immigration judge (*id.* at 22a-48a) are unreported.

JURISDICTION

The judgment of the court of appeals was entered on February 14, 2019. The Court granted a timely petition for certiorari on October 18, 2019. The Court has jurisdiction under 28 U.S.C. § 1254(1).

STATUTORY AND REGULATORY PROVISIONS INVOLVED

Pertinent statutory and regulatory provisions are reproduced in the appendix. App., *infra*, 1a-39a.

STATEMENT

Under the federal statute implementing the United Nations Convention Against Torture (CAT), the United States may not return individuals to countries where they are more likely than not to be tortured. During a removal proceeding, a noncitizen may seek this protection by requesting CAT relief. When the Board of Immigration Appeals (Board) resolves a CAT claim, the stakes are monumental. An erroneous denial means that the United States removes an individual to a country where he or she will likely be tortured.

The question here is whether the Board's denial of a CAT claim is subject to the jurisdiction-stripping provision of 8 U.S.C. § 1252(a)(2)(C), which provides that courts may not review "any final order of removal" entered against noncitizens with certain criminal his-

tories. 8 U.S.C. § 1252(a)(2)(C).[1] This provision does not apply, because an order resolving a CAT claim is not a "final order of removal."

When Congress enacted what is now Section 1252(a)(2)(C), it specified its reach by defining the term "order of deportation." See 8 U.S.C. § 1101(a)(47)(A). An order qualifies if it concludes that a noncitizen is "deportable" or if it "order[s] deportation." *Ibid*. An order resolving a CAT claim does neither. Because CAT relief is country specific, the government may execute the order and remove an individual to a third country despite the grant of CAT relief. As the government itself has recently informed the Court, even if CAT relief is granted, the removal order remains effective.

Congress has distinguished CAT claims from "orders of removal." In the REAL ID Act, Congress enacted two parallel statutory provisions with identical purpose and effect—one applies to judicial review of "any cause or claim under the [CAT]" (8 U.S.C. § 1252(a)(4)), while the other, neighboring provision applies to judicial review of "an order of removal" (*id*. § 1252(a)(5)). Congress created these twin provisions because an order resolving a CAT claim is *not* an order of removal.

The government's principal argument appears to be that Section 1252(a)(2)(C) applies to the whole "petition for review"—that is, it applies to the whole vehicle in which a noncitizen challenges *both* the order of removal *and* the CAT order. But that is not what Section 1252(a)(2)(C) says. It prevents judicial review of the "order of removal"—and no more.

This conclusion accords with the strong presumption that Congress intends for judicial review over

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[1] Another provision, 8 U.S.C. § 1252(a)(2)(D), restores jurisdiction for "constitutional claims or questions of law."

agency action. That principle is especially imperative here, where an administrative agency is making decisions that carry life-or-death consequences.

The policy underlying the INA also supports this understanding of Section 1252(a)(2)(C). CAT relief acts as a broad counterweight to other policy goals reflected in immigration law. For example, Nazi persecutors and those who commit genocide are ineligible for virtually every form of immigration relief. Yet, if they meet the criteria for CAT, relief is *mandatory*, as it is for all who qualify for CAT protection. Recent Executive actions regarding immigration further confirm that CAT relief is absolute. It is the bulwark that prevents our immigration system from subjecting individuals to the horrors of torture.

A. Legal background.

1. Removal proceedings.

The Immigration and Nationality Act (INA) governs removal proceedings brought against noncitizens. See, *e.g.*, 8 U.S.C. §§ 1229, 1229a. The Department of Homeland Security (DHS) initiates a removal proceeding by serving a noncitizen with a "notice to appear." 8 U.S.C. § 1229.

During a removal proceeding, an immigration judge (IJ) first determines whether a noncitizen is "removable." 8 U.S.C. § 1229a(c)(1)(A). For noncitizens admitted to the United States, a "removable" individual is one who is "deportable." *Id*. § 1229a(e)(2)(B).[2] The

[2] Until 1997, the INA used the term "deportation" hearings; the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (IIRIRA) largely changed the nomenclature to "removal" proceedings. Pub. L. No. 104-208, div. C, § 304(a)(3), 110 Stat. 3009-546, 3009-593; see also *Calcano-Martinez* v. *INS*, 533 U.S. 348, 350 n.1 (2001) (identifying the "statute-wide change in terminology," replacing "deportation" with "removal"). But, certain portions

INA defines the range of conduct that renders one "[d]eportable." 8 U.S.C. § 1227. There are several grounds, including being out of lawful immigration status (*e.g.*, a tourist who overstays the length of his or her admission) (*id*. § 1227(a)(1)) and conviction of certain criminal offenses (*id*. § 1227(a)(2)).

An individual may defend against the charge of deportability by disputing the government's factual premises. See 8 C.F.R. § 1240.10(c)-(d). A noncitizen may demonstrate that she is, in fact, a citizen of the United States. See 8 U.S.C. § 1101(a)(3). If applicable, a noncitizen may seek a waiver of the ground of deportability. See, *e.g.*, *id.* § 1227(a)(7) (waiver for victims of domestic violence); *id*. § 1227(a)(3)(C)(ii) (waiver for those who committed document fraud "incurred solely" to support the noncitizen's "spouse or child"). If an IJ concludes that a noncitizen is "removable," the IJ then considers whether to order the individual removed.

A "removable" noncitizen may ask the IJ not to enter an "order of removal" for several reasons. The noncitizen may request cancellation of removal. 8 U.S.C. § 1229b; 8 C.F.R. § 1240.11(a)(1).[3] For permanent residents, the IJ "may cancel removal" of an "inadmissible or deportable" noncitizen, if the individual has not been convicted of an aggravated felony and meets certain residency requirements. 8 U.S.C. § 1229b(a). Cancellation is available for nonpermanent residents under different criteria. *Id*. § 1229b(c). An IJ

of the INA retain the historic language of "deportation" and "deportability." As used here, "deportation" is generally synonymous with "removal," as is "deportable" with "removable."

[3] Until 1997, noncitizens could request "suspension of deportation" (see 8 C.F.R. § 1240.21), which remains available to individuals with pre-1997 convictions. See *Matter of Abdelghany*, 26 I. & N. Dec. 254, 254 (B.I.A. 2014). IIRIRA replaced suspension of deportation with cancellation of removal.

may also adjudicate a request for "adjustment of status," which may provide a noncitizen a lawful basis for remaining in the United States. See 8 U.S.C. § 1255; 8 C.F.R. § 1240.11(a)(1). In lieu of an order of removal, the IJ may grant voluntary departure. See 8 U.S.C. § 1229c(b). If the IJ does not grant the noncitizen relief from removability, the IJ will enter an order of removal.

An IJ's decision to order a noncitizen removed thus has two components: assessing whether the individual is "removable" and determining whether in fact to order "removal." These two components are reflected in the INA definition of an "order of removal" (which retains historic terms): an order that "conclud[es] that the alien is deportable or order[s] deportation." 8 U.S.C. § 1101(a)(47)(A).

If a noncitizen "has been ordered removed," the IJ considers any request by a noncitizen for "protection under the Convention Against Torture." 8 C.F.R. § 1208.17(a). If the IJ grants CAT relief, the IJ—"[a]fter" "order[ing]" the noncitizen "removed"—"inform[s] 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." *Id*. § 1208.17(b)(1).

2. Claims for CAT relief.

The Convention Against Torture obligates signatories never to "expel, return (*refouler*) or extradite" a person to a country "where there are substantial grounds for believing that he would be in danger of being subjected to torture." Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment art. 3, adopted by U.N. General Assembly

Dec. 10, 1984, S. Treaty Doc. No. 100-20 (1988), 1465 U.N.T.S. 85.[4]

In 1998, Congress implemented the CAT through the Foreign Affairs Reform and Restructuring Act of 1998 (FARRA). See Pub. L. No. 105-277, div. G, § 2242, 112 Stat. 2681-761, 2681-822 (codified at 8 U.S.C. § 1231 note). FARRA provides that:

> It 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 * * *.

Id. § 2242(a). FARRA directed "the heads of the appropriate agencies [to] prescribe regulations to implement the obligations of the United States under Article 3 of the [CAT]" within 120 days. *Id*. § 2242(b). In 1999, the Immigration and Naturalization Service (INS) did so. See *Regulations Concerning the Convention Against Torture*, 64 Fed. Reg. 8,478 (Feb. 19, 1999).

Torture is defined as "severe pain or suffering, whether physical or mental," when "intentionally inflicted on a person," for one of any number of purposes, including to extract a confession, to punish, to intimidate or coerce, or to discriminate. 8 C.F.R. § 1208.18(a)(1). Torture must be "inflicted by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official ca-

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[4] The United States signed the CAT in 1988, the Senate provided advice and consent in 1990, and the United States formally ratified the CAT by depositing instruments of ratification with the United Nations in 1994. See Cong. Research Serv., 108th Cong., Treaties and Other International Agreements: The Role of the United States Senate 290-291 (Comm. Print 2001).

pacity." *Ibid*. The "threat of imminent death" is sufficient to cause "mental pain or suffering" amounting to torture. *Id*. § 1208.18(a)(4).

CAT withholding. An individual becomes eligible for CAT withholding of removal by demonstrating "that it is more likely than not that he or she would be tortured if removed to the proposed country of removal." 8 C.F.R. § 1208.16(c)(2). The applicant's own testimony, "if credible, may be sufficient to sustain the burden of proof." *Ibid*. Relevant evidence includes past torture of the applicant, the probability that the individual could relocate to a part of the country of removal where torture is unlikely, and evidence of country conditions relating to torture. *Id*. § 1208.16(c)(3). Certain individuals are ineligible for CAT withholding (*id.* § 1208.16(d)(2)), including those who persecuted others, who have been convicted of certain criminal offenses, or who pose a danger to national security (8 U.S.C. § 1231(b)(3)(B)).[5]

CAT deferral. CAT deferral provides backstop relief for individuals ineligible for CAT withholding. It is available to an individual who "has been ordered removed" and is "entitled to protection under [CAT]," but who "is subject to the provisions for mandatory denial of withholding of removal." 8 C.F.R. § 1208.17(a). CAT deferral is thus available to all individuals, regardless of criminal history.

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[5] The INA separately provides for statutory withholding—the government may not remove a noncitizen to a country where the individual's "life or freedom would be threatened in that country because of the alien's race, religion, nationality, membership in a particular social group, or political opinion." 8 U.S.C. § 1231(b)(3)(A). Statutory withholding has the same bars for eligibility as CAT withholding. *Id*. § 1231(b)(3)(B).

The government "has no discretion to deny relief to a noncitizen who establishes his eligibility" for CAT relief. *Moncrieffe* v. *Holder*, 569 U.S. 184, 187 n.1 (2013). Thus, a "conviction of an aggravated felony has no effect" with respect to a request for CAT deferral of removal. *Ibid*.

Even if an individual is granted CAT withholding or deferral, the government may execute the noncitizen's underlying removal order. CAT relief is country-specific; that is, it is limited to the country addressed in the CAT order. Accordingly, at any time, the government may remove the noncitizen "to a third country other than the country to which removal has been withheld or deferred." 8 C.F.R. § 1208.16(f).[6]

The government may also seek to terminate CAT relief. It may terminate CAT withholding by showing by a preponderance of evidence "a fundamental change in circumstances relating to the original claim," among other grounds. 8 C.F.R. § 1208.24(b)(1), (f). CAT deferral is less durable than CAT withholding: "At any time while deferral of removal is in effect," the government may file a motion with the immigration judge "to consider whether deferral of removal should be terminated." *Id*. § 1208.17(d)(1). At this hearing, the immigration judge's determination is "de novo," based on all record evidence, thus placing the burden on the noncitizen to again demonstrate that, upon removal, torture is more likely than not. *Id*. § 1208.17(d)(3).

CAT relief "[d]oes not confer upon the alien any lawful or permanent immigration status in the United

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[6] Prior to a third-country removal, the government must provide the noncitizen opportunity to request CAT relief as to the proposed country of removal. See 8 C.F.R. § 1208.17(b)(2); *Guzman Chavez* v. *Hott*, 940 F.3d 867, 879 (4th Cir. 2019).

States." 8 C.F.R. § 1208.17(b)(1)(i). Additionally, if a noncitizen is subject to immigration detention, the grant of CAT relief does not end the detention. *Id.* § 1208.17(c).[7]

3. Judicial review.

The INA provides for judicial review of various administrative determinations in immigration proceedings. In general, the INA provides for judicial review via a "petition for review." See 8 U.S.C. § 1252. Section 1252 imposes various requirements, including venue (*id.* § 1252(b)(2)), timeliness (*id.* § 1252(b)(1)), standards of review (*id.* § 1252(b)(4)), and administrative exhaustion (*id.* § 1252(d)).

A petition for review is the appropriate vehicle to bring challenges to "a final order of removal." 8 U.S.C. § 1252(a)(1). And, when there is such an order, the "Zipper Clause" provides that "[j]udicial review of all questions of law and fact * * * arising from any action taken or proceeding brought to remove an alien from the United States under this subchapter shall be avail-

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[7] Asylum claims differ from CAT relief. See *Moncrieffe*, 569 U.S. at 187 n.1. Among other things, the asylum standard is more generous—an individual must show a "well-founded fear" (which is less than CAT's more-likely-than-not standard) of "persecution" (not state-sanctioned torture). 8 U.S.C. §§ 1101(a)(42)(A), 1158(b). Asylum is also more favorable in several respects: The government may not remove asylees to any country, including safe third countries (8 C.F.R. § 1208.22), immediate family members are eligible for relief (*id.* § 1208.21), asylees may travel outside the United States (8 U.S.C. § 1158(c)(1)(C)), and asylees may naturalize (see *id.* § 1158(b)). But some individuals are ineligible for asylum, including many of those who are convicted of certain criminal offenses (*id.* § 1158(b)(2)(A)), applied outside the one-year time bar, absent an applicable exception (*id.* § 1158(a)(2)(B)), or were previously denied asylum (*id.* § 1158(a)(2)(C)).

able only in judicial review of a final order under this section." *Id*. § 1252(b)(9).

Two parallel statutory provisions further ensure appellate consolidation. First, and especially relevant here, the INA provides:

> [A] petition for review filed with an appropriate court of appeals in accordance with this section shall be the sole and exclusive means for judicial review of *any cause or claim under the [CAT]*.

8 U.S.C. § 1252(a)(4) (emphasis added). A parallel provision provides:

> [A] petition for review filed with an appropriate court of appeals in accordance with this section shall be the sole and exclusive means for judicial review of *an order of removal* entered or issued under any provision of this chapter.

Id. § 1252(a)(5) (emphasis added).

In addition to Section 1252(a)(4)'s direction that a "petition for review" governed by Section 1252 is the appropriate mechanism for judicial review of a CAT claim, FARRA provides that review may occur only "as part of the review of a final order of removal." FARRA § 2242(d) (codified at 8 U.S.C. § 1231 note).

Congress has removed judicial review with respect to certain issues. In the Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA), Congress limited judicial review of final removal orders of aliens with certain criminal histories:

> Any final order of deportation against an alien who is deportable by reason of having committed a criminal offense covered in section 241(a)(2)(A)(iii), (B), (C), or (D), or any offense

> covered by section 241(a)(2)(A)(ii) for which both predicate offenses are covered by section 241(a)(2)(A)(i), shall not be subject to review by any court.

Pub. L. No. 104-132, § 440(a), 110 Stat. 1214, 1276-1277.

As part of this provision, AEDPA also defined an "order of deportation" as an order "concluding that the alien is deportable or ordering deportation." Pub. L. No. 104-132 § 440(b), 110 Stat. at 1277 (codified at 8 U.S.C. § 1101(a)(47)).

That same year, IIRIRA made minor changes to this judicial review bar, recodifying it in its current placement, 8 U.S.C. § 1252(a)(2)(C). See Pub. L. No. 104-208, div. C, § 306, 110 Stat. at 3009-607 to 3009-608. Section 1252(a)(2)(C) now provides:

> Notwithstanding any other provision of law (statutory or nonstatutory), including section 2241 of title 28, or any other habeas corpus provision, and sections 1361 and 1651 of such title, and except as provided in subparagraph (D), no court shall have jurisdiction to review any final order of removal against an alien who is removable by reason of having committed a criminal offense covered in section 1182(a)(2) or 1227(a)(2)(A)(iii), (B), (C), or (D) of this title, or any offense covered by section 1227(a)(2)(A)(ii) of this title for which both predicate offenses are, without regard to their date of commission, otherwise covered by section 1227(a)(2)(A)(i) of this title.

8 U.S.C. § 1252(a)(2)(C).

In response to *INS* v. *St. Cyr*, 533 U.S. 289, 306 (2001), the REAL ID Act of 2005 (Pub. L. No. 109-13, div. B, § 106(a)(1)(B), 119 Stat. 302, 310) restored judi-

cial review for "constitutional claims or questions of law raised upon a petition for review." 8 U.S.C. § 1252(a)(2)(D); see also Pet'r Br. 6-8, *Guerrero-Lasprilla* v. *Barr*, No. 18-776.

The central question presented in this case is whether an order resolving a CAT claim is a "final order of removal." The answer to that question determines whether Section 1252(a)(2)(C)'s limitation on judicial review applies to such an order.

B. Factual and procedural background.

1. Petitioner grew up in the Chouf area of Lebanon, a mountainous region where Lebanese Druze, a religious minority, are concentrated. JA37; A.R. 574. As a child, petitioner's parents told him to never go far from home because Hezbollah "might kidnap [him] or take [him]." JA40.

According to a State Department counterterrorism report, Hezbollah is "the most capable and prominent terrorist group in Lebanon," operating as "an armed militia beyond the control of the state and as a powerful political actor that can hobble or topple the government as it sees fit." A.R. 567. Hezbollah "is known to kidnap and harm Lebanese Druze" (Pet. App. 43a), "call[s] [the Druze] infidels," and is "trying to take control of the [Chouf] area." JA32.

In 2005, petitioner and his friend, both teenagers, went for a hike in the mountains. JA32, 41-42. They came across uniformed Hezbollah soldiers, who were carrying guns. JA32. The militants saw the young men and demanded that they "[c]ome here and stop." *Ibid*. Petitioner and his friend—afraid because they "knew that Hezbollah harms Druze and [that they] were in an area where [Hezbollah] knew [they] were Druze"—attempted to leave. *Ibid*. The soldiers began "scream-

ing" at petitioner and his friend "to stop" and "started shooting in the air." JA32, 41.

Petitioner and his friend began to run away. JA32, 41. The militants, still shouting, chased them to the edge of a 40-foot cliff. JA32. With no way out, and with the militants "still coming with their guns," petitioner and his friend "did the only thing [they] could." *Ibid*. They jumped. *Ibid*. Petitioner "felt safer" "jumping off of the cliff," than "surrendering to the militants." Pet. App. 43a.

Petitioner broke his back. JA32; A.R. 555. He was admitted to a hospital on August 8, 2005. A.R. 554. Given petitioner's severe fracture of his lumbar vertebrae, his doctors informed him that there was a 90 percent chance he would never walk again. JA42. Two pins and four screws later, petitioner was discharged from the hospital on December 8, 2005. JA42; A.R. 554.[8]

2. In July 2006, petitioner left Lebanon and was admitted to the United States as a temporary visitor. Pet. App. 13a-14a. He became a lawful permanent resident the next year. *Ibid*. While in the United States, he graduated from college with a 3.6 GPA (JA52), worked as the manager of an automotive store (A.R. 533), and performed extensive community service as a member of the American Druze Society (A.R. 547).

In 2010, petitioner was approached by undercover federal agents, who offered to sell him what they rep-

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[8] Petitioner's friend submitted a sworn letter to the record, indicating that, as he and petitioner ran from Hezbollah, the militants "followed" and "kept threatening" to "shoot[]" them. JA30. Despite breaking both of his legs and his right arm in the fall, he "still [to] this day say[s] thank [G]od they didn't catch us, because we would've been disappeared for a long time." *Ibid*.

resented to be stolen cigarettes. JA3. He agreed, and, on multiple occasions, he purchased purportedly stolen cigarettes from the undercover agents. *Ibid*. Petitioner pleaded guilty to two charges (JA12) and was sentenced to 364 days' incarceration (JA23-24; Pet. App. 3a). The judge postponed petitioner's sentence, which he later served, until petitioner graduated from college. A.R. 165. Petitioner has no other criminal history. A.R. 43.

3. Based on the conviction, DHS initiated removal proceedings. Pet. App. 3a. During the hearing, the immigration judge found petitioner credible and accepted his testimony as true. *Id*. at 41a.

a. The immigration judge first concluded that petitioner was removable from the United States; she therefore entered an order of removal, directing that petitioner be removed from the country. Pet. App. 31a-34a. In particular, the IJ found that the conviction—receipt of stolen property—qualified categorically as "a crime involving moral turpitude." *Id*. at 33a. As a result, the IJ "ORDERED THAT [petitioner] be REMOVED from the United States to LEBANON." *Id*. at 47a.

b. Next, the IJ determined that petitioner's conduct constituted a "particularly serious" crime, reasoning that it posed a danger to the community. Pet. App. 38a-41a.[9] This finding rendered petitioner ineligible for asylum, statutory withholding, and CAT withholding. *Id*. at 34a-41a. The IJ accordingly "ORDERED THAT [petitioner's] requests [for] asylum, withholding of re-

[9] In observing generally that "black market" sales may in some circumstances "help[] fund organized crime or terrorism," the IJ carefully noted that she had "no reason to believe [petitioner] supports the goals of terrorism or organized crime." Pet. App. 40a.

moval under the Act, and withholding of removal under the CAT are hereby DENIED." *Id*. at 47a.

c. The immigration judge granted petitioner CAT deferral of removal. Pet. App. 41a-46a. She observed that he fears harm in Lebanon "based on his religious minority status as a Druze and his Western ties." *Id*. at 42a.

Considering petitioner's history in Lebanon, the IJ concluded that "there is a clear indication that the [Hezbollah] militants pursued [petitioner] with the intent to harm him and his acquaintance." Pet. App. 43a. According to the IJ, "[t]he militants initially shot into the air when [petitioner] attempted to flee, and continued firing their weapons as [petitioner] fled." *Ibid*. "Although it is unclear whether the militants were actually firing *at* [petitioner], it is clear that the shots were fired to at least scare or intimidate [petitioner]." *Ibid*.

The IJ concluded that, in view of the evidence, petitioner was "subject to severe pain and suffering, both physical and mental, intentionally inflicted by [Hezbollah] militants for the purpose of intimidation, coercion, or possible discrimination based on [petitioner's] religious affiliation." Pet. App. 43a.

The IJ found further that petitioner is "particularly susceptible" to torture because he "has resided in the United State[s] for nearly a decade, and his immediate family resides lawfully in the U.S." Pet. App. 45a. That threat, the IJ held, is even more pronounced in view of the "worsening state of affairs for the Druze in Lebanon." *Id*. at 46a.

Surveying the evidence and citing to the record, the IJ concluded that "[petitioner's] relocating within Lebanon would [not] reduce the likelihood of [his] being

individually targeted for torture upon his return to Lebanon." Pet. App. 45a.

The IJ also found that public officials would acquiesce to this torture: "The Lebanese government has shown an unwillingness to interfere with [Hezbollah] control of certain regions of the country," and petitioner showed "that Lebanese police forces are unwilling to address crimes committed against Druze citizens at the hands of [Hezbollah]." Pet. App. 44a.

At bottom, the IJ concluded:

> Due to [petitioner's] past experience, the civil strife within Lebanon, the destabilization of surrounding countries, and the violent activities of [Hezbollah] and other violent groups[,] [petitioner], as a religious minority with strong western connections, will more likely than not be targeted personally for harm rising to the level of torture if he was removed to Lebanon.

Pet. App. 46a.

The IJ accordingly granted petitioner's request for deferral of removal. Pet. App. 47a. The IJ underscored that petitioner's removal "has been deferred only to Lebanon"; petitioner can still "be removed at any time to another country where he is not likely to be tortured." *Ibid*. During a colloquy with petitioner, the IJ highlighted the temporary nature of deferral relief: "All this does is say that you cannot be deported today. You're going to be ordered removed and then the Court is going to tell the Government to defer that removal." JA59.

The IJ ultimately "ORDERED THAT [petitioner's] request for deferral of removal under the CAT is GRANTED." Pet. App. 47a.

d. Altogether, then, the IJ issued a removal order; an order denying petitioner's request for asylum, statu-

tory withholding, and CAT withholding; and an order granting CAT deferral. See A.R. 116; Pet. App. 47a.

4. The government appealed and petitioner cross-appealed to the Board. A.R. 89. In its brief to the Board, the government asserted that petitioner "willingly jumped off a cliff." A.R. 28. It further contended that petitioner experienced only brief "mental suffering," arising from a "single incident" that "lasted minutes." A.R. 26.

The Board affirmed the IJ's order of removal (Pet. App. 13a-15a), as well as the order denying asylum, statutory withholding, and CAT withholding (*id*. at 15a-18a). But it vacated the IJ's grant of CAT deferral. *Id*. at 19a-20a.

The Board stated that it could not "conclude that [petitioner] was tortured in Lebanon." Pet. App. 19a. First, "[t]he conduct of the [Hezbollah] militants[] was limited to shouting and firing their guns in the air." *Ibid*.[10] Second, the Board asserted that "the fact that the militants fired their guns in the air and not at [petitioner] suggests that they did not intend to physically harm him." *Ibid*.[11] The Board concluded that petitioner had not shown "that it is more likely than not that [he] would personally be targeted for harm rising to the level of torture if removed to Lebanon." *Id*. at 20a.

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[10] Contra Pet. App. 43a ("[T]here is a clear indication that the [Hezbollah] militants pursued [petitioner] with the intent to harm him and his acquaintance."); JA32 (describing that the militants "chased" petitioner and his friend, with guns, to the edge of a 40-foot cliff).

[11] Contra Pet. App. 43a ("Although it is unclear whether the militants were actually firing *at* [petitioner], it is clear that the shots were fired to at least scare or intimidate [petitioner]."); JA30 (petitioner's friend stating that the militants "followed [him and petitioner] and kept threatening [to] shoot[]" them).

The Board observed that the record contains substantial "evidence of widespread civil strife and various human rights abuses in Lebanon, including crimes against members of the Druze community in [Hezbollah]-controlled areas of the country and anti-Western terrorist activity." Pet. App. 20a. (citing more than 200 pages of record evidence, A.R. 428-509, 566-696). But the Board dismissed the record as "generalized evidence," "insufficient" to carry petitioner's burden. *Ibid*.

For these reasons, the Board "vacated" the "Immigration Judge's order granting the respondent's application for deferral of removal." Pet. App. 21a.

5. Petitioner filed a petition for review in the court of appeals, which denied in part and dismissed in part. Pet. App. 1a-11a. The court found that the jurisdiction-stripping provision in Section 1252(a)(2)(C) applies by virtue of petitioner's criminal convictions. *Id*. at 9a.[12]

With respect to CAT withholding, petitioner argued that the Board "misapplied factors used to determine whether he committed a particularly serious crime because he was convicted of a crime 'solely against property.'" Pet. App. 9a. Calling this a request "to reweigh the factors involved" in the "discretionary determination" regarding what qualifies as a "particularly serious crime," the court held that it did not involve "a question of law" and the "court therefore lacks jurisdiction to review the BIA's particularly-serious-crime determination." *Id*. at 9a-10a. Because Section 1252(a)(2)(C) generally stripped jurisdiction in these circumstances, and because Section 1252(a)(2)(D) did

[12] For its part, the government did not assert that the court lacked jurisdiction over any of petitioner's challenges; to the contrary, the government argued solely the merits. See Gov't C.A. Br. 1-2 (identifying basis for judicial review).

not restore it for this issue, the court dismissed the petition for review for lack of jurisdiction. *Ibid*.

As to CAT deferral, the court first accepted the Board's factual findings and concluded that it "found as a matter of law that [petitioner] had not been tortured in Lebanon." Pet. App. 10a-11a. Accepting those facts as true, the court affirmed to the extent the Board made a legal judgment. *Ibid*. The court, however, deemed "[a] determination about the likelihood of future harm" a "finding of fact, not a question of law." *Id*. at 11a. Again applying Section 1252(a)(2)(C), the court concluded that it lacked jurisdiction to review this issue. *Ibid*.

SUMMARY OF ARGUMENT

A. By its plain text, Section 1252(a)(2)(C) does not strip jurisdiction over orders resolving CAT claims.

1. Section 1252(a)(2)(C) precludes jurisdiction as to a "final order of removal." 8 U.S.C. § 1252(a)(2)(C). The statute extends no further.

2. An order granting or denying a claim for CAT relief is not a "final order of removal."

First, an order resolving a CAT claim is outside the INA's definition of "order of removal." Congress adopted what is now Section 1252(a)(2)(C) in AEDPA. At the time, AEDPA used the term "order of deportation." And, immediately adjacent to this jurisdiction-stripping provision, Congress defined "order of deportation" to mean the "order * * * concluding that the alien is deportable or ordering deportation." 8 U.S.C. § 1101(a)(47)(A). An order resolving a CAT claim neither concludes that an alien is deportable, nor does it order deportation.

The INA separately defines what renders a noncitizen "deportable." See 8 U.S.C. § 1227. The myriad grounds include conviction for various crimes or com-

mitting certain forms of fraud. An order resolving a CAT claim has no bearing on whether a noncitizen is "deportable."

Nor does resolution of a CAT claim "order[] removal." CAT relief, if granted, precludes removal only to a *particular* country. 8 C.F.R. § 1208.22. The removal order remains fully effective, and "[n]othing * * * shall prevent the [government] from removing an alien to a third country other than the country to which removal has been withheld or deferred." *Id*. § 1208.16(f). Here, when the IJ granted petitioner CAT deferral, the IJ underscored that the removal order remained in effect; petitioner may be "removed at any time to another country where he is not likely to be tortured." Pet. App. 47a.

Second, Congress specifically distinguished between an order resolving a CAT "claim" and an "order of removal." In the REAL ID Act, Congress enacted two parallel provisions to prevent noncitizens from using habeas proceedings to challenge various aspects of immigration proceedings. The first provided that a "petition for review" governed by Section 1252 "shall be the sole and exclusive means for judicial review of *any cause or claim under the [CAT]*." Pub. L. No. 109-13, div. B § 106(a)(1)(B), 119 Stat. at 310 (codified at 8 U.S.C. § 1252(a)(4)) (emphasis added). Immediately following, Congress enacted a nearly-identical provision, providing that a "petition for review" governed by Section 1252 "shall be the sole and exclusive means for judicial review of an *order of removal*." *Id*. § 106(a)(1)(B) (codified at 8 U.S.C. § 1252(a)(5)) (emphasis added).

That is, Congress simultaneously enacted two adjacent provisions with identical effect. The only distinction is that one applies to a "cause or claim under the [CAT]" while the other applies to an "order of removal." These differing provisions are definitive proof that, in

Section 1252, Congress has distinguished an order resolving a CAT claim from an "order of removal."

Third, the regulations implementing CAT relief are filled with additional confirmation that a CAT order is not an order of removal. A noncitizen is eligible for a grant of deferral only if ordered removed, and the regulation instructs the immigration judge to inform the noncitizen of the grant of CAT deferral "*[a]fter*" the judge "orders" him or her "removed." 8 C.F.R. § 1208.17(a), (b)(1) (emphasis added). In delegating authority from the Attorney General to the IJ, the regulations authorize the IJ to "[d]etermine removability" and to enter "orders of removal" (*id.* § 1240.1(a)(1)(i))—and then, separately, "[t]o order withholding of removal pursuant to the [CAT]" (*id.* 1240.1(a)(1)(iii)). The regulations repeatedly distinguish a "removal order" from the "order of deferral" and a "withholding order." In expedited removal proceedings, CAT relief is considered only after the final removal order is issued. *Id.* § 1238.1(f)(3). This all confirms what the statutory text makes apparent: An order resolving a CAT claim is not an "order of removal."

3. Judicial review of a CAT claim is directly established in the INA. First, Section 1252(a)(4) directs that judicial review occurs via a "petition for review" governed by Section 1252 generally. Second, FARRA § 2242(d), codified as a note at 8 U.S.C. § 1231, provides that review occurs only "as part of the review of a final order of removal."

Taken together, these provisions provide that judicial review of an order resolving a CAT claim occurs via the same "petition for review" that addresses the noncitizen's "order of removal." One proceeding in the court of appeals, therefore, will resolve any challenges to both orders.

The government argues that, when a petition for review contains a challenge to an "order of removal," which in turn triggers the jurisdiction-stripping provision in Section 1252(a)(2)(C), jurisdiction is stripped as to the *entire* petition for review. But that is not what the statute says. Section 1252(a)(2)(C) does not attach to the "petition for review." It applies to the "order of removal." Accordingly, when a petition for review challenges both an "order of removal" and an order resolving a CAT claim, Section 1252(a)(2)(C) strips jurisdiction as to the former, but not the latter.

B. In resolving this question of statutory construction, there is a "strong presumption that Congress intends judicial review of administrative action." *Smith* v. *Berryhill*, 139 S. Ct. 1765, 1776 (2019). While Section 1252(a)(2)(C) reflects an intent to strip jurisdiction as to *some* aspects of immigration proceedings, this weighty presumption cautions against reading it beyond the clear bounds of the statutory text. That presumption is especially appropriate here, where an erroneous agency denial means that the United States sends an individual to a country where he or she is *likely* to be tortured.

C. The construction we urge is also consistent with the policy underlying the INA. Section 1252(a)(2)(C) is designed to streamline judicial review of removal proceedings against criminal noncitizens. The government's brief will no doubt emphasize this point (see BIO 3)—a contention we do not dispute. But, not only is our construction compelled by the statutory text, it also accords with the broader policy reflected by the INA as a whole.

Congress streamlined judicial review over removal orders based on underlying criminal conduct in light of the judicial process—including appellate review—that was available in the state or federal criminal proceed-

ing. Congress concluded that criminal noncitizens already had judicial review over the issue that rendered them removable—the criminal conviction. Thus, less judicial review in that context was appropriate. But that policy judgment says nothing with respect to a CAT claim, which bears no resemblance to the issues resolved in a domestic criminal case.

What is more, CAT claims are absolute, by purposeful design. In implementing the CAT, the United States recognized that it admits of no exceptions. Even the most heinous—including Nazi persecutors and those who commit genocide—may seek and be awarded CAT relief.

When the United States restricts immigration rights or benefits for various policy reasons, it has consistently recognized that CAT claims remain inviolable. That has continued to this day: CAT claims are the counterbalance to other weighty immigration goals, safeguarding individuals from the horrors of torture. Concluding that a CAT order is outside the scope of Section 1252(a)(2)(C) is consistent with the treatment of such claims throughout the immigration laws. This conclusion is also the only one consistent with the statutory text.

ARGUMENT

A. Section 1252(a)(2)(C) does not apply to orders resolving CAT claims.

"In statutory interpretation disputes, a court's proper starting point lies in a careful examination of the ordinary meaning and structure of the law itself." *Food Mktg. Inst.* v. *Argus Leader Media*, 139 S. Ct. 2356, 2364 (2019). When "that examination yields a clear answer," the inquiry "must stop." *Ibid*.

Section 1252(a)(2)(C) limits judicial review of a "final order of removal." An order granting or denying

CAT relief is not a "final order of removal." Section 1252(a)(2)(C) does not, therefore, strip judicial review of an order resolving a CAT claim.

1. Section 1252(a)(2)(C) limits judicial review of a "final order of removal."

Section 1252(a)(2)(c) provides that "no court shall have jurisdiction to review any final order of removal against an alien who is removable by reason of having committed" a criminal offense covered by the cross-referenced statutes. 8 U.S.C. § 1252(a)(2)(C). The statute specifies what is outside the scope of judicial review—"any final order of removal," no more and no less.[13] See, *e.g.*, *Cyan, Inc.* v. *Beaver Cty. Emps. Ret. Fund*, 138 S. Ct. 1061, 1078 (2018) ("[T]his Court has no license to 'disregard clear language' based on an intuition that 'Congress must have intended something broader.'") (quoting *Michigan* v. *Bay Mills Indian Cmty.*, 572 U.S. 782, 794 (2014)); *Virginia Uranium, Inc.* v. *Warren*, 139 S. Ct. 1894, 1900 (2019) ("[I]t is our duty to respect not only what Congress wrote but, as importantly, what it didn't write.") (plurality op.).

2. An order resolving a CAT claim is not a "final order of removal."

The critical question posed here, then, is whether an order granting or denying a noncitizen's request for CAT relief is a "final order of removal." It is not. It is a separate order, directed to a different end. The statutory text, the implementing regulations, and the agency's practice all confirm that an order resolving a request for CAT relief is not—and cannot be accurately described as—a "final order of removal."

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[13] The REAL ID Act restores jurisdiction with respect to "constitutional claims or questions of law." 8 U.S.C. § 1252(a)(2)(D).

During a removal proceeding, an IJ first determines if a noncitizen is removable. If he or she is removable, and there is no basis to otherwise cancel or suspend the removal, the IJ enters a removal order. See pages 3-5, *supra*. If an individual has expressed a fear of torture if sent to a particular country, the IJ *then* resolves the request for CAT relief. If granted, the order blocks removal to a *particular* country. The removal order, however, remains in place, and the government may execute it by removing the noncitizen to a third country.

In sum, the removal order and the CAT order are two separate orders. To be sure, they usually arise in the same proceeding, and, when they do, they are reviewed together on appeal via a consolidated petition for review. But the orders remain separate and distinct.

a. The term "order of removal" is statutorily defined—and it does not include an order resolving a request for CAT relief.

In 1996, Congress enacted what is now Section 1252(a)(2)(C) as part of AEDPA. See Pub. L. 104-132, § 440(a), 110 Stat. at 1276-1277. At the time, the statute provided that "[a]ny final order of deportation against an alien who is deportable by reason of having committed" one of certain categories of offenses "shall not be subject to review by any court." *Ibid*.

In the immediately following provision, AEDPA specified the reach of this jurisdiction-stripping provision by defining "order of deportation." The term "means" the "order * * * concluding that the alien is deportable or ordering deportation." Pub. L. No. 104-132, § 440(b), 110 Stat. at 1277 (codified at 8 U.S.C.

§ 1101(a)(47)(A)).[14] This order is "final" either when affirmed by the Board or when the time to appeal to the Board expires. *Ibid*. (codified at 8 U.S.C. § 1101(a)(47)(B)). Thus, when Congress enacted the jurisdiction-stripping provision at issue here, Congress also defined its reach: It applies only to orders determining that an alien is "deportable" or "ordering deportation."

As the Court has explained, "[a]s a rule, a [statutory] definition which declares what a term 'means' excludes any meaning that is not stated." *Burgess* v. *United States*, 553 U.S. 124, 131 (2008) (alterations incorporated). Such statutory definitions are "virtually conclusive." *Sturgeon* v. *Frost*, 139 S. Ct. 1066, 1086 (2019) (quoting Antonin Scalia & Bryan A. Garner, *Reading Law: The Interpretation of Legal Texts* 228 (2012)).

An order granting or denying CAT relief does not address whether a noncitizen is "deportable." The INA specifically defines what makes a noncitizen "deportable" via 8 U.S.C. § 1227, which is titled "[d]eportable aliens." Several grounds can render one "deportable," including criminal conduct, marriage fraud, and a host of other activities. *Ibid*. An order on a CAT claim, however, has no bearing on whether a particular noncitizen is "deportable."

Nor does an order resolving a CAT claim "order[] deportation." It is the removal order—not the CAT order—that "order[s] deportation." Rather, CAT relief, if granted, forbids the "involuntary return" of the indi-

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[14] Following IIRIRA's change in "nomenclature," this is now the definition of "order of removal." See *Calcano-Martinez*, 533 U.S. at 350 n.1; see also, *e.g.*, *Nken* v. *Holder*, 556 U.S. 418, 439 (2009) (Alito, J., dissenting) (identifying Section 1101(a)(47)(B) as concerning finality of an "order of removal").

vidual to a particular country, at a particular time. FARRA § 2242(a) (codified at 8 U.S.C. § 1231 note).

If an individual is granted CAT relief, he or she remains "deportable" and "order[ed] deport[ed]." That is because, notwithstanding a grant of CAT withholding or deferral, the government may still execute the "order of removal" by removing the noncitizen to a third country.

To unpack this, CAT relief is country-specific; it is effective only as "to the country to which * * * removal is ordered withheld or deferred." 8 C.F.R. § 1208.22. In a subsection titled "[r]emoval to third country," the regulation provides that "[n]othing * * * shall prevent the [government] from removing an alien to a third country other than the country to which removal has been withheld or deferred." *Id*. § 1208.16(f). And the INA identifies several "[a]lternative" and "[a]dditional" countries to which the government may remove a noncitizen, beyond the country specified in the removal order. 8 U.S.C. § 1231(b)(2)(D), (E); see also 8 C.F.R. § 1240.12(d).

The government has recently underscored this point: If a noncitizen is granted "protection under the CAT," the individual "still remains subject to a final order of removal from the United States." U.S. Br. Opp. 3, *Padilla-Ramirez* v. *Culley*, No. 17-1568 (2018). And that removal order may be executed because the individual "may still be removed to a third country." *Ibid*. (citing 8 U.S.C. § 1231(b)(2)). See also *Asylum Eligibility and Procedural Modifications*, 84 Fed. Reg. 33,829, 33,834 (July 16, 2019) ("CAT protection [does] not [] [p]rohibit the Government from removing the alien to a third country where the alien would not face the requisite probability of persecution or torture.").

In short, notwithstanding a grant of CAT relief, the "order of removal" remains operative—and the government can enforce it through third-country removal. Because the removal order remains in force, a CAT claim cannot be described as an "order * * * concluding that the alien is deportable or ordering deportation." 8 U.S.C. § 1101(a)(47)(A). Regardless of CAT relief, the removal order is *presently* effective—the noncitizen remains deportable and has been ordered deported.

The orders in this case are illustrative. The IJ found petitioner "removable" (Pet. App. 34a), and it ordered him "removed" from the United States (*id*. at 47a). The IJ *additionally* granted petitioner CAT deferral, meaning that petitioner's "removal has been deferred only to Lebanon." *Ibid*. The IJ underscored that the removal order was nonetheless presently effective: Petitioner "may therefore be removed at any time to another country where he is not likely to be tortured." Pet. App. 47a.[15]

b. In related statutory provisions, Congress has made clear that an order granting or denying CAT relief is not a "final order of removal."

In Section 1252 itself, Congress distinguished between judicial review of orders resolving CAT claims and judicial review of orders of removal. As a response to *INS* v. *St. Cyr*, 533 U.S. 289, 306 (2001), the REAL ID Act sought to limit the use of habeas petitions as a mechanism to seek judicial review apart from a peti-

[15] Further, when the Board reviewed—and reversed—the IJ's grant of CAT deferral, the Board also spoke of the CAT order as independent of the removal order. The Board "vacated" the "Immigration Judge's *order* granting the respondent's application for deferral of removal." Pet. App. 21 (emphasis added).

tion for review governed by Section 1252.[16] In that statute, Congress enacted two parallel provisions to accomplish this end.

First, Congress addressed CAT claims, providing:

> [A] petition for review filed with an appropriate court of appeals in accordance with this section shall be the sole and exclusive means for judicial review of *any cause or claim under the [CAT]*.

Pub. L. No. 109-13, div. B, § 106(a)(1)(B), 119 Stat. at 310 (emphasis added) (codified at 8 U.S.C. § 1252(a)(4)).

Immediately following that provision, Congress enacted what is now Section 1252(a)(5). Pub. L. No. 109-13, div. B, § 106(a)(1)(B), 119 Stat. at 310. This subsection operates in precisely the same fashion, but with respect to an "order of removal":

> [A] petition for review filed with an appropriate court of appeals in accordance with this section shall be the sole and exclusive means for judicial review of an *order of removal*.

8 U.S.C. § 1252(a)(5) (emphasis added).

In light of these provisions, "any cause or claim under the" CAT must be distinct from "an order of removal." Otherwise, Section 1252(a)(4) would have no meaning. And to drain Section 1252(a)(4) of all meaning would run headlong into the interpretive principle that "a statute should be construed so that effect is given to all its provisions, so that no part will be inoperative or superfluous, void or insignificant." *Corley* v.

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[16] Pub. L. No. 109-13, div. B., § 106(a)(1)(B), 119 Stat. at 310; see also Pet'r Br. 6-8, 31-34, *Guerrero-Lasprilla*, No. 18-776.

United States, 556 U.S. 303, 314 (2009) (citation omitted; alteration incorporated).

This canon against statutory superfluity has particular bite here. Sections 1252(a)(4) and (a)(5) were adopted at the same time, via the same subsection of the REAL ID Act (Section 106(a)(1)(B))—indeed, they were next-door neighbors. Given that Congress simultaneously adopted these parallel provisions, it must have intended for them to have independent effect. See *Russello* v. *United States*, 464 U.S. 16, 23 (1983). Under our construction, they do: Section 1252(a)(4) channels orders resolving "any cause or claim under the [CAT]" into Section 1252, while Section 1252(a)(5) channels into Section 1252 all challenges to an "order of removal." Congress enacted two different provisions because they concern two different kinds of orders.

FARRA, which implements certain portions of the CAT, further confirms that an order resolving a CAT claim is distinct from an "order of removal." FARRA Section 2242(d) provides judicial review over "claims raised under the [CAT]" only as "*part of* the review of a final order of removal." FARRA § 2242(d) (emphasis added) (codified at 8 U.S.C. § 1231 note).

Once more, Congress distinguished between an order resolving a CAT claim and a "final order of removal." And, while Section 2242(d) confirms that judicial review of a CAT claim often happens along with the "final order of removal," it makes plain that the CAT claim is *not* the "final order of removal" itself. If a CAT order actually *were* the "final order of removal," Congress would have had no need to specify that review of the CAT order occurs as "part of the review" of the removal order. Rather, this language indicates that these are distinct orders.

c. Several aspects of the governing regulations further demonstrate that an order resolving a CAT claim is distinct from the "order of removal."

First, an order of removal is a precondition to CAT relief—and CAT relief temporally follows the removal order.

A noncitizen is eligible to be considered for a "[g]rant of deferral of removal" only if the alien "has been ordered removed." 8 C.F.R. § 1208.17(a). Given that an order of removal is a prerequisite to consideration for CAT deferral, the order resolving the CAT deferral claim cannot itself be an "order of removal."

Closely related, the regulation instructs the immigration judge to inform the noncitizen of the grant of CAT deferral "*[a]fter*" the judge "orders" him or her "removed." 8 C.F.R. § 1208.17(b)(1) (emphasis added). This temporal distinction accords with the conclusion that there are two separate orders, which, by regulation, are issued to the noncitizen sequentially.

Second, regulations bestow on immigration judges separate "authority" to enter a removal order and then to resolve a CAT claim. 8 C.F.R. § 1240.1(a)(1).

In addressing the IJ's powers in "any removal proceeding," regulations first provide that the IJ may "[d]etermine removability" and enter "orders of removal." 8 C.F.R. § 1240.1(a)(1)(i). An IJ holds *separate* authority "[t]o order withholding of removal pursuant to section 241(b)(3) of the Act and pursuant to the Convention Against Torture." *Id*. 1240.1(a)(1)(iii). The regulations independently authorize the IJ to enter these different kinds of orders.

Third, the regulations repeatedly distinguish between a "removal order" and an order resolving a CAT claim.

The regulations refer to a grant of CAT deferral as "the order of deferral." 8 C.F.R. §§ 1208.17(d)(4), 1208.17(e)(1), 1208.17(e)(2). Separately, the regulations discuss a CAT "withholding order." *Id*. § 1208.22. They also describe a "removal order" See, *e.g.*, *id.* § 1208.31(a). These orders are distinct from one another.

Likewise, when promulgating these regulations, the legacy Immigration & Naturalization Service (INS) used the term "order of removal" as distinct from "order of deferral." Compare *Regulations Concerning the Convention Against Torture*, 64 Fed. Reg. 8,478, 8,479 (Feb. 19, 1999) ("Only execution of an order of removal to a country where an alien is more likely than not to be tortured would violate the Convention.") with *id*. at 8,481 ("While the order of deferral is in effect, the alien will not be returned to the country in question."). INS then understood—and reflected in its regulations—that a CAT order is not an "order of removal."

Fourth, relevant expedited removal procedures confirm that CAT relief orders are separate from removal orders. Section 1228 creates expedited removal procedures for noncitizens convicted of aggravated felonies. 8 U.S.C. § 1228. In these circumstances, when a noncitizen requests CAT relief, the individual's case is referred to an asylum officer for "a reasonable fear determination" in accordance with CAT relief procedures *after* "issuance of a Final Administrative Removal Order." 8 C.F.R. § 1238.1(f)(3); see also *id*. § 1003.42(f) (similar).

d. To argue that an order resolving a CAT claim "fits squarely within [the] definition" of "order of removal," the government relies (BIO 12) on *INS* v. *Chadha*, 462 U.S. 919 (1983) and *Foti* v. *INS*, 375 U.S. 217 (1963). Both are inapt.

In *Chadha*, the Court considered the meaning of "final orders of deportation" as then used in part of the INA. 462 U.S. at 937. *Chadha* predates AEDPA's critical definition, enacted in 1996. In any event, the Court concluded that the term "includes all matters on which the validity of the final order is contingent." *Id*. at 938. But a final order of removal is *not* contingent on a CAT claim; as we have said—and the government has repeatedly argued—the removal order remains effective and executable notwithstanding a subsequent grant of CAT relief.

Foti, like *Chadha*, predates Congress's enactment of the definition in 8 U.S.C. § 1101(a)(47) applicable here. Regardless of what may be said as to the construction of the term "final order of deportation" before AEDPA, the definition that Congress adopted—as part of enacting what is now Section 1252(a)(2)(C)—governs. See, *e.g.*, *Digital Realty Tr., Inc.* v. *Somers*, 138 S. Ct. 767, 776-777 (2018) ("'When a statute includes an explicit definition, we must follow that definition,' even if it varies from a term's ordinary meaning.") (quoting *Burgess*, 553 U.S. at 130).

In any event, *Foti* held only that a request for the Attorney General to grant discretionary relief in the form of "suspension of deportation" was part of the "final deportation order." 375 U.S. at 222-223. And in reaching this result, the Court observed that it was "[s]ignificant[]" that, "when suspension is granted, no deportation order is rendered at all, even if the alien is in fact found to be deportable." *Id*. at 223. The Court underscored that a grant of this "discretionary relief" would "effectively terminate[] the proceeding." *Id*. at 224.

Since *Foti*, suspension of removal has been recast as cancellation of removal. See pages 4-5 & n.3, *supra*. In AEDPA vernacular, therefore, a suspension order

determines whether a noncitizen is in fact "order[ed] deport[ed]." 8 U.S.C. § 1101(a)(47)(A). If suspension relief (like cancellation) were granted, no such order would be entered. CAT relief, however, addresses neither whether a noncitizen is "deportable" nor whether that individual is "order[ed] deport[ed]." Rather, even with a grant of CAT relief, the government may still actually remove the noncitizen and, as the government acknowledges, the removal order remains in effect.

Foti also turned significantly on the practical backdrop. The statute at issue was designed "to abbreviate the process of judicial review." 375 U.S. at 224. But, if the suspension determination was not part of the deportation order, then separate review could have been had in a district court. This "[b]ifurcation of judicial review of deportation proceedings" would be "inconvenient" and "clearly undesirable." *Id*. at 232. No such bifurcation is possible here; by virtue of multiple provisions now contained in the INA, CAT claims are reviewed together with any challenges to the removal order in the same petition for review. See pages 35-36, *infra*.

3. This construction is consistent with the framework for judicial review of CAT orders.

Our construction of the INA is consistent with its provisions directing judicial review.

Three statutory provisions are most relevant to judicial review of CAT claims. The INA expressly provides for judicial review of a CAT order: "[A] petition for review filed with an appropriate court of appeals in accordance with this section shall be the sole and exclusive means for judicial review of any cause or claim under the [CAT]." 8 U.S.C. § 1252(a)(4). Per this provi-

sion, to review a CAT claim, a noncitizen files a petition for review governed by Section 1252.[17]

Additionally, FARRA provides that judicial review of a CAT claim is available only "as part of the review of a final order of removal pursuant to" Section 1252. FARRA § 2242(d) (codified at 8 U.S.C. § 1231 note).

Finally, the so-called Zipper Clause consolidates all issues "arising from any action taken or proceeding brought to remove an alien from the United States" into the "judicial review of a final order under" Section 1252. 8 U.S.C. § 1252(b)(9).

Putting these statutes together, two conclusions follow. *First*, there is judicial review over a CAT order. Section 1252(a)(4) makes that clear, and the government has never argued otherwise. *Second*, the mechanism for the challenge is a "petition for review" brought pursuant to the requirements of Section 1252. 8 U.S.C. § 1252(a)(4).

Neither conclusion suggests that the CAT order *is* the "order of removal." Instead, when a noncitizen challenges the Board's ruling with respect to both a removal order and a CAT order, a petition for review will consolidate them into one appellate proceeding. That is why the Zipper Clause is titled "[c]onsolidation of questions for judicial review." 8 U.S.C. § 1252(b)(9). Consolidating multiple orders into a single petition for review does not make them the *same* order. For example, if a district court dismisses a plaintiff's complaint and orders Rule 11 sanctions against that plaintiff, the

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[17] When enacting Section 1252(a)(4) in the REAL ID Act, Congress identified its purpose as supplying jurisdiction. "This provision will allow aliens in section 240 removal proceedings to seek review of" a CAT claim "in the courts of appeal." H.R. Conf. Rep. 109-72 at 176 (2005).

plaintiff may seek review of both orders in one appellate proceeding. But the two underlying actions by the district court nonetheless remain distinct orders.

The government's lead argument appears to be that Section 1252(a)(2)(C) applies to the *whole* "petition for review" that is brought under Section 1252. BIO 15-16. That is, the government seems to assert that, if Section 1252(a)(2)(C) applies to *any* order challenged by a petition for review, then Section 1252(a)(2)(C)'s jurisdiction-stripping applies to the *whole* petition.

But Section 1252(a)(2)(C) says no such thing. It does not, for example, attach to "a petition for review filed with an appropriate court of appeals in accordance with this section"—the language that Congress used in both Sections 1252(a)(4) and (a)(5).

Rather, Section 1252(a)(2)(C) applies to a "final order of removal." That is all. Because it does not attach to the whole "petition," the government's argument is refuted by the statute's plain text. See *Cyan*, 138 S. Ct. at 1078; *Virginia Uranium*, 139 S. Ct. at 1900.

B. The government's contrary position conflicts with the presumption in favor of judicial review.

The construction we urge is further supported by the strong presumption in favor of judicial review over agency action.

The Court applies a "well-settled" (*Reno* v. *Catholic Social Servs., Inc.*, 509 U.S. 43, 63-64 (1993)) and "strong presumption that Congress intends judicial review of administrative action" (*Smith* v. *Berryhill*, 139 S. Ct. 1765, 1776 (2019) (quoting *Bowen* v. *Michigan Acad. of Family Physicians*, 476 U.S. 667, 670 (1986))). See also *Mach Mining, LLC* v. *EEOC*, 135 S. Ct. 1645, 1651 (2015) (same); *United States* v. *Nourse*, 34 U.S. 8, 28-29 (1835) (Marshall, C.J.). All told, "[i]f a provision

can reasonably be read to permit judicial review, it should be." *Cuozzo Speed Techs., LLC* v. *Lee*, 136 S. Ct. 2131, 2150 (2016) (Alito, J., concurring in part and dissenting in part).

Though the presumption of judicial review is "rebuttable," "the burden for rebutting it is 'heavy.'" *Smith*, 139 S. Ct. at 1776-1777 (quoting *Mach Mining*, 135 S. Ct. at 1651). It "takes 'clear and convincing evidence' to dislodge the presumption" in favor of judicial review. *Kucana* v. *Holder*, 558 U.S. 233, 252 (2010) (quoting *Catholic Social Servs.*, 509 U.S. at 64).

This presumption stems, in significant part, from separation-of-powers principles. As the Court has held, "[s]eparation-of-powers concerns" caution "against reading legislation, absent clear statement, to place in executive hands authority to remove cases from the Judiciary's domain." *Kucana*, 558 U.S. at 237. Broadly guaranteeing judicial review "enforces the limits that Congress has imposed on the agency's power," which "serves to buttress * * * Congress's objectives." *Cuozzo Speed Techs.*, 136 S. Ct. at 2151 (Alito, J., concurring in part and dissenting in part).[18]

Judicial review of Board determinations is especially critical, as "the content and reasoning of the BIA opinion can mean life or death to a deportee." *Jahjaga* v. *Attorney Gen.*, 512 F.3d 80, 85 (3d Cir. 2008). That is, "[i]mmigration decisions, especially in asylum cases, may have life or death consequences, and so the costs

[18] The Court has also long construed "ambiguities in deportation statutes in the alien's favor." *Kawashima* v. *Holder*, 132 S. Ct. 1166, 1176 (2012).

of error are very high." *Albathani* v. *INS*, 318 F.3d 365, 378 (1st Cir. 2003).[19]

The issue in a CAT claim is whether the litigant has shown that it is more likely than not that he or she will be tortured upon removal to a particular country. An erroneous Board denial means that a noncitizen *has shown* that he or she is more likely than not to be tortured—but the administrative agency botched the adjudication. And, as a result of that mistake, the individual will be sent to the place where torture is likely. It is hard to imagine more serious agency error.

Indeed, noncitizens who feared torture abroad have been killed upon removal. See, *e.g.*, Sarah Stillman, *When Deportation Is a Death Sentence*, The New Yorker (Jan. 8, 2018) (uncovering more than sixty cases of individuals who were killed, kidnapped, assaulted, or otherwise seriously harmed after being removed); Maria Sacchetti & Carolyn Van Houten, *Death Is Waiting for Him*, Wash. Post (Dec. 6, 2018) (recounting circumstances of Santos Chirino, who was murdered in Honduras following denial of his asylum claim); cf. *id.* ("[Immigration] Judges say they must handle 'death-penalty' cases in a traffic court setting, with inadequate budgets and grueling caseloads."). The presump-

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[19] See also, *e.g.*, *Ardestani* v. *INS*, 502 U.S. 129, 140 (1991) (Blackmun, J., dissenting) ("The alien's stake in [a deportation] proceeding is * * * sometimes life or death in the asylum context[.]"); *Rodriguez-Roman* v. *INS*, 98 F.3d 416, 432 (9th Cir. 1996) (Kozinski, J., concurring) (noting "the importance of independent judicial review in an area [asylum] where administrative decisions can mean the difference between freedom and oppression and, quite possibly, life and death"); *id*. at 433 (Reinhardt and Hawkins, JJ., specially concurring) ("[J]udicial review of asylum cases may mean the difference between life and death for refugees from tyranny or from religious or racial persecution.").

tion in favor of judicial review should apply with full force here.

That is all the more so because, despite these massively high stakes, Board errors occur. In *Arej* v. *Sessions*, 852 F.3d 665 (7th Cir. 2017), for example, the court of appeals—noting that "a competent immigration service would not ignore world events"—vacated a Board decision that had turned on a finding that the outbreak of a violent civil war in South Sudan, "with the young nation described as 'cracking apart' and United Nations officials raising concerns about genocide," did not amount to materially changed circumstances. *Id.* at 667. And in *Zhang* v. *Gonzales*, 452 F.3d 167 (2d Cir. 2006), the court of appeals was "compelled to remand for further proceedings to allow the BIA to explain why it denie[d] [the petitioner] relief from removal when, on apparently identical facts, the agency granted such relief to *her husband*." *Id.* at 169 (emphasis added).

Nor are such "serious legal error[s]" (*Arej*, 852 F.3d at 667) merely anecdotal; statistical analyses tell the same story. While it is well-established empirically that "some immigration judges are up to three times more likely than their colleagues to order immigrants deported," "[t]he removal orders of harsher immigration judges are *no more likely* to be reversed on appeal by the Board of Immigration Appeals." David Hausman, *The Failure of Immigration Appeals*, 164 U. Pa. L. Rev. 1177, 1177 (2016) (emphasis added) (analyzing FOIA-obtained database of hundreds of thousands of immigration adjudications). Particularly given the life-or-death consequences of an erroneous denial, decisions rejecting CAT relief must not escape judicial review.

C. Judicial review is consistent with the INA's purposes.

Two purposes of the INA inform the construction of Section 1252(a)(2)(C) at issue here—the United States' inviolable policy that it does not deport individuals to countries where they are likely to be tortured, and the United States' interest in efficient removal proceedings for noncitizens with criminal histories.

Our construction gives effect to both policies. Section 1252(a)(2)(C) strips jurisdiction with respect to the core aspect of a removal proceeding, the removal order. But Section 1252(a)(2)(C) does not undermine the essential protections the United States has adopted to ensure that the removal apparatus does not result in torture or extrajudicial killing. In fact, throughout immigration law, CAT relief routinely acts as a counterbalance to other weighty goals.

1. Congress adopted the jurisdiction-stripping provisions in Section 1252(a)(2)(C) to streamline judicial review with respect to the removal of noncitizens with criminal histories. But the rationales justifying the provision demonstrate its inapplicability here.

What is now Section 1252(a)(2)(C) originated in an amendment offered by Senator Spencer Abraham. See S. Rep. No. 104-249, at 14, 27-28 (1996); AEDPA, Pub. L. No. 104-132, § 440, 110 Stat. at 1276-1277. Senator Abraham tethered the stripping of jurisdiction to the judicial process the noncitizen had already received in the criminal proceeding.

On the Senate floor, Senator Abraham noted that this provision contemplates that "the criminal alien had exhausted all appeals available under the criminal laws." 142 Cong. Rec. S3328-3329 (1996) (daily ed. Apr. 15, 1996). He confirmed that criminal noncitizens "would still be entitled to the lengthy appellate and

habeas corpus review, just like U.S. citizens." *Ibid*. Section 1252(a)(2)(C) thus stemmed from the view that criminal noncitizens *already had* judicial review with respect to the issue that renders them deportable.

That rationale does not apply to a request for CAT relief. The issues present in a CAT claim—whether a noncitizen is likely to be tortured if removed to a particular country—bear no resemblance to the issues previously litigated in a criminal trial. The basis for pretermitting judicial review over "final orders of removal" entered against criminal noncitizens thus does not apply to CAT claims.

2. CAT relief implements a core value that the United States has adopted. As the Department of Justice informed Congress during ratification hearings on CAT, "[t]he United States does not and, we trust, never would extradite or deport a person to a country where it is known that he would be subjected to torture." *Convention Against Torture: Hearing Before the S. Comm. on Foreign Relations*, 101st Cong. 14-15 (1990) (Statement of Deputy Ass't Att'y Gen. Mark Richard).

When Congress implemented CAT relief via domestic law, Congress specified that this relief extends to "*any* person." FARRA § 2242(a) (emphasis added) (codified at 8 U.S.C. § 1231 note). The term "any" precludes qualification. It means "one or some indiscriminately of whatever kind," and it is "used to indicate one selected without restriction." Merriam-Webster's College Dictionary 56 (11th ed. 2003).

In promulgating implementing regulations for FARRA and CAT, the INA made clear that "any" does in fact reach *all* individuals. Though some categories of individuals—including those "who assisted in Nazi persecution or engaged in genocide" and those "who have been convicted of particularly serious crimes"—

are ineligible for statutory withholding, CAT "does not exclude such persons from its scope." 64 Fed. Reg. at 8,478-8,479. CAT "contains no exceptions" to the "mandate" that no person may be returned "to a country where he or she would be tortured." *Id*. at 8,481.

As INS underscored, when the United States ratified CAT, no "reservations, understandings, declarations, or provisos contained in the Senate's resolution of ratification provide[d] that the United States may exclude any person from Article 3's prohibition on return because of criminal or other activity or for any other reason." 64 Fed. Reg. at 8,481. "Indeed, the ratification history of the Convention Against Torture clearly indicates that the Executive Branch presented Article 3 to the Senate with the understanding that it 'does not permit any discretion or provide for any exceptions.'" *Ibid*. (quoting Richard, *supra*, at 15).

In sum, CAT relief purposefully extends to the most heinous, including Nazi war criminals and those who commit genocide. The United States' refusal to remove an individual to a country where he or she is likely to be torture is absolute.

3. For these reasons, CAT relief always counterbalances laws that, for various policy objectives, restrict judicial review. Construing Section 1252(a)(2)(C) not to reach CAT orders is consistent with the privileged position that CAT claims enjoy throughout immigration law.

For example, though a reinstated order of removal is otherwise absolute, a noncitizen may nevertheless request CAT relief. 8 C.F.R. § 241.8(e). An alien deemed inadmissible following a request for an S visa (granted to those with information about criminal activity) "may not contest such removal, other than by applying for withholding of removal," including CAT

relief. *Id*. § 236.4(e). And certain waivers of noncitizen rights exempt CAT claims. See 8 U.S.C. § 1182(l)(2)(B).

Recent Executive actions confirm the sanctity of CAT claims, even in the face of immigration objectives deemed compelling. In 2017, the President issued multiple orders restricting the entry of individuals to the United States from certain enumerated countries. See Executive Order No. 13,780, *Protecting the Nation From Foreign Terrorist Entry Into the United States* (Mar. 6, 2017); Proclamation No. 9645, 82 Fed. Reg. 45,161 (Sept. 24, 2017). The President exempted from these entry bars "any individual who has been granted * * * protection under the Convention Against Torture." EO 13,780 § 3(b)(vi); Proclamation 9645 § 3(b)(vi). The President further specified that "[n]othing in this order shall be construed to limit the ability of an individual to seek * * * protection under the Convention Against Torture, consistent with the laws of the United States." EO 13,780 § 12(e); see also Proclamation 9645 § 6(e). Thus, the President specifically accommodated the ironclad policy that the United States does not return individuals to countries where they likely would be tortured.

More recently, DHS promulgated a regulation rendering individuals who cross the southern land border ineligible for asylum if they did not apply for relief in an available third country that they crossed en route to the United States. *Asylum Eligibility and Procedural Modifications*, 84 Fed. Reg. 33,829 (2019); see also Order, *Barr* v. *East Bay Sanctuary Covenant*, No. 19a-230 (Sep. 11, 2019) (granting application for stay). In adopting this asylum bar, DHS observed that these individuals would "remain eligible to apply for statutory

withholding of removal and for deferral of removal under the CAT." 84 Fed. Reg. at 33,831.[20]

The same was true of the February 2019 Presidential Proclamation designed to close the southern border to all crossings by noncitizens. See Proclamation No. 9842 § 2(c), 84 Fed. Reg. 3,665, 3,666 *Addressing Mass Migration through the Southern Border of the United States* (Feb. 7, 2019) ("Nothing in this proclamation shall limit an alien entering the United States from being considered for * * * protection pursuant to the regulations promulgated under the authority of the implementing legislation regarding the [CAT].").

The whole of immigration law reflects that CAT protection is inviolable. Against this settled principle, there is nothing remotely exceptional in concluding that Section 1252(a)(2)(C) does not apply to CAT claims. Limitations on immigration—regardless of purpose—essentially never limit CAT claims. It is the *government's* contrary construction that would be exceptional, as it would disrupt the unique and absolute role that CAT claims play.

At bottom, the construction we urge accords with the calibrated approach governing immigration law. And, most importantly, it is the only construction true to the statutory text.

* * *

[20] In seeking a stay of lower court orders enjoining this regulation, the government underscored that the regulation left CAT relief undisturbed. See Application for Stay Pending Appeal at 5, *Barr* v. *East Bay Sanctuary Covenant*, No. 19a-230 ("As for the aliens the rule covers, * * * it allows them to seek other forms of protection, including withholding of removal in the United States."); *id*. at 9, 36.

One final point. After the petition in this case was filed, the Court granted certiorari in *Guerrero-Lasprilla* v. *Barr*, No. 18-776, and *Ovalles* v. *Barr*, No. 18-1015. In resolving those cases, the Court may address the meaning of the term "questions of law," as it is used in Section 1252(a)(2)(D).

If—contrary to our submission in this case—the Court concludes that Section 1252(a)(2)(C) applies to judicial review of CAT claims, it should remand to the court of appeals for consideration of whether petitioner's arguments are cognizable as "questions of law" pursuant to Section 1252(a)(2)(D). See *Heller* v. *New York*, 413 U.S. 483, 494 (1973) (vacating and remanding in view of an intervening decision).

As to CAT withholding, petitioner challenges whether the Board "misapplied factors used to determine whether he committed a particularly serious crime"—an inquiry that the court of appeals held "does not involve * * * a question of law." Pet. App. 9a. As to CAT deferral, the court concluded that a "determination about the likelihood of future harm * * * is a finding of fact, not a question of law." *Id*. at 11a.[21] The Court's decision in *Guerrero-Lasprilla* and *Ovalles* may cast doubt on either or both determinations.[22]

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[21] In contrast, the Board reviewed whether petitioner had established a likelihood of future torture without deference to the immigration court's favorable finding. See Pet. App. 18a-20a. Not once did the Board apply a clearly erroneous standard—as would have been obligatory if the future-torture issue were a question of fact. *Id*. at 13a.

[22] To be clear, this issue is subsequent to the question presented here, which addresses whether Section 1252(a)(2)(C) applies at all. If, contrary to our submission, Section 1252(a)(2)(C) does apply, then so does Section 1252(a)(2)(D), leading to the issues presently before the Court in *Guerrero-Lasprilla* and *Ovalles*.

CONCLUSION

The Court should reverse the judgment of dismissal entered by the court of appeals.

Respectfully submitted.

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APPENDIX

The United Nations Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, Dec. 10, 1984, S. Treaty Doc. No. 100-20 (1988), 1465 U.N.T.S. 85, provides, in relevant part:

* * *

Article 3

1. No State Party shall expel, return ("refouler") or extradite a person to another State where there are substantial grounds for believing that he would be in danger of being subjected to torture.

The Foreign Affairs Reform and Restructuring Act of 1998 (FARRA), Pub. L. No. 105–277, div. G, § 2242, 112 Stat. 2681-761, 2681-822 (1998) (codified at 8 U.S.C. § 1231 note) provides:

(a) Policy. It 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.

(b) Regulations. Not later than 120 days after the date of enactment of this Act [Oct. 21, 1998], the heads of the appropriate agencies shall prescribe regulations to implement the obligations of the United States under Article 3 of the United Nations Convention Against Torture and Other Forms of 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.

(c) Exclusion of Certain Aliens. To the maximum extent consistent with the obligations of the United States under the Convention, subject to any reservations, understandings, declarations, and provisos contained in the United States Senate resolution of ratification of the Convention, the regulations described in subsection (b) shall exclude from the protection of such regulations aliens described in section 241(b)(3)(B) of the Immigration and Nationality Act (8 U.S.C. 1231(b)(3)(B)).

(d) Review and Construction. Notwithstanding any other provision of law, and except as provided in the regulations described in subsection (b), no court

shall have jurisdiction to review the regulations adopted to implement this section, and nothing in this section shall be construed as providing any court jurisdiction to consider or review claims raised under the Convention or this section, or any other determination made with respect to the application of the policy set forth in subsection (a), except as part of the review of a final order of removal pursuant to section 242 of the Immigration and Nationality Act (8 U.S.C. 1252).

(e) Authority To Detain. Nothing in this section shall be construed as limiting the authority of the Attorney General to detain any person under any provision of law, including, but not limited to, any provision of the Immigration and Nationality Act [8 U.S.C. 1101 et seq.].

(f) Definitions.

(1) Convention defined. In this section, the term 'Convention' means the United Nations Convention Against Torture and Other Forms of Cruel, Inhuman or Degrading Treatment or Punishment, done at New York on December 10, 1984.

(2) Same terms as in the convention. Except as otherwise provided, the terms used in this section have the meanings given those terms in the Convention, subject to any reservations, understandings, declarations, and provisos contained in the United States Senate resolution of ratification of the Convention.

8 U.S.C. § 1101 provides, in relevant part:

Definitions

(a) As used in this chapter—

* * *

(47)(A)

The term "order of deportation" means the order of the special inquiry officer, or other such administrative officer to whom the Attorney General has delegated the responsibility for determining whether an alien is deportable, concluding that the alien is deportable or ordering deportation.

(B)

The order described under subparagraph (A) shall become final upon the earlier of –

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

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

8 U.S.C. § 1227 provides, in relevant part:

Deportable aliens

(a) Classes of deportable aliens

Any alien (including an alien crewman) in and admitted to the United States shall, upon the order of the Attorney General, be removed if the alien is within one or more of the following classes of deportable aliens:

(1) Inadmissible at time of entry or of adjustment of status or violates status

(A) Inadmissible aliens

Any alien who at the time of entry or adjustment of status was within one or more of the classes of aliens inadmissible by the law existing at such time is deportable.

(B) Present in violation of law

Any alien who is present in the United States in violation of this chapter or any other law of the United States, or whose nonimmigrant visa (or other documentation authorizing admission into the United States as a nonimmigrant) has been revoked under section 1201(i) of this title, is deportable.

(C) Violated nonimmigrant status or condition of entry

(i) Nonimmigrant status violators

Any alien who was admitted as a nonimmigrant and who has failed to maintain the nonimmigrant status in which the alien was admitted or to which it was changed under section 1258 of this title, or

to comply with the conditions of any such status, is deportable.

(ii) Violators of conditions of entry

Any alien whom the Secretary of Health and Human Services certifies has failed to comply with terms, conditions, and controls that were imposed under section 1182(g) of this title is deportable.

(D) Termination of conditional permanent residence

(i) In general

Any alien with permanent resident status on a conditional basis under section 1186a of this title (relating to conditional permanent resident status for certain alien spouses and sons and daughters) or under section 1186b of this title (relating to conditional permanent resident status for certain alien entrepreneurs, spouses, and children) who has had such status terminated under such respective section is deportable.

(ii) Exception

Clause (i) shall not apply in the cases described in section 1186a(c)(4) of this title (relating to certain hardship waivers).

(E) Smuggling

(i) In general

Any alien who (prior to the date of entry, at the time of any entry, or within 5 years of the date of any entry) knowingly has encouraged, induced, assisted, abetted, or aided any other alien to enter or to try

to enter the United States in violation of law is deportable.

(ii) Special rule in the case of family reunification

Clause (i) shall not apply in the case of alien who is an eligible immigrant (as defined in section 301(b)(1) of the Immigration Act of 1990), was physically present in the United States on May 5, 1988, and is seeking admission as an immediate relative or under section 1153(a)(2) of this title (including under section 112 of the Immigration Act of 1990) or benefits under section 301(a) of the Immigration Act of 1990 if the alien, before May 5, 1988, has encouraged, induced, assisted, abetted, or aided only the alien's spouse, parent, son, or daughter (and no other individual) to enter the United States in violation of law.

(iii) Waiver authorized

The Attorney General may, in his discretion for humanitarian purposes, to assure family unity, or when it is otherwise in the public interest, waive application of clause (i) in the case of any alien lawfully admitted for permanent residence if the alien has encouraged, induced, assisted, abetted, or aided only an individual who at the time of the offense was the alien's spouse, parent, son, or daughter (and no other individual) to enter the United States in violation of law.

(F) Repealed. Pub.L. 104-208, Div. C, Title VI, § 671(d)(1)(C), Sept. 30, 1996, 110 Stat. 3009-723

(G) Marriage fraud

An alien shall be considered to be deportable as having procured a visa or other documentation by fraud (within the meaning of section 1182(a)(6)(C)(i) of this title) and to be in the United States in violation of this chapter (within the meaning of subparagraph (B)) if--

(i) the alien obtains any admission into the United States with an immigrant visa or other documentation procured on the basis of a marriage entered into less than 2 years prior to such admission of the alien and which, within 2 years subsequent to any admission of the alien in the United States, shall be judicially annulled or terminated, unless the alien establishes to the satisfaction of the Attorney General that such marriage was not contracted for the purpose of evading any provisions of the immigration laws, or

(ii) it appears to the satisfaction of the Attorney General that the alien has failed or refused to fulfill the alien's marital agreement which in the opinion of the Attorney General was made for the purpose of procuring the alien's admission as an immigrant.

(H) Waiver authorized for certain misrepresentations

The provisions of this paragraph relating to the removal of aliens within the United States on the ground that they were inadmis-

sible at the time of admission as aliens described in section 1182(a)(6)(C)(i) of this title, whether willful or innocent, may, in the discretion of the Attorney General, be waived for any alien (other than an alien described in paragraph (4)(D)) who--

(i)

(I) is the spouse, parent, son, or daughter of a citizen of the United States or of an alien lawfully admitted to the United States for permanent residence; and

(II) was in possession of an immigrant visa or equivalent document and was otherwise admissible to the United States at the time of such admission except for those grounds of inadmissibility specified under paragraphs (5)(A) and (7)(A) of section 1182(a) of this title which were a direct result of that fraud or misrepresentation.

(ii) is a VAWA self-petitioner.

A waiver of removal for fraud or misrepresentation granted under this subparagraph shall also operate to waive removal based on the grounds of inadmissibility directly resulting from such fraud or misrepresentation.

(2) Criminal offenses

(A) General crimes

(i) Crimes of moral turpitude

Any alien who--

(I) is convicted of a crime involving moral turpitude committed within five

years (or 10 years in the case of an alien provided lawful permanent resident status under section 1255(j) of this title) after the date of admission, and

(II) is convicted of a crime for which a sentence of one year or longer may be imposed,

is deportable.

(ii) Multiple criminal convictions

Any alien who at any time after admission is convicted of two or more crimes involving moral turpitude, not arising out of a single scheme of criminal misconduct, regardless of whether confined therefor and regardless of whether the convictions were in a single trial, is deportable.

(iii) Aggravated felony

Any alien who is convicted of an aggravated felony at any time after admission is deportable.

(iv) High speed flight

Any alien who is convicted of a violation of section 758 of Title 18 (relating to high speed flight from an immigration checkpoint) is deportable.

(v) Failure to register as a sex offender

Any alien who is convicted under section 2250 of Title 18 is deportable.

(vi) Waiver authorized

Clauses (i), (ii), (iii), and (iv) shall not apply in the case of an alien with respect to

a criminal conviction if the alien subsequent to the criminal conviction has been granted a full and unconditional pardon by the President of the United States or by the Governor of any of the several States.

(B) Controlled substances

(i) Conviction

Any alien who at any time after admission has been convicted of a violation of (or a conspiracy or attempt to violate) any law or regulation of a State, the United States, or a foreign country relating to a controlled substance (as defined in section 802 of Title 21), other than a single offense involving possession for one's own use of 30 grams or less of marijuana, is deportable.

(ii) Drug abusers and addicts

Any alien who is, or at any time after admission has been, a drug abuser or addict is deportable.

(C) Certain firearm offenses

Any alien who at any time after admission is convicted under any law of purchasing, selling, offering for sale, exchanging, using, owning, possessing, or carrying, or of attempting or conspiring to purchase, sell, offer for sale, exchange, use, own, possess, or carry, any weapon, part, or accessory which is a firearm or destructive device (as defined in section 921(a) of Title 18) in violation of any law is deportable.

(D) Miscellaneous crimes

Any alien who at any time has been convicted (the judgment on such conviction becom-

ing final) of, or has been so convicted of a conspiracy or attempt to violate--

(i) any offense under chapter 37 (relating to espionage), chapter 105 (relating to sabotage), or chapter 115 (relating to treason and sedition) of Title 18 for which a term of imprisonment of five or more years may be imposed;

(ii) any offense under section 871 or 960 of Title 18;

(iii) a violation of any provision of the Military Selective Service Act (50 U.S.C. App. 451 et seq.) [now 50 U.S.C.A.§ 3801 et seq.] or the Trading With the Enemy Act (50 U.S.C. App. 1 et seq.) [now 50 U.S.C.A. § 4301 et seq.]; or

(iv) a violation of section 1185 or 1328 of this title,

is deportable.

(E) Crimes of domestic violence, stalking, or violation of protection order, crimes against children and1

(i) Domestic violence, stalking, and child abuse

Any alien who at any time after admission is convicted of a crime of domestic violence, a crime of stalking, or a crime of child abuse, child neglect, or child abandonment is deportable. For purposes of this clause, the term "crime of domestic violence" means any crime of violence (as defined in section 16 of Title 18) against a person committed by a current or former spouse of the person, by an individual with

whom the person shares a child in common, by an individual who is cohabiting with or has cohabited with the person as a spouse, by an individual similarly situated to a spouse of the person under the domestic or family violence laws of the jurisdiction where the offense occurs, or by any other individual against a person who is protected from that individual's acts under the domestic or family violence laws of the United States or any State, Indian tribal government, or unit of local government.

(ii) Violators of protection orders

Any alien who at any time after admission is enjoined under a protection order issued by a court and whom the court determines has engaged in conduct that violates the portion of a protection order that involves protection against credible threats of violence, repeated harassment, or bodily injury to the person or persons for whom the protection order was issued is deportable. For purposes of this clause, the term "protection order" means any injunction issued for the purpose of preventing violent or threatening acts of domestic violence, including temporary or final orders issued by civil or criminal courts (other than support or child custody orders or provisions) whether obtained by filing an independent action or as a pendente lite order in another proceeding.

(F) Trafficking

Any alien described in section 1182(a)(2)(H) of this title is deportable.

(3) Failure to register and falsification of documents

(A) Change of address

An alien who has failed to comply with the provisions of section 1305 of this title is deportable, unless the alien establishes to the satisfaction of the Attorney General that such failure was reasonably excusable or was not willful.

(B) Failure to register or falsification of documents

Any alien who at any time has been convicted--

(i) under section 1306(c) of this title or under section 36(c) of the Alien Registration Act, 1940,

(ii) of a violation of, or an attempt or a conspiracy to violate, any provision of the Foreign Agents Registration Act of 1938 (22 U.S.C. 611 et seq.), or

(iii) of a violation of, or an attempt or a conspiracy to violate, section 1546 of Title 18 (relating to fraud and misuse of visas, permits, and other entry documents),

is deportable.

(C) Document fraud

(i) In general

An alien who is the subject of a final order for violation of section 1324c of this title is deportable.

(ii) Waiver authorized

The Attorney General may waive clause (i) in the case of an alien lawfully

admitted for permanent residence if no previous civil money penalty was imposed against the alien under section 1324c of this title and the offense was incurred solely to assist, aid, or support the alien's spouse or child (and no other individual). No court shall have jurisdiction to review a decision of the Attorney General to grant or deny a waiver under this clause.

(D) Falsely claiming citizenship

(i) In general

Any alien who falsely represents, or has falsely represented, himself to be a citizen of the United States for any purpose or benefit under this chapter (including section 1324a of this title) or any Federal or State law is deportable.

(ii) Exception

In the case of an alien making a representation described in clause (i), if each natural parent of the alien (or, in the case of an adopted alien, each adoptive parent of the alien) is or was a citizen (whether by birth or naturalization), the alien permanently resided in the United States prior to attaining the age of 16, and the alien reasonably believed at the time of making such representation that he or she was a citizen, the alien shall not be considered to be deportable under any provision of this subsection based on such representation.

(4) Security and related grounds

(A) In general

Any alien who has engaged, is engaged, or at any time after admission engages in--

(i) any activity to violate any law of the United States relating to espionage or sabotage or to violate or evade any law prohibiting the export from the United States of goods, technology, or sensitive information,

(ii) any other criminal activity which endangers public safety or national security, or

(iii) any activity a purpose of which is the opposition to, or the control or overthrow of, the Government of the United States by force, violence, or other unlawful means,

is deportable.

(B) Terrorist activities

Any alien who is described in subparagraph (B) or (F) of section 1182(a)(3) of this title is deportable.

(C) Foreign policy

(i) In general

An alien whose presence or activities in the United States the Secretary of State has reasonable ground to believe would have potentially serious adverse foreign policy consequences for the United States is deportable.

(ii) Exceptions

The exceptions described in clauses (ii) and (iii) of section 1182(a)(3)(C) of this title

shall apply to deportability under clause (i) in the same manner as they apply to inadmissibility under section 1182(a)(3)(C)(i) of this title.

(D) Participated in Nazi persecution, genocide, or the commission of any act of torture or extrajudicial killing

Any alien described in clause (i), (ii), or (iii) of section 1182(a)(3)(E) of this title is deportable.

(E) Participated in the commission of severe violations of religious freedom

Any alien described in section 1182(a)(2)(G) of this title is deportable.

(F) Recruitment or use of child soldiers

Any alien who has engaged in the recruitment or use of child soldiers in violation of section 2442 of Title 18 is deportable.

(5) Public charge

Any alien who, within five years after the date of entry, has become a public charge from causes not affirmatively shown to have arisen since entry is deportable.

(6) Unlawful voters

(A) In general

Any alien who has voted in violation of any Federal, State, or local constitutional provision, statute, ordinance, or regulation is deportable.

(B) Exception

In the case of an alien who voted in a Federal, State, or local election (including an initiative, recall, or referendum) in violation of a

lawful restriction of voting to citizens, if each natural parent of the alien (or, in the case of an adopted alien, each adoptive parent of the alien) is or was a citizen (whether by birth or naturalization), the alien permanently resided in the United States prior to attaining the age of 16, and the alien reasonably believed at the time of such violation that he or she was a citizen, the alien shall not be considered to be deportable under any provision of this subsection based on such violation.

(7) Waiver for victims of domestic violence

(A) In general

The Attorney General is not limited by the criminal court record and may waive the application of paragraph (2)(E)(i) (with respect to crimes of domestic violence and crimes of stalking) and (ii) in the case of an alien who has been battered or subjected to extreme cruelty and who is not and was not the primary perpetrator of violence in the relationship--

(i) upon a determination that--

(I) the alien was acting is3 self-defense;

(II) the alien was found to have violated a protection order intended to protect the alien; or

(III) the alien committed, was arrested for, was convicted of, or pled guilty to committing a crime--

(aa) that did not result in serious bodily injury; and

(bb) where there was a connection between the crime and the alien's hav-

ing been battered or subjected to extreme cruelty.

(B) Credible evidence considered

In acting on applications under this paragraph, the Attorney General shall consider any credible evidence relevant to the application. The determination of what evidence is credible and the weight to be given that evidence shall be within the sole discretion of the Attorney General.

8 U.S.C. § 1231 provides, in relevant part:

Detention and removal of aliens ordered removed

* * *

(b) Countries to which aliens may be removed

* * *

(3) Restriction on removal to a country where alien's life or freedom would be threatened

(A) In general

Notwithstanding paragraphs (1) and (2), the Attorney General may not remove an alien to a country if the Attorney General decides that the alien's life or freedom would be threatened in that country because of the alien's race, religion, nationality, membership in a particular social group, or political opinion.

(B) Exception

Subparagraph (A) does not apply to an alien deportable under section 1227(a)(4)(D) of this title or if the Attorney General decides that--

(i) the alien ordered, incited, assisted, or otherwise participated in the persecution of an individual because of the individual's race, religion, nationality, membership in a particular social group, or political opinion;

(ii) the alien, having been convicted by a final judgment of a particularly serious crime is a danger to the community of the United States;

(iii) there are serious reasons to believe that the alien committed a serious nonpolitical crime outside the United States before the alien arrived in the United States; or

(iv) there are reasonable grounds to believe that the alien is a danger to the security of the United States.

For purposes of clause (ii), an alien who has been convicted of an aggravated felony (or felonies) for which the alien has been sentenced to an aggregate term of imprisonment of at least 5 years shall be considered to have committed a particularly serious crime. The previous sentence shall not preclude the Attorney General from determining that, notwithstanding the length of sentence imposed, an alien has been convicted of a particularly serious crime. For purposes of clause (iv), an alien who is described in section 1227(a)(4)(B) of this title shall be considered to be an alien with respect to whom there are reasonable grounds for regarding as a danger to the security of the United States.

(C) Sustaining burden of proof; credibility determinations

In determining whether an alien has demonstrated that the alien's life or freedom would be threatened for a reason described in subparagraph (A), the trier of fact shall determine whether the alien has sustained the alien's burden of proof, and shall make credibility determinations, in the manner described in

clauses (ii) and (iii) of section 1158(b)(1)(B) of this title.

8 U.S.C. § 1252 provides, in relevant part:

Judicial review of orders of removal

(a) Applicable Provisions

* * *

(2) Matters not subject to judicial review

* * *

(C) Orders against criminal aliens

Notwithstanding any other provision of law (statutory or nonstatutory), including section 2241 of Title 28, or any other habeas corpus provision, and sections 1361 and 1651 of such title, and except as provided in subparagraph (D), no court shall have jurisdiction to review any final order of removal against an alien who is removable by reason of having committed a criminal offense covered in section 1182(a)(2) or 1227(a)(2)(A)(iii), (B), (C), or (D) of this title, or any offense covered by section 1227(a)(2)(A)(ii) of this title for which both predicate offenses are, without regard to their date of commission, otherwise covered by section 1227(a)(2)(A)(i) of this title.

(D) Judicial review of certain legal claims

Nothing in subparagraph (B) or (C), or in any other provision of this chapter (other than this section) which limits or eliminates judicial review, shall be construed as precluding review of constitutional claims or questions of law raised upon a petition for review filed with an appropriate court of appeals in accordance with this section.

* * *

(4) Claims under the United Nations Convention

Notwithstanding any other provision of law (statutory or nonstatutory), including section 2241 of title 28, or any other habeas corpus provision, and sections 1361 and 1651 of such title, a petition for review filed with an appropriate court of appeals in accordance with this section shall be the sole and exclusive means for judicial review of any cause or claim under the United Nations Convention Against Torture and Other Forms of Cruel, Inhuman, or Degrading Treatment or Punishment, except as provided in subsection (e).

(5) Exclusive means of review

Notwithstanding any other provision of law (statutory or nonstatutory), including section 2241 of title 28, or any other habeas corpus provision, and sections 1361 and 1651 of such title, a petition for review filed with an appropriate court of appeals in accordance with this section shall be the sole and exclusive means for judicial review of an order of removal entered or issued under any provision of this chapter, except as provided in subsection (e). For purposes of this chapter, in every provision that limits or eliminates judicial review or jurisdiction to review, the terms "judicial review" and "jurisdiction to review" include habeas corpus review pursuant to section 2241 of title 28, or any other habeas corpus provision, sections 1361 and 1651 of such title, and review pursuant to any other provision of law (statutory or nonstatutory).

(b) Applicable Provisions

* * *

(9) Consolidation of questions for judicial review

* * *

Judicial review of all questions of law and fact, including interpretation and application of constitutional and statutory provisions, arising from any action taken or proceeding brought to remove an alien from the United States under this subchapter shall be available only in judicial review of a final order under this section. Except as otherwise provided in this section, no court shall have jurisdiction, by habeas corpus under section 2241 of title 28 or any other habeas corpus provision, by section 1361 or 1651 of such title, or by any other provision of law (statutory or nonstatutory), to review such an order or such questions of law or fact.

8 U.S.C. § 1534 provides, in relevant part:

Removal hearing

* * *

(i) Determination of deportation

If the judge, after considering the evidence on the record as a whole, finds that the Government has met its burden, the judge shall order the alien removed and detained pending removal from the United States. If the alien was released pending the removal hearing, the judge shall order the Attorney General to take the alien into custody.

(j) Written order

At the time of issuing a decision as to whether the alien shall be removed, the judge shall prepare a written order containing a statement of facts found and conclusions of law. Any portion of the order that would reveal the substance or source of information received in camera and *ex parte* pursuant to subsection (e) shall not be made available to the alien or the public.

(k) No right to ancillary relief

At no time shall the judge consider or provide for relief from removal based on—

(1) asylum under section 1158 of this title;
(2) by withholding of removal under section 1231(b)(3) of this title;
(3) cancellation of removal under section 1229b of this title;
(4) voluntary departure under section 1254a(3) of this title;
(5) adjustment of status under section 1255 of this title;
(6) registry under section 1259 of this title.

8 C.F.R. § 1208.2 provides, in relevant part:

Jurisdiction

* * *

(c) Certain aliens not entitled to proceedings under section 240 of the Act—

* * *

(2) Withholding of removal applications only.

After Form I-863, Notice of Referral to Immigration Judge, has been filed with the Immigration Court, an immigration judge shall have exclusive jurisdiction over any application for withholding of removal filed by:

(i) An alien who is the subject of a reinstated removal order pursuant to section 241(a)(5) of the Act; or

(ii) An alien who has been issued an administrative removal order pursuant to section 238 of the Act as an alien convicted of committing an aggravated felony.

(3) Rules of procedure.

(i) General. Except as provided in this section, proceedings falling under the jurisdiction of the immigration judge pursuant to paragraph (c)(1) or (c)(2) of this section shall be conducted in accordance with the same rules of procedure as proceedings conducted under 8 CFR part 1240, subpart A. The scope of review in proceedings conducted pursuant to paragraph (c)(1) of this section shall be limited to a determination of whether the alien is eligible for asylum or withholding or deferral of removal, and whether asylum shall be granted in

the exercise of discretion. The scope of review in proceedings conducted pursuant to paragraph (c)(2) of this section shall be limited to a determination of whether the alien is eligible for withholding or deferral of removal. During such proceedings, all parties are prohibited from raising or considering any other issues, including but not limited to issues of admissibility, deportability, eligibility for waivers, and eligibility for any other form of relief.

8 C.F.R. § 1208.16 provides:

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

(a) Consideration of application for withholding of removal. An asylum officer shall not decide whether the exclusion, deportation, or removal of an alien to a country where the alien's life or freedom would be threatened must be withheld, except in the case of an alien who is otherwise eligible for asylum but is precluded from being granted such status due solely to section 207(a)(5) of the Act. 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 (b)(2) of this section, adjudicators should consider, among other things, whether the applicant would face other serious harm in the place of suggested relocation; any ongoing civil strife within the country; administrative, economic, or judicial

infrastructure; geographical limitations; and social and cultural constraints, such as age, gender, health, and social and familial ties. These factors may or may not be relevant, depending on all the circumstances of the case, and are not necessarily determinative of whether it would be reasonable for the applicant to relocate.

(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, or the applicant has established persecution in the past, it shall be presumed that internal relocation would not be reasonable, unless the Service establishes by a preponderance of the evidence that under all the circumstances it would be reasonable for the applicant to relocate.

(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 con-

tained 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 with-

holding 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

8 C.F.R. § 1208.17 provides:

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).