No. 18-1432

In the Supreme Court of the United States

NIDAL KHALID NASRALLAH, PETITIONER

v.

WILLIAM P. BARR, ATTORNEY GENERAL

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

BRIEF FOR THE RESPONDENT

NOEL J. FRANCISCO
Solicitor General
Counsel of Record
JOSEPH H. HUNT
Assistant Attorney General
EDWIN S. KNEEDLER
Deputy Solicitor General
MATTHEW GUARNIERI
Assistant to the Solicitor General
DONALD E. KEENER
JOHN W. BLAKELEY
ANDREW C. MACLACHLAN
Attorneys

Department of Justice
Washington, D.C. 20530-0001
SupremeCtBriefs@usdoj.gov
(202) 514-2217

QUESTION PRESENTED

The Immigration and Nationality Act, 8 U.S.C. 1101 *et seq.*, 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 specified "criminal offense." 8 U.S.C. 1252(a)(2)(C). The question presented is whether, when that jurisdictional bar applies, it precludes review of an alien's factual challenge to the denial of the alien's application for withholding or deferral of removal under the regulations implementing the United States' obligations under Article 3 of the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, *adopted* Dec. 10, 1984, S. Treaty Doc. No. 20, 100th Cong., 2d Sess. (1988), 1465 U.N.T.S. 114.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-11a) is not published in the Federal Reporter but is reprinted at 762 Fed. Appx. 638. The decisions of the Board of Immigration Appeals (Pet. App. 12a-21a) and the immigration judge (Pet. App. 22a-48a) are unreported.

JURISDICTION

The judgment of the court of appeals was entered on February 14, 2019. The petition for a writ of certiorari was filed on May 14, 2019, and granted on October 18, 2019. The jurisdiction of this Court rests on 28 U.S.C. 1254(1).

STATUTORY AND REGULATORY PROVISIONS INVOLVED

Pertinent statutory and regulatory provisions are reproduced in the appendix to this brief. App., *infra*, 1a-37a.

STATEMENT

A. Statutory Background

1. The Immigration and Nationality Act (INA), 8 U.S.C. 1101 *et seq.*, establishes a comprehensive and reticulated framework for "[j]udicial review of a final order of removal," initiated by the filing of a "petition for review" in the appropriate court of appeals. 8 U.S.C. 1252(a)(1) and (b)(1). Over successive enactments since the 1960s, Congress has made clear that those provisions are generally the sole and exclusive means for an alien to seek review of administrative determinations made in removal proceedings, including the denial of an alien's request for relief or protection from removal.

a. Before 1952, federal immigration law contained no express provision for judicial review of orders of deportation or exclusion—the predecessors to removal, see *Calcano-Martinez* v. *INS*, 533 U.S. 348, 350 n.1 (2001). The established rule was that such orders could be reviewed only by a petition for a writ of habeas corpus. After Congress enacted the INA in 1952, however, this Court held that judicial review of deportation or exclusion orders was also available in district court under Section 10 of the Administrative Procedure Act (APA), ch. 324, 60 Stat. 243-244. See *Shaughnessy* v. *Pedreiro*, 349 U.S. 48, 50-52 (1955) (deportation); *Brownell* v. *Tom We Shung*, 352 U.S. 180, 184-185 (1956) (exclusion).

Congress responded to those decisions by amending the INA in 1961 to channel judicial review of "all final orders of deportation" to the courts of appeals. 8 U.S.C. 1105a(a) (1964); see Act of Sept. 26, 1961, Pub. L. No. 87-301, § 5(a), 75 Stat. 651. In particular, Congress made review in the courts of appeals under the Administrative Orders Review Act (Hobbs Act), ch. 1189,

64 Stat. 1129 (28 U.S.C. 2341 *et seq.*), the "sole and exclusive procedure" for an alien to obtain judicial review of a "final order[] of deportation." 8 U.S.C. 1105a(a) (1964). Congress thus sought to "create a single, separate, statutory form of judicial review." H.R. Rep. No. 1086, 87th Cong., 1st Sess. 22-23 (1961) (1961 House Report).

In *Foti* v. *INS*, 375 U.S. 217 (1963), this Court interpreted the term "final orders of deportation" as used in the 1961 judicial-review amendments to encompass review of "all determinations made during and incident to the administrative proceeding," including "orders denying the withholding of deportation." *Id.* at 229; see *id.* at 219-220. The Court explained that requests for such relief are "an integral part of the proceedings which have led to the issuance of a final deportation order," *id.* at 223, and that the "fundamental purpose" of the 1961 amendments had been "to abbreviate the process of judicial review" into a single proceeding in the court of appeals, *id.* at 224.

b. In two laws enacted in 1996, Congress revised the INA's judicial-review provisions to further "streamline[]" the appeal and removal process for criminal aliens. H.R. Rep. No. 469, 104th Cong., 2d Sess. Pt. 1, at 108 (1996) (IIRIRA House Report).

First, in the Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA), Pub. L. No. 104-132, 110 Stat. 1214, Congress amended the INA to preclude judicial review of "[a]ny final order of deportation against an alien who is deportable by reason of having committed" a specified criminal offense. § 440(a), 110 Stat. 1276-1277. Congress defined the term "order of deportation" to mean "the order * * * concluding that the alien is deportable or ordering deportation." § 440(b), 110 Stat. 1277; see 8 U.S.C. 1101(a)(47)(A).

Second, in the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (IIRIRA), Pub. L. No. 104-208, Div. C, 110 Stat. 3009-546, Congress repealed the prior INA judicial-review provision and replaced it with the provision now codified as amended at 8 U.S.C. 1252. IIRIRA § 306(a) and (b), 110 Stat. 3009-607 to 3009-612. Section 1252(a) provides for judicial review of a "final order of removal" by way of a petition for review in a court of appeals. 8 U.S.C. 1252(a)(1). Congress also retained, in modified form, the criminal-alien review bar enacted in AEDPA, providing 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 in" particular sections of the INA. 8 U.S.C. 1252(a)(2)(C).

Congress additionally specified in IIRIRA that "[j]udicial review of all questions of law and fact * * * arising from any action taken or proceeding brought to remove an alien from the United States * * * shall be available only in judicial review of a final order under this section." 8 U.S.C. 1252(b)(9). And to confirm the exclusivity of those procedures, Congress directed that "no court shall have jurisdiction to hear any cause or claim by or on behalf of an alien arising from the decision or action by the Attorney General to commence proceedings, adjudicate cases, or execute removal orders against any alien" under the INA, "[e]xcept as provided" in Section 1252 itself. 8 U.S.C. 1252(g).

2. This case concerns claims for protection from removal under the regulations implementing the United States' obligations under the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (Convention or CAT), *adopted* Dec. 10, 1984, S. Treaty Doc. No. 20, 100th Cong., 2d Sess. (1988),

1465 U.N.T.S. 85. Under Article 3 of the Convention, party States agree not to "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." Art. 3(1), 1465 U.N.T.S. 114.

After the Convention entered into force for the United States, Congress directed that regulations be promulgated "to implement the obligations of the United States under Article 3." Foreign Affairs Reform and Restructuring Act of 1998 (FARRA), Pub. L. No. 105-277, Div. G, § 2242(b), 112 Stat. 2681-822. In the same provision, Congress further provided that "nothing in this section shall be construed as providing any court jurisdiction to consider or review claims raised under the Convention or this section * * * except as part of the review of a final order of removal pursuant to [Section 1252]." § 2242(d), 112 Stat. 2681-822; see 8 U.S.C. 1231 note.

The Attorney General promulgated the relevant regulations in 1999. 64 Fed. Reg. 8478, 8479 (Feb. 19, 1999). In general, the regulations permit an alien in removal proceedings to request withholding of removal based on a fear of torture under the same procedures and limitations that apply to a request for withholding of removal under the INA, 8 U.S.C. 1231(b)(3), based on a fear of persecution on a specified basis, such as race or religion. 64 Fed. Reg. at 8480; 8 C.F.R. 208.16(c), 1208.16(c). Some aliens are barred by statute from receiving withholding of removal under the INA, including those convicted of "a particularly serious crime." 8 U.S.C. 1231(b)(3)(B)(ii). The CAT regulations provide that such aliens may still seek a limited form of CAT

protection known as "deferral of removal." 64 Fed. Reg. at 8481-8482; see 8 C.F.R. 208.17, 1208.17.

The CAT regulations confirm that "there shall be no judicial appeal or review of any action, decision, or claim raised under the Convention" or under FARRA, "except as part of the review of a final order of removal pursuant to" Section 1252. 8 C.F.R. 208.18(e)(1), 1208.18(e)(1); see 64 Fed. Reg. at 8480 (explaining that judicial review of CAT claims "remains subject to the requirements and limitations" of Section 1252).

3. Finally, in the REAL ID Act of 2005, Pub. L. No. 109-13, Div. B, 119 Stat. 310, Congress revisited both the criminal-alien jurisdictional bar and the statutory provisions for judicial review of CAT claims. The REAL ID Act was enacted after this Court's decision in *INS* v. *St. Cyr*, 533 U.S. 289 (2001), which had interpreted the post-1996 statutory scheme to permit criminal aliens to seek habeas review in federal district court of certain pure questions of law that the aliens were otherwise barred from presenting in a petition for review in a court of appeals under Section 1252, see *id.* at 308-314.

Congress responded by amending the criminal-alien review bar and the other jurisdictional bars in Section 1252 to expressly foreclose habeas review, while adding a provision stating that the INA's jurisdictional bars shall not be "construed as precluding review of constitutional claims or questions of law raised upon a petition for review filed * * * in accordance" with Section 1252. 8 U.S.C. 1252(a)(2)(D); see REAL ID Act § 106(a)(1)(A), 119 Stat. 310; cf. H.R. Rep. No. 72, 109th Cong., 1st Sess. 172-175 (2005) (REAL ID Act Conf. Rep.).

Congress also amended Section 1252 to confirm that judicial review of CAT claims by criminal aliens may oc-

cur only in conformity with those limitations. Specifically, Congress directed that, "[n]otwithstanding any other provision of law," including the statutory provisions for federal habeas review, "a petition for review filed with an appropriate court of appeals in accordance with [Section 1252] shall be the sole and exclusive means for judicial review of any cause or claim under the [CAT]," subject to certain exceptions inapplicable here. 8 U.S.C. 1252(a)(4); see REAL ID Act § 106(a)(1)(B), 119 Stat. 310.

B. Prior Proceedings

Petitioner, a native and citizen of Lebanon, pleaded guilty to receiving stolen property in interstate commerce, in violation of 18 U.S.C. 2315. Pet. App. 2a. The Department of Homeland Security (DHS) initiated removal proceedings. As relevant here, petitioner sought withholding or deferral of removal under the CAT regulations issued pursuant to FARRA, arguing that he would be tortured if removed to Lebanon. *Id.* at 3a-4a, 12a-13a. An immigration judge (IJ) determined that petitioner was ineligible for withholding of removal but granted deferral of removal. *Id.* at 34a-47a. The Board of Immigration Appeals (Board or BIA) affirmed the denial of withholding of removal and reversed the grant of deferral of removal. *Id.* at 12a-21a. The court of appeals denied a petition for review in part and dismissed it in part. *Id.* at 1a-11a.

1. Petitioner was admitted to the United States as a visitor in 2006 and became a lawful permanent resident in 2007. Pet. App. 2a. In 2011, a federal grand jury charged him with eight counts of receiving stolen property in interstate commerce, in violation of 18 U.S.C. 21 and 2315. J.A. 3-10; Pet. App. 2a. The indictment alleged that petitioner paid undercover law enforcement

agents "over $387,600 dollars in cash" for 273 cases of cigarettes that petitioner "believed to have been stolen and taken by fraud" from delivery trucks and guarded storage facilities. J.A. 3. The indictment further alleged that petitioner agreed to one of the purchases even after undercover agents told him that some of the cases had been damaged by gunfire during the robbery. J.A. 7. Petitioner pleaded guilty to the count associated with that illicit purchase and to a second count. J.A. 9, 11. The district court sentenced him to 12 months of imprisonment for each count, to be served concurrently. J.A. 13.

2. After his convictions, DHS charged petitioner with being removable under 8 U.S.C. 1227(a)(2)(A)(i), which makes aliens convicted of certain "crimes involving moral turpitude" subject to removal. Pet. App. 3a. The IJ sustained that charge. See *id.* at 25a, 31a-34a.[1]

In the removal proceeding, petitioner applied for asylum, 8 U.S.C. 1158, and for withholding or deferral of removal under 8 U.S.C. 1231(b)(3) and the CAT regulations. See Pet. App. 12a-13a, 24a. The IJ found that petitioner was ineligible for asylum and withholding of removal because he had been convicted of a "particularly serious crime." *Id.* at 40a; see 8 U.S.C. 1158(b)(2)(A)(ii),

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[1] DHS initially charged petitioner with being removable under 8 U.S.C. 1227(a)(2)(A)(iii), which makes an alien "convicted of an aggravated felony" subject to removal. Pet. App. 3a. An aggravated felony is defined to include a "theft offense (including receipt of stolen property) * * * for which the term of imprisonment [is] at least one year." 8 U.S.C. 1101(a)(43)(G) (footnote omitted). The district court later reduced petitioner's prison sentence from one year to 364 days. J.A. 23-24. In response, DHS withdrew the aggravated-felony charge and instead sought to remove petitioner under Section 1227(a)(2)(A)(i). Pet. App. 3a; see *id.* at 12a.

1231(b)(3)(B)(ii); 8 C.F.R. 1208.16(d)(2). The IJ emphasized that petitioner had engaged in repeated transactions in which he admitted paying nearly $250,000 in cash for property that he believed had been obtained through burglary and robbery, "in utter disregard for the laws of the United States and the safety of the community." Pet. App. 38a.

The IJ nevertheless granted deferral of removal under the CAT regulations, which is available to an alien who is "more likely than not to be tortured" in the country of removal even if the alien has been convicted of a particularly serious crime, 8 C.F.R. 1208.17(a). Pet. App. 41a-46a. The gravamen of petitioner's CAT claim was that, if returned to Lebanon, he would be tortured by the terrorist organization Hezbollah "based on his religious minority status as a Druze." *Id.* at 42a-43a; cf. 8 C.F.R. 1208.18(a)(1) (definition of "torture" for CAT purposes). Petitioner testified that, in 2005, he and a friend were hiking in Lebanon and encountered a group of Hezbollah militants; the militants ordered them to stop and followed them, "shooting into the air," when they instead fled; and that he suffered a severe back injury when he jumped off a precipice to escape. J.A. 32; see J.A. 41-43. Although petitioner did not "indicate[] whether" the militants "targeted him because he is Druze," the IJ found that his "pain and suffering [rose] to the level of torture." Pet. App. 43a. The IJ further found that the Lebanese government had acquiesced in acts of terrorism by Hezbollah and that internal relocation within Lebanon was not feasible. *Id.* at 43a-46a. Accordingly, the IJ ordered petitioner removed but granted his request for deferral of his removal to Lebanon. *Id.* at 47a.

3. Petitioner and DHS both appealed to the Board. Pet. App. 12a-13a. The Board affirmed the IJ's conclusion that petitioner was removable based on his conviction for a crime involving moral turpitude and that he was ineligible for asylum and withholding of removal because his crime was particularly serious. *Id.* at 14a-18a.

The Board reversed the IJ's grant of deferral of removal under the CAT regulations. Pet. App. 18a-21a. The Board explained that the "record does not support the [IJ]'s finding that [petitioner] was tortured in Lebanon." *Id.* at 19a. Specifically, the Board determined that the "conduct of the militants, which was limited to shouting and firing their guns in the air, does not constitute torture, and the record does not reflect that [petitioner]'s back injury was intentionally inflicted." *Ibid.* In any event, the Board further determined that the record "does not support" a finding that "it is more likely than not that [petitioner] would personally be targeted for harm rising to the level of torture if removed to Lebanon." *Id.* at 20a. The Board observed that, apart from the single incident that he described, petitioner "was never threatened or harmed in Lebanon." *Ibid.* The Board added that, while there were "widespread * * * human rights abuses in Lebanon, including crimes against members of the Druze community," such "generalized evidence, without more, is insufficient to demonstrate a clear probability that" petitioner himself would be tortured. *Ibid.* "Considering all of the relevant evidence," the Board found that petitioner had "not met his burden to show that it is more likely than not that he would be tortured in Lebanon," as required to obtain deferral of removal under the CAT regulations. *Ibid.*

4. The court of appeals denied in part and dismissed in part a petition for review. Pet. App. 1a-11a. As relevant here, the court denied the petition insofar as it challenged the Board's conclusion that petitioner's prior convictions qualified as crimes involving moral turpitude, subjecting him to removal under Section 1227(a)(2)(A)(i). *Id.* at 7a-8a. The court observed that both the Board and federal courts "have consistently held that a crime involving the receipt of stolen property involves moral turpitude if it 'specifically requires knowledge of the stolen nature of the goods,'" as was the case here. *Id.* at 8a (citation omitted).

The court of appeals then determined that, under its precedent, petitioner was subject to the jurisdictional bar to judicial review for criminal aliens in Section 1252(a)(2)(C). Pet. App. 9a. That bar applies to aliens who are "removable by reason of having committed a criminal offense covered in" specified provisions of the INA. 8 U.S.C. 1252(a)(2)(C). Section 1227(a)(2)(A)(i)—the sole basis on which petitioner was found removable—is not among the listed provisions, although the bar applies to "any offense covered by section 1227(a)(2)(A)(ii) * * * for which both predicate offenses are, without regard to their date of commission, otherwise covered by section 1227(a)(2)(A)(i)." *Ibid.* Nonetheless, in *Keungne* v. *U.S. Attorney General*, 561 F.3d 1281 (2009) (per curiam), the Eleventh Circuit had held that the bar applies "if the alien is removable under 8 U.S.C. § 1227(a)(2)(A)(i) for being convicted of a crime involving moral turpitude within five years of admission for which a sentence of one year or longer may be imposed," *id.* at 1283. The court adhered to that precedent here, concluding that it could review only "constitutional claims or questions of law." Pet. App. 9a (quoting

8 U.S.C. 1252(a)(2)(D)). The court therefore dismissed petitioner's challenge to the Board's discretionary determination that his prior conviction was a particularly serious crime. See *id.* at 9a-10a.[2]

Finally, with respect to petitioner's request for deferral of removal under the CAT regulations, the court of appeals "agree[d] with the BIA's determination" that petitioner had failed "as a matter of law" to show that he had been "tortured in Lebanon." Pet. App. 11a. The court also concluded that, by virtue of the criminal-alien jurisdictional bar, it lacked jurisdiction to review the Board's finding that petitioner "would not likely be singled out for torture if he was removed to" Lebanon. *Ibid.* The court stated that a "determination about the likelihood of future harm * * * is a finding of fact, not a question of law," and therefore that petitioner's challenge to that determination fell outside the court's limited jurisdiction to review "legal and constitutional claims." *Ibid.* (citing *Keungne*, 561 F.3d at 1283).

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[2] The government had argued in *Keungne* that the criminal-alien jurisdictional bar in Section 1252(a)(2)(C) does not apply when an alien is found removable solely under Section 1227(a)(2)(A)(i). Gov't Br. at 5, *Keungne*, *supra* (No. 07-14501). The government continues to take that position and did not invoke Section 1252(a)(2)(C) below. See Gov't C.A. Br. 28, 35. Petitioner, however, has relinquished any argument that the court of appeals erred in treating a finding of removability under Section 1227(a)(2)(A)(i) as by itself sufficient to trigger the criminal-alien review bar in Section 1252(a)(2)(C), because he failed to raise such an argument at any prior point in this case. Although "federal courts have an independent obligation to ensure that they do not *exceed* the scope of their jurisdiction," *Henderson ex rel. Henderson* v. *Shinseki*, 562 U.S. 428, 434 (2011) (emphasis added), no analogous obligation exists to consider arguments *in favor* of jurisdiction that a party fails to make, see, *e.g.*, *Scenic Am., Inc.* v. *United States Dep't of Transp.*, 836 F.3d 42, 53 n.4 (D.C. Cir. 2016).

SUMMARY OF ARGUMENT

The court of appeals correctly determined that, when the criminal-alien jurisdictional bar in 8 U.S.C. 1252(a)(2)(C) applies, it forecloses review of an alien's factual challenge to the administrative denial of the alien's request for withholding of removal or deferral of removal under the regulations adopted pursuant to the Foreign Affairs Restructuring and Reform Act (FARRA) to implement the United States' obligations under the Convention Against Torture (CAT).

A. Petitioner principally contends (Br. 1-2) that the criminal-alien jurisdictional bar does not apply when an alien seeks review of the denial of a CAT claim because the denial of a CAT claim is not itself a "final order of removal." See 8 U.S.C. 1252(a)(2)(C) (limiting review of "any final order of removal"). That contention, however, is directly contrary to the established meaning of the term "final order of removal" in this context. That term and its predecessor, "final order of deportation," have long been understood to encompass all administrative determinations made during the course of the removal proceedings. This Court adopted that construction in *Foti* v. *INS*, 375 U.S. 217 (1963), and Congress carried forward the same meaning when it enacted Section 1252 in 1996. Accordingly, when Section 1252 limits the review available to criminal aliens of any "final order of removal," 8 U.S.C. 1252(a)(2)(C), it also limits review of any challenges to the denial of relief or protection from removal, such as CAT claims.

That understanding of the statutory framework is confirmed by the provisions through which the United States' obligations under Article 3 of the Convention are implemented in domestic law. Congress was at pains to

make clear that judicial review of CAT claims in removal proceedings would be available *only* "as part of the review of a final order of removal" pursuant to Section 1252, and thus subject to its jurisdictional bars. FARRA § 2242(d), 112 Stat. 2681-822. The implementing regulations confirm that limitation. 8 C.F.R. 208.18(e)(1), 1208.18(e)(1).

The REAL ID Act further confirms that judicial review of CAT claims is subject to the jurisdictional limits in Section 1252(a)(2)(C). That statute enacted Section 1252(a)(4), which states that "a petition for review filed with an appropriate court of appeals in accordance with [Section 1252] shall be the sole and exclusive means for judicial review" of any CAT claim. 8 U.S.C. 1252(a)(4). To be "in accordance" with Section 1252, judicial review of such a petition must conform to the limitations specified in Section 1252, including the criminal-alien jurisdictional bar. More broadly, the purpose and history of the REAL ID Act demonstrate that Congress meant to subject CAT claims to the criminal-alien jurisdictional bar.

B. Petitioner's contrary view is inconsistent with these statutory provisions. It also would be self-defeating, in that adopting it would deprive the courts of appeals of any jurisdictional basis to review CAT claims. If the denial of a CAT claim in removal proceedings were not reviewable as part of the "final order of removal" for purposes of Section 1252(a)(2)(C), then Section 1252(a)(1) would not provide any basis for judicial review of the denial of such a claim. Petitioner's narrow interpretation of the term "final order of removal" also cannot make sense of the many circumstances in which courts of appeals review the denial of CAT claims even when the alien does not (or cannot) seek review of the order finding the alien removable. Finally, petitioner's

reliance on the purposes of the INA and a presumption of the availability of judicial review is misplaced. Congress unambiguously limited the judicial review available to criminal aliens, including for CAT claims, and those clear limits should be given effect.

C. In seeking this Court's review, petitioner endorsed two theories of jurisdiction that, unlike his present view, have found some purchase in the lower courts. Pet. 21-24. Those theories, which petitioner has abandoned, are also unavailing. Contra the Ninth Circuit, the statute contains no implicit exception permitting judicial review if the CAT claim is denied "on the merits." Pet. 23. And contra the Seventh Circuit, Section 1252(a)(2)(C) precludes review of factual challenges to an order denying deferral of removal under the CAT regulations even though deferral of removal is a temporary reprieve.

ARGUMENT

SECTION 1252(a)(2)(C) PRECLUDES JUDICIAL REVIEW OF ANY FACTUAL CHALLENGE BY A CRIMINAL ALIEN TO THE DENIAL OF WITHHOLDING OR DEFERRAL OF REMOVAL UNDER THE REGULATIONS IMPLEMENTING THE UNITED STATES' OBLIGATIONS UNDER THE CONVENTION AGAINST TORTURE

The court of appeals correctly determined that, when the criminal-alien jurisdictional bar in 8 U.S.C. 1252(a)(2)(C) applies, it forecloses review of an alien's factual challenge to the administrative denial of the alien's request for withholding or deferral of removal under the regulations implementing the United States' obligations under Article 3 of the Convention Against Torture. Petitioner contends (Br. 2) that Section 1252(a)(2)(C) does not preclude review of his factual challenge to the denial of his CAT claim because the order denying that claim is not itself a "final order of removal." That contention is

inconsistent with the established meaning of the term "final order of removal" in this context, and petitioner does not identify a single court that has ever exercised jurisdiction on that basis. The text, history, and purpose of Section 1252 demonstrate that its provisions governing—and limiting—judicial review of a "final order of removal" preclude jurisdiction to review the denial of an alien's requests for relief or protection from removal, including a request for withholding or deferral of removal under the CAT regulations. That reading is confirmed by FARRA and the CAT regulations, as well as by the REAL ID Act. Moreover, petitioner's contrary reading of the statute would be self-defeating. If the denial of a CAT claim were not reviewable as part of a final order of removal under Section 1252, it would not be reviewable at all.

A. The Criminal-Alien Jurisdictional Bar Limits Judicial Review Of CAT Claims In Removal Proceedings

The "proper starting point" to resolve a question of statutory interpretation is a "careful examination" of the text of the statute. *Food Mktg. Inst.* v. *Argus Leader Media*, 139 S. Ct. 2356, 2364 (2019). In undertaking that examination, this Court has frequently observed that "the words of [the] statute must be read in their context and with a view to their place in the overall statutory scheme." *Home Depot U.S.A., Inc.* v. *Jackson*, 139 S. Ct. 1743, 1748 (2019) (quoting *Davis* v. *Michigan Dep't of Treasury*, 489 U.S. 803, 809 (1989)). Thus, the relevant words are not to be read "in a vacuum," but rather with an eye "to the statutory context, 'structure, history, and purpose.'" *Abramski* v. *United States*, 573 U.S. 169, 179 (2014) (citation omitted).

Section 1252(a)(2)(C) provides that, "[n]otwithstanding any other provision of law," including the federal habeas statute, "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" specified sections of the INA. 8 U.S.C. 1252(a)(2)(C). That prohibition admits of only one exception. See *ibid.* ("except as provided in subparagraph (D)"). The exception, in turn, provides that other provisions of the INA, including the criminal-alien jurisdictional bar, do not preclude "review of constitutional claims or questions of law raised upon a petition for review filed with an appropriate court of appeals in accordance with" Section 1252. 8 U.S.C. 1252(a)(2)(D). And an adjacent provision specifically states that a petition for review filed "in accordance with" Section 1252 is the "sole and exclusive means for judicial review of any cause or claim" under the CAT regulations, 8 U.S.C. 1252(a)(4), with an exception not relevant here.

Read as a whole, Section 1252 thus makes clear that criminal aliens are jurisdictionally barred from obtaining judicial review of factual challenges to the denial of a CAT claim in removal proceedings, though they may still obtain review of pure questions of law and constitutional claims concerning such a denial in a duly filed petition for review of a final order of removal. The large majority of courts of appeals have applied Section 1252(a)(2)(C) in this straightforward manner. See *Ventura-Reyes* v. *Lynch*, 797 F.3d 348, 356-358 (6th Cir. 2015); *Ortiz-Franco* v. *Holder*, 782 F.3d 81, 88-91 (2d Cir. 2015), cert. denied, 136 S. Ct. 894 (2016); *Cole* v. *U.S. Attorney Gen.*, 712 F.3d 517, 532-533 (11th Cir.), cert. denied, 571 U.S. 826 (2013); *Escudero-Arciniega* v.

Holder, 702 F.3d 781, 785 (5th Cir. 2012) (per curiam); *Cherichel* v. *Holder*, 591 F.3d 1002, 1017 (8th Cir.), cert. denied, 562 U.S. 828 (2010); *Gourdet* v. *Holder*, 587 F.3d 1, 5 (1st Cir. 2009); *Saintha* v. *Mukasey*, 516 F.3d 243, 248 (4th Cir.), cert. denied, 555 U.S. 1031 (2008); *Ilchuk* v. *Attorney Gen. of the U.S.*, 434 F.3d 618, 624 (3d Cir. 2006); see also *Medrano-Olivas* v. *Holder*, 590 Fed. Appx. 770, 772 (10th Cir. 2014).

Petitioner does not dispute that a challenge like the one he raises here—challenging the Board's assessment of the likelihood that he will be tortured if removed to Lebanon, see Pet. App. 11a, 20a—is a factual challenge, not a question of law. He contends, however, that the fact/law distinction is irrelevant, on the theory that the jurisdictional bar in Section 1252(a)(2)(C) applies only to review of a "final order of removal," 8 U.S.C. 1252(a)(2)(C), and that he seeks review of something distinct from a final order of removal—namely, review of the denial of his CAT claim. See Pet. Br. 2-3, 24-32. The term "final order of removal" in Section 1252, however, encompasses administrative determinations made in the course of removal proceedings. Just as review of a "final decision[] of the district court[]," 28 U.S.C. 1291, encompasses review of the various decisions the court made that "merge" into final judgment, *Cohen* v. *Beneficial Indus. Loan Corp.*, 337 U.S. 541, 546 (1949), so too judicial review under Section 1252 of the "final order of removal" encompasses review of the agency's denial of requests for relief or protection from removal in the same proceeding, including CAT claims. The denial of a CAT claim is a constituent part of the final order of removal for purposes of judicial review, and it is reviewable only to the extent the order is.

1. The statutory provisions limiting judicial review of a "final order of removal" also limit review of the denial of CAT claims

The history of the term "final order of removal" and its predecessor, "final order of deportation," demonstrate that it is a term with an established meaning in this context, encompassing the various administrative determinations made in the course of proceedings leading up to the rendering of a final order. This Court held as much more than 50 years ago, and Congress has operated against that background understanding ever since.

a. As explained above (see pp. 2-3, *supra*), the INA did not contain any express provision for judicial review when it was first enacted in 1952. In 1961, in response to judicial decisions permitting aliens to bring APA actions in district court challenging deportation orders, Congress amended the INA to make review in the courts of appeals under the Hobbs Act the "sole and exclusive" procedure for judicial review. Act of Sept. 26, 1961, Pub. L. No. 87-301, § 5(a), 75 Stat. 651. Those amendments applied to "review of all final orders of deportation." *Ibid.*

In *Foti* v. *INS*, 375 U.S. 217 (1963), this Court considered whether those amendments also provided the exclusive means for obtaining judicial review of "final administrative orders with respect to discretionary relief sought during deportation proceedings," *id.* at 220. The alien in that case had conceded his deportability but requested a suspension of deportation under 8 U.S.C. 1254(a)(4) (1958). 375 U.S. at 218. After that request was denied, the alien brought an action in district court. *Id.* at 218-219. The court of appeals concluded that the 1961

amendments did not eliminate the district court's jurisdiction to hear such an action because "the term 'final orders of deportation' * * * does not include a denial of discretionary relief" from deportation, *id.* at 219—essentially the same textual argument that petitioner advances here, see Pet. Br. 24-25.

This Court rejected that narrow understanding of the term "final orders of deportation." *Foti*, 375 U.S. at 219 (quoting 8 U.S.C. 1105a (Supp. IV 1962)). The Court explained that the consideration of a request for relief from deportation is "an integral part of the proceedings," which result in "one final order of deportation." *Id.* at 223. The Court further explained that the "fundamental purpose" of the 1961 amendments was to create "'a single * * * form of judicial review,'" *id.* at 224-225 (quoting 1961 House Report 22-23), and that Congress's purpose would be defeated if judicial review of the denial of relief from deportation were still available by other means in district court. The Court also observed that Congress had been concerned with "histories of abuse," brought to light during the legislative process, involving dilatory "litigation arising out of discretionary determinations." *Id.* at 226. The Court therefore concluded that "the final administrative action that Congress was thinking of in using the phrase 'final orders of deportation' included denials of suspension of deportation." *Id.* at 232. Indeed, the Court understood that term to encompass "all determinations made during and incident to the administrative proceeding." *Id.* at 229.

This Court has adhered to that view in subsequent cases. In *INS* v. *Chadha*, 462 U.S. 919 (1983), for example, the Court held that the INA's provision for judicial review of "final orders of deportation," then found in

8 U.S.C. 1105a (1982), permitted review of a constitutional challenge to the legislative veto because "the term 'final orders' * * * 'includes all matters on which the validity of the final order is contingent,'" *Chadha*, 462 U.S. at 938 (citation omitted). Similarly, in *Cheng Fan Kwok* v. *INS*, 392 U.S. 206 (1968), the Court confirmed that the statutory provisions governing review of final orders of deportation encompass all "orders entered during [the deportation] proceedings," *id.* at 215; see *id.* at 216-217.

The particular relief the alien sought in *Foti* was discretionary, see 375 U.S. at 218-219, but the same logic applies to judicial review of denials of mandatory protection from removal. In particular, withholding of deportation based on a fear of persecution—now known as withholding of removal, 8 U.S.C. 1231(b)(3)—became a "mandatory" form of protection in 1980. *INS* v. *Cardoza-Fonseca*, 480 U.S. 421, 444 (1987); see *id.* at 428-429. After that change, the courts of appeals routinely exercised jurisdiction under the Hobbs Act to review challenges that concerned only the denial of withholding of deportation, without any suggestion that such a denial was any less an integral part of the final order of removal than was a denial of discretionary relief. See, *e.g.*, *Kofa* v. *INS*, 60 F.3d 1084, 1087 (4th Cir. 1995); *Al-Salehi* v. *INS*, 47 F.3d 390, 391 (10th Cir. 1995); *Mansoori* v. *INS*, 32 F.3d 1020, 1021 (7th Cir. 1994); *Garcia* v. *INS*, 7 F.3d 1320, 1323 (7th Cir. 1993); *Mosquera-Perez* v. *INS*, 3 F.3d 553, 553 (1st Cir. 1993). Those decisions and others like them reflect the settled consensus that the term "final orders of deportation" encompassed other administrative decisions made in the deportation proceedings, including the denial of withholding of deportation.

b. In 1996, Congress carried forward that same understanding into Section 1252, which was enacted in IIRIRA. Section 1252(a)(1) states that review of "a final order of removal" may be obtained only by filing a petition for review under the Hobbs Act. 8 U.S.C. 1252(a)(1); see IIRIRA § 306(a), 110 Stat. 3009-607. That provision was closely modeled on prior law, with a change in terminology from "deportation" to "removal." Compare 8 U.S.C. 1252(a)(1) (providing for "[j]udicial review of a final order of removal" under the Hobbs Act), with 8 U.S.C. 1105a(a) (1964) (providing for "judicial review of all final orders of deportation" under the Hobbs Act). Accordingly, when Congress provided for judicial review of "a final order of removal," 8 U.S.C. 1252(a)(1), it also authorized review all the "constituent part[s]" of the final order, *Foti*, 375 U.S. at 226, including the denial of relief or protection from removal.

That conclusion follows from the principle that "Congress is presumed to be aware of * * * [a] judicial interpretation of a statute and to adopt that interpretation when it re-enacts a statute without change." *Lorillard* v. *Pons*, 434 U.S. 575, 580 (1978). To be sure, Section 1252 reflects the updated terminology—removal, rather than deportation—used throughout IIRIRA. But except for that slight variation, Section 1252 uses "the materially same language" as the prior statutory provision for judicial review, and Congress should be presumed to have ratified this Court's construction of that language in *Foti*, *Chadha*, and *Cheng Fan Kwok*. *Lamar, Archer & Cofrin, LLP* v. *Appling*, 138 S. Ct. 1752, 1762 (2018); see also, *e.g.*, *Bank of Am. Corp.* v. *City of Miami*, 137 S. Ct. 1296, 1303-1304 (2017) (presuming that Congress ratified prior judicial construction even when it made "minor changes" to the

statutory language). And the legislative record confirms that Section 1252 was intended to "preserve[] the right to appeal from a final administrative order of removal," subject to various new limitations. IIRIRA House Report 161; see H.R. Rep. No. 828, 104th Cong., 2d Sess. 219 (1996) (Conf. Rep.) (amendments would "revise and *restate*" current law) (emphasis added).

Section 1252 as enacted by IIRIRA also contains the criminal-alien jurisdictional bar, which operates as a limit on judicial review of a "final order of removal." § 306(a)(2), 110 Stat. 3009-607 (8 U.S.C. 1252(a)(2)(C)). The same terminology ("final order of removal") in adjacent provisions, enacted at the same time and addressing the same general subject matter, ought to be given the same meaning. See, *e.g.*, *Ratzlaf* v. *United States*, 510 U.S. 135, 143 (1994). Accordingly, the criminal-alien review bar in Section 1252(a)(2)(C) withdraws jurisdiction to review any "final order of removal" in the same sense that Section 1252(a)(1) confers jurisdiction to review a "final order of removal." In both cases, the term "final order of removal" encompasses all administrative determinations made within the removal proceeding, including the denial of an alien's request for withholding or deferral of removal under the CAT regulations.

c. Petitioner contends (Br. 33) that this Court's decisions in *Foti* and *Chadha* are irrelevant because those decisions predate the statutory definition of an "order of deportation" enacted in 1996, see AEDPA § 440(b), 110 Stat. 1277. Petitioner contends (Br. 25-28) that the administrative denial of a CAT claim does not fall under the statutory definition of an "order of deportation," and therefore is not a "final order of removal" for purposes of Section 1252(a)(2)(C), because it does not determine the alien's deportability. Petitioner, however,

misunderstands the import of the statutory definition, which addresses the *finality* of the IJ's order rather than its scope or constituent parts.

The relevant definition states that "[t]he 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." 8 U.S.C. 1101(a)(47)(A). Removability determinations are now made by IJs, who are required, at the "conclusion of the proceeding," to "decide whether an alien is removable." 8 U.S.C. 1229a(c)(1)(A); see also 8 C.F.R. 1240.12(a) and (c) (requiring the IJ to "conclude[]" his or her written or oral decision by issuing "the order" directing removal or "such disposition of the case as may be appropriate"). The statutory definition functions to make clear that no "order of deportation" exists, and thus no appeal is ripe, until the IJ issues an order "concluding that the alien is deportable or ordering deportation." 8 U.S.C. 1101(a)(47)(A). That limited function is confirmed by the second subparagraph of the definition, which specifies the circumstances in which "[t]he order described under subparagraph (A) shall become final," 8 U.S.C. 1101(a)(47)(B).

The definition does not, however, speak to the scope of judicial review. Notably, the definition was enacted in AEDPA at the same time as the first version of the criminal-alien jurisdictional bar, which was phrased as a limit on review of "final order[s] of deportation." AEDPA § 440(a), 110 Stat. 1276-1277. If petitioner were correct that a "final order of deportation" for purposes of judicial review encompassed *only* that part of the administrative decision concluding that the alien is

deportable, then AEDPA's criminal-alien jurisdictional bar would have been largely ineffective, or at least incomplete; it would not have precluded judicial review of the denial of a criminal alien's request for relief or protection from removal, such as withholding of removal. The government is not aware of any court that construed AEDPA in that manner, and this Court did not identify that as a plausible construction of the statute in *INS* v. *St. Cyr*, 533 U.S. 289 (2001), which involved a criminal alien's challenge to a determination regarding his eligibility for a waiver of deportation, see *id.* at 293. Instead, in *St. Cyr* this Court applied the constitutional avoidance canon to conclude that the post-1996 statutory scheme permitted aliens subject to the criminal-alien jurisdictional bar to obtain judicial review of questions of law in federal district court via habeas proceedings. See *id.* at 299-300, 314.

Petitioner further contends (Br. 33-34) that *Foti* is distinguishable because it involved an alien's request for suspension of deportation, which the Court described as resulting (if granted) in "no deportation order [being] rendered at all." *Foti*, 375 U.S. at 223. In petitioner's view (Br. 34), CAT claims are different because, even if granted, "the removal order remains in effect." That putative distinction is inconsistent with this Court's reasoning in *Foti*. Although the alien in *Foti* was requesting a suspension of deportation, the Court made clear that the rationale of its decision extended to "all determinations made during" the deportation proceedings, including specifically to "orders denying the withholding of deportation" under 8 U.S.C. 1253(h) (1958). *Foti*, 375 U.S. at 229; see *Chupina* v. *Holder*, 570 F.3d 99, 103-104 (2d Cir. 2009) (per curiam)

(recognizing that the "reasoning in *Foti* is equally applicable" to judicial review of "applications for CAT protection" in removal proceedings).

Moreover, the fact that an order of removal remains in effect even if CAT protection is granted is unremarkable in this context. An IJ likewise may not grant a request for withholding of removal based on a fear of persecution, 8 U.S.C. 1231(b)(3), unless and until the alien is ordered removed. See, *e.g.*, *Kouambo* v. *Barr*, 943 F.3d 205, 210 (4th Cir. 2019) (citing *In re I-S- & C-S-*, 24 I. & N. Dec. 432 (B.I.A. 2008)). Without such a finding, there is no removal to be withheld. See *ibid.* And the courts of appeals have routinely exercised Hobbs Act jurisdiction to review denials of statutory withholding of removal as part of judicial review of a final order of removal, subject to Section 1252's limitations. See p. 21, *supra* (collecting examples). Petitioner does not explain how his narrow understanding of the term "final order of removal" could be squared with that settled practice.

2. The Convention and its implementing provisions confirm that judicial review of CAT claims is subject to the jurisdictional limitations in Section 1252(a)(2)(C)

The Convention and the statutory and regulatory provisions through which the United States' obligations under the Convention are implemented in domestic law confirm that judicial review of CAT claims in removal proceedings is subject to the jurisdictional limitations in Section 1252(a)(2)(C). Indeed, at each step in the process of implementing the treaty in U.S. law, Congress and the Executive Branch have been careful to ensure that judicial review of CAT claims is available, if at all, only under the strictures of Section 1252.

In 1988, the United States signed the Convention, and President Reagan submitted the treaty to the Senate for its advice and consent. See S. Exec. Rep. No. 30, 101st Cong., 2d Sess. 2 (1990) (CAT Report). The Senate granted its advice and consent in 1990 on the express understanding that the Convention was not self-executing. 136 Cong. Rec. 36,198-36,199 (1990). The accompanying Senate committee report explained that, "[b]ecause the Convention is not self-executing," administrative determinations about CAT claims in deportation proceedings "will not be subject to judicial review in domestic courts," CAT Report 18, at least not by virtue of ratification of the Convention itself.

Congress later directed the Attorney General to promulgate regulations to implement the United States' obligations under Article 3 of the Convention. FARRA § 2242(b), 112 Stat. 2681-822. In doing so, however, Congress made clear that it was not providing a basis for judicial review of CAT claims outside the framework of Section 1252:

> Notwithstanding any other provision of law, and except as provided in the regulations described in subsection (b), * * * nothing in this section shall be construed as providing any court jurisdiction to consider or review claims raised under the Convention or this section * * * 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).

§ 2242(d), 112 Stat. 2681-822.

Petitioner argues (Br. 30) that this provision in FARRA demonstrates that Congress "distinguished between an order resolving a CAT claim and a 'final order of removal.'" To the contrary, FARRA not only provides

that CAT claims are subject to review pursuant to Section 1252, but also confirms that the denial of a CAT claim is reviewable only "as *part* of the review of a final order," FARRA § 2242(d), 112 Stat. 2681-822 (emphasis added)—consistent with the established understanding, described above, that judicial review of a final order of removal encompasses review of the order's constituent parts, including the denial of relief or protection from removal. See pp. 19-21, *supra*.

The regulations promulgated by the Attorney General in response to FARRA reiterate that "there shall be no judicial appeal or review of any action, decision, or claim raised under the Convention * * * except as part of the review of a final order of removal pursuant to" Section 1252. 8 C.F.R. 208.18(e)(1), 1208.18(e)(1). The regulations also contain a proviso stating that "any appeal or petition regarding an action, decision, or claim under the Convention * * * shall not be deemed to include or authorize the consideration of any administrative order or decision, or portion thereof, the appeal or review of which is restricted or prohibited by the [INA]." *Ibid.* Thus, an alien may petition for review of the denial of a CAT claim only "as part of the review of a final order of removal" under Section 1252, but such a petition does not "include or authorize" review of the claim to the extent that review is "restricted or prohibited" by some other provision of the INA—including, as relevant here, the criminal-alien jurisdictional bar in Section 1252(a)(2)(C). The preamble to the rulemaking made the same point, noting that the regulations do not "expand the availability of judicial review for aliens who make claims to protection under the Convention," because any such review "remains subject to the requirements and limitations" of Section 1252. 64 Fed. Reg. at 8480.

The rule that petitioner advocates would also undercut the structure and purpose of the implementing regulations. In promulgating the CAT regulations, the Attorney General utilized the pre-existing regulatory framework for adjudicating requests for statutory withholding of removal. 8 C.F.R. 208.16(c), 1208.16(c); see pp. 5-6, *supra*. The regulations are thus designed to provide parallel treatment to claims for withholding of removal based on fear of persecution, 8 U.S.C. 1231(b)(3), and withholding of removal based on fear of torture. FARRA itself likewise tied CAT withholding of removal to the existing limits on statutory withholding of removal, directing that the CAT regulations "exclude from [CAT] protection" any criminal aliens who are ineligible for statutory withholding of removal, to the "maximum extent" possible. FARRA § 2242(c), 112 Stat. 2681-822.[3] Petitioner's rule would upend that parallel treatment by creating a loophole for criminal aliens to obtain judicial review of factual challenges to the denial of withholding of removal under the CAT regulations even while comparable challenges to the denial of statutory withholding of removal would be precluded.

3. The REAL ID Act further confirms that Section 1252(a)(2)(C) limits judicial review of CAT claims

a. The REAL ID Act further confirms that judicial review of CAT claims is subject to the jurisdictional limits in Section 1252(a)(2)(C). In that 2005 statute, Congress amended Section 1252 to add a new Subsection (a)(4), which specifically addresses judicial review of CAT claims. REAL ID Act § 106(a)(1)(B), 119 Stat. 310. Section 1252(a)(4) states that "[n]otwithstanding any

[3] Such aliens may obtain deferral of removal under the CAT regulations implementing FARRA. 8 C.F.R. 208.17, 1208.17.

other provision of law," including the federal habeas statute, "a petition for review filed with an appropriate court of appeals in accordance with [Section 1252] shall be the sole and exclusive means for judicial review of any cause or claim under the" Convention, subject to an exception not relevant here. 8 U.S.C. 1252(a)(4); see 8 U.S.C. 1225(b)(1), 1252(e).

A petition for review of a CAT claim is filed "in accordance" with Section 1252, 8 U.S.C. 1252(a)(4), only if it conforms to the limitations of Section 1252. See, *e.g.*, *The American Heritage Dictionary of the English Language* 11 (5th ed. 2016) (defining "accordance" to mean "[a]greement; conformity"); *Webster's New World College Dictionary* 9 (5th ed. 2014) ("agreement; harmony; conformity"); cf. Bryan A. Garner, *A Dictionary of Modern Legal Usage* 14 (2d ed. 1995) ("To be *in accordance* is to be in conformity or compliance."). And Section 1252(a)(2)(C), in turn, forbids the exercise of jurisdiction with respect to any factual challenge raised in a petition for review by a criminal alien. Reviewing a criminal alien's factual challenge to the denial of a CAT claim would not be "in accordance" with that jurisdictional limitation.

Moreover, the purpose and history of the REAL ID Act show that the law was intended to limit judicial review of criminal aliens' requests for relief or protection from removal, including CAT claims. Congress enacted the REAL ID Act in part as a response to this Court's decision in *St. Cyr*, *supra*, which had interpreted the post-1996 statutory scheme to permit an alien to obtain judicial review of pure questions of law in district court in habeas proceedings, even when IIRIRA's criminal-alien bar foreclosed the alien from obtaining review of the same question in a petition for review in the court of

appeals under Section 1252. 533 U.S. at 308-314. The specific question of law at issue in *St. Cyr* concerned the alien's eligibility for a discretionary waiver of deportation, not the alien's deportability. See *id.* at 293, 298. After *St. Cyr*, several courts of appeals applied the logic of that decision to permit district-court habeas review of CAT claims denied in removal proceedings.[4]

The REAL ID Act was plainly intended to foreclose district-court review in those kinds of cases, by ensuring that all judicial review of removal proceedings—including review of CAT claims—occurs only under Section 1252, subject to its prohibition forbidding "criminals from obtaining review over non-constitutional, nonlegal claims." REAL ID Act Conf. Rep. 175; see also *id.* at 173-174 (criticizing *St. Cyr* and "the anomalies created by" it in the lower courts). Indeed, consistent with the plain text of Section 1252(a)(4), Members of Congress anticipated that "criminal aliens would have the opportunity for circuit court review of constitutional claims and pure questions of law," but not factual challenges, even with respect to requests for "Torture Convention protection." H.R. Rep. No. 724, 108th Cong., 2d Sess. Pt. 6, at 192 (2004). That is precisely the result the government advocates here: Criminal aliens may obtain judicial review of the denial of a CAT claim in removal proceedings only under Section 1252 and only

---

[4] See *Cadet* v. *Bulger*, 377 F.3d 1173, 1181-1182 (11th Cir. 2004); *Singh* v. *Ashcroft*, 351 F.3d 435, 441-442 (9th Cir. 2003); *Ogbudimkpa* v. *Ashcroft*, 342 F.3d 207, 216 (3d Cir. 2003); *Saint Fort* v. *Ashcroft*, 329 F.3d 191, 200-202 (1st Cir. 2003); *Wang* v. *Ashcroft*, 320 F.3d 130, 140-142 (2d Cir. 2003). General habeas review in district court was not subject to certain limitations that govern review under Section 1252—for example, the 30-day time limitation on filing a petition, 8 U.S.C. 1252(b)(1).

to the extent they seek review of "constitutional claims or questions of law," 8 U.S.C. 1252(a)(2)(D).

The text of the REAL ID Act also refutes petitioner's interpretation of the term "final order of removal." Congress directed district courts to transfer any habeas case pending at the time of the enactment of the REAL ID Act to the appropriate court of appeals, if the case "challeng[es] *a final administrative order of removal*, deportation, or exclusion." § 106(c), 119 Stat. 311 (emphasis added). That provision was correctly understood to require the transfer of habeas cases challenging the denial of CAT claims in administrative removal proceedings. See, *e.g.*, *Ishak* v. *Gonzales*, 422 F.3d 22, 25-26, 28 (1st Cir. 2005). And Congress accomplished that transfer by using the term "final administrative order of removal" to encompass the denial of requests for relief or protection from removal.

b. Petitioner argues (Br. 29-30) that "Section 1252(a)(4) would have no meaning" unless a CAT claim were treated as distinct from a final order of removal, because an adjacent provision, also enacted by the REAL ID Act, separately addresses judicial review of "an order of removal." 8 U.S.C. 1252(a)(5); see REAL ID Act § 106(a)(1)(B), 119 Stat. 310. That provision states that "a petition for review filed with an appropriate court of appeals in accordance with" Section 1252 "shall be the sole and exclusive means for judicial review of an order of removal." 8 U.S.C. 1252(a)(5). Thus, in petitioner's view, the statute distinguishes between a "cause or claim under" the CAT regulations and an "order of removal." 8 U.S.C. 1252(a)(4) and (5).

That surplusage argument is unsound and has been rejected by the only courts of appeals to consider it. See *Ortiz-Franco*, 782 F.3d at 88-89 (explaining that Section

1252(a)(4) "simply serves to 'confirm[]' that the statutory right to judicial review exists only as part of a review of a final order of removal") (citation omitted; brackets in original); *Lovan* v. *Holder*, 574 F.3d 990, 998 (8th Cir. 2009) (similar). As those courts have recognized, Congress's decision to enact two overlapping and complementary provisions in Subsections (a)(4) and (a)(5), to ensure that criminal aliens may not circumvent the jurisdictional limits in Section 1252, is not a sound basis to read either or both of those provisions narrowly. Moreover, Section 1252(a)(4) serves a distinct function, not accomplished by Section 1252(a)(5). By making clear that CAT claims may be reviewed only "during a court's review of a final order of removal," *Omar* v. *McHugh*, 646 F.3d 13, 18 (D.C. Cir. 2011) (Kavanaugh, J.), Section 1252(a)(4) forecloses review of CAT claims made *outside* of removal proceedings—for example, by military detainees or in extradition cases, see *id.* at 19-21. Both provisions can therefore be given independent effect, even though review of a final order of removal encompasses review of the denial of a CAT claim in removal proceedings. Cf. *Connecticut Nat'l Bank* v. *Germain*, 503 U.S. 249, 253 (1992) (observing that "[r]edundancies across statutes are not unusual events in drafting," and that canon against surplusage applies only if an interpretation would render a statutory provision "wholly superfluous").

B. Petitioner's Contrary Interpretation Of The Statute Is Unsound

1. Petitioner principally contends (Br. 2-3, 23-34) that the criminal-alien jurisdictional bar does not preclude judicial review of an alien's factual challenge to the denial of a CAT claim in removal proceedings because the administrative denial of the CAT claim is not

itself an "order of removal." For the reasons set forth above, that contention is inconsistent with the established meaning of the term "final order of removal" in this context, and it cannot be squared with the statutory and regulatory provisions implementing the United States' obligations under the Convention or with the REAL ID Act.

Petitioner's crabbed understanding of the term "final order of removal" in the criminal-alien jurisdictional bar, 8 U.S.C. 1252(a)(2)(C), would also be self-defeating, in that adopting it would deprive the courts of appeals of any jurisdictional basis to review the alien's CAT claim in the first place. Section 1252(a)(1) authorizes the courts of appeals to exercise Hobbs Act jurisdiction, 28 U.S.C. 2342, only with respect to a petition for review of a "final order of removal." 8 U.S.C. 1252(a)(1). The same term ("final order of removal") should be given the same meaning in Section 1252(a)(1) and (a)(2)(C). See p. 23, *supra*; see also, *e.g.*, *Cochise Consultancy, Inc.* v. *United States ex rel. Hunt*, 139 S. Ct. 1507, 1512 (2019) (avoiding an interpretation that "would 'attribute different meanings to the same phrase'") (quoting *Reno* v. *Bossier Parish Sch. Bd.*, 528 U.S. 320, 329 (2000)); *Law* v. *Siegel*, 571 U.S. 415, 422 (2014) ("[W]ords repeated in different parts of the same statute generally have the same meaning."). Thus, if the denial of a CAT claim in removal proceedings were not considered a constituent part of the "final order of removal" for purposes of Section 1252(a)(2)(C), then Section 1252(a)(1) would not provide a basis for judicial review of the denial of such claim.

Petitioner argues (Br. 34-36) that his interpretation of the term "final order of removal" in Section 1252(a)(2)(C) can be made consistent with the INA's

scheme for judicial review, but each of the provisions that he invokes cuts against his view. Petitioner relies on three provisions: 8 U.S.C. 1252(a)(4), which states that a petition for review filed in accordance with Section 1252 is the "sole and exclusive" means for obtaining review of CAT claims; FARRA § 2242(d), 112 Stat. 2681-822, which states that no court shall have jurisdiction to review a CAT claim "except as part of the review of a final order of removal pursuant to" Section 1252; and 8 U.S.C. 1252(b)(9), which states that "[j]udicial review of all questions of law and fact" arising from removal proceedings "shall be available only in judicial review of a final order" under Section 1252. By their plain terms, none of those provisions furnishes an independent jurisdictional basis for a court of appeals to review an alien's challenge to the denial of a CAT claim. Indeed, quite the opposite—each one makes clear that judicial review of a CAT claim is available *only* under and in conformity with Section 1252 itself. See *Ortiz-Franco*, 782 F.3d at 88 ("Section 1252(a)(4) * * * does not grant reviewing courts greater jurisdiction over CAT claims than over other claims.") (quoting *Lovan*, 574 F.3d at 998); *Ahmed* v. *Mukasey*, 300 Fed. Appx. 324, 327 n.1 (5th Cir. 2008) (per curiam) (similar).

Petitioner's suggestion (Br. 35) that judicial review of a CAT claim is best viewed as a distinct undertaking that is merely consolidated with an alien's petition for review of a removal order under the so-called zipper clause, 8 U.S.C. 1252(b)(9), is also inconsistent with established practice. The courts of appeals routinely exercise jurisdiction when an alien files a petition for review of the denial of a CAT claim, even when the alien does not (or cannot) otherwise seek review of the order finding the alien removable. For example, an alien may

petition for judicial review after a prior CAT remand to the agency by a court, see, *e.g.*, *Enwonwu* v. *Gonzáles*, 232 Fed. Appx. 11, 12-13 (1st Cir. 2007) (per curiam); after the denial of a motion to reopen seeking CAT protection, see, *e.g.*, *Shabo* v. *Sessions*, 892 F.3d 237, 238 (6th Cir. 2018), cert. denied, 139 S. Ct. 2631 (2019); or after the agency terminates a prior grant of CAT protection due to changed circumstances in the country of removal, see, *e.g.*, *Ali* v. *Mukasey*, 529 F.3d 478, 482, 489 (2d Cir. 2008).[5] In each of these examples, the alien's removability may have been conclusively determined in a prior proceeding, and the alien's petition may be limited solely to CAT issues. The alien thus is not seeking review of the "order of removal" in the narrow sense that petitioner would give to that term, and petitioner's theory fails to explain why review is available at all.

2. The presumption of judicial review (Pet. Br. 36-38) and the purposes of the INA (*id.* at 40-44) do not support petitioner's position.

With respect to the latter, the avowed purpose of Congress's amendments to the judicial-review provisions of the INA in IIRIRA was to "streamline[]" and expedite the removal of criminal aliens. IIRIRA House Report 108. That purpose extended to limiting judicial review of denials of discretionary relief from removal—matters that were necessarily *not* "previously litigated

[5] Similarly, an alien may petition for judicial review of the denial of a CAT claim after full administrative proceedings on that claim even when the alien is subject to a reinstated order of removal, after illegally reentering the United States following a prior removal; in that circumstance, the reinstated order is not itself "subject to being * * * reviewed," 8 U.S.C. 1231(a)(5); 8 C.F.R. 208.31. See, *e.g.*, *Ponce-Osorio* v. *Johnson*, 824 F.3d 502, 505-506 (5th Cir. 2016) (per curiam); *Luna-Garcia* v. *Holder*, 777 F.3d 1182, 1185 (10th Cir. 2015); *Ortiz-Alfaro* v. *Holder*, 694 F.3d 955, 960 (9th Cir. 2012).

in a criminal trial." Pet. Br. 41. Indeed, as this Court observed in *Reno* v. *American-Arab Anti-Discrimination Committee*, 525 U.S. 471 (1999), "protecting the Executive's discretion" in such matters from the courts "can fairly be said to be the theme of the legislation," *id.* at 486 (citing, as an example, 8 U.S.C. 1252(a)(2)(C)). Ensuring that criminal aliens could obtain judicial review of CAT claims only under the strictures of Section 1252, including the criminal-alien jurisdictional bar, was also the manifest purpose of the REAL ID Act. See pp. 30-31, *supra*. Petitioner's construction of the statutory scheme would subvert those legislative purposes, not further them.

Petitioner's reliance on a presumption of the availability of judicial review is also misplaced. That presumption "may be overcome by clear and convincing indications, drawn from specific language, specific legislative history, and inferences of intent drawn from the statutory scheme as a whole, that Congress intended to bar review." *Cuozzo Speed Techs., LLC* v. *Lee*, 136 S. Ct. 2131, 2140 (2016) (citation and internal quotation marks omitted). There can be no question that Congress intended to bar review of factual challenges by criminal aliens; that is the plain import of Section 1252(a)(2)(C) and (D). See 8 U.S.C. 1252(a)(2)(C) (when the criminal-alien jurisdictional bar applies, "no court shall have jurisdiction to review any final order of removal against [the] alien," except "as provided in subparagraph (D)"). The statute, in light of its text, history, and purpose, clearly establishes that the same jurisdictional bar applies to judicial review of CAT claims by criminal aliens.

The "separation-of-powers principles" invoked by petitioner (Br. 37) are therefore inapposite. Indeed, if

this case has a separation-of-powers dimension to it, the relevant principle is that the jurisdiction of the lower federal courts is subject to the control of Congress. As this Court has explained, "Congress' greater power to create lower federal courts includes its lesser power to 'limit the jurisdiction of those Courts.'" *Patchak* v. *Zinke*, 138 S. Ct. 897, 906 (2018) (plurality opinion) (quoting *United States* v. *Hudson*, 11 U.S. (7 Cranch) 32, 33 (1812)). "So long as Congress does not violate other constitutional provisions, its 'control over the jurisdiction of the federal courts' is 'plenary.'" *Ibid.* (quoting *Brotherhood of R.R. Trainmen, Enter. Lodge, No. 27* v. *Toledo, Peoria & W. R.R.*, 321 U.S. 50, 63-64 (1944)). Here, Congress limited the jurisdiction of the courts of appeals in unambiguous terms, 8 U.S.C. 1252(a)(2)(C) and (D), and also provided that any review of CAT claims would be available only "in accordance" with Section 1252 and its limitations, 8 U.S.C. 1252(a)(4). A proper respect for the separation of powers requires that those directives by Congress be given effect.

Petitioner contends (Br. 38-39) that the result of giving effect to the criminal-alien jurisdictional bar will be that some administrative errors about CAT claims go uncorrected. Notably, even when the criminal-alien jurisdictional bar does *not* apply, a reviewing court is obligated to review the agency's factual findings under the substantial-evidence test, treating the agency's findings as "conclusive unless any reasonable adjudicator would be compelled to conclude to the contrary." 8 U.S.C. 1252(b)(4)(B); see *INS* v. *Elias-Zacarias*, 502 U.S. 478, 481 (1992). And additional layers of judicial review are not without cost. The practical reality of removal proceedings is that "every delay works to the advantage of the [removable] alien who wishes merely to remain in

the United States," *Stone* v. *INS*, 514 U.S. 386, 399-400 (1995) (quoting *INS* v. *Doherty*, 502 U.S. 314, 321-325 (1992)), which creates incentives for "dilatory" litigation, *Foti*, 375 U.S. at 224-225. In any event, weighing the marginal benefit of additional review against its costs is primarily a task for Congress, and Congress struck the relevant balance by providing criminal aliens with an opportunity to seek review of constitutional claims and questions of law regarding the denial of CAT claims, but not factual challenges.

C. The Alternative Jurisdictional Theories Adopted By The Seventh And Ninth Circuits Are Incorrect

In seeking this Court's review, petitioner invoked two alternative theories of jurisdiction, one adopted by the Seventh Circuit and the other by the Ninth Circuit, which formed the basis for the division of authority among the courts of appeals that petitioner asked this Court to resolve. See Pet. i, 21-24. Petitioner has now abandoned both theories. Notwithstanding petitioner's retrenchment, this Court should make clear that both of those alternative theories are also unsound.

1. The Ninth Circuit has erroneously read an "on the merits" exception into the criminal-alien jurisdictional bar in Section 1252(a)(2)(C). See *Pechenkov* v. *Holder*, 705 F.3d 444, 449-452 (2012) (Graber, J., concurring). The Ninth Circuit applies its exception in circumstances where relief or protection from removal is denied "on the merits" of an alien's claim, as opposed to being denied because the alien is substantively ineligible for that form of relief or protection due to a criminal conviction. See *id.* at 450-451; see also, *e.g.*, *Alphonsus* v. *Holder*, 705 F.3d 1031, 1036-1037 (9th Cir. 2013). Indeed, the Ninth Circuit has extended its "on the merits" reasoning even beyond CAT claims to hold that Section

1252(a)(2)(C) "does not apply to the denial of a procedural motion that rests on a ground independent of the conviction that triggers the bar." *Garcia* v. *Lynch*, 798 F.3d 876, 881 (2015); cf. *Agonafer* v. *Sessions*, 859 F.3d 1198, 1203 (9th Cir. 2017) (extending *Garcia*'s rationale to challenges to the denial of motions to reopen). The Ninth Circuit's "on the merits" exception is thus both far broader and in one respect narrower than petitioner's current theory—far broader in that it is not limited to CAT claims but apparently extends to additional situations in which the criminal-alien jurisdictional bar would otherwise apply, and narrower in that it permits review of only some factual challenges (even to CAT claims) by criminal aliens but not others.

The statutory scheme does not contain any implicit "on the merits" exception. When an IJ or the Board determines that an alien's claim for protection under the CAT regulations fails "on the merits"—*e.g.*, because the alien has failed to establish that he would be personally subject to "intentionally inflicted" severe pain or suffering "at the instigation" of public officials in the country of removal, 8 C.F.R. 208.18(a)(1)—that determination is part of the "final order of removal" for purposes of judicial review. As explained above, the denial of an alien's request for relief or protection in the removal proceeding is a constituent part of the final order of removal for purposes of Section 1252. See pp. 19-21, *supra*. Thus, under Section 1252(a)(2)(C), "the only relevant question is whether an IJ has made a finding of *removability* because of a relevant conviction." *Pechenkov*, 705 F.3d at 451 (Graber, J., concurring). That leads to "a straightforward inquiry: Was the alien charged with removability because of a relevant crime, and did the IJ correctly sustain that charge?" *Ibid.* If so, the criminal-

alien jurisdictional bar applies and the court of appeals "lack[s] jurisdiction over all questions not covered by [Section] 1252(a)(2)(D)." *Id.* at 451-452.

2. The Seventh Circuit has concluded that it retains jurisdiction to review a criminal alien's factual challenge to the denial of a request for deferral of removal under the CAT regulations for a different but equally flawed reason. In *Issaq* v. *Holder,* 617 F.3d 962 (2010), the Seventh Circuit observed in dicta that because *deferral* of removal is an "inherently non-final remedy," Section 1252(a)(2)(C) "(which speaks only of a final order) appears to be inapplicable." *Id.* at 970. Subsequently, in *Wanjiru* v. *Holder*, 705 F.3d 258 (2013), the Seventh Circuit stated:

> A deferral of removal is like an injunction: for the time being, it prevents the government from removing the person in question, but it can be revisited if circumstances change. * * * That is why such an order can be final enough to permit judicial review, but at the same time not be the kind of "final" order covered by § 1252(a)(2)(C).

Id. at 264. The court acknowledged that this analysis was not "necessary" to its determination that it had jurisdiction in *Wanjiru* because, as the government had conceded, the criminal-alien jurisdictional bar did not apply in that case. *Id.* at 263. Nonetheless, a different panel later treated *Wanjiru* as having "conclusively held that deferral of removal is not a final remedy and therefore the INA does not bar judicial review." *Lenjinac* v. *Holder*, 780 F.3d 852, 855 (7th Cir. 2015). Thus, the Seventh Circuit permits a criminal alien to obtain judicial review of a factual challenge to the denial of deferral of

removal under the CAT regulations—though not *withholding* of removal, unlike petitioner's current theory. See Br. in Opp. 17.

Like the Ninth's Circuit's "on the merits" exception, the Seventh Circuit's approach is contrary to the established meaning of a "final order of removal" in this context. That term and its predecessor ("final order of deportation") have long been understood to encompass administrative determinations regarding all reprieves from removal, such as the request for a suspension of deportation that was at issue in this Court's decision in *Foti*, 375 U.S. at 217. Moreover, even if the agency's decision to *grant* deferral of removal is "inherently non-final" in some respects, *Issaq*, 617 F.3d at 970, the agency's decision to *deny* deferral of removal—the matter before the court of appeals when an alien petitions for review from an order of removal—is unquestionably final. See *Ventura-Reyes*, 797 F.3d at 358; *Ortiz-Franco*, 782 F.3d at 90.[6]

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[6] Petitioner's conclusory request (Br. 45) that the Court vacate the judgment below on alternative grounds should be rejected. Petitioner is correct (*ibid.*) that this Court is presently considering the application of 8 U.S.C. 1252(a)(2)(D) in two consolidated cases, *Guerrero-Lasprilla* v. *Barr*, No. 18-776, and *Ovalles* v. *Barr*, No. 18-1015, which were argued on December 9, 2019. The question presented in those cases is whether a determination that an alien failed to exercise reasonable diligence for purposes of equitable tolling of the statutory deadline to file a motion to reopen is a "question[] of law" under Section 1252(a)(2)(D). Resp. Br. at I, *Guerrero-Lasprilla*, *supra* (No. 18-776) (brackets in original). Here, however, petitioner relinquished any argument that the court of appeals erred in treating his challenge to the denial of his CAT claim as a factual challenge, rather than a question of law, by failing to raise any such argument in his petition for a writ of certiorari. See *Yee* v. *City of Escondido*, 503 U.S. 519, 535 (1992) (explaining that, "under this Court's Rule 14.1(a), 'only the questions set forth in the petition,

CONCLUSION

The judgment of the court of appeals should be affirmed.

Respectfully submitted.

NOEL J. FRANCISCO
Solicitor General
JOSEPH H. HUNT
Assistant Attorney General
EDWIN S. KNEEDLER
Deputy Solicitor General
MATTHEW GUARNIERI
Assistant to the Solicitor General
DONALD E. KEENER
JOHN W. BLAKELEY
ANDREW C. MACLACHLAN
Attorneys

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or fairly included therein, will be considered by the Court' ") (brackets and citation omitted). Indeed, the question presented in this case presumes that petitioner is seeking judicial review of "factual findings," not a question of law. Pet. i; see also Pet. 18-19; Br. in Opp. 10. The petition was granted on that premise, and petitioner should not be allowed to reverse course now.

APPENDIX

1. 8 U.S.C. 1101(a) provides in pertinent 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.

* * * * *

2. 8 U.S.C. 1231(b)(3) provides:

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.

3. 8 U.S.C. 1252 provides:

Judicial review of orders of removal

(a) Applicable provisions

(1) General orders of removal

Judicial review of a final order of removal (other than an order of removal without a hearing pursuant to section 1225(b)(1) of this title) is governed only by chapter 158 of title 28, except as provided in subsection (b) and except that the court may not order the

taking of additional evidence under section 2347(c) of such title.

(2) Matters not subject to judicial review

(A) Review relating to section 1225(b)(1)

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, no court shall have jurisdiction to review—

(i) except as provided in subsection (e), any individual determination or to entertain any other cause or claim arising from or relating to the implementation or operation of an order of removal pursuant to section 1225(b)(1) of this title,

(ii) except as provided in subsection (e), a decision by the Attorney General to invoke the provisions of such section,

(iii) the application of such section to individual aliens, including the determination made under section 1225(b)(1)(B) of this title, or

(iv) except as provided in subsection (e), procedures and policies adopted by the Attorney General to implement the provisions of section 1225(b)(1) of this title.

(B) Denials of discretionary relief

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), and regardless of whether the judgment, decision, or action is made in removal proceedings, no court shall have jurisdiction to review—

(i) any judgment regarding the granting of relief under section 1182(h), 1182(i), 1229b, 1229c, or 1255 of this title, or

(ii) any other decision or action of the Attorney General or the Secretary of Homeland Security the authority for which is specified under this subchapter to be in the discretion of the Attorney General or the Secretary of Homeland Security, other than the granting of relief under section 1158(a) of this title.

(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.

(3) Treatment of certain decisions

No alien shall have a right to appeal from a decision of an immigration judge which is based solely on a certification described in section 1229a(c)(1)(B) of this title.

(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) Requirements for review of orders of removal

With respect to review of an order of removal under subsection (a)(1), the following requirements apply:

(1) Deadline

The petition for review must be filed not later than 30 days after the date of the final order of removal.

(2) Venue and forms

The petition for review shall be filed with the court of appeals for the judicial circuit in which the immigration judge completed the proceedings. The record and briefs do not have to be printed. The court of appeals shall review the proceeding on a typewritten record and on typewritten briefs.

(3) Service

(A) In general

The respondent is the Attorney General. The petition shall be served on the Attorney General

and on the officer or employee of the Service in charge of the Service district in which the final order of removal under section 1229a of this title was entered.

(B) Stay of order

Service of the petition on the officer or employee does not stay the removal of an alien pending the court's decision on the petition, unless the court orders otherwise.

(C) Alien's brief

The alien shall serve and file a brief in connection with a petition for judicial review not later than 40 days after the date on which the administrative record is available, and may serve and file a reply brief not later than 14 days after service of the brief of the Attorney General, and the court may not extend these deadlines except upon motion for good cause shown. If an alien fails to file a brief within the time provided in this paragraph, the court shall dismiss the appeal unless a manifest injustice would result.

(4) Scope and standard for review

Except as provided in paragraph (5)(B)—

(A) the court of appeals shall decide the petition only on the administrative record on which the order of removal is based,

(B) the administrative findings of fact are conclusive unless any reasonable adjudicator would be compelled to conclude to the contrary,

(C) a decision that an alien is not eligible for admission to the United States is conclusive unless manifestly contrary to law, and

(D) the Attorney General's discretionary judgment whether to grant relief under section 1158(a) of this title shall be conclusive unless manifestly contrary to the law and an abuse of discretion.

No court shall reverse a determination made by a trier of fact with respect to the availability of corroborating evidence, as described in section 1158(b)(1)(B), 1229a(c)(4)(B), or 1231(b)(3)(C) of this title, unless the court finds, pursuant to subsection (b)(4)(B), that a reasonable trier of fact is compelled to conclude that such corroborating evidence is unavailable.

(5) Treatment of nationality claims

(A) Court determination if no issue of fact

If the petitioner claims to be a national of the United States and the court of appeals finds from the pleadings and affidavits that no genuine issue of material fact about the petitioner's nationality is presented, the court shall decide the nationality claim.

(B) Transfer if issue of fact

If the petitioner claims to be a national of the United States and the court of appeals finds that a genuine issue of material fact about the petitioner's nationality is presented, the court shall transfer the proceeding to the district court of the United States for the judicial district in which the petitioner resides for a new hearing on the nation-

ality claim and a decision on that claim as if an action had been brought in the district court under section 2201 of title 28.

(C) Limitation on determination

The petitioner may have such nationality claim decided only as provided in this paragraph.

(6) Consolidation with review of motions to reopen or reconsider

When a petitioner seeks review of an order under this section, any review sought of a motion to reopen or reconsider the order shall be consolidated with the review of the order.

(7) Challenge to validity of orders in certain criminal proceedings

(A) In general

If the validity of an order of removal has not been judicially decided, a defendant in a criminal proceeding charged with violating section 1253(a) of this title may challenge the validity of the order in the criminal proceeding only by filing a separate motion before trial. The district court, without a jury, shall decide the motion before trial.

(B) Claims of United States nationality

If the defendant claims in the motion to be a national of the United States and the district court finds that—

(i) no genuine issue of material fact about the defendant's nationality is presented, the court shall decide the motion only on the administrative record on which the removal order

is based and the administrative findings of fact are conclusive if supported by reasonable, substantial, and probative evidence on the record considered as a whole; or

(ii) a genuine issue of material fact about the defendant's nationality is presented, the court shall hold a new hearing on the nationality claim and decide that claim as if an action had been brought under section 2201 of title 28.

The defendant may have such nationality claim decided only as provided in this subparagraph.

(C) Consequence of invalidation

If the district court rules that the removal order is invalid, the court shall dismiss the indictment for violation of section 1253(a) of this title. The United States Government may appeal the dismissal to the court of appeals for the appropriate circuit within 30 days after the date of the dismissal.

(D) Limitation on filing petitions for review

The defendant in a criminal proceeding under section 1253(a) of this title may not file a petition for review under subsection (a) during the criminal proceeding.

(8) Construction

This subsection—

(A) does not prevent the Attorney General, after a final order of removal has been issued, from detaining the alien under section 1231(a) of this title;

(B) does not relieve the alien from complying with section 1231(a)(4) of this title and section 1253(g)[1] of this title; and

(C) does not require the Attorney General to defer removal of the alien.

(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.

(c) Requirements for petition

A petition for review or for habeas corpus of an order of removal—

(1) shall attach a copy of such order, and

(2) shall state whether a court has upheld the validity of the order, and, if so, shall state the name of the court, the date of the court's ruling, and the kind of proceeding.

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[1] See References in Text note below.

(d) Review of final orders

A court may review a final order of removal only if—

(1) the alien has exhausted all administrative remedies available to the alien as of right, and

(2) another court has not decided the validity of the order, unless the reviewing court finds that the petition presents grounds that could not have been presented in the prior judicial proceeding or that the remedy provided by the prior proceeding was inadequate or ineffective to test the validity of the order.

(e) Judicial review of orders under section 1225(b)(1)

(1) Limitations on relief

Without regard to the nature of the action or claim and without regard to the identity of the party or parties bringing the action, no court may—

(A) enter declaratory, injunctive, or other equitable relief in any action pertaining to an order to exclude an alien in accordance with section 1225(b)(1) of this title except as specifically authorized in a subsequent paragraph of this subsection, or

(B) certify a class under Rule 23 of the Federal Rules of Civil Procedure in any action for which judicial review is authorized under a subsequent paragraph of this subsection.

(2) Habeas corpus proceedings

Judicial review of any determination made under section 1225(b)(1) of this title is available in habeas corpus proceedings, but shall be limited to determinations of—

(A) whether the petitioner is an alien,

(B) whether the petitioner was ordered removed under such section, and

(C) whether the petitioner can prove by a preponderance of the evidence that the petitioner is an alien lawfully admitted for permanent residence, has been admitted as a refugee under section 1157 of this title, or has been granted asylum under section 1158 of this title, such status not having been terminated, and is entitled to such further inquiry as prescribed by the Attorney General pursuant to section 1225(b)(1)(C) of this title.

(3) Challenges on validity of the system

(A) In general

Judicial review of determinations under section 1225(b) of this title and its implementation is available in an action instituted in the United States District Court for the District of Columbia, but shall be limited to determinations of—

(i) whether such section, or any regulation issued to implement such section, is constitutional; or

(ii) whether such a regulation, or a written policy directive, written policy guideline, or written procedure issued by or under the authority of the Attorney General to implement such section, is not consistent with applicable provisions of this subchapter or is otherwise in violation of law.

(B) Deadlines for bringing actions

Any action instituted under this paragraph must be filed no later than 60 days after the date the challenged section, regulation, directive, guideline, or procedure described in clause (i) or (ii) of subparagraph (A) is first implemented.

(C) Notice of appeal

A notice of appeal of an order issued by the District Court under this paragraph may be filed not later than 30 days after the date of issuance of such order.

(D) Expeditious consideration of cases

It shall be the duty of the District Court, the Court of Appeals, and the Supreme Court of the United States to advance on the docket and to expedite to the greatest possible extent the disposition of any case considered under this paragraph.

(4) Decision

In any case where the court determines that the petitioner—

(A) is an alien who was not ordered removed under section 1225(b)(1) of this title, or

(B) has demonstrated by a preponderance of the evidence that the alien is an alien lawfully admitted for permanent residence, has been admitted as a refugee under section 1157 of this title, or has been granted asylum under section 1158 of this title, the court may order no remedy or relief other than to require that the petitioner be provided a hearing in accordance with section 1229a

of this title. Any alien who is provided a hearing under section 1229a of this title pursuant to this paragraph may thereafter obtain judicial review of any resulting final order of removal pursuant to subsection (a)(1).

(5) Scope of inquiry

In determining whether an alien has been ordered removed under section 1225(b)(1) of this title, the court's inquiry shall be limited to whether such an order in fact was issued and whether it relates to the petitioner. There shall be no review of whether the alien is actually inadmissible or entitled to any relief from removal.

(f) Limit on injunctive relief

(1) In general

Regardless of the nature of the action or claim or of the identity of the party or parties bringing the action, no court (other than the Supreme Court) shall have jurisdiction or authority to enjoin or restrain the operation of the provisions of part IV of this subchapter, as amended by the Illegal Immigration Reform and Immigrant Responsibility Act of 1996, other than with respect to the application of such provisions to an individual alien against whom proceedings under such part have been initiated.

(2) Particular cases

Notwithstanding any other provision of law, no court shall enjoin the removal of any alien pursuant to a final order under this section unless the alien

shows by clear and convincing evidence that the entry or execution of such order is prohibited as a matter of law.

(g) Exclusive jurisdiction

Except as provided in this section and 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, no court shall have jurisdiction to hear any cause or claim by or on behalf of any alien arising from the decision or action by the Attorney General to commence proceedings, adjudicate cases, or execute removal orders against any alien under this chapter.

4. Foreign Affairs Reform and Restructuring Act of 1998, Div. G, § 2242, 112 Stat. 2681-822 provides:

SEC. 2242. UNITED STATES POLICY WITH RESPECT TO THE INVOLUNTARY RETURN OF PERSONS IN DANGER OF SUBJECTION TO TORTURE.

(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, 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.

(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.

5. 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 contained in § 1208.18(a) of this part shall govern all decisions made under regulations under Title II of the Act about the applicability of Article 3 of the Convention Against Torture.

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

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

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

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

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

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

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

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

(2) *Mandatory denials.* Except as provided in paragraph (d)(3) of this section, an application for withhold-

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

(3) *Exception to the prohibition on withholding of deportation in certain cases.* Section 243(h)(3) of the Act, as added by section 413 of Pub. L. 104-132 (110 Stat. 1214), shall apply only to applications adjudicated in proceedings commenced before April 1, 1997, and in which final action had not been taken before April 24, 1996. The discretion permitted by that section to override section 243(h)(2) of the Act shall be exercised only in the case of an applicant convicted of an aggravated felony (or felonies) where he or she was sentenced to an aggregate term of imprisonment of less than 5 years and the immigration judge determines on an individual basis that the crime (or crimes) of which the applicant was convicted does not constitute a particularly serious crime. Nevertheless, it shall be presumed that an alien convicted of an aggravated felony has been convicted of a particularly serious crime. Except in the cases specified in this paragraph, the grounds for denial of withholding of deportation in section 243(h)(2) of the Act as

it appeared prior to April 1, 1997, shall be deemed to comply with the Protocol Relating to the Status of Refugees, Jan. 31, 1967, T.I.A.S. No. 6577.

(e) *Reconsideration of discretionary denial of asylum.* In the event that an applicant is denied asylum solely in the exercise of discretion, and the applicant is subsequently granted withholding of deportation or removal under this section, thereby effectively precluding admission of the applicant's spouse or minor children following to join him or her, the denial of asylum shall be reconsidered. Factors to be considered will include the reasons for the denial and reasonable alternatives available to the applicant such as reunification with his or her spouse or minor children in a third country.

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

6. 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).

7. 8 C.F.R. 1208.18 provides:

Implementation of the Convention Against Torture.

(a) *Definitions.* The definitions in this subsection incorporate the definition of torture contained in Article 1 of the Convention Against Torture, subject to the reservations, understandings, declarations, and provisos contained in the United States Senate resolution of ratification of the Convention.

(1) Torture is defined as any act by which severe pain or suffering, whether physical or mental, is intentionally inflicted on a person for such purposes as obtaining from him or her or a third person information or a confession, punishing him or her for an act he or she or a third person has committed or is suspected of having committed, or intimidating or coercing him or her or a third person, or for any reason based on discrimination of any kind, when such pain or suffering is inflicted by

or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity.

(2) Torture is an extreme form of cruel and inhuman treatment and does not include lesser forms of cruel, inhuman or degrading treatment or punishment that do not amount to torture.

(3) Torture does not include pain or suffering arising only from, inherent in or incidental to lawful sanctions. Lawful sanctions include judicially imposed sanctions and other enforcement actions authorized by law, including the death penalty, but do not include sanctions that defeat the object and purpose of the Convention Against Torture to prohibit torture.

(4) In order to constitute torture, mental pain or suffering must be prolonged mental harm caused by or resulting from:

(i) The intentional infliction or threatened infliction of severe physical pain or suffering;

(ii) The administration or application, or threatened administration or application, of mind altering substances or other procedures calculated to disrupt profoundly the senses or the personality;

(iii) The threat of imminent death; or

(iv) The threat that another person will imminently be subjected to death, severe physical pain or suffering, or the administration or application of mind altering substances or other procedures calculated to disrupt profoundly the sense or personality.

(5) In order to constitute torture, an act must be specifically intended to inflict severe physical or mental

pain or suffering. An act that results in unanticipated or unintended severity of pain and suffering is not torture.

(6) In order to constitute torture an act must be directed against a person in the offender's custody or physical control.

(7) Acquiescence of a public official requires that the public official, prior to the activity constituting torture, have awareness of such activity and thereafter breach his or her legal responsibility to intervene to prevent such activity.

(8) Noncompliance with applicable legal procedural standards does not *per se* constitute torture.

(b) *Applicability of §§ 1208.16(c) and 1208.17(a)—(1) Aliens in proceedings on or after March 22, 1999.* An alien who is in exclusion, deportation, or removal proceedings on or after March 22, 1999 may apply for withholding of removal under § 1208.16(c), and, if applicable, may be considered for deferral of removal under § 1208.17(a).

(2) *Aliens who were ordered removed, or whose removal orders became final, before March 22, 1999.* An alien under a final order of deportation, exclusion, or removal that became final prior to March 22, 1999 may move to reopen proceedings for the sole purpose of seeking protection under § 1208.16(c). Such motions shall be governed by §§ 1003.23 and 1003.2 of this chapter, except that the time and numerical limitations on motions to reopen shall not apply and the alien shall not be required to demonstrate that the evidence sought to be

offered was unavailable and could not have been discovered or presented at the former hearing. The motion to reopen shall not be granted unless:

(i) The motion is filed within June 21, 1999; and

(ii) The evidence sought to be offered establishes a prima facie case that the applicant's removal must be withheld or deferred under §§ 1208.16(c) or 1208.17(a).

(3) *Aliens who, on March 22, 1999, have requests pending with the Service for protection under Article 3 of the Convention Against Torture.* (i) Except as otherwise provided, after March 22, 1999, the Service will not:

(A) Consider, under its pre-regulatory administrative policy to ensure compliance with the Convention Against Torture, whether Article 3 of that Convention prohibits the removal of an alien to a particular country, or

(B) Stay the removal of an alien based on a request filed with the Service for protection under Article 3 of that Convention.

(ii) For each alien who, on or before March 22, 1999, filed a request with the Service for protection under Article 3 of the Convention Against Torture, and whose request has not been finally decided by the Service, the Service shall provide written notice that, after March 22, 1999, consideration for protection under Article 3 can be obtained only through the provisions of this rule.

(A) The notice shall inform an alien who is under an order of removal issued by EOIR that, in order to seek consideration of a claim under §§ 1208.16(c) or 1208.17(a),

such an alien must file a motion to reopen with the immigration court or the Board of Immigration Appeals. This notice shall be accompanied by a stay of removal, effective until 30 days after service of the notice on the alien. A motion to reopen filed under this paragraph for the limited purpose of asserting a claim under §§ 1208.16(c) or 1208.17(a) shall not be subject to the requirements for reopening in §§ 1003.2 and 1003.23 of this chapter. Such a motion shall be granted if it is accompanied by a copy of the notice described in paragraph (b)(3)(ii) or by other convincing evidence that the alien had a request pending with the Service for protection under Article 3 of the Convention Against Torture on March 22, 1999. The filing of such a motion shall extend the stay of removal during the pendency of the adjudication of this motion.

(B) The notice shall inform an alien who is under an administrative order of removal issued by the Service under section 238(b) of the Act or an exclusion, deportation, or removal order reinstated by the Service under section 241(a)(5) of the Act that the alien's claim to withholding of removal under § 1208.16(c) or deferral of removal under § 1208.17(a) will be considered under § 1208.31.

(C) The notice shall inform an alien who is under an administrative order of removal issued by the Service under section 235(c) of the Act that the alien's claim to protection under the Convention Against Torture will be decided by the Service as provided in § 1208.18(d) and 1235.8(b)(4) and will not be considered under the provisions of this part relating to consideration or review by an immigration judge, the Board of Immigration Appeals, or an asylum officer.

(4) *Aliens whose claims to protection under the Convention Against Torture were finally decided by the Service prior to March 22, 1999.* Sections 208.16(c) and 208.17(a) and paragraphs (b)(1) through (b)(3) of this section do not apply to cases in which, prior to March 22, 1999, the Service has made a final administrative determination about the applicability of Article 3 of the Convention Against Torture to the case of an alien who filed a request with the Service for protection under Article 3. If, prior to March 22, 1999, the Service determined that an applicant cannot be removed consistent with the Convention Against Torture, the alien shall be considered to have been granted withholding of removal under § 1208.16(c), unless the alien is subject to mandatory denial of withholding of removal under § 1208.16(d)(2) or (d)(3), in which case the alien will be considered to have been granted deferral of removal under 208.17(a). If, prior to March 22, 1999, the Service determined that an alien can be removed consistent with the Convention Against Torture, the alien will be considered to have been finally denied withholding of removal under § 1208.16(c) and deferral of removal under § 1208.17(a).

(c) *Diplomatic assurances against torture obtained by the Secretary of State.* (1) The Secretary of State may forward to the Attorney General assurances that the Secretary has obtained from the government of a specific country that an alien would not be tortured there if the alien were removed to that country.

(2) If the Secretary of State forwards assurances described in paragraph (c)(1) of this section to the Attorney General for consideration by the Attorney General or her delegates under this paragraph, the Attorney

General shall determine, in consultation with the Secretary of State, whether the assurances are sufficiently reliable to allow the alien's removal to that country consistent with Article 3 of the Convention Against Torture. The Attorney General's authority under this paragraph may be exercised by the Deputy Attorney General or by the Commissioner, Immigration and Naturalization Service, but may not be further delegated.

(3) Once assurances are provided under paragraph (c)(2) of this section, the alien's claim for protection under the Convention Against Torture shall not be considered further by an immigration judge, the Board of Immigration Appeals, or an asylum officer.

(d) *Cases involving aliens ordered removed under section 235(c) of the Act.* With respect to an alien terrorist or other alien subject to administrative removal under section 235(c) of the Act who requests protection under Article 3 of the Convention Against Torture, the Service will assess the applicability of Article 3 through the removal process to ensure that a removal order will not be executed under circumstances that would violate the obligations of the United States under Article 3. In such cases, the provisions of Part 208 relating to consideration or review by an immigration judge, the Board of Immigration Appeals, or an asylum officer shall not apply.

(e) *Judicial review of claims for protection from removal under Article 3 of the Convention Against Torture.* (1) Pursuant to the provisions of section 2242(d) of the Foreign Affairs Reform and Restructuring Act of 1998, there shall be no judicial appeal or review of any action, decision, or claim raised under the Convention or that section, except as part of the review of a final order

of removal pursuant to section 242 of the Act; provided however, that any appeal or petition regarding an action, decision, or claim under the Convention or under section 2242 of the Foreign Affairs Reform and Restructuring Act of 1998 shall not be deemed to include or authorize the consideration of any administrative order or decision, or portion thereof, the appeal or review of which is restricted or prohibited by the Act.

(2) Except as otherwise expressly provided, nothing in this paragraph shall be construed to create a private right of action or to authorize the consideration or issuance of administrative or judicial relief.