17-6835

IN THE UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

JOSE AYALA CRESPIN,

Petitioner-Appellant,

v.

MARY YVONNE EVANS,

Respondent-Appellee

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF VIRGINIA
CASE NO. 1:17-CV-00140-TSE-JFA
THE HONORABLE T.S. ELLIS, III

BRIEF OF *AMICI CURIAE* AMERICAN IMMIGRATION COUNCIL AND AMERICAN IMMIGRATION LAWYERS ASSOCIATION

IN SUPPORT OF PETITIONER-APPELLANT AND REVERSAL

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CORPORATE DISCLOSURE STATEMENT

I, Melissa Crow, attorney for *Amici Curiae*, the American Immigration Council and the American Immigration Lawyers Association, certify that *amici* are both not-for-profit organizations. Neither organization has a parent corporation; neither organization issues stock; consequently, there exists no publicly held corporation which owns 10% or more of the stock of either organization.

July 28, 2017

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I. INTRODUCTION

Pursuant to Federal Rule of Appellate Procedure 29, *Amici Curiae* American Immigration Council and American Immigration Lawyers Association submit this brief to support Petitioner-Appellant Crespin's first argument: that the pre-final order detention statute, 8 U.S.C. § 1226, and not the post-final order detention statute, 8 U.S.C. § 1231, governs his detention pending his withholding-only proceedings.[1]

The question presented in this case has important ramifications for the many detained noncitizens who are in withholding-only proceedings, and who may not receive a final decision on the merits of their claims for months or years. Under the government's view, these individuals should be subject to mandatory detention, without any opportunity for a neutral decision maker to review whether their continued detention is necessary to address flight risk or danger. Under Mr. Crespin's view, and that of the Second Circuit in *Guerra v. Shanahan*, 831 F.3d 59 (2d Cir. 2016), many of these individuals—at the very least, those who fall under 8 U.S.C. § 1226(a)—are entitled to a bond hearing before an Immigration Judge.

[1] The parties consent to this filing. *Amici* further certify that no party's counsel authored the brief in whole or in part, no party or party's counsel contributed money intended to fund preparation or submission of this brief, and no person other than *Amici* and their counsel contributed money intended to fund preparation or submission of the brief.

Unlike most people with reinstated orders of removal—who do not seek protection from removal—Mr. Crespin has passed a reasonable fear screening and been referred for administrative proceedings before the Immigration Judge (IJ) to determine whether he is entitled to relief pursuant to the Convention Against Torture ("CAT").[2] While both groups have removal orders, those in the former category are subject to *final* orders of removal that *may be executed*, absent a discretionary stay of proceedings. Mr. Crespin, on the other hand, *may not be removed* to El Salvador until his withholding application has been adjudicated and all avenues of administrative appeal have been exhausted. Although Mr. Crespin indisputably has a reinstated removal order, that removal order is not yet *final*. He is, therefore, detained under the pre-final-order detention statute, 8 U.S.C. § 1226, and *not* the post-final-order detention statute, 8 U.S.C. § 1231.

This conclusion—that Section 1226 governs the detention of individuals in Mr. Crespin's posture—was correctly adopted by the Second Circuit in *Guerra v. Shanahan*, 831 F.3d 59 (2d Cir. 2016). The district court below, as well as the Ninth Circuit in *Padilla-Ramirez v. Bible*, 2017 WL 2871513 (9th Cir. 2017),

[2] In fiscal year 2015, the government removed 137,449 people through reinstatement proceedings. *See* DHS, *Immigration Enforcement Actions: 2015* at 8 (July 2017), *available at* https://www.dhs.gov/sites/default/files/publications/Enforcement_Actions_2015.pdf. In the same fiscal year, only 3,056 withholding-only cases were received in Immigration Court. *See* EOIR, *FY 2016 Statistics Yearbook* (Mar. 2017), *available at* https://www.justice.gov/eoir/page/file/fysb16/download.

disagreed, holding that Section 1231 governs Mr. Crespin's detention. The reasoning of the district court and the Ninth Circuit misconstrues the significance of withholding-only proceedings and the structure of removal proceedings. It, moreover, conflicts with both the government's own position—and the position adopted by all Circuits to have considered the question—on when an order of removal becomes "final" for purposes of judicial review, with the plain language of the Immigration and Nationality Act ("INA"), and with the well-established canon that, once interpreted, a statute must be applied consistently.

In the judicial review context, the government has consistently adopted, and courts have uniformly accepted, a distinction between those subject to reinstated orders of removal who are seeking withholding and those who are not. The rule is simple: a reinstated order of removal is not final and is not subject to judicial review until withholding-only proceedings are completed. If an order is reinstated and withholding-only proceedings are not sought, the order is final at the time of reinstatement. Where an application for protection from removal is allowed, a reinstated order only becomes final at the conclusion of withholding-only proceedings.

Despite the fact that Mr. Crespin does not have a final order of removal, the district court concluded that he still somehow has an "administratively final" order for purposes of detention. JA 130. That view cannot be squared with the plain

language of the statute, which contains a single definition of finality, and expressly provides that a removal order is not final until the completion of review by the Immigration Judge and the Board of Immigration Appeals (BIA). *See* 8 U.S.C. § 1101(a)(47)(B). And it cannot be squared with settled law, which holds that the finality of an order of removal is contingent upon the conclusion of proceedings challenging the effect of such an order and provides no basis to distinguish between an order's finality for purposes of detention and judicial review.

Indeed, Mr. Crespin is similarly situated to an individual in INA § 240 proceedings who has conclusively been found removable by the IJ and seeks only CAT relief before the IJ or BIA. Such an individual does not yet have a *final* order, and thus is properly detained under Section 1226, not Section 1231. There is no reason to take a different approach here.

In sum, because Mr. Crespin will not have a final removal order until his claim for relief is decided, he is properly detained under Section 1226. The decision below should be reversed.

II. INTERESTS OF AMICI

The American Immigration Council (Council) is a non-profit organization established to increase public understanding of immigration law and policy, advocate for the fair and just administration of our immigration laws, protect the legal rights of noncitizens, and educate the public about the enduring contributions

of America's immigrants. The Council frequently appears before federal courts on issues relating to the interpretation of the Immigration and Nationality Act.

The American Immigration Lawyers Association (AILA) is a national association with more than 15,000 members throughout the United States and abroad, including lawyers and law school professors who practice and teach in the field of immigration and nationality law. AILA seeks to advance the administration of law pertaining to immigration, nationality, and naturalization; to cultivate the jurisprudence of the immigration laws; and to facilitate the administration of justice and elevate the standard of integrity, honor, and courtesy of those appearing in a representative capacity in immigration and naturalization matters. AILA is a professional trade association dedicated to promotion of justice for immigrants. AILA's members practice regularly before the Department of Homeland Security and before the Executive Office for Immigration Review, as well as before the United States District Courts, United States Courts of Appeals, and United States Supreme Court.

Through their experiences representing immigrants, AILA and the Council have gained extensive, first-hand knowledge of the impact of prolonged detention, without access to bond hearings, on individuals with reinstated removal orders who genuinely fear persecution or torture in their home countries.

III. BACKGROUND

Amici provide the following background information to contextualize the need for immigration court review over the detention of people who are subject to reinstated orders of removal and detained pending withholding-only proceedings. As set forth below, Mr. Crespin's case reflects both the government's hugely expanded reliance on the reinstatement of removal statute to expeditiously remove noncitizens from the United States, and the increasing number of individuals in the reinstatement process who are found to have a reasonable fear of persecution or torture in their home countries and are referred for withholding-only proceedings before an IJ. A significant percentage of these individuals—approximately twenty percent—meet their burden of showing a clear probability (i.e., that it is more likely than not) that they face persecution or torture and win protection from removal.

At the same time, the vast majority—more than eighty-five percent—are detained until their cases are decided, typically for prolonged periods of time and sometimes for years. The underlying statutory question presented in Mr. Crespin's case is a significant one for these people. Individuals who are detained under Section 1226(a) are entitled to an immediate bond hearing before an Immigration Judge to determine if they pose a danger or flight risk that justifies this significant deprivation of their liberty. *See Guerra v. Shanahan*, 831 F.3d 59, 64 (2d Cir.

2016).[3] Even those whom the government initially detains under Section 1226(c), which provides for detention without a bond hearing for those convicted of certain enumerated crimes, may nonetheless be entitled to a bond hearing. *See* Pet'r-Apellant's Br. 31-38.

Under the government's view, no individual in withholding-only proceedings is entitled to a bond hearing, and all are entitled only to administrative custody reviews by Immigration and Customs Enforcement ("ICE")—reviews that have been repeatedly criticized for rubberstamping detention.

A. Reinstatement and Withholding-Only Proceedings

Over the past decade, the Department of Homeland Security ("DHS") has increasingly relied on the reinstatement process to remove individuals from the United States. Under this process, a noncitizen who was previously removed from the country and subsequently reentered may have his prior order reinstated through summary procedures, without any hearing before an IJ. 8 U.S.C. § 1231(a)(5).[4] Reinstated removal orders constitute a rapidly growing category of removal orders.

[3] If Section 1226 does apply to Mr. Crespin, he requests a remand for determination of whether he falls under Section 1226(a) or 1226(c). *Amici* address only the threshold statutory question, which will govern the question of the detention of all those in withholding-only proceedings, including those who fall under 1226(a).

[4] To reinstate a prior removal order, a DHS officer determines whether the noncitizen has a prior order, is the same person identified in the prior order, and has unlawfully reentered. 8 C.F.R. § 1241.8(a). If these three requirements are met, DHS reinstates the prior removal order. 8 C.F.R. § 1241.8(c). The reinstated order is not appealable to the BIA, and is only subject to limited judicial review.

In 2005 only 43,137 deportations were effected through reinstatement proceedings; in FY 2015, this number had grown to 137,449 people—an increase of over 300 percent. Reinstated removal orders constituted forty one percent of all removals that year.[5]

While the reinstatement statute provides that individuals subject to reinstatement are "not eligible and may not apply for any relief [from removal]," 8 U.S.C. § 1231(a)(5), the government has recognized that individuals must be provided the opportunity to apply for both withholding of removal and relief under the Convention Against Torture ("CAT"). *See Fernandez-Vargas v. Gonzales*, 548 U.S. 30, 35 n.4 (2006) ("[n]otwithstanding the absolute terms in which the bar on relief is stated, even an alien subject to [§ 1231(a)(5)] may seek withholding of removal"). This is necessary to ensure compliance with the United States' statutory and treaty-based obligations not to return any person to a country where that person would face persecution or torture. *See* 8 U.S.C. § 1231(b)(3)(A); Foreign Affairs Reform and Restructuring Act of 1998, § 2242, Pub. L. 105-277, 112 Stat. 2681, 2681-821. Withholding of removal and protection under the CAT are mandatory, not discretionary—by law, the United States cannot remove someone who qualifies for protection under these provisions. *See Zhong v. Dep't of Justice*, 480 F.3d 104, 115 (2d Cir. 2006).

[5] *See* DHS Office of Immigration Statistics, *Immigration Enforcement Actions: 2015* at 8 (July 2017).

These vital commitments are implemented through a two-part process. First, an individual in reinstatement proceedings who expresses a fear of return must be provided an interview with an asylum officer to determine whether he has a "reasonable fear" of persecution or torture. 8 C.F.R. § 1208.31(a)-(c). Meeting the reasonable fear burden is significant: it is equivalent to establishing a "well-founded fear," the standard that governs discretionary grants of asylum.[6] Second, if the individual establishes a "reasonable fear," he is placed in proceedings before the IJ for full consideration of his claims for withholding of removal or protection under CAT. *See* 8 C.F.R. § 1208.31(e). An IJ's decision denying such relief is appealable to the BIA and the Court of Appeals. *See id*.; *Ortiz-Alfaro v. Holder*, 694 F.3d 955, 959 (9th Cir. 2012). As the government has conceded, and in harmony with its underlying obligations, individuals in withholding-only proceedings are entitled to remain in the United States while their cases are pending. *See* Resp't-Apellant's Br., *Guerra v. Shanahan*, 831 F.3d 59 (2d Cir. 2016) (No. 15-504) at 20-21 ("[A]s long as the withholding only proceedings are still ongoing, DHS cannot execute the removal order").[7]

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[6] USCIS, Reasonable Fear Lesson Plan at 11 (Feb. 13, 2017), *available at* https://drive.google.com/file/d/0B_6gbFPjVDoxY0FCczROOFZ4SVk/edit.

[7] Although the government often maintains that it may effect removal to a third country while withholding-only proceedings are pending, or even if withholding or CAT relief is granted, in either case it may do so only upon satisfying certain required designation procedures, which the government has *not* done here. Moreover, were the government to identify and properly designate a third country

The surge in reinstatement cases has been accompanied by a surge in withholding-only proceedings. IJs decided nearly ten times as many withholding-only cases in 2014 (2,551 completions) as they did in 2010 (278 completions).[8] These larger numbers have also persisted since 2014.[9]

Individuals in withholding-only proceedings win withholding or CAT relief at a significant rate: approximately twenty percent of all cases decided in 2014 resulted in grants of relief.[10] The grant rate is striking given the elevated standard for relief. Unlike asylum, which requires only a "well-founded fear" of persecution, withholding requires that the individual show a "clear probability"—or that it is "more likely than not"—that he faces persecution or torture upon removal. *See INS v. Stevic*, 467 U.S. 407, 429-30 (1984); 8 C.F.R. § 1208.16(c)(2).

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for Crespin's removal, no such removal could be ordered until he was first given an opportunity to apply for protection against removal to that country as well. *See* Section V.B, *infra*.

[8] Fact Sheet: Withholding-Only Cases and Detention ("Fact Sheet"), at 1 (Apr. 2015), *available at* https://www.aclu.org/fact-sheet/fact-sheet-withholding-only-cases-and-detention.

[9] *See* FY 2016 Statistics Yearbook, U.S. Department of Justice, EOIR, at B2 (showing over 2,000 completions for FY 2015 and FY 2016 as well).

[10] Fact Sheet at 1. By contrast, only 12% of withholding applications and 2% of applications for CAT relief overall were granted by IJs in FY 2014. *See* EOIR, *FY 2014 Statistics Yearbook* (Mar. 2015) at K5, M1, *available at* https://www.justice.gov/sites/default/files/eoir/pages/attachments/2015/03/16/fy14syb.pdf .

B. The Detention of Individuals In Withholding-Only Proceedings

Despite their strong claims for relief, the overwhelming majority of individuals in withholding-only proceedings—including those who would fall under Section 1226(a) and have an automatic entitlement to a bond hearing—are detained until their cases are decided. In 2014, in *more than eighty-five percent* of withholding-only cases, respondents remained detained throughout their proceedings.[11] Moreover, these individuals are detained for protracted periods of time—months or even years.[12]

Under the government's policies, these individuals never receive a bond hearing before the IJ to determine whether their detention is necessary to prevent flight or protect public safety. Instead, the only process they receive is an administrative custody review—conducted by *ICE*—and intended for detainees with final orders of removal. *See* 8 C.F.R. §§ 241.4, 241.13.

Notably, the Supreme Court has cast doubt on the constitutional adequacy of the Post-Order Custody Review ("POCR") process, the administrative custody review process governing those who are detained pursuant to 8 U.S.C. § 1231. *See Zadvydas v. Davis*, 533 U.S. 678, 691-92 (2001) (noting that administrative custody reviews lack judicial review and place the burden of proof on the detainee). But even assuming that the POCR process were adequate, the

[11] *See* Fact Sheet at 2.
[12] *Id*.

government routinely fails to follow even its own review procedures.[13] These procedures require that, where ICE headquarters determines that removal is reasonably foreseeable, it still must determine whether continued detention is warranted based on flight risk or danger. *See* 8 C.F.R. § 241.13(g)(2) (providing that where removal is reasonably foreseeable, "detention will continue to be governed under the established standards in § [241.4]); *see also id*. § 241.4(e), (f) (setting forth release criteria).

C. Case Stories

The following case examples are typical of the many individuals with reinstated orders of removal who are detained without a bond hearing, despite

[13] The federal courts and the government's own reports have recognized ICE's routine failure to follow the POCR regulations. *Compare, e.g*., *Casas-Castrillon v. Dep't of Homeland Security*, 535 F.3d 948, 951-52 & n.3 (9th Cir. 2008) (finding that detainee was given only one paper review over six-year period of detention, never received in-person interview, and may have received only notice of review one year before the review date) *with* 8 C.F.R. §§ 241.4(h)(2), (k)(2)(iii) & (i)(3) (requiring annual reviews, in-person interviews on an annual basis for prolonged detainees, and 30-day notice prior to review); *see generally* General Accounting Office, *Better Data and Controls Are Needed to Assure Consistency with the Supreme Court Decision on Long-Term Alien Detention*, GAO-04-434 (May 2004), *available at* http://www.gao.gov/new.items/d04434.pdf (finding that ICE's database could not even identify the detainees entitled to a custody review and that ICE was possibly violating post-order custody review regulations); DHS Office of the Inspector General, *ICE's Compliance with Detention Limits for Aliens with a Final Order of Removal from the United States*, OIG-07-28 (Feb. 2007), *available at* http://www.dhs.gov/xoig/assets/mgmtrpts/OIG_07-28_Feb07.pdf (reporting ICE's failure to provide custody reviews in a timely manner and, in some cases, its failure to provide them at all, and ICE's improper suspension of detainees from the review process).

having established a reasonable fear of persecution or torture and being referred for a withholding-only hearing before an IJ, where they often prevail. Had these individuals been held under the proper detention authority—Section 1226(a)—they would have been entitled to a bond hearing. In the absence of such a basic procedural protection, they were subject to needless detention for years. Their names have been redacted to protect their identities.

- **L-A-** is a citizen of Honduras who entered the United States without inspection in March 2007.[14] She was ordered removed in November 2007.[15] In Honduras, L-A- entered into a domestic partnership with a man who subjected her to severe physical and sexual abuse; on one occasion, he beat her until she miscarried. L-A- reported the abuse to the authorities, but was refused protection; she also left her partner twice and relocated within Honduras, but her partner found her each time. Ultimately, L-A- fled to the United States. In March 2013, she was apprehended by Border Patrol in Texas and issued a reinstated order of removal.[16] She was found to have a reasonable fear of persecution and referred for withholding-only proceedings before an IJ.[17] L-A- spent more than a year in ICE custody at the York County Prison in York, Pennsylvania without a bond hearing until, in March 2014, she was granted withholding by the IJ and released from custody.[18]

- **O-B-** is a Jamaican national who fled to the U.S. in the 1980s to escape persecution based on his sexual orientation.[19] He was deported to Jamaica in April 1988. Upon his return, he suffered severe persecution on account of his sexual orientation. On one occasion police beat him so severely that O-B was hospitalized for his injuries; he continues to suffer seizures today. O-B

[14] Parole Request at 2, dated Nov. 14, 2013 (on file with *amici*).
[15] Reasonable Fear Determination at 1, dated Sept. 3, 2013 (on file with *amici*).
[16] *Id*. at 1.
[17] *See* Parole Request at 1-2; *see also* Notice of Referral to Immigration Judge, dated Sept. 16, 2013 (on file with *amici*).
[18] *Id.*; *See* Email from Steve Heiden, dated Mar. 31, 2014 (on file with *amici*).
[19] Reasonable Fear Determination at 1, dated Mar. 4, 2011 (on file with *amici*).

fled again to the U.S. in 1989.[20] In 2010, he was arrested for conspiracy to commit bank fraud.[21] Although the charge was ultimately dismissed,[22] O-B- was detained by ICE, which reinstated his prior order of removal. After passing his reasonable fear interview, he was referred for withholding-only proceedings, and ultimately won withholding before the IJ in June 2012.[23] The government did not even oppose the grant of withholding.[24] Nonetheless, O-B- was detained for sixteen months without ever receiving a bond hearing to determine if his detention was necessary.

- **A-R-** and her eight-year old daughter, **J-R-R-**, fled their native Honduras to escape severe verbal, physical, and sexual abuse from her partner, who was involved in the drug trade. A-R-'s partner, Carlos, raped A-R- and subjected her to gang rapes by other men.[25] Fearing for her life, A-R- left her children with her mother and fled to the U.S. in December 2014. Although she told Border Patrol she feared returning to Honduras, A-R- accepted removal in February 2014 after learning that Carlos had threatened her mother and that J-R-R- was ill.[26] In May 2014, A-R- discovered Carlos molesting her daughter.[27] The next month, in June 2014, she and J-R-R- fled to the U.S. and were detained at the Berks County Family Residential Center. A-R- was found to have a reasonable fear of persecution, and the family was referred for withholding-only proceedings.[28] Nonetheless, A-R- and J-R-R- were detained for six months without ever receiving a bond hearing before the IJ. Ultimately, in December 2014, the IJ granted A-R- withholding and J-R-R- asylum, and they were released.[29]

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[20] *See id*.
[21] *See* Complaint, *United States v. O-B*, No. 1:10-mk-01241 (E.D.N.Y. filed Oct. 22, 2010).
[22] Order Granting Mot. to Dismiss, *United States v. O-B*, No. 1:10-mk-01241 (E.D.N.Y. filed Dec. 17, 2010).
[23] *See* Record of Sworn Statement of O-B- at 5, dated March 4, 2011 (on file with *amici*); Notice of Referral to Immigration Judge, dated Mar. 7, 2011 (on file with *amici*); IJ Order Granting Withholding, dated June 21, 2012 (on file with *amici*).
[24] Email from Sarah Gillman, dated Aug. 25, 2015 (on file with *amici*).
[25] IJ Decision and Order Granting Withholding and Asylum at 1, dated Dec. 3, 2014 (on file with *amici*).
[26] *Id*.
[27] *Id*. at 2.
[28] Reasonable Fear Determination at 1, 4, dated Aug. 7, 2014 (on file with *amici*).
[29] IJ Order at 6.

IV. SUMMARY OF ARGUMENT

The government's position is inconsistent with the text and structure of the detention statutes and the INA's definition of finality. 8 U.S.C. § 1226 governs detention prior to a final order of removal, "pending a decision on whether the alien is to be removed from the United States." *Id*. Detention authority shifts to Section 1231(a) during the removal period, which in pertinent part is defined as beginning when an "order of removal becomes administratively final." 8 U.S.C. § 1231(a)(1)(B)(i). During this time, the "Attorney General *shall* remove the alien from the United States within a period of 90 days." 8 U.S.C. § 1231(a)(1)(A) (emphasis added).

The text of each detention statute reflects its unique role in the removal process. While a noncitizen awaits a decision on the issuance of a final order of removal, he is detained under Section 1226. While a noncitizen awaits execution of a final order of removal, he is detained under Section 1231. Here, Mr. Crespin *cannot* be removed to El Salvador because his application for withholding of removal to that country is pending before the IJ, and his removal order will not be final until the IJ adjudicates that claim and all avenues of administrative appeal have been exhausted.

The district court held otherwise, based on two fundamental errors:

First, the district court misunderstood Mr. Crespin's order of removal to be simultaneously final and not final: final for purposes of detention, but not final for purposes of judicial review. Not only is this argument internally inconsistent, it is incorrect. The finality of an order of removal is always contingent upon the finality of a decision on withholding of removal, and this definition of finality applies equally and without distinction to judicial review and detention. *See* Section V.A, *infra*.

Second, the district court erroneously believed that Mr. Crespin *can* be removed from the United States pending adjudication of his withholding claim. This is incorrect. Mr. Crespin's order of removal specifies that he be removed to El Salvador, and he is currently litigating the U.S. government's ability to do just that. Should the government seek to remove him to an alternate country, it must first seek an order of removal specifying that country, which it has not done. *See, e.g.*, 8 C.F.R. § 1240.10(f) (setting out procedure by which IJ can order removal to an alternate country); *Jama v. ICE*, 543 U.S. 335, 341 (2005). Moreover, the government would need to provide Mr. Crespin with an opportunity to seek protection from removal to that country before he could be removed. *See* Section V.B, *infra*.

V. ARGUMENT

A. Mr. Crespin's Order of Removal Is Not Final.

1. An Order of Removal Is Not Final Until A Final Decision Is Made On A Claim For Protection From Removal.

8 U.S.C. § 1101(a)(47)(B) provides that a removal order is not final until the conclusion of IJ review and any BIA review of that order. The government nonetheless maintains that Mr. Crespin has a final order for detention purposes—while not for purposes of judicial review—because his withholding claim has no bearing on his removability, but merely affords him protection from removal to El Salvador.

This position cannot be reconciled with longstanding precedent holding that a removal order is not final until a claim for protection from removal has been decided. Consistent with Supreme Court case law, the Courts of Appeal have uniformly held that individuals who are seeking relief or protection from removal do not yet have final removal orders for purposes of judicial review. This is true even if they have conceded removability or been conclusively found removable by the IJ and BIA.

This is because the final removal order includes all applications for relief from that order, and not merely the determination of removability. Thus, a removal order is not final until all applications for relief or protection from effectuation of that removal order are decided. *See Chupina v. Holder*, 570 F.3d 99, 103-04 (2d

Cir. 2009); *Foti v. INS*, 375 U.S. 217, 226 (1963); *Alam v. Holder*, 546 F. App'x 121 (4th Cir. 2013) (citing *Chupina* to hold that the BIA decision remanding to the Immigration Judge for further consideration of request for withholding was "not a final order of removal" because the IJ will consider "applications for relief that may directly affect whether he is removed").

The rule is that the denial of an application for protection from removal such as withholding or CAT is "'antecedent to *and a constituent part* of the final order of deportation.'" *Chupina*, 570 F.3d at 103 (emphasis added) (quoting *Foti*, 375 U.S. at 226). *See also INS v. Chadha*, 462 U.S. 919, 938 (1983) ("the term 'final order[ ]' . . . includes all matters on which the validity of the final order is contingent."). There are no grounds to depart from this definition of finality, which is consistent with administrative law in general. *See Guerra v. Shanahan*, 831 F.3d 59, 63 (2d Cir. 2016); *Bennett v. Spear,* 520 U.S. 154, 178 (1997) (to be final, an agency action must "mark the consummation of the agency's decision-making process"). Here, as in other contexts, the decision that an individual may be removed from the United States to a specified country—in this case, El Salvador—is not final until all applications for protection from that order have been decided.

It is true that Mr. Crespin had an initial round of removal proceedings and received a final removal order that was then reinstated upon his return to the United States. Nevertheless, the principle holds. For the question of CAT relief to

be reached in the first instance, an IJ must *always* enter an order of removal. *See Matter of I-S- & C-S-*, 24 I. & N. Dec. 432, 434 (BIA 2008) ("when an Immigration Judge decides to grant withholding of removal, an explicit order of removal must be included in the decision").

The government nonetheless maintains that Mr. Crespin is not properly subject to detention under Section 1226 because that statute governs detention "pending a decision on whether the alien is to be removed from the United States," 8 U.S.C. § 1226(a), and when an order of removal is reinstated, the individual has already been found removable. However, this argument proves too much. If it were correct, then every individual in INA § 240 proceedings who admits removability and seeks only CAT relief should be placed in post-removal order detention. This is not the case; the regulations specify that Section 1226 governs custody determinations for noncitizens in proceedings before the Executive Office for Immigration Review, which includes immigration courts and the BIA. 8 C.F.R. § 241.4(b)(1). Numerous cases also reflect that individuals in this posture are held under Section 1226 and not Section 1231. *See, e.g., Diop v. ICE/Homeland Security*, 656 F.3d 221, 225-26, 228 (3d Cir. 2011) (reasoning that individual who has no challenge to his removability and is eligible only for CAT deferral is held under Section 1226); *Aceves-Santos v. Sedlock*, No. 08 CV 4550, 2008 WL 5101348, at *2 (N.D. Ill. Dec. 2, 2008) (the petitioner is "being held pursuant to 8

U.S.C. § 1226(c) because a final order has not yet been entered"; "although [he] has been ordered removed, the Government is seeking review of the IJ's decision to also grant . . . Withholding of Removal"); *Zhang v. Gonzales*, No. CV06–0892, 2007 WL 2925192, at *4 (D. Ariz. May 21, 2007) (noting that the government "contends, and Petitioner agrees" that petitioner was detained under Section 1226(c) because his withholding claim was still pending before BIA, and thus his removal period under Section 1231(a)(1) had not begun). Mr. Crespin is similarly situated to these individuals: he is subject to an order of removal, but that order is not final until completion of his withholding-only proceedings.

2. A Reinstated Order Of Removal, Like Any Order Of Removal, Is Not Final Until A Final Decision Is Reached in Withholding-Only Proceedings.

Every circuit to have addressed the question has agreed that a reinstated order of removal is *not* final until withholding-only proceedings have been concluded, notwithstanding the prior final removal order. *See Ponce-Osorio v. Johnson*, 824 F.3d 502, 507 (5th Cir. 2016); *Jimenez-Morales v. U.S. Att'y Gen.*, 821 F.3d 1307, 1308 (11th Cir. 2016), *cert. denied sub nom. Jimenez-Morales v. Lynch*, 137 S.Ct. 685 (2017); *Luna-Garcia v. Holder*, 777 F.3d 1182, 1183 (10th Cir. 2015); *Ortiz-Alfaro v. Holder*, 694 F.3d 955 (9th Cir. 2012). The question presented in these cases was when a petition for review must be filed to challenge a

decision to reinstate a prior order of removal when the individual was in reasonable fear or withholding-only proceedings.

The INA limits the availability of judicial review to a "final order of removal" and specifies that a petition for review to a circuit court must be filed "not later than 30 days after the date of the final order of removal." 8 U.S.C. §§ 1252(a)(1) & (b)(1). When an individual does not request a reasonable fear interview and the order of removal is final, a petition for review challenging reinstatement of the prior order must be filed within thirty days of the reinstatement. *See, e.g.*, *Ponta-Garca v. Ashcroft*, 386 F.3d 341, 342-43 (1st Cir. 2004). Where, however, a reasonable fear interview has been granted, the petition for review must be filed after completion of withholding-only proceedings. *Ortiz-Alfaro*, 694 F.3d at 958; *Luna-Garcia*, 777 F.3d at 1185.

A reinstated order of removal is not final until after withholding-only proceedings are complete for two reasons. First, this conclusion is consistent with the treatment of finality in removal cases in general. Sister circuits have reasoned that treatment of a reinstated order of removal as "final" only after the conclusion of withholding-only proceedings "comports with other cases [considering] when a removal order becomes final in different contexts than the one presented here." *Ortiz-Alfaro*, 694 F.3d at 958-59 (explaining that an order was not final where "it left open the possibility that the alien would receive CAT relief and never have to

leave the country"); *see also Luna-Garcia*, 777 F.3d at 1186 ("treating the reinstated removal order and the denial of relief as a single unit for purposes of finality is consistent with caselaw holding that pending applications for relief render an order of removal nonfinal").

Second, treating a removal order as final prior to completion of withholding-only proceedings would raise serious constitutional questions. If a "removal order became final when it was reinstated," then a noncitizen could never file a petition "for review of any yet-to-be-issued IJ decisions denying . . . relief or finding that he lacks a reasonable fear of persecution," because such a petition "would be dismissed as untimely." *Ortiz-Alfaro*, 694 F.3d at 958. However, the "Suspension Clause unquestionably requires some judicial intervention in deportation cases." *Ortiz-Alfaro*, 694 F.3d at 958 (internal quotations removed) (citing*, inter alia, INS v. St. Cyr,* 533 U.S. 289, 300 (2001)). Thus, "leaving immigrants with no opportunity for judicial review of their withholding applications would raise grave constitutional concerns." *Id.*

3. The Finality Of An Order Of Removal Is Identical For Purposes Of Judicial Review And Detention.

The text of the INA is clear that there is no basis for the government's proffered distinction between finality of an order for detention and for judicial review purposes. Just as the INA limits the availability of judicial review to a "final order of removal," 8 U.S.C. § 1252(a)(1), it specifies that detention authority

shifts from Section 1226(a) to Section 1231(a) when "the removal order becomes administratively final." 8 U.S.C. § 1231(a)(1)(B)(ii). The INA provides a unitary definition of "order of removal" in its definitions section—one that applies whenever the term is "used in this chapter"—along with a single definition for when such an order is deemed "final": when it is affirmed by the BIA or when the period to seek BIA review has expired. *See* 8 U.S.C. §§ 1101(a) & (a)(47)(B).

The single definition of "finality" cannot be applied in two different ways in the same statute. To do so "would be to invent a statute rather than interpret one." *Clark v. Martinez*, 543 U.S. 371, 378 (2005). Moreover, there is no difference between "final" and "administratively final." Indeed, the decisions holding that the finality of a removal order for purposes of judicial review is contingent upon completion of a withholding claim are grounded on principles of *administrative* finality. *Luna-Garcia*, 777 F.3d at 1185 ("to be final, agency action must 'mark the consummation of the agency's decision-making process,' and it must determine 'rights or obligations' or occasion 'legal consequences' (*quoting Bennett v. Spear,* 520 U.S. 154, 178 (1997)) (internal quotation marks omitted). The non-finality of Mr. Crespin's order is supported by the "usual legal sense" of the term "final"—"ending a court action or proceeding leaving nothing further to be determined by the court or to be done except the administrative execution of the court's finding,

but not precluding an appeal.'" *Id.* (quoting *Webster's Third New Int'l Dictionary* 851 (1993)).

B. The Fact That Mr. Crespin May Potentially Be Removed To A Third Country Does Not Impact The Finality Analysis.

Mr. Crespin cannot simply be removed to *any* third country. His order of removal is not a general grant of authority directing his removal *anywhere* in the world. It is country-specific and directs that he be sent to El Salvador. *See* JA 62, JA 32. The specific question addressed in withholding-only proceedings is whether his "fear of returning to the country designated in *that order*" qualifies him for withholding. 8 C.F.R. § 241.8(e) (emphasis added).

Moreover, to transfer Mr. Crespin to a third country, the government must follow statutory and regulatory requirements for designating alternate countries of removal, which it has not even attempted to do here. *See* 8 U.S.C. § 1231(b)(2); 8 C.F.R. § 1240.10(f) (requiring IJ to designate primary and alternative countries of removal as part of a removal order and to provide notice and opportunity to respond to such designation); *Urgen v. Holder*, 768 F.3d 269, 273-74 (2d Cir. 2014) (reviewing IJ designation of third country in removal order for conformity with the statute and regulations).

The government has not identified a third country to which Mr. Crespin could be removed. Nor has the government complied with the required designation procedures. Moreover, even if the government were to identify and properly

designate a third country for Mr. Crespin's removal, no such removal could be ordered until he was first given an opportunity to apply for protection against removal to that country as well. *See, e.g., Kossov v. INS*, 132 F.3d 405, 408 (7th Cir. 1998) (failure to provide notice of and hearing on deportation to third country was a "fundamental failure of due process"); *Kuhai v. INS*, 199 F.3d 909, 913 (7th Cir. 1999) (same); *Andriasian v. INS*, 180 F.3d 1033, 1041 (9th Cir. 1999) ("Failing to notify individuals who are subject to deportation that they have the right to apply for asylum in the United States and for withholding of deportation to the country to which they will be deported violates both INS regulations and the constitutional right to due process").

At this point in Mr. Crespin's proceedings, and unless and until the government obtains a new order of removal properly designating an alternative country of removal, the question presented in Mr. Crespin's withholding proceedings is precisely that posed by Section 1226: "whether" he will be removed from the United States.

The detention regulations support Mr. Crespin's position. Under 8 C.F.R. § 241.4(b)(3), those individuals "granted withholding of removal . . . or withholding or deferral of removal under the [CAT] who are otherwise subject to detention are subject" to Section 1231. This regulation addresses individuals already granted withholding or deferral of removal and presumes a *final* order of removal is in

place, which is not the case before withholding or deferral have been actually granted. Even individuals in regular INA § 240 removal proceedings may be detained under Section 1231 after a grant of CAT relief has issued and proceedings have ended. But while litigating their claim for relief they are detained under the pre-final-order detention statute, Section 1226, even if they are raising no challenges to their underlying removal order. *See* Section V.A., *supra*. Moreover, where a court grants a motion to reopen proceedings for consideration of a CAT claim, the regulations dictate that the authority to detain the individual shifts from Section 1231 to 1226. *See* 8 C.F.R. § 241.4(b)(1).

VI. CONCLUSION

For the foregoing reasons, this Court should hold that Section 1226 governs Mr. Crespin's detention, reverse the district court's decision, and remand for further proceedings.

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CERTIFICATE OF COMPLIANCE

1. This brief complies with the type-volume limitation of Fed. R. App. P. 29(d) because this brief contains 6,419 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii).

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CERTIFICATE OF SERVICE

I, Dree Collopy, hereby certify that on July 28, 2017 this Brief of Amici Curiae was electronically filed via the CM/ECF system. I certify that all participants in the case are registered CM/ECF users and service will be accomplished by the appellate CM/ECF system.

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