15-504

IN THE UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

DEYLI NOE GUERRA, A.K.A. DEYLI NOE GUERRA CANTORAL**,**

Petitioner-Appellee,

v.

CHRISTOPHER SHANAHAN, New York Field Office Director for U.S. Immigration and Customs Enforcement, *et al.*,

Respondents-Appellants.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK

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

IN SUPPORT OF PETITIONER-APPELLEE AND AFFIRMANCE

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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 own 10% or more of the stock of either organization.

September 11, 2015

s/ Melissa Crow .
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I. INTRODUCTION

Pursuant to Federal Rule of Appellate Procedure 29, *amici curiae* American Immigration Council and American Immigration Lawyers Association ("AILA") submit this brief to support Petitioner-Appellee Guerra's main argument: because the pre-final order detention statute, 8 U.S.C. § 1226(a), and not the post-final order detention statute, 8 U.S.C. § 1231, governs his detention pending his withholding-only proceedings, Guerra was entitled to his bond hearing before the Immigration Judge ("IJ"). *See* Ans. Br. at 17-33.[1] The parties consent to this filing.

Unlike most people with reinstated orders of removal—who are seeking no protection from removal—Guerra has passed a reasonable fear screening and been referred for administrative proceedings before the IJ to determine whether he is entitled to withholding of removal. While both groups have removal orders, those in the former category are subject to *final* orders of removal that *may be executed* at any time, absent a discretionary stay of proceedings. Guerra, on the other hand, *may not be removed* to Guatemala until his withholding application has been adjudicated. Although Guerra undisputedly has a reinstated removal order, that removal order is not yet *final*. He is, therefore, detained under the pre-final-order

[1] Although *amici* agree that Guerra's indefinite detention raises due process concerns, the Court need not reach this issue, as the case can be resolved on straightforward statutory grounds. Thus, *amici* focus their brief on the primary statutory argument in this case.

detention statute, 8 U.S.C. § 1226(a)—and *not* the post-final-order detention statute, 8 U.S.C. § 1231.

The government's position to the contrary is both misleading and inconsistent. It is misleading because it misconstrues the significance of Guerra's withholding-only proceedings. It is inconsistent because it conflicts with both the government's own position regarding when an order of removal becomes "final" for purposes of judicial review and with the plain language of the Immigration and Nationality Act ("INA").

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. Otherwise, it is final at the conclusion of withholding-only proceedings.

Despite the concession that Guerra does not have a final order of removal, the government asserts that Guerra still somehow has an administratively "final" order for purposes of detention. *See* Gov't Br. at 20-22. 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 IJ and Board of Immigration Appeals (BIA) review. *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, Guerra is similarly situated to an individual in INA § 240 proceedings who admits removability and only seeks withholding before the IJ or BIA. Even the government concedes that 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 Guerra will not have a final removal order until his withholding claim is decided, he was properly detained under Section 1226(a) and was entitled to his bond hearing before the IJ. The decision below should be affirmed.

II. INTEREST OF AMICI[2]

The American Immigration 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.

AILA is a national association with more than 13,000 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's members practice regularly before the Department of Homeland Security and before the Executive Office for Immigration Review, as

[2] Under Federal Rule of Appellate Procedure 29(c)(5), amici state that no party's counsel authored this brief in whole or in part; no party or party's counsel contributed money that was intended to fund preparing or submitting the brief; and no person—other than amici—contributed money that was intended to fund preparing or submitting the brief.

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 have genuine fears of 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, like Guerra, who are subject to reinstated orders of removal and detained pending withholding-only proceedings. As set forth below, Guerra'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 IJs. 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. None of these individuals ever receive a bond hearing before the IJ to determine if they pose a danger or flight risk that justifies this significant deprivation of their liberty. Instead, under the government's view, they are only entitled to administrative custody reviews by Immigration and Customs Enforcement ("ICE"), which routinely rubberstamps their 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).[3] Reinstated removal orders are both the fastest growing and largest category of removal orders. Whereas in 2005 only 43,137 deportations were effected through reinstatement proceedings, by FY 2013 this number had grown to 159,634 people—an increase of nearly 270 percent. Reinstated removal orders constituted

[3] 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.

thirty nine percent of all removals accomplished that year, larger than any other category of removal orders.[4]

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

[4] *See* American Immigration Council, Removal Without Recourse: The Growth of Summary Deportations from the United States 2 (May 2014), *available at* http://www.immigrationpolicy.org/just-facts/removal-without-recourse-growth-summary-deportations-united-states; ACLU, *American Exile: Rapid Deportations that Bypass the Courtroom* 11, 19 & n.86 (Dec. 2014), *available at* https://www.aclu.org/immigrants-rights/american-exile-rapid-deportations-bypass-courtroom-report (citing DHS statistics).

who qualifies for protection under these provisions. *See Zhong v. Dep't of Justice*, 480 F.3d 104, 115 (2d Cir. 2006).

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.[5] 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* Gov't Br. at 20-21; Resp't-Appellee's Br., *Ortiz-Alfaro v. Holder*, 694 F.3d 955 (9th Cir. 2012) (No. 10-73057) at 13 ("The otherwise executable reinstated removal order is

[5] USCIS, Reasonable Fear Lesson Plan at 7-8 (Aug. 6, 2008), *available at* http://www.uscis.gov/sites/default/files/USCIS/Humanitarian/Refugees%20%26%20Asylum/Asylum/AOBTC%20Lesson%20Plans/Reasonable-of-Persecution-Torture-Determinations-31aug10.pdf

necessarily stayed during the alien's proceedings before the immigration judge and Board").[6]

Not surprisingly, the recent surge in reinstatement cases has been accompanied by a surge in withholding-only proceedings. According to data from the Executive Office of Immigration Review ("EOIR"), IJs decided nearly ten times as many withholding-only cases in 2014 (2,551 completions) as they did in 2010 (278 completions).[7] A significant portion of the growth in reinstatement and withholding-only proceedings in the past year is attributable to the uptick in migrants—including families—arriving from Honduras, Guatemala, and El Salvador. Many are fleeing gender-based and gang violence in Central America.[8]

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[6] Although the government asserts that it may effect removal to a third country while withholding-only proceedings are pending, or even if withholding or CAT relief is granted, *see* Gov't Br. at 7, 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 for Guerra'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*.

[7] 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.

[8] *See generally* Human Rights Watch, *"You Don't Have Rights Here": U.S. Border Screening and Returns of Central Americans to Risk of Serious Harm* 4-10 (Oct. 2014), *available at* http://www.hrw.org/reports/2014/10/16/you-don-t-have-rights-here-0; American Immigration Council, "*Mexican and Central American Asylum and Credible Fear Claims: Background and Context*" (May 2014) 9, 12-13, *available at* http://www.immigrationpolicy.org/sites/default/files/docs/asylum_and_credible_fear_claims_final.pdf.

Individuals in withholding-only proceedings win withholding or CAT relief at a significant rate: approximately twenty percent of all completed cases resulted in grants of relief.[9] 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 "clear probability"—or that is 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).

B. The Detention of Individuals In Withholding-Only Proceedings

Despite their strong claims for relief, the overwhelming majority of individuals in withholding-only proceedings are detained until their cases are decided. Indeed, as of April 2015, in *more than eighty-five percent* of withholding-only cases, respondents remained detained throughout their proceedings.[10] Moreover, these individuals are detained for protracted periods of time—months or even years.[11]

Under the government's policies, these individuals never receive a bond hearing before the IJ to determine whether their detention is necessary to prevent

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[9] 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* http://www.justice.gov/sites/default/files/eoir/pages/attachments/2015/03/16/fy14syb.pdf.

[10] *See* Fact Sheet at 2.

[11] *Id*.

flight or protect public safety. Instead, the only process they receive are administrative custody reviews—conducted by *ICE*—and intended for detainees with final orders of removal. *See* 8 C.F.R. §§ 241.4, 241.13. These post-order custody reviews ("POCRs") typically rubberstamp detention until withholding-only proceedings are concluded.

Notably, the Supreme Court has cast doubt on the constitutional adequacy of the POCR process. *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, as Guerra's case illustrates, *see* Ans. Br. at 8-10, the government routinely fails to follow even its own review procedures. *See United States ex rel. Accardi v. Shaughnessy*, 347 U.S. 260, 266-67 (1954) (due process requires that agency follow its own regulations).[12]

[12] 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

In particular, 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). However, as in Guerra's case, *see* JA 76-77, ICE frequently approves the detention of individuals in reinstatement without *any* finding of danger or flight risk, based merely on the fact that the individual has asserted a reasonable fear or has been referred for withholding-only proceedings—facts that hardly justify imprisonment.[13]

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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).

[13] Moreover, as a matter of policy, ICE impermissibly subjects all individuals in reinstatement proceedings to an initial 90-day period of *mandatory* detention, on the erroneous theory that their detention is governed by 8 U.S.C. § 1231(a)(2), which *requires* detention "during" the 90-day removal period, rather than by 8 U.S.C. 1231(a)(6), which authorizes *discretionary* detention "beyond" the removal period. However, if, as the government argues, a reinstated removal order were in fact a final order of removal—regardless of the pendency of withholding-only proceedings—in most cases the removal period would have long since expired and the individual would therefore be subject to *discretionary* detention under Section 1231(a)(6). This is because, as the government itself notes, *see* Gov't Br. at 15, the "prior order of removal is reinstated *from its original date*." 8 U.S.C. § 1231(a)(5) (emphasis added). As a result, individuals in reinstatement should be entitled to a

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 having established a reasonable fear of persecution or torture and being referred for a withholding-only hearing before an IJ, where they often prevail. 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] L-A- was transferred to ICE custody and spent more than a year detained at the York County Prison in York, Pennsylvania without a bond hearing—even though she was found to have a reasonable fear of persecution and referred for withholding only proceedings before an IJ.[17] Ultimately, 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 at the hands of

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custody review at the *outset* of their detention, rather than being subjected to 90 days of mandatory detention under Section 1231(a)(2). *See* 8 C.F.R. § 241.4(k)(2).
[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] 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*).

the police on account of his sexual orientation. On one occasion police beat him so severely that O-B was hospitalized for his injuries, and he continues to suffer seizures today. O-B 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.

- **M-C-C-** was forced to flee her native Guatemala with her four-year-old daughter, **Y-C-C-**, who is deaf, and her five-year-old son **D-V-C-**, when she was targeted by a local landowner who wanted her to return a small tract of land she had bought to support her family. The landowner had hired men to target her for violence and paid off the police.[25] M-C-C- fled to the United States twice with her children: first in December 2013, when she was summarily removed by Border Patrol, and again in June 2014. The second time, she was found to have a reasonable fear and referred for withholding-only proceedings before the IJ.[26] Nonetheless, from June to December 2014, she was detained at the Berks County Family Residential Center in Leesport, Pennsylvania, without ever receiving a bond hearing before the IJ.[27] Finally, in December 2014, the IJ granted M-C-C- withholding and her children asylum, and they were released.[28]

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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] Reasonable Fear Determination at 1-2, dated Aug. 6, 2014 (on file with *amici*).
[26] *Id*. at 1, 4.
[27] *See id*. at 1.
[28] IJ Decision and Order Granting Withholding and Asylum, dated Dec. 2, 2014 (on file with *amici*).

- **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.[29] 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.[30] In May 2014, A-R- discovered Carlos molesting her daughter.[31] The next month, in June 2014, she and her daughter fled to the U.S. and they 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.[32] 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.[33]

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(a) 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

[29] IJ Decision and Order Granting Withholding and Asylum at 1, dated Dec. 3, 2014 (on file with *amici*).
[30] *Id*.
[31] *Id*. at 2
[32] Reasonable Fear Determination at 1, 4, dated Aug. 7, 2014 (on file with *amici*).
[33] IJ Order at 6.

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(a). While a noncitizen awaits execution of a final order of removal, he is detained under Section 1231. Here, Mr. Guerra *cannot* be removed to Guatemala 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.

The government makes two sets of arguments to muddy the waters:

First, the government claims that Guerra's order of removal is 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 simply 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 government argues that Mr. Guerra *can* be removed from the United States pending adjudication of his withholding claim. This argument is similarly flawed. Mr. Guerra's order of removal specifies that he be removed to

Guatemala, 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. Guerra with an opportunity to seek protection from removal to that country before he could be removed. *See* Section V.B, *infra*.

V. ARGUMENT

A. Guerra's Order of Removal Is Not Final

1. An Order of Removal Is Not Final Until A Final Decision Is Made On Withholding of 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 asserts that Guerra 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 the effectuation of removal to Guatemala. *See* Gov't Br. at 15-16, 22.

The government's 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, this Court has

held that individuals like Guerra 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, 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). The rule of these cases 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 Chupina*, 570 F.3d at 104. Here, as in *Chupina* and other cases, the decision that an individual may be removed from the United States to a specified country—in this case, Guatemala—is not yet final until all applications for protection from that order have been decided.

It is true that, unlike the petitioner in *Chupina*, Guerra had an initial round of removal proceedings and received a final removal order that was reinstated upon his return to the United States. Nevertheless, the principle of *Chupina* holds. In *Chupina*, the BIA affirmed the IJ's denial of Chupina's asylum application but remanded the case to the IJ for further proceedings as to withholding and protection under the CAT. *Chupina*, 570 F.3d at 103. The pending claims—withholding and CAT protection—did not challenge the underlying order of removal, and yet the order was still considered not final. Indeed, for the question of withholding to be reached in the first instance, the IJ had to 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 order of removal there—as here—was not subject to further administrative review or challenge, but was nonetheless considered not final.

Notwithstanding this precedent, the government argues that Guerra is not properly subject to detention under Section 1226(a) because that statute governs detention "pending a decision on whether an alien is to be removed from the country," and when an order of removal is reinstated, the individual has already been found removable. *See* Gov't Br. at 17. However, the government's argument proves too much. If the government were correct, then every individual in INA §

240 proceedings who admits removability and seeks only withholding of removal 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 the BIA, and thus his removal period under Section 1231(a)(1) had not begun). Guerra 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 Made On Withholding

The two circuits to have addressed the question have agreed that a reinstated order of removal is *not* final until withholding-only proceedings have been concluded, notwithstanding the prior final removal order. *See Ortiz-Alfaro v. Holder*, 694 F.3d 955 (9th Cir. 2012); *Luna-Garcia v. Holder*, 777 F.3d 1182, 1183 (10th Cir. 2015).[34] 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.

[34] The government has taken this very position before this Court. *See Herrera-Molina v. Holder*, 597 F.3d 128, 132 (2d Cir. 2010) (noting that "the Attorney General argued that the reinstated order of deportation was not a 'final' order of removal over which we could exercise jurisdiction" due to a pending BIA appeal of the IJ's denial of withholding).

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. The Ninth and Tenth Circuits 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 upon reinstatement, then a noncitizen could never file a petition "for review of any yet-to-be-issued IJ decisions denying . . . relief or finding that [an individual] 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

Although the government has consistently argued, and every circuit court to consider the question has agreed, that a reinstated order of removal is not final until completion of withholding-only proceedings, the government now maintains that what is final in one context—judicial review—is not final in another—detention. The government is wrong.

The text of the INA is clear that there is no basis for the distinction the government makes. 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 government cannot apply the single definition of "finality" 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." *See* Gov't Br. at 20-22 (arguing for this distinction). Indeed, this Court's holding that the finality of a removal order for purposes of judicial review is contingent upon completion of a withholding claim was grounded on principles of *administrative* finality. *See Chupina*, 570 F.3d at 104 (final decision is "the consummation of the agency's decision making process" and must "not be of [an] . . . interlocutory nature") (alteration in the original) (internal quotation marks omitted); *accord 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). Further support for treating a reinstated removal order as not final during the pendency of withholding-only proceedings comes from 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)).

The government can point to no precedent to support its distinction between an "administratively final" order of removal and a "final order of removal." Nor could it, given that courts have consistently assessed the finality of an order of removal, and its suitability for judicial review, by reference to its administrative finality.

B. The Fact That A Noncitizen Granted Withholding May Potentially Be Removed To A Third Country Does Not Impact The Finality Analysis

Finally, the government seeks to bolster its theory of finality by claiming that Guerra "can be removed pursuant to the removal order at any time, to any country except [Guatemala] while withholding proceedings are pending." Gov't Br. at 22. However, Guerra cannot simply be removed to *any* third country as his prior 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 Guatemala. *See* JA 55, 67. The specific question addressed in withholding-only proceedings is whether his "fear of returning to the country designated in *that order*"—meaning, the prior order of removal—qualifies him for withholding. 8 C.F.R. § 241.8(e) (emphasis added).

Moreover, to transfer Mr. Guerra 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); *Mendis v. Filip*, 554 F.3d 335, 337, 339-42 (2d Cir. 2009) (same).

The government has never identified a third country to which Guerra 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 Guerra'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").

The government asserts that detention authority has shifted to Section 1231 because the question of Guerra's removal is settled, and therefore, Section 1226, which governs detention pending a decision on "whether" a noncitizen is to be removed, does not apply. *See* Gov't Br. at 14, 17. However, at this point in Guerra'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 Guerra's withholding proceedings is precisely "whether" he will be removed from the United States.

The government's reliance on 8 C.F.R. § 241.4(b)(3) to attempt to create ambiguity reflects the fundamental error of its position. *See* Gov't Br. at 18. The regulation provides that detention of those "granted withholding of removal . . . or withholding or deferral of removal under the [CAT] who are otherwise subject to detention" is governed by Section 1231. 8 C.F.R. § 241.4(b)(3). This regulation, however, addresses individuals already granted withholding or deferral of removal and who, therefore, already have a *final* order of removal. It presumes a *final* order of removal is in place, which it is not before withholding or deferral have been actually granted. Even individuals in regular INA § 240 removal proceedings who are seeking withholding of removal are detained under Section 1231 once a grant

of withholding has issued. But this has no bearing on the fact that prior to such a grant of withholding they are detained under the pre-final-order detention statute, Section 1226, even if they are raising no challenges to their underlying removal orders. *See* Section III.A., *supra*. Moreover, where a court grants a motion to reopen proceedings for consideration of a withholding of removal 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). Contrary to the government's arguments, therefore, the regulations are consistent with the plain meaning of the statute and Guerra's position in this case.

VI. CONCLUSION

For the foregoing reasons, this Court should reject the government's arguments, affirm the decision below, and hold that because Section 1226(a) governed Guerra's decision pending his withholding-only proceedings, he was entitled to his bond hearing before the IJ.

Respectfully submitted,

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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 6,936 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii).

2. This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and type style requirements of Fed. R. App. P. 32(a)(6) because this brief has been prepared in a proportionally spaced typeface using Microsoft Word 2007 in 14 point Times New Roman.

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CERTIFICATE OF SERVICE

I, Melissa Crow, hereby certify that on September 11, 2015 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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