No. 19-897

In the
Supreme Court of the United States

MATTHEW T. ALBENCE, ACTING DIRECTOR OF U.S. IMMIGRATION AND CUSTOMS ENFORCEMENT, ET AL.,
Petitioners,

v.

MARIA ANGELICA GUZMAN CHAVEZ, ET AL.,
Respondent.

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

BRIEF OF *AMICUS CURIAE* IMMIGRATION REFORM LAW INSTITUTE IN SUPPORT OF PETITIONERS

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INTEREST OF *AMICUS CURIAE*

The Immigration Reform Law Institute[1] ("IRLI") is a nonprofit 501(c)(3) public interest law firm dedicated both to litigating immigration-related cases in the interests of United States citizens and to assisting courts in understanding federal immigration law. IRLI has litigated or filed amicus curiae briefs in a wide variety of immigration-related cases. For more than twenty years the Board of Immigration Appeals has solicited supplementary briefing, drafted by IRLI staff, from the Federation for American Immigration Reform, of which IRLI is a supporting organization.

SUMMARY OF THE ARGUMENT

Under existing administrative precedent accepted by the courts, a final order of removal is a prerequisite to granting an order withholding removal. The holding of the U.S. Court of Appeals for the Fourth Circuit that a reinstated final order of removal is not final during withholding of removal proceedings is inconsistent with this administrative interpretation, under which a final order of removal must already exist before an order withholding removal can be granted.

Also under existing administrative precedent, an order withholding removal determines which countries an alien may not be deported to, not whether the alien

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[1] *Amicus* files this brief with all parties' written consent. Pursuant to Rule 37.6, counsel for amicus authored this brief in whole, no party's counsel authored this brief in whole or in part, and no person or entity—other than *amicus* and its counsel—contributed monetarily to preparing or submitting the brief.

can be deported. The Fourth Circuit accordingly erred by holding that an order withholding removal determines whether that alien will be removed.

ARGUMENT

Under the Immigration and Nationality Act ("INA"), aliens unlawfully present may be deported after the Department of Justice issues a final order of removal. *E.g.*, *Nken* v. *Holder*, 556 U.S. 418, 439–40 (2009). Congress, however, has placed restrictions on where an alien may be deported. 8 U.S.C. § 1231(b). In particular, aliens may not be deported to a country where their life of freedom will be threatened. 8 U.S.C. § 1231(b)(3)(B). An alien with an order of removal may seek an order of withholding to block removal to specific countries where he or she would be threatened. *Sangmo* v. *Holder*, 566 F. App'x 23, 26 (2d Cir. 2014). An administrative law judge may only grant an order of withholding after the alien has a final order of removal. *Id.* Even if an order of witholding is issued, the alien remains deportable under the removal order and may be deported to a country not covered by the witholding order. *Id.*

When an alien who left the country under an order of removal reenters the United States unlawfully, the previous order of removal is reinstated and the alien has no ability to challenge the order. 8 U.S.C. § 1231(a)(5). Such an alien, however, may still seek an order of withholding to block removal to specific countries. 8 C.F.R. § 208.31; 8 U.S.C. § 1231(b)(3)(B).

Two sections of the INA as amended govern the detention of aliens. When there is "pending a decision

on whether the alien is to be removed from the United States," the alien is detained pursuant to 8 U.S.C. § 1226. "[W]hen an alien is ordered removed," the alien is detained pursuant to 8 U.S.C. § 1231. The procedural difference between those sections relevant to this case is that an alien may apply for bail under section 1226 but may not under section 1231. Both sections at issue were enacted at the same time. While the sections have ancestors in the Immigration and Nationality Act of 1952, Pub. L. No, 82–414, 66 Stat. 163, the current text for both was comprehensively rewritten in the Illegal Immigration Reform and Immigrant Responsibility Act of 1996, Pub. L. No. 104-208 303, 305, 110 Stat. 3009–546, 3009-585, 3009-597.

The question before this Court is whether section 1226 or section 1231 governs the detention of aliens when an order of removal is reinstated after an alien reenters the United State unlawfully.

Five Courts of Appeals have addressed this question. The U.S. Court of Appeals for the Second Circuit was first in *Guerra* v. *Shanahan*, 831 F.3d 59 (2d Cir. 2016). In *Guerra*, an alien's removal order had been reinstated, but under 8 C.F.R. § 208.31, an asylum officer referred his case to an immigration judge for a decision on withholding of removal. *Id*. at 61. The Second Circuit described the withholding of removal proceeding as one that decides "whether the alien will actually be removed." *Id.* at 62. Because the court operated on that premise, it concluded that the alien's order of removal was not final. *Id.* at 62–64.

The U.S. Court of Appeals for the Ninth Circuit addressed the issue next in *Padilla-Ramirez* v. *Bible*,

882 F.3d 826 (9th Cir. 2018). In *Padilla-Ramirez*, an asylum officer referred the alien's case to an immigration judge, who denied withholding of removal. *Id*. at 829. During the appeal process, the alien sought bond under section 1226. The Ninth Circuit concluded that a removal order is final and that the reinstatement of such an order was naturally final, as well. *Id*. at 831. The Ninth Circuit also observed that Congress's placement of the reinstatement provision within section 1231 indicated that the detention provision of that section should apply. *Id*. The Ninth Circuit recognized that it was creating a circuit split in its opinion. *Id*. at 836–837. The court stated, however, that to adopt the holding of the Second Circuit would not give effect to Congress's purpose. *Id*. at 836.

Next, in the U.S. Court of Appeals for the Third Circuit, came *Guerrero-Sanchez* v. *Warden York Cnty. Prison*, where the relevant facts are similar to those of the previous cases. 905 F.3d 208, 211–213 (3d Cir. 2018). The Third Circuit's reasoning tracks that of the Ninth Circuit. The Third Circuit also concluded that a removal order was "unquestionably final" and that the reinstatement of such an order was final, as well. *Id*. at 215–216. The Third Circuit also found that that placement of the removal reinstatement provision within section 1231 indicated that Congress meant section 1231 to apply to reinstatements. *Id*. at 216. The concurring opinion called for legislative action to add clarity to the law. *Id*. at 228–29 (Rendell, J. concurring).

The decision under review consolidated several cases. *Chavez* v. *Hott*, 940 F.3d 867 (4th Cir. 2019). In

Chavez, a divided Fourth Circuit adopted the position that a withholding proceeding determines "whether the alien will actually be removed." *Id.* at 876 (quoting *Guerra*, 831 F.3d at 62). Using that description of a withholding proceeding, the court held that the reinstated removal order was not final, and thus that section 1226 governed the alien's detention. The dissent argued that "withholding does not address whether an alien is ordered removed—that has already been determined. It only addresses how, and more specifically where, the removal will occur." *Id*. at 884 (Richardson, J. dissenting).

Last month, a divided U,S. Court of Appeals for the Sixth Circuit joined the Third and Ninth Circuits in holding that section 1231 applies when an alien's order of removal is reinstated. *Martinez* v. *Larose*, No. 19-3908, 2020 U.S. App. LEXIS 23605 (6th Cir. July 27, 2020). A dissent also stated that section 1231 applied. *Id*. at 22–23. (Gibbons, J.). The dissent addressed Due Process concerns over lengthy detentions. *Id*. at 22–26; *see also Guerrero-Sanchez*, 905 F.3d 228–29 (Rendell, J. concurring) (calling on Congress for legislative action).

There is a key precedential administrative interpretation that should determine the outcome here, the precedential Bureau of Immigration Appeals ("BIA") opinion *In re I— S— & C— S—*, 24 I. & N. Dec. 432 (B.I.A. Jan. 10, 2008) ("*ISCS*"). The key holdings in *ISCS* were that (1) an order of withholding of removal cannot be issued without a final order of removal and (2) that an order of withholding of removal does not prevent the agency from removing an alien to a country

other than the one to which removal was withheld. *Id.* at 433–434. This interpretation should be entitled deference under *Chevron, U.S.A., Inc.* v. *NRDC, Inc.*, 467 U.S. 837 (1984). Furthermore, no direct challenge[2] has ever been raised to *ISCS*'s validity, and various courts of appeals have consistently accepted its holdings. *Arias Chupina* v. *Holder*, 570 F.3d 99, 104 (2d Cir. 2009); *Tonfack* v. *AG United States*, 580 F. App'x 79, 81 (3d Cir. 2014); *Kouambo* v. *Barr*, 943 F.3d 205, 210 (4th Cir. 2019); *Achola* v. *Sessions*, 707 F. App'x 830, 831–32 (5th Cir. 2018); *Taslimi* v. *Holder*, 590 F.3d 981, 988 (9th Cir. 2010); *Luna-Garcia* v. *Holder*, 777 F.3d 1182, 1183 (10th Cir. 2015). The Second Circuit in *Guerra* and the Fourth Circuit in *Chavez* are not consistent with earlier precedent of those circuits. While this Court has never cited *ISCS*, it has adopted its holdings. *Nasrallah* v. *Barr*, 140 S. Ct. 1683, 1687, 1692 (2020); *INS* v. *Cardoza-Fonseca*, 480 U.S. 421, 428 n.6 (1987).

Unless this Court rejects the established administrative interpretation of *ISCS*, the reasoning of the Fourth Circuit in *Chavez* and Second Circuit in *Guerra* collapses.

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[2] *Chavez*, *Guerra*, *Padilla-Ramirez, Guerrero-Sanchez,* and *Martinez* are indirect challenges to *ISCS* that do not mention it.

I. The opinion under review is inconsistent with established administrative and prior judicial interpretation that a final order of removal is a prerequisite order for withholding of removal.

When a previously removed alien enters the United States, the previous final removal order is reinstated and that order cannot be reviewed. 8 U.S.C 1231(a)(5). If the existing, reinstated removal order cannot be reviewed, there is no process for creating a new removal order for the alien, and there is no way for a withholding of removal order to be issued for the alien concurrently with a new removal order. *See* 8 § U.S.C. 1231(a)(5). The Fourth Circuit's holding that a reinstated final order of removal is not final until any withholding of removal is incompatible with both the requirement of 8 U.S.C. § 1231(b) that the relief of withholding of removal be available to aliens having a final order of removal and *ISCS's* interpretation that an alien must have a final order of removal before an order of withholding of removal can be granted. 24 I. & N. Dec. 433–34; *Arias Chupina* v. *Holder*, 570 F.3d 99, 104 (2d Cir. 2009); *Tonfack* v. *AG United* States, 580 F. App'x 79, 81 (3d Cir. 2014)*; Kouambo* v. *Barr*, 943 F.3d 205, 210 (4th Cir. 2019); *Taslimi* v. *Holder*, 590 F.3d 981, 988 (9th Cir. 2010); *Luna-Garcia* v. *Holder*, 777 F.3d 1182, 1183 (10th Cir. 2015).

II. The opinion under review is inconsistent with established administrative interpretation and judicial precedent that an order of withholding does not determine whether an alien will be removed.

An order of withholding does not block deportation. *Id*. at 434. It only withholds deportation to the specific countries specified within the order. *INS* v. *Cardoza-Fonseca*, 480 U.S. 421, 428 n.6 (1987); *Sangmo v. Holder*, 566 F. App'x 23, 26 (2d Cir. 2014). An alien with an order of withholding can still be deported to a country outside the withholding order. *Id*.; *Achola* v. *Sessions*, 707 F. App'x 830, 831–32 (5th Cir. 2018); *Phuntsok* v. *Holder*, 475 F. App'x 343, 345 (2d Cir. 2012); *Chavez*, 940 F.3d at 884 (Richardson, J., dissenting). A final order of removal determines that the alien is to be removed, whereas an order of withholding limits the countries to which the alien can be removed. *Id*.

Both the Second's and the Forth Circuit's analyses are based on the flawed presumption that a withholding of removal proceeding decides "whether the alien will actually be removed."[3] *Guerra*, 831 F.3d at 62; *Chavez*, 940 F.3d at 876 (quoting *Guerra*, 831 F.3d at 62). This characterization of a withholding of removal proceeding conflicts with the precedential administrative and judicial interpretation that a withholding of removal proceeding does not determine whether the alien will be removed. *E.g.*, *ISCS*, 24 I. &

[3] At best, the outcome of withholding of removal proceeding can make it impracticable for the alien to be removed.

N. Dec. 433–34; *INS* v. *Cardoza-Fonseca*, 480 U.S. 421, 428 n.6, 107 S. Ct. 1207, 1211 (1987); *Kouambo* v. *Barr*, 943 F.3d 205, 210 (4th Cir. 2019).

The Fourth Circuit addressed this conflict by holding the questions of "whether" and "where" the alien is removed cannot be separated. *Chavez*, 940 F.3d at 878. But this Court has already answered the question of whether these issues are merged: "The answer is no." *Nasrallah* v. *Barr*, 140 S. Ct. 1683, 1691 (2020). Furthermore, the Fourth Circuit's reasoning is incongruous with 8 U.S.C. § 1321, which applies when an alien is ordered removed, not when it is practicable for the alien to be removed.

III. The structure of the INA dictates that section 1231 applies to reinstated removal orders.

The provisions governing withholding of removal (8 U.S.C. § 1231(b)) are contained within a section titled "Detention and removal of aliens ordered removed." 8 U.S.C. 1231; *In re I— S— & C— S—*, 24 I. & N. Dec. 432, 433 (B.I.A. Jan. 10, 2008); *see also* 8 U.S.C. § 1231(a) ("Detention, release, and removal of aliens ordered removed"). The argument that section 1226 applies (rather than section 1231) when a final order of removal is reinstated raises a difficult question: why did Congress place the reinstatement provision in § 1231(a)(5)? If Congress's intent was to have section 1226 apply to reinstated removal orders, the obvious place to put the reinstatement provision would have been in section 1226, especially since the current texts of both sections were created in the same act. Illegal Immigration Reform and Immigrant

Responsibility Act of 1996, Pub. L. No. 104-208 303, 305,110 Stat. 3009–546, 3009-585, 3009-597.

It is notable that, in holding section 1226 applies to reinstatements, both the Second Circuit in *Guerra* and the Fourth Circuit in *Chavez* ignored this question. It is equally notable that both the Ninth Circuit in *Padilla-Ramirez,* 882 F.3d at 831, and the Third Circuit in *Guerrero-Sanchez*, 905 F.3d at 216, found the placement of the reinstatement provision within section section 1231 to be strong evidence that the same section applied to reinstatements. *See also Chavez*, 940 F.3d at 888 (Richardson, J., dissenting) (discussing the structure of § 1231).

CONCLUSION

For the foregoing reasons, the decision of the Fourth Circuit should be reversed.

Respectfully submitted,

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