No. 18-14842-GG

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

WILLIAM P. BARR,
UNITED STATES ATTORNEY GENERAL, ET AL.,
Appellants-Respondents,

v.

FIRDAVS J. RADZHABOV,
Appellee-Petitioner.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF FLORIDA
Case No. 1:18-cv-20357-MGC

BRIEF OF AMICI CURIAE AMERICAN IMMIGRATION COUNCIL, NORTHWEST IMMIGRANT RIGHTS PROJECT AND AMERICAN IMMIGRATION LAWYERS ASSOCIATION IN SUPPORT OF APPELLEE-PETITIONER AND AFFIRMANCE

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CERTIFICATE OF INTERESTED PERSONS AND CORPORATE DISCLOSURE STATEMENT

In accordance with Federal Rule of Appellate Procedure 26.1 and the Local Rules for the United States Court of Appeals for the Eleventh Circuit, undersigned counsel for amici curiae certifies that the following is a complete list of trial judges, attorneys, persons, associations of persons, firms, partnerships, or corporations that have an interest in the outcome of this appeal:

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I. INTRODUCTION[1]

Pursuant to Federal Rule of Appellate Procedure 29, the American Immigration Council (the Council), Northwest Immigrant Rights Project (NWIRP), and American Immigration Lawyers Association (AILA) urge this Court to affirm the District Court's decision finding that the detention of individuals in withholding-only proceedings is governed by the pre-final order detention statute, 8 U.S.C. § 1226(a), and that, therefore, they have a right to a bond hearing in which an immigration judge (IJ) will consider their release pending resolution of their fear-based claims. Appellants' Appendix (App.) Docket Entry (DE) 29 at 1-2 (affirming and adopting the Magistrate Judge's report and recommendations, App. DE 26 at 1-42). This is an important issue of first impression in this circuit.

By its plain language, 8 U.S.C. § 1226(a) governs detention "pending a decision on whether the [noncitizen] is to be removed from the United States." *Id.* Because § 1226(a) governs detention pending ongoing removal proceedings, the District Court correctly found that it governs detention where withholding-only proceedings are pending. App. DE 26 at 41. In so holding, the court correctly

[1] Amici 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. *See* Fed. R. App. P. 29(a)(4)(E).

rejected the government's assertion that the post-final order detention statute, 8 U.S.C. § 1231(a), controls. Appellants-Respondents' Opening Brief (Opening Br.) at 3-4. Under the government's view, individuals in withholding-only proceedings are subject to mandatory detention without any opportunity for a bond hearing during the months or years it takes to receive a final decision on the merits of their claims.

In concluding that 8 U.S.C. § 1226(a) governs, the District Court, like the Second Circuit in *Guerra v. Shanahan*, 831 F.3d 59 (2d Cir. 2016), discerned Congress' intent by looking to the text and structure of the detention statutes, as well as this Court's existing precedent. App. DE 26 at 28-39.

With respect to the plain language of § 1231(a), which does not allow release on bond "during the removal period," the court correctly identified the relevant subsection of the statute which states that the removal period "does not begin to run until at least '[t]he date the order of removal becomes administratively final." App. DE at 30 quoting 8 U.S.C. § 1231(a)(1)(B)(i), (2). Accordingly, the court correctly held that "the plain text and context of § 1231(a) show that a reinstated order of removal is not 'administratively final' while a withholding-only proceeding is pending." App. DE 26 at 29-30. The reinstatement order is only administratively final for purposes of § 1231(a)(1)(B)(i), (2) when it is "beyond challenge," which means "there must not be a pending withholding-only

proceeding." App. DE 26 at 30-32. Moreover, the District Court correctly noted that § 1231(a) contemplates the possibility of actual removal during the 90-day removal period, yet persons cannot be removed pending the withholding-only proceedings. App. DE 26 at 35. Withholding-only proceedings generally take far longer, especially as individuals are entitled to appeal negative immigration judge decisions to the Board of Immigration Appeals (BIA or Board), 8 C.F.R. § 1208.31(g)(2), and courts of appeals, 8 U.S.C. § 1252(a)(5).

With respect to 8 U.S.C. § 1226(a), the District Court "concur[red] with *Guerra*'s common-sense interpretation" that the plain language of § 1226(a) governs detention "pending a decision on whether the [non-citizen] is to be removed," which refers to "whether the [noncitizen] *will* be removed", and not whether a noncitizen is "theoretically removable." App. DE 26 at 36 (citing *Guerra*, 831 F.3d at 62 (emphasis added)); *see also* App. DE 26 at 34 (citing *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)). The District Court concluded that this determination "has not yet been made" in the case of individuals in withholding-only proceedings. App. DE 26 at 37 (citing *Romero v. Evans*, 280 F. Supp. 3d 835, 846 (E.D. Va. 2017)).

Moreover, the court correctly found that its construction of the detention statutes is consistent with this Court's decision in *Jimenez-Morales*. App. DE 26 at

34, 39. Furthermore, the District Court agreed with the Second Circuit that "avoiding 'tiers of finality'" that distinguish between finality for purposes of judicial review versus detention is more "in line with the text and context of the statutes." App. DE 26 at 40.

Lastly, the court correctly rejected the contrary interpretation adopted by the Ninth and Third Circuits holding that § 1231(a) governs the detention of individuals in withholding-only proceedings. *See Padilla-Ramirez v. Bible*, 882 F.3d 826 (9th Cir. 2018); *Guerrero-Sanchez v. Warden York Cnty. Prison*, 905 F.3d 208 (3d Cir. 2017). Those decisions fail to give meaning to the plain language of the statutes and conflate finality for purposes of judicial review with finality for detention purposes.

In sum, individuals in withholding-only proceedings are detained under § 1226(a) and this Court should affirm the decision below.

II. STATEMENT OF AMICI

The 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. NWIRP is a non-profit legal organization dedicated to the defense and advancement of the legal rights of noncitizens in the United States with respect to

their immigrant status. 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.

The issue in this case has important ramifications for detained noncitizens in withholding-only proceedings. All three organizations have a direct interest in ensuring that these individuals have access to bond hearings.

III. BACKGROUND

A. Reinstatement of Removal

1. In General

The Department of Homeland Security (DHS), through its component agencies, primarily U.S. Immigration and Customs Enforcement (ICE) and U.S. Customs and Border Protection (CBP), may issue summary removal orders, including: reinstatement orders to individuals who reenter the country after a prior removal order under 8 U.S.C. § 1231(a)(5) and administrative removal orders to certain individuals convicted of aggravated felonies under 8 U.S.C. § 1228(b).

According to government data, DHS removed 120,545 individuals pursuant to reinstatement orders in fiscal year 2017. *See* Katherine Witsman, Dep't of Homeland Sec., Office of Immigration Statistics, Annual Report: Immigration

Enforcement Actions: 2017, 12 (Table 6) (March 2019).[2] Reinstatement orders can be issued anywhere in the United States and can be issued against noncitizens who have been living in the country for many years.

In the reinstatement process, individuals face summary removal based solely on the decision of a DHS officer, i.e., without a hearing before an IJ. 8 C.F.R. §§ 241.8(a), 1241.8(a). DHS can, and often will, execute reinstatement orders and deport individuals within hours or days of apprehension.

2. Reinstatement of Individuals Who Indicate a Fear of Return

Although individuals who are subject to reinstatement are not eligible for asylum, *Jimenez-Morales*, 821 F.3d at 1309-10, if a person indicates a fear of return, DHS must refer the person to an asylum officer to determine whether she or he can articulate a "reasonable fear of persecution or torture." 8 C.F.R. §§ 208.31, 1208.31, 241.8(e), 1241.8(e); *see also Jimenez-Morales*, 821 F.3d at 1310. 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, Pub. L. No. 105-277, § 2241, 112 Stat. 2681 (Oct. 21,

[2] *Available at* https://www.dhs.gov/sites/default/files/publications/enforcement_actions_2017.pdf

1998).[3]

a. Positive Reasonable Fear Determinations

Meeting the reasonable fear burden is difficult: it is equivalent to establishing a "well-founded fear," the standard that governs discretionary grants of asylum. *See* U.S. Citizenship and Immigration Services, Reasonable Fear of Persecution and Torture Determinations Lesson, 11 (Feb. 13, 2017), *as reprinted in* Mem. from John Lafferty, Chief, Asylum Division to All Asylum Office Personnel (Feb. 13, 2017).[4] If an asylum officer determines that the person's fear is reasonable, the officer must refer the person to an IJ to apply for withholding of removal under 8 U.S.C. § 1231(b)(3)(A) and/or protection under the United Nations Convention Against Torture (CAT). *See* 8 C.F.R. §§ 208.31(e) (requiring asylum officer to refer case to IJ), 1208.31(e) (same), 208.2(c)(2) (IJ jurisdiction in referred cases), 1208.2(c)(2) (same), 208.16 (withholding-only hearings before IJ), 1208.16 (same). In 2017, just over 3,000 such cases were referred to the

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[3] Individuals subject to administrative removal orders issued by DHS pursuant to 8 U.S.C. § 1228(b) and who articulate a fear of return similarly undergo a reasonable fear screening and follow the same administrative and judicial processes when a reasonable fear determination is made. *See generally* 8 C.F.R. §§ 208.31, 238.1(f)(3), 1208.31, 1238.1(f)(3). For that reason, this Court's determination regarding eligibility for bond hearings likely also will apply to individuals subject to § 1228(b) who articulate a fear of return.

[4] *Available at* https://drive.google.com/file/d/0B_6gbFPjVDoxY0FCczROOFZ4SVk/edit.

immigration court, as compared with the total of 120,545 persons subject to the reinstatement process.[5] Although CAT protection is available in these proceedings, they are commonly referred to as "withholding-only" proceedings.

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* Opening Br. at 9; *see also Luna-Garcia v. Holder*, 777 F.3d 1182, 1183 (10th Cir. 2015) ("DHS cannot execute the reinstated removal order until the reasonable fear and withholding of removal proceedings are complete."); *Padilla-Ramirez*, 882 F.3d at 831-32 (same).

Withholding of removal and CAT protection are mandatory, not discretionary—by law, the United States cannot remove someone who qualifies for protection under these provisions. *See Najjar v. Ashcroft*, 257 F.3d 1262, 1303 (11th Cir. 2001) ("Relief under the Convention is in the form of the mandatory remedy of withholding of removal."). To qualify for either of these forms of protection, the person must establish a much higher likelihood of future harm than the "well-founded fear" of persecution required for asylum; rather, the person must show a "clear probability" that persecution or torture is "more likely than not." *See* 8 C.F.R. §§ 208.16(b)(2), (c)(2); 1208.16(b)(2), (c)(2); *see also INS v. Stevic*, 467

[5] U.S. Dep't of Justice, Executive Office for Immigration Review, Statistics Yearbook FY 2017, 13 at Table 4, *available at* https://www.justice.gov/eoir/page/file/1107056/download.

U.S. 407, 429-30 (1984).

If an IJ denies withholding and/or CAT protection, the person may appeal that decision to the BIA. 8 C.F.R. §§ 208.31 (g)(2)(ii), 1208.31(g)(2)(ii). If the BIA denies the appeal, the individual may file a petition for review to this Court. 8 U.S.C. § 1252(a)(1); *see Jimenez-Morales*, 821 F.3d at 1308.

b. Negative Reasonable Fear Determinations

If an asylum officer determines that a person has not established a reasonable fear, the person may seek review of that determination by an IJ. 8 C.F.R. §§ 208.31(f), (g); 1208.31(f), (g). If the IJ disagrees with the asylum officer's determination, the person then may apply for withholding of removal and/or CAT protection before the IJ. 8 C.F.R. §§ 208.31(g)(2), 1208.31(g)(2). If the IJ agrees with the asylum officer's determination, the person *cannot* appeal that decision to the BIA. 8 C.F.R. §§ 208.31(g)(1), 1208.31(g)(1).

3. Judicial Review of Reinstatement Orders

Unless the person expresses a fear of return to his or her country of origin, the date that the officer signs the bottom portion of the reinstatement form (Form I-871) commences the 30-day period for filing a petition for review set forth in 8 U.S.C. § 1252(b)(1). *See, e.g.*, *Sarmiento Cisneros v. U.S. Att'y Gen.*, 381 F.3d 1277, 1278-79 (11th Cir. 2004); *Arevalo v. Ashcroft*, 344 F.3d 1, 9 (1st Cir. 2003); *Avila-Macias v. Ashcroft*, 328 F.3d 108, 110 (3d Cir. 2003).

For individuals who have been denied withholding of removal and/or CAT protection by the BIA, the 30-day deadline for filing a petition for review commences on the date the administrative proceedings are completed. *See, e.g.*, *Jimenez-Morales*, 821 F.3d at 1308; *Cazun v. Att'y Gen.*, 856 F.3d 249, 254 n.9 (3d Cir. 2017); *Ponce-Osorio v. Johnson*, 824 F.3d 502, 505-06 (5th Cir. 2016); *Ortiz-Alfaro v. Holder*, 694 F.3d 955, 957-59 (9th Cir. 2012); *Luna-Garcia*, 777 F.3d at 1184-87.

In these cases, the court of appeals have uniformly held that they have jurisdiction to review a negative reasonable fear determination or the denial of withholding and/or CAT protection. *See, e.g.*, *Ordonez-Tevalan v. Att'y Gen.*, 837 F.3d 331, 336, 340-43 (3d Cir. 2016); *Andrade-Garcia v. Lynch*, 828 F.3d 829, 833 (9th Cir. 2016). Notably, judicial review of reinstatement orders also necessarily encompasses challenges to the propriety of the reinstatement order itself and ancillary challenges; it is not limited to review of fear-based claims. *See, e.g.*, *Avila v. U.S. Att'y Gen.*, 560 F.3d 1281, 1285-86 (11th Cir. 2009) (addressing due process challenge to reinstatement of removal order); *Fernandez-Vargas v. Gonzales*, 548 U.S. 30, 36 (2006) (addressing retroactive application of reinstatement statute); *Batista v. Ashcroft*, 270 F.3d 8, 12, 17 (1st Cir. 2001) (transferring case to district court to resolve genuine issue of fact regarding citizenship claim); *Villa-Anguiano v. Holder*, 727 F.3d 873, 878-82 (9th Cir. 2013)

(vacating reinstatement order predicated on a prior removal order that a federal district court subsequently deemed unconstitutional in the context of a criminal reentry charge).

B. Detention During Withholding-Only Proceedings

Many individuals who are referred for withholding-only proceedings before an IJ 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.[6] At the same time, the vast majority are detained until their cases are decided, typically for prolonged periods of time and sometimes for years.[7]

At issue in this case is which statutory provision governs the detention of individuals in withholding-only proceedings. If detention is governed by § 1226(a), as the District Court and the Second Circuit have held, then individuals in withholding-only proceedings have an immediate right to a bond hearing, unless they have committed specific offenses that subject them to mandatory detention under 8 U.S.C. § 1226(c). *See* App. DE 26 at 29-30; *Guerra*, 831 F.3d at 64.

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[6] *See, e.g.*, David Hausman, *Fact Sheet: Withholding-Only Cases and Detention*, 1-2 (Apr. 19, 2015), *available at* https://www.aclu.org/fact-sheet/fact-sheet-withholding-only-cases-and-detention (Fact Sheet indicating that, between 2001 and 2015, the court granted withholding of removal in over 20% of those cases where an IJ or the BIA "reached an identifiable decision").

[7] Fact Sheet at 2 (indicating that, between 2001 and 2015, more than 85% of individuals in withholding-only proceedings remained detained throughout proceedings).

On the other hand, if, as the government contends, and as the Ninth and Third Circuits have held, detention is governed by § 1231(a), these individuals are not eligible to receive a bond hearing in which an IJ can consider whether their continued detention is necessary or whether they may be released on bond or other appropriate conditions pending resolution of their fear-based claims. *Padilla-Ramirez*, 882 F.3d at 829-30, 832; *Guerrero-Sanchez*, 905 F.3d at 219.

Were this Court to find that § 1231(a) applies, the *only* process individuals who are in withholding-only proceedings would receive is administrative custody reviews—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 administrative custody review process governing those who are detained pursuant to 8 U.S.C. § 1231(a). *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).

C. Case Stories

Every individual in immigration detention has a constitutional liberty interest in freedom from physical restraint. *See Zadvydas*, 533 U.S. at 690. It is axiomatic that this fundamental right applies to noncitizens and citizens alike. *See, e.g.*, *Harisiades v. Shaughnessy*, 342 U.S. 580, 586 & n.9 (1952) (immigrants stand on "equal footing with citizens" under the Constitution in several respects,

including the protection of personal liberty). Absent a bond hearing, individuals who already have demonstrated to DHS officials a bona fide fear-based claim will languish in detention for months, and even years.

The following case examples are typical of individuals who are detained without a bond hearing while in withholding-only proceedings before an IJ. As 8 U.S.C. § 1226(a) governs their detention, they should have been entitled to a bond hearing. In the absence of such a basic procedural protection, they were subjected to needless detention for extended periods of time. Their names are redacted or pseudonyms are used to protect their identities, and documentation supporting their claims are on file with amici.

- **J-M-** is a citizen of Colombia who fled to the United States with his family in 1991 to escape persecution on account of his father's political opinion. J-M- was arrested in April 2014 and transferred to immigration custody in May 2014. Immigration authorities issued a final administrative removal order under 8 U.S.C. § 1228(b) against J-M- in June 2014. J-M- expressed a fear of return to Colombia and he received a reasonable fear interview. Eventually, an IJ placed J-M- in withholding-only proceedings in September 2014. J-M- spent twenty-five months—more than two years—in detention. In June 2016, after J-M- determined he could no longer endure detention, he accepted removal to Colombia.

- **O-B-** is a Jamaican national who fled to the United States in the 1980s to escape persecution based on sexual orientation. He was deported to Jamaica in April 1988. In Jamaica, he continued to face 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 fled again to the United States in 1989. In 2010, after criminal charges against him were dismissed, immigration authorities detained O-B- and issued him a reinstatement order. After demonstrating a reasonable fear to an asylum officer, O-B- ultimately won withholding before the IJ in June 2012.

Nonetheless, O-B- endured detention for sixteen months without a bond hearing.

- **L-A-** is a citizen of Honduras who entered the United States without inspection in March 2007. She was ordered removed in November 2007. 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, Border Patrol apprehended L-A- and issued her a reinstated order of removal. She established a reasonable fear of persecution to an asylum officer who referred her for withholding-only proceedings before an IJ. L-A- spent more than a year in immigration custody without a bond hearing until, in March 2014, an IJ granted withholding and immigration authorities finally released her.

- **Perry** is a citizen of Honduras who fled to the United States in 2012 to escape persecution based on his sexual orientation. Immigration authorities detained Perry in Texas, where he passed a credible fear interview. An IJ subsequently denied Perry asylum and ordered him removed in August of 2013. In Honduras, Perry cooperated with law enforcement to help prosecute a narcotrafficking ring involved in the murder of his friend. Despite receiving protection from the Honduran police, the narcotrafficking ring that killed his friend targeted Perry. Perry reentered the country in April of 2015 and demonstrated a reasonable fear of persecution in Honduras to an asylum officer. After enduring eight months in detention, an IJ granted Perry withholding of removal and immigration authorities released him from custody in December of 2015.

- **A-R-** and her eight-year old daughter, **J-R-R-**, fled 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. Fearing for her life, A-R- left her children with her mother and fled to the United States 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. In May 2014, A-R- discovered Carlos molesting her daughter. The next month, in June 2014, she and J-R-R- fled to the United States and immigration authorities detained them. An asylum officer found that A-R-

had a reasonable fear of persecution and referred the family for withholding proceedings. Nonetheless, A-R- and J-R-R- spent six months in detention without ever receiving a bond hearing before an IJ. Ultimately, in December 2014, an IJ granted A-R- withholding and J-R-R- asylum, and DHS finally released them.

IV. ARGUMENT

A. The District Court Correctly Held That Detention Under § 1231(a)(2) Does Not Begin Until All Withholding-Only Proceedings Are Completed.

The detention authority at § 1231(a) provides for mandatory detention without the opportunity for an individualized bond hearing during a ninety-day "removal period." The statute then provides for discretionary detention beyond the removal period where removal is not effectuated during that time. 8 U.S.C. § 1231(a)(6). The removal period, as defined at § 1231(a)(1)(B), begins on the "latest" of one of three events described in the statute:

> (i) The date the order of removal becomes administratively final.
> (ii) If the removal order is judicially reviewed and if a court orders a stay of the removal of the alien, the date of the court's final order.
> (iii) If the [noncitizen] is detained or confined (except under an immigration process), the date the [noncitizen] is released from detention or confinement.

8 U.S.C. § 1231(a)(1)(B). Here, the District Court focused on subsection (i), as neither subsections (ii) or (iii) currently apply in this case. The court analyzed when a removal order becomes "administratively final" such that the removal period begins and detention becomes mandatory. The court recognized that ongoing administrative proceedings – i.e., withholding-only proceedings – "may

affect the execution of the reinstated order of removal," App. DE 26 at 32, and concluded that removal orders are not final until they are "beyond challenge," including that no further withholding-only proceedings are possible, App. DE 26 at 30. This is consistent with this Court's analysis in the context of judicial review, making clear that the administrative order is not final while reasonable fear proceedings are ongoing. *Jimenez-Morales*, 821 F.3d at 1308. Thus, § 1231(a)(1)(B)(i) makes clear that the removal period has not yet commenced because the agency below has not completed the administrative process.

The text of subsection (ii) further reinforces that the removal period has not commenced. Although not currently at issue in this case, if the BIA had denied Mr. Radzhabov's withholding-only claim and ordered removal, he could have sought review of that decision in the Second Circuit. *See Guerra*, 831 F.3d at 62. If he obtained a judicial stay of removal from that court while it reviewed the BIA's decision, then, under subsection (ii), the removal period would not commence until after the Second Circuit issued a decision. The government's reading of the statute, that the removal period has already expired for an individual in withholding-only proceedings, would render subsection (ii) a nullity. The plain language of the statute makes clear that the removal period has not yet commenced as the administrative proceedings have not yet concluded, and similarly, it is not yet clear whether the petitioner will obtain a stay of removal while seeking judicial review.

1. The District Court Correctly Concluded That Reinstatement Orders Are Not Administratively Final Until the Conclusion of Reasonable Fear or Withholding-Only Proceedings.

Every circuit to have addressed the question have agreed that a reinstatement order where the individual has articulated a fear of return is *not* final until reasonable fear or the withholding-only proceedings have been concluded. *See Jimenez-Morales*, 821 F.3d at 1308; *Ponce-Osorio*, 824 F.3d at 504-06; *Luna-Garcia*, 777 F.3d at 1184-87; *Ortiz-Alfaro*, 694 F.3d at 957-58. The question presented in these cases was when a petition for review must be filed to challenge a reinstatement order 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). When an individual does not articulate a fear and the order of removal is final, a petition for review must be filed within thirty days of the reinstatement order. *See* § III.A.3, *supra*. Where, however, a reasonable fear interview has been granted, to timely challenge a reinstatement order, the petition for review must be filed after completion of reasonable fear or withholding only proceedings. *Jimenez-Morales*, 821 F.3d at 1308; *Ortiz-Alfaro*, 694 F.3d at 958; *Luna-Garcia*, 777 F.3d at 1185. Thus, the District Court's determination that a removal order is

not final until it is "beyond challenge" is consistent with this Court's position in *Jimenez-Morales*. App. DE 26 at 30.

2. The Court Correctly Concluded that DHS Ability to Potentially Remove an Individual to a Third Country Does Not Undermine Its Finality Analysis.

The government urges this Court to find that "a reinstated removal order must necessarily be final" because of the "authority in § 1231(b)(2) to immediately remove [a noncitizen] to an alternative country based on a reinstated order." Opening Br. at 33. The argument is inconsistent with the statute as it fails to acknowledge that a person may not be "immediately remove[d]" while in withholding-only proceedings. *See* Opening Br. at 8-10; *Luna-Garcia*, 777 F.3d at 1183; *Padilla-Ramirez*, 882 F.3d at 831-32. An individual whose prior removal order has been reinstated qualifies for referral to withholding only proceedings based on a "fear of returning to the country designated in *that order*." 8 C.F.R. § 241.8(e) (emphasis added). Thus, the reinstatement order is not a general grant of authority directing removal *anywhere* in the world. Rather, on its face, it is country-specific decision by DHS to seek an individual's removal to the country designated in the prior proceeding.

If DHS were to attempt to remove an individual to an alternative country, it must follow statutory and regulatory requirements for designating alternate countries of removal. *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); *see also Jama v. ICE*, 543 U.S. 335, 341 (2005) (addressing statutory process for removal to a third country). As this Court has recognized, even if DHS were to identify and properly designate a third country for removal, no such removal could be ordered until the individual first was given an opportunity to apply for withholding and/or CAT protection from that country. *See, e.g., Protsenko v. U.S. Att'y Gen.*, 149 F. App'x 947, 953 (11th Cir. 2005) (stating that failure to give "proper notice of a potential country of deportation" and a subsequent order of removal to that country constituted a violation of due process); *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"); *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"). Thus, in reaching the conclusion that a reinstatement order is not final, the District Court was correct to find that "the United States cannot remove [a noncitizen] to a third country absent a full and fair hearing without violating the [noncitizen's] Fifth Amendment due process rights." App. DE 26 at

32-33.

At this point, and individual only may be removed if her application for protection is denied, or, if granted, only if DHS obtains a new order of removal properly designating an alternative country of removal. And, as discussed above, they then would be entitled to apply for protection from removal to that third country. Thus, the question presented in the individual's case is precisely that posed by § 1226(a): "whether" he or she will be removed from the United States. This "is because if the answer to 'where" is *nowhere*—such as in the event the [noncitizen] may be tortured if returned to his native country and no other option is available—then the [noncitizen] will *remain in the United States*." App. DE 26 at 38. And this is in fact what generally occurs when a person is granted withholding of removal.[8] Accordingly, the regulations clarify that a person granted withholding of removal is entitled to employment authorization. 8 C.F.R. § 274a.12(a)(10).

The additional process required to effectuate removal to an alternative

[8] As a practical matter, DHS rarely exercises its authority to seek removal to an alternative country. In fact, in fiscal year 2017, of 1,511 individuals granted asylum-only withholding, ICE removed only 1.39% to a third country. *See* Attachment A, Declaration of Katherine Melloy Goettel; *see also Kumarasamy v. Att'y Gen. of U.S.*, 453 F.3d 169, 171 n.1 (3d Cir. 2006), *as amended* (Aug. 4, 2006) ("Although withholding of removal (a.k.a. restriction on removal) only prevents removal to the specified country and does not preclude removal to a third country, commentators have noted that '[i]n practice, however, non-citizens who are granted restrictions on removal are almost never removed from the U.S.'") (quotation omitted).

country underscores the objective fact, and the District Court's conclusion, that a reinstatement order is not final until withholding-only proceedings are complete.

B. The District Court Correctly Held that § 1226(a) Governs Individuals in Withholding-Only Proceedings Because DHS Has No Authority to Remove an Individual in Such Proceedings.

The District Court correctly harmonized § 1226(a) and § 1231(a) within the structure of the immigration statute. The District Court recognized that § 1231(a) governs detention beginning only during a final 90-day period, "in which the government has actual authority to remove the [noncitizen] and need only schedule and execute the deportation." App. DE 26 at 35 (citing *Romero*, 280 F. Supp. 3d at 846). But, withholding-only proceedings create an "impediment or obstacle to removal" that prevents the start of the removal period. *Id.* Moreover, the District Court found it "illogical" that § 1231(a) would apply to individuals in withholding-only proceedings, because it is the rare withholding-only proceedings that can be completed within the 90-day period intended to "trigger" detention under § 1231(a). *Id.*

Thus, the situation of individuals in withholding-only proceedings is consistent only with the detention proscribed under § 1226(a) which governs detention when a "pending [] decision [remains] on whether the [noncitizen] is to be removed from the United States." *Id.* Like the Second Circuit in *Guerra*, the District Court interpreted the language of § 1226(a) to apply where a pending

decision will determine "whether the [noncitizen] *will* actually be removed" and not whether the noncitizen is "theoretically removable." App. DE 26 at 36 (quoting *Guerra*, 831 F.3d at 62 (emphasis added)).

Here, the District Court specifically cautioned against "conflat[ing] the 'to be removed' language [in § 1226(a)], which implies a future action, with the concept of 'removability,' which is a status." App. DE 26 at 37. Sister circuits similarly have reasoned that treatment of a reinstated order of removal as "final" only after the conclusion of reasonable fear or 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 [noncitizen] would receive CAT relief and never have to leave the country"); *see also Luna-Garcia*, 777 F.3d at 1186 ("[T]reating 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").

The District Court correctly held that § 1226(a) governs the detention of individuals in withholding-only proceedings, because DHS lacks the actual authority to execute a reinstatement order until after all fear-based claims have been adjudicated to resolution. *See also* § III.A.3, *supra*. Indeed, this is no different

than when a person is placed in standard removal proceedings before an immigration judge under 8 U.S.C. § 1229a, concedes removability and applies only for withholding of removal or protection under CAT. Just as in withholding-only proceedings, a final agency removal order is entered against the applicant, even if they are granted withholding of removal. *See Matter of I-S & C-S-*, 24 I&N Dec. 432, 434 (BIA 2008) (holding "that when an Immigration Judge decides to grant withholding of removal, an explicit order of removal must be included in the decision."). Yet the government readily acknowledges that those individuals are detained pursuant to 8 U.S.C. § 1226. Similarly, if the individual was denied withholding of removal, and appealed that decision to the BIA, the government does not contest that those individuals are detained under § 1226 even though the individual is not even challenging the removal order entered by immigration judge, but instead is only challenging the denial of withholding of removal or CAT protection. In either case, that person is "detained detained pending a decision on whether the [noncitizen] is to be removed." 8 U.S.C. § 1226(a).

C. The District Court's Decision Provides a Consistent Interpretation of Agency Finality.

There is no basis for distinguishing between finality of an order for detention and for judicial review purposes. In *Jimenez-Morales*, this Court held that a reinstatement order is not administratively final for judicial review purposes until all administrative proceedings, including reasonable fear proceedings, are

complete. 821 F.3d at 1308; *see also* App. DE 26 at 39. Other circuits have similarly held. *See Guerra*, 831 F.3d at 63 ("The bifurcated definition of finality urged upon us runs counter to principles of administrative law . . .."); *Luna-Garcia*, 777 F.3d at 1185 ("[T]o 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.'") (quotation omitted).

The concept of administrative 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). Thus, the District Court correctly applied the concept of administrative finality to determine that where, for judicial review purposes, there remain administrative, withholding-only proceedings, "which, although unable to technically overturn or cancel the removal order, may affect how it is executed, *if at all*," App. DE 26 at 34, it is consistent "with the text and context of the statutes [§ 1226(a) and § 1231(a)]" that the removal order also not be considered administratively final for detention purposes, such that § 1231(a) would apply. *Id.* at 40.

D. *Padilla-Ramirez* and *Guerrero-Sanchez* Are Analytically Flawed.

The Court should reject the government's invitation to adopt the approach taken by the Ninth Circuit in *Padilla-Ramirez*, and the Third Circuit's adoption of that analysis in *Guerrero-Sanchez*. *See* Opening Br. at 22-37; 39-45. In *Padilla-*

Ramirez and *Guerrero-Sanchez*, the Ninth and Third Circuit considered the issue here, whether § 1226(a) or § 1231(a) governs the detention of an individual in withholding-only proceedings and found that the post-final order detention statute, § 1231(a), governs detention for these individuals. *Padilla-Ramirez*, 882 F.3d at 830-32; *Guerrero-Sanchez*, 905 F.3d at 215-19.

These decisions are analytically flawed. First, the Ninth Circuit incorrectly found that "[a]lthough Padilla-Ramirez may seek judicial review of an adverse decision in his withholding-only proceedings, that review would be confined to the order relating to his application for withholding . . . [t]he court would not review the reinstated removal order itself." *Padilla-Ramirez*, 882 F.3d at 830 (internal citations omitted); *see also Guerrero-Sanchez*, 905 F.3d at 216. This is wrong. The courts of appeals have unambiguously and repeatedly held that a petition for review challenging a reinstatement order may raise constitutional and statutory challenges to the reinstatement order itself. *See, e.g.*, *Avila*, 560 F.3d at 1285-86 (addressing due process challenge to reinstatement of removal order); *see also* § III.A.3, *supra*.

Second, the Ninth and Third Circuits applied a definition of an administratively final order that conflicts with the holding of this Court. *See* § IV.A.1., *supra*. Specifically, the courts found that a person in withholding-only proceedings has a final removal order, notwithstanding ongoing agency

proceedings. *Padilla-Ramirez*, 882 F.3d at 832; *see also Guerrero-Sanchez*, 905 F.3d at 217-19. This holding is in tension with case law defining an administratively final order for purposes of judicial review, including this Court's holding in *Jimenez-Morales*, 821 F.3d at 1308. *See* § III.A.3. and IV.A., C., *supra*. In *Jimenez-Morales* this Court squarely held that "DHS' reinstatement of the [prior] order of removal was not final because the reasonable fear proceeding was ongoing." 821 F.3d at 1308; *see* § IV.A., C., *supra*.

Finally, the Ninth and Third Circuits incorrectly rely on the placement of the provision governing reinstated orders of removal, § 1231(a)(5), within § 1231(a) as a basis for concluding that § 1231(a) should govern the detention of individuals in withholding-only proceedings. *Padilla-Ramirez*, 882 F.3d at 831; *Guerrero-Sanchez*, 905 F.3d at 216. Although located in the same section, this argument ignores the plain language of §1231(a)(5), which does not address the detention of individuals with reinstated orders of removal and fails to account for the implications of mandatory withholding of removal relief. App. DE 26 at 38-39.

The reasoning of *Padilla-Ramirez*, adopted by the court in *Guerrero-Sanchez*, rejects the plain language of the statute, as recognized by the Second Circuit in *Guerra* and the District Court here; namely that an individual seeking to withhold execution of a reinstatement order is detained pursuant to § 1226(a)—the general detention authority for persons "pending a decision on whether the

[noncitizen] is to be removed from the United States"—because the agency has not yet made a final administrative determination concerning whether the person will be removed from the country. *See Guerra*, 831 F.3d at 63; App. DE 26 at 37-38 (finding that Congress "drafted §1226(a) in a way that implicates not a status (removability), but a future, concrete action ('to be removed'))".

V. CONCLUSION

The Court should find that 8 U.S.C. § 1226(a) governs detention during withholding-only proceedings and affirm the District Court's decision.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

1. This brief complies with the type-volume limitation of Fed. R. App. P. 29(a)(5) because this brief contains 6,459 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(f).

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 2016 in 14-point Times New Roman.

June 18, 2019

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DECLARATION OF KATHERINE MELLOY GOETTEL

Pursuant to 28 U.S.C. § 1746, I, Katherine Melloy Goettel, declare under the penalty of perjury as follows:

1. I have personal knowledge of the matters stated in this Declaration and they are true and correct. I am an attorney licensed to practice in the State of Iowa.

2. I am a Senior Litigation Attorney at the National Immigrant Justice Center (NIJC), a program of Heartland Alliance, a position I have held since June 2017. Before my employment at NIJC, I was an attorney for the Department of Justice for nearly eight years.

3. NIJC is a non-profit organization located in Chicago, Illinois. NIJC presently serves over 10,000 low-income immigrants, refugees, and asylum-seekers each year. NIJC's projects serve approximately 4,000 individuals in DHS custody annually.

4. On February 6, 2018, I sent a Freedom of Information Act (FOIA) Request to Immigration and Customs Enforcement (ICE) asking for three things: (1) The total number of individuals granted withholding of removal in Fiscal Year (FY) 2017; (2) The total number of individuals granted withholding of removal who were removed in FY 2017; and (3) For those individuals described in Request #2, the total number of individuals who were removed to a country for which they had a connection, as described in the statute. *See* Ex. 1.

5. The same day, February 6, 2018, I sent a FOIA request to the Executive Office of Immigration Review (EOIR), seeking: (1) The total number of individuals granted withholding of removal in FY 2017; and (2) The total number of motions to reopen filed in FY 2017 based on ICE's efforts to remove an individual granted withholding to an alternate country not designated by the Immigration Judge. *See* Ex. 2.

ATTACHMENT A

6. EOIR confirmed receipt on February 6, 2018, *see* Ex. 3, and ICE confirmed receipt of the FOIA request by email on February 14, 2018, *see* Ex. 4.

7. On March 30, 2018, EOIR responded via postal mail, stating that in Fiscal Year 2017, 1,511 individuals were granted asylum-based withholding of removal. *See* Ex. 5. This number does not include individuals granted Convention Against Torture-based withholding of removal.

8. EOIR did not respond to Request Number 2, which sought the number of motions to reopen filed in FY 2017 based on ICE's efforts to remove an individual granted withholding to an alternate country not designated by the Immigration Judge. EOIR responded that its "data does not capture the information requested in subsection (2) of your request. Therefore, we provided data regarding all motion to reopen receipts." *Id.* Accordingly, the number EOIR provided, 10,023, does not represent the number of motions to reopen where ICE sought to remove an individual to a non-designated alternate country.

9. On April 13, 2018, ICE responded to the FOIA request by email. *See* Ex. 6. According to ICE's response, in Fiscal Year 2017, ICE removed 21 people who were granted withholding of removal to third countries. *See* Ex. 7. ICE did not respond to the other two inquires in my February 6th FOIA request.

10. Accordingly, approximately 1.39% of those individuals that EOIR identified as receiving withholding or removal were removed to a third country by ICE in FY 2017.

11. Furthermore, the percentage may be even lower as EOIR's statistics did not include individuals granted Conventions Against Torture-based withholding of removal. Additionally, ICE did not respond to the portion of the FOIA request which sought information regarding whether those people who were removed to a third country had some connection to

that country, such as dual nationals or some form of immigration status in that third country. *See* Ex. 7.

12. Upon receipt of EOIR's response, I scanned and saved the response to NIJC's computer network. I have the original paper copy of EOIR's response in my files. Upon receipt of ICE's response, I downloaded the response to NIJC's network. A copy of the email and attachment remains on NIJC's email server. Neither document has been altered in any way and has been produced as they were originally received.

I declare under penalty of perjury under the laws of the United States that the foregoing is true and correct. Executed on June 17, 2019, in Chicago, Illinois.

s/ Katherine Melloy Goettel
Katherine Melloy Goettel, Esq.
Senior Litigation Attorney
National Immigrant Justice Center

Exhibit 1

NATIONAL
IMMIGRANT
JUSTICE CENTER
A HEARTLAND ALLIANCE PROGRAM

February 6, 2018

Submitted via electronic mail

U.S. Immigration and Customs Enforcement
Freedom of Information Act Office
500 12th Street, S.W., Stop 5009
Washington, D.C. 20536-5009

Re: Freedom of Information Act Request

Dear Immigration and Customs Enforcement:

This is a request for information under the Freedom of Information Act ("FOIA"), 5 U.S.C. §552. We request any documents in the custody or control of Immigration and Customs Enforcement (ICE)'s Enforcement and Removal Operations Headquarters Office, which fit the following description:

1. The total number of individuals granted withholding of removal in FY 2017.

2. The total number of individuals granted withholding of removal who were removed in FY 2017.

3. For those individuals described in Request #2, the total number of individuals who were removed to a country for which they had a connection, as described in 8 USC 1231(b)(2)(D) and 1231(b)(2)(E)(i)-(vi), for FY 2017.

If all or part of any of this request is denied, please specify the exemption(s) claimed for withholding each item of data. If some portion or portions of the requested materials are determined to be exempt, please provide the remaining non-exempt portions. 5 U.S.C. § 552(b).

We reserve the right to appeal any decision(s) to withhold information. 5 U.S.C. § 552(a)(6)(A)(i). Please reply to this request within twenty working days, or as required by statute. *Id.*

Fee Waiver Request

NIJC, the Requestor, is entitled to a waiver of all costs because the information sought "is likely to contribute significantly to public understanding of the operations or activities of the government and is not primarily in the [NIJC's] commercial interest." 5 U.S.C. § 552(a)(4)(A)(iii); *see also* 6 C.F.R. § 5.11(k) (records must be furnished without charge if the information is in the public interest, and disclosure is not in the commercial interest of the institution). NIJC has a proven track-record of compiling and disseminating information to the public about government functions and activities, particularly as they pertain to immigration detention. We intend to make your response—and an analysis thereof—publicly available on our website, www.immigrantjustice.org. The issue of the detention of immigrants is one of significant public interest. NIJC has undertaken this work in the public interest and not for any private commercial interest. The primary purpose of this FOIA request is to obtain information to further the public's understanding of the manner in which ICE detains immigrants. Access to this information is necessary for the public to evaluate meaningfully federal immigration policies, and the public has an interest in knowing about the manner in which those policies are effectuated.

As stated above, NIJC has no commercial interest in this matter. NIJC will make any information that it receives as a result of this FOIA request available to the public, including the press, at no cost. Disclosure in this case therefore meets the statutory criteria, and a fee waiver would fulfill Congress's legislative intent in amending FOIA. *See Judicial Watch, Inc. v. Rossotti*, 326 F.3d 1309, 1312 (D.C. Cir. 2003) ("Congress amended FOIA to ensure that it be 'liberally construed in favor of waivers of noncommercial requesters.'").

Because the documents subject to this request are not sought for any commercial use, we understand that no fee may be charged for the first two hours of search time or for the first 100 pages of duplication. 5 U.S.C. §552(a)(4)(A)(iv)(II). If you decline to waive these fees, and if these fees will exceed $100.00, please notify us of the amount of these fees before fulfilling this request. We note that under FOIA, an agency may charge "a representative of the news media" only "reasonable standard charges for document duplication," not for search-related costs. Under the 2007 amendments to FOIA, "a representative of the news media" means "any person or entity that gathers information of potential interest to a segment of the public, uses its editorial skills to tum the raw materials into distinct work, and distributes that work to an audience." 5 U.S.C. § 552(a)(6)(A)(ii). "News" means "information that is about current events or that would be of current interest to the public." One example of news media entities is "alternative media" that disseminate their publications for free "through telecommunications services," i.e., the internet. As noted above, NIJC has a track-record of turning raw material into reports and other publications for distribution to the general public, which it does at no charge. Because NIJC qualifies as

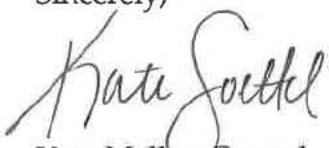
"a representative of the news media" under the revised statutory definition, you should not charge NIJC any search-related costs for this FOIA request. Should you have any questions regarding NIJC's work in gathering information and using editorial skills to digest or distribute that information to the general public, please advise me, and I will be happy to provide examples and explanations.

In the alternative, NIJC seeks all applicable reductions in fees pursuant to 6 C.F.R. § 5.11(d). NIJC agrees to pay for the first 100 pages of duplication. *See* 6 C.F.R. § 5 .11(d). NIJC agrees to pay search, duplication, and review fees up to $200.00. If the fees will amount to more than $200.00, NIJC requests a fee waiver pursuant to 5 U.S.C. § 552(a)(4)(A)(iii). If no fee waiver is granted and the fees exceed $200.00, please contact NIJC at the telephone number below to obtain consent to incur additional fees.

Please reply to this request within twenty working days, or as required by statute. 5 U.S.C. § 552(a)(6)(A)(i). If you have any questions regarding this request, please feel free to call me at my direct line, 312-660-1335 or email me at kgoettel@heartlandalliance.org.

Certification
The undersigned certifies that the above information is true and correct to the best of the undersigned's knowledge. *See* 6 C.F.R. § 5.5(d)(3).

Sincerely,



Kate Melloy Goettel
Tel.: 312-660-1335
Fax: 312-660-1505
E-mail: kgoettel@heartlandalliance.org

Exhibit 2

NATIONAL
IMMIGRANT
JUSTICE CENTER
A HEARTLAND ALLIANCE PROGRAM

February 6, 2018

Submitted via electronic mail

Office of the General Counsel
Attn: FOIA Service Center
Executive Office for Immigration Review
5107 Leesburg Pike, Suite 1903
Falls Church, VA 22041

Re: Freedom of Information Act Request

Dear Executive Office for Immigration Review FOIA Office:

This is a request for information under the Freedom of Information Act ("FOIA"), 5 U.S.C. §552. We request any documents in the custody or control of the Executive Office for Immigration Review, which fit the following description:

1. The total number of individuals granted withholding of removal in FY 2017.

2. The total number of motions to reopen filed in FY 2017 based on ICE's efforts to remove an individual granted withholding to an alternate country not designated by the Immigration Judge.

If all or part of any of this request is denied, please specify the exemption(s) claimed for withholding each item of data. If some portion or portions of the requested materials are determined to be exempt, please provide the remaining non-exempt portions. 5 U.S.C. § 552(b).

We reserve the right to appeal any decision(s) to withhold information. 5 U.S.C. § 552(a)(6)(A)(i). Please reply to this request within twenty working days, or as required by statute. *Id.*

Fee Waiver Request

NIJC, the Requestor, is entitled to a waiver of all costs because the information sought "is likely to contribute significantly to public understanding of the operations or activities of the government and is not primarily in the [NIJC's] commercial interest." 5 U.S.C. § 552(a)(4)(A)(iii); *see also* 6 C.F.R. § 5.11(k) (records must be furnished without charge if the information is in the public interest, and disclosure is not in the commercial interest of the institution). NIJC has a proven track-record of compiling and disseminating information to the public about government functions and activities, particularly as they pertain to immigration proceedings. We intend to make your response—and an analysis thereof—publicly available on our website, www.immigrantjustice.org. The issue of withholding of removal and other protection-based claims is one of significant public interest. NIJC has undertaken this work in the public interest and not for any private commercial interest. The primary purpose of this FOIA request is to obtain information to further the public's understanding of the number of immigrants each year who obtain withholding of removal and the number of those such immigrants whom the government removes to alternate country. Access to this information is necessary for the public to evaluate meaningfully federal immigration policies, and the public has an interest in knowing about the manner in which those policies are effectuated.

As stated above, NIJC has no commercial interest in this matter. NIJC will make any information that it receives as a result of this FOIA request available to the public, including the press, at no cost. Disclosure in this case therefore meets the statutory criteria, and a fee waiver would fulfill Congress's legislative intent in amending FOIA. *See Judicial Watch, Inc. v. Rossotti*, 326 F.3d 1309, 1312 (D.C. Cir. 2003) ("Congress amended FOIA to ensure that it be 'liberally construed in favor of waivers of noncommercial requesters.'").

Because the documents subject to this request are not sought for any commercial use, we understand that no fee may be charged for the first two hours of search time or for the first 100 pages of duplication. 5 U.S.C. §552(a)(4)(A)(iv)(II). If you decline to waive these fees, and if these fees will exceed $100.00, please notify us of the amount of these fees before fulfilling this request. We note that under FOIA, an agency may charge "a representative of the news media" only "reasonable standard charges for document duplication," not for search-related costs. Under the 2007 amendments to FOIA, "a representative of the news media" means "any person or entity that gathers information of potential interest to a segment of the public, uses its editorial skills to tum the raw materials into distinct work, and distributes that work to an audience." 5 U.S.C. § 552(a)(6)(A)(ii). "News" means "information that is about current events or that would be of current interest to the public." One example of news media entities is "alternative media" that disseminate their publications for free "through telecommunications services," i.e., the internet. As noted above, NIJC has a track-record of turning raw material into reports and other publications

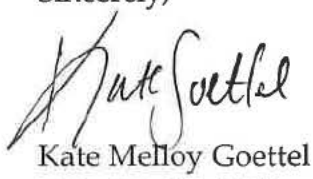
for distribution to the general public, which it does at no charge. Because NIJC qualifies as "a representative of the news media" under the revised statutory definition, you should not charge NIJC any search-related costs for this FOIA request. Should you have any questions regarding NIJC's work in gathering information and using editorial skills to digest or distribute that information to the general public, please advise me, and I will be happy to provide examples and explanations.

In the alternative, NIJC seeks all applicable reductions in fees pursuant to 6 C.F.R. § 5.11(d). NIJC agrees to pay for the first 100 pages of duplication. *See* 6 C.F.R. § 5 .11(d). NIJC agrees to pay search, duplication, and review fees up to $200.00. If the fees will amount to more than $200.00, NIJC requests a fee waiver pursuant to 5 U.S.C. § 552(a)(4)(A)(iii). If no fee waiver is granted and the fees exceed $200.00, please contact NIJC at the telephone number below to obtain consent to incur additional fees.

Please reply to this request within twenty working days, or as required by statute. 5 U.S.C. § 552(a)(6)(A)(i). If you have any questions regarding this request, please feel free to call me at my direct line, 312-660-1335 or email me at kgoettel@heartlandalliance.org.

Certification
The undersigned certifies that the above information is true and correct to the best of the undersigned's knowledge. *See* 6 C.F.R. § 5.5(d)(3).

Sincerely,



Kate Melloy Goettel
Tel.: 312-660-1335
Fax: 312-660-1505
E-mail: kgoettel@heartlandalliance.org

Exhibit 3

FEB 12 2018

U.S. Department of Justice

Executive Office for Immigration Review

Office of the General Counsel

5107 Leesburg Pike, Suite 1903
Falls Church, Virginia 22041

February 6, 2018

Kate Melloy Goettel
National Immigrant Justice Center
208 S. LaSalle Street, Ste. 1300
Chicago, IL 60604

RE: Freedom of Information Act Request
Statistics

Dear Kate Melloy Goettel:

This response acknowledges receipt of your Freedom of Information Act (FOIA) request by the Executive Office for Immigration Review (EOIR). Your request has been assigned control number: 2018-16436.

If you have filed a fee waiver request, EOIR will address the fee waiver in a separate letter. Otherwise, your request constitutes an agreement to pay fees that may be chargeable up to $25 without notice. Most requests do not require any fees; however, if the fees for processing the request are estimated to exceed $25.00, EOIR will notify you before processing the request to determine whether you will commit to paying the fee or whether you wish to narrow the scope of your request to reduce the fee. Fees may be charged for searching records at the rate of $4.75 (administrative)/$10.00 (professional) per quarter hour, and for duplication of copies at the rate of $.05 per copy. The first 100 copies and two hours of research time are not charged, and charges must exceed $25.00 before we will charge a fee.

The FOIA requires an agency to respond within 20 working days after receipt of the request, and EOIR endeavors to meet this standard. The FOIA permits a ten-day extension of this time period, pursuant to 5 U.S.C. § 552(a)(6)(B), based on unusual circumstances. Your request involves "unusual circumstances," and EOIR is extending the time period to respond by an additional 10 working days because your request either requires the collection of records from field offices, or involves a search for numerous records that will necessitate a thorough and wide-ranging search at headquarters.

EOIR FOIA requests are placed in one of three tracks. Track one is for those requests that seek and receive expedited processing pursuant to subsection (a)(6)(E) of the FOIA. The second track is for simple requests that do not involve voluminous records or lengthy consultations with other entities. Simple requests generally receive a response in about 28 business days. Track three is for complex requests that involve voluminous records and for which lengthy or numerous consultations are required, or those requests that may involve sensitive records. Complex requests generally receive a response in six months to one year. As a matter of default, your request has been placed in the second track for simple requests. If EOIR intends to place your request in track three for complex requests or if you have requested expedited processing, EOIR will contact you in a separate letter.

If you have any questions regarding unusual circumstances, you may contact the EOIR FOIA Service Center to discuss reformulation or an alternative time frame for the processing of your request with the analyst handling your request or the FOIA Public Liaison at the telephone number 703-605-1297 for any further assistance and to discuss any aspect of your request. Additionally, you may contact the Office of Government Information Services (OGIS) at the National Archives and Records Administration to inquire about the FOIA mediation services they offer. The contact information for OGIS is as follows: Office of Government Information Services, National Archives and Records Administration, Room 2510, 8601 Adelphi Road, College Park, Maryland 20740-6001; e-mail at ogis@nara.gov; telephone at 202-741-5770; toll free at 1-877-684-6448; or facsimile at 202-741-5769.

Sincerely,

Mai Phung

EOIR# 2018-16436

Exhibit 4

From: ice-foia@dhs.gov
To: Kate Melloy Goettel
Subject: ICE FOIA Request 2018-ICFO-19918
Date: Wednesday, February 14, 2018 12:55:05 PM

February 14, 2018

KATE GOETTEL
National Immigrant Justice Center
208 LASALLE ST
STE 1300
CHICAGO, IL 60604

RE: ICE FOIA Case Number 2018-ICFO-19918

Dear Ms. GOETTEL:

This acknowledges receipt of your Freedom of Information Act (FOIA) request to U.S. Immigration and Customs Enforcement (ICE), dated February 06, 2018, and to your request for a waiver of all assessable FOIA fees. Your request was received in this office on February 06, 2018. Specifically, you requested:

1. The total number of individuals granted withholding of removal in FY 2017.
2. The total number of individuals granted withholding of removal who were removed in FY 2017.
3. For those individuals described in Request #2, the total number of individuals who were removed to a country for which they had a connection, as described in 8 USC 1231(b)(2)(D) and 1231(b)(2)(E)(i)-(vi), for FY 2017.

Due to the increasing number of FOIA requests received by this office, we may encounter some delay in processing your request. Per Section 5.5(a) of the DHS FOIA regulations, 6 C.F.R. Part 5, ICE processes FOIA requests according to their order of receipt. Although ICE's goal is to respond within 20 business days of receipt of your request, the FOIA does permit a 10- day extension of this time period. As your request seeks numerous documents that will necessitate a thorough and wide-ranging search, ICE will invoke a 10-day extension for your request, as allowed by Title 5 U.S.C. § 552(a)(6)(B). If you care to narrow the scope of your request, please contact our office. We will make every effort to comply with your request in a timely manner.
ICE evaluates fee waiver requests under the legal standard set forth above and the fee waiver policy guidance issued by the Department of Justice on April 2, 1987, as incorporated into the Department of Homeland Security's Freedom of Information Act regulations[1]. These regulations set forth six factors to examine in determining whether the applicable legal standard for fee waiver has been met. I have considered the following factors in my evaluation of your request for a fee waiver:

(1) Whether the subject of the requested records concerns "the operations or activities of the government";

(2) Whether the disclosure is "likely to contribute" to an understanding of government operations or activities;

(3) Whether disclosure of the requested information will contribute to the understanding of the public at large, as opposed to the individual understanding of the requestor or a narrow segment of interested persons;

(4) Whether the contribution to public understanding of government operations or activities will be "significant";

(5) Whether the requester has a commercial interest that would be furthered by the requested disclosure; and

(6) Whether the magnitude of any identified commercial interest to the requestor is sufficiently large in comparison with the public interest in disclosure, that disclosure is primarily in the commercial interest of the requestor.

Upon review of your request and a careful consideration of the factors listed above, I have determined to grant your request for a fee waiver.

ICE has queried the appropriate program offices within ICE for responsive records. If any responsive records are located, they will be reviewed for determination of releasability. Please be assured that one of the processors in our office will respond to your request as expeditiously as possible. We appreciate your patience as we proceed with your request.

Your request has been assigned reference number **2018-ICFO-19918**. Please refer to this identifier in any future correspondence. To check the status of an ICE FOIA/PA request, please visit http://www.dhs.gov/foia-status. Please note that to check the status of a request, you must enter the 2018-ICFO-XXXXX tracking number. If you need any further

assistance or would like to discuss any aspect of your request, please contact the FOIA office. You may send an e-mail to ice-foia@ice.dhs.gov, call toll free (866) 633-1182, or you may contact our FOIA Public Liaison, Fernando Pineiro, in the same manner. Additionally, you have a right to right to seek dispute resolution services from the Office of Government Information Services (OGIS) which mediates disputes between FOIA requesters and Federal agencies as a non-exclusive alternative to litigation. If you are requesting access to your own records (which is considered a Privacy Act request), you should know that OGIS does not have the authority to handle requests made under the Privacy Act of 1974. You may contact OGIS as follows: Office of Government Information Services, National Archives and Records Administration, 8601 Adelphi Road-OGIS, College Park, Maryland 20740-6001, e-mail at ogis@nara.gov; telephone at 202-741-5770; toll free at 1-877-684-6448; or facsimile at 202-741-5769.

Regards,

ICE FOIA Office
Immigration and Customs Enforcement
Freedom of Information Act Office
500 12th Street, S.W., Stop 5009
Washington, D.C. 20536-5009
Telephone: 1-866-633-1182
Visit our FOIA website at www.ice.gov/foia

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[1] 6 CFR § 5.11(k).

Exhibit 5

U.S. Department of Justice

Executive Office for Immigration Review

Office of the General Counsel

5107 Leesburg Pike, Suite 1903
Falls Church, Virginia 22041

March 30, 2018

Kate Malloy Goettel
National Immigrant Justice Center
208 S. LaSalle St., Suite 1300
Chicago, IL 60604

Re: FOIA 2018-16436

Dear Ms. Goettel,

This letter is in response to your Freedom of Information Act (FOIA) request to the Executive Office for Immigration Review (EOIR) in which you seek data regarding withholding of removal in FY 2017.

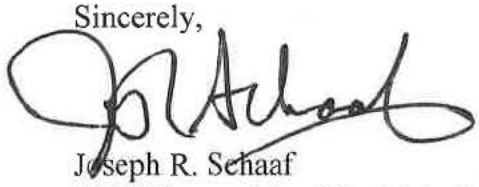
The enclosed documents are responsive to your request. Please note that EOIR data does not capture the information requested in subsection (2) of your request. Therefore, we provided data regarding all motion to reopen receipts. There will be no charge for this information.

For your information, Congress excluded three discrete categories of law enforcement and national security records from the requirements of the FOIA. *See* 5 U.S.C. § 552(c) (2006 & Supp. IV 2010). This response is limited to those records that are subject to the requirements of the FOIA. This is a standard notification that is given to all our requesters and should not be taken as an indication that excluded records do, or do not, exist. *See* http://www.justice.gov/oip/foiapost/2012foiapost9.html.

You may contact our FOIA Public Liaison at the telephone number 703-605-1297 for any further assistance and to discuss any aspect of your request. Additionally, you may contact the Office of Government Information Services (OGIS) at the National Archives and Records Administration to inquire about the FOIA mediation services they offer. The contact information for OGIS is as follows: Office of Government Information Services, National Archives and Records Administration, Room 2510, 8601 Adelphi Road, College Park, Maryland 20740-6001, e-mail at ogis@nara.gov; telephone at 202-741-5770; toll free at 1-877-684-6448; or facsimile at 202-741-5769.

If you are not satisfied with my response to this request, you may administratively appeal by writing to the Director, Office of Information Policy (OIP), United States Department of Justice, Suite 11050, 1425 New York Avenue, NW, Washington, DC 20530-0001, or you may submit an appeal through OIP's FOIAonline portal by creating an account on the following web site: https://foiaonline. regulations.gov/foia/action/public/home. Your appeal must be postmarked or electronically transmitted within 90 days of the date of my response to your request. If you submit your appeal by mail, both the letter and the envelope should be clearly marked "Freedom of Information Act Appeal."

Sincerely,



Joseph R. Schaaf
Chief Counsel for Administrative Law

Enclosure:

EOIR FOIA# 2018-16436

Executive Office for Immigration Review
Planning, Analysis, and Statistics Division

PASD #18-242

I-862 & I-863 Initial Case Completions[1] with an Asylum Withholding Grant and Motion to Reopen Receipts[2] Filed by DHS
Date Range: October 1, 2016 through September 30, 2017
Date of Data Run: March 28, 2018

I-862 & I-863 Initial Case Completions[1] with an Asylum Withholding Grant

Fiscal Year	I-862 & I-863 Initial Case Completions[1] with an Asylum Withholding Grant
FY 2017	1,511

Motion to Reopen Receipts[2] Filed by DHS

Fiscal Year	Motion to Reopen Receipts Filed by DHS[2]
FY 2017	10,023

[1] I-862 & I-863 Initial Case Completions excludes cases with a previous BCR or remand decision (Board), cases with a previous motion grant (Court) unless the motion grant was based off an administrative closure decision, change of venue & transfer decisions and other completion decisions. I-862 & I-863 Initial Case Completions include cases with a case type of Removal, Deportation, Exclusion, Asylum Only & Withholding Only and the decision of Failure to Prosecute.

[2] Motion to Reopen Receipts includes Motion to Reopen, Motion to Reconsider, Motion to Recalendar, Motion to Reopen for Changed Country Conditions an Motion to Reopen for In Absentia.

Exhibit 6

From:	ice-foia@dhs.gov
To:	Kate Melloy Goettel
Subject:	ICE FOIA Response for 2018-ICFO-19918
Date:	Friday, April 13, 2018 7:42:47 AM
Attachments:	2018-ICFO-19918.zip

Ms. GOETTEL,

ICE's final response to your FOIA request, 2018-ICFO-19918, for 1. The total number of individuals granted withholding of removal in FY 2017. 2. The total number of individuals granted withholding of removal who were removed in FY 2017. 3. For those individuals described in Request #2, the total number of individuals who were removed to a country for which they had a connection, as described in 8 USC 1231(b)(2)(D) and 1231(b)(2)(E)(i)-(vi), for FY 2017 is attached.

Please note that the attachment may be password protected. If you are prompted to enter a password when opening the attachment and you did not receive a password it may be in your junk/spam folder.

Sincerely,
ICE FOIA

Exhibit 7

Freedom of Information Act Office

U.S. Department of Homeland Security
500 12th St SW, Stop 5009
Washington, DC 20536

U.S. Immigration and Customs Enforcement

April 13, 2018

KATE GOETTEL
National Immigrant Justice Center
208 LASALLE ST
STE 1300
CHICAGO, IL 60604

RE: ICE FOIA Case Number 2018-ICFO-19918

Dear Ms. GOETTEL:

This letter is the final response to your Freedom of Information Act (FOIA) request to U.S. Immigration and Customs Enforcement (ICE), dated February 06, 2018. You are requesting:

1. The total number of individuals granted withholding of removal in FY 2017;
2. The total number of individuals granted withholding of removal who were removed in FY 2017; and
3. The total number of individuals who were removed to a country for which they had a connection, as described in 8 USC 1231(b)(2)(D) and 1231(b)(2)(E)(i)-(vi), for FY 2017.

ICE has considered your request under the FOIA, 5 U.S.C. § 552. A search of the ICE Office of Enforcement and Removal Operations (ERO) for records responsive to your request produced a 1-page document that is responsive to your request. ICE has determined that the document will be released in their entirety; ICE has claimed no deletions or exemptions.

If you deem this to be an adverse determination, you may exercise your appeal rights. Should you wish to do so, you must send your appeal and a copy of this letter, within 90 days of the date of this letter following the procedures outlined in the DHS FOIA regulations at 6 C.F.R. Part 5 § 5.8, to:

U.S. Immigration and Customs Enforcement
Office of the Principal Legal Advisor
U.S. Department of Homeland Security
500 12th Street, S.W., Mail Stop 5900
Washington, D.C. 20536-5900

Your envelope and letter should be marked "FOIA Appeal." Copies of the FOIA and DHS regulations are available at www.dhs.gov/foia.

Provisions of FOIA allow DHS to charge for processing fees, up to $25, unless you seek a waiver of fees. In this instance, because the cost is below the $25 minimum, there is no charge.

If you need any further assistance or would like to discuss any aspect of your request, please contact the FOIA office and refer to FOIA case number **2018-ICFO-19918**. You may send an e-mail to ice-foia@ice.dhs.gov, call toll free (866) 633-1182, or you may contact our FOIA Public Liaison, Fernando Pineiro, in the same manner. Additionally, you have a right to right to seek dispute resolution services from the Office of Government Information Services (OGIS) which mediates disputes between FOIA requesters and Federal agencies as a non-exclusive alternative to litigation. If you are requesting access to your own records (which is considered a Privacy Act request), you should know that OGIS does not have the authority to handle requests made under the Privacy Act of 1974. You may contact OGIS as follows: Office of Government Information Services, National Archives and Records Administration, 8601 Adelphi Road-OGIS, College Park, Maryland 20740-6001, e-mail at ogis@nara.gov; telephone at 202-741-5770; toll free at 1-877-684-6448; or facsimile at 202-741-5769.

Sincerely,

Meronica D. Stoney
for

Catrina M. Pavlik-Keenan
FOIA Officer

Enclosure(s): 1 page(s)

ERO-LESA Statistical Tracking Unit

~~For Official Use Only (FOUO)/Pre-decisional~~

2018-ICFO-19918

FY2017 ICE Removals with Case Category 5C

Case Category	Total
[5C] Relief Granted - Withholding of Deportation / Removal	21

CERTIFICATE OF SERVICE

I, Trina Realmuto, hereby certify that on June 18, 2019, I filed this Brief of Amici Curiae 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.

June 18, 2019

s/*Trina Realmuto*
Trina Realmuto
American Immigration Council
1318 Beacon Street, Suite 18
Brookline, MA 02446
Tel: 857-305-3600
trealmuto@immcouncil.org