No. 19-897

IN THE

Supreme Court of the United States

TONY H. PHAM, Senior Official Performing the Duties of the Director of U.S. Immigration and Customs Enforcement, *et al.*,

Petitioners,

—v.—

MARIA ANGELICA GUZMAN CHAVEZ, *et al.*,

Respondents.

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

BRIEF OF THE AMERICAN IMMIGRATION COUNCIL, THE AMERICAN IMMIGRATION LAWYERS ASSOCIATION, THE ASYLUM DEFENSE PROJECT, THE BRONX DEFENDERS, BROOKLYN DEFENDER SERVICES, THE CAPITAL AREA IMMIGRANTS' RIGHTS COALITION, THE LEGAL AID SOCIETY, REFUGEE AND IMMIGRANT CENTER FOR EDUCATION AND LEGAL SERVICES, AND THE ROCKY MOUNTAIN IMMIGRANT ADVOCACY NETWORK AS *AMICI CURIAE* IN SUPPORT OF RESPONDENTS

ELIZABETH B. PRELOGAR
Counsel of Record
ELIAS S. KIM
COOLEY LLP
1299 Pennsylvania Avenue, NW
Washington, D.C. 20004
(202) 842-7800
eprelogar@cooley.com

Counsel for Amici Curiae

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STATEMENT OF INTEREST[1]

Amici are nonprofit organizations established to serve immigrants, to increase public understanding of immigration law and policy, and to protect the legal rights of noncitizens. Amici represent and advocate for the legal rights of applicants seeking protection and relief under the immigration laws of the United States. Amici have a strong interest in ensuring that detained noncitizens in withholding-only proceedings have access to bond hearings. Amici have a further interest in ensuring that the United States government lives up to its international and domestic obligations in administering withholding-only proceedings. Amici believe their extensive experience working within the immigration system will help the Court in considering this case.

Additional information about amici may be found in the Appendix. Many of the narratives in this brief involve individuals affiliated with amici's organizations.

INTRODUCTION AND SUMMARY OF ARGUMENT

This case raises a critically important question about whether a noncitizen subject to a reinstated removal order who has established a reasonable fear that she will be persecuted or tortured if removed pursuant to that order must be detained by the U.S. government while her request for withholding of removal is pending. The answer is no.

As relevant here, the Immigration and Nationality Act ("INA") significantly limits the Attorney General's authority to remove noncitizens from the United States by

[1] No counsel for a party authored this brief in whole or in part, and no person other than amici or their counsel made a monetary contribution to this brief's preparation and submission. All parties have consented to this filing.

barring removal to countries where a noncitizen would likely be persecuted or tortured. *See* 8 U.S.C. § 1231(b)(3). That limit on removal equally applies when a noncitizen is subject to a reinstated removal order. *See Fernandez-Vargas v. Gonzales*, 548 U.S. 30, 35 n.4 (2006). The INA further provides that, in general, "pending a decision on whether [a noncitizen] is to be removed from the United States," the noncitizen is not subject to mandatory detention and instead may be released on "bond." 8 U.S.C. § 1226(a); *see* 8 C.F.R. §§ 236.1(d)(1), 1236.1(d)(1) (providing authority to request bond hearings). Mandatory detention does not apply until a removal order "becomes administratively final," triggering a 90-day "removal period" during which the Attorney General "shall remove the [noncitizen] from the United States." 8 U.S.C. § 1231(a)(1)(A)–(B) & (a)(2).

Applying these provisions here, a decision on whether a noncitizen with a reinstated removal order "is to be removed from the United States" remains "pending" if the noncitizen has established a reasonable fear of persecution or torture and been placed in withholding-only proceedings. 8 U.S.C. § 1226(a). While the withholding-only claim is pending, a decision has not been made as to whether the noncitizen will in fact be removed from the United States to the designated country. Put differently, a reinstated removal order that has an associated withholding-only claim cannot "become[] administratively final" until a permissible country for removal has been selected and the INA authorizes the government to carry out the removal. 8 U.S.C. § 1231(a)(1)(B). Thus, 8 U.S.C. § 1226(a) governs the detention of noncitizens in withholding-only proceedings. Those noncitizens therefore have a right to a bond hearing in which an immigration judge can consider their requests for release from detention pending adjudication of their fear-based claims.

That interpretation of the INA draws force from the history and context of the provisions that grant protection

from persecution and torture. Section 1231(b)(3)—which codifies the ban on refoulement—implements deeply rooted moral and geopolitical commitments our nation has made to safeguard human rights. The protection granted in a withholding-only proceeding is about more than determining the rights of the particular individual involved; it is also about honoring the promises the United States has made to the international community. The historical background reinforces the conclusion that a decision to remove an individual remains pending until the government ensures that those promises will not be broken.

Moreover, mandatory detention for individuals in withholding-only proceedings undermines the protection afforded by those proceedings. The stories of noncitizens who have established a reasonable fear of persecution or torture, and thus have been placed in withholding-only proceedings, illustrate the importance of that protection and the critical need to provide an opportunity to obtain release from detention on bond. Although the stories span a range of human experiences, they have a common thread: each involves a noncitizen who endured immense hardship before seeking refuge in the United States and faced additional harm from detention pending adjudication of a fear-based claim.

The fact that a removal order has been reinstated does not change that reality. Noncitizens with reinstated removal orders frequently were unable to present claims for protection before. If a noncitizen establishes a reasonable fear of persecution or torture upon returning to the United States, moreover, adjudication of her withholding-only claim will take months and often years. Mandatory detention during that time can be intolerable, characterized by inhumane conditions and inadequate medical care. Facing prolonged detention, some noncitizens with meritorious withholding-only claims give up those claims before they can be adjudicated and are deported. The

statute does not require that profoundly unjust result, which runs counter to the core commitments our nation has made to protect human rights.

ARGUMENT

I. OUR NATION'S INTERNATIONAL HUMAN RIGHTS COMMITMENTS REINFORCE THAT A DECISION TO REMOVE A NONCITIZEN REMAINS PENDING UNTIL A WITHOLDING-ONLY CLAIM IS RESOLVED.

Withholding-only proceedings implement and reflect our nation's commitments to protect human rights. The history of those commitments reinforces the conclusion that the decision whether a noncitizen will be removed remains pending—and she therefore is not subject to mandatory detention—until her claim for withholding has been considered and acted upon.

A. Our Nation's International Commitments Inform the Proper Understanding of the INA.

The statutory and regulatory provisions that create withholding-only proceedings embody deep moral and geopolitical commitments that the United States has made—and that historical background illuminates the proper interpretation of the provisions.

1. The Post-World-War-II International and Domestic Recognition of Human Rights.

In 1945, member states of the United Nations ratified the United Nations Charter ("UN Charter"), which committed member states to promote "universal respect for, and observance of, human rights and fundamental freedoms for all without distinction as to race, sex, language, or origin." UN Charter art. 55(c). President Franklin Delano Roosevelt had initiated "preparatory work on what would become the UN Charter," believing that the "promotion of

human rights" should "be listed among the UN's main purposes" in forging a new world order following World War II. Mary Ann Glendon, *A World Made New: Eleanor Roosevelt and the Universal Declaration of Human Rights* 4, 6 (2001).

Following ratification of the UN Charter, the United Nations established a special Universal Declaration of Human Rights Drafting Committee. Eleanor Roosevelt chaired the committee and aimed to create a document that would influence the global recognition of human rights, much as the Declaration of Independence had influenced the American government. *Id.* at 235–36. In its final form, the Universal Declaration of Human Rights, Dec. 10, 1948 (the "Declaration"), included 30 articles that defined basic principles and listed specific rights. Over time, these "principles . . . have increasingly acquired legal force, mainly through their incorporation into national legal systems." *Glendon*, *supra* at 237.

Around the same time, U.S. immigration law first provided explicit protection against persecution. In 1950, Congress enacted the Internal Security Act of 1950 ("ISA"), which defined certain classes of noncitizens—anarchists, communists, and their associates—and made them deportable. ISA, Pub. L. No. 831-1024, 64 Stat. 987, 1006. Section 23, however, provided that "[n]o alien shall be deported under any provisions of this Act to any country in which the Attorney General shall find that such alien would be subjected to physical persecution." 64 Stat. at 1010. Several courts had the opportunity to interpret Section 23 and, in doing so, noted the significance of the protection it provided. In *Watts, U.S. ex rel. v. Shaughnessy*, 107 F. Supp. 613 (S.D.N.Y. 1952), the court considered a Basque political activist's claim that the government had failed to provide him with due process when it considered whether Section 23 prohibited deporting him to Spain. In granting his claim, the court wrote that the "provision in question is,

by strong analogy, consonant with our historic tradition of affording asylum to the persecuted, a tradition which reaches back beyond the birth of the Fifth Amendment itself." *Id.* at 615.

2. The 1951 Refugee Convention.

In 1951, the United States played a key role in drafting the first treaty inspired by the Declaration: the UN Convention Relating to the Status of Refugees, Jul. 28, 1951 (the "1951 Refugee Convention"). The 1951 Refugee Convention is "[g]rounded in Article 14 of the [Declaration], which recognizes the rights of persons to seek asylum from persecution in other countries." UN High Comm'r for Refugees ("UNHCR"), *Introduction to Convention and Protocol Relating to the Status of Refugees* 2 (Dec. 2010). The 1951 Refugee Convention defines "refugee" as a person who, "owing to well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion, is outside the country of his nationality and is unable or, owing to such fear, is unwilling to avail himself of the protection of that country." 1951 Refugee Convention art. 1(A)(2).

A critical provision of the 1951 Refugee Convention is its ban on refoulement. Among the "Administrative Measures" required by the Convention is Article 33, titled "Prohibition of Expulsion or Return ('Refoulement')." Article 33 provides, in relevant part, that "[n]o Contracting State shall expel or return ('refouler') a refugee in any manner whatsoever to the frontiers of territories where his life or freedom would be threatened on account of his race, religion, nationality, membership of a particular social group or political opinion." 1951 Refugee Convention art. 33(1).

3. Implementation of the Non-Refoulement Principle in the United States.

In enacting the INA in 1952 to consolidate the immigration laws, Congress initially failed to implement the 1951 Refugee Convention's requirements. INA of 1952, Pub. L. No. 414-477, 66 Stat. 163. The Act "authorized"—but did not require—the Attorney General "to withhold deportation" of a noncitizen facing "physical persecution." 66 Stat. at 214. In 1965, Congress broadened this protection to cover any "persecution on account of race, religion, or political opinion," but continued to make withholding of removal discretionary. INA of 1965, Pub. L. No. 89-236, 79 Stat. 911, 913.

In 1980, the United States finally fulfilled a key promise of the 1951 Refugee Convention by enacting the statutory withholding provision at issue in this case and making withholding mandatory rather than discretionary. David A. Martin, *The Refugee Act of 1980: Its Past and Future*, 3 Mich. J. Int'l L. 91, 109 (1982) (observing that the UN High Commissioner for Refugees had urged President Carter to codify the commitments of the 1951 Convention in "mandatory, rather than discretionary, provisions of U.S. law"). The final version of the statute, the Refugee Act of 1980, Pub. L. No. 96-212, 94 Stat. 102, mirrored Article 33 of the 1951 Refugee Convention. 94 Stat. at 107.

Five years later, President Reagan signed the UN Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, Feb. 4, 1985 ("CAT"). Like the 1951 Refugee Convention, the CAT was inspired by an Article of the Declaration: "[n]o one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment." Declaration art. 5. Upon transmitting the CAT to the Senate, President Reagan emphasized America's role in its drafting and stated that the treaty "marks a significant step in the development during this century of international measures against torture and

other inhuman treatment or punishment." Ronald Reagan, *Message to the Senate Transmitting CAT*, The White House (May 20, 1988). Article 3 of the CAT provides its own prohibition on refoulement, declaring that "[n]o State Party shall expel, return ('refouler') or extradite a person to another State where there are substantial grounds for believing that he would be in danger of being subjected to torture." CAT art. 3.

4. Current Provisions of U.S. Law Protecting Against Refoulement.

Today, these international human rights commitments are codified, in part, at 8 U.S.C. § 1231(b)(3) and are implemented through various regulations governing the procedures for withholding of removal. *See* 8 C.F.R. §§ 208.16, 208.31.

Specifically, 8 U.S.C. § 1231(b)(3) codifies the 1951 Refugee Convention's ban on refoulement. Subject to limited exceptions, "the Attorney General may not remove an alien to a country if the Attorney General decides that alien's life or freedom would be threatened in that country because of the alien's race, religion, nationality, membership in a particular social group, or political opinion." 8 U.S.C. §§ 1231(b)(3)(A), (B). Additionally, a note appended to Section 1231 states that "[i]t shall be the policy of the United States not to expel, extradite, or otherwise effect the involuntary return of any person to a country in which there are substantial grounds for believing the person would be in danger of being subjected to torture." 8 U.S.C. § 1231, 1998 Congress note. To enforce these requirements, the Department of Justice has established proceedings in which a removable noncitizen may prove that she will be persecuted or tortured if she is removed to a particular country—thus preventing her removal there. 8 C.F.R. § 208.16.

If a noncitizen has previously been removed from the United States and enters the country unlawfully, she is subject to a truncated removal proceeding and denied access to other forms of protection. *See* 8 U.S.C. § 1231(a)(5). But this provision does not eliminate the Attorney General's obligation to grant withholding of removal if she establishes a likelihood of persecution or torture. *See Fernandez-Vargas*, 548 U.S. at 35 n.4. Regulations provide for withholding-only proceedings, through which a noncitizen "whose removal is reinstated" must have an opportunity to "express[] a fear of returning to the country of removal." 8 C.F.R. § 208.31(a). Upon expressing such fear, the noncitizen undergoes an interview designed to determine whether she "has a reasonable fear of persecution or torture." *Id.* § 208.31(c). If the noncitizen establishes that she has a reasonable fear, her claim for protection is referred to an immigration judge "for full consideration of the request for withholding of removal only." *Id.* § 208.31(e). The noncitizen may appeal the immigration judge's withholding determination to the Board of Immigration Appeals ("BIA") and seek judicial review of the BIA's determination through a petition to the court of appeals. *Id.* § 208.31(e); 8 U.S.C. § 1252(a)(1), (4).

These interlocking statutory and regulatory provisions accordingly recognize and implement our country's commitment to protecting human rights and barring refoulement in *all* contexts—including in reinstated removal proceedings.

B. A Decision on Whether Removal Will Occur Under a Reinstated Removal Order Remains Pending and Is Not Administratively Final Until the Government Ensures Our Nation's Moral and Geopolitical Commitments Will Not Be Broken.

This case raises the question whether noncitizens with reinstated removal orders who have established a reasonable fear of persecution or torture are entitled to bond hearings or instead are subject to mandatory detention while their claims for withholding of removal are pending.

The INA provides for discretionary detention "pending a decision on whether the [noncitizen] is to be removed from the United States." 8 U.S.C. § 1226(a). Thus, with enumerated exceptions not relevant here, the noncitizen has a right to seek release from detention on bond until all proceedings conclude. *Id.* § 1226(a)(2)(A); *see id.* § 1226(c) (providing for mandatory detention if the noncitizen has committed certain crimes or poses a threat to national security).

Once all proceedings conclude—such that a noncitizen's order of removal has "become[] administratively final"—a "removal period" begins and the Attorney General "shall remove" the noncitizen "from the United States within a period of 90 days." 8 U.S.C. § 1231(a)(1)(A) & (B)(i). "During the removal period"—but not before—the noncitizen is subject to mandatory detention. *Id.* § 1231(a)(2).

As Respondents persuasively explain, the text, structure, and purpose of Sections 1226(a) and 1231 support the conclusion that noncitizens in withholding-only proceedings are entitled to bond hearings. *See* Resps. Br. at 22–37. Amici agree in full with those arguments and do not repeat them here. Instead, amici highlight two aspects of the historical background of the non-refoulement principle

that reinforce the conclusion that a reinstated removal order does not become administratively final—and thus, mandatory detention under 8 U.S.C. § 1231(a)(2) does not apply—until the government obtains authority under the INA to carry out the removal of a noncitizen in withholding-only proceedings following resolution of her claim or the selection of a permissible third country for removal.

First, in assessing administrative finality under 8 U.S.C. § 1231, it is significant that the 1951 Refugee Convention itself describes the ban on refoulement as an "Administrative Measure." Section 1231(b)(3) states "virtually verbatim the nonrefoulement obligation of Article 33 of the Convention." Martin, *supra* at 109; *compare* 1951 Refugee Convention art. 33(1) *with* 8 U.S.C. § 1231(b)(3). Additionally, the exceptions to Section 1231(b)(3) mirror the exceptions specified by Article 1(F) and 33(B) of the 1951 Refugee Convention. Given Section 1231(b)(3)'s purpose to implement the 1951 Refugee Convention, the statutory reference to a removal order becoming "administratively final" should be read to require the completion of a critical "Administrative Measure" required by the Convention: the refoulement determination made in withholding-only proceedings.

Second, and relatedly, it would make little sense to deem a removal order "administratively final" before it has been determined whether removal pursuant to the order would breach our nation's international commitments. Once a noncitizen establishes a fear-based claim, a reinstated order of removal is not executable to that country until the claim has been adjudicated. Withholding-only proceedings reflect and give effect to the deep commitments our nation has made to secure and protect human rights here and around the world.

The government asserts that a reinstated removal order is administratively final notwithstanding the pendency of

withholding-only proceedings designed to safeguard those rights because "a grant of such protection precludes the government from removing" the noncitizen "to a particular country," but "leaves the government free to remove [her] to another country." Pet'rs Br. at 16. But the government ignores the additional administrative proceedings that are necessary before the INA authorizes the government to carry out a noncitizen's removal to a third country. Section 1231(b) does not direct removal *anywhere* in the world, but rather delineates permissible categories of countries and establishes procedures that must be followed to perfect removal to a third country. *See Jama v. Immigration and Customs Enforcement*, 543 U.S. 335, 341 (2005). Once an alternative country is identified, moreover, a noncitizen has the right to seek withholding of removal to that third country. Contrary to the government's interpretation, an order of removal cannot be deemed administratively final triggering the 90-day removal period until the withholding-only proceedings conclude or the determination is made that the noncitizen can be removed to an alternative country without violating domestic and international law.

II. STORIES OF NONCITIZENS IN WITHOLDING-ONLY PROCEEDINGS HIGHLIGHT THE IMPORTANCE OF ALLOWING FOR THE OPPORTUNITY TO SEEK RELEASE FROM DETENTION ON BOND.

The stories of noncitizens in withholding-only proceedings underscore the critical need to protect those who are persecuted and highlight the harms of mandatory detention for those with reinstated removal orders who have established a prima facie fear-based claim.

Mandatory detention is typically reserved for those who face imminent removal or who have been convicted of certain crimes. In light of those purposes, it makes no sense to automatically subject noncitizens with reinstated

removal orders who have established a reasonable fear of persecution or torture to mandatory detention. While the noncitizens' withholding-only claims are pending, removal is far from imminent, as the proceedings often last months and sometimes years. Moreover, many noncitizens with reinstated removal orders were previously unable to seek protection. Preventing noncitizens from obtaining bond hearings and instead subjecting them to mandatory detention serves no purpose and runs counter to our nation's commitment to provide protection to vulnerable populations. The conditions of confinement can be intolerable, creating a substantial risk of further harm. And prolonged detention has dissuaded some noncitizens from pursuing their withholding-only claims to completion. These results are fundamentally unjust—and the statute does not require them.

A. The Stories.

The following eight stories provide important context for this Court's analysis. Each describes the life of an individual who was born into immense hardship and came to the United States seeking refuge. Each individual established a prima facie case for protection in the United States, but nevertheless faced detention of months or even years while awaiting adjudication of that fear-based claim. These stories reflect the critical importance of our nation's commitment to protecting human rights and illustrate the harms that occur from subjecting noncitizens to mandatory

detention during the pendency of withholding-only proceedings.[2]

1. Sara.

Sara was born and raised in Peru, a country with a high incidence of domestic violence. Sara married a local police officer who repeatedly beat her, starting from the beginning of the marriage and continuing over a decade. As a result, their children were born premature. But given her husband's job and societal attitudes towards domestic violence, Sara was hesitant to seek help.

In 2014, however, the abuse escalated with a brutal attack when Sara's husband threw her to the ground and anally raped her. Sara sought help from the police, but they refused to intervene and told her that a man cannot rape his wife. And when the police learned who her husband was, they threatened Sara and told her to watch her words.

In 2015, Sara's husband became enraged and threatened to kill her. For the first time, he threatened to harm their children. Sara again sought help from the police, but they still refused to record her claim. Because her husband's position on the police force would have enabled him to track her across Peru, Sara determined her only option was to flee the country.

Although Sara was detained at the U.S. border, an asylum officer determined she had demonstrated a credible fear of persecution. At Sara's hearing, however, the immigration judge misinterpreted her request for relief. Confused, scared, and without the assistance of counsel, Sara was removed.

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[2] Attorney declarations supporting the stories collected in this brief are on file with counsel for amici, and underlying documentation supporting each story is on file with amici. Pseudonyms are used in this brief to protect the noncitizens' identities.

Months later, Sara again fled to the United States and was apprehended by a Border Patrol agent. The agent noted that Sara had previously been removed and reinstated her prior removal order. But Sara expressed her intent to seek withholding of removal to Peru and was transferred to a detention center. Shortly thereafter, an officer determined she had established a reasonable fear of persecution and referred her case to an immigration judge.

Because Sara was subject to a reinstated removal order, the government told her she was not eligible to be released from detention on bond. Sara thus remained detained for the duration of her withholding-only proceeding. Finally, after six months in detention, Sara received a hearing before the immigration judge. She was granted withholding of removal the same day and was released from detention.

2. Soledad.

Soledad was born in Guatemala. She and her family are Quiché—an indigenous people descended directly from the Mayans. When Soledad's grandfather died, he left a parcel of land to Soledad's uncle and mother. Soledad's uncle claimed ownership of the entire parcel, however, asserting that women should not be able to own property. In response, Soledad helped her mother file a civil action in Guatemalan court.

Realizing that Soledad's mother did not speak Spanish and could not seek further help without Soledad's assistance, Soledad's uncle beat Soledad unconscious and threatened to kill her if she spoke to the authorities again. Soledad reported her uncle to the police, but the police frequently decline to intervene in disputes involving indigenous communities and refused to help. Over the next two years, Soledad's uncle continued to terrorize her, including by coming to her house with a pistol and repeatedly threatening to kill her.

In 2015, fearing for her life, Soledad fled to the United States and was detained by Immigration and Customs Enforcement ("ICE"). After five days in detention, she was removed to Guatemala. Weeks later, Soledad returned to the United States and was again detained. A Border Patrol agent issued a reinstated removal order, but this time Soledad was able to express an intent to seek withholding of removal to Guatemala. Soledad received a reasonable fear interview but broke down emotionally and could not articulate her reasons for fearing persecution. Thus, the officer determined that she did not have a reasonable fear.

With the help of counsel, Soledad appealed that decision. In late 2015, after Soledad's counsel helped present her story more clearly, an immigration judge found Soledad had established a reasonable fear and scheduled a hearing to determine whether she would receive withholding.

Because Soledad was subject to a reinstated removal order, the government told her she could not apply for release on bond, and she remained detained during the pendency of her withholding proceeding. After she had spent almost eight months in detention, Soledad was granted withholding of removal and was released.

3. Marcos.

Marcos was born in El Salvador during the Salvadoran Civil War. The year after the war ended, the United States conducted mass deportations of members of the Mara Salvatrucha ("MS-13") gang, many of whom regrouped in El Salvador. MS-13's ascent to power was accomplished through a campaign of terror, and Marcos was one victim. In the mid-2000s, Marcos attempted to enter the United States. After four months in detention, he was removed to El Salvador. Upon returning to El Salvador, Marcos opened a small store. Shortly thereafter, members of MS-13, one wielding a machete, came to Marcos's store and

assaulted Marcos's wife and stepson. When the MS-13 members learned that Marcos's family had reported them to the police, they threatened to kill him. Thereafter, the same four MS-13 members repeatedly returned to Marcos's home and demanded extortion payments.

MS-13 continued to extort Marcos for years and regularly increased the amounts they demanded. Although Marcos attempted to keep up with the payments, he eventually was unable to do so. As punishment, members of MS-13 assaulted Marcos while he was riding his bike home. They fired gunshots that knocked Marcos off his bike, slashed him with knives, and sodomized him with their guns. Marcos was saved by a passing driver and, upon being taken to the hospital, made another police report. MS-13 found out about this report and once again threatened to murder Marcos.

After this brutal assault, Marcos fled to the United States, entered undetected, and made his way to New York. In New York, Marcos made a life for himself, getting married, starting a family, and volunteering with an immigrant advocacy group. MS-13 continued to terrorize Marcos from afar, however, murdering two of his family members and leaving death threats to Marcos on the bodies.

In 2018, Marcos was detained by ICE and his earlier removal order was reinstated. Marcos eventually was able to secure release on bond because of the Second Circuit's decision in *Guerra v. Shanahan*, 831 F.3d 59 (2d Cir. 2016), which found that 8 U.S.C. § 1226(a) applies to the detention of noncitizens with reinstated removal orders in withholding-only proceedings. After being released from detention, Marcos was able to return to his family and community.

When Marcos moved for deferral of removal under the CAT, the government stipulated that he had established a

reasonable fear of torture and agreed that his removal should be deferred.

4. Jaime.

Jaime was born in Honduras in the 1970s, a few years before Colombia's Medellin cartel overthrew the Honduran head of state. These events permanently weakened law enforcement institutions in Honduras.

When Jaime was an adult, his mother was brutally murdered by a man she had been dating, the leader of a powerful criminal organization. Soon thereafter, Jaime learned that members of the organization were looking for him and his family.

In 2005, Jaime fled to the United States, but he was apprehended by a Border Patrol agent and summarily removed.

Two months later, Jaime returned to the United States, entered undetected, and moved to Brooklyn. Over the next ten years, Jaime lived a peaceful life, working and raising his children with his partner. But back in Honduras, the organization that killed Jaime's mother murdered three more members of Jaime's family.

In 2014, Jaime was arrested for a misdemeanor. Although that case was fully dismissed, Jaime was identified by ICE agents who released him on an order of supervision. Jaime requested a reasonable fear interview and reported to all his check-ins. But in 2017, at a routine check-in, a deportation officer provided Jaime with a notice of intent to reinstate his removal order and Jaime was suddenly and unexpectedly detained.

After a month in detention, Jaime finally received a reasonable fear interview. The officer determined that Jaime had established a reasonable fear of persecution and referred his case to an immigration judge. Under the Second Circuit's decision in *Guerra*, Jaime had the

opportunity to seek release on bond. At Jaime's initial hearing, the immigration judge found that he was neither a flight risk nor a danger to the community, and released him on a low bond so that he could be reunited with his family.

Two years later, Jaime was granted withholding of removal to Honduras.

5. Carlos.

Carlos was born in Honduras and is a member of the Garifuna, an indigenous people. He is diabetic and suffers from chronic back pain.

Carlos was a lifelong victim of Honduras's drug cartels. The Garifuna people primarily reside in small towns along Guatemala's Mosquito Coast, which is a key transit zone for drug traffickers. To acquire as much land as possible, the cartels have killed residents and bribed local government officials. Kendra McSweeney & Zoe Pearson, *Prying Native People from Native Lands: Narco Business in Honduras*, NACLA (Feb. 4, 2014), https://perma.cc/4M8P-LGTR.

For most of his adult life, Carlos was outspoken against the cartels and their bureaucratic allies. As a result, the cartels threatened Carlos's life, attempted to kidnap him, and burned down his home. After these initial efforts at intimidation did not work, cartel operatives attempted to kill Carlos and, during one attempt, killed Carlos's daughter.

Carlos fled to the United States and lived in New York for six years before being deported. Upon Carlos's return to Honduras, the cartels immediately discovered where Carlos was living, destroyed his belongings, and set his room on fire.

In 2014, Carlos fled to the United States once again and was apprehended at the border. After hearing Carlos's story, ICE released him on an order of supervision, requiring that he attend periodic check-ins. Carlos returned

to New York and became an integral member of his community. He joined a local church and became heavily involved with its community service efforts.

Additionally, Carlos started seeing a doctor about his diabetes and chronic pain. The doctor helped Carlos make significant changes to his diet and medications to treat his diabetes without being dependent on insulin and, over time, Carlos's health significantly improved.

In 2017, at a check-in with ICE, Carlos was arbitrarily detained. He received a reasonable fear interview and was referred to an immigration judge.

While he was detained, Carlos received substandard medical care. The facility's staff failed to monitor his blood sugar, injected him with insulin against his wishes, and fed him a high-carbohydrate diet. As a result, Carlos frequently felt faint and dizzy. After Carlos's doctor reviewed medical records produced by the facility, she expressed alarm at Carlos's high glucose levels and deteriorating health.

Under *Guerra*, Carlos was able to seek release on bond. Dozens of members of Carlos's community—including leaders from Carlos's church and a neighbor whose autistic son Carlos had cared for—submitted letters attesting to Carlos's character. In addition, Carlos's doctor wrote a letter explaining how continued detention severely endangered his health. After two months of detention, Carlos was released on bond. Three years later, his claim for withholding is still pending.

6. Ava.

Ava is a transgender woman from Mexico. Long before Ava transitioned, her father beat her for failing to conform to traditional gender norms. Ava experienced violence and abuse outside her home as well, including being raped by an older neighbor. When Ava was old enough to get a job, her place of business was repeatedly

invaded by gang members who thought that Ava and her coworkers would be easy targets for extortion.

Eventually, Ava fled her rural hometown for a larger city, hoping to find acceptance of her identity. But Ava once again became a target for extortion by a gang. After reaching a breaking point, Ava refused to comply with the gang's demands. In response, the gang beat Ava with their guns, kicked her in the face, and sodomized her with a piece of wood.

In 2001, Ava fled to the United States. Although Ava was detained at the border and summarily removed, she returned to the United States the same day. After making her way to New York, Ava obtained a job in a restaurant.

In 2015, Ava was arrested for a misdemeanor but did not receive any jail time. Ava's arrest put her back on ICE's radar, however. Her 2001 removal order was reinstated, and she was placed in a detention facility in New York. In detention, Ava was beaten and sexually abused by fellow detainees.

While Ava was detained, the Second Circuit decided *Guerra*. Thus, in January 2017, after spending nearly two years in detention, Ava was finally able to obtain release on bond. Release allowed her not only to escape further abuse, but also to return to her old job, start therapy, complete her GED, and begin pursuing a bachelor's degree. Almost four years later, Ava's claim for withholding of removal remains pending.

7. Gabriel.

Gabriel was born in Guatemala to a family of political activists. When Gabriel was young, his father, who had spoken out against repressive government policies, was murdered by a pro-government militia. In adulthood, Gabriel became an active member of the Guatemalan Congress's primary opposition party. Gabriel is also a member of one of Guatemala's many indigenous groups

and suffers from a chronic condition that requires frequent medication. For all these reasons, Gabriel and his family were constant targets of threats and violence.

After Gabriel was tortured by government security forces, he came to the United States without his family. Although an asylum officer determined that Gabriel had a credible fear of torture, Gabriel decided that he had to return to Guatemala to care for his family, including his daughter who has cerebral palsy and cannot walk without assistance. Thus, after spending over seven months in detention, Gabriel gave up his claims and was removed from the country.

In June 2019, Gabriel returned to the United States with his family. ICE released him on an order of supervision, requiring him to wear an ankle monitor and attend weekly check-ins.

At a subsequent check-in, ICE inexplicably detained Gabriel and transferred him to a detention facility in New Jersey. The facility initially refused to provide Gabriel with the medication he needed to treat his chronic condition and he became ill. Several months later, Gabriel finally received a reasonable fear interview. The officer determined that Gabriel had established a reasonable fear of torture and placed him in withholding-only proceedings.

Five months after being detained, Gabriel was released on bond. Gabriel's claim for withholding of removal is still pending.

8. Ronaldo.

Ronaldo has lived in Honduras for most of his life and has suffered at the hands of the MS-13 gang. MS-13 tried to recruit Ronaldo's daughter to sell drugs at the school she attended. After Ronaldo told the gang to leave his family alone, an MS-13 member came to Ronaldo's house with a gun. Ronaldo again refused to give MS-13 access to his daughter, and the member shot Ronaldo in the back. After

Ronald was released from the hospital, he fled to the United States.

In 2015, Ronaldo arrived in the United States and was immediately detained by ICE. After Ronaldo expressed his intent to seek withholding of removal under the CAT, he was moved to a detention facility in Virginia.

Although Ronaldo was eligible for release on bond, he did not have the means to pursue it. Accordingly, Ronaldo remained in detention. Seven months later, a Virginia immigration court scheduled a hearing for his claim. But after the court rescheduled his hearing, Ronaldo decided that he could no longer endure detention and had to return to Honduras to care for his family. He gave up his claims and was removed from the country.

B. Having an Opportunity to Obtain Release on Bond Is Critically Important to Individuals in Withholding-Only Proceedings.

As these stories illustrate, individuals who have established a reasonable fear of persecution and are placed in withholding-only proceedings may be detained for months or years before their claims are adjudicated. Many times, the individuals were previously unable to present their claims for protection. And the conditions of detention can be intolerable—sometimes requiring noncitizens to abandon meritorious claims for withholding of removal and instead return to countries where they will face further persecution. These realities reinforce the need to provide an opportunity for individuals in withholding-only proceedings to obtain release on bond.

1. Many Noncitizens With Reinstated Removal Orders Previously Were Unable to Present Claims for Protection.

While the government emphasizes that noncitizens with reinstated removal orders were previously removed from the United States, many individuals in that situation

were unable to present claims for protection before. A September 2017 report issued by the American Immigration Counsel ("AIC")—an amicus here—found that many noncitizens reported that they were not asked required questions about their fear of persecution before being removed from the United States. Sara Campos & Guillermo Cantor, *Deportations in the Dark: Lack of Process and Information in the Removal of Mexican Migrants*, American Immigration Council 3 (Sept. 19, 2017), https://perma.cc/8EDF-Y6ZE. Specifically, 334 of 600 noncitizens who were deported from the United States to Mexico in expedited removal proceedings reported that they had not been asked whether they feared being returned or would be harmed if they were removed to their home country or country of last residence. *Id.* at 5.[3] Several of these noncitizens further stated that immigration officers had actively thwarted their plans to seek relief. *Id.* at 6–8. For example, one explained that although he "was told [he] would have a credible fear interview," he was deported the night before the interview was supposed to occur. *Id.* at 7.

In addition, a 2017 report by the Department of Homeland Security's Office of the Inspector General found that language assistance is "not always" provided to noncitizen detainees, despite regulations requiring that assistance. U.S. Department of Homeland Security, Office of Inspector General, *Concerns about ICE Detainee Treatment and Care at Detention Facilities* 4 (Dec. 11, 2017) ("DHS OIG

[3] The INA provides that immigration officers conducting expedited removal proceedings must "create a record of the facts of the case and statements," 8 C.F.R. § 1235.3(b)(2), using a form that asks whether the noncitizen has "any fear or concern about being returned to [his or her] home country" and whether the noncitizen would "be harmed" if returned to his or her "home country or country of last residence," U.S. Comm'n on Int'l Religious Freedom, *Barriers to Protection: The Treatment of Asylum Seekers in Expedited Removal* 18 n.21 (2016) (reproducing form), https://perma.cc/8543-WRAE.

Report"), https://perma.cc/TZC5-P6WM. Specifically, the inspectors found that "[a]t some facilities, problems began at intake where facility staff failed to use interpretation service for detainees who did not speak English." *Id.* And although every detainee is "supposed to receive the *ICE National Detainee Handbook*," which "cover[s] essential information"—including informing noncitizens of their right to obtain counsel and to seek withholding of removal if they fear persecution in their home countries—the inspectors found that "detainees were not always given handbooks in a language they could understand." *Id.*; *see* U.S. ICE, *Enforcement and Removal Operations National Detainee Handbook* 5 (Apr. 2016) (containing information about withholding of removal), https://perma.cc/5EAC-WCFN. This failure exacerbates the existing difficulty of obtaining counsel. Indeed, only 14 percent of detained noncitizens secure counsel, primarily because attorneys must adhere to strict visitation rules and because detention centers are often located a great distance from the noncitizen's place of residence or apprehension. Ingrid Eagly & Steven Shafer, *Access to Counsel in Immigration Court*, American Immigration Council (Sept. 28, 2016), https://perma.cc/YW5U-7KUA.

Based on these deficiencies, individuals with reinstated removal orders may not have previously been able to seek protection. And even those who previously received credible fear interviews and have meritorious claims may not ultimately have had their claims for protection properly considered, as the stories in Part A above illustrate. For example, Sara was originally removed after establishing a credible fear but before her protection claim was adjudicated because the immigration judge misunderstood her request. And Gabriel gave up his claim for withholding and was removed after establishing a reasonable fear but before his claim was adjudicated because he needed to care for his disabled daughter.

Additionally, a noncitizen previously removed from the United States may be subject to new persecution following the removal, necessitating a second attempt to seek refuge in the United States. For example, Marcos was removed for the first time nearly a decade before he returned to the United States and made his withholding-only claim. In that decade before he returned, he was robbed, extorted, and tortured by a powerful criminal organization. When Marcos finally returned to the United States and asserted a CAT claim, the government stipulated that he had established a reasonable fear of torture and agreed that his removal should be deferred.

In short, the mere fact that a removal order was reinstated does not establish that an individual previously had a sufficient opportunity to present a claim for protection. The opportunity to obtain release on bond should not be denied simply because a noncitizen is in removal proceedings for a second time.

2. Detention May Be Intolerable and Can Prompt Noncitizens to Abandon Meritorious Claims for Withholding of Removal.

Although the mandatory detention provision in Section 1231 contemplates that the removal period will generally conclude within 90 days, *see* 8 U.S.C. § 1231(b), detention pending adjudication of a withholding-only claim often lasts far longer. A 2015 report found that even when a case reaches only the minimum tier of review—"the IJ made a final decision and neither party appealed"—the average length of detention is 114 days. David Hausman, *Fact Sheet: Withholding-Only Cases and Detention*, ACLU Immigrants' Rights Project 2, https://perma.cc/35PC-GBH6 (Apr. 19, 2015). In a more standard case, where at least one party appeals to the Board of Immigration Appeals, the average length of detention is 301 days. *Id.*

And in cases where a party petitions to a court of appeals, detention lasts nearly three years. *Id.*

As that detention stretches on, the conditions of confinement can be intolerable. The 2017 DHS OIG Report "identified problems that undermine the protection of detainees' rights, their humane treatment, and the provision of a safe and healthy environment." DHS OIG Report at Introduction. The inspectors described "concerns about a lack of professionalism and inappropriate treatment of detainees by facility staff, which fostered a culture of disrespect and disregard for detainees' basic rights." *Id.* at 6. For example, "multiple detainees corroborated an incident in which a guard yelled at detainees for several minutes, while threatening to lock down detainees at his discretion." *Id.* The inspectors also found that detainees' rooms were covered in mold, that some bathrooms had no hot water, and that facilities often failed to provide "basic hygienic supplies, such as toilet paper, shampoo, soap, lotion, and toothpaste." *Id.* at 7.

Inadequate medical care at detention facilities is also well documented—and has many times been fatal. In June 2018, the ACLU and Human Rights Watch identified three categories of frequent medical failures that have caused deaths: "unreasonable delays," "poor practitioner and nursing care," and "botched emergency responses." ACLU & Human Rights Watch, *Code Red: The Fatal Consequences of Dangerously Substandard Medical Care in Immigration Detention* 46, 48 (June 2018), https://perma.cc/45B6-Y7MT. In one example, a detainee died of gastrointestinal cancer after medical staff at the Adelanto Detention Facility repeatedly failed to refer him to a specialist. *Id*. at 45. For two years, the detainee had "suffered from symptoms of undiagnosed cancer including weight loss, body aches, diarrhea, and rectal bleeding, and he was not seen by a specialist until a month before his death." *Id.* The doctor who finally saw him told ICE investigators that the detainee

"had the largest abdominal mass she had ever seen in her practice." *Id.* (internal citations omitted).

Even when detainees do receive medical treatment, the quality of care is frequently inadequate. In one case, a detainee at Elizabeth Detention Center died after medical staff repeatedly gave him double doses of his medications. *Id.* at 48. As another example, a detainee at the Denver Contract Detention Facility died after staff delayed calling 911 for over an hour in order to file transfer paperwork. *Id.* at 50.

The stories of noncitizens in withholding-only proceedings described in Part A above reflect these concerns about the length and conditions of immigration detention. Ava spent two years detained while she awaited adjudication of her withholding-only claim, and she was repeatedly beaten and abused during that time. She finally obtained release after the Second Circuit recognized the availability of bond hearings. Gabriel and Carlos, who suffer from chronic illnesses, did not receive adequate medical care and became ill during their periods of detention. And Ronaldo, who spent seven months in detention, finally gave up his withholding-only claim before it could be adjudicated because he could no longer endure being detained.

Mandatory detention has significant real-world consequences for individuals in withholding-only proceedings who have sought refuge in the United States and established a reasonable fear that they will be persecuted or tortured if they are removed pursuant to a reinstated removal order. And when detention prompts noncitizens to abandon meritorious claims for withholding of removal, our country fails to fulfill its international human rights commitments. The statutory provisions at issue here need not—and should not—be interpreted to require that result.

CONCLUSION

The judgment below should be affirmed.

Respectfully submitted,

ELIZABETH B. PRELOGAR
Counsel of Record
ELIAS S. KIM
COOLEY LLP
1299 Pennsylvania Ave., NW
Washington, DC 20004
(202) 842-7800
eprelogar@cooley.com

Counsel for Amici Curiae

November 12, 2020

APPENDIX

List of Amici Curiae

The American Immigration Council ("Council") is a non-profit organization established to increase public understanding of immigration law and policy, advocate for the fair and just administration of our immigration laws, protect the legal rights of noncitizens, and educate the public about the enduring contributions of America's immigrants. The Council frequently appears before federal courts on issues relating to the interpretation of the Immigration and Nationality Act.

The American Immigration Lawyers Association ("AILA"), founded in 1946, is a non-partisan, nonprofit national association of more than 15,000 attorneys and law professors who practice and teach immigration law. AILA members represent U.S. families, businesses, foreign students, entertainers, athletes, and asylum seekers, often on a pro bono basis, as well as providing continuing legal education, professional services, and information to a wide variety of audiences. AILA has participated as amicus curiae in numerous cases before the U.S. Courts of Appeals and the U.S. Supreme Court.

The Asylum Defense Project ("ADP") provides free legal services to individuals who seek asylum in the United States through two pro bono initiatives—Proyecto Dilley and the Proyecto de Asilo para Solicitantes de Asilo (PASA). Proyecto Dilley represents asylum-seeking families who are detained at the South Texas Family Residential Center in Dilley, Texas, while PASA represents asylum seekers who are subjected to the Migrant Protection Protocols and required to wait in Mexico throughout their removal proceedings. A significant percentage of asylum seekers represented by Proyecto Dilley and PASA—including many children—establish a reasonable fear of

persecution or torture subsequent to the issuance of an order of reinstatement.

The Bronx Defenders is a nonprofit provider of innovative, holistic, and client-centered criminal defense, removal defense, family defense, social work support, and other civil legal services and advocacy to indigent Bronx residents. It represents individuals in over 20,000 cases each year and reaches hundreds more through outreach programs and community legal education. The Immigration Practice of The Bronx Defenders provides removal defense services to detained New Yorkers as part of the New York Immigrant Family Unity Project at the Varick Street Immigration Court and also represents non-detained immigrants in removal proceedings. The Bronx Defenders' removal defense practice extends to motions to reopen, appeals and motions before the BIA, and petitions for review.

Brooklyn Defender Services ("BDS") is a public defender organization that represents nearly 30,000 low-income residents of Brooklyn and elsewhere each year in criminal, family, civil, and immigration proceedings, providing interdisciplinary legal and social services since 1996. Since 2013, BDS has provided removal defense services through the New York Immigrant Family Unity Project, New York's first-in-the-nation assigned counsel program for detained New Yorkers facing deportation. Through this program, BDS has represented over 1,500 detained clients, providing deportation defense and challenging immigration detention in immigration court and through federal habeas corpus litigation.

The Capital Area Immigrants' Rights Coalition ("CAIR Coalition") is a nonprofit legal-services organization. CAIR Coalition is the only organization dedicated to providing legal services to adults and children detained and facing removal proceedings throughout Virginia and Maryland. CAIR Coalition provides legal

rights presentations, conducts pro se workshops, and provides legal advice and assistance to individuals in federal immigration detention. CAIR Coalition also secures pro bono legal counsel and provides in-house pro bono representation for adult and children immigrants who are detained.

The Legal Aid Society is the oldest and largest program in the nation providing direct legal services to low-income families and individuals. Founded in 1876, The Legal Aid Society has a long-standing proven track record of providing targeted services to meet the essential legal needs for the most vulnerable New Yorkers. The Society's legal program operates three major practices—Civil, Criminal, and Juvenile Rights—and receives volunteer help from law firms, corporate law departments, and expert consultants that is coordinated by the Society's Pro Bono program.

The Civil Practice maintains an Immigration Law Unit ("ILU"), which is a recognized leader in the delivery of free, comprehensive, and high-caliber legal services to low-income immigrants in New York City and surrounding counties. The ILU has represented hundreds of detained individuals in removal and withholding-only proceedings before immigration judges, on appeals to the Board of Immigration Appeals, the federal courts of appeals, and the United States Supreme Court, and in habeas proceedings in federal court.

Refugee and Immigrant Center for Education and Legal Services ("RAICES") is a BIA-recognized, non-profit, legal services agency with eleven offices throughout Texas. RAICES envisions a compassionate society where all people have the right to migrate and human rights are guaranteed. RAICES defends the rights of immigrants and refugees, empowers individuals, families, and communities, and advocates for liberty and justice. In 2019, RAICES closed nearly 29,000 cases free of charge. RAICES

regularly represents immigrants in withholding-only proceedings who are subject to prolonged detention and seek bond in order to be released from detention while their cases are pending. As a result, the outcome of this case will have a significant impact on RAICES' clients and the communities RAICES serves.

The Rocky Mountain Immigrant Advocacy Network ("RMIAN") is a nonprofit organization that provides free immigration legal services to individuals in immigration detention, as well as to children and families throughout Colorado. RMIAN regularly provides legal representation and social service support to clients subject to withholding-only proceedings, reinstatement of removal, and mandatory detention. RMIAN has a deep interest in ensuring that noncitizens who fear harm in their home countries benefit from the right to due process, including fair immigration adjudication. Access to release from detention prior to the resolution of their legal claims facilitates evidence collection, broader access to medical and mental healthcare, and allows people to live with the support of loved ones as they seek protection pursuant to the laws of the United States.