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 FOR *AMICUS CURIAE* NATIONAL IMMIGRANT JUSTICE CENTER IN SUPPORT OF RESPONDENTS

CHARLES ROTH
NATIONAL IMMIGRANT JUSTICE CENTER
224 S. Michigan Ave
Suite 600
Chicago, IL 60604

NICOLE HENNING
Counsel of Record
JONES DAY
77 West Wacker, Suite 3500
Chicago, IL 60601
(312) 782-3939
nhenning@jonesday.com

DAVID R. FOX
JONES DAY
100 High Street
Boston, MA 02210

Counsel for Amicus Curiae
National Immigrant Justice Center

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES ii

INTEREST OF *AMICUS CURIAE* 1

SUMMARY OF ARGUMENT 2

ARGUMENT 6

I. THE INA TASKS IMMIGRATION JUDGES, NOT IMMIGRATION OFFICERS, WITH REINSTATING PRIOR ORDERS OF REMOVAL 8

A. The INA's Unambiguous Text Requires Immigration Judges to Make Reinstatement Decisions 8

B. Administrative Practice Confirms that Congress Required Immigration Judges to Address Reinstatement 12

C. The Justice Department's Contrary Regulation Is an Unreasonable Interpretation of §§ 1229a and 1231(a)(5) 15

D. The Courts of Appeals Have Erred in Deferring to the Agency's Regulation 20

II. SECTION 1226 GOVERNS RESPONDENTS' DETENTION BECAUSE IMMIGRATION OFFICERS REINSTATED THEIR REMOVAL ORDERS WITHOUT STATUTORY AUTHORITY 25

CONCLUSION 28

TABLE OF AUTHORITIES

Page(s)

CASES

Anderson v. Napolitano,
611 F.3d 275 (5th Cir. 2010) 18

Barton v. Barr,
140 S. Ct. 1442 (2020) 21

Batista v. Ashcroft,
270 F.3d 8 (1st Cir. 2001) 17

Bob Jones Univ. v. United States,
461 U.S. 574 (1983) 25

Bragdon v. Abbott,
524 U.S. 624 (1998) 14, 15, 25

Chevron, U.S.A., Inc. v. Nat. Res. Def.Council, Inc.,
467 U.S. 837 (1984) 8, 20, 21

Cordova-Soto v. Holder,
659 F.3d 1029 (10th Cir. 2011) 18

De Sandoval v. Att'y Gen.,
440 F.3d 1276 (11th Cir. 2006) 20, 21, 22, 23

Debeato v. Att'y Gen.,
505 F.3d 231 (3d Cir. 2007)..... 18

Esquivel-Quintana v. Sessions,
137 S. Ct. 1562 (2017) 21

Fernandez-Vargas v. Gonzales,
548 U.S. 30 (2006) 12, 17, 23

Garcia v. Sessions,
856 F.3d 27 (1st Cir. 2017) 17

TABLE OF AUTHORITIES
(continued)

Page(s)

Garcia-Villeda v. Mukasey,
531 F.3d 141 (2d Cir. 2008)..... 20, 22, 24

Hechavarria v. Sessions,
891 F.3d 49 (2d Cir. 2018)..... 27

INS v. Aguirre-Aguirre,
526 U.S. 415 (1999)..... 19

Lattab v. Ashcroft,
384 F.3d 8 (1st Cir. 2004) .....*passim*

Lorenzo v. Mukasey,
508 F.3d 1278 (10th Cir. 2007)..... 20, 23

Lorillard v. Pons,
434 U.S. 575 (1978)..... 4, 14, 25

Morales-Izquierdo v. Gonzales,
486 F.3d 484 (9th Cir. 2007) (en banc).....*passim*

Ochoa-Carrillo v. Gonzales,
437 F.3d 842 (8th Cir. 2006)..... 20

Ortiz-Alfaro v. Holder,
694 F.3d 955 (9th Cir. 2012)..... 19

Padilla-Ramirez v. Bible,
882 F.3d 826 (9th Cir. 2017)..... 20

Pereira v. Sessions,
138 S. Ct. 2105 (2018)..... 21

Ponta-Garca v. Ashcroft,
386 F.3d 341 (1st Cir. 2004)..... 17

Ponta-Garcia v. Att'y Gen.,
557 F.3d 158 (3d Cir. 2009)..... 20, 21, 23

TABLE OF AUTHORITIES
(continued)

Page(s)

Prieto-Romero v. Clark,
534 F.3d 1053 (9th Cir. 2008) 27

Ramirez-Molina v. Ziglar,
436 F.3d 508 (5th Cir. 2006) 18

Rapanos v. United States,
547 U.S. 715 (2006) 25

Solid Waste Agency of N. Cook Cnty. v. U.S. Army Corps of Eng'rs,
531 U.S. 159 (2001) 25

Tilley v. Chertoff,
144 F. App'x 536 (6th Cir. 2005) 20

Traynor v. Turnage,
485 U.S. 535 (1988) 14, 25

Villa-Anguiano v. Holder,
727 F.3d 873 (9th Cir. 2013) 20

ADMINISTRATIVE DECISIONS

Matter of Lok,
18 I. & N. Dec. 101 (BIA 1981) 10

Matter of Malone,
11 I. & N. Dec. 730 (BIA 1966) 18

STATUTES

8 U.S.C. § 1101 27

8 U.S.C. § 1103 11

8 U.S.C. § 1158 ..... 3, 11, 17

8 U.S.C. § 1182 ..... *passim*

TABLE OF AUTHORITIES
(continued)

Page(s)

8 U.S.C. § 1225 ..... 3, 10, 12
8 U.S.C. § 1226 ..... *passim*
8 U.S.C. § 1227 ..... 2, 9, 21, 22
8 U.S.C. § 1228 12
8 U.S.C. § 1229a ..... *passim*
8 U.S.C. § 1229b 3, 11, 15
8 U.S.C. § 1229c 15
8 U.S.C. § 1231 ..... *passim*
8 U.S.C. § 1252 ..... 3, 4, 13, 20
8 U.S.C. § 1254 15

OTHER AUTHORITIES

8 C.F.R. § 3.10 (1995) 10
8 C.F.R. § 6.1 (1952) 13
8 C.F.R. § 208.31 17
8 C.F.R. § 241.8 (2020) 4, 16, 17
8 C.F.R. § 242.23 (1965) 4
8 C.F.R. § 242.23 (1996) 13, 15, 18
8 C.F.R. § 1003.1 ..... 11, 19
8 C.F.R. § 1003.10 (2014) 3, 10
8 C.F.R. § 1240.10 22
8 C.F.R. § 1240.12 22

TABLE OF AUTHORITIES
(continued)

Page(s)

Deportation Proceedings Under Section 242(f) of the Act, 26 Fed. Reg. 12,282 (Dec. 23, 1961)..... 4, 13

H.R. Rep. 104-828 (1996) 12, 14, 24

Immigration and Naturalization Serv., Inspection & Expedited Removal of Aliens; Detention & Removal of Aliens; Conduct of Removal Proceedings; Asylum Procedures, 62 Fed. Reg. 10,312 (Mar. 6, 1997)..... 16

INTEREST OF *AMICUS CURIAE*[1]

The National Immigrant Justice Center (NIJC), a program of the Heartland Alliance for Human Needs and Human Rights, is a Chicago-based not-for-profit organization that provides legal representation and consultation to low-income immigrants, asylum-seekers, and refugees, including survivors of domestic violence, victims of crimes, detained immigrant adults and children, and victims of human trafficking, as well as immigrant families and other non-citizens facing removal and family separation. In 2019, through its staff attorneys and its network of approximately 2000 pro bono attorneys, NIJC provided legal services to more than 10,000 non-citizens.

NIJC promotes respect for human rights and access to justice for immigrants, refugees, and asylum seekers through policy advocacy, impact litigation, and public education. NIJC has a deep interest in ensuring that immigration statutes are properly interpreted and that non-citizens benefit from all of the procedural and substantive rights that Congress granted them.

---

[1] Pursuant to Rule 37.3(a), counsel for all parties consented in writing to the filing of this brief. No counsel for any party authored this brief in any part, and no person or entity other than *amicus*, *amicus*'s members, or *amicus*'s counsel made a monetary contribution to fund the preparation or submission of this brief.

SUMMARY OF ARGUMENT

The question presented in this case would never arise under a proper interpretation of the governing statute. The decision below and much of the parties' briefing assume that the Immigration and Nationality Act (INA) authorizes the agency's practice of having immigration officers, rather than immigration judges, decide whether to reinstate prior orders of removal under 8 U.S.C. § 1231(a)(5). In fact, however, the INA is properly interpreted to prohibit that practice, and to require that reinstatement determinations, like withholding determinations, be made by immigration judges only. The question supposedly presented in this case, of the detention of aliens whose removal orders were reinstated by immigration officers, thus will never arise under a proper interpretation of the statute.

I.A. The INA expressly provides that "[a]n *immigration judge* shall conduct proceedings for deciding the inadmissibility or deportability of an alien," and that "a proceeding under [8 U.S.C. § 1229a] shall be the sole and exclusive procedure" for determining admissibility and removability of aliens. 8 U.S.C. § 1229a(a) (emphasis added).

Reinstatement decisions fall directly within that express provision requiring immigration judge hearings. Reinstatement decisions are determinations of "admissibility" and "deportability," *id.* § 1229a(a)(1), because the grounds for reinstatement—unlawful reentry following a prior order of removal, *id.* § 1231(a)(5)—render an alien both inadmissible and deportable, *id.* §§ 1182(a)(9)(C), 1227(a)(1)(A), (B). Reinstatement decisions are also

determinations "whether an alien may be . . . removed from the United States," *id.* § 1229a(a)(3), because if an order of removal is reinstated, "the alien shall be removed" from the United States, *id.* § 1231(a)(5).

Nothing in the INA provides for different procedures to govern reinstatement decisions—unlike in many other areas where Congress did specify alternative procedures. *See, e.g.*, *id.* § 1225(b)(1)(A)(i), (c). The INA does provide for reinstatement if "the Attorney General finds" the requirements met. *Id.* § 1231(a)(5). But the INA uses that same language to describe many other issues that immigration judges routinely adjudicate. *See, e.g.*, *id.* § 1229b (withholding of removal); *id.* § 1158(b)(1) (asylum); *id.* § 1182(a) (inadmissibility). Immigration judges are appointed by the Attorney General, and "act as the Attorney General's delegates in the cases that come before them," including in conducting "hearings under [§ 1229a]." 8 C.F.R. § 1003.10(a) (2014).

I.B. Administrative practice confirms that the INA's text requires immigration judges, not immigration officers, to make reinstatement decisions. Congress enacted the present-day reinstatement provision as part of a wide-ranging amendment in 1996. *See* Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (IIRIRA), Pub. L. No. 104-208, div. C, § 302, 110 Stat. 3009-546, 3009-579 to 584. In doing so, Congress expanded an existing reinstatement of removal provision first enacted in 1950 and amended in 1952. *See* Immigration & Nationality Act, Pub. L. No. 82-414, § 242(f), 66 Stat. 163, 212 (1952) (codified at 8 U.S.C. § 1252(f) (1952)). For decades before IIRIRA's enactment, all reinstatement determinations had been made by the

officials now known as immigration judges, as part of deportation hearings. *See* Deportation Proceedings Under Section 242(f) of the Act, 26 Fed. Reg. 12,282 (Dec. 23, 1961) (codified at 8 C.F.R. § 242.23 (1965)). Congress toughened the substantive aspects of the reinstatement provision in IIRIRA, but it made no change to the prior provision's language concerning the proper decisionmaker, which, since 1952, has been "the Attorney General." *See* 8 U.S.C. § 1231(a)(5); 8 U.S.C. § 1252(f) (1996). By re-enacting that same language as part of IIRIRA, Congress ratified the existing administrative practice under which such determinations must be made by immigration judges. *See, e.g.*, *Lorillard v. Pons*, 434 U.S. 575, 580 (1978).

I.C. After IIRIRA's enactment, and despite IIRIRA's express text and the decades of administrative practice, the agency abruptly changed course and promulgated a regulation requiring immigration officers, rather than immigration judges, to make reinstatement decisions. *See* 8 C.F.R. § 241.8 (2020). This regulation is invalid. In addition to being contrary to the INA's express text and an unjustified repudiation of decades of administrative practice, the regulation unreasonably requires non-lawyer immigration officers to adjudicate complicated issues that often arise in connection with reinstatement determinations, including disputes over citizenship, questions about whether subsequent re-entry was "unlawful," and questions about whether a prior order of removal is enforceable. The regulation also perversely insulates such determinations from review by the Board of Immigration Appeals.

I.D. This Court has never before addressed whether the INA requires immigration judges, rather

than immigration officers, to make reinstatement determinations. And while several courts of appeals have upheld immigration officer reinstatement authority, the decisions doing so have not adequately addressed the INA's plain text or the decades of contrary administrative practice. In nearly all cases, the courts simply deferred to the agency's regulation without adequately construing the INA's unambiguous text for themselves, as the law requires.

II. Recognizing that the INA requires immigration judges rather than immigration officers to make reinstatement determinations resolves the question presented in this case. The government's argument that Respondents are detained under § 1231 depends entirely on the government's contention that "Respondents are subject to reinstated orders of removal and thus have already been ordered removed from the United States." Gov't Br. at 12–13. But Respondents' orders of removal were purportedly reinstated by officials without the necessary statutory authority. Respondents therefore have not "already been ordered removed from the United States" even on the government's account. And so their detention is necessarily governed by § 1226 until such time as an immigration judge, rather than an immigration officer, orders reinstatement.

Under the statute properly construed, the jurisdictional gap between a reinstatement determination (by an immigration officer) and a withholding-of-removal determination (by an immigration judge) that gives rise to the question presented in this case need never arise. Because immigration judges must make both the reinstatement determination and the withholding-of-

removal determination, those determinations can be made together as part of the same proceedings. In this way, recognizing that the INA requires immigration judges to decide reinstatement eliminates the apparent statutory gap concerning detention authority that is the focus of the parties' briefing.

ARGUMENT

The decision below, like much of the briefing, proceeds from a false premise. The question of which statute "governs the detention of an alien who is subject to a reinstated removal order and who is pursuing withholding or deferral of removal," Gov't Br. at (I), presumes the regulatory bifurcation of reinstatement determinations (made by immigration officers) from withholding determinations (made by immigration judges). But the text, structure, and history of the relevant provisions of the INA preclude such bifurcation. Congress required immigration judges, not immigration officers, to decide whether to reinstate removal orders.

Lower courts have declined to apply the statute as written, reasoning that Congress' goal of prompt removal would be undermined by a plain-text reading of the statute, and have accordingly deferred to a regulation of the Immigration and Naturalization Service (INS) allowing immigration officers to address reinstatement. But Congress knew how to create streamlined removal proceedings exempt from the otherwise applicable immigration-judge requirement, and it did not do so for reinstatement determinations. Instead, when Congress adopted the present-day reinstatement provision in 1996, it maintained statutory language that the INS had previously

interpreted for nearly four decades as providing for reinstatement determinations to be administered by immigration judges. Congress said nothing in the new provision suggesting any change in such procedures. The INS nevertheless unilaterally changed course shortly after the new provision was enacted in 1996.

The apparent lacuna in the detention statutes that is the subject of this case illustrates the complete lack of statutory support for the agency's present approach to reinstatement. Neither party can point to a detention statute that is clearly on point, for the simple reason that Congress did not create or authorize this convoluted procedure.

The Court should resolve the instant dispute about detention statutes by correcting course and holding that under the INA's plain text, reinstatement determinations must be made by immigration judges, not immigration officers. Immigration officers lack statutory authority to reinstate removal orders. Rather, reinstatement orders and orders denying withholding of removal must be entered by immigration judges. Under the statute's express text, there thus cannot be any aliens whose removal orders have been reinstated solely by immigration officers but who are awaiting withholding determinations from immigration judges. Because there will not be any such aliens, there is no need for the Court to determine whether such aliens have been "ordered removed," as is required for them to be detained pursuant to § 1231. Rather, immigration judges should address both reinstatement and withholding of removal together, with noncitizens held under the authority of § 1226 while such proceedings are pending.

I. THE INA TASKS IMMIGRATION JUDGES, NOT IMMIGRATION OFFICERS, WITH REINSTATING PRIOR ORDERS OF REMOVAL

The plain text of the INA requires immigration judges to address reinstatement. Congress' adoption of the current reinstatement provision in 1996 ratified more than three decades of administrative practice in which immigration judges did just that. The 1997 INS regulation conflicts with that statute, and courts of appeals have erred in upholding it under *Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984).

A. The INA's Unambiguous Text Requires Immigration Judges to Make Reinstatement Decisions

The INA provides in categorical terms that "[a]n immigration judge shall conduct proceedings for deciding the inadmissibility or deportability of an alien." 8 U.S.C. § 1229a(a)(1). The INA further provides that "[u]nless otherwise specified in" the INA, a removal proceeding meeting the requirements of § 1229a "shall be the sole and exclusive procedure for determining whether an alien may be admitted to the United States or, if the alien has been so admitted, removed from the United States." *Id.* § 1229a(a)(3). The determination of whether to reinstate a prior order of removal under 8 U.S.C. § 1231(a)(5) falls squarely within both of these provisions. Such a determination must therefore be made by an immigration judge, pursuant to the procedures set forth in § 1229a.

First, the determination of whether to reinstate a removal order is a determination of both "inadmissibility" and "deportability," and therefore a proceeding that "[a]n immigration judge shall conduct," *id.* § 1229a(a)(1). Under the INA's reinstatement provision, a prior removal order will be reinstated if an alien "has reentered the United States illegally after having been removed or having departed voluntarily, under an order of removal." *Id.* § 1231(a)(5). An alien meeting that test is by definition "inadmissible," because she "has been ordered removed . . . and [has] enter[ed] or attempt[ed] to reenter the United States without being admitted." *Id.* § 1182(a)(9)(C). Such an alien is also by definition "deportable," both because of her inadmissibility and because she is present in the United States in violation of the immigration laws. *Id.* § 1227(a)(1)(A), (B). The reinstatement determination is therefore necessarily a determination of "inadmissibility or deportability," and so among the proceedings that § 1229a(a)(1) expressly provides that an immigration judge in particular "shall conduct."

Second, the reinstatement determination is also a determination "whether an alien may be admitted to the United States or, if the alien has been so admitted, removed from the United States," and it is therefore subject to § 1229a's "sole and exclusive procedure." *id.* § 1229a(a)(3). The reinstatement provision provides that if an order of removal is reinstated, "the alien shall be removed" from the United States. *Id.* § 1231(a)(5). The Government agrees that as a matter of "ordinary English," aliens whose orders of removal have been reinstated have been "ordered removed." Gov't Br. at 14. The reinstatement decision is therefore a determination "whether an alien may be . . .

removed from the United States," so § 1229a(a)(3) requires that § 1229a provide the "sole and exclusive procedure" for making that determination.

Finally, the INA does not "otherwise specif[y]" a different set of procedures to govern reinstatement determinations, in place of a § 1229a hearing before an immigration judge. 8 U.S.C. § 1229a(a)(3). Where Congress displaced a § 1229a hearing in the INA, it did so expressly. In § 1225(b)(1)(A)(i), for example, Congress provided for expedited removal determinations based on a determination by "an immigration officer" "without further hearing or review." Similarly, in § 1225(c), Congress enacted expedited procedures applicable to suspected terrorists, and stated that there would be no "further inquiry or hearing."

Section 1231(a)(5) does state that it applies "[i]f the Attorney General finds" that the requirements for reinstatement are met. *Id.* § 1231(a)(5). But that mention of the Attorney General does not show that Congress displaced § 1229a(a)'s requirement for a hearing before an immigration judge. Immigration judges are appointed by the Attorney General, and "act as the Attorney General's delegates in the cases that come before them," including in conducting "hearings under [§ 1229a]." 8 C.F.R. § 1003.10(a) (2014). The same was true when § 1231(a)(5) was enacted in 1996. *See* 8 C.F.R. § 3.10 (1995); *Matter of Lok*, 18 I. & N. Dec. 101, 107 (BIA 1981) ("Authority to adjudicate an alien's deportability is vested primarily in the Attorney General and his delegates, the immigration judge and the Board [of Immigration Appeals].").

Indeed, immigration judges regularly adjudicate—and are required by § 1229a to adjudicate—other determinations that the INA assigns ultimately to the Attorney General. This includes the cancellation of removal provision, which specifies that "[t]he Attorney General may cancel removal" under certain circumstances, 8 U.S.C. § 1229b, and the asylum provision, which specifies that "the Attorney General may grant asylum" where certain requirements are met, *id.* § 1158(b)(1). It also includes the grounds for inadmissibility that § 1229a(a)(2) requires immigration judges to adjudicate, many of which are framed in terms of what "the Attorney General knows, or has reasonable ground to believe." *Id.* § 1182(a). Congress' seemingly inconsistent express requirements that, on the one hand, "the Attorney General" make these determinations and, on the other, that they be determined "sole[ly] and exclusive[ly]" via a hearing before an immigration judge, § 1229a(a)(3), are reconciled by the power of the Attorney General and his delegates, the Board of Immigration Appeals, to review immigration judges' decision-making. 8 C.F.R. § 1003.1(b)(1)–(3), (h); *see also* 8 U.S.C. § 1103(g)(2) ("The Attorney General shall . . . review such administrative determinations in immigration proceedings, delegate such authority, and perform such other acts as the Attorney General determines to be necessary for carrying out this section.").

The legislative history confirms this plain textual interpretation. Section 1229a's hearing requirement was enacted along with the § 1231(a)(5) reinstatement provision as part of the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (IIRIRA), Pub. L. No. 104-208, div. C, § 302, 110 Stat. 3009-546,

3009-579 to 584. IIRIRA's conference report expressly states that certain sections—including the expedited removal and terrorist provisions described above—are carved out from § 1229a's otherwise mandatory proceedings before an immigration judge, but says nothing about reinstatement proceedings under § 1231(a)(5) being exempted from § 1229a's requirement. *See* H.R. Rep. 104-828, at 211 (1996) (what became § 1229a "shall not affect proceedings under new section [1225](c) (aliens inadmissible on national security grounds), new section [1228] (currently section 242A) (aliens convicted of aggravated felonies), or new section [1225](b)(1) (arriving aliens, or aliens present in the United States without having been admitted or paroled, who are inadmissible for fraud or lack of documents)").

B. Administrative Practice Confirms that Congress Required Immigration Judges to Address Reinstatement

When Congress enacted the present-day reinstatement of removal provision as part of IIRIRA in 1996, it built upon an existing reinstatement-of-removal provision that had first been enacted in 1950, and then amended in 1952. *See Fernandez-Vargas v. Gonzales*, 548 U.S. 30, 33–35 (2006); Immigration & Nationality Act § 242(f), 66 Stat. at 212. IIRIRA's reinstatement provision undeniably "toed a harder line" than these prior provisions, both by expanding the class of aliens whose removal orders could be reinstated and by restricting the relief available to such aliens. *Fernandez-Vargas*, 548 U.S. at 34. But despite that substantive change, IIRIRA kept the procedural portion of the 1952 reinstatement provision intact: like the 1952 statute, IIRIRA made

reinstatement turn on whether "the Attorney General find[s]" that the requirements for reinstatement are met. *See* 8 U.S.C. § 1231(a)(5); 8 U.S.C. § 1252(f) (1996).

Congress' choice to re-enact the pre-IIRIRA reinstatement provision's procedural language is significant. For 35 years before IIRIRA's enactment, INS had consistently interpreted the prior reinstatement provision as requiring a hearing before "special inquiry officers"—the pre-IIRIRA term for immigration judges [2] —by means of the same procedures governing other deportation proceedings. *See* 26 Fed. Reg. 12,282.; *see also* 8 C.F.R. § 242.23 (1996) (version in force at the time of IIRIRA's enactment). Those regulations expressly treated reinstatement as a ground for deportability. 8 C.F.R. § 242.23(a) (1996) ("[T]he order to show cause shall charge [the alien] with deportability under section [1252](f) of the Act."). And they required that "proceedings under [the reinstatement provision] shall be conducted in general accordance with the rules prescribed in" the regulations that set forth the procedures governing *all* deportation proceedings before special inquiry officers. *Id.* § 242.23(b). Such proceedings—like immigration judge proceedings today—were subject to review by the Board of Immigration Appeals, the Attorney General's delegate. *See* 8 C.F.R. § 6.1(b) (1952).

The Court presumes that Congress is "aware of an administrative or judicial interpretation of a statute,"

---

[2] *See* IIRIRA § 371(a), 110 Stat. 3009-645 to 646 (substituting the term "immigration judge" for "special inquiry officer" across the INA).

and understands Congress "to adopt that interpretation when it re-enacts a statute without change." *Lorillard*, 434 U.S. at 580. As a result, "[w]hen administrative and judicial interpretations have settled the meaning of an existing statutory provision, repetition of the same language in a new statute indicates, as a general matter, the intent to incorporate its administrative and judicial interpretations as well." *Bragdon v. Abbott*, 524 U.S. 624, 645 (1998); *see also Traynor v. Turnage*, 485 U.S. 535, 546 (1988) ("[W]e must assume that Congress was aware of the Veterans' Administration's interpretation of 'willful misconduct' at the time that it enacted § 1662(a)(1), and that Congress intended that the term receive the same meaning for purposes of that statute as it had received for purposes of other veterans' benefits statutes.").

There is no evidence that Congress did not "inten[d] to incorporate" the "administrative . . . interpretations" of the reinstatement provision's procedural language when it re-enacted it in IIRIRA. To the contrary, IIRIRA's conference report expressly states Congress' expectation that "the removal proceeding under [§ 1229a] shall be conducted by an immigration judge in largely the same manner as currently provided" for deportation proceedings under pre-IIRIRA law. H.R. Rep. 104-828, at 211. And as explained above, pre-IIRIRA law provided for reinstatement determinations to be made in deportation proceedings before the officials now known as immigration judges Nor does Congress' change to the substantive reinstatement standard imply a change to the decision-maker: The 1996 amendments altered the substantive rules applicable to noncitizens in myriad

other ways, too, but it was not suggested elsewhere that these substantive changes alone meant Congress intended to eliminate immigration judge jurisdiction over those issues.. *Compare, e.g.*, 8 U.S.C. § 1229b(a)(1) with 8 U.S.C. § 1182(c) (1996) (repealed) (cancellation of removal for permanent residents); 8 U.S.C. § 1229b(b)(1) with 8 U.S.C. § 1254(a) (1996) (repealed) (cancellation of removal for non-permanent residents); 8 U.S.C. § 1229c with 8 U.S.C. § 1254(e) (1996) (repealed) (voluntary departure).

Thus, when Congress enacted IIRIRA, there was a decades-old, established administrative practice of having immigration judges determine reinstatement by means of the procedures governing all deportation or removal proceedings. That practice had been enshrined for more than 35 years in in formal INS regulations. *See* 8 C.F.R. § 242.23 (1996). Congress re-enacted the exact same key language used to establish that procedure ("the Attorney General find[s]") as part of the toughened reinstatement provision enacted in IIRIRA. By maintaining the reinstatement provision's procedural language, Congress revealed its "intent to incorporate its administrative . . . interpretations as well." *Bragdon*, 524 U.S. at 645. In other words, it reaffirmed the requirement that reinstatement determinations be made by immigration judges under IIRIRA, as they had been under pre-IIRIRA law.

C. The Justice Department's Contrary Regulation Is an Unreasonable Interpretation of §§ 1229a and 1231(a)(5)

Despite § 1229a's express text and decades of contrary administrative practice, the INS repealed the

existing reinstatement regulations shortly after IIRIRA's enactment. It replaced them with a new regulation that eliminated any hearing before an immigration judge and required the reinstatement determination to be made by an immigration officer instead. *See* Immigration and Naturalization Serv., Inspection & Expedited Removal of Aliens; Detention & Removal of Aliens; Conduct of Removal Proceedings; Asylum Procedures, 62 Fed. Reg. 10,312, 10,379 (Mar. 6, 1997) (codified at 8 C.F.R. § 241.8). That regulation remains in force in largely the same form today. *See* 8 C.F.R. § 241.8 (2020).

During notice and comment rulemaking, commenters objected to the new procedure and, specifically, that the agency had eliminated the requirement for a hearing before an immigration judge during reinstatement proceedings. In response, the INS attempted to justify the procedural change based on substantive changes to the reinstatement provision, including that the new provision stated that the prior order of removal was "not subject to being reopened or reviewed." 62 Fed. Reg. at 10,326. The agency further explained that it would use "fingerprint identification" to "ensure the positive identification of an alien apprehended and removed" under the reinstatement provision. *Id.* The agency seemed to believe that these changes obviated the need for an immigration judge hearing. *See id.* The agency did not, however, explain how to square its new regulation with the statutory history or text, which as explained above, explicitly required immigration hearings on reinstatement. *Supra* Part I.A.

The INS's confidence that "fingerprint identification" and preclusion of relief could replace

immigration judge hearings was seriously misguided. Section 1231(a)(5)'s apparent simplicity is deceptive. For one thing, as the Court has recognized and the facts of this case illustrate, "even an alien subject to [the reinstatement provision] may seek withholding of removal under 8 U.S.C. § 1231(b)(3)(A)." *Fernandez-Vargas*, 548 U.S. at 35 n.4. Withholding of removal claims, if credible, must be adjudicated by an immigration judge regardless of whether the reinstatement determination has already been made.[3] *See* 8 C.F.R. §§ 208.31, 241.8(e).

Other issues, too, must sometimes be resolved during reinstatement proceedings. Reinstatement requires that the alien *be* an alien, *see* 8 U.S.C. § 1231(a)(5), which is sometimes disputed and may not have been resolved in the prior removal hearing. *See*, *e.g.*, *Batista v. Ashcroft*, 270 F.3d 8, 10 (1st Cir. 2001). It requires that the alien have "reentered the United States illegally," 8 U.S.C. § 1231(a)(5), which raises issues when immigration officials readmit previously removed aliens despite the removal order that should have precluded admission. *See, e.g.*, *Ponta-Garca v.*

---

[3] *Fernandez-Vargas* also alluded to "the possibility of asylum" being available in the reinstatement context. 548 U.S. at 35 n.4. The INA provides that "[*a*]*ny alien* who is physically present in the United States . . . , irrespective of such alien's status, may apply for asylum." 8 U.S.C. § 1158(a) (emphasis added). Section 1158 itself specifies several "[e]xceptions"—circumstances in which an application for asylum is unavailable—that do not include reinstatement of removal. *Id.* § 1158(a)(2). While this case does not present the question, there is at least a strong argument that aliens subject to reinstatement are eligible to apply for asylum, in addition to withholding of removal. *See Garcia v. Sessions*, 856 F.3d 27, 43–61 (1st Cir. 2017) (Stahl, J., dissenting).

Ashcroft, 386 F.3d 341, 343 (1st Cir. 2004) (noting that if an alien "did not reenter the country illegally but, rather, was inspected and allowed entry," then "the reinstatement provision would appear to be inapplicable by its express terms"); *Cordova-Soto v. Holder*, 659 F.3d 1029, 1031 (10th Cir. 2011) (removed alien was "waved . . . through" a border checkpoint by an immigration officer after inspection); *Anderson v. Napolitano*, 611 F.3d 275, 277 (5th Cir. 2010) (removed alien "received an immigration stamp in her passport indicating that she was 'admitted' by an immigration official"). And it requires that the prior removal order remain enforceable, which many courts have held precludes reinstatement of erroneous removal orders under certain circumstances. *See, e.g.*, *Debeato v. Att'y Gen.*, 505 F.3d 231, 235–36 (3d Cir. 2007) (removal order may not be reinstated if there would be a "gross miscarriage of justice"); *Ramirez-Molina v. Ziglar*, 436 F.3d 508, 514 (5th Cir. 2006) (similar).

These issues are the normal stuff of hearings conducted before immigration judges, and they could readily be adjudicated in that context. Indeed, they include precisely the issues that the pre-IIRIRA regulation required an immigration judge assessing reinstatement to consider. *See* 8 C.F.R. § 242.23(c) (1996); *see*, *e.g.*, *Matter of Malone*, 11 I. & N. Dec. 730, 731 (BIA 1966) (declining to order reinstatement of removal where prior removal was a "gross miscarriage of justice"). The INS's atextual regulation forces these matters to be addressed instead by non-lawyer immigration officers, outside of a formal hearing, with little to no opportunities for factfinding.

Moreover, by removing reinstatement determinations from immigration judges, the agency's regulation prevents such determinations from being administratively appealed to the Board of Immigration Appeals and subjected to potential review by the Attorney General. *See, e.g.*, *Ortiz-Alfaro v. Holder*, 694 F.3d 955, 958 (9th Cir. 2012) ("[T]here is no way to appeal the reinstatement of a removal order to the BIA."). In other areas of immigration law, the Board of Immigration Appeals provides some guidance to agency adjudicators by issuing published decisions, which receive judicial deference. 8 C.F.R. § 1003.1(d)(1), (g); *INS v. Aguirre-Aguirre*, 526 U.S. 415, 424–425 (1999). The INS's interpretation of Congress' requirement that "the Attorney General find[]" reinstatement to be appropriate, 8 U.S.C. § 1231(a)(5), as authorizing reinstatement decisions to be made by immigration officers rather than immigration judges has the perverse result of precluding Board of Immigration Appeals review of reinstatement decisions. It thereby insulates such decisions from the very process of Board of Immigration Appeals review that Congress and the Attorney General established to ensure the Attorney General's effective supervision of the many matters that the INA tasks to him. This result is contrary to the statute, which tasks "the Attorney General" rather than an individual immigration official with ultimate responsibility for determining reinstatement.[4]

---

[4] Review of reinstatement determinations by the Board of Immigration Appeals is fully consistent with § 1231(a)(5)'s limitations on review. The statute provides that "*the prior order of removal* . . . is not subject to being reopened or reviewed." 8

D. The Courts of Appeals Have Erred in Deferring to the Agency's Regulation

In the face of the INA's clear text and the other arguments just described, Courts of Appeals have erred in upholding the Department of Justice's regulation tasking immigration officers rather than immigration judges with reinstatement decisions.

Most of the Courts of Appeals that have upheld the elimination of immigration judge hearings for reinstatement determinations have done so under the second step of *Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984).[5] Such an approach is improper where, as here, the statute itself expressly and unambiguously resolves

---

U.S.C. § 1231(a)(5) (emphasis added). But it does not preclude review of the decision to reinstate that prior order. Moreover, notwithstanding § 1231(a)(5)'s limitations, 8 U.S.C. § 1252(a)(2)(D), "reinstates [courts'] jurisdiction over certain constitutional claims and questions of law" in the context of reinstated removal orders. *Padilla-Ramirez v. Bible*, 882 F.3d 826, 830 n.2 (9th Cir. 2017) (quoting *Villa-Anguiano v. Holder*, 727 F.3d 873, 877 n.3 (9th Cir. 2013))

[5] *See Lattab v. Ashcroft*, 384 F.3d 8, 19–20 (1st Cir. 2004); *Garcia-Villeda v. Mukasey*, 531 F.3d 141, 148 (2d Cir. 2008); *Ponta-Garcia v. Att'y Gen.*, 557 F.3d 158, 161 (3d Cir. 2009); *Lorenzo v. Mukasey*, 508 F.3d 1278, 1283 (10th Cir. 2007); *De Sandoval v. Att'y Gen.*, 440 F.3d 1276, 1282–83 (11th Cir. 2006). *But see Morales-Izquierdo v. Gonzales*, 486 F.3d 484, 489–95 (9th Cir. 2007) (en banc) (upholding the regulation under *Chevron* step two but noting that it "could probably be decided under the first *Chevron* inquiry"); *Ochoa-Carrillo v. Gonzales,* 437 F.3d 842, 846 (8th Cir. 2006) (concluding with little explanation that the regulation is valid under either step of *Chevron*); *Tilley v. Chertoff*, 144 F. App'x 536, 540 (6th Cir. 2005) (upholding the regulation and finding no ambiguity in the statute, without addressing the arguments laid out *supra*);

the issue. *See, e.g.*, *Pereira v. Sessions*, 138 S. Ct. 2105, 2113 (2018) ("the Court need not resort to *Chevron* deference, as some lower courts have done, for Congress has supplied a clear and unambiguous answer to the interpretive question at hand"); *Esquivel-Quintana v. Sessions*, 137 S. Ct. 1562, 1572 (2017) ("We have no need to resolve whether the rule of lenity or *Chevron* receives priority in this case because the statute, read in context, unambiguously forecloses the Board's interpretation"); *see also, e.g.*, *Barton v. Barr*, 140 S. Ct. 1442 (2020) (construing an aspect of the INA that the Board of Immigration Appeals had addressed, without applying the *Chevron* framework).

Moreover, in upholding the regulation, the courts of appeals have relied on manifestly erroneous rationales. The First Circuit found § 1229a inapplicable because that section "is primarily concerned with proceedings to determine whether aliens are excludable or deportable on one of the bases enumerated in" §§ 1182 and 1227. *Lattab v. Ashcroft*, 384 F.3d 8, 18 (1st Cir. 2004). As explained above, however, *supra* Part I.A., and as the Third and Eleventh Circuits have since acknowledged, reinstatement of a prior order of removal in fact involves just such a basis. *See Ponta-Garcia v. Att'y Gen.*, 557 F.3d 158, 162 (3d Cir. 2009) (reinstatement determinations "involve the 'deportability of an alien'"); *De Sandoval v. Att'y Gen.*, 440 F.3d 1276, 1282 (11th Cir. 2006) ("One of the grounds for 'inadmissibility' listed under § 1182(a) is that the alien

reentered the United States in violation of an existing removal order.").[6]

Several circuits focused on § 1231(a)(5)'s presence in a "separate section," § 1231, that "deals specifically with aliens who already have been ordered removed." *Lattab*, 384 F.3d at 18; *see also Garcia-Villeda v. Mukasey*, 531 F.3d 141, 146 (2d Cir. 2008) (same); *Morales-Izquierdo v. Gonzales*, 486 F.3d 484, 490 (9th Cir. 2007) (same); *De Sandoval*, 440 F.3d at 1281 (similar). This argument overlooks that § 1231 addresses multiple issues that immigration judges are generally tasked with handling, including withholding of removal and the determination of which country an alien will be removed to. 8 U.S.C. § 1231(b); *see also* 8 C.F.R. § 1240.12(d) ("[T]he immigration judge shall identify a country, or countries in the alternative, to which the alien's removal may in the first instance be made, pursuant to the provisions of section [1231](b) of the Act."); *id.* § 1240.10(f). It also overlooks that § 1229a provides a set of procedures "for deciding the inadmissibility or deportability of an alien," while all of the substantive standards governing that determination are located elsewhere, in "separate section[s]" of the INA. *See, e.g.*, 8 U.S.C. § 1182 (inadmissibility); *id.* § 1227 (deportability).

Several circuits also relied on what they saw as Congress's general "dissatisf[action] with the

---

[6] Somewhat similarly, the Second Circuit oddly found § 1229a inapplicable because it "concern[s] only aliens already admitted [lawfully] to the U.S.," *Garcia-Villeda*, 531 F.3d at 146—a construction that is simply wrong, as § 1229a expressly governs removal proceedings whether or not an alien has been "admitted to the United States," 8 U.S.C. § 1229a(a)(3).

performance of the former reinstatement provision," and supposed desire to alter it "dramatically." *Lattab*, 384 F.3d at 18–19; *see also Ponta-Garcia*, 557 F.3d at 162 ("Congress's intent to expedite and streamline reinstatement determinations"); *De Sandoval*, 440 F.3d at 1282 (similar). Such analysis proceeds at far too high a level of generality.[7] Yes, Congress made significant substantive changes to the reinstatement provision in IIRIRA, such that the new provision "toe[s] a harder line." *Fernandez-Vargas*, 548 U.S. at 34. But just as important is what Congress did not change—the requirement that "the Attorney General find" the requirements for reinstatement were met, which decades of administrative practice treated as requiring an immigration judge hearing. *Supra* Part I.B. Similarly, the Tenth Circuit thought that § 1231(a)(5)'s language "assume[d] the use of summary, rather than judicial, proceedings," *Lorenzo v. Mukasey*, 508 F.3d 1278, 1283 (10th Cir. 2007), while the Ninth and Eleventh Circuit's relied on § 1231(a)(5)'s reference to the "Attorney General," *Morales-Izquierdo*, 486 F.3d at 491; *De Sandoval*, 440 F.3d at 1281, in each case ignoring that the INA repeatedly refers to the Attorney General to describe determinations that must be made by immigration judges in hearings under § 1229a. *Supra* Part I.A. And although those courts assumed that Congress desired summary proceedings, they did not even consult the conference report's statement that

[7] Indeed, the First Circuit acknowledged as much with respect to the legislative history, noting that while it indicated a "general intent that illegal reentrants be removed expeditiously," it did not "address procedural questions with either clarity or specificity." *Lattab*, 384 F.3d at 19.

Congress expected that "the removal proceeding under [§ 1229a] shall be conducted by an immigration judge in largely the same manner as currently provided" under pre-IIRIRA law, which had provided for reinstatement determinations to be made in such proceedings. H.R. Rep. 104-828, at 211.

Somewhat inexplicably, the Second and Ninth Circuits also thought Congress would not "have bothered with the detailed provisions of" § 1231(a)(5) "if it intended to give an alien subject to reinstatement of a prior removal order exactly the same rights and procedural protections as an alien facing removal for the first time," *Garcia-Villeda*, 531 F.3d at 147; *Morales-Izquierdo*, 486 F.3d at 491. The Second Circuit even thought that requiring immigration judge hearings would somehow "render [§ 1231](a)(5) superfluous." *Garcia-Villeda*, 513 F.3d at 147. But to say that § 1229a(a) requires immigration judges to adjudicate reinstatement issues is not, of course, to say that immigration judges must (or even may) overlook § 1231(a)(5)'s express substantive limitations in doing so. Whether the reinstatement decision is made by an immigration judge or an immigration officer, Congress' substantive limitations on that decision, including that "the prior order of removal . . . is not subject to being reopened or reviewed" and that "the alien is not eligible and may not apply for any relief under this chapter," would remain fully applicable, streamlining adjudication of reinstatement determinations. 8 U.S.C. § 1231(a)(5).[8]

[8] The First Circuit recognized this, explaining that "[t]o say, as does section [1231](a)(5), that an alien 'shall be removed under the prior order at any time after . . . reentry' says nothing about

No circuit but the Ninth even addressed the argument that Congress had ratified the prior administrative practice. *See Morales-Izquierdo*, 486 F.3d at 493. And the Ninth Circuit's analysis went awry when it relied on precedent addressing the significance of Congress' *failure to enact* legislation. *See id.* (citing *Rapanos v. United States*, 547 U.S. 715, 750 (2006) (plurality op.), *Solid Waste Agency of N. Cook Cnty. v. U.S. Army Corps of Eng'rs*, 531 U.S. 159, 170 (2001), and *Bob Jones Univ. v. United States*, 461 U.S. 574, 601 (1983)). Here, in contrast, Congress acted by specifically enacting legislation that maintained the relevant features of the prior legislation. This Court's precedent treats those two categories separately, and provides that where Congress affirmatively acts by re-enacting existing statutory language, it is presumed to have adopted the existing administrative interpretation of that language. *See Bragdon*, 524 U.S. at 645; *Traynor*, 485 U.S. at 546; *Lorillard*, 434 U.S. at 580.

II. SECTION 1226 GOVERNS RESPONDENTS' DETENTION BECAUSE IMMIGRATION OFFICERS REINSTATED THEIR REMOVAL ORDERS WITHOUT STATUTORY AUTHORITY

The above analysis resolves the question presented in this case. The Government's argument that

---

how the government may go about determining either the existence of a prior order or the fact of an illegal reentry. Nor does section [1231](a)(5)'s bar on seeking relief from reinstatement of an earlier order necessarily indicate an intention that the prior order be reinstated peremptorily." *Lattab*, 384 F.3d at 19 (internal citation omitted).

Respondents' detention is governed by 8 U.S.C. § 1231 rather than by § 1226 is based entirely on the Government's assertion that "Respondents are subject to reinstated orders of removal and thus have already been ordered removed from the United States." Gov't Br. at 12–13. Because immigration officers lack statutory authority to reinstate orders of removal, however, aliens whose removal orders have purportedly been reinstated solely by such officers have not been validly "ordered removed," so as to trigger the detention authority of § 1231.[9] Such aliens' detention must be governed by § 1226, which addresses detention "pending a decision on whether the alien is to be removed." 8 U.S.C. § 1226(a). Any bond decision can be made in reinstatement proceedings before an immigration judge, as the INA requires.

The question presented by the case as to the proper detention framework for aliens whose removal orders have purportedly been reinstated by immigration officers thus never should arise. Detention in reinstatement proceedings should follow the same pattern as detention in other removal proceedings: it

---

[9] True, Respondents were *previously* ordered removed, but the Government rightly relies on the fact of *reinstatement* rather than the original removal orders as the basis for arguing that Respondents have been "ordered removed." *See* Gov't Br. at 17–18. If the prior removal order simply remained in force and subject to re-execution, there would be no need for § 1231(a)(5)'s reinstatement provision. And so, as the Ninth Circuit has explained, while "[i]t's certainly possible to conceive of a system where a removal order remains in force permanently and may be re-executed whenever the alien is found to have reentered the country illegally," that is not "the way our immigration law has developed." *Morales-Izquierdo*, 486 F.3d at 487 n.1.

would be governed by § 1226 up until the order became final, upon denial or completion of review by the Board of Immigration Appeals and the expiration of any applicable stay of removal. *See id.* § 1101(a)(47); *Hechavarria v. Sessions*, 891 F.3d 49, 54–55 (2d Cir. 2018); *Prieto-Romero v. Clark*, 534 F.3d 1053, 1059 (9th Cir. 2008). And because the same decision-maker—an immigration judge—would address both reinstatement and withholding of removal, the decisions could be made together, eliminating the temporal gap responsible for the statutory lacuna at issue in this case. Indeed, the fact that the detention provisions would work so smoothly under such circumstances, and produce such puzzles under the agency's present approach, only confirms that the agency has misinterpreted the statute at the outset.

CONCLUSION

For the foregoing reasons, the judgment below should be affirmed.

November 12, 2020

Respectfully submitted,

CHARLES ROTH
NATIONAL IMMIGRANT
JUSTICE CENTER
224 S. Michigan Ave
Suite 600
Chicago, IL 60604

NICOLE HENNING
Counsel of Record
JONES DAY
77 West Wacker
Suite 3500
Chicago, IL 60601
(312) 782-3939
nhenning@jonesday.com

DAVID R. FOX
JONES DAY
100 High Street
Boston, MA 02210

Counsel for Amicus Curiae
National Immigrant Justice Center