Exhibit A

22-1221

IN THE

United States Court Of Appeals

FOR THE FOURTH CIRCUIT

Jose Antonio MARTINEZ,
Petitioner,

– against –

Merrick B. GARLAND, U.S. Attorney General,
Respondent.

On Petition for Review of an Order of the
Board of Immigration Appeals

[PROPOSED] BRIEF OF THE BRONX DEFENDERS, BROOKLYN DEFENDER SERVICES, THE LEGAL AID SOCIETY, AND MAKE THE ROAD NEW YORK AS AMICI CURIAE IN SUPPORT OF BOTH PARTIES' PETITIONS FOR REHEARING EN BANC

Julie Dona
Sayoni Maitra
THE LEGAL AID SOCIETY
49 Thomas Street, 5th floor
New York, NY 10013
jdona@legal-aid.org
(646) 988-1425

Counsel for Proposed Amici Curiae

DISCLOSURE STATEMENT

Proposed *amici curiae*, The Bronx Defenders, Brooklyn Defender Services, The Legal Aid Society, and Make the Road New York, make the following disclosures under Local Rule 26.1(b):

1. Information about other financial interests: None.

2. Information about other publicly held legal entities: None.

Respectfully submitted,

/s/ Julie Dona
Julie Dona
Sayoni Maitra
THE LEGAL AID SOCIETY
49 Thomas Street, 5th floor
New York, NY 10013
jdona@legal-aid.org
(646) 988-1425

Counsel for Proposed Amici Curiae

Dated: February 8, 2024
New York, NY

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page(s)

Cases

Statutes

Other Authorities

INTRODUCTION AND STATEMENT OF INTEREST

Proposed *amici curiae*, The Bronx Defenders, Brooklyn Defender Services, The Legal Aid Society, and Make the Road New York, are legal services organizations located within the Second Circuit who represent noncitizens before the federal immigration agencies and in federal court.[1] *Amici* have successfully litigated numerous petitions for review of agency decisions in withholding-only proceedings, securing remands due to substantive and procedural errors by the agency. Collectively, we represent dozens of individuals who are currently in reasonable fear and withholding-only proceedings before asylum officers, immigration judges (IJs), and the Board of Immigration Appeals (BIA).

Following the Second Circuit's decision in *Bhaktibhai-Patel v. Garland*, 32 F.4th 180 (2d Cir. 2022), legal services organizations in that circuit frequently file petitions for review on behalf of clients in pending reasonable fear and withholding-only proceedings, even before they have

[1] Individual statements of interest for each organization are attached at Appendix A.

exhausted their fear-based claims before the agency. *See Alonso-Juarez v. Garland*, 80 F.4th 1039, 1053 (9th Cir. 2023) (explaining that adoption of the *Bhaktibhai-Patel* rule will lead to applicants filing premature petitions for review before the issues on appeal are ripe). Because important aspects of our clients' cases are unresolved at the time of filing, we then routinely ask the court to withdraw each case from active consideration (*i.e.*, hold the case in abeyance) pending resolution of the agency proceedings. *See id.*

As we discuss below, this post-*Bhaktibhai-Patel* process represents a departure from decades of past practice where noncitizens filed petitions for review following the conclusion of reasonable fear or withholding-only proceedings. This new process burdens the circuit with petitions that are not ripe for briefing and which ultimately may be withdrawn or transferred. It also creates significant work for the parties and may deprive many individuals—particularly pro se litigants—of meaningful judicial review. Because the panel's decision in *Martinez v. Garland* will likely have similar consequences, we respectfully submit this proposed amicus brief in support of both parties' petitions for rehearing.

BACKGROUND ON JUDICIAL REVIEW AT THE CONCLUSION OF REASONABLE FEAR AND WITHHOLDING-ONLY PROCEEDINGS

Until April 2022, it was settled law that noncitizens could seek review of fear-based claims in the courts of appeals by filing a petition for review within 30 days of the conclusion of reasonable fear proceedings or withholding-only proceedings. *See Alonso-Juarez*, 80 F.4th at 1048 (collecting cases).

However, in April 2022, the Second Circuit departed from this settled position in *Bhaktibhai-Patel*, 32 F.4th 180. The Second Circuit held that the agency's final decision in reasonable fear or withholding-only proceedings was not a final order for the purposes of judicial review. *See id.* at 189-96. Instead, the court found that the only order of removal in such proceedings is the reinstatement order, and it rejected the argument that pending agency proceedings render that order non-final. *Id*. In addition, the court, relying on prior precedents, assumed that 8 U.S.C. § 1252(b)(1)'s 30-day deadline for filing petitions for review was jurisdictional. *Id*. at 188. The Second Circuit therefore found that it lacked jurisdiction over a petition

filed after a reasonable fear proceeding concluded because it was not filed within 30 days of the underlying reinstatement order. *Id*. at 194-95.

The Second Circuit characterized its decision as having the effect of foreclosing judicial review in only "some" reasonable fear and withholding-only proceedings. *Id*. at 187-88, 196. Specifically, the Court included a caveat: "To be sure, review may be available when the withholding-only proceedings conclude within 30 days of DHS's reinstatement decision and the reentrant files a petition for review before that period expires." *Id*. at 195 n.21.

Before other courts of appeals had weighed in on *Bhaktibhai-Patel*, the Supreme Court issued *Santos-Zacaria v. Garland*, 598 U.S. 411 (2023). In *Santos-Zacaria*, the Supreme Court held that 8 U.S.C. § 1252(d)(1), the exhaustion provision for immigration petitions for review, was not jurisdictional. *Id*. at 417-23. Subsequently, the circuits began to consider whether 8 U.S.C. § 1252(b)(1) is jurisdictional in light of *Santos-Zacaria*, as well as whether the Second Circuit got it right in *Bhaktibhai-Patel* when it reconsidered finality. The Second Circuit itself has issued a supplemental

briefing order in two cases implicating the validity of its decision in *Bhaktibhai-Patel* in light of *Santos-Zacaria*. *See* Order, *Castejon-Paz v. Garland*, 22-6024 (2d Cir. filed Jan. 12, 2022), ACMS 25.1; Order, *Cerrato-Barahona v. Garland*, 22-6349 (2d Cir. filed July 22, 2022), ACMS 22.1.

In the panel decision below, this Court adhered to its prior holding that § 1252(b)(1) is jurisdictional in *Salgado v. Garland*, 69 F.4th 179, 181 & n.1 (4th Cir. 2023), becoming the only court of appeals to consider *Santos-Zacaria* and do so. *See Martinez v. Garland*, 86 F.4th 561, 566 & n.3 (4th Cir. 2023). This Court is also the only court of appeals to adopt the reasoning of *Bhaktibhai-Patel* with respect to finality. *See id.* at 568-71.

By contrast, the Fifth and Ninth Circuits reconsidered their prior decisions in light of *Santos-Zacaria* and concluded that the petition for review deadline set forth in § 1252(b)(1) is not jurisdictional and therefore did not bar review of the petitioners' claims. *Argueta-Hernandez v. Garland*, 87 F.4th 698, 705 (5th Cir. 2023); *Alonso-Juarez*, 80 F.4th at 1045-47.

Furthermore, the Fifth, Sixth, Ninth, and Tenth Circuits have affirmed their prior precedents permitting petitions for review filed within

30 days of the conclusion of reasonable fear and withholding-only proceedings. *See Arostegui-Maldonado v. Garland*, 75 F.4th 1132, 1142-43 (10th Cir. 2023); *Kolov v. Garland*, 78 F.4th 911, 919 (6th Cir. 2023); *Alonso-Juarez*, 80 F.4th at 1049; *Argueta Hernandez*, 87 F.4th at 706.

In addition, the Fifth and Ninth Circuits identified significant and foreseeable practical problems with adopting the *Bhaktibhai-Patel* rule as this Court did. The Ninth Circuit explained that it was not persuaded to adopt a rule that would either "effectively cut[] off judicial review for all noncitizens in reasonable fear [or withholding-only] proceedings" or create an "unworkable" and "immensely resource intensive" system in which noncitizens file petitions for review that are not yet ripe. *Alonso-Juarez*, 80 F.4th at 1052-53 (internal quotation marks omitted). The Fifth Circuit agreed, noting that the contrary conclusion "could have disastrous consequences on the immigration and judicial systems," in light of the "numerous noncitizens" who likely "would file premature petitions for review." *Argueta-Hernandez*, 87 F.4th at 706 & n.5.

ARGUMENT

The *Bhaktibhai-Patel* rule adopted by this Court—which requires individuals to file petitions within 30 days of the reinstatement order even if they seek protection in reasonable fear or withholding-only proceedings—yields predictable and substantial inefficiencies for the courts of appeals. This is for two reasons. First, in *amici's* experience, fully exhausted reasonable fear and withholding-only proceedings invariably take more than 30 days to conclude. Second, when reasonable fear or withholding-only proceedings are still pending at the time the petition is filed, important aspects of the petition for review have not yet been resolved, impairing the courts' ability to process and adjudicate the cases.

A. Reasonable fear and withholding-only proceedings are rarely complete at the 30-day mark.

In *amici's* experience, the reasonable fear process routinely lasts for longer than 30 days. After a Department of Homeland Security (DHS) officer (typically within U.S. Immigration and Customs Enforcement (ICE)) issues a reinstated order for an individual who expresses a fear of persecution or torture if removed, the officer must refer the case to U.S.

Citizenship and Immigration Services (USCIS), where an asylum officer must conduct the reasonable fear interview. 8 C.F.R. § 241.8(e). The regulations provide that "in the absence of exceptional circumstances," the interview should take place "within 10 days of the referral." 8 C.F.R. § 208.31(b). In *amici's* experience, however, it can take several weeks after the reinstatement order is issued for the reasonable fear interview to take place. *See*, *e.g.*, *Bhaktibhai-Patel*, 32 F.4th at 185-86 (noting that DHS issued a reinstatement order on March 9, 2019, but an asylum officer did not conduct the reasonable fear interview until June 14, 2019, three months later).

If the asylum officer determines that the noncitizen does not meet the "reasonable fear" standard, and the applicant wishes to challenge that decision, USCIS then refers the case to an IJ for review. 8 C.F.R. § 208.31(g). Upon receipt of the referral, the IJ should conduct the review within 10 days, "[i]n the absence of exceptional circumstances." *Id.* In reality, the referral and scheduling process can take weeks, even months. *See*, *e.g.*, *Bhaktibhai-Patel*, 32 F.4th at 187 (noting that the IJ's review took place on

August 7, 2019, nearly two months after the asylum officer's interview); *Ortiz-Alfaro v. Holder*, 694 F.3d 955, 957 (9th Cir. 2012) (noting that petitioner's removal order had been reinstated nearly two years earlier but reasonable fear proceedings were not yet complete).

Withholding-only proceedings last even longer. Once an asylum officer or IJ determines that an applicant has a reasonable fear of persecution or torture, the immigration court must schedule an evidentiary hearing on the individual's application. Applicants bear the burden of proof, *see* 8 C.F.R. §§ 1208.16(b), (c)(2), and therefore require time to compile written submissions and prepare witnesses. ICE must also complete background checks. 8 C.F.R. § 1003.47. An IJ must then review the evidence and arguments before issuing a decision. *See* 8 C.F.R. §§ 1208.16(b), (c)(3). Either party may appeal the IJ's final decision to the BIA, *see* 8 C.F.R. § 208.31(g), which takes months and sometimes years to issue a decision. The BIA may even remand the case to the IJ for additional proceedings, further prolonging the process. *See* 8 C.F.R. § 1003.1(d)(7).

The Second Circuit incorrectly assumed in *Bhaktibhai-Patel* that reasonable fear and withholding-only proceedings are sometimes completed within the thirty days following reinstatement. 32 F.4th at 195 n.21 (noting that judicial review "may be available when the withholding-only proceedings conclude within 30 days of DHS's reinstatement decision"). In *amici's* experience, it is rare, if not impossible, for an individual to exhaust the administrative reasonable fear or withholding-only process within thirty days of the reinstatement order. Therefore, in practice, the *Bhaktibhai-Patel* rule effectively closes off petitions for review of fear-based claims for nearly all noncitizens in these proceedings—unless they have the foresight and means to file a premature appeal (as discussed in Section B, *infra*).

Asylum officers, IJs, and the BIA frequently make errors in assessing claims in reasonable fear and withholding-only proceedings, and courts of appeals play an important role in ensuring that these errors are corrected. For example, *amici* have secured remands in numerous cases, including where the IJ "abrogated his responsibility to function as a neutral, impartial

arbiter," *Ali v. Mukasey*, 529 F.3d 478, 491 (2d Cir. 2008) (internal quotation marks omitted), or where the agency failed to adequately address petitioners' material evidence or claims, *see, e.g.*, *Mendoza-Ventura v. Garland*, No. 19-4176, 2022 WL 1073010, at *1 (2d Cir. Apr. 11, 2022) (remanding due to agency's failure to evaluate petitioner's argument that he was persecuted because of his anticorruption political opinion); *Cazahuatl Torres v. Garland*, 848 F. App'x 29, 30-31 (2d Cir. 2021) (remanding because agency ignored significant aspect of petitioner's testimony about his fear of return); *M.A. v. Garland*, No. 19-728, 2021 WL 2878926, at *2 (2d Cir. July 9, 2021) (finding agency made only passing reference to record evidence in assessing government acquiescence in petitioner's torture and remanding for reconsideration of CAT claim).

B. Requiring individuals to file petitions for review before they have exhausted the reasonable fear or withholding-only process is burdensome and inefficient.

Treating a reinstated order as final for purposes of judicial review, even where agency proceedings are ongoing, creates significant logistical challenges for litigants and the courts. At the 30-day mark, litigants may

believe that they have a meritorious protection claim, but they cannot yet know if the agency will deny relief or commit reversible error. Under the *Bhaktibhai-Patel* rule, applicants "inevitably have to file a petition for review to preserve the possibility of judicial review, even when unsure if they would need to, or even choose to, challenge the decision in the future." *Argueta-Hernandez*, 87 F.4th at 706 n.5 (quoting *Alonso-Juarez*, 80 F.4th at 1053) (internal quotation marks omitted). Individuals cannot advise the courts of the issues on appeal at the time of filing. And a litigant may even be unsure of the proper circuit court in which to file their appeal.[2]

Once the petition is filed, the case cannot progress. The government cannot comply with rules requiring it to file the administrative record on which review must be based, absent a lengthy abeyance. *Cf.* 8 U.S.C. § 1252(b)(4)(A) (requiring the petition to be decided "only on the administrative record on which the order of removal is based"); Fed. R.

[2] A withholding-only proceeding may conclude in a different immigration court than where it started. *See* 8 C.F.R. § 1003.20 (permitting change of venue from one immigration court to another). It therefore is impossible to predict which circuit will ultimately serve as the proper venue for review. *See* Pet'r's Pet. for Reh'g En Banc at 15 n.6, ECF No. 91.

App. P. 17(a) (directing the agency to file record within 40 days after being served with the petition, unless otherwise directed by the court). Nor can parties submit their merits briefs in a timely manner. *Cf.* Fed. R. App. P. 31(a)(1) (directing the petitioner to submit a brief within 40 days after the record is filed). Under this regime, many such petitions will be held in abeyance for years pending resolution of reasonable fear and withholding-only proceedings.

While this system presents headaches for litigants and court staff, it is "particularly unfair to pro se noncitizens." *Alonso-Juarez*, 80 F.4th at 1053. Because DHS's reinstatement orders, unlike BIA decisions, generally do not contain language about the right to file a petition for review, pro se noncitizens rarely receive notice that any appeals must be filed within 30 days of the reinstatement order. Moreover, these litigants, "who often face language and education barriers" are "forced to navigate a confusing system set up to require appeals of decisions not yet made," *id.*, and are likely to miss the opportunity for judicial review entirely.

C. Section 1252 should be construed in a manner that avoids consequences that Congress could not have intended.

It is implausible that Congress intended to require the filing of premature petitions for review when it enacted the judicial review procedures for immigration cases. By construing 8 U.S.C. § 1252 in a manner that generates substantial and foreseeable inefficiencies, *Bhaktibhai-Patel* and this Court's decision in *Martinez* violate the rule that statutes should not be interpreting in a manner that "leads to consequences Congress could not have intended." *Moncrieffe v. Holder*, 133 S. Ct. 1678, 1690 (2013); *see also Mellouli v. Lynch*, 575 U.S. 798, 809-10 (2015) (directing courts to interpret statutes "as a symmetrical and coherent regulatory scheme" (internal quotation marks omitted)). This is particularly so where other tools of statutory interpretation support the parties' arguments that a reinstatement order becomes "final" for purposes of judicial review only after any reasonable fear and withholding-only proceedings are complete. *See* Pet'r's Pet. for Reh'g En Banc at 6-13, ECF No. 91; Resp't's Pet. for Reh'g En Banc at 9-17, ECF No. 93. Together, these considerations weigh in favor of rehearing this case.

CONCLUSION

Amici respectfully submit that the Court should grant the parties' petitions for rehearing.

Respectfully submitted,

/s/ Julie Dona
Julie Dona
Sayoni Maitra
THE LEGAL AID SOCIETY
49 Thomas Street, 5th floor
New York, NY 10013
jdona@legal-aid.org
(646) 988-1425

Counsel for Proposed Amici Curiae

Dated: February 8, 2024
New York, NY

APPENDIX A: STATEMENTS OF INTEREST OF AMICI CURIAE

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 low-income 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' representation extends to affirmative immigration applications, motions to reopen, appeals and motions before the BIA, petitions for review, and federal district court litigation and appeals.

Brooklyn Defender Services ("BDS") is a public defender organization that represents low-income people in nearly 22,000 criminal, family, civil, and immigration proceedings each year. Since 2009, BDS has

counseled more than 16,000 clients in immigration matters, including deportation defense, affirmative applications, advisals, and immigration consequence consultations in Brooklyn's criminal court system. 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. BDS regularly litigates immigration cases in U.S. federal courts, including habeas, mandamus, and petitions for review.

The Legal Aid Society is the nation's oldest and largest not-for-profit provider of legal services to low-income clients. Legal Aid's Immigration Law Unit (the "ILU") 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. Part of the ILU's work consists of representing detained and non-detained individuals in removal proceedings before immigration judges, on appeals to the BIA and the U.S. Court of Appeals for the Second Circuit, and in habeas proceedings in district courts around the country.

Make the Road New York ("MRNY") is a nonprofit, membership-based community organization that integrates adult and youth education, legal and survival services, and community and civic engagement, in a holistic approach to help low-income New Yorkers improve their lives and neighborhoods. MRNY has over 200 staff, over 24,000 members, and five offices spread throughout New York City, Long Island, and Westchester. MRNY is at the forefront of numerous initiatives to analyze, develop, and improve civil and human rights for immigration communities, including issues related to detention and deportation of immigrant community members. Its attorneys and accredited representatives regularly represent both detained and nondetained clients in the greater New York City area in immigration matters, including in reinstatement and administrative removal proceedings.

CERTIFICATE OF COMPLIANCE

This brief complies with the type-volume limitations of Rule 29(b)(4) of the Federal Rules of Appellate Procedure because it contains 2,546 words, excluding the parts of the brief exempted by Rule 32(f). This brief complies with the typeface requirements of Rule 32(a)(5) and the type style requirements of Rule 32(a)(6) because it has been prepared in a proportionally spaced typeface using Microsoft Word in Palatino Linotype 14-point font.

Respectfully submitted,

/s/ Julie Dona
Julie Dona

Dated: February 8, 2024
New York, NY

CERTIFICATE OF SERVICE

I certify that on February 8, 2024, the foregoing Proposed Brief Of Amici Curiae In Support Of Rehearing En Banc was served on all parties or their counsel of record through the CM/ECF system.

Respectfully submitted,

/s/ Julie Dona
Julie Dona

Dated: February 8, 2024
New York, NY