No. 22-856

In the Supreme Court of the United States

RAUL GARCIA MARIN, PETITIONER

v.

MERRICK B. GARLAND, ATTORNEY GENERAL

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF FOR THE RESPONDENT

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QUESTION PRESENTED

Whether petitioner's removal from the United States rendered moot his petition for review of the decision of the Board of Immigration Appeals.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. la-6a) is reported at 41 F.4th 947. The decisions of the Board of Immigration Appeals (Pet. App. 15a-17a) and the immigration judge (Pet. App. 7a-14a) are unreported.

JURISDICTION

The judgment of the court of appeals was entered on July 29, 2022. A petition for rehearing was denied on October 19, 2022 (Pet. App. 18a). On January 10, 2023, Justice Barrett extended the time within which to file a petition for a writ of certiorari to and including March 17, 2023, and the petition was filed on March 6, 2023. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. The Immigration and Nationality Act (INA), 8 U.S.C. 1101 *et seq.*, authorizes the removal of certain

classes of noncitizens from the United States. 8 U.S.C. 1182, 1227.[1] The full process for removal can include a hearing before an immigration judge, an appeal to the Board of Immigration Appeals (Board or BIA), and judicial review. 8 U.S.C. 1229a, 1252. Many noncitizens facing removal also have an opportunity in the proceedings to apply for relief from removal. See, *e.g.*, 8 U.S.C. 1158 (asylum); 8 U.S.C. 1229b (cancellation of removal); 8 U.S.C. 1255 (adjustment of status).

Congress has established a streamlined process for removing noncitizens who have previously been removed from the United States under a final order of removal and who later reenter the country unlawfully. If the Department of Homeland Security (DHS) "finds that an alien has reentered the United States illegally after having been removed * * * under an order of removal, the prior order of removal is reinstated from its original date." 8 U.S.C. 1231(a)(5). In those circumstances, the reinstated order of removal is "not subject to being reopened or reviewed," and the noncitizen "is not eligible and may not apply for any relief" from the reinstated order. *Ibid.*

The statutory prohibition on seeking "relief" from a reinstated order of removal, 8 U.S.C. 1231(a)(5), does not preclude a noncitizen from seeking withholding of removal with respect to a particular country. Federal law provides "two paths for seeking withholding." *Johnson* v. *Guzman Chavez*, 141 S. Ct. 2271, 2282 (2021). First, a noncitizen may seek statutory withholding of removal under 8 U.S.C. 1231(b)(3), which prohibits the removal of a noncitizen to a country where he is

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[1] This brief uses the term "noncitizen" as equivalent to the statutory term "alien." See *Barton* v. *Barr*, 140 S. Ct. 1442, 1446 n.2 (2020) (quoting 8 U.S.C. 1101(a)(3)).

more likely than not to face persecution because of his "race, religion, nationality, membership in a particular social group, or political opinion." 8 U.S.C. 1231(b)(3). Second, a noncitizen may seek withholding of removal under regulations implementing the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (CAT), *adopted* Dec. 10, 1984, S. Treaty Doc. No. 20, 100th Cong., 2d Sess. (1988), 1465 U.N.T.S. 85. Withholding of removal under the CAT regulations is generally available if a noncitizen shows that he "likely would be tortured if removed to the designated country of removal." *Nasrallah* v. *Barr*, 140 S. Ct. 1683, 1687 (2020).

Some noncitizens are barred from receiving withholding of removal under the INA or the CAT regulations—for example, because they themselves previously participated in the persecution of others. 8 U.S.C. 1231(b)(3)(B); see 8 C.F.R. 208.16(d), 1208.16(d). The CAT regulations provide that such noncitizens may still seek a limited form of country-specific protection known as "deferral of removal." 8 C.F.R. 208.17, 1208.17.

If a noncitizen who is subject to a reinstated removal order expresses a fear of returning to the country of removal designated in the order, an asylum officer determines whether the noncitizen has a "reasonable fear" of persecution or torture there, meaning that the noncitizen has demonstrated "a reasonable possibility that he or she would be persecuted * * * [or] tortured" in that country. 8 C.F.R. 208.31(c); see 8 C.F.R. 241.8(e). If the asylum officer finds that the noncitizen has failed to meet the reasonable-fear standard, the noncitizen may request review by an immigration judge. 8 C.F.R. 208.31(f) and (g). If the immigration judge concurs in the asylum officer's negative determination, the case is

"returned to DHS for removal" of the noncitizen, and no further administrative appeals are permitted. 8 C.F.R. 208.31(g)(1), 1208.31(g)(1).

If either the asylum officer or the immigration judge determines that the noncitizen has met the reasonable-fear standard, the noncitizen is placed in "withholding-only proceedings." *Guzman Chavez*, 141 S. Ct. at 2282. In those proceedings, an immigration judge proceeds to consider the ultimate merits of the noncitizen's claim for withholding or deferral of removal, under the rules of procedure that apply in removal proceedings and subject to review by the Board. See 8 C.F.R. 208.31(e), 1208.2(c)(2) and (3), 1208.16. The only issue that may be adjudicated in withholding-only proceedings is whether the noncitizen is entitled to withholding or deferral of removal; all parties, including the immigration judge, "are prohibited from raising or considering any other issues." 8 C.F.R. 208.2(c)(3)(i).

Withholding or deferral of removal is a limited form of "country specific" protection. *Guzman Chavez*, 141 S. Ct. at 2283 (quoting *INS* v. *Cardoza-Fonseca*, 480 U.S. 421, 428 n.6 (1987)). While the grant of withholding or deferral is in effect, DHS may not remove the noncitizen to the specific country where the noncitizen has demonstrated that he or she is likely to be persecuted or tortured. *Ibid.* But the underlying order of removal "remains in full force," and DHS may execute the order at any time to remove the noncitizen to a third country as prescribed by the INA. *Id.* at 2285; see *Nasrallah*, 140 S. Ct. at 1694 (observing that a grant of CAT protection "does not affect the validity of a final order of removal").

2. Petitioner is a "native and citizen of Mexico" with a "long history of illegal entry and removal from the

United States." Pet. App. 1a. After previously being removed to Mexico, petitioner reentered the United States unlawfully and "accumulat[ed] a criminal record that includes convictions for residential burglary, domestic battery, illegal firearm possession, and four convictions for drunk driving." *Id.* at 2a. In 2019, DHS located petitioner in an Illinois state prison and notified him of the agency's intent to reinstate his prior order of removal to Mexico. *Ibid.* Petitioner expressed a fear of returning to Mexico and was therefore interviewed by an asylum officer under the reasonable-fear screening process. *Ibid.* The asylum officer "determined that [petitioner] had a reasonable fear of torture and placed him in withholding-only proceedings before an immigration judge." *Ibid.* Because petitioner had been convicted of at least one particularly serious crime, he was ineligible for withholding of removal under both the INA and the CAT regulations. *Id.* at 2a-3a; see 8 U.S.C. 1231(b)(3)(B); 8 C.F.R. 208.16(d)(2). The immigration judge therefore considered only deferral of removal. Pet. App. 3a, 7a n.1.

The gravamen of petitioner's CAT claim was that he feared that he would be tortured in Mexico by drug traffickers in reprisal for his prior cooperation with DHS. Pet. App. 8a. Petitioner testified that, in 2015, he was approached by DHS agents and agreed to work with them as an informant, arranging drug deals in the United States. *Ibid.* Petitioner claimed that, working with the agents, he arranged to buy drugs from a high-school acquaintance but the contemplated sale fell through. *Id.* at 8a-9a. Petitioner further testified that, after those failed efforts, he received a threatening phone call from the acquaintance's brother, "Juan," whom petitioner believed to be a high-ranking member

of the Sinaloa drug cartel living in Durango, Mexico. *Id.* at 9a-10a. According to petitioner, Juan threatened to kill him for attempting to "set up" Juan's brother. *Id.* at 9a. Petitioner testified that Juan called to threaten him once in 2015 and again in 2018. *Ibid.*

The immigration judge granted petitioner's application for deferral of removal to Mexico under the CAT regulations. Pet. App. 7a-14a. The judge found that petitioner had "testified credibly and with detail" about his cooperation with DHS and the threats he had received from Juan as a result of that cooperation. *Id.* at 11a. Although those alleged threats had come from a person whom petitioner believed to be a cartel member, not a governmental official, the judge also found that petitioner had carried his burden of showing "that it is more likely than not[] that he will be tortured" by the cartel "with the Mexican government's acquiescence." *Ibid.*; see 8 C.F.R. 1208.18(a)(1) (defining "[t]orture" to be limited to certain acts of severe pain or suffering "inflicted by, or at the instigation of, or with the consent or acquiescence of, a public official acting in an official capacity or other person acting in an official capacity").

The government appealed to the Board, and the Board reversed. Pet. App. 15a-17a. The Board determined that petitioner had failed to show that he faced a "substantial risk of torture if removed to Mexico." *Id.* at 16a. The Board emphasized that petitioner had not claimed to have had any personal "involvement with the Sinaloa cartel," and that the last threatening phone call had occurred in 2018, after which petitioner did not allege to have ever heard from Juan again. *Ibid.* Having determined that petitioner is not entitled to deferral of removal, the Board ordered petitioner "removed from

the United States to Mexico" in accordance with the reinstated order of removal. *Id.* at 17a.

3. The Board issued its decision on November 16, 2020. Pet. App. 15a. On December 9, 2020, petitioner filed a petition for review in the Seventh Circuit. C.A. Doc. 1. Five days later, petitioner filed a request for an administrative stay of removal from DHS. See Gov't C.A. Mot. to Dismiss 7. On December 17, 2020, DHS denied petitioner's request. *Ibid.*; see *id.*, Ex. B (notice of DHS's denial). Petitioner did not thereafter seek a stay of removal from the court of appeals. On December 28, 2020, petitioner was removed to Mexico. *Id.*, Ex. A (warrant of removal).

After petitioner's removal, the government moved to dismiss his petition for review as moot. Pet. App. 4a. The government took the position that, because petitioner had failed to move for a stay and thus had "declined to pursue all available legal avenues to preserve his objections to removal to Mexico, his claim to protection under the CAT is now moot." Gov't C.A. Mot. to Dismiss 8. The court of appeals determined that the government's motion to dismiss should be decided by a merits panel and ordered the parties to address mootness in their briefs. C.A. Order 1 (May 17, 2021).

In its merits brief, the government again took the position that the petition for review was moot because, by not moving for a judicial stay of removal, petitioner had failed to "pursue all available legal avenues to preserve his objections to removal to Mexico." Gov't C.A. Br. 12; see *id.* at 11-21. The government also argued that, if the court were to determine that the petition is not moot, then the petition should be granted and the case remanded to the Board to allow the Board "to clarify its scope of review" and to address any clear errors by the

immigration judge. *Id.* at 21. In making that alternative argument, the government stated that it was not "confessing error" and was instead merely requesting a remand for the Board to clarify the basis of its decision. *Id.* at 22.

4. The court of appeals dismissed the petition for review as moot. Pet. App. 1a-6a. The court observed that petitioner is "inadmissible by virtue of his unchallenged removal order and his criminal record." *Id.* at 5a. In the court's view, his removal from the United States therefore "moot[ed] the petition for review," because petitioner would remain outside the United States and inadmissible "even if [the court] were to find an error in the BIA's decision reversing the immigration judge." *Ibid.* The court stated that the "action that [petitioner] sought to prevent," *i.e.*, deferral of his removal to Mexico, "ha[d] already taken place," *ibid.*, and that the court could no longer "grant any effectual relief," *id.* at 6a. The court also accepted the government's argument that petitioner did not face any "possible collateral legal consequences" as the result of the denial of his CAT claim. *Id.* at 5a. The court stated that a grant of CAT protection would not "unwind [petitioner's] removal order, enable him to seek readmission, or have any other consequence beyond" preventing DHS from removing him to Mexico, which had already occurred. *Id.* at 6a.

5. Petitioner sought rehearing and contended, for the first time, that his removal did not moot his petition for review because of a policy adopted by U.S. Immigrations and Customs Enforcement (ICE) in 2012, known as the "Return Directive." C.A. Pet. for Reh'g 2 (Reh'g Pet.). The Return Directive states, in part:

> Absent extraordinary circumstances, if an alien who prevails before the U.S. Supreme Court or a U.S.

> court of appeals was removed while his or her [petition for review] was pending, ICE will facilitate the alien's return to the United States if either the court's decision restores the alien to lawful permanent residence (LPR) status, or the alien's presence is necessary for continued administrative removal proceedings.

ICE, Policy Directive 11061.1, *Facilitating the Return to the United States of Certain Lawfully Removed Aliens* ¶ 2 (Feb. 24, 2012), https://www.ice.gov/doclib/foia/dro_policy_memos/11061.1_current_policy_facilitating_return.pdf. The Return Directive also states that ICE may facilitate a noncitizen's return to the United States when a reviewing court grants a petition for review and remands to the agency and the agency then grants a form of "relief * * * allowing him or her to reside in the United States lawfully." *Ibid.*

In his request for rehearing, petitioner argued that his petition for review of the Board's decision was not moot because the Return Directive "provide[s] an avenue for" ICE to facilitate his return to the United States if he were to prevail in the court of appeals. Reh'g Pet. 6. Petitioner recognized that the Return Directive "does not automatically entitle" any noncitizen to ICE's assistance in facilitating the noncitizen's return. *Ibid.* But he contended that "[t]he possibility that he will be permitted to return" if he ultimately prevails in obtaining CAT protection "is sufficient to resolve the mootness inquiry in his favor." *Id.* at 8.

The court of appeals denied the petition for rehearing without calling for a response from the government. Pet. App. 18a.

DISCUSSION

Petitioner contends (Pet. 20-28) that the court of appeals erred in dismissing his petition for review as moot after he was removed to Mexico. Plenary review of the judgment below is not warranted. The government, however, has reassessed its position on mootness in cases involving noncitizens who are removed while a petition for review is pending, who seek review only of the denial of a claim for withholding or deferral of removal, and who fail to move for a judicial stay of removal. The court of appeals did not have the benefit of the government's current views when it dismissed the petition for review as moot, and the court may well change its view on mootness upon further consideration. Accordingly, the petition for a writ of certiorari should be granted, the judgment vacated, and the case remanded for further proceedings in light of the position expressed in this brief.

1. a. Article III of the Constitution limits the jurisdiction of the federal courts to the resolution of actual "Cases" or "Controversies," U.S. Const. Art. III, § 2, Cl. 2, in which the party invoking federal jurisdiction has "a 'personal stake' in the outcome of the action," *United States* v. *Sanchez-Gomez*, 138 S. Ct. 1532, 1537 (2018) (citation omitted). "To qualify as a case fit for federal-court adjudication, 'an actual controversy must be extant at all stages of review.'" *Arizonans for Official English* v. *Arizona*, 520 U.S. 43, 67 (1997) (quoting *Preiser* v. *Newkirk*, 422 U.S. 395, 401 (1975)). "A case that becomes moot at any point during the proceedings is 'no longer a "Case" or "Controversy" for purposes of Article III,' and is outside the jurisdiction of the federal courts." *Sanchez-Gomez*, 138 S. Ct. at 1537 (quoting *Already, LLC* v. *Nike, Inc.*, 568 U.S. 85, 91 (2013)).

A case becomes moot "when the issues presented are no longer 'live' or the parties lack a legally cognizable interest in the outcome." *Already, LLC*, 568 U.S. at 91 (citation omitted). The parties lack such an interest if "an event occurs while a case is pending * * * that makes it impossible for the court to grant 'any effectual relief whatever' to a prevailing party." *Church of Scientology* v. *United States*, 506 U.S. 9, 12 (1992) (quoting *Mills* v. *Green*, 159 U.S. 651, 653 (1895)). On the other hand, "[a]s long as the parties have a concrete interest, however small, in the outcome of the litigation, the case is not moot." *Chafin* v. *Chafin*, 568 U.S. 165, 172 (2013) (citation omitted).

b. Ordinarily, a noncitizen who is removed while his petition for review is pending has a sufficiently "concrete interest" in the judicial proceedings to prevent them from becoming moot, *Chafin*, 568 U.S. at 172 (citation omitted), if a favorable decision in the litigation may lead ICE to decide to facilitate the noncitizen's return to the United States pursuant to the Return Directive.

As explained above (at pp. 8-9), the Return Directive is an ICE policy setting forth the circumstances in which the agency may facilitate a noncitizen's return to the United States if the noncitizen "prevails before * * * a U.S. court of appeals" after being "removed while his or her [petition for review] was pending." Return Directive ¶ 2. The policy states that ICE may facilitate the return of a noncitizen if the court of appeals grants the petition for review and remands to the agency, and the noncitizen's presence in the United States "is necessary for continued administrative removal proceedings." *Ibid.* ICE may also facilitate the return of a noncitizen if, as a result of prevailing in the

court of appeals, the noncitizen is "granted relief * * * allowing him or her to reside in the United States lawfully." *Ibid.*

The Return Directive contemplates that in some cases ICE may facilitate the return of a noncitizen who is placed in withholding-only proceedings; whose claim for withholding or deferral of removal under the CAT regulations is denied; who files a timely petition for review but is removed before the petition is adjudicated; and who ultimately prevails in the court of appeals. The Return Directive would be implicated in those circumstances if the court were to remand to the agency and the agency were to determine that the noncitizen's presence would be necessary for further administrative proceedings, or if the agency were to determine on remand that the noncitizen is entitled to CAT protection.

In those circumstances, CAT protection would not confer any lawful immigration status on the noncitizen, who could still be removed at any time to a third country as prescribed in the INA. See *Johnson* v. *Guzman Chavez*, 141 S. Ct. 2271, 2286 (2021) (explaining that withholding of removal "does not afford an alien any permanent right to remain in the United States") (brackets and citation omitted); 8 C.F.R. 208.16(f) (authorizing DHS to remove noncitizens who receive CAT protection to a third country); 8 C.F.R. 208.17(b)(1)(i) (requiring an immigration judge to notify a noncitizen who is granted deferral of removal that such deferral "[d]oes not confer * * * any lawful or permanent immigration status in the United States"). But a grant of CAT protection could still lead ICE to facilitate a noncitizen's return under the Return Directive in at least some cases.

The Return Directive contains a number of important caveats, including that the policy does not apply if "extraordinary circumstances" counsel against facilitating the return of any particular noncitizen who would otherwise be covered by the terms of the policy. Return Directive ¶ 2. As particularly relevant here, ICE generally would not facilitate the return of a noncitizen who seeks only CAT protection against removal to a particular country if, after the noncitizen's removal to that country, the noncitizen has resettled in a third country. A decision not to facilitate return in those circumstances would be consistent with the Return Directive and with 8 C.F.R. 1208.16(f), which permits removal of a noncitizen "to a third country other than the country to which removal has been withheld or deferred."

c. The court of appeals did not consider the Return Directive, which neither party brought to its attention at the panel stage. The court instead reasoned that it lacked the authority to "grant any effectual relief," and that the case was therefore moot, because petitioner sought only deferral of removal but had already been removed. Pet. App. 6a. The court appeared to believe that a judicial determination in petitioner's favor would do nothing for him, as a practical matter, because he has already been removed to Mexico and will remain inadmissible regardless of the outcome of the judicial proceedings. See *id.* at 5a-6a. The court was mistaken to view itself as categorically disabled from granting any effectual relief as a result of petitioner's removal. Instead, the mootness inquiry should have taken into account whether ICE may facilitate petitioner's return to the United States in the event that he prevails in the litigation.

In some cases, the government has relied on the Return Directive to argue that a petition for review is not moot when a noncitizen is removed before a petition for review is adjudicated and the petition arises from withholding-only proceedings or otherwise seeks review only with respect to the denial of a claim for withholding of removal. See, *e.g.*, *Igiebor* v. *Barr*, 981 F.3d 1123, 1128-1130 (10th Cir. 2020) (accepting the government's view and holding that noncitizen's removal did not moot his petition for review of denial of CAT claim based on the possibility that ICE "would facilitate his return"); *Del Cid Marroquin* v. *Lynch*, 823 F.3d 933, 936, 937-941 (9th Cir. 2016) (per curiam) (accepting the government's view in similar circumstances, involving petition for review from withholding-only proceedings, and observing that, in light of the Return Directive, a judicial decision in the noncitizen's favor would "at least increase his chances of being allowed to" return).

In some recent cases, however, including this one, the government has moved to dismiss as moot a petition for review arising from withholding-only proceedings where the noncitizen was removed after failing to seek a stay of removal from the court of appeals. In those motions, the government has contended that noncitizens who fail to request a judicial stay of removal to the country in which they claim to fear torture or persecution have "declined to pursue all available legal avenues to preserve [their] objections to removal" and should therefore be treated as having abandoned their claims for protection. Gov't C.A. Mot. to Dismiss 8; see Gov't C.A. Br. at 23-30, *Lopez-Sorto* v. *Garland*, No. 21-2107 (4th Cir. Nov. 21, 2022); 12/16/20 Gov't Letter at 1, *Mendoza-Flores* v. *Rosen*, 983 F.3d 845 (5th Cir. 2020) (No. 19-60225) (*Mendoza-Flores* Letter).

The government has reconsidered the abandonment argument reflected in those recent motions and no longer endorses it. Declining to file a stay motion may be some evidence that a noncitizen has abandoned a CAT claim in a given case, but a noncitizen's failure to file such a motion is not categorically equivalent to abandoning the claim when a petition for review is still being pressed.

Although the court of appeals did not clearly endorse or rely on the government's abandonment argument here, it would nonetheless be appropriate to grant the petition for a writ of certiorari, vacate the judgment below, and remand for reconsideration in light of the views expressed in this brief. The government was relying on its theory of abandonment as a basis for mootness and did not bring the Return Directive to the court's attention. Nor did petitioner (until his rehearing petition). See pp. 8-9, *supra*. The court of appeals should be afforded an opportunity to reconsider its mootness holding in light of the Return Directive.

2. This case does not otherwise warrant plenary review. Petitioner contends (Pet. 14-20) that the courts of appeals are divided over whether a noncitizen's removal renders a pending petition for review moot when the petition arises from withholding-only proceedings. But the only two cases that petitioner identifies (Pet. 15-16) as finding a petition moot because of the noncitizen's removal are the decision below and the Fifth Circuit's decision in *Mendoza-Flores* v. *Rosen*, 983 F.3d 845 (2020). In *Mendoza-Flores*, the noncitizen did not move for a stay of removal, and the government relied on the abandonment theory described above to argue that the petition was moot (without discussing the Return Directive). See *Mendoza-Flores* Letter at 1. The Fifth

Circuit found the case moot on the same basis as the Seventh Circuit here—*i.e.*, because the court could not grant the noncitizen any "effectual relief" after his removal. *Mendoza-Flores*, 983 F.3d at 848.

The shallow and recent division identified by petitioner does not warrant plenary review. The decision below would be better addressed by granting the petition, vacating the judgment below, and remanding for further proceedings. And the Fifth Circuit's judgment in *Mendoza-Flores* will likely have limited prospective significance. In light of the Return Directive, which the Fifth Circuit did not discuss or apparently consider, a reviewing court may be able to grant "effectual relief," *Mendoza-Flores*, 983 F.3d at 848, after a noncitizen is removed—even when the noncitizen challenges only the denial of a CAT claim—because a judicial decision in the noncitizen's favor could lead ICE to facilitate the noncitizen's return to the United States. Nothing in *Mendoza-Flores* would prevent a future panel of the Fifth Circuit from taking account of the Return Directive in analyzing mootness.[2]

3. In any event, this case would not be a suitable vehicle for plenary review. Whether this particular case is moot, after properly taking into account the Return Directive, is fact-bound and case-specific. And the correct answer to that question may depend on facts that

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[2] The government so advised the Fifth Circuit in a supplemental letter brief filed on May 22, 2023. See Gov't Supp. Letter Br. at 3, *Theodore* v. *Garland*, No. 22-60410 (5th Cir. oral argument scheduled for June 8, 2023) (stating that *Mendoza-Flores* "does not foreclose recognizing in an appropriate future case that a petition for review arising from withholding-only proceedings is not mooted by the noncitizen's removal" if, under the circumstances, a decision in the noncitizen's favor "may lead ICE to facilitate the noncitizen's return to the United States pursuant to the Return Directive").

are not presently in the record—concerning, for example, whether petitioner has resettled in a third country after his removal. See p. 13, *supra*. The court of appeals would be better positioned to address those issues in the first instance. Cf. *Cutter* v. *Wilkinson*, 544 U.S. 709, 718 n.7 (2005) (stating that this Court is generally "a court of review, not of first view").

CONCLUSION

The petition for a writ of certiorari should be granted, the court of appeals' judgment vacated, and the case remanded for further proceedings in light of the position expressed in this brief.

Respectfully submitted.

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