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Tenth Circuit

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Christopher M. Wolpert
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PUBLISH

UNITED STATES COURT OF APPEALS

FOR THE TENTH CIRCUIT

DENNIS AROSTEGUI-MALDONADO,

Petitioner,

v.

MERRICK B. GARLAND, United States Attorney General,

Respondent.

NATIONAL IMMIGRATION LITIGATION ALLIANCE; CENTER FOR GENDER & REFUGEE STUDIES; IMMIGRANT JUSTICE IDAHO; NATIONAL IMMIGRANT JUSTICE CENTER; NEW MEXICO IMMIGRANT LAW CENTER; AMERICAN CIVIL LIBERTIES UNION,

Amici Curiae.

No. 22-9554

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

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Anand Balakrishnan, American Civil Liberties Union, New York, New York (Lee Gelernt, American Civil Liberties Union, New York, New York, and Spencer Amdur and Cody H. Wofsy, American Civil Liberties Union, San Francisco, California, with him on the brief), for Amicus Curiae American Civil Liberties Union, In Support of Jurisdiction.

Kristin Macleod-Ball and Trina Realmuto, National Immigration Litigation Alliance, Brookline, Massachusetts, on the briefs for Amici Curiae National Immigration Litigation Alliance, Center for Gender & Refugee Studies, Immigrant Justice Idaho, National Immigrant Justice Center, and New Mexico Immigrant Law Center in support of Petitioner.

Before **TYMKOVICH**, **MATHESON**, and **EID**, Circuit Judges.

MATHESON, Circuit Judge.

Petitioner Dennis Humberto Arostegui-Maldonado, a citizen of Costa Rica and El Salvador, was removed from the United States in 2008. In 2021, he reentered. The Department of Homeland Security ("DHS") reinstated his removal order. Mr. Arostegui-Maldonado told an asylum officer that he feared persecution or torture in Costa Rica and El Salvador. The officer referred his case to an Immigration Judge ("IJ") for "withholding-only proceedings" to decide whether to forbid his removal to those countries. The IJ denied relief. The Board of Immigration Appeals ("BIA") affirmed. Mr. Arostegui-Maldonado petitioned for review. We address jurisdiction and merits questions.

First, the Government moves to dismiss for lack of jurisdiction because Mr. Arostegui-Maldonado did not file his petition within 30 days of the reinstated order of removal. Instead, he filed it within 30 days of the BIA's order affirming the IJ's decision to deny relief. The petition was timely under *Luna-Garcia v. Holder*, 777 F.3d 1182 (10th Cir. 2015), but the Government contends that *Luna-Garcia* is no longer good law after the Supreme Court's decisions in *Nasrallah v. Barr*, 140 S. Ct. 1683 (2020), and *Johnson v. Guzman Chavez*, 141 S. Ct. 2271 (2021). We disagree and deny the Government's motion to dismiss.

Second, Mr. Arostegui-Maldonado challenges the agency's rulings on the merits. He argues (1) the IJ misapplied the "under color of law" element to his Convention Against Torture ("CAT") claim, (2) the BIA ignored his CAT claim, (3) the IJ failed to fully develop the record, and (4) the IJ and the BIA violated his due process rights. We agree with Mr. Arostegui-Maldonado that the IJ misapplied "under color of law" to his CAT claim. We grant the petition on that ground but deny it on the others.

I. BACKGROUND

A. *First Order of Removal and Reinstatement*

On June 24, 2008, an IJ ordered Mr. Arostegui-Maldonado's removal from the United States.[1] He reentered in September 2021. On September 10, 2021, DHS reinstated his order of removal.

[1] After his removal in 2008, Mr. Arostegui-Maldonado unlawfully reentered the United States in 2012 or 2013. He was removed to Costa Rica in 2018, and he again unlawfully reentered the United States in 2021.

B. *Withholding-Only Proceedings Before the IJ*

Following the reinstatement of the removal order, an asylum officer conducted a reasonable fear interview with Mr. Arostegui-Maldonado. The officer determined that he presented a reasonable possibility of persecution or torture if removed to Costa Rica. The officer referred the matter to withholding-only proceedings, in which an IJ decides whether to forbid removal of a noncitizen to a specific country.[2] Mr. Arostegui-Maldonado applied for asylum, withholding of removal, and CAT protection.

1. **Mr. Arostegui-Maldonado's Testimony and Evidence**

Mr. Arostegui-Maldonado, proceeding pro se, claimed that he feared persecution or torture if he returned to El Salvador or Costa Rica.

a. *El Salvador*

Mr. Arostegui-Maldonado testified that he feared returning to El Salvador because his uncle sexually assaulted him there in 1994. He also said he feared conditions of crime and violence and referenced a 2012 incident when a gang member threatened him and shot his brother.

b. *Costa Rica*

Mr. Arostegui-Maldonado testified that Costa Rican police officers harmed him in 2020. He stated that on November 24, 2020, two officers confronted him at gunpoint at his home and demanded that he sell drugs for them. He said the men arrived in a patrol

[2] Even if successful in that proceeding, the noncitizen may still be removed to a different country. 8 C.F.R. §§ 1208.17(b)(2), 1208.16(f) (2022).

car and wore police uniforms, though they did not explicitly identify themselves as police officers. Mr. Arostegui-Maldonado said he reported this encounter to the police.

Mr. Arostegui-Maldonado testified that on December 10, 2020, three police officers again confronted him at his home. At least one of them had threatened him the month before. All three were in uniform and arrived in a patrol car. The officers took him at gunpoint to an isolated location and severely beat and raped him. They again demanded that he sell drugs for them and threatened to kill him if he reported their actions or did not comply. During the beating and sexual abuse, they demanded he give them his family contact information. They threatened to harm his family if he did not sell drugs for them. After the abuse, the officers took Mr. Arostegui-Maldonado to jail. They released him after approximately 24 hours without charging him with any crime.

Upon his release, the officers told him that he had seven days to begin selling drugs for them. He testified that he was too afraid to seek medical treatment for his injuries, but that someone purchased medicine from a pharmacy for him. During the next week, the officers who beat him were often present outside of his home. They continued to harass and threaten him.

On December 17, 2020, Mr. Arostegui-Maldonado left Costa Rica. He never reported the December 10, 2020, incident to the police. He later learned from his former

landlord that police officers had asked where he was and said they had a warrant for his arrest.[3]

2. **IJ Decision**

The IJ found Mr. Arostegui-Maldonado to be credible, but denied his applications for asylum, withholding of removal, and CAT protection.

On the El Salvador CAT claim, the IJ found that Mr. Arostegui-Maldonado "has never been threatened or harmed in any way in El Salvador other than the one incident with the uncle in 1994," and therefore had not "met his burden to show it is more likely than not that he would be tortured if he were returned to El Salvador." A.R., Vol. 1 at 296-97.

On the Costa Rica CAT claim, the IJ said "the evidence is somewhat mixed, but on balance, the Court finds that [Mr. Arostegui-Maldonado] has not met his burden to show that the officers were acting under color of law." *Id.* at 297. The IJ further said that Mr. Arostegui-Maldonado "cannot show that any harm to him by the officers was at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity." *Id.* at 298.

C. ***BIA Appeal***

Mr. Arostegui-Maldonado appealed the IJ's decision in a counseled brief to the BIA. While his appeal was pending, he moved the BIA to remand to the IJ so he

[3] Mr. Arostegui-Maldonado also testified about other instances of abuse in Costa Rica that are not relevant to this appeal.

could present additional evidence regarding country conditions in El Salvador and his fear of returning to that country. He argued he did not have adequate time to fully prepare his CAT claim because DHS did not identify El Salvador as an alternative country for removal until the day of his IJ hearing.

On July 13, 2022, in an unpublished order, the BIA affirmed the IJ's decision, adopting the IJ's opinion in whole, and denied Mr. Arostegui-Maldonado's motion to remand. Mr. Arostegui-Maldonado filed a petition for review in this court. He challenges only the BIA's denial of his El Salvador and Costa Rica CAT claims.

II. **DISCUSSION**

A. ***Jurisdiction to Review the Petition***

The Government moved to dismiss for lack of jurisdiction. It argued that Mr. Arostegui-Maldonado's petition was not timely because he did not file it within 30 days of the reinstated order of removal but instead filed it within 30 days of the BIA's order affirming the IJ's denial of withholding. Doc. 10956095 ("Resp. Mot.").[4]

A noncitizen generally must petition a circuit court to review an order of removal within 30 days after the order becomes final. 8 U.S.C. § 1252(b)(1). The question here is whether a reinstated order of removal is final for purposes of judicial review if withholding-only proceedings are pending. In *Luna-Garcia v. Holder*, 777 F.3d 1182

[4] Two sets of organizations—(1) the National Immigration Litigation Alliance, Center for Gender and Refugee Studies, Immigrant Justice Idaho, National Immigrant Justice Center, and New Mexico Immigrant Law Center; and (2) the American Civil Liberties Union—filed amicus briefs in favor of jurisdiction.

(10th Cir. 2015), we held a reinstated order of removal is final for purposes of judicial review only after withholding-only proceedings conclude. *Id*. at 1185. *Luna-Garcia* controls here. Mr. Arostegui-Maldonado's petition was timely because he filed it within 30 days of the BIA's decision in his withholding-only proceedings.

1. **Legal Background**

a. *Jurisdiction under the Immigration and Nationality Act*

The Immigration and Nationality Act ("INA") authorizes judicial review of "a final order of removal." 8 U.S.C. § 1252(a)(1); *see Reyes-Vargas v. Barr*, 958 F.3d 1295, 1299-1300 (10th Cir. 2020). An order of removal is an administrative order finding that a noncitizen is removable or ordering removal. 8 U.S.C. § 1101(a)(47)(A); *see Batubara v. Holder*, 733 F.3d 1040, 1042 (10th Cir. 2013). "An order reinstating a prior removal order is the functional equivalent of a final order of removal and, therefore, we have jurisdiction to review the reinstatement order" under § 1252(a)(1). *Fernandez-Vargas v. Ashcroft*, 394 F.3d 881, 884 (10th Cir. 2005).

A "petition for review must be filed not later than 30 days after the date of the final order of removal." 8 U.S.C. § 1252(b)(1). "Timely filing is both mandatory and jurisdictional." *Luna-Garcia*, 777 F.3d at 1185.

b. *Tenth Circuit precedent*—Luna-Garcia

In *Luna-Garcia*, we addressed "the point at which the reinstated removal order becomes final for purposes of calculating the time to petition for review . . . under § 1252(b)(1)." *Id.* Ms. Luna-Garcia had petitioned this court for review of a reinstated order of removal. *Id*. at 1183. "During the reinstatement process, Luna-Garcia expressed

fear that she would be harmed if returned to her home country, and she was referred to an asylum officer for a reasonable fear hearing." *Id.* After she filed her petition, "[t]he government [] moved to dismiss the petition for review for lack of jurisdiction, arguing that the ongoing reasonable fear proceedings[5] render[ed] the reinstated removal order nonfinal." *Id.*[6] Ms. Luna-Garcia had "agree[d] that the reinstated removal order is not final in these circumstances and ask[ed] the court to directly address this question of first impression in our circuit to provide clarity to other would-be-petitioners in similar situations." *Id.*

We granted the Government's motion and dismissed the petition for lack of jurisdiction. *Id.* at 1185-87. We held that when a noncitizen "pursues reasonable fear proceedings, the reinstated removal order is not final in the usual legal sense because it cannot be executed until further agency proceedings are complete." *Id.* at 1185. "[A]lthough the reinstated removal order itself is not subject to further agency review, an IJ's decision on an application for relief from that order is appealable to the BIA." *Id.* "Thus, the rights, obligations, and legal consequences of the reinstated removal order are not fully determined until the reasonable fear and withholding of removal proceedings are complete." *Id.*

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[5] In *Luna-Garcia*, we used "reasonable fear proceedings" and "reasonable fear and withholding of removal proceedings" to refer to what we call "withholding-only proceedings" in this opinion. 777 F.3d at 1183.

[6] This argument was the opposite of what the Government argues now here, which is that reinstatement of Mr. Arostegui-Maldonado's removal order was final, notwithstanding ongoing withholding-only proceedings.

Under *Luna-Garcia*, a reinstated removal order therefore becomes final for purposes of judicial review—and the 30-day clock to file a petition for review under § 1252(b)(1) starts—upon the conclusion of withholding-only proceedings, not the order reinstating removal. *Id.* at 1185-86.

c. *Supreme Court cases*

The Government's motion focuses largely on two Supreme Court cases—*Nasrallah v. Barr*, 140 S. Ct. 1683 (2020), and *Johnson v. Guzman Chavez*, 141 S. Ct. 2271 (2021). It contends these decisions conflict with and supersede *Luna-Garcia*.

i. *Nasrallah*

In *Nasrallah*, the Government initiated removal proceedings after Mr. Nasrallah, a noncitizen, pled guilty to receiving stolen property. 140 S. Ct. at 1688. Mr. Nasrallah applied for CAT relief to prevent his removal to Lebanon. *Id.* An IJ determined Mr. Nasrallah was removable but granted him CAT relief and prohibited his removal to Lebanon, finding he had "previously suffered torture at the hands of Hezbollah." *Id.* On appeal, the BIA disagreed, vacated the order granting CAT relief, and ordered removal to Lebanon. *Id.*

Mr. Nasrallah petitioned the Eleventh Circuit for review, raising factual challenges to the BIA opinion. *Id.* at 1688-89. The court declined review. *Id.* "The court explained that Nasrallah had been convicted of a crime specified in 8 U.S.C. § 1252(a)(2)(C)." *Id.* at 1689. "Noncitizens convicted of § 1252(a)(2)(C) crimes may not obtain judicial review of factual challenges to a 'final order of removal.'" *Id.* The court held this prohibition extended to review of factual challenges to the order denying CAT relief. *Id.*

The Supreme Court reversed, holding "as a matter of straightforward statutory interpretation, Congress's decision to bar judicial review of factual challenges to final orders of removal does not bar judicial review of factual challenges to CAT orders." *Id.* at 1692. The Court considered (1) whether a CAT order itself is a final order of removal, and concluded it is not; and (2) whether a CAT order merges into a final order of removal, and concluded it does not. *Id.* at 1691. The Court explained that "[a] CAT order is not itself a final order of removal because it is not an order concluding that the [noncitizen] is deportable or ordering deportation," nor does it "merge into final orders of removal," and it therefore "does not disturb the final order of removal." *Id.* at 1691 (quotations omitted).

The Court cabined *Nasrallah* to its facts, stating "our decision does not affect the authority of the courts of appeals to review CAT orders." *Id*. at 1693.

ii. *Guzman Chavez*

In *Guzman Chavez*, a class of noncitizens subject to reinstated orders of removal and detention brought a habeas corpus action to challenge DHS's refusal to afford them bond hearings during their withholding-only proceedings. 141 S. Ct. at 2283. The question presented was which of two detention statutes applied to them: (1) 8 U.S.C. § 1226, "which applies 'pending a decision on whether the alien is to be removed from the United States'" and allows a bond hearing before an IJ; or (2) 8 U.S.C. § 1231, "which applies after the alien is 'ordered removed'" and does not allow a bond hearing. *Id*. at 2280 (quoting §§ 1226, 1231). The noncitizen class members argued their

reinstated orders of removal were still "pending" because they had initiated withholding-only proceedings, so § 1226 governed. *Id*. at 2283.

The Court disagreed, holding that "§ 1231, not § 1226, governs the detention of aliens subject to reinstated orders of removal, meaning those aliens are not entitled to a bond hearing while they pursue withholding of removal." *Id.* at 2280. It explained that a "removal order[] and withholding-only proceedings address two distinct questions," "end in two separate orders, and the finality of the order of removal does not depend in any way on the outcome of the withholding-only proceedings." *Id*. at 2287. The Court also said "the order of removal is separate from and antecedent to a grant of withholding of removal." *Id.* at 2288.

As in *Nasrallah*, the Court limited its decision, stating that it expressed "no view on whether the lower courts are correct in their interpretation of § 1252"—the jurisdictional provision before us—which "relates to judicial review of removal orders rather than detention." *Id.* at 2285 n.6.

2. **Analysis**

We deny the Government's motion to dismiss and hold that we have jurisdiction under *Luna-Garcia*. As a general rule, "[o]ne panel of this court cannot overrule the judgment of another panel absent en banc consideration." *United States v. White*, 782 F.3d 1118, 1126-27 (10th Cir. 2015) (quotations and alterations omitted). But a panel may depart from circuit precedent if a "subsequent Supreme Court decision *contradicts or invalidates* our prior analysis." *United States v. Brooks*, 751 F.3d 1204, 1209-10 (10th Cir. 2014). Such a case must "clearly overrule" our precedent—"indirect"

"tension" between our precedent and a later Supreme Court opinion is not enough. *Speidell v. Internal Revenue Serv.*, 978 F.3d 731, 738-39 (10th Cir. 2020).

In *Luna-Garcia*, we concluded that when a noncitizen "pursues reasonable fear proceedings, the reinstated removal order is not final in the usual legal sense because it cannot be executed until further agency proceedings are complete." 777 F.3d at 1185. The "rights, obligations, and legal consequences of the reinstated removal order are not fully determined" for purposes of judicial review "until the reasonable fear and withholding of removal proceedings are complete." *Id.* The Government has not persuaded us that *Nasrallah* or *Guzman Chavez* clearly overruled *Luna-Garcia*.

First, the Government relies on language in *Nasrallah* that "[a] CAT order is not itself a final order of removal because it is not an order concluding that the alien is deportable or ordering deportation," nor does it "merge into final orders of removal," and it therefore "does not disturb the final order of removal." 140 S. Ct. at 1691; *see* Resp. Mot. at 6. It argues this language requires us to "dismiss the petition for lack of jurisdiction" because an order from withholding-only proceedings "does not constitute a final order of removal" and Mr. Arostegui-Maldonado's petition for review was therefore "untimely-filed as to DHS's reinstatement order." Resp. Mot. at 6 (citing *Nasrallah*, 140 S. Ct. at 1691). We disagree.

The BIA's denial of Mr. Arostegui-Maldonado's applications for asylum, withholding of removal, and CAT protection in his withholding-only proceedings was not a final order of removal, just as the BIA's denial of Mr. Nasrallah's CAT claim was, as the Supreme Court held, "not itself a final order of removal." *Nasrallah*, 140 S. Ct.

at 1691. The *Nasrallah* language is consistent with *Luna-Garcia*. We did not say in *Luna-Garcia* that the BIA's disposition in the withholding-only proceedings would *itself* be a final order of removal. We said that the culmination of the withholding-only proceedings would render the reinstated order of removal final. *Luna-Garcia*, 777 F.3d at 1185-86.

The Government's focus is misplaced. In *Nasrallah*, the Supreme Court reversed the Eleventh Circuit's denial of review of Mr. Nasrallah's factual challenges to the BIA's order denying CAT protection. Although the BIA's CAT denial was not itself a final order of removal, it was a reviewable denial of CAT protection. The Court noted that "judicial review of final orders of removal is somewhat limited in cases (such as Nasrallah's) involving noncitizens convicted of crimes specified in § 1252(a)(2)(C)." *Nasrallah*, 140 S. Ct. at 1690. "In those cases, a court of appeals may review constitutional or legal challenges to a final order of removal, but the court of appeals may not review factual challenges to a final order of removal." *Id.* (emphasis omitted). But it said the Eleventh Circuit was mistaken in thinking this limitation also barred review of Mr. Nasrallah's CAT denial, which presented a different issue than the removal order.

Moreover, the Court explicitly cautioned against overreading its holding regarding a circuit court's ability to review factual challenges to CAT orders. The Court stated that "our decision does not affect the authority of the courts of appeals to review CAT orders." *Id*. at 1693. *Nasrallah* does not contradict or invalidate *Luna-Garcia*.

Second, *Guzman Chavez*'s holding about bond hearings during withholding-only proceedings likewise does not undermine *Luna-Garcia*. The Government points to the

Court's statements that "the finality of the order of removal does not depend in any way on the outcome of the withholding-only proceedings" and "the order of removal is separate from and antecedent to a grant of withholding of removal." Resp. Mot. at 5, 6, 8 (quoting 141 S. Ct. at 2287-88).

Although this language, standing alone, lends support to the Government's argument, it is limited to its context. The *Guzman Chavez* Court's holding—that noncitizens with reinstated removal orders who are detained pending withholding-only proceedings are not entitled to bond hearings—answered a different question from the one presented here. Holding that a reinstated removal order is final for purposes of an IJ's consideration of detention does not answer whether it is final for purposes of circuit court review of the outcome of withholding-only proceedings. *See Padilla-Ramirez v. Bible*, 882 F.3d 826, 836 (9th Cir. 2017) ("It therefore is consonant with settled administrative legal principles to hold that the alien's reinstated removal order (i.e., the agency's decision that he is to be removed from the United States) is final for detention purposes even though it lacks finality for purposes of judicial review of his withholding-only claim." (quotations and citations omitted)).

Further, the *Guzman Chavez* Court "express[ed] no view on whether the lower courts are correct in their interpretation of § 1252," which "relates to judicial review of removal orders rather than detention." 141 S. Ct. at 2285 n.6. Thus, the Court said it did not address the question presented in *Luna-Garcia* regarding finality of a reinstatement of removal order when withholding-only proceedings are pending for purposes of judicial review.

* * * *

The Government has failed to show that *Nasrallah* or *Guzman Chavez* "contradicts or invalidates" our decision in *Luna-Garcia*. *Brooks*, 751 F.3d at 1210 (emphasis omitted). Because *Luna-Garcia* thus remains binding, Mr. Arostegui-Maldonado's reinstated removal order became final for purposes of judicial review upon culmination of his withholding-only proceedings when the BIA affirmed the IJ's order. His petition for review, filed within 30 days of the BIA's decision, was timely. We have jurisdiction to review the merits of his petition, which we turn to next.

B. ***Challenges to the BIA's Decision***

Mr. Arostegui-Maldonado argues that (1) the IJ misapplied the under-color-of-law element of a CAT claim, (2) the BIA ignored his CAT claim, (3) the IJ failed to fully develop the record, and (4) the IJ and the BIA violated his due process rights. We grant his petition on the first argument and deny it on the others.

Because the BIA's order agreed with and adopted the IJ's decision, we review that decision as if it were the BIA's. *See Wiransane v. Ashcroft*, 366 F.3d 889, 897 (10th Cir. 2004); *Abebe v. Gonzales*, 432 F.3d 1037, 1040-41 (9th Cir. 2005) (en banc).[7]

We review the IJ's "legal determinations de novo, and its findings of fact under a substantial-evidence standard." *Xue v. Lynch*, 846 F.3d 1099, 1104 (10th Cir. 2017)

[7] Here, a single BIA member upheld the IJ's CAT eligibility determination without adding any of his own analysis, so we consult the IJ's decision, as it is "all that can give substance to the BIA's reasoning in its order of affirmance." *Uanreroro v. Gonzales*, 443 F.3d 1197, 1203-04 (10th Cir. 2006).

(quotations omitted). The substantial evidence standard is "highly deferential," as the "administrative findings of fact are conclusive unless any reasonable adjudicator would be compelled to conclude to the contrary." *Wiransane v. Ashcroft*, 366 F.3d 889 (10th Cir. 2004); 8 U.S.C. § 1252(b)(4)(B). We review de novo "the application of law to undisputed facts." *Garcia-Aranda v. Garland*, 53 F.4th 752, 757 (2d Cir. 2022); *see H.H. v. Garland*, 52 F.4th 8, 16 (1st Cir. 2022); *Iruegas-Valdez v. Yates*, 846 F.3d 806, 810 (5th Cir. 2017).[8]

1. **Application of the Under-Color-of-Law Element of the Convention Against Torture Claim**

a. *Legal background—CAT claims and under color of law*

The CAT "prohibits removal to a country where an alien would probably face torture." *Igiebor v. Barr*, 981 F.3d 1123, 1127 (10th Cir. 2020) (quotations omitted). It

[8] Mr. Arostegui-Maldonado filed a letter under Federal Rule of Appellate Procedure 28(j), stating that "whether the government acted under the color of law" raises a "legal question that receives de novo review," citing *H.H.*, 52 F.4th at 16, and *Saban-Cach v. Attorney General*, 58 F.4th 716, 736 (3d Cir. 2023). The Government submitted a response, asserting that "[u]nder 8 U.S.C. § 1252(b)(4)(B), this Court reviews the denial of an application for CAT protection under the substantial evidence standard of review," citing *INS v. Elias Zacarias*, 502 U.S. 478, 481 (1992), and *Xue*, 846 F.3d at 1104.

We agree with Mr. Arostegui-Maldonado. *Elias Zacarias* and *Xue* do not state that the substantial evidence standard applies to whether an applicant met CAT requirements. In fact, their discussions of the standard of review do not even pertain to CAT determinations. Rather, they explain that, for an asylum claim, "the ultimate determination whether an alien has demonstrated persecution is a question of fact." *Xue*, 846 F.3d at 1104 (quotations omitted); *see Zacarias*, 502 U.S. at 481. We agree with the other circuits holding that the standard of review for the application of law to facts for CAT determinations is de novo. *See, e.g.*, *H.H.*, 52 F.4th at 16; *Saban-Cach*, 58 F.4th at 736; *Garcia-Aranda*, 53 F.4th at 757; *Iruegas-Valdez*, 846 F.3d at 810.

became a part of U.S. law through the Foreign Affairs Reform and Restructuring Act of 1998. *See Nasrallah*, 140 S. Ct. at 1690.

An applicant for relief under CAT must show "that it is more likely than not that he or she would be tortured if removed to the proposed country of removal." 8 C.F.R. § 1208.16(c)(2).[9] Torture for purposes of a CAT claim is defined as:

> (1) an act causing severe physical or mental pain or suffering; (2) intentionally inflicted; (3) for a proscribed purpose; (4) by or at the instigation of or with the consent or acquiescence of a public official who has custody or physical control of the victim; and (5) not arising from lawful sanctions.

DeCarvalho v. Garland, 18 F.4th 66, 72 (1st Cir. 2021) (citing 8 C.F.R. § 1208.18(a)(1)). In assessing an applicant's CAT claim, "all evidence relevant to the possibility of future torture shall be considered," including "[e]vidence of past torture inflicted upon the applicant." 8 C.F.R. § 1208.16(c)(3)(i)-(iv).[10]

By requiring that torture be "[1] by or at the instigation or [2] with the consent or acquiescence of a public official," CAT protection requires a connection between torture and the government in one of two ways, but not both. *DeCarvalho*, 18 F.4th at 72.

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[9] A CAT claim "differs from a claim for asylum or withholding of removal under the INA because there is no requirement that the petitioners show that torture will occur on account of a statutorily protected ground." *Cruz-Funez v. Gonzales*, 406 F.3d 1187, 1192 (10th Cir. 2005). "The testimony of the applicant, if credible, may be sufficient to sustain the burden of proof without corroboration." 8 C.F.R. § 1208.16(c)(2).

[10] "Relief under the CAT is mandatory if the convention's criteria are satisfied." *Igiebor*, 981 F.3d at 1127-28 (quotations omitted).

First, the CAT applies to pain or suffering inflicted by a "public official acting in an official capacity or other person acting in an official capacity." 8 C.F.R. § 1208.18(a)(1). "[P]ublic officials or other persons act 'in an official capacity' when they act 'under color of law.'" *Matter of O-F-A-S-*, 28 I. & N. Dec. 35, 39 (B.I.A. 2020). Thus, "under color of law" is an element of a CAT claim based on torture "by or at the instigation of . . . a public official." *DeCarvalho*, 18 F.4th at 72.

An act is "'under the color of law' when the actor misuses power possessed by virtue of law and made possible only because the actor was clothed with the authority of law." *Matter of O-F-A-S-*, 28 I. & N. Dec. at 39 (citing *Nat'l Collegiate Athletic Ass'n v. Tarkanian*, 488 U.S. 179, 191 (1988)). "Whether any particular official's actions ultimately satisfy this standard is a fact-intensive inquiry . . . ." *Id.* at 40. When police officers inflict torture, "[i]t is irrelevant whether the police were rogue (in the sense of not serving the interests of the [entire] government) or not . . . . The relevant question is whether they acted under color of law." *Id.*

Second, if someone who is not a public official or a person acting in an official capacity inflicted the pain or suffering, the CAT applicant must show that public officials "acquiesce[d]" to the acts constituting torture. *See Karki v. Holder*, 715 F.3d 792, 806 (10th Cir. 2013). "This standard does not require actual knowledge, or willful acceptance by the government . . . . Rather, willful blindness suffices to prove acquiescence." *Id.* (citations and quotations omitted).

b. *Analysis*

The IJ erred because it misapplied the under-color-of-law element. We agree with Mr. Arostegui-Maldonado that the police officers who beat and raped him "displayed all indicia of lawful police officers." Pet. Br. at 14-15. His credible testimony established that the officers wore their police uniforms, drove a marked patrol car, held him at gunpoint, handcuffed him, arrested him, brought him to a government jail where he was held for 24 hours; and later issued a warrant for his arrest. *See* A.R., Vol. 1 at 357-70, 400, 417-18. The Government does not contest these facts. *See* Resp. Br. at 36-37. The police officers thus "misused power possessed by virtue of law, made possible only because" they were "clothed with the authority of law." *Matter of O-F-A-S-*, 28 I. & N. Dec. at 42.[11]

The IJ said that because a private citizen could have performed those acts against Mr. Arostegui-Maldonado, the police officers did not act under color of law. For example, the IJ explained that "when the officers required respondent to go with them, they did so under coercion by pointing a gun at him which obviously any person could do regardless of whether they are a public official or not." A.R., Vol. 1 at 298. "And regardless of whether they were a public official, they could have abducted him in a

[11] Mr. Arostegui-Maldonado also argues "the IJ ignored the testimony of Petitioner that he was indeed tortured while detained in the state jail." Pet. Br. at 17. The Government counters that Mr. Arostegui-Maldonado testified at the IJ hearing that he was not tortured while in jail. *See* Resp. Br. at 37. Our review of the transcript reveals ambiguity on this factual dispute. We cannot say that "any reasonable adjudicator would be compelled to conclude to the contrary" of the IJ's conclusion that no torture occurred at the jail itself. 8 U.S.C. § 1252(b)(4)(B).

vehicle." *Id.* Under the IJ's rationale, because a private citizen could have held Mr. Arostegui-Maldonado at gunpoint, abducted him in a vehicle, and beaten and raped him, it made no difference that uniformed police officers held him at gunpoint, abducted him in a patrol vehicle, beat and raped him, jailed him, and obtained a warrant for his arrest.

This interpretation defies logic and the law. The police officers wore their uniforms, used a gun and a patrol car, put Mr. Arostegui-Maldonado in jail, and later obtained a warrant for his arrest. Their misuse of power—threatening, beating, raping, and jailing Mr. Arostegui-Maldonado—was thus made possible by virtue of being clothed with the authority of law. As stated in *Matter of O-F-A-S-*, the IJ's analysis "would appear to disqualify much of what the under color of law rule might otherwise qualify as torture." 28 I. & N. Dec. at 41 (quotations omitted). It would resurrect the "rogue official test" rejected in *Matter of O-F-A-S-*, which would "immuniz[e] extrajudicial action by low-level officials from the CAT's scope." *Id.*[12]

[12] *See also Iruegas-Valdez*, 846 F.3d at 812 ("[A]cts motivated by an officer's personal objectives are 'under color of law' when the officer uses his official capacity to further those objectives." (quotations omitted)); *Garcia v. Holder*, 756 F.3d 885, 893 (5th Cir. 2014) (holding it was legal error when "[t]he BIA denied CAT relief solely because it was not clear that the men who threatened and beat Garcia were actual police officers," but "[n]either the BIA nor the IJ considered the alternative view of the evidence showing that the extortionists may have received their information about Garcia from other government officials acting in their official capacities").

We grant the petition for review on Mr. Arostegui-Maldonado's claim that the IJ misapplied the under-color-of-law element of his CAT claim and remand for further proceedings.[13]

2. **Whether the BIA Ignored the Convention Against Torture Claim**

Mr. Arostegui-Maldonado argues that the BIA considered only his abandoned asylum and withholding claims and ignored his CAT claim. We deny relief based on this argument because it is moot due to our remand of the CAT claim as explained above.[14]

3. **Full Development of the Record**

Mr. Arostegui-Maldonado argues the IJ failed to "fully develop the record" on his fear of returning to El Salvador. Pet. Br. at 11. But he has not identified additional

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[13] Mr. Arostegui-Maldonado argues the IJ erred when it "held that acquiescence of the government *also* was required" in addition to establishing that public officials tortured him. Pet. Br. at 18. He bases this argument on the following portion of the IJ's order:

> Perhaps more importantly, respondent cannot show that any harm to him by the officers was at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity. The acquiescence issue is determinative if nothing else is.

Id. (quoting A.R., Vol. 1 at 298). It is not clear to us that the IJ meant Mr. Arostegui-Maldonado must show both types of government connection to torture—under-color-of-law-infliction and acquiescence. It would be error if the IJ did because these are alternative bases for torture. *See* 8 C.F.R. § 1208.18(a)(1). We address this point for guidance on remand.

[14] The BIA did not otherwise ignore the CAT claim. It adopted the IJ's order in full, which addressed and denied the CAT claim. A.R., Vol. 1 at 3, 296-300; *see Matter of Burbano*, 20 I. & N. Dec. 872, 874 (BIA 1994). Also, the BIA stated, "The applicant also has not raised any argument on appeal that would cause us to disturb the Immigration Judge's decision denying withholding of removal and protection under CAT." A.R., Vol. 1 at 4.

evidence that supports his CAT claim and thus cannot prevail on this argument under *Matumona v. Barr*, 945 F.3d 1294 (10th Cir. 2019). *See id*. at 1304 ("To prevail on this argument, Petitioner must identify evidence that the IJ should have elicited that would have altered the BIA's finding.").

Although we have never "explicitly recognized" that an "IJ has an affirmative duty to develop the record when the applicant is not represented," *Matumona*, 945 F.3d at 1303-04, even assuming such a duty, Mr. Arostegui-Maldonado's argument fails.[15] He still must show the IJ's insufficient "development of the record was prejudicially inadequate." *Id*. at 1304. Rather than doing so, he summarily asserts "[p]rejudice occurred here," contending that "[i]f the IJ had 'fully developed the record', he likely would not have found El Salvador to be an appropriate alternative country for removal." Pet. Br. at 25. Without more, he has not established prejudice.

4. **Due Process**

Mr. Arostegui-Maldonado's due process arguments fail.

First, he claims he was "not provided an opportunity to effectively submit evidence in support of his [El Salvador CAT] claim describing the country conditions . . . ." Pet. Br. at 23. But to establish a due process violation based on this claim, he needed to demonstrate prejudice. *Witjaksono v. Holder*, 573 F.3d 968, 974-75 (10th Cir. 2009). And he has not done so because the conditions of a country alone are

[15] Mr. Arostegui-Maldonado appeared pro se before the IJ but has since obtained counsel.

"insufficient to demonstrate the applicant is more likely than not to be tortured upon returning there." *Escobar-Hernandez v. Barr*, 940 F.3d 1358, 1362 (10th Cir. 2019).[16]

Second, he asserts "two other errors" as additional "grounds for his due process claim." Pet. Br. at 26.

> First, the Petitioner argued that the IJ conducted the hearing in English instead of in his native language of Spanish. Second, Petitioner contended that he was not fully advised of the hearing procedures, particularly of the elements he needed to prove, the reasonable means of proving them, and the potential sources of that evidence. In the Board's opinion, these arguments were not addressed. For these additional reasons, the Board failed to discharge its legal obligation.

Id. (citations omitted). These arguments are inadequately briefed. "[C]ursory statements, without supporting analysis and case law, fail to constitute the kind of briefing that is necessary" to preserve an issue for appellate review. *Bronson v. Swensen*, 500 F.3d 1099, 1105 (10th Cir. 2007). Mr. Arostegui-Maldonado has therefore waived these arguments.

III. **CONCLUSION**

We deny the Government's motion to dismiss for lack of jurisdiction. On the merits, we grant the petition for review in part and remand to the BIA for reconsideration

[16] As explained earlier, Mr. Arostegui-Maldonado testified about an incident of sexual abuse by an uncle and an incident with a gang in El Salvador. He has never alleged a government connection to these incidents. Taken together, even with an opportunity to present country conditions evidence in addition to testimony about these past incidents, this does not amount to the required government nexus for a CAT claim. *See Karki*, 715 F.3d at 806. He has therefore not demonstrated prejudice.

of Mr. Arostegui-Maldonado's CAT claim under the correct under-color-of-law standard. We otherwise deny the petition.

22-9554, *Arostegui-Maldonado v. Garland*

TYMKOVICH, Circuit Judge, joined by **EID**, Circuit Judge, concurring.

I concur with the majority's well-reasoned analysis. But I write separately to explain why *Luna-Garcia v. Holder* sits in tension with two recent Supreme Court cases that have seriously undermined its analytical structure. Under the new approach suggested by these cases, Mr. Arostegui-Maldonado did not timely file his petition for review. It would be appropriate for a full en banc court to consider whether to overrule *Luna-Garcia*.

To understand this tension, we must first take a brief detour through our labyrinthian immigration system. Under the Immigration and Nationality Act, we can typically review only "final order[s] of removal." 8 U.S.C. § 1252(a)(1). No final order of removal, no jurisdiction. An order of removal is an order "concluding that the alien is deportable or ordering deportation." *Nasrallah v. Barr*, 140 S. Ct. 1683, 1690 (2020) (quoting § 1101(a)(47)(A)). That deportation order becomes final when the BIA affirms it, or when the period during which the alien can appeal the order to the BIA lapses—whichever comes first. § 1101(a)(47)(B)(i)–(ii). We can review the order so long as the alien files his petition within 30 days. § 1252(b)(1).

While our review is limited to final orders of removal, the INA allows a petitioning alien to package related matters in his petition for review. Under the INA's "zipper clause," we can package and consider "*all questions of law and fact . . . arising from any action taken or proceeding brought to remove an alien from the United States.*" § 1252(b)(9) (emphasis added). But we can only consider these questions when a final

order of removal is also reviewable. *See Bhaktibhai-Patel v. Garland*, 32 F.4th 180, 189–90 (2d Cir. 2022).

The zipper clause captures—and allows us to review—the agency's resolution of an alien's withholding claims. Typically, when an alien challenges his deportation order, he can apply for a separate form of relief to halt that deportation. He can pursue statutory withholding under § 1231(b)(3)(A) to prevent deportation to a country where his life or freedom would be threatened due to his membership in a protected class. Or he, like Mr. Arostegui-Maldonado, can seek refuge under the Convention Against Torture's implementing regulations, which bar the government from removing an alien to a country where he would likely face torture. 8 C.F.R. § 241.8(d). If an alien obtains either withholding grant[1] from the Department of Homeland Security, his removal order remains valid; the government is just limited in where it can send him. *Johnson v. Guzman Chavez*, 141 S. Ct. 2271, 2286 (2021).

That seems straightforward enough, but in a case where an alien challenges a *reinstatement* order, things get muddled. When an alien reenters the United States after his initial deportation, the agency does not impose a new removal order. Instead, it reinstates the *prior* order, and that order "is not subject to being reopened or reviewed." 8 U.S.C. § 1231(a)(5). This provision also "generally foreclose[es] discretionary relief from the terms of the reinstated order" by the agency. *Guzman Chavez*, 141 S. Ct. at

[1] Because I do not see an important distinction between CAT protection grants and statutory withholding of removal grants in the following analysis, I refer to them jointly as "withholding grants" or "withholding determinations" for the sake of brevity.

2282 (quoting *Fernandez-Vargas v. Gonzales*, 548 U.S. 30, 35 (2006)). Nevertheless, like most circuits, we treat the reinstatement order as the functional equivalent of an order of removal and therefore retain jurisdiction to review it.[2] *Garcia-Marrufo v. Ashcroft*, 376 F.3d 1061, 1064 (10th Cir. 2004).

Because we typically treat reinstatement orders as judicially reviewable removal orders, we encounter an odd situation when an alien raises withholding claims following reinstatement. Here's the problem: We can review only final orders of removal. If a reinstatement order becomes final upon its imposition—recall that further agency review is cut off—then an alien seeking statutory withholding or CAT relief—like Mr. Arostegui-Maldonado—probably could not obtain judicial review of those determinations. After all, the alien has only 30 days after the deportation order becomes final to petition for review, but the withholding claims need time to navigate agency proceedings. We patched up this problem by finding that outstanding withholding claims unsettle the finality of a reinstatement order:

> When an alien pursues reasonable fear proceedings, the reinstated removal order is *not final in the usual legal sense* because it cannot be executed until further agency proceedings are complete. And, although the reinstated removal order itself is not subject to further agency review, an IJ's decision on an application for relief from that order is appealable to the BIA. Thus, the rights, obligations, and legal consequences of the reinstated removal order are not fully determined until the reasonable fear and withholding of removal proceedings are complete.

[2] Some find the legal soundness of this approach dubious. *See Bhaktibhai-Patel*, 32 F.4th at 195–96; *Ruiz-Perez v. Garland*, 49 F.4th 972, 982–83 (5th Cir. 2022) (Oldham, J., dissenting).

Luna-Garcia v. Holder, 777 F.3d 1182, 1185 (10th Cir. 2015) (emphasis added). Under *Luna-Garcia*, a reinstatement order is rendered non-final (in the usual legal sense) by pending withholding proceedings. Accordingly, an alien can secure judicial review of the agency's withholding determinations by filing a petition within 30 days of that decision.

In my view, two new Supreme Court precedents have undermined *Luna-Garcia*'s foundations. Read together, they suggest that Mr. Arostegui-Maldonado's petition was not timely filed, and that we are without jurisdiction to consider his CAT claims.

The first Supreme Court case is *Nasrallah v. Barr*, 140 S. Ct. 1683 (2020). There, the Court defined the scope of § 1252(a)(2)(C), which strips courts of jurisdiction to review "final orders of removal" against certain criminal aliens. The Court had to decide whether, given the jurisdiction strip, courts could review factual challenges to CAT orders. The Court decided that courts *do* maintain jurisdiction to review those challenges, primarily because a CAT order is not a final order of removal and therefore remains unaffected by the jurisdiction strip. *Id.* at 1691–92.

The Court could only reach that conclusion by establishing two premises. First, the Court reasoned that "a CAT order is not itself a final order of removal because it is not an order concluding that the alien is deportable or ordering deportation." *Id.* at 1691 (internal quotation marks omitted). Second, the Court held that a CAT order does not merge into final orders of removal. *Id.* The Court explained, "[f]or purposes of this statute, final orders of removal encompass only the rulings made by the [IJ] or [BIA] that affect the validity of the final order of removal," "[b]ut the [IJ]'s or the Board's ruling on a CAT claim does not affect the validity of the final order of removal." *Id.*

The second case is *Johnson v. Guzman Chavez*, 141 S. Ct. 2271 (2021). There, the Court considered which statutory provision governed the rights of aliens subject to reinstated orders of removal who awaited withholding proceedings: 8 U.S.C. § 1226 or § 1231. The parties agreed that § 1226 governs until § 1231's "removal period" begins. And the removal period begins when an alien is "ordered removed," and the order becomes "administratively final." The aliens were ordered removed by the reinstatement order, so the Court had to decide whether the order was "administratively final." It found that a reinstatement order becomes administratively final when the agency imposes it, and that withholding proceedings do not unsettle its finality. *Id.* at 2288.

The Court could only reach that conclusion by establishing another important premise. It explained that "removal orders and withholding-only proceedings address two distinct questions. As a result, they end in two separate orders, *and the finality of the order of removal does not depend in any way on the outcome of the withholding-only proceedings*." *Id.* at 2287 (emphasis supplied). "Because the validity of removal orders is not affected by the grant of withholding-only relief, an alien's initiation of withholding-only proceedings does not render non-final an otherwise 'administratively final' reinstated order of removal." *Id.* at 2288.

While *Nasrallah* and *Guzman Chavez* resolved different questions in different contexts, they established important principles applicable to this case. Crucially, we must view a withholding determination as distinct from an order of removal; they are "two separate orders." *Id.* at 2287. Not only is a withholding order "not itself a final order of removal," it "does not merge into a final order of removal" and does not "affect the

validity of a final order of removal." *Nasrallah*, 140 S. Ct. at 1691. Even if *Nasrallah* did "not affect the authority of the courts of appeals to review CAT orders," the opinion left *Luna-Garcia* on shaky ground. *Id.* at 1693. After all, "[i]t makes no sense for finality of an order to depend on a separate order that can't change the first one." *Ruiz-Perez v. Garland*, 49 F.4th 972, 985 (5th Cir. 2022) (Oldham, J., dissenting).

Guzman Chavez affirmed that it makes little sense to view a withholding determination as undermining the finality of a removal order. The Court, building off *Nasrallah*'s framework, explained that a withholding grant's inability to alter the legal status of a removal order also prevents it from unsettling that order's finality. *Guzman Chavez*, 141 S. Ct. at 2287–88. To be sure, the Court addressed administrative finality, not finality for the purposes of judicial review. But its logic turned on the relationship between withholding determinations and reinstated removal orders, not on the nature of administrative finality. *See id*.

Because the Supreme Court decided *Guzman Chavez* and *Nasrallah* relatively recently, few circuit courts have had the opportunity to reassess their treatment of removal orders and withholding determinations. The Second Circuit, however, recently concluded that the cases unsettled existing law in the manner described here. *See Bhaktibhai-Patel*, 32 F.4th at 193–95. The Fifth Circuit saved the question for another day, but a dissent would have joined the Second Circuit. *Ruiz-Perez*, 49 F.4th at 984–85 (Oldham, J., dissenting).

Luna-Garcia sits uneasily in the regime established by *Nasrallah* and *Guzman Chavez*. It now makes little sense to reason that "[w]hen an alien pursues reasonable fear

proceedings, the reinstated removal order is not final in the usual legal sense." *Luna-Garcia*, 777 F.3d at 1185. The full court should consider whether Mr. Arostegui-Maldonado should have petitioned for review within the 30-day window following the imposition of his reinstatement order. *See Lincoln v. BNSF Ry. Co.*, 900 F.3d 1166, 1183 (10th Cir. 2018).