

In the
United States Court of Appeals
For the Second Circuit

August Term 2024
No. 23-7191-ag

FLAVIO DIVINO SANTOS,
Petitioner,

v.

TODD BLANCHE, UNITED STATES ATTORNEY GENERAL,
*Respondent.**

ARGUED: DECEMBER 11, 2024
DECIDED: SEPTEMBER 8, 2026

Before: LOHIER, *Chief Judge*, SULLIVAN, and KAHN, *Circuit Judges*.

Petitioner Flavio Divino Santos, a citizen of Brazil, attempted to enter the United States in 2004, was issued an expedited removal order, and was deported. In 2017, Santos reentered the United States without inspection and was issued a reinstatement order based on his 2004 expedited removal order. Santos was not removed at the time but, in 2023, was detained pursuant to his reinstatement order. Santos subsequently filed a motion to reopen, reconsider, and rescind his reinstatement order with U.S. Customs and Border Protection (“CBP”), which the agency denied. Santos seeks review of two distinct agency actions: (1) a July 2,

* The Clerk of Court is respectfully directed to amend the caption accordingly.

2017 order reinstating his 2004 expedited removal order and (2) an August 23, 2023 order denying his motion to reopen, reconsider, and rescind that reinstatement order.

As to the 2017 reinstatement order, we reaffirm our precedent that a reinstatement order is a final order of removal under 8 U.S.C. § 1252(a) such that we have jurisdiction to review his claims. Guided by the Supreme Court’s recent decision in *Riley v. Bondi*, 606 U.S. 259 (2025), we acknowledge that the 30-day filing deadline at 8 U.S.C. § 1252(b)(1) is a claims-processing rule rather than a jurisdictional bar. However, even assuming that deadline is subject to equitable tolling, we find that Santos did not exercise the requisite diligence to warrant tolling in this case.

As to the 2023 denial of Santos’s motion, we conclude that 8 U.S.C. §§ 1252(a) and 1252(b)(6) together grant us jurisdiction to review CBP’s denial of Santos’s motion to reopen. We further hold that 8 C.F.R § 103.5(a) authorizes CBP to reopen, reconsider, and rescind its decisions to reinstate removal orders. We hold that CBP denied Santos’s motion on the erroneous understanding that it had no authority to reopen or reconsider its reinstatement decision, that it therefore misperceived the law and, as such, that it abused its discretion.

Accordingly, we **DENY** Santos’s petition for review as to his 2017 reinstatement order. We **GRANT** Santos’s petition as to the 2023 denial of his motion to reopen, reconsider, and rescind the 2017 reinstatement order, **VACATE** that denial, and **REMAND** for CBP to consider Santos’s motion in the first instance. The government’s motion to dismiss Santos’s petition for review is **DENIED** as moot.

Judge Sullivan concurs in part and dissents in part in a separate opinion.

ANNELISE M.J. DE ARAUJO, Araujo & Fisher, LLC, Boston, MA, *for Petitioner*.

TIM RAMNITZ, Senior Litigation Counsel (Brian M. Boynton, Principal Deputy Assistant Attorney General and Shelley R. Goad, Assistant Director, *on the brief*), Office of Immigration Litigation, Civil Division, U.S. Department of Justice, Washington, DC, *for Respondent*.

TRINA REALMUTO (Kristin Macleod-Ball, *on the brief*),
National Immigration Litigation Alliance, Brookline, MA,
for Amicus Curiae National Immigration Litigation Alliance,
in support of Petitioner.

MARIA ARAÚJO KAHN, *CIRCUIT JUDGE*:

Petitioner Flavio Divino Santos (“Santos”), a citizen of Brazil, attempted to enter the United States in 2004, was issued an expedited removal order, and was deported. In 2017, Santos reentered the United States without inspection and was issued a reinstatement order based on his 2004 expedited removal order. Santos was not removed at the time but, in 2023, was detained pursuant to his reinstatement order. Santos subsequently filed a motion to reopen, reconsider, and rescind his reinstatement order with U.S. Customs and Border Protection (“CBP”), which the agency denied. Santos seeks review of two distinct agency actions: (1) the July 2, 2017 reinstatement of his 2004 expedited removal order and (2) the August 23, 2023 denial of his motion to reopen, reconsider, and rescind that reinstatement order.

Each of the two orders that Santos challenges raises several issues for this Court. As to his 2017 reinstatement order, we must consider: (1) whether we have jurisdiction to review reinstatement orders, (2) whether Santos’s petition for

review was timely, and (3) if Santos's petition was untimely, whether equitable tolling cures that defect. In Part I of this opinion, we hold that reinstatement orders are final orders of removal, such that we have jurisdiction to review them under 8 U.S.C. § 1252(a)(1). We further hold that Santos's petition for review was untimely and that, even assuming that equitable tolling applies to the thirty-day deadline in 8 U.S.C. § 1252(b)(1), Santos is not entitled to tolling. We therefore deny Santos's petition for review as to his 2017 reinstatement order.

As to the 2023 denial of Santos's motion to reopen, reconsider, and rescind his 2017 reinstatement order, we must consider: (1) whether we have jurisdiction to review a motion to reopen a reinstatement order, (2) whether CBP has the authority to reopen reinstatement orders under 8 C.F.R § 103.5, and (3) if CBP does have that authority, whether it erred in denying Santos's motion. In Part II of this opinion, we hold that we have jurisdiction to review Santos's motion to reopen under 8 U.S.C. § 1252(b)(6). We further hold that CBP is authorized to reopen, reconsider, and rescind reinstatement orders and that it misapprehended its authority to do so when it denied Santos's motion. We therefore grant Santos's petition for review as to his 2023 motion to reopen, vacate the agency's decision, and remand for further proceedings consistent with this opinion.

FACTUAL AND PROCEDURAL BACKGROUND

A. INITIAL ENTRY

Santos is a citizen of Brazil who first entered the United States without inspection in 1995. He lived in the United States for several years, during which time he had a U.S. citizen child. Santos then left the country and, in 2004, sought reentry on a B-2 visitor visa. The U.S. Department of Homeland Security (“DHS”) denied Santos entry and issued him an expedited removal order pursuant to 8 U.S.C. § 1225(b)(1).

In late 2016 and early 2017, Santos arranged to return to the United States with the help of a smuggling network. While en route to the United States, the smugglers warned Santos and his wife that they had previously broken the legs of a client who had not paid his smuggling debt and that they would kill anyone who revealed their identities to U.S. law enforcement.

B. REENTRY AND REINSTATEMENT

On or about July 1, 2017, Santos entered the United States without inspection at the border in Vermont, where he was apprehended by CBP agents shortly after crossing. These agents served Santos with a Form I-871 Notice of Intent/Decision to Reinstate his 2004 expedited removal order pursuant to 8 U.S.C.

§ 1231(a)(5) and 8 C.F.R. § 241.8. CBP informed Santos of his right to contest the decision to reinstate his removal order in English. Santos represents that he does not speak English and therefore did not understand that he had a right to contest that order. This reinstatement order is the first of two agency actions that Santos challenges in his petition for review.

Santos was transferred to the custody of the U.S. Marshal and charged with unlawful entry under 8 U.S.C. § 1325(a) in the United States District Court for the District of Vermont. Both Santos and his wife cooperated with the investigation into the smuggling network that had arranged for their entry into the United States, providing detailed information on the arrangements that the network used and other evidence, including financial documents. Thereafter the government dismissed the criminal complaint against Santos.

C. WITHHOLDING-ONLY PROCEEDINGS

While he was still in CBP custody, Santos expressed a fear of returning to Brazil and was referred to an asylum officer for a “reasonable fear interview” pursuant to 8 C.F.R. § 208.31. At that interview, which took place on September 14, 2017, Santos claimed that, because of his cooperation with U.S. law enforcement, he feared retaliation from the smugglers who had transported him

into the United States. The asylum officer found Santos credible, but also found that he had not established a reasonable fear of persecution or torture. Santos requested that an immigration judge review the asylum officer's determination pursuant to 8 C.F.R. § 208.31(g). On September 28, 2017, Santos appeared for a hearing at the Boston Immigration Court and testified before an immigration judge ("IJ") who vacated the asylum officer's reasonable fear decision and ordered a "withholding-only" hearing on Santos's claims.¹

Santos submitted evidence to support his fear claims, including police reports of threatening calls his relatives continued to receive, and photos depicting his sister-in-law's home, which had been ransacked, riddled with bullet holes, and vandalized with graffiti bearing death threats related to Santos's cooperation with law enforcement. The IJ held an individual merits hearing on January 22, 2018, and denied Santos's applications for withholding of removal. Santos appealed to the Board of Immigration Appeals ("BIA"), which adopted and affirmed the IJ's decision on October 2, 2020. Santos was released from DHS custody in April 2018, during the pendency of his withholding-only proceedings.

¹ When in withholding-only proceedings, noncitizens may only seek withholding of removal under 8 U.S.C. § 1231(b)(3)(A) or under the regulations that implement the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment. *See* 8 C.F.R. §§ 208.16–208.17, 1208.16–1208.17.

D. MORE RECENT PROCEEDINGS

In early 2020, Santos's wife was granted asylum by an IJ in the San Francisco Immigration Court. According to Santos, she was granted asylum on the same facts and circumstances he alleged in his own asylum petition. On May 18, 2020, Santos's wife filed an I-730 Asylee Relative Petition on Santos's behalf. U.S. Citizenship and Immigration Services ("USCIS") denied that petition on May 18, 2022 due to Santos's outstanding reinstatement order.

Santos represents that, on August 1, 2022, he sent a request for a stay of removal and rescission of his reinstatement order to the U.S. Immigration and Customs Enforcement ("ICE") field office in San Francisco, to which he was regularly reporting at the time. He further represents that ICE denied that motion by phone on April 20, 2023. Santos also submits that, on April 25, 2023, his counsel filed a Freedom of Information Act ("FOIA") request for the entirety of his immigration file in order to assess his reinstatement order, and that his counsel received a response to the FOIA request on June 1, 2023.

Meanwhile, on August 4, 2023, Santos filed a motion to reopen, reconsider, and rescind his 2017 reinstatement order with CBP in Boston, arguing that DHS violated his due process rights by failing to advise him of his rights to contest the

reinstatement order at the time it was issued. Specifically, he claims that he was not advised in a language he understood of his right to make an oral or written statement challenging the reinstatement decision in violation of 8 C.F.R. § 241.8(b). On August 23, 2023, CBP denied Santos's motion. This denial is the second of the two agency actions that Santos challenges in his petition for review.

E. PROCEEDINGS BEFORE THIS COURT

Santos filed the instant petition for review on September 22, 2023. Santos then filed a motion for a stay of removal, and the government filed a motion to dismiss the petition for lack of jurisdiction. Following argument, a motions panel of this Court granted the motion for a stay and referred the motion to dismiss to a merits panel. The motions panel further ordered the parties to brief the following questions:

[W]hether (1) a decision to reinstate a removal order is a final order of removal subject to judicial review under 8 U.S.C. § 1252(a); (2) the CBP has statutory or regulatory authority to reopen or rescind a reinstated removal order; (3) if so, whether this Court has jurisdiction to review such a ruling; and (4) this Court can review the 2017 reinstated removal order if Respondent does not invok[e] the 30-day filing deadline in 8 U.S.C. § 1252(b)(1).

Certified Order, Dkt. No. 33. Following briefing and argument, Santos moved to withdraw his motion for a stay of removal. This panel granted that request, and

then ordered supplemental briefing on the issue of equitable tolling, which the parties duly filed.

DISCUSSION

Santos's challenges to the two agency actions at issue present questions of statutory construction, which we review *de novo*. *See Fisher v. Aetna Life Ins. Co.*, 32 F.4th 124, 135 (2d Cir. 2022).

I. 2017 REINSTATEMENT ORDER

Santos urges this Court to review his 2017 reinstatement order. The gist of his challenge to that order is that CBP did not comply with the regulations for reinstating his removal order because it failed “to provide actual notice of his right to make a statement contesting the [agency’s] determination . . . in a language he could understand” and “fail[ed] to provide him with an interpreter in order to allow a response.” Petitioner’s Reply Br. at 22; *see also* 8 C.F.R. § 241.8(b) (requiring immigration officers to provide noncitizens with notice of the reinstatement decision and of the opportunity to contest it and requiring that officers consider that challenge). Specifically, Santos represents that he speaks only Portuguese but was notified of his rights in English, which forms the basis of his due process claim. *See* Certified Administrative Record at 495, 505; Petitioner’s Br. at 26; *see also*

Bergamo v. Commodity Futures Trading Comm’n, 192 F.3d 78, 79 (2d Cir. 1999) (“An agency is bound to follow procedures required by its own regulations, even if these regulations were not statutorily or constitutionally mandated.” (citing *United States v. Nixon*, 418 U.S. 683, 694–95 (1974))).

A. JURISDICTION OVER SANTOS’S 2017 REINSTATEMENT ORDER UNDER 8

U.S.C. § 1252(A)(1)

Our analysis begins with our jurisdiction to review Santos’s 2017 reinstatement order. *See Juras v. Garland*, 21 F.4th 53, 58–59 (2d Cir. 2021). Judicial review of immigration orders is circumscribed by statute. As relevant here, 8 U.S.C. § 1252(a)(1) vests the circuit courts of appeal with jurisdiction to review “final order[s] of removal.” *Chupina v. Holder*, 570 F.3d 99, 103–04 (2d Cir. 2009) (alteration in original). Therefore, our ability to review Santos’s 2017 reinstatement order turns on whether that order is a “final order of removal” within the meaning of 8 U.S.C. § 1252(a)(1).

Although the government took the contrary position in its main brief, it argues in supplemental briefing that Santos’s reinstatement order is not a final order of removal and that we therefore lack jurisdiction to hear his appeal. For the reasons set forth below, we disagree.

“[A]ny statutory reference to ‘an order of removal’ is deemed to include a reference to an order of deportation,” *Riley v. Bondi*, 606 U.S. 259, 267 (2025) (cleaned up), which Congress defined in the Antiterrorism and Effective Death Penalty Act of 1996 (“AEDPA”), Pub. L. No. 104-132, 110 Stat. 1214 (1996).² That definition reads:

(A) The term “order of deportation” means the order of the special inquiry officer, or other such administrative officer to whom the Attorney General has delegated the responsibility for determining whether an alien is deportable, concluding that the alien is deportable or ordering deportation.

(B) The order described under subparagraph (A) shall become final upon the earlier of—

- (i) a determination by the Board of Immigration Appeals affirming such order; or
- (ii) the expiration of the period in which the alien is permitted to seek review of such order by the Board of Immigration Appeals.

8 U.S.C. § 1101(a)(47). We must therefore determine whether Santos’s 2017 reinstatement order is (1) an order of removal and (2) final.

Santos’s reinstatement order is an order of removal. In *Nasrallah v. Barr*, the Supreme Court decided that an IJ’s order granting or denying protection under

² Following the enactment of the Illegal Immigration Reform and Immigrant Responsibility Act (“IIRAIRA”) of 1996, Pub. L. 104-828, the terms “order of removal” and “order of deportation” are used to the same effect in different sections of Title 8. See IIRAIRA § 309(d)(2) (“[A]ny reference in law to an order of removal shall be deemed to include a reference to an order of exclusion and deportation or an order of deportation.”). Though this opinion uses “removal,” the terms are interchangeable.

the Convention Against Torture (“CAT”)—one issued in “withholding-only” proceedings—is not an “‘order of deportation’ because it is not an order ‘concluding that the alien is deportable or ordering deportation.’” 590 U.S. 573, 584 (2020) (quoting 8 U.S.C. § 1101(a)(47)). It further held that orders on CAT relief do not “merge into final orders of removal”—unlike, for instance, an IJ’s “evidentiary rulings”—because “final orders of removal encompass only the rulings made by the immigration judge or Board of Immigration Appeals *that affect the validity of the final order of removal.*” *Id.* at 582 (emphasis added).

Reinstatement orders are new and distinct agency decisions from the removal orders on which they are predicated. The statute requires that DHS make factual determinations prior to reinstatement of the sort contemplated by *Nasrallah*. See 8 U.S.C. § 1231(a)(5) (requiring findings that an individual is a noncitizen, that they do not have authorization to reenter the United States, and that they have previously been removed or granted voluntary departure while subject to a removal order); 8 C.F.R. § 241.8(a) (same); see also *Beekhan v. Holder*, 634 F.3d 723, 725 (2d Cir. 2011) (reviewing whether petitioner’s reentry was actually unlawful); *Miller v. Mukasey*, 539 F.3d 159, 164 (2d Cir. 2008) (contemplating review of “the predicate facts underlying the reinstatement order”); *Ochoa-Carrillo v.*

Gonzales, 437 F.3d 842, 845–48 (8th Cir. 2006) (reviewing both reinstatement procedures and their factual and legal underpinnings); *Vega-Anguiano v. Barr*, 982 F.3d 542, 544–45 (9th Cir. 2019) (reviewing challenge to the legal underpinning of a reinstatement order). These factual determinations are independent of those the agency is required to make for the underlying removal order because a reinstatement order “conclud[es] that the alien is deportable [and] order[s] deportation.” *Nasrallah*, 590 U.S. at 584 (internal quotation marks omitted); see *Herrera-Molina v. Holder*, 597 F.3d 128, 132 (2d Cir. 2010).³

Although the reinstatement statute states that “the prior order of removal is reinstated,” that reinstatement is explicitly predicated on agency findings of fact. 8 U.S.C. § 1231(a)(5) (“If the Attorney general finds . . .”) (emphasis added). The Supreme Court has explained that “law-enforcement discretion” is so fundamental that it endures “even in the presence of seemingly mandatory legislative commands.” *Town of Castle Rock v. Gonzales*, 545 U.S. 748, 761 (2005). The Court has specifically stated that the Executive may, in its discretion, abandon

³ The government’s reliance on *United States v. Rodriguez* is misplaced. In *Rodriguez*, this Court did not address whether reinstatement orders are “final orders of removal.” *Rodriguez* was a criminal case in which the defendant moved to dismiss an indictment for aggravated illegal reentry based on the alleged invalidity of his original removal order. See 162 F.4th 288, 291, 294 (2d Cir. 2025). The discussion of reinstatement orders in *Rodriguez* has no bearing on the issue before us: whether such orders are “orders of removal” under 8 U.S.C. §§ 1101(a)(47) and 1252(a)(1).

removal, including after issuing a removal order, despite the statute's directive that the agency "shall remove" noncitizens with removal orders. 8 U.S.C. § 1231(a)(1)(A); see *Reno v. Am.-Arab Anti-Discrimination Comm.*, 525 U.S. 471, 483 (1999). As such, we conclude that Santos's 2017 reinstatement order is an "order of removal."

Having determined that reinstatement orders are distinct orders of removal, we turn to whether they are "final," and, as such, subject to judicial review. 8 U.S.C. § 1252(a)(1). The issue of when a reinstatement order becomes final came before this Court in *Bhaktibhai-Patel v. Garland*, 32 F.4th 180 (2d Cir. 2022), *abrogated on other grounds by Riley*, 606 U.S. at 299. In that case, we assumed that a reinstatement order is a judicially reviewable final order of removal and concluded that such orders become final when the reinstatement decision "is definitive and not subject to further review within the agency." *Id.* at 192–93 & n.18.

The definition of finality we delineated in *Bhaktibhai-Patel* makes sense because § 1101(a)(47)(B) "ties finality to the final stage of agency review available as of right" *Id.* at 192. The immigration statutes focus on completion of agency review as the measure of finality beyond the definition at 8 U.S.C. § 1101(a)(47)(B). See *Bhaktibhai-Patel*, 32 F.4th at 194 ("Thus, in § 1231(a)(1) [removal periods] and

§ 1252 [judicial review] alike, ‘Congress focused our attention on the agency’s review proceedings’ as the decisive metric for determining the finality of a removal order.” (quoting *Johnson v. Guzman Chavez*, 594 U.S. 523, 534 (2021))).

Our holding that reinstatement orders are judicially reviewable final orders of removal is consistent with Congress’s scheme. At the time that Congress defined orders of deportation, that definition encompassed reinstatement orders because they could be appealed to the BIA. The enactment of a new reinstatement statute did not change this. In 1996, when Congress enacted § 1101(a)(47), a prior version of the reinstatement statute was in effect. *See* 8 U.S.C. § 1252(f) (repealed 1996). Under the regulations implementing that statute, reinstatement authority was vested exclusively in immigration judges and their reinstatement orders were appealable to the BIA. *See* 8 C.F.R. §§ 242.8(a) (repealed 1997) (reinstatement authority), 242.23(d) (repealed 1997) (same), 242.21 (allowing appeal of IJ reinstatement orders to the BIA); *see also Luna v. Holder*, 637 F.3d 85, 95 (2d Cir. 2011) (recognizing noncitizens’ prior ability to move to reopen before the BIA); *Castro-Cortez v. I.N.S.*, 239 F.3d 1037, 1048 (9th Cir. 2001) (noting that noncitizens could appear before IJs to contest reinstatement); *Dinnall v. Gonzales*, 421 F.3d 247,

253 (3d Cir. 2005) (describing the prior regime, including the “right to appeal an adverse [reinstatement] decision to the Board”).

Neither party has presented evidence, nor has this Court found any, to suggest that Congress’s subsequent amendments to the reinstatement statute intended to exclude reinstatement orders from the provision that defines what constitutes a final order of removal.⁴ See *Oklahoma v. Castro-Huerta*, 597 U.S. 629, 645 (2022) (“This Court does not infer that Congress, in revising and consolidating the laws, intended to change their policy, unless such an intention be clearly expressed.” (internal quotation marks omitted)). True, the Supreme Court has described Congress’s intent in enacting the new reinstatement statute as “toe[ing] a harder line” by subjecting all illegal reentrants to reinstatement and “foreclos[ing] discretionary relief from the terms of the reinstat[ment] order,” *Fernandez-Vargas v. Gonzales*, 548 U.S. 30, 35 (2006), but imposing harsher consequences for illegal reentry is a separate and distinct policy goal from an indirect curtailment of judicial review.

⁴ In *Bhaktibhai-Patel*, we also noted the “seemingly odd result” that reinstatement orders are reviewable but that, under its holding, reentrants “generally may not obtain judicial review of subsequent withholding-only proceedings.” 32 F.4th at 195. The Supreme Court has since addressed that oddity in *Riley*, writing that the timing and reviewability of withholding-only proceedings have no bearing on the finality of a removal order. 606 U.S. at 270–72.

When presented with a similar question about appellate jurisdiction over the BIA's denials of motions to reopen, the Supreme Court wrote that "[a]ny lingering doubt . . . [is] dispelled by a familiar principle of statutory construction: the presumption favoring judicial review of administrative action." *Kucana v. Holder*, 558 U.S. 233, 251 (2010). "We have consistently applied that interpretive guide to legislation regarding immigration, and particularly to questions concerning the preservation of federal-court jurisdiction." *Id.* at 251–52 (further requiring "'clear and convincing evidence' to dislodge the presumption" (citations omitted)).

Our own precedent supports the conclusion that reinstatement orders constitute final orders of removal subject to our review. In *Garcia-Villeda v. Mukasey*, this Court considered, among other things, a due process challenge to the reinstatement procedure under 8 C.F.R. § 241.8. 531 F.3d 141, 149–50 (2d Cir. 2008). We entertained the challenge via a petition for review of a reinstatement order, *id.* at 144, and so appeared to have assumed jurisdiction *sub silentio*. However, we also wrote that, among the procedural safeguards available under

the scheme, noncitizens “may also challenge the reinstatement order in a court of appeals.” *Id.* at 150 (citing 8 U.S.C. § 1252(a)).⁵

Later, in *Herrera-Molina v. Holder*, we also took up a petition for review of a reinstatement order. 597 F.3d at 131–32. Even though the initial petition for review was filed prior to the BIA’s decision, we explained “that the reinstatement of his prior deportation order [became] a reviewable final order” *Id.* at 132. We then proceeded to address the merits of the petitioner’s due process challenge to the agency’s reinstatement of his order. *Id.* at 132–40. These opinions were followed by a number of cases in which we, once again, *sub silentio* exercised jurisdiction over challenges to reinstatement orders. *See, e.g., Miller*, 539 F.3d at 162; *Amos v.*

⁵ Each of our sister circuits to consider this issue has agreed that reinstatement orders may be judicially reviewed. *See Ponta-Garca v. Ashcroft*, 386 F.3d 341, 342 (1st Cir. 2004) (“An order reinstating an earlier order of deportation is subject to review under 8 U.S.C. § 1252.”); *Dinnall*, 421 F.3d at 251 n.6 (“Because an order reinstating a prior removal order is the functional equivalent of a final order of removal, we have jurisdiction to hear [the] petition.” (internal citation and quotation marks omitted)); *Velasquez-Gabriel v. Crocetti*, 263 F.3d 102, 105 (4th Cir. 2001) (“First, we note that, as the INS concedes, we clearly have subject matter jurisdiction in this case.”); *Ojeda-Terrazas v. Ashcroft*, 290 F.3d 292, 295 (5th Cir. 2002) (“[R]einstatement of [petitioner’s] previous deportation order is a final order of the INS. A fair interpretation of [§ 1252] grants this court the authority to review the lawfulness of the reinstatement order.”); *Avila v. U.S. Att’y Gen.*, 560 F.3d 1281, 1284 (11th Cir. 2009) (“An order of reinstatement is a final order of removal under § 1252(a)(1).”). *But see Ruiz-Perez v. Garland*, 49 F.4th 972, 976 (5th Cir. 2022) (noting that *Ojeda-Terrazas*’s holding “may require reassessment”).

Holder, 358 F. App'x 261, 262 (2d Cir. 2009) (summary order); *Familia v. Holder*, 600 F. App'x 23, 24 (2d Cir 2015) (summary order).⁶

We recognize that our dicta in *Bhaktibhai-Patel* questioned the limited reasoning underpinning our prior holdings that reinstatement orders are final orders of removal subject to judicial review. In *Bhaktibhai-Patel*, we referred to our precedents as only “implicitly hold[ing]” that reinstatement orders are “final order[s] of removal” and described that holding as “rest[ing] on an unstable foundation.” *Id.* at 195. We nevertheless refrained from ruling on our jurisdiction under § 1252(a), *see id.* at 192 n.18, because we found the petition untimely under § 1252(b)(1) and held that such a defect was jurisdictional, *id.* at 193. But the *Riley* Court subsequently rejected the logic that an agency order “may never become final” in view of § 1101(a)(47)(B) if “it cannot be appealed to the BIA.” *Id.* at 195 (internal quotation marks omitted); *see Riley*, 606 U.S. at 267. As discussed above, there is a sound statutory basis to reaffirm our prior holdings, and we expressly hold that a reinstatement order is a final order of removal subject to judicial review under 8 U.S.C. § 1252(a).

⁶ *See also Villegas de la Paz v. Holder*, 640 F.3d 650, 653 (6th Cir. 2010) (exercising jurisdiction to review a reinstatement order); *Lopez v. Heinauer*, 332 F.3d 507, 510 (8th Cir. 2003) (same); *Duran-Hernandez v. Ashcroft*, 348 F.3d 1158, 1162 n.5 (10th Cir. 2003) (same).

For these reasons, this Court has jurisdiction under 8 U.S.C. § 1252(a) to review Santos's challenge to his 2017 reinstatement order.

B. TIMELINESS AND EQUITABLE TOLLING

Section § 1252(b)(1) provides that 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). Santos filed this petition for review on September 22, 2023, more than six years after his reinstatement order became “final” on July 2, 2017. Santos argues that we should apply equitable tolling and deem his petition timely.

Even assuming equitable tolling applies, the record reveals that Santos is not entitled to tolling. We have held that equitable tolling is warranted where “the party seeking tolling was prevented from timely filing in some extraordinary way and passes with reasonable diligence through the period it seeks to have tolled.” *Perez v. Bondi*, 166 F.4th 327, 330 (2d Cir. 2026) (per curiam) (internal quotation marks omitted). A review of the record in the light most favorable to Santos fails to show that he exercised reasonable diligence during the time period he seeks to toll.

Santos provides no explanation, nor is one readily apparent, for the delay of more than two months between the May 18, 2022 USCIS denial of his Asylee

Relative Petition, which he claims placed him on notice of his reinstatement order, and his August 1, 2022 request to the San Francisco ICE field office to rescind that order. Moreover, Santos's failure to file the FOIA request until eleven months after he was indisputably on notice of his reinstatement order is incompatible with any argument that he exercised due diligence. As such, Santos's petition for review of the 2017 reinstatement order is untimely.

II. 2023 DENIAL OF SANTOS'S MOTION TO REOPEN, RECONSIDER, AND RESCIND

Having determined that Santos's petition for review of his 2017 reinstatement order is untimely, we next consider his petition for review of CBP's 2023 denial of his motion to reopen, reconsider, and rescind the 2017 reinstatement order.

A. JURISDICTION OVER CBP'S DENIAL OF SANTOS'S MOTION UNDER 8

U.S.C. § 1252(B)(6)

As before, we begin by determining whether we have jurisdiction to review CBP's denial of Santos's 2023 motion to reopen, reconsider, and rescind his reinstatement order. We hold that we do.

Section 1252(b)(6) provides that “[w]hen a petitioner seeks review of a [final order of removal], any review sought of a motion to reopen or reconsider the order shall be consolidated with the review of the order.” 8 U.S.C. § 1252(b)(6). Section 1252(b)(6) “expressly contemplates” appellate jurisdiction over “decisions refusing to reopen or reconsider” final orders of removal. *Mata v. Lynch*, 576 U.S. 143, 147 (2015). The Supreme Court has further held that circuit courts have jurisdiction to review the denials of motions to reopen, in a case involving a denial by the BIA. *Kucana v. Holder*, 558 U.S. 233, 242, 253 (2010) (“Action on motions to reopen . . . therefore remain subject to judicial review.”). The government seeks to limit § 1252(b)(6) to petitions for review of BIA-issued removal orders. Yet § 1252(b)(6) provides that “[w]hen a petitioner seeks review of an order under this section, any review sought of a motion to reopen or reconsider the order shall be consolidated with the review of the order.” 8 U.S.C. § 1252(b)(6). The statute draws no distinction between final removal orders issued by the BIA and by DHS. Exercising jurisdiction here gives effect to Congress’s purpose to channel multiple agency actions into the petition for review process. Section 1252(b)(6) is one of several provisions in the IIRAIRA that sought to consolidate and streamline judicial review of agency action in the courts of appeals. *See generally Luna*, 637

F.3d at 93, 95–96 (discussing how AEDPA and IIRAIRA amendments “consolidated all judicial review” and “reject[ed] the existing dual tracks of review” (cleaned up)).

As such, we hold that 8 U.S.C. §§ 1252(a) and 1252(b)(6) provide us with jurisdiction to review CBP’s denial of Santos’s motion to reopen. Accordingly, we turn to the merits.

B. CBP’S AUTHORITY UNDER 8 C.F.R. § 103.5

CBP denied Santos’s motion because it believed that “there is no prescribed mechanism for CBP to reopen, reconsider, or vacate . . . a reinstatement order.” Special App’x at 36. Because we conclude that 8 C.F.R. § 103.5 vests CBP with authority to reopen, reconsider, and rescind Santos’s reinstatement order, we vacate and remand for the agency to consider his motion in the first instance.

“As always, we begin with the text.” *Sw. Airlines Co. v. Saxon*, 596 U.S. 450, 457 (2022). Section 103.5 is quite broad: where “the affected party files a motion,” § 103.5 grants the “official having jurisdiction” authority to “reopen the proceeding or reconsider the prior decision.” 8 C.F.R. § 103.5(a)(1)(i). The “official having jurisdiction is the official who made the latest decision in the proceeding.” *Id.* § 103.5(a)(1)(ii).

On its face, then, the plain language of § 103.5 contemplates that immigration officials, like CBP officers, have the authority to consider and grant motions to reopen and reconsider so long as those CBP officers were the officials who made the latest decision in the proceeding. *See id.* § 103.5(a)(1). “Where there is no ambiguity in the words, there is no room for construction. The case must be a strong one indeed, which would justify a Court in departing from the plain meaning of words . . . in search of an intention which the words themselves did not suggest.” *United States v. Wiltberger*, 18 U.S. 76, 95–96 (1820) (Marshall, C.J.); *see also Conn. Nat’l Bank v. Germain*, 503 U.S. 249, 254 (1992).

The regulation’s exclusion of several categories of decisions from its reach, *see id.* § 103.5(a)(1)(i), does not alter or undermine our conclusion because none of these exclusions apply to removal orders issued by DHS, such as reinstatement orders. *See Hardy v. N.Y.C. Health & Hosps. Corp.*, 164 F.3d 789, 794 (2d Cir. 1999); *N.L.R.B. v. SW Gen., Inc.*, 580 U.S. 288, 302 (2017). Specifically, § 103.5 expressly excludes all those matters over which the BIA has authority. *See* 8 C.F.R. § 103.5(a)(1)(i) (“Except where the Board has jurisdiction . . .”). It further excludes all matters relating to “Special Agricultural Workers” over which the Executive Office of Immigration Review has jurisdiction, and matters relating to

adjustment of status. *See id.* Section 103.5 could have added to its list of exclusions motions to reopen reinstated removal orders. The fact that it does not supports our conclusion.⁷

The government raises two distinct arguments as to why we should not interpret § 103.5 to grant CBP the authority to consider Santos’s motion to reopen. First, it claims that § 103.5 should be cabined to the benefits context. Second, it claims that the reinstatement statute, *see* 8 U.S.C. § 1231(a)(5), itself bars motions to reopen reinstatement orders. We address each argument in turn.

1. SECTION 103.5 IS NOT LIMITED TO THE BENEFITS CONTEXT

Irrespective of the clear answer that the text of the regulation provides, the government, relying on the title of the regulation and its references to USCIS Form I-290B, argues that 8 C.F.R. § 103.5 is limited to the benefits context. We do not find these arguments persuasive. More specifically, the government argues that § 103.5 provides only for reopening and reconsidering benefits applications before USCIS because § 103.5 is housed within Part 103, titled “Immigration Benefit

⁷ The partial dissent submits that “if section 103.5 covers only benefits, then the *expressio unius* canon would simply suggest that the section applies to all non-excluded *benefits*.” Sullivan, J., dissenting in part, *infra* 6. In support, the partial dissent supplies an analogy of a customer seeking a lobster in an ice cream shop. That analogy assumes its conclusion – that § 103.5 covers benefits only. To assume that we are in an ice cream shop, rather than a grocery store, begs the question.

Requests; USCIS Filing Requirements; Biometric Requirements; Availability of Records,” and within a subpart titled “Applying for Benefits, Surety Bonds, and Fees.” *Amicus* has provided the Court with cases in which the government has endorsed, and our sister circuits have accepted, a contrary litigating position. *See* *Amicus Br.* at 9; *see also Xu v. Garland*, 26 F.4th 100, 104 (1st Cir. 2022) (“[T]he government . . . contend[ed] . . . that 8 C.F.R. § 103.5(a)(5)(i) authorizes the DHS to cancel a [DHS-issued removal order under 8 U.S.C. § 1228(b)].”); *Escoto-Castillo v. Napolitano*, 658 F.3d 864, 866 (8th Cir. 2011) (“As the government notes, . . . Escoto-Castillo could have filed a timely motion to reopen the removal proceedings. *See* 8 C.F.R. § 103.5(a).”). Although titles may be useful for interpretive purposes, they are “of use only when [they] shed[] light on some ambiguous word or phrase.” *Pa. Dep’t of Corr. v. Yeskey*, 524 U.S. 206, 212 (1998) (internal quotation marks omitted). The text of § 103.5 is not ambiguous. Again, § 103.5 provides that when an “affected party files a motion,” “the official who made the latest decision in the proceeding” “may . . . reopen the proceeding or reconsider the prior decision.” 8 C.F.R. § 103.5(a)(1)(i)–(ii). The title of the regulation cannot supply the escape hatch for which the government grasps. *See Pa. Dep’t of Corr.*, 524 U.S. at 212 (“The

title of a statute cannot limit the plain meaning of the text.” (alterations accepted) (internal quotation marks omitted)).⁸

The government’s reliance on the language of Form I-290B, a USCIS form referenced in § 103.5, to argue that § 103.5 applies only to benefits applications before USCIS is equally unavailing. *See* Respondent’s Br. at 25–26 (citing the form and instructions, which are published on USCIS’s website). The reference in the regulation to Form I-290B was introduced in 2005.⁹ *See* Adjustment of the Appeal and Motion Fees to Recover Full Costs, 70 Fed. Reg. 50954-01, 50957 (Aug. 29, 2005). In that amendment, the agency did not make substantive changes to the text of the regulation but merely introduced Form I-290B to replace the then-

⁸ Urging a contrary conclusion, the partial dissent *begins* with context, *see* Sullivan, J., dissenting in part, *infra* 2–4 (discussing Part 103’s title and the provisions neighboring § 103.5(a)(1)(i)), and only later arrives at text, *see id.* at 5 (analyzing the text of § 103.5(a)(1)(i)). But that context-first approach inverts the correct order of analysis. Although some of the surrounding sections do relate to immigration benefits, § 103 also addresses distinct subjects such as procedures for precedent decisions—including from removal proceedings—by the Attorney General, *see* 8 C.F.R. § 103.10, immigration bonds, *see id.* § 103.6, and fees, including those payable to other agencies besides USCIS, *see id.* § 103.7.

⁹ Reliance on the current version of the form is not instructive because it may differ from the 2005 version. The current version of Form I-290B states that it was last modified on May 31, 2024, such that it postdates the regulation’s amendment by nearly two decades. Neither party has submitted to this Court the version of Form I-290B that was in effect in 2005. To the extent the current version of the form has any force, however, its scope is not as limited as the partial dissent suggests. *Contrast* Sullivan, J., dissenting in part, *infra* 4 (asserting that Form I-290B governs only “affirmative requests for benefits” but not “responses to CBP’s enforcement actions” (emphasis removed)), *with* Form I-290B at 3, U.S. Citizenship & Immigr. Servs. (May 31, 2024), <https://www.uscis.gov/sites/default/files/document/forms/i-290b.pdf> (requiring applicants to authorize the release of any information “to other entities and persons where necessary for the administration and enforcement of U.S. immigration law” (emphases added)).

obsolete Form I-290A, which was directed to the defunct Immigration and Naturalization Service. *Id.* at 50956. In the same amendment, the agency added a fee provision relating to Form I-290B and described its purpose as follows: “For filing an appeal from *any decision* under the immigration laws in *any type of proceeding* over which the [BIA] does not have appellate jurisdiction—\$385.00” *Id.* at 50957 (emphasis added). This language as to the form’s purpose is broad and unambiguously encompasses motions to reopen like Santos’s.¹⁰

The language of the regulation, which refers to both an “applicant or petitioner,” does not alter our analysis. 8 C.F.R. § 103.5(a)(1)(i). Although both “applicant” and “petitioner” may refer to noncitizens seeking immigration benefits, noncitizens seeking something other than an immigration benefit may also be referred to as applicants. *Compare* 8 C.F.R. § 244.2(f) (applications for

¹⁰ We are unpersuaded that Form I-290B cannot be used to file motions or appeals with agencies other than USCIS. *See* 8 C.F.R. § 103.7(d)(15) (setting the fee for filing of Form I-290B with ICE). The form does focus on USCIS benefits appeals and motions, as one would expect of a USCIS form, yet the instructions, which the government relies upon, specify that the form “is *primarily* used to file” appeals with the Administrative Appeals Office or motions with USCIS, not that this is the form’s exclusive purpose. Instructions for Notice of Appeal or Motion, *available at* <https://www.uscis.gov/i-290b>. One agency’s use of another’s ill-fitting forms is not unheard of in the immigration context. *See e.g.*, State Dep’t Foreign Affairs Manual, 9 FAM 103.4-3(a)(3)(b), 601.7-3(c)(2)(a) (requiring filing of DHS Form G-28 to establish an attorney/client relationship before the Department of State); Form G-28, *available at* <https://www.uscis.gov/g-28> (requiring attorneys to specify which agency of *DHS* they are appearing before).

Temporary Protected Status) and 8 C.F.R. § 204.1(a) (visa petitions) with 8 C.F.R. § 208.16(a) (applications for withholding of removal and CAT protection).

We recognize that two of our sister circuits have reasoned that 8 C.F.R. § 103.5 is limited to immigration benefits, but we are unpersuaded by their reasoning. In *Lavery v. Barr*, the Fifth Circuit engaged in limited analysis; it considered only the title of § 103 and the benefits-related nature of some surrounding sections and did not discuss the text of the regulation. See 943 F.3d 272, 276 (5th Cir. 2019). The Tenth Circuit in *Aguilar-Aguilar v. Napolitano* came to the same conclusion, albeit in dicta, because the case was on direct review of a DHS-issued removal order. See 700 F.3d 1238, 1242 n.3 (10th Cir. 2012). Although the Tenth Circuit did reference the text, it conclusorily noted that “[r]ead in context, the meaning of ‘affected party’ in § 103.5(a)(1)(i) refers to an unsuccessful petitioner [for benefits] under § 103.2.” *Id.*¹¹

That § 103.5 is not limited to the benefits context is buttressed by *Department of Homeland Security v. Thuraissigiam*, 591 U.S. 103 (2020). In that case, the Supreme Court examined its jurisdiction to review a habeas petition challenging a DHS-

¹¹ Like the government and the partial dissent, *Lavery*—in a single paragraph—errs in relying on context over text. See 943 F.3d at 276. And the relevant language in *Aguilar-Aguilar* is dicta, not a holding. See 700 F.3d at 1242 n.3. Hence, there is no “clear authority” that § 103.5 is limited to the context of benefits. *Contra* Sullivan, J., dissenting in part, *infra* 9.

issued removal order issued pursuant to 8 U.S.C. § 1225(b)(1). *Id.* at 114–15. As relevant, the Court ultimately held that certain statutory limitations on judicial review did not violate the Due Process Clause. *Id.* at 140. In so doing, the Court wrote that Thuraissigiam could pursue his claims administratively, noting that “[d]epartment officials and immigration judges may reopen cases or reconsider decisions” under 8 C.F.R. § 103.5(a)(1). *Id.* at 140 & n.28. Although we recognize that *Thuraissigiam* was a benefits case in which the Court considered a decision by an asylum officer in credible fear proceedings, the Court’s choice of language was broad and came in the context of a discussion of the petitioner’s due process rights, not the nature of the relief he sought. As such, we conclude that Santos’s argument about the scope of § 103.5 finds support in *Thuraissigiam*, in which the Supreme Court made no reference to an atextual limitation to the benefits context.

Several of our sister circuits have similarly refrained from reading a benefits restriction into § 103.5. For example, in *Escoto-Castillo v. Napolitano*, the Eighth Circuit wrote that “[a]s the government notes . . . Escoto-Castillo could have filed a timely motion to reopen the removal proceedings[, s]ee 8 C.F.R. § 103.5(a),” to raise a challenge to his DHS-issued removal order. 658 F.3d at 866; *see also Turcios v. Wolf*, 828 F. App’x 496, 500 (10th Cir. 2020) (unpublished) (finding that § 103.5

provides for motions to reopen expedited removal orders and, more generally, “proceeding[s] conducted by someone *other* than the BIA”); *Evers v. Mukasey*, 288 F. App’x 441, 441 (9th Cir. 2008) (unpublished) (“Pursuant to 8 C.F.R. § 103.5(a)(1)(i), Evers could have filed a motion to reopen proceedings as an ‘affected party’ after the DHS’s [expedited removal] decision.”). For the foregoing reasons, we conclude that motions to reopen or reconsider under 8 C.F.R. § 103.5 are not limited to the benefits context or to USCIS.

2. THE REINSTATEMENT STATUTE DOES NOT BAR REOPENING OF REINSTATEMENT ORDERS

Contrary to the government’s position, the reinstatement statute, *see* 8 U.S.C. § 1231(a)(5), does not bar reopening of reinstatement orders. That provision reads in relevant part: “[T]he prior order of removal is reinstated from its original date and is not subject to being reopened or reviewed” 8 U.S.C. § 1231(a)(5). The subject of that sentence is “the prior order of removal,” meaning the original removal order. As discussed *supra* in Part I.A, reinstatement orders are agency actions distinct from original removal orders. Section 1231(a)(5) plainly forbids the reopening of the original removal order, not a subsequent reinstatement order. A bar to reopening the original removal order is also consistent with the purpose

of § 1231(a)(5), which penalizes noncitizens who reenter the United States after being removed by barring any challenges to their original removal. Yet petitioners may still raise limited challenges to reinstatement orders. In fact, the regulations themselves require the agency to advise noncitizens of their right to contest the reinstatement decision. *See* 8 C.F.R. § 241.8(b). It would make little sense to provide such a procedural protection without any mechanism to pursue it.

There are good reasons to allow such limited challenges. For example, citizens who fall prey to cases of mistaken identity may argue that they are, in fact, citizens, and that the agency has erred in establishing the factual predicates to a reinstatement order. *See* 8 U.S.C. § 1231(a); 8 C.F.R. § 241.8(a)(2). Interpreted otherwise, citizens wrongly issued an invalid reinstatement order would be left with no recourse. Likewise, noncitizens who have authorization to enter the United States may raise that claim if the agency erroneously determines that they do not have such authorization and issues a reinstatement order. *See* 8 C.F.R. § 241.8(a)(3). Santos's motion to reopen his reinstatement order does not seek to attack the underlying removal order but the reinstatement process itself.

Although the Seventh Circuit in *Tapia-Lemos v. Holder*, 696 F.3d 687, 689 (7th Cir. 2012), endorsed the government's interpretation of § 1231(a)(5), it did so based

on a premise that a subsequent decision of that court has since undermined, *see Cordova-Soto v. Holder*, 732 F.3d 789, 790–92 (7th Cir. 2013). The Seventh Circuit in *Tapia-Lemos* reasoned that, because the petitioner was already barred from reopening his original removal order by the ninety-day deadline set forth in 8 U.S.C. § 1229a(c)(7)(C)(i), § 1231(a)(5) must be read to bar reopening of reinstatement orders, rather than underlying removal orders, to avoid surplusage.¹² *See Tapia-Lemos*, 696 F.3d at 690. That reasoning fails, however, because the Seventh Circuit did not consider that § 1229a(c)(7)(C)(i) does not bar reopening of all removal orders, just those more than 90 days old. The fact that the petitioner in *Tapia-Lemos* happened to be barred from reopening his original removal order by a separate provision does not render the bar in § 1231(a)(5) a nullity. Our reading of § 1231(a)(5) has the independent effect of barring the reopening of all original removal orders underlying reinstatement orders, including those not otherwise covered by § 1229a(c)(7)(C)(i). Indeed, one year later, the Seventh Circuit construed § 1231(a)(5) to bar reopening of an original removal order, giving it precisely the effect that *Tapia-Lemos* labeled surplusage.

¹² The canon against surplusage requires courts to “give effect, if possible, to every clause and word of a statute.” *Williams v. Taylor*, 529 U.S. 362, 404 (2000) (internal quotation marks omitted). But the Supreme Court has counseled that “our preference for avoiding surplusage constructions is not absolute.” *Lamie v. U.S. Tr.*, 540 U.S. 526, 536 (2004).

See *Cordova-Soto*, 732 F.3d at 790, 793. The Seventh Circuit’s reasoning in *Tapia-Lemos* that § 1231(a)(5) serves no function if it does not bar reopening of reinstatement orders is incompatible with its more recent application of that section to bar original removal orders. See *Cordova-Soto*, 732 F.3d at 793.¹³

It is also incompatible with the consistent application of § 1231(a)(5) to bar reopening of original removal orders by this Court and five of our sister circuits. This Court has regularly interpreted and applied § 1231(a)(5) to bar reopening of underlying removal orders, rather than reinstatement orders. See, e.g., *Garcia-Villeda*, 531 F.3d at 150; *Miller*, 539 F.3d at 164–65; *Lema v. Holder*, 363 F. App’x 88, 90 (2d Cir. 2010) (summary order). Likewise, several of our sister circuits have applied the statute in the same way. See *Sanchez-Gonzalez v. Garland*, 4 F.4th 411, 414 (6th Cir. 2021) (interpreting 8 U.S.C. § 1231(a)(5) to limit reopening of petitioner’s original removal order); *Tarango-Delgado v. Garland*, 19 F.4th 1233, 1239–40 (10th Cir. 2021) (same); *Gutierrez-Gutierrez v. Garland*, 991 F.3d 990, 994

¹³ Nor does the Seventh Circuit’s reading in *Tapia-Lemos* of 8 C.F.R. § 103.5, which turned on its incorrect reading of § 1231(a)(5), survive that court’s decision one year later in *Cordova-Soto*, 732 F.3d 789 (7th Cir. 2013). See *Tapia-Lemos*, 696 F.3d at 689 (concluding incorrectly that § 1231(a)(5) bars reopening of reinstatement orders, and then reasoning that, because “[a] regulation cannot countermand a statute, . . . § 103.5(a) does not apply to decisions that reinstate removal orders.”). *Tapia-Lemos*’s reasoning does not support the partial dissent’s reading of § 103.5. And, as discussed, the Seventh Circuit corrected its misreading of § 1231(a)(5) one year later in *Cordova-Soto*.

(8th Cir. 2021) (same); *Rodriguez-Saragosa v. Sessions*, 904 F.3d 349, 354 (5th Cir. 2018) (same); *Cordova-Soto*, 732 F.3d at 793 (same); *but see Suate-Orellana v. Garland*, 101 F.4th 624, 631–32 (9th Cir. 2024).

For these reasons, we hold that 8 C.F.R. § 103.5(a)(1) provides CBP with the authority to reopen and reconsider its decision to reinstate a removal order.¹⁴

C. JUSTICIABILITY UNDER 5 U.S.C. § 701(A)(2)

Having established that the agency has the authority to adjudicate motions to reopen and reconsider its decisions to reinstate removal orders, we must decide whether this case is justiciable under 5 U.S.C. § 701(a)(2), a provision of the Administrative Procedure Act that precludes judicial review where “agency action is committed to agency discretion by law.” 5 U.S.C. § 701(a)(2). We hold that judicial review is not precluded by § 701(a)(2).

In *Heckler v. Chaney*, the Supreme Court interpreted § 701(a)(2) and held that judicial review is precluded where “the statute is drawn so that a court would have no meaningful standard against which to judge the agency’s exercise of discretion.” 470 U.S. 821, 830 (1985). Pursuant to this rule, the Court concluded

¹⁴ As in *Bhaktibhai-Patel*, we need not decide whether 8 U.S.C. § 1252(a)(2)(D) excepts constitutional or legal claims from the § 1231(a)(5) bar on review of an underlying removal order. *See* 32 F.4th at 192 n.17.

that a Food and Drug Administration decision to refrain from taking certain enforcement actions was unreviewable. *Id.* at 823. The Court noted, however, that the § 701(a)(2) exception “remains a narrow one.” *Id.* at 827–28 (citation omitted). “The legislative history of the [APA] indicates that it is applicable in those rare instances where statutes are drawn in such broad terms that in a given case there is no law to apply.” *Citizens to Pres. Overton Park, Inc. v. Volpe*, 401 U.S. 402, 410 (1971) (internal quotation marks omitted).

Where there exist meaningful standards, § 701(a)(2) does not bar judicial review. The Supreme Court recently held that review was not barred in *Salinas v. United States Railroad Retirement Board*, which concerned the Railroad Retirement Board’s denial of a motion to reopen a decision denying a former employee’s application for benefits. *See* 592 U.S. 188, 190 (2021). In that case, the Court exercised jurisdiction because, even though “[w]hether to grant reopening is ultimately discretionary,” the Board “ha[d] established substantive criteria to guide its discretion.” *Id.* at 191. The Court found that a regulation providing that “a decision may be reopened ‘[w]ithin four years of the date of the notice of such decision, if there is new and material evidence’” was a sufficiently substantive

criterion to permit judicial review. *Id.* (alterations in original) (quoting 20 C.F.R. § 261.2(b)).

Section 103.5 sets forth a similar standard by which this Court may review the agency's exercise of its discretion: it provides that reopening may be had "for proper cause shown," 8 C.F.R. § 103.5(a)(1)(i), and that motions must "state the new facts to be provided . . . and be supported by affidavits or other documentary evidence," *id.* § 103.5(a)(2).¹⁵ These standards are similar to those for motions to reopen before the immigration courts, which must "state the new facts that will be proven at a hearing to be held if the motion is granted, and shall be supported by affidavits or other evidentiary material." 8 U.S.C. § 1229a(c)(7)(B). This Court regularly, and uncontroversially, reviews such motions. *See Ali v. Gonzales*, 448 F.3d 515, 517 (2d Cir. 2006) (setting forth our standard of review for such challenges); *see also, e.g., Mohamed v. Bondi*, No. 24-723, 2026 WL 41091, at *4 (2d

¹⁵ We further note that another part of 8 C.F.R. § 103.5 and the underlying reinstatement regulation both provide additional substantive criteria by which courts may review decisions on motions to reopen or reconsider reinstatement orders. *See* 8 C.F.R. §§ 103.5(a)(1)(i), (3) (providing for reconsideration for "proper cause" upon a motion "stat[ing] the reasons for reconsideration and . . . supported by any pertinent precedent decisions to establish that the decision was based on an incorrect application of law or Service policy"); *id.* § 241.8(a)(3) (setting forth the substantive criteria for the decision to be reconsidered, including that "the officer shall consider all relevant evidence, including statements made by the alien and any evidence in the alien's possession" and that the "officer shall attempt to verify an alien's claim, if any, that he or she was lawfully admitted, which shall include a check of Service data systems . . ."). As such, we are satisfied that 5 U.S.C. § 701(a)(2) does not preclude our review of motions filed under 8 U.S.C. § 103.5(a).

Cir. Jan. 7, 2026) (summary order); *Rahman v. Bondi*, No. 24-103, 2025 WL 3085594, at *1 (2d Cir. Nov. 5, 2025) (summary order).¹⁶

Even assuming that § 701(a)(2) applies, we may nonetheless review the agency's decision because "review is not entirely foreclosed [where an agency] misperceives the law or misunderstands its jurisdiction." *Vela-Estrada*, 817 F.3d at 71 n.1 (noting that, in such cases, "it is appropriate to remand to allow the [agency] to consider its authority"); see also, e.g., *Sang Goo Park v. Att'y Gen.*, 846 F.3d 645, 651 (3rd Cir. 2017) (recognizing the same exception); *Bonilla v. Lynch*, 840 F.3d 575, 587 (9th Cir. 2016) (same); *Thompson v. Barr*, 959 F.3d 476, 483 (1st Cir. 2020) (same).

That was the case here. The denial that CBP issued Santos stated that "there is no prescribed mechanism for CBP to reopen, reconsider, or vacate an expedited removal order or a reinstatement order." Special App'x at 36. At a minimum, CBP misperceived the law and misunderstood its jurisdiction over Santos's motion, which it was authorized to adjudicate. See *supra* Section II.B. Where an adjudicator's conclusions are predicated on "erroneous determinations of law," he

¹⁶ We have joined other circuits in applying *Heckler* only in those rare cases where neither the statute nor the regulations provide meaningful standards of any kind. See, e.g., *Ali*, 448 F.3d at 518 (explaining that we may not review BIA decisions regarding whether to reopen cases *sua sponte* under 8 C.F.R. § 1003.2(a), which provides merely that this is "within the discretion of the Board" and can be done "at any time" (quoting 8 C.F.R. § 1003.2(a))); *Vela-Estrada v. Lynch*, 817 F.3d 69, 71–72 (2d Cir. 2016) (explaining that we may not review BIA decisions regarding whether to self-certify appeals under 8 C.F.R. § 1003.1(c), which provides merely that it may do so "in its discretion" (quoting 8 C.F.R. § 1003.1(c))).

has “necessarily” abused his discretion. *Matthew Bender & Co. v. West Pub. Co.*, 240 F.3d 116, 124 (2d Cir. 2001) (internal quotation marks omitted). As that is the only basis for CBP’s denial, and because it has the power to consider Santos’s motion to reopen, we remand for further proceedings consistent with this opinion.

CONCLUSION

Accordingly, and for the reasons set forth above, we **DENY** Santos’s petition for review as to his 2017 reinstatement order. We further **GRANT** Santos’s petition as to CBP’s 2023 denial of his motion to reopen, reconsider, and rescind his 2017 reinstatement order, **VACATE** CBP’s decision, and **REMAND** for the agency to consider Santos’s motion in the first instance. The government’s motion to dismiss Santos’s petition for review is **DENIED** as moot.

RICHARD J. SULLIVAN, *Circuit Judge*, concurring in part and dissenting in part:

I agree with the majority that (i) we have jurisdiction over reinstated removal orders; and (ii) Santos’s challenge to his 2017 reinstated removal order came too late. *See* 8 U.S.C. §§ 1252(a), (b)(1). But I cannot join its holding that we may also review Customs and Border Protection’s 2023 denial of Santos’s motion to reopen the reinstated order. I therefore respectfully dissent from that portion of the majority opinion.

“[A]gency action is not subject to judicial review to the extent that such action is committed to agency discretion by law.” *Lincoln v. Vigil*, 508 U.S. 182, 190–91 (1993) (internal quotation marks omitted). To determine whether an action is so committed, we must examine whether any “judicially manageable standards are available for judging how and when an agency should exercise [its] discretion.” *Heckler v. Chaney*, 470 U.S. 821, 830 (1985). If we lack such standards, “then it is impossible to evaluate agency action for ‘abuse of discretion,’” and “review is not to be had.” *Id.*; *see* 5 U.S.C. § 701(a)(2) (making agency action unreviewable if it “is committed to agency discretion”).

The majority agrees with this general principle. *See* Maj. Op. at 36. But it nonetheless insists that 8 C.F.R. § 103.5 – which allows Customs and Border

Protection (“CBP”) to “reopen [a] proceeding or reconsider [a] prior decision” if a movant shows “proper cause” – applies to removal orders, thus providing a “meaningful standard[]” of review, *id.* at 37–38 (internal quotation marks omitted). I disagree. Both the regulation’s text and persuasive precedent show that section 103.5 governs only requests for certain immigration *benefits*, not motions asking CBP to reconsider discretionary decisions to reinstate removal orders. And without section 103.5 – which is the only source of “meaningful standards” that the majority identifies – we have no “law to apply” and therefore may not review CBP’s denial of Santos’s motion. *Heckler*, 470 U.S. at 834 (internal quotation marks omitted).

I. The Text of Section 103.5 Makes Clear that It Does Not Govern Reinstated Removal Orders.

Section 103.5 lies in the middle of Part 103, which is titled “Immigration Benefit Requests; USCIS Filing Requirements; Biometric Requirements; Availability of Records.” *See Dubin v. United States*, 599 U.S. 110, 120–21 (2023) (“[T]he title of a statute and the heading of a section are tools available for the resolution of a doubt about [its] meaning.” (internal quotation marks omitted)). Subpart A of that section begins by establishing general procedures for “[a]pplying for benefits,” such as asylum or withholding of removal. To that end,

Section 103.2 first tells applicants how to “[s]ubmi[t] . . . benefit requests” to U.S. Citizenship and Immigration Services (“USCIS”). And sections 103.3 and 103.5 then detail what an applicant should do if USCIS initially denies his request. Specifically, section 103.3 explains how to formally appeal, while section 103.5 establishes procedures allowing the party “affected” by the denial of benefits to ask the “official who made the latest decision” in the benefits “proceeding” to reconsider.

Section 103.5 does not just provide abstract guidance – it expressly mandates that motions for reconsideration “be submitted on Form I-290B.” *See* 8 C.F.R. § 103.5(a)(1)(iii). And Form I-290B in turn includes a link to “information on the immigration benefit types that are eligible for . . . [a] motion using this form.” *See Form I-290B*, U.S. Citizenship & Immigr. Servs. (May 31, 2024), <https://www.uscis.gov/sites/default/files/document/forms/i-290b.pdf>; *see also* 8 C.F.R. § 103.2(a)(1) (requiring applicants to follow “form instructions”). Those types include both important benefits like asylum (Form I-589) and more mundane ones like a replacement green card (Form I-90). *See When to Use Form I-290B, Notice of Appeal or Motion*, U.S. Citizenship & Immigr. Servs. (Apr. 3 2025),

<https://www.uscis.gov/i-290b/eligibility>. But notably absent from this list of benefits is coaxing CBP into reconsidering a reinstated removal order.

That makes sense: section 103.5 and its accompanying form clearly govern *affirmative requests for benefits*, not responses to CBP's enforcement actions. Indeed, section 103.5 does not involve CBP at all; section 103.2(a)(7)(i) explains that USCIS – not CBP – “will consider a benefit request.” And unlike CBP, USCIS plays no role in reinstating orders of removal.

The majority does not seriously contest any of this analysis, and it does not claim that motions to reconsider reinstated removal orders somehow involve immigration benefits. In fact, it concedes that (i) the title of Part 103 describes benefits, and such titles may be “useful for interpretive purposes”; (ii) “some of the surrounding sections do relate to immigration benefits”; and (iii) Form I-290B is an “ill-fitting form” for motions to reconsider reinstated removal orders because it “focus[es] on USCIS benefits appeals and motions,” not CBP's removal orders. Maj. Op. at 27–28 & n.8, 29 n.10. Nevertheless, the majority contends that it may avoid this unpleasant context because “the plain language of [section] 103.5” unquestionably extends to agency decisions unrelated to benefits, and “when

there is no ambiguity[,] . . . there is no room for construction.” *Id.* at 25 (internal quotation marks omitted).

But the majority offers a strained reading of section 103.5. As discussed above, that section allows any “affected party” to file a motion with “the official who made the latest decision in the proceeding.” But who qualifies as an “affected party”? Affected by *what*, exactly? And in what kind “proceeding”? The surrounding context provides clear answers: “affected” parties are those who have encountered a *specific* kind of decision – the denial of benefits. *See Aguilar-Aguilar v. Napolitano*, 700 F.3d 1238, 1243 (10th Cir. 2012) (“Read in context, the meaning of ‘affected party’ in [section] 103.5(a)(1)(i) refers to an unsuccessful petitioner [for benefits] under [section] 103.2.”); *see also Grajales v. Comm’r*, 47 F.4th 58, 62 (2d Cir. 2022) (“We must not look merely at the plain language of a particular clause[] but consider [it] in connection with . . . the whole statute.” (quoting *Dada v. Mukasey*, 554 U.S. 1, 16 (2008))).

Perhaps sensing the weakness of its bare textual argument, the majority also invokes the *expressio unius* canon, explaining that because section 103.5 “exclu[des] . . . several categories of decisions from its reach” it must implicitly *include* all other matters. *Maj. Op.* at 25. *But see Whetsel v. Network Prop. Servs., LLC*, 246 F.3d 897,

902 (7th Cir. 2001) (“[T]he canon of *expressio unius est exclusio alterius* has reduced force in the context of interpreting agency[-]administered regulations.”). But if section 103.5 covers only benefits, then the *expressio unius* canon would simply suggest that the section applies to all non-excluded *benefits*. Just imagine a sign at an ice cream shop saying that it served every major flavor except chocolate chip. That instruction would suggest that the shop had vanilla, chocolate, and even cookie-dough ice cream on hand – but it wouldn’t mean that the shop also served lobster.

Finally, the majority drops a last-ditch structural argument into a footnote, suggesting that Part 103 “also addresses distinct subjects” other than immigration benefits. Maj. Op. at 28 n.8. But no one contests that fact: Part 103’s title makes clear that it deals not only with “Immigration Benefit Requests,” but also with “USCIS Filing Requirements; Biometric Requirements; [and] Availability of Records.” As the structure of the regulation makes obvious, however, different sections discuss different issues. While sections 103.2 through 103.5 deal with *benefits*, section 103.6 pivots to “[i]mmigration bonds,” and section 103.10 describes “[p]recedent decisions.” I do not see how these later sections, on unrelated topics, could retroactively alter the meaning of section 103.5 – especially given that section

103.10, which the majority cites as the only other provision in Part 103 involving “removal proceedings,” Maj. Op. at 28 n.8, expressly cross-references a *different* regulation, *see* 8 C.F.R. § 103.10 (“Proceedings before [Department of Justice agencies] are governed by [P]art 1003 of 8 CFR.”).

In sum, the text, context, and structure of section 103.5 all make clear that it regulates benefits proceedings. I therefore cannot sign onto the majority’s shut-your-eyes-theory of interpretation, which ignores the “fundamental canon of . . . construction that the words of a [text] must be read in their context and with a view to their place in the overall . . . scheme.” *West Virginia v. EPA*, 597 U.S. 697, 721 (2022) (internal quotation marks omitted).

II. Precedent Confirms that Section 103.5 Does Not Apply to Reinstated Removal Orders.

The majority’s reading also creates a jarring Circuit split. All of our sister Circuits to have seriously considered this issue have concluded that “[section] 103.5(a) does not apply to decisions that reinstate removal orders.” *Tapia-Lemos v. Holder*, 696 F.3d 687, 689 (7th Cir. 2012); *see also Lavery v. Barr*, 943 F.3d 272, 276 (5th Cir. 2019) (“[T]he scope of 8 C.F.R. § 103.5 is limited to aliens who affirmatively seek and are then denied select immigration benefits.”); *Aguilar-Aguilar*, 700 F.3d

at 1243 n.3 (same).¹ And with good reason: Part 103 is not some convoluted or arcane regulation, muddled by contradictory signals or shadowy language. Its meaning is clear.

The majority hardly engages with most of these cases. Instead, it simply pronounces – in a single paragraph – that their analysis was “limited” and “conclusor[y].” Maj. Op. at 30. But it is the majority’s bare dismissal of these opinions that is “conclusory.” Rather than articulating how or why our sister Circuits erred, it simply rejects them out of hand.

Confronted by unanimous authority on the other side, the majority also casts about for its own precedents. It relies first on *Department of Homeland Security v. Thuraissigiam*, where the Supreme Court explained in a footnote that “[immigration] officials and immigration judges may reopen cases or reconsider decisions.” 591 U.S. 103, 140 n.28 (2020). But *Thuraissigiam* involved a request for a classic benefit – asylum in the United States. *Id.* at 114; see Maj. Op. at 31

¹ The majority suggests that *Tapia-Lemos*’s conclusion about 8 C.F.R. § 103.5(a) was tacitly overturned by the Seventh Circuit’s subsequent decision in *Cordova-Soto v. Holder*, 732 F.3d 789 (7th Cir. 2013). Maj. Op. at 35 n.13. But the court in *Cordova-Soto* did not address section 103.5. See generally 732 F.3d 789. And given that the court’s determination in *Tapia-Lemos* about the scope of section 103.5(a) was necessary to its judgment denying the alien’s petition for review, *Cordova-Soto* could not have overturned that component of the decision. See, e.g., *Brooks v. Walls*, 279 F.3d 518, 522 (7th Cir. 2002) (“One panel of this court cannot overrule another implicitly.”).

(conceding that “*Thuraissigiam* was a benefits case”). It thus fits comfortably within the regulatory scheme sketched out above.

The majority’s other precedents, a smattering of out-of-Circuit cases (including two non-precedential decisions) that left open the possibility that section 103.5 has a broader scope, fare no better. See Maj. Op. at 31–32 (citing *Escoto-Castillo v. Napolitano*, 658 F.3d 864, 866 (8th Cir. 2011); *Evers v. Mukasey*, 288 F. App’x 441 (9th Cir. 2008); *Turcios v. Wolf*, 828 F. App’x 496, 499 (10th Cir. 2020)). For starters, they all involved section 1228, which deals with the removal of “alien[s] convicted of aggravated felon[ies]” – not section 1231(a)(5), the provision at issue here. Furthermore, none of them grappled with the operative question presented in this case. Instead, they merely suggested – in dicta and while responding to tertiary arguments – that section 103.5 might stretch beyond benefits. They did not offer *any* meaningful analysis: *Evers* and *Turcios* failed even to consider whether section 103.5 might not apply, and *Escoto-Castillo* provided just one (similar) sentence of reasoning – that the petitioner “cite[d] no clear authority for” the proposition that section 103.5 is limited to benefits, *Escoto-Castillo*, 658 F.3d at 866. Given that courts since *Escoto-Castillo* have generated the kind of “clear authority” that the Eighth Circuit deemed to be lacking in 2011, the

majority's reliance on *Escoto-Castillo* is particularly misplaced. See *Tapia-Lemos*, 696 F.3d at 689; *Lavery*, 943 F.3d at 276; *Aguilar-Aguilar*, 700 F.3d at 1243 n.3.

* * *

In sum, the majority takes language housed in a *benefits*-focused regulation that specifically instructs movants to use a *benefits* form to apply to an agency that doles out *benefits* and concludes that this language in fact allows them to seek non-benefits relief on removal from a different agency. Because I cannot agree that section 103.5 is secretly an omnibus, all-purpose regulation allowing petitioners to ask immigration agencies to reconsider virtually any decision in virtually any context, I respectfully dissent. Cf. *West Virginia*, 597 at 723 (explaining that sweeping rules are “rarely accomplished through modest words, vague terms, or subtle device[s]” (internal quotation marks omitted)).