FOR PUBLICATION

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

WALTER OROZCO-LOPEZ, *Petitioner*, v. MERRICK B. GARLAND, Attorney General, *Respondent.*	No. 20-70127 Agency No. A097-738-794
HOMERO GONZALEZ MARTINEZ, *Petitioner*, v. MERRICK B. GARLAND, Attorney General, *Respondent.*	No. 20-71308 Agency No. A072-099-648 OPINION

On Petitions for Review of Orders of Immigration Judges

Argued and Submitted April 15, 2021[*]
Seattle, Washington

[*] *Orozco-Lopez* was argued. The panel unanimously concludes that *Gonzalez Martinez* is suitable for decision without oral argument. *See* Fed. R. App. P. 34(a)(2).

Filed August 25, 2021

Before: Susan P. Graber and Consuelo M. Callahan, Circuit Judges, and James V. Selna, Senior District Judge.[**]

Opinion by Judge Callahan;
Concurrence by Judge Callahan

SUMMARY[***]

Immigration

Granting Walter Orozco-Lopez's petition for review, and remanding, and denying Homero Gonzalez Martinez's petition for review, of decisions of immigration judges affirming asylum officers' reasonable fear determinations in reinstatement proceedings, the panel held that noncitizens at reasonable fear hearings before an immigration judge are statutorily entitled to counsel, but that this entitlement is cabined by 8 C.F.R. § 208.31(g)'s temporal limitations on IJ review hearings.

The panel observed that in *Zuniga v. Barr*, 946 F.3d 464 (9th Cir. 2019) (per curiam), this court addressed the question of whether non-citizens subject to expedited removal under 8 U.S.C. § 1228 have a statutory right to counsel in reasonable fear proceedings before immigration

[**] James V. Selna, United States Senior District Judge for the Central District of California, sitting by designation.

[***] This summary constitutes no part of the opinion of the court. It has been prepared by court staff for the convenience of the reader.

judges. In *Zuniga*, the court held that there is indeed such a right because § 1228 provides that non-citizens in such expedited removal proceedings have the right to counsel at no expense to the government, and reasonable fear proceedings are in turn part of those expedited removal proceedings.

The panel wrote that here the question is whether there is a statutory right to counsel at a reasonable fear hearing before an IJ for non-citizens with reinstated removal orders. The government argued that because neither the statute regarding reinstatement orders, 8 U.S.C. § 1231(a)(5), nor the regulations governing reinstatement proceedings, 8 C.F.R. § 1241.8, explicitly provide a right to counsel, there is no such right. The panel wrote that this approach was not persuasive. The panel explained that in *Zuniga*, this court considered the broader legislative context—outside of the specific provisions dealing with expedited removal proceedings for criminal non-citizens—and concluded that there is a right to counsel in reasonable fear proceedings, in particular because 8 U.S.C. § 1362 provides that non-citizens shall have the privilege of being represented (at no expense to the Government), by counsel of their choosing, in any removal proceedings before an IJ and in any appeal proceedings before the Attorney General from any such removal proceedings. The panel wrote that the question thus becomes whether reasonable fear hearings before an IJ fall under the category of "any removal proceedings."

Considering the plain language of the statute, and in the absence of a textual basis for restricting the right to counsel under § 1362 to only those proceedings determining removability under 8 U.S.C. § 1229a, the panel concluded that "any removal proceedings" includes those concerning eligibility for relief from removal. Thus, the panel held that

non-citizens whose removal orders have been reinstated are statutorily entitled to counsel under § 1362, at no expense to the government, at their reasonable fear hearings before an IJ.

The panel next considered how this eligibility for counsel is cabined by 8 C.F.R. § 208.31(g)(1)'s requirement that, in the absence of exceptional circumstances, the reasonable fear review hearing "shall be conducted by the immigration judge within 10 days of the filing of the Notice of Referral to Immigration Judge with the immigration court." The panel wrote that in the absence of exceptional circumstances, denying a continuance despite the non-citizen's inability to retain counsel within ten days is not a denial of this entitlement where, at the time the asylum officer notified the non-citizen of the negative fear determination and the non-citizen requested IJ review, the asylum officer informed the non-citizen of the opportunity to have counsel, such as by providing the non-citizen with a list of legal service providers. The panel held that the statutory entitlement to counsel does not mean that a non-citizen must have counsel before an IJ can proceed, but only that a non-citizen must at least be informed of the entitlement to counsel and have an opportunity to seek counsel within § 208.31(g)(1)'s constraints.

Applying these holdings to the petitions at hand, the panel determined that Orozco-Lopez's statutory right to counsel was denied, but that Gonzalez's was not. Noting that a non-citizen may waive the right to counsel, but such waiver must be knowing and voluntary, the panel wrote that the IJ at Orozco-Lopez's hearing did not mention the possibility of legal representation, so Orozco-Lopez could not possibly have waived it. Relying on *Montes-Lopez v. Holder*, 694 F.3d 1085 (9th Cir. 2012), the panel also wrote

that Orozco-Lopez need not show prejudice. The panel concluded that in Gonzalez's case, the IJ's denial of his request for a continuance to find a lawyer did not amount to a denial of his statutory right to counsel, where the asylum officer gave Gonzalez a list of free legal service providers after he requested review by an IJ, and at the review hearing eight days later, Gonzalez had not retained counsel or suggested when, if ever, he might do so.

The panel rejected Gonzalez's additional due process arguments concerning his hearing difficulties at the IJ hearing, and the IJ's failure to call a witness by telephone. The panel also held that substantial evidence supported the IJ's decision to affirm the asylum officer's negative reasonable fear determination as to Gonzalez's torture claim.

Concurring, Judge Callahan acknowledged *Montes-Lopez*'s holding that the denial of an alien's statutory right to counsel is per se reversible error, but for the reasons stated in the dissent in *Hernandez v. Holder*, 545 F. App'x 710 (9th Cir. 2013), she believes that the case was wrongly decided, and should be revisited en banc.

COUNSEL

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OPINION

CALLAHAN, Circuit Judge:

Walter Orozco-Lopez and Homero Gonzalez Martinez (collectively, "Petitioners"), natives and citizens of Guatemala and Mexico, respectively, reentered the United States illegally. The Department of Homeland Security ("DHS") ordered them removed after reinstating earlier removal orders entered against them. They expressed fear of persecution and torture if removed to their home countries, so asylum officers conducted screening interviews to determine whether their fears were reasonable. The asylum officers determined that they were not, and immigration judges ("IJs") affirmed those determinations. Orozco-Lopez and Gonzalez now petition for review of the IJs' decisions on the ground that non-citizens whose removal orders have been reinstated are entitled to counsel, at no expense to the government, at their reasonable fear hearings before an IJ. We have jurisdiction under 8 U.S.C. § 1252(a) and hold that such noncitizens are statutorily entitled to counsel, but that this entitlement is cabined by 8 C.F.R.

§ 208.31(g)'s requirement that, in the absence of exceptional circumstances, such hearings "shall be conducted by the immigration judge within 10 days of the filing of the Notice of Referral to Immigration Judge with the immigration court."[1] As we will explain, Orozco-Lopez's right to counsel was denied, but Gonzalez's was not. We also reject Gonzalez's additional contentions not related to the right-to-counsel issue. Orozco-Lopez's petition is granted and remanded, while Gonzalez's is denied.

I

"Congress has authorized reinstatement of prior removal orders as [a] streamlined process through which certain non-citizens may be removed from the country." *Alvarado-Herrera v. Garland*, 993 F.3d 1187, 1190 (9th Cir. 2021). As we recently explained, through reinstatement, "Congress sought to expedite the removal of those who reenter the United States illegally after having been removed at least once before." *Id.* at 1194 (citation omitted).

"To reinstate a prior removal order, an immigration officer must find that the individual in question: (1) is not a citizen; (2) was removed or voluntarily departed while subject to a prior removal order; and (3) reentered the United States illegally." *Id*. at 1190 (citations omitted). Orozco-

[1] Because we find a statutory entitlement to counsel, we do not address whether there is constitutional right to counsel. *See Ashwander v. Tennessee Valley Authority*, 297 U.S. 288, 347 (1936) (Brandeis, J., concurring) ("The Court will not pass upon a constitutional question although properly presented by the record, if there is also present some other ground upon which the case may be disposed of. . . . Thus, if a case can be decided on either of two grounds, one involving a constitutional question, the other a question of statutory construction or general law, the Court will decide only the latter.").

Lopez and Gonzalez do not contest that the DHS made these findings against them.

Although § 1231(a)(5) states that a non-citizen whose prior removal order has been reinstated "is not eligible and may not apply for any relief under [the INA]," "[a] non-citizen *may* be entitled to apply for withholding of removal or protection under the Convention Against Torture [("CAT")]." *Alvarado-Herrera*, 993 F.3d at 1190 (emphasis added). In creating this exception, "Congress sought to effectuate the United States' obligations under CAT by declaring it to be 'the policy of the United States not to expel, extradite, or otherwise effect the involuntary return of any person to a country in which there are substantial grounds for believing the person would be in danger of being subjected to torture.'" *Id*. at 1194 (citation omitted). "Congress directed the agency to issue regulations implementing this policy, without excluding non-citizens in reinstatement proceedings from those eligible to apply for protection under CAT." *Id*. (citation omitted).

For non-citizens whose removal orders have been reinstated, those regulations provide that "a non-citizen must first pass a screening interview conducted by an asylum officer, during which the non-citizen must show that he or she has a 'reasonable fear' of persecution or torture in the designated country of removal." *Id*. at 1190 (citation omitted). "The alien may be represented by counsel or an accredited representative at the interview, at no expense to the Government." 8 C.F.R. § 208.31(c).[2] "If the asylum

[2] There are two identical sets of regulations governing the reasonable fear process, 8 C.F.R. §§ 208.31 and 1208.31, applicable to the DHS and the Executive Office for Immigration Review, respectively. "Because the text is the same in both sets of regulations, for the sake of

officer determines that the non-citizen has established a reasonable fear," then the non-citizen may apply for withholding of removal or protection under CAT. *Alvarado-Herrera*, 993 F.3d at 1190 (citation omitted).

This regulatory scheme "allows immigration officials 'to quickly identify and resolve frivolous claims to protection,' thereby recognizing Congress's desire to ensure the swift removal of non-citizens subject to reinstatement." *Id*. at 1194 (citation omitted). "At the same time, a screening process addresses the United States' treaty obligations by making it possible for those who do have a reasonable fear of persecution or torture to receive a hearing before an immigration judge at which they can establish their entitlement to appropriate relief." *Id*. at 1195. We have previously stated that the regulation "balance[es] the fair resolution of claims for relief from removal against Congress' desire to provide for streamlined removal of certain classes of individuals, including those subject to reinstated removal orders." *Perez-Guzman v. Lynch*, 835 F.3d 1066, 1079 n.8 (9th Cir. 2016).

"If the asylum officer determines that the non-citizen has *not* established a reasonable fear, the non-citizen may request review of that determination by an immigration judge." *Alvarado-Herrera*, 993 F.3d at 1190 (citation omitted) (emphasis in original). "In the absence of exceptional circumstances, such review shall be conducted by the immigration judge within 10 days of the filing of the Notice of Referral to Immigration Judge with the immigration court." 8 C.F.R. § 208.31(g). "During the

simplicity we will refer only to one set throughout the remainder of this opinion." *Zuniga v. Barr*, 946 F.3d 464, 467 n.4 (9th Cir. 2019) (per curiam).

review hearing, the immigration judge conducts a *de novo* review of the record prepared by the asylum officer and may (but need not) accept additional evidence and testimony from the non-citizen." *Alvarado-Herrera*, 993 F.3d at 1190–91 (citation omitted). Thus, "[r]easonable fear review hearings were not envisioned to be full evidentiary hearings . . . ." *Bartolome v. Sessions*, 904 F.3d 803, 813 (9th Cir. 2018) (citations omitted). "Rather, they are abbreviated proceedings to ensure that an alien does not have a reasonable fear of returning to his or her country of origin." *Id*. (citations omitted). Moreover, "reasonable fear review proceedings are intended to be expedited and efficient." *Id*. (citations omitted). Finally, "[i]f the immigration judge affirms the asylum officer's adverse determination, . . . the non-citizen may file a petition for review in the appropriate circuit court of appeals." *Alvarado-Herrera*, 993 F.3d at 1191 (citation omitted). "Collectively, these procedures reduce the risk that meritorious claims will be erroneously rejected at the screening stage." *Id*. at 1195.

II

A

Orozco-Lopez is a native and citizen of Guatemala. He first entered the United States in 2003, illegally. The DHS promptly initiated removal proceedings. He did not appear at his removal hearing, and an IJ issued a removal order *in absentia* in April 2004. After being convicted of and jailed for a traffic offense, Orozco-Lopez was finally removed in May 2008. In 2013, he reentered illegally. After he was detained on charges of "corporal injury on spouse/cohabitant" and "criminal threats," his prior order of removal was reinstated, and he was again removed in June 2019. At that time he did not raise a fear of persecution or torture if removed to Guatemala. In October 2019, he

reentered illegally a third time. In December 2019, his prior order of removal was once again reinstated, but this time he raised a fear of persecution if removed.

Orozco-Lopez was referred to an asylum officer for a reasonable fear determination. He chose to have the interview without counsel. He told the asylum officer that, in 2003 in Guatemala, masked men who "wanted money" surrounded him, his mother, and his aunt and "tried to kill" them, though they were ultimately unharmed. He also testified that on another occasion, gang members asked him for money. When the asylum officer asked whether he feared harm based on statutorily protected grounds, he answered in the negative. Asked about his fear of government-enabled torture, Orozco-Lopez testified that the government had never harmed him and that he did not fear harm from officials if removed. He noted, however, that the police were not very effective at combatting crime. The asylum officer found Orozco-Lopez credible but determined that he had not established a reasonable fear of persecution because, among other reasons, (1) he was not actually harmed during the 2003 incident with the masked men; (2) there was no indication that they acted against him on account of a protected ground; (3) after the incident, there was no further contact with them; and (4) Orozco-Lopez's fear of future persecution was related to general victimization by criminals or gangs—an unprotected ground. The asylum officer also found that there was "not a reasonable possibility that [Orozco-Lopez] would be tortured, with official consent or acquiescence, in the future," because he "stated he was never harmed by public officials in the past and does not fear them in the future. . . . [And] he does not think they would intentionally allow criminals to severely harm him in their presence."

Orozco-Lopez requested that an IJ review the asylum officer's negative determination. At the hearing before the IJ, the IJ did not raise the possibility of legal representation at all. Orozco-Lopez testified about the 2003 incident with the masked men, a 2007 kidnapping of his sister and her return, and a 2009 robbery. The IJ found him credible but concluded that he had not shown past harm based on a protected ground, a reasonable fear of future harm on account of a protected ground, or fear of torture by the government or with the government's acquiescence. Orozco-Lopez then petitioned for our review.

B

Gonzalez is a native and citizen of Mexico. He first entered the United States in 1992, illegally, and was both ordered removed and in fact removed in 1995. At some time he reentered the country illegally and, in 1996, was convicted of "disturbing by loud unreasonable noise." In 2005, he was convicted of battery. In 2006, he was convicted for "the felony offense of threaten[ing] crime with intent to terrorize." In 2013, he was convicted of driving with a suspended license. Later that year, he was arrested by the U.S. Border Patrol and granted voluntary return to Mexico. Sometime thereafter he illegally reentered the United States. In 2020, the DHS notified Gonzalez that, because he had a prior order of removal, had been removed, and had illegally reentered, his earlier removal order was being reinstated. Gonzalez expressed fear of returning to Mexico and was referred to an asylum officer for a reasonable fear interview, which was held on April 3, 2020. At the beginning of the interview the asylum officer informed Gonzalez that he was permitted to have "a legal representative or consultant" present and asked if he wanted to proceed without one. Gonzalez responded that he "would

like to have a representative" and that his wife had "been talking to an attorney." The asylum officer then asked Gonzalez if he wanted to reschedule to have an attorney present, but Gonzalez stated, "I don't know what could be the difference to be honest with you." The asylum officer replied, "I understand. But I want to know from you whether you are comfortable proceeding with your interview without a legal representative or consultant." Gonzalez responded "Yes, that's fine."

Gonzalez told the asylum officer that he was physically harmed twice in Mexico in 2013. In the first incident, he went to pick up money that his family had sent him and was surrounded by several individuals who assaulted and robbed him. In the second incident, Gonzalez took a bus to Mexicali to look for help coming to the United States. Three people offered to help but instead kidnapped Gonzalez and held him for ransom. After a day and a night his wife paid a ransom to secure his release. Gonzalez tried to report his kidnapping, but the two officers to whom he spoke "were laughing at the moment that [he] told them." The asylum officer found Gonzalez credible, but determined that he could not establish persecution or torture because he had not been targeted on account of any protected ground and was harmed only by criminals.

On April 29, 2020, the asylum officer notified Gonzalez of his determination that Gonzalez did not have a reasonable fear of persecution or torture. That same day, Gonzalez requested review by an IJ, the Notice of Referral to Immigration Judge was issued, and a list of free legal service providers was given to him.

A hearing was held on May 7, 2020. Gonzalez asked for an extension of time to find someone to represent him. The IJ responded that the asylum officer's "findings [were] filed

. . . with the Court . . . a week ago" and that "[t]he law require[d] the Court to hear these cases within ten days." Gonzalez said that he had looked for an attorney but did not have one. The IJ then stated that the hearing would proceed.

Initially, Gonzalez indicated some problems with understanding the translation through the headset due to a hearing problem. However, the IJ thought that this was because Gonzalez was "trying to listen to [the IJ's] English and the Spanish at the same time and [the IJ and interpreter are] talking at the same time which is why you're not supposed to be listening to both." After the IJ offered this suggestion, Gonzalez did not mention any hearing difficulties.

Gonzalez told the IJ about the incidents that he had related to the asylum officer. He also reported that people who return to Mexico from the United States are at risk of getting kidnapped. He stated that he had a cousin who, in 2012, was kidnapped a week after he returned to Mexico and was never found. Gonzalez added that there are a lot of "zetas" who "ask for money for kidnapping."

He also testified that he had a brother-in-law who was being charged 2000 pesos for his business and was threatened with death if he said anything. Gonzalez asked the IJ to call a cousin, but the IJ said she could not do so.

Gonzalez further stated that, in 2004, a friend of his had packed all his things in his truck and trailer and tried to leave, but the police killed him in front of his wife and children and took the trailer.

At the end of the hearing, Gonzalez again asked for time to get an attorney. The IJ responded, "[I]f you're having trouble finding an attorney because of the coronavirus issues

there's no way to predict when that is going to end. Under the law the Court's required to review these applications within a certain number of days and we are at that limit already." Gonzalez did not respond. That same day, the IJ issued her order concurring with the asylum officer's negative reasonable fear determination because the harms that Gonzalez had experienced were attributable to crime, not persecution, and he had not established a reasonable fear of torture by a state actor. Gonzalez then filed his petition for review.

III

"We review de novo due process challenges to reasonable fear proceedings." *Zuniga v. Barr*, 946 F.3d 464, 466 (9th Cir. 2019) (per curiam) (citation omitted). We also review de novo questions of law, including those of statutory construction. *Romero-Mendoza v. Holder*, 665 F.3d 1105, 1107 (9th Cir. 2011).

An "IJ's decision not to continue a hearing is reviewed for abuse of discretion," *Arrey v. Barr*, 916 F.3d 1149, 1158 (9th Cir. 2019), but "whether [an] IJ's denial of a continuance violated [a petitioner's] statutory right to counsel . . . is a question of law which we review de novo," *Montes-Lopez v. Holder*, 694 F.3d 1085, 1088 (9th Cir. 2012).

"We review [an] IJ's determination that [an] alien did not establish a reasonable fear of persecution or torture for substantial evidence," which means that "we must uphold the IJ's conclusion . . . unless, based on the evidence, any reasonable adjudicator would be compelled to conclude to the contrary." *Bartolome*, 904 F.3d at 811 (citations and quotation marks omitted).

IV

Petitioners argue that *Zuniga* holds that non-citizens have a right to counsel at their reasonable fear review hearings before an IJ. However, *Zuniga*'s holding is not so broad. In *Zuniga*, the question was whether "non-citizens subject to *expedited removal under 8 U.S.C. § 1228* have a statutory right to counsel in reasonable fear proceedings before immigration judges." *Zuniga*, 946 F.3d at 465 (emphasis added). The panel answered that there is indeed such a right because § 1228, the statute governing the "[e]xpedited removal of aliens convicted of committing aggravated felonies," provides that non-citizens in expedited removal proceedings have the right to counsel at no expense to the government, 8 U.S.C. § 1228(b)(4)(B), and "[r]easonable fear proceedings are in turn part of those expedited removal proceedings," *Zuniga*, 946 F.3d at 468–69. Thus, *Zuniga*'s holding was limited to non-citizens in expedited removal proceedings.

Here, the question is whether there is a statutory right to counsel at a reasonable fear hearing before an IJ *for non-citizens with reinstated removal orders*. Neither the statute regarding reinstatement orders, 8 U.S.C. § 1231(a)(5), nor the regulations governing reinstatement proceedings, 8 C.F.R. § 1241.8, explicitly provide a right to counsel. Section 1241.8(e) simply provides that if an alien in a reinstatement proceeding expresses a fear of returning to the country of removal, then the alien is entitled to go through the reasonable fear screening process. On this basis, the government argues that there is no statutory right to counsel in reinstatement proceedings, *see Morales-Izquierdo v. Gonzales*, 486 F.3d 484, 497 (9th Cir. 2007) (en banc), and, accordingly, no right to counsel for non-citizens with reinstated removal orders who are at reasonable fear

hearings before IJs, citing *Kucana v. Holder*, 558 U.S. 233, 249 (2010) ("[W]here Congress includes particular language in one section of a statute but omits it in another section of the same Act, it is generally presumed that Congress acts intentionally and purposely in the disparate inclusion or exclusion." (alteration in original) (citation omitted)).

This approach is not persuasive. In *Zuniga*, we explained that "[t]he broader legislative context—outside of the specific provisions dealing with expedited removal proceedings for criminal non-citizens—also supports the conclusion that there is a right to counsel in reasonable fear proceedings." *Zuniga*, 946 F.3d at 469. "In particular, 8 U.S.C. § 1362 provides that '[i]n *any* removal proceedings before an immigration judge and in any appeal proceedings before the Attorney General from any such removal proceedings,' non-citizens '*shall have the privilege of being represented (at no expense to the Government)*' by counsel of their choosing." *Id*. (alteration in original) (emphases added) (citation omitted). The question thus becomes whether reasonable fear hearings before an IJ fall under the category of "any removal proceedings."

We are not asking whether *reinstatement proceedings* are necessarily a species of removal. We answered that question in the negative in *Morales-Izquierdo*. 486 F.3d at 490 ("[T]he fact that Congress placed reinstatement in a separate section from removal suggests that reinstatement is a separate procedure, not a species of removal."). We explained that "[t]he scope of a reinstatement inquiry . . . can be performed like any other ministerial enforcement action. The *only* question is whether the alien has illegally reentered after having left the country while subject to a removal order." *Id*. at 491.

These petitions raise a subtly but significantly different question: whether *reasonable fear hearings before an IJ*, at which non-citizens with reinstated removal orders may be ordered removed to countries where they allege they will be persecuted, constitute "removal proceedings" as that term is used in § 1362. Indeed, in *Zuniga*, we noted that *Morales-Izqueirdo*'s holding that there is no "statutory right to counsel at the *initial stage* of reinstatement proceedings, during which an immigration officer performs the 'ministerial' task of determining whether the non-citizen's prior removal order should be reinstated . . . did not address whether a statutory right to counsel attach[es] during [a] *subsequent reasonable fear review* before an IJ." *Zuniga*, 946 F.3d at 469 n.8 (emphases added).

Because the INA does not define "any removal proceedings," we resort to tools of statutory interpretation. And "[a]s with any question of statutory interpretation, our analysis begins with the plain language of the statute." *Jimenez v. Quarterman*, 555 U.S. 113, 118 (2009); *see also Chacon v. Wilkinson*, 988 F.3d 1131, 1134 (9th Cir. 2021) ("When Congress does not define a term, we 'interpret the words consistent with their ordinary meaning at the time Congress enacted the statute.'" (citation omitted)).

First, "[r]ead naturally, the word 'any' has an expansive meaning, that is, 'one or some indiscriminately of whatever kind.'" *United States v. Gonzales*, 520 U.S. 1, 5 (1997) (quoting Webster's Third New International Dictionary 97 (1976)). Second, by saying "any removal proceedings," Congress signaled that there is more than one kind of removal proceeding. Thus, Congress intended that non-citizens have an entitlement to counsel at every possible flavor of removal proceedings before an IJ.

The government, however, asserts that "removal proceedings" are only those proceedings that determine the "removability" of a non-citizen. But there does not appear to be any textual basis for such a narrow reading. Congress indeed defined "removable," § 1229a(e)(2), but that is not the same as defining "removal," *see FCC v. AT&T Inc.*, 562 U.S. 397, 403 (2011) ("[I]n ordinary usage, a noun and its adjective form may have meanings as disparate as any two unrelated words."). We have previously held that "[t]o order an individual removed, the immigration judge must make two determinations: (1) whether the individual is removable from the United States; and, if so, (2) whether the individual is otherwise eligible for relief from removal." *Morales-Izquierdo*, 486 F.3d at 491 (citation omitted). A non-citizen alleging persecution in his or her homeland is not actually removed from the United States unless it is determined that he or she is "removable" *and* is not entitled to any relief from removal, such as withholding of removal or relief under CAT.[3] While determining removability in reinstatement proceedings may be mechanical, adjudicating "eligib[ility] for relief from removal . . . is often complex and fact-intensive." *Id*. Accordingly, as a reasonable fear hearing before an IJ concerns "relief from removal," we find it to be a type of "removal proceeding[]" included in § 1362.

This conclusion is consistent with our prior reference to "reasonable fear and withholding of removal proceedings" as a "removal moratorium." *See Padilla-Ramirez v. Bible*, 882 F.3d 826, 832 (9th Cir. 2018). Also, we have previously relied on § 1362 in finding that a non-citizen's eligibility for counsel in withholding of removal proceedings was violated.

[3] Certainly, being removed to a country in which the non-citizen believes he or she will be tortured may be more devastating to the non-citizen than simply being found removable from the United States.

See Castro-O'Ryan v. U.S. Dep't of Immigr. & Naturalization, 847 F.2d 1307, 1311–12 (9th Cir. 1987). We conclude that, in the absence of a textual basis for restricting the right to counsel under § 1362 to only those proceedings determining removability, "any removal proceedings" includes those concerning eligibility for relief from removal.[4]

Our conclusion is supported by applicable rules of statutory interpretation. "We do not . . . construe statutory phrases in isolation; we read statutes as a whole," *United States v. Morton*, 467 U.S. 822, 828 (1984), and "[w]here Congress includes particular language in one section of a statute but omits it in another . . . , it is generally presumed that Congress acts intentionally and purposely in the disparate inclusion or exclusion," *Keene Corp. v. United States*, 508 U.S. 200, 208 (1993) (second alteration in original) (citation and quotation marks omitted). Here, instead of saying "any removal proceedings," Congress could have referred specifically to proceedings under § 1229a that determine a person's removability. Indeed, the INA does so explicitly no less than three times. *See* § 1229(a)(1) ("In removal proceedings under section 1229a of this title, written notice . . . shall be given"); § 1229(a)(2)(A) ("In removal proceedings under section 1229a of this title, in the case of any change or postponement in the time and place of such proceedings, . . . a written notice shall be given); 8 U.S.C. § 1182(d)(3)(B)(i) ("The Secretary of State may not exercise the discretion provided in this clause with respect to an alien at any time during which the alien is the subject of pending removal proceedings under section 1229a of this title"). Congress's

[4] Of course, Congress has the authority to expand or contract the statutory entitlement to representation.

use of "any removal proceedings" instead of "removal proceedings under section 1229a of this title" in § 1362 must mean something. Specifically, for the word "any" to do any work as it must, and not be surplusage, § 1362 must include a broader class of removal proceedings than those described in § 1229a. *See Corley v. United States*, 556 U.S. 303, 314 (2009) (holding that a "statute should be construed so that effect is given to all its provisions, so that no part will be inoperative or superfluous" (citation omitted)). Also, § 1229a has its own right to counsel provision. 8 U.S.C. § 1229a(b)(4)(A). Thus, if the right under § 1362 covered only removal proceedings under § 1229a, where removability is at issue, § 1229a(b)(4)(A) would be mere surplusage.

Finally, we note that, "[e]ven if there were some doubt as to the correct construction of the statute, the doubt should be resolved in favor of the alien." *See INS* v. *Errico*, 385 U.S. 214, 225 (1966).

In sum, we hold that the words "any removal proceedings" in § 1362 must cover removal proceedings not included in § 1229a(b)(4)(A), and that a reasonable fear hearing before an IJ is a type of "removal proceeding[]" included in § 1362. Consequently, non-citizens whose removal orders have been reinstated are statutorily entitled to counsel under § 1362, at no expense to the government, at their reasonable fear hearings before an IJ.

V

We next consider how this eligibility for counsel is cabined by § 208.31(g)(1)'s requirement that, "[i]n the absence of exceptional circumstances," the reasonable fear review hearing "shall be conducted by the immigration judge within 10 days of the filing of the Notice of Referral to

Immigration Judge with the immigration court." 8 C.F.R. § 208.31(g)(1). This regulation comports with Congress's intent that those who were previously ordered removed and illegally reentered should be removed again expeditiously. *See Alvarado-Herrera*, 993 F.3d at 1194–95.

We recognize that

> [t]o infuse the critical right to counsel with meaning, we have held that IJs must provide aliens with reasonable time to locate counsel and permit counsel to prepare for the hearing. Absent a showing of clear abuse, we typically do not disturb an IJ's discretionary decision not to continue a hearing. Nonetheless, we cannot allow a "myopic insistence upon expeditiousness" to render the right to counsel "an empty formality."
>
> No bright line guides our consideration of what constitutes reasonable time. The inquiry is fact-specific and thus varies from case to case. We pay particular attention to the realistic time necessary to obtain counsel; the time frame of the requests for counsel; the number of continuances; any barriers that frustrated a petitioner's efforts to obtain counsel, such as being incarcerated or an inability to speak English; and whether the petitioner appears to be delaying in bad faith.

Biwot v. Gonzales, 403 F.3d 1094, 1098–99 (9th Cir. 2005) (citations omitted). *Biwot*, however, discussed the right to counsel in the context of ordinary removal proceedings where there are no strict statutory or regulatory deadlines by which the removal hearings must be heard. *See id*. at 1096–

97. Here, in contrast, 8 C.F.R. § 208.31(g)(1) provides that, "[i]n the absence of exceptional circumstances," the reasonable fear hearing before the IJ "shall be conducted by the immigration judge within 10 days of the filing of the Notice of Referral to Immigration Judge with the immigration court." Accordingly, the statutory entitlement to counsel in this context exists within that time frame. In other words, in the absence of exceptional circumstances, denying a continuance despite the non-citizen's inability to retain counsel within ten days is not a denial of this entitlement where, at the time the asylum officer notified the non-citizen of the negative fear determination and the non-citizen requested IJ review, the asylum officer informed the non-citizen of the opportunity to have counsel, such as by providing the non-citizen with a list of legal service providers.

Nor would an IJ violate the statutory entitlement to counsel by denying a non-citizen's request for a continuance beyond the ten-day mark just so the non-citizen's counsel can further prepare for the hearing. As we have noted, review hearings before the IJ "are abbreviated proceedings to ensure that an alien does not have a reasonable fear of returning to his or her country of origin." *Bartolome*, 904 F.3d at 813. The limited purpose is for the IJ to "review . . . the record prepared by the asylum officer," *Alvarado-Herrera*, 993 F.3d at 1191, and to assess whether the asylum officer erred in finding that the non-citizen's fear was unreasonable. "Reasonable fear review hearings were not envisioned to be full evidentiary hearings." *Bartolome*, 904 F.3d at 813. Only if the IJ deems the asylum officer's negative fear determination to be incorrect—in other words, finds that the non-citizen's fear may be reasonable—will the non-citizen become eligible for full withholding proceedings, which involve evidentiary hearings with the

opportunity to put on witnesses and submit evidence. *See id*. at 809. But the preliminary nature of the IJ's decision in a reasonable fear review hearing is reflected by the provision that the IJ "may (but need not) accept additional evidence and testimony from the non-citizen." *Alvarado-Herrera*, 993 F.3d at 1190. Thus, counsel's role is largely to help her client testify convincingly about her fear so that the IJ will find it reasonable. Hence, there is no requirement to find witnesses to testify and documentary evidence to submit. Moreover, if the IJ affirms the asylum officer's negative fear determination, a non-citizen can seek review by a circuit court of appeals where she, of course, can be represented by a lawyer. *See Alvarado-Herrera*, 993 F.3d at 1191.

We thus hold that this statutory entitlement to counsel does not mean that a non-citizen must have counsel before an IJ can proceed, but only that a non-citizen must at least be informed of the entitlement to counsel and have an opportunity to seek counsel within § 208.31(g)(1)'s constraints.

VI

Applying our holdings to the petitions at hand, we determine that Orozco-Lopez's statutory right to counsel was denied, but that Gonzalez's was not. A non-citizen may waive the right to counsel, but such waiver must be knowing and voluntary. *See Tawadrus v. Ashcroft*, 364 F.3d 1099, 1103 (9th Cir. 2004). The IJ at Orozco-Lopez's hearing did not mention the possibility of legal representation, so Orozco-Lopez could not possibly have waived it. Also, we have held that where a non-citizen's statutory right to counsel has been denied, as in Orozco-Lopez's case, he need not show prejudice. *See Montes-Lopez v. Holder*, 694 F.3d 1085, 1093–94 (9th Cir. 2012) (holding that a non-citizen "who shows that he has been denied the statutory right to be

represented by counsel in an immigration proceeding need not also show that he was prejudiced by the absence of the attorney").

In Gonzalez's case, the IJ's denial of his request for a continuance to find a lawyer did not amount to a denial of his statutory right to counsel. On April 29, 2020, the asylum officer issued his negative fear determination to Gonzalez, Gonzalez requested review by an IJ, the Notice of Referral to Immigration Judge was issued, and a list of free legal service providers was given to Gonzalez. The review hearing was held eight days later, on May 7, 2020. When Gonzalez asked for a continuance that day to keep searching for counsel, the IJ reasonably denied it on the grounds that the asylum officer's "findings [were] filed . . . with the Court . . . a week ago" and that "[t]he law required the Court to hear these cases within ten days." The asylum officer had given Gonzalez a list of legal service providers. During the eight days thereafter, Gonzalez had not retained counsel and, at the hearing, did not suggest when, if ever, he might be able to do so.[5] Under these circumstances, the IJ reasonably proceeded with the review hearing.[6] *See* 8 C.F.R. § 208.31(g)(1).

[5] Gonzalez did not respond to the IJ's suggestion that the coronavirus pandemic may have made it harder to find a lawyer. We thus need not address when, if ever, the pandemic could constitute "exceptional circumstances" that toll § 208.31(g)'s ten-day deadline.

[6] We also reject Gonzalez's assertion that he did not knowingly and voluntarily waive his right to counsel before the asylum officer because when the asylum officer stated, "I want to know from you whether you are comfortable proceeding today with your interview without a legal representative or consultant," Gonzalez replied, "Yes, that's fine." On this record, we find that his waiver was knowing and voluntary.

Gonzalez also contends that the IJ violated due process by (1) "refus[ing] to address Petitioner's hearing difficulties," and (2) not calling his cousin after he offered to provide the IJ with his cousin's phone number. His first point is not persuasive because, when Gonzalez raised the hearing difficulties at the beginning of the proceeding, the IJ suggested that he not listen to both the IJ and the interpreter at the same time, and thereafter Gonzalez expressed no trouble hearing or understanding the IJ. His second argument also fails because the purpose of the hearing is to conduct "a *de novo* review of the record prepared by the asylum officer," and the IJ "may (*but need not*) accept additional evidence." *Alvarado-Herrera*, 993 F.3d at 1190–91 (emphasis added). Gonzalez offers no authority requiring an IJ to call a witness by telephone. Thus, Gonzalez's additional due process claims also fail.

Finally, Gonzalez argues that the IJ misapplied the law governing CAT claims by failing to appreciate that mere acquiescence by the government in the past harm is sufficient. He testified that when he sought police assistance after his kidnapping, the police knew who his kidnappers were but refused to help and laughed instead. However, it seems that the harms he alleged did not rise to the level of torture. He was robbed in one incident and kidnapped for ransom in another. *See* 8 C.F.R. § 1208.18(a)(1) ("Torture is defined as any act by which severe pain or suffering, whether physical or mental, is intentionally inflicted on a person."); 8 C.F.R. § 1208.18(a)(2) ("Torture is an extreme form of cruel and inhuman treatment and does not include lesser forms of cruel, inhuman or degrading treatment or punishment that do not amount to torture."). Therefore, under the substantial evidence standard, sufficient evidence supported the IJ's decision to affirm the asylum officer's negative reasonable fear determination as to Gonzalez's

torture claim. *See Bartolome*, 904 F.3d at 811 (explaining that under this standard of review, "we must uphold the IJ's conclusion . . . unless, based on the evidence, any reasonable adjudicator would be compelled to conclude to the contrary" (citations and quotation marks omitted)).

VII

In conclusion, we hold that non-citizens whose removal orders have been reinstated are statutorily entitled to counsel, at no expense to the government, at their reasonable fear hearings before an IJ. This statutory entitlement is cabined by 8 C.F.R. § 208.31(g)(1)'s requirement that, "[i]n the absence of exceptional circumstances," such hearings "shall be conducted by the immigration judge within 10 days of the filing of the Notice of Referral to Immigration Judge with the immigration court." Because this right was denied to Orozco-Lopez, we remand his case to the agency for further proceedings consistent with this opinion. However, Gonzalez's statutory right to counsel was not violated because he had the opportunity to retain counsel and failed to do so, and his other challenges are without merit.

Orozco-Lopez's petition, No. 20-70127, is **GRANTED** and **REMANDED**. Gonzalez's petition, No. 20-71308, is **DENIED**.[7]

[7] Gonzalez's Motion to Hold Case in Abeyance, Dkt. No. 42, is **DENIED** as moot now that the *Alvarado-Herrera* opinion has been issued.

CALLAHAN, J., concurring:

I acknowledge *Montes-Lopez*'s holding that the denial of an alien's statutory right to counsel is per se reversible error, but for the reasons stated in the dissent in *Hernandez v. Holder*, 545 F. App'x 710 (9th Cir. 2013), I believe that the case "was wrongly decided, and we should revisit this decision en banc." *See id*. at 712–13 (Ikuta, J., dissenting).