1 IN THE SUPREME COURT OF THE UNITED STATES

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3 JEAN MARC NKEN, :

4 Petitioner :

5 v. : No. 08-681

6 MARK R. FILIP, :

7 ACTING ATTORNEY GENERAL. :

8 - - - - - - - - - - - - - - - - - x

9 Washington, D.C.

10 Wednesday, January 21, 2009

11

12 The above-entitled matter came on for oral

13 argument before the Supreme Court of the United States

14 at 1:00 p.m.

15 APPEARANCES:

16 LINDSAY C. HARRISON, ESQ., Washington, D.C.; on behalf

17 of the Petitioner.

18 EDWIN S. KNEEDLER, ESQ., Deputy Solicitor General,

19 Department of Justice, Washington, D.C.; on behalf of

20 the Respondent.

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1 C O N T E N T S

2 ORAL ARGUMENT OF PAGE
3 LINDSAY C. HARRISON, ESQ.
4 On behalf of the Petitioner 3
5 EDWIN S. KNEEDLER, ESQ.
6 On behalf of the Respondent 23
7 REBUTTAL ARGUMENT OF
8 LINDSAY C. HARRISON, ESQ.
9 On behalf of the Petitioner 47
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25

1 P R O C E E D I N G S

2 (1:00 p.m.)

3 CHIEF JUSTICE ROBERTS: We'll hear argument

4 next in Nken v. Filip.

5 Ms. Harrison.

6 ORAL ARGUMENT OF LINDSAY C. HARRISON

7 ON BEHALF OF THE PETITIONER

8 MS. HARRISON: Thank you, Mr. Chief Justice,

9 and may it please the Court:

10 In 1996, Congress provided in 8 U.S.C.

11 1252(b)(3)(B) that courts may stay an alien's order of

12 removal pending appeal. The question in this case is

13 whether Congress intended that temporary stays of removal

14 be governed by the normal standards applicable to stays or,

15 instead, by the special standard that Congress separately

16 set forth for injunctions in 1252(f)(2).

17 There are three primary reasons why the normal

18 stay standard should apply.

19 First, Congress used different words to

20 describe these different forms of relief, "stay" in

21 (b)(3)(B) and "enjoin" in (f)(2). Congress used different

22 words because it saw these forms of relief as different.

23 Second and related, a stay is, in fact,

24 different from an injunction. It is a temporary vacatur of

25 a court or vacancy order pending review. It is not

1 directed at a party and does not order a party to take
2 action.
3 Third, even an alien with a strong likelihood
4 of success on the merits who will face certain persecution,
5 if deported, cannot get a stay under the (f)(2) standard, a
6 result Congress should not be presumed to authorize in the
7 absence of a clear statement to that effect.
8 CHIEF JUSTICE ROBERTS: Counsel, I'm -- I'm not
9 sure this matters very much, but do you know, are stays
10 usually granted in this type of case? Not this type of
11 case. A -- a removal case as opposed to a application to
12 reopen.
13 MS. HARRISON: In -- in a removal case, stays
14 are granted in eight circuits only if the individual meets
15 the traditional --
16 CHIEF JUSTICE ROBERTS: No, no, I understand
17 it. I'm just saying if you happen to know empirically if
18 most people who are facing removal get stays.
19 MS. HARRISON: I've seen no empirical study.
20 CHIEF JUSTICE ROBERTS: Okay.
21 JUSTICE GINSBURG: How long is it --
22 JUSTICE KENNEDY: Did -- did the government
23 cite -- I can ask you. I thought the government said that
24 an empirical database would be the Ninth Circuit, which has
25 the more generous rule.

1 MS. HARRISON: That --

2 JUSTICE KENNEDY: And my understanding is that

3 stays are granted in a very high percentage of those cases.

4 I'd be curious to know, A, the percentage of the cases in

5 which it's granted; and B, the percentage of those cases

6 that are ultimately decided in favor of the government?

7 MS. HARRISON: The data that I believe Your

8 Honor is referencing was the rate at which petitions for

9 review are filed, and not the rate at which stays are

10 granted or filed.

11 JUSTICE KENNEDY: Well, is it true that there

12 are more petitions filed in the -- in the courts with the

13 more generous standard?

14 MS. HARRISON: Again, I've not seen a

15 comprehensive study. There are more petitions filed in the

16 Ninth Circuit, but there's no evidence of the cause of

17 that.

18 And -- and I think it's important that stays

19 are, in fact, denied under the traditional standard,

20 because what that demonstrates is that the traditional

21 standard effectuates Congress' purpose of passing IIRIRA

22 and eliminating the automatic stay and making it, in fact,

23 more difficult for an individual to obtain a stay on

24 appeal. That -- the traditional standard does have real

25 teeth and it does not result in an automatic stay.

1 JUSTICE GINSBURG: How many years ago was the
2 automatic stay eliminated? When did this -- this -- the
3 current law come into effect?
4 MS. HARRISON: At the same time in 1996.
5 Congress both eliminated the automatic stay, and it
6 replaced it with the language in 1252(b)(3)(B), which
7 indicates that a stay is not automatic unless a court
8 orders otherwise.
9 And -- now, that language was nearly identical
10 to the language that had previously existed, where a stay
11 was automatic except for aggravated felons. For aggravated
12 felons, the statute provided that a stay was not automatic
13 unless a court otherwise directs. And courts had
14 interpreted that language to provide for application of the
15 traditional stay standard.
16 CHIEF JUSTICE ROBERTS: Is it possible in this
17 case to kind of split the -- split the baby? You have a
18 more appealing fact case than is typical because yours
19 involves a denial of a motion to reopen and doesn't really
20 go to the ultimate merits. Most of the petitions, I think,
21 do go to the ultimate merits, and it's easier to see that
22 (f)(2) may apply there as opposed to your case.
23 Now, is there a coherent way of saying that?
24 In other words, in your type of case, you apply the
25 traditional stay standards, but in a case where the issue

1 that is before the court is whether to order removal or not
2 on the merits, the -- the other approach applies.
3 MS. HARRISON: I think that the way to do that,
4 Your Honor, is to apply (f)(2) where the alien is seeking
5 permanent relief. And where the alien is seeking to enjoin
6 his or her removal, the (f)(2) standard makes a lot of
7 sense, but the (f)(2) standard doesn't contain any
8 predictive language. It doesn't --
9 CHIEF JUSTICE ROBERTS: Well, but that's just
10 really saying the way to avoid that is to say you win
11 across the board. I mean, it -- my understanding is that
12 situations in which they're going to be seeking an
13 injunction to enjoin are actually quite limited. They're
14 typically just seeking to vacate the removal order.
15 MS. HARRISON: And if you then apply the (f)(2)
16 standard across the board to stay requests, then what that
17 would mean is that the court of appeals is deciding the
18 merits twice. It's deciding it at the outset when
19 determining whether or not the individual is entitled to a
20 stay, and then it is deciding it again when the court
21 decides whether the individual is entitled to have the
22 order of removal vacated. And that just doesn't seem like
23 what Congress had --
24 CHIEF JUSTICE ROBERTS: No, I think I
25 understand that point when they're seeking to have the

1 order -- the removal order vacated. But here, you're
2 seeking the reopening of the proceedings, which I guess is
3 a little different, isn't it, than the -- the underlying
4 decision on the merits?
5 MS. HARRISON: Technically, the order of
6 removal is the order denying the motion to reopen, so
7 they're one and the same in this case and in any case where
8 the petition for review is of an order of removal, which is
9 what the statute provides for. And I think that point is
10 very important that the --
11 CHIEF JUSTICE ROBERTS: Is that right? How --
12 how can that be? I mean, you have an order of removal, and
13 then you move to reopen the proceedings. Aren't they two
14 separate things?
15 MS. HARRISON: Well, the -- the statute
16 provides that an order denying a motion to reopen is itself
17 an order of removal, and that it's consolidated with the
18 original order of removal on appeal. So they -- they
19 become one and the same case, and the order denying the
20 motion to reopen is the order of removal.
21 CHIEF JUSTICE ROBERTS: Where does it say that?
22 MS. HARRISON: I do not believe that it is in
23 1252 itself, and I don't have the citation for you. I'm
24 sorry, Your Honor.
25 CHIEF JUSTICE ROBERTS: Okay.

1 MS. HARRISON: Back to the point that it's
2 important to recognize that the (f)(2) standard contains no
3 predictive language, it doesn't allow a court to say is
4 this individual likely to succeed on the merits. It says
5 can this individual show, by clear and convincing evidence,
6 that the entry or execution of the removal order is
7 prohibited by law, not likely to show, not we are likely to
8 find.
9 And so if courts were required to apply this
10 standard at the stay stage, they would be deciding the very
11 same question twice. They would be deciding both the
12 merits question of whether the individual removal order is
13 prohibited by law and also the stay question of whether it
14 should be stayed pending --
15 JUSTICE SCALIA: They wouldn't be deciding it
16 the same way twice. Initially, they'd just have to decide
17 whether -- whether the alien has shown by clear and
18 convincing evidence that he should win, and if they decide,
19 no, he hasn't, then at the merits stage, they have to
20 decide which one prevails by a preponderance of the
21 evidence. So it's really a -- a different call the second
22 time.
23 MS. HARRISON: Well, Your Honor, the government
24 has stated in its brief that it -- it believes these two
25 standards to be virtually identical. And in the event that

1 a stay was granted, it would certainly render the merits
2 decision superfluous because, if a stay was granted and you
3 can meet this higher burden, then, perforce, you could meet
4 the lower burden.
5 JUSTICE SCALIA: That's true.
6 MS. HARRISON: And so, in that situation,
7 (b)(3)(B) would be superfluous.
8 JUSTICE SCALIA: What do you claim that -- that
9 (f)(2) covers, if it doesn't cover these stays?
10 MS. HARRISON: It covers any time an alien
11 seeks an injunction, now, both in the courts of appeals and
12 in a district court case.
13 JUSTICE GINSBURG: When would that be?
14 MS. HARRISON: Well, the Catholic Social
15 Services case is one example where individuals were
16 challenging the procedures whereby their legalization
17 applications were adjudicated under the Immigration Reform
18 and Control Act. And in that case, they sought injunctive
19 relief as a class to enjoin their removal pending that case
20 and -- and permanently, in fact, because they said they
21 were entitled to legalization, which was an amnesty
22 statute.
23 CHIEF JUSTICE ROBERTS: Well, that's -- that's
24 kind of a systemic challenge, but you wouldn't have a
25 situation where you get an injunction in far more typical

1 individual cases. Right?

2 MS. HARRISON: Well, if an individual in that

3 case, Your Honor, attempted to enjoin his or her removal,

4 then the (f)(2) standard would certainly apply to that

5 individual. And there's -- there's no reason why an

6 individual couldn't have brought that challenge as opposed

7 to a class.

8 JUSTICE SCALIA: Why would he seek to enjoin

9 his removal when he -- he's subject to a much lesser

10 standard if he just seeks to stay the removal? I mean, he

11 has a bad lawyer or what?

12 MS. HARRISON: Well, in that case, it would be

13 in a district court, which doesn't have supervisory

14 authority over the court of appeals -- I'm sorry -- over

15 the BIA's order. And so the district court presumably

16 couldn't stay an order that it wasn't reviewing.

17 JUSTICE SCALIA: Why wouldn't he go to the

18 court of appeals, is the next question.

19 MS. HARRISON: Well, he perhaps might, but if

20 there was a delay in the -- in the procedure or if there

21 was some reason why --

22 JUSTICE SCALIA: That's a fluke. I mean, that

23 is a flukey situation. And I -- I find it hard to believe

24 that (f)(2) was meant to address just that.

25 MS. HARRISON: Well, it would be in any case,

1 even in the court of appeals, where an individual sought an
2 injunction as opposed to a stay. For example, if it was a
3 situation like the Singh case in the Ninth Circuit, where
4 there was a stay of removal in place, but the agency was
5 deporting the individual anyway. Then the individual would
6 need to obtain an injunction, and in fact that was
7 essentially what the Ninth Circuit ordered, was a remand
8 for the imposition of an injunction against --
9 JUSTICE SCALIA: Also a fluke. We -- we don't
10 expect the -- the executive to ignore a stay.
11 MS. HARRISON: No, Your Honor. I think --
12 JUSTICE SOUTER: I think it's a fluke, too, but
13 you gave -- in my recollection -- I forget where it was --
14 I think you gave citations to three or four cases in which
15 that actually happened, didn't you?
16 MS. HARRISON: The Singh case, Your Honor, is
17 -- is one of those cases. There's also the Lindstrom case
18 from the Seventh Circuit. And -- and it does -- it does
19 happen that either because of a miscommunication or -- or
20 some other reason, that the stay is not effective, and in
21 that case an injunction would be.
22 And I think, in order to address the Court's
23 concern that -- that (f)(2) was a fluke, it's important to
24 take a look at where it appears in the statute and -- and
25 its context.

1 Now, originally, the statute contained only
2 (f)(1), which says that you cannot obtain injunctions as a
3 class, but that individuals can obtain injunctions. There
4 was no (f)(2).
5 The bill went to conference and then Congress
6 added in (f)(2), I think to make very clear that, although
7 they had carved out this exception in (f)(1) for individual
8 cases, that it was not to be granted as a matter of course,
9 that even in particular cases, which is the subtitle of
10 (f)(2), the standard should be very strict. And so I think
11 Congress saw itself as closing a potential hole here,
12 because it had created this opportunity to obtain an
13 injunction as an individual without articulating a
14 standard. Then Congress went about articulating a standard
15 in (f)(2). And it's a very high standard.
16 Now, Congress did not cross-reference
17 (b)(3)(B), which is the stay provision, and in fact, in the
18 transitional rules, what Congress did was it only -- it
19 only included a provision that was identical to (b)(3)(B).
20 It did not include (f)(2) in the transitional rules, which
21 -- all of which demonstrate that Congress did not see
22 (f)(2) and (b)(3)(B) as related. They saw them as separate
23 with (f)(2) governing injunctions and (b)(3)(B) governing
24 stays.
25 CHIEF JUSTICE ROBERTS: Maybe I'm missing

1 something but -- and, again, I don't know which way this
2 cuts, but the dispute strikes me as very academic as a
3 practical matter. Judges looking at whether someone is
4 likely to prevail on the merits versus judges looking at
5 whether the person has shown by clear and convincing
6 evidence that he shouldn't be removed, the judge that's
7 going to find one in one case, depending on the standard,
8 and the opposite in the same case I can't visualize.
9 MS. HARRISON: Well, the -- the key I believe,
10 Your Honor, is the -- the equities. Now, the (f)(2)
11 standard does not permit consideration of the equities in
12 determining whether removal is prohibited by law. The --
13 CHIEF JUSTICE ROBERTS: It doesn't? You're
14 talking about equities or irreparable harm?
15 MS. HARRISON: Both -- both, Your Honor.
16 CHIEF JUSTICE ROBERTS: Same.
17 MS. HARRISON: Yes.
18 CHIEF JUSTICE ROBERTS: Same thing. And you
19 cannot consider that at all under (f)(2)? There's no way
20 in which the removal would be prohibited as a matter of law
21 under provisions that are concerned, for example, about
22 whether the person would be tortured or something like
23 that?
24 MS. HARRISON: Well -- well, Your Honor, under
25 the (f)(2) standard -- take, for example, someone who had

1 applied for asylum, and it was denied on a procedural
2 technicality, and the question is, was the entry of the
3 execution -- entry or execution of the removal order
4 prohibited by law?
5 But that -- the issue of whether the
6 technicality was a -- was a correct finding or was not a
7 correct finding permits no consideration of whether or not
8 that individual, if they are deported, is going to face
9 persecution, torture, death, et cetera. Only under the --
10 the traditional standard.
11 CHIEF JUSTICE ROBERTS: Because the -- because
12 the objection is on this procedural matter?
13 MS. HARRISON: Correct.
14 CHIEF JUSTICE ROBERTS: But if the objection is
15 that I'm going to be tortured and so you shouldn't order my
16 removal, he would be able to -- a court under (f)(2) would
17 be able to consider that, wouldn't it?
18 MS. HARRISON: I don't believe so, Your Honor,
19 unless the very question that was being decided is whether
20 the individual had met the -- met the standard for relief
21 under the Convention Against Torture.
22 But there are also cases where an individual is
23 seeking asylum, and there's questions about whether --
24 whether the persecution is on the basis of a protected
25 class. Now, the question there is not whether or not the

1 person is likely to suffer irreparable harm if they go
2 back, but, rather, what is the basis on which they may be
3 entitled to asylum? And so the court of appeals --
4 CHIEF JUSTICE ROBERTS: Don't they get -- don't
5 they get to pursue that even after they're sent back?
6 There are provisions that -- I mean, their case does not
7 abate just because they've been removed.
8 MS. HARRISON: That is true, Your Honor.
9 However, their case may abate because they are killed, they
10 are put in jail, they're not in a position to come back to
11 this country. And that is why consideration of the
12 equities in this context is so critical and why Congress
13 would not have eliminated the equities from the
14 consideration without a very clear statement.
15 CHIEF JUSTICE ROBERTS: Well, I guess that's
16 why -- I guess that goes back to my earlier question is --
17 I see that if they're killed the case is probably not in
18 very good shape. But -- but the situations in which
19 they're likely to face that sort of difficulties upon
20 removal, it would seem to me are these situations where the
21 removal would be prohibited by law.
22 MS. HARRISON: Well, Your Honor, that would --
23 the court of appeals would only be allowed to consider that
24 if the question presented was whether they had proven that
25 they were likely to be killed if they were returned to the

1 country. But that often is not what the -- the question
2 that the court of appeals is deciding. It's deciding a
3 procedural question. It's deciding whether the persecution
4 was on the basis of a protected class, those sorts of
5 considerations, which are not the same question as: Is
6 this person likely to be killed if they're returned?
7 That's why -- that's why the -- this Court has
8 held that unless Congress demonstrates very clearly that it
9 intends to take away the court's ability to consider the
10 equities, that we don't interpret Congress' --
11 JUSTICE STEVENS: Maybe I'm just not following
12 it. But I have the same difficulty that perhaps the Chief
13 Justice is trying to get at. In a case where it appears to
14 the -- the judge that the -- that the alien would be
15 murdered when he was returned, wouldn't his -- his
16 deportation be prohibited by law?
17 MS. HARRISON: Well, not always, Your Honor, if
18 the question that the court was considering wasn't whether
19 in fact the individual was going to be killed if returned.
20 If the question the court is considering is whether --
21 whether a crime he has committed subjects the individual to
22 deportation, then the fact that that individual is going to
23 be killed when he is returned to the country is not part of
24 the (f)(2) calculus.
25 And -- and I don't believe that the government

1 has -- has argued that the equities would be part of the
2 consideration. The government has argued that for legal --
3 for factual questions, you need to prove them by clear and
4 convincing evidence, and for legal questions you need to
5 prove you're entitled to judgment as a matter of law.
6 Where the equities fall into that calculus is
7 -- is unclear, and I think they would only fall into that
8 calculus if the very question presented to the court was
9 that one. And -- and, moreover --
10 JUSTICE GINSBURG: When you say equities, is
11 the fact that he has applied or his wife has applied for
12 adjustment of his status -- is that an equity?
13 MS. HARRISON: No, Your Honor, I don't believe
14 that that itself would be an equity. But the fact that he
15 does have a wife and he does have a young child in this
16 country would be a permissible consideration in the
17 equitable analysis, in the analysis of -- of irreparable
18 harm that would come to him and his family. The -- the
19 basis for his motion to reopen was not the denial of
20 adjustment -- of his adjustment of his status.
21 JUSTICE GINSBURG: It was changing conditions.
22 MS. HARRISON: That's right, Your Honor.
23 JUSTICE GINSBURG: Alleged changing conditions.
24 MS. HARRISON: Yes, Your Honor.
25 And I also think that -- that it's important to

1 emphasize this Court's clear-statement rule, which is that
2 the court doesn't take lightly statutes that do not very,
3 very clearly take away the power of the courts to grant the
4 stay, to grant an injunction. And if it's not very clear
5 from the face of the statute that that is what Congress
6 intended, that the court will not interpret as having done
7 so.
8 I also think that it's important to emphasize
9 that when Congress wanted to be expansive in getting rid of
10 forms of equitable relief, it was. In 1252(e)(1)(A), for
11 example, which, if you'd like to look, appears on page 11a
12 of the appendix to the gray brief, that's the provision
13 where Congress limited the forms of equitable relief
14 available to aliens facing removal in expedited situations.
15 And there Congress' language was very clear, that said no
16 declaratory injunctive or other equitable relief. There's
17 no language of that sort in (f)(2).
18 Same with (f)(1). In that provision, Congress
19 said no court in -- in a class situation can enjoin or
20 restrain the removal of an alien. Not in (f)(2). In
21 (f)(2) Congress only used the word "enjoin" in its omission
22 of other equitable relief, and its omission of restrain are
23 instructive.
24 CHIEF JUSTICE ROBERTS: So you think references
25 to equitable relief and restrain are clear enough to cover

1 the court's authority to grant a stay?

2 MS. HARRISON: I don't believe that restrain

3 is, Your Honor, because I think restrain -- it's unclear

4 whether Congress is talking about a -- a stay versus a

5 temporary injunction or a restraining order. I think other

6 equitable relief does capture stays because we don't deny

7 that a stay is a form of equitable relief. It's simply not

8 an injunction because it's not directed at a party and it

9 doesn't order a party to do something.

10 JUSTICE KENNEDY: Just to refresh my

11 recollection, what -- what's the major difference between

12 the standard that -- or the findings that the judge must

13 make, A, to grant a preliminary injunction and, B, to grant

14 a stay?

15 MS. HARRISON: That text is the same, Your

16 Honor, in the usual situation because both arise at the

17 same stage in the proceedings where it makes sense that a

18 court would want to consider what is the likelihood that

19 this person is going to succeed down the road. What --

20 what is the risk if I don't grant relief at this stage?

21 But those two things are also treated as

22 different in the Federal Rules of Appellate Procedure in

23 Rule 8 and also Rule 18, which governs only stays of agency

24 orders, not injunctions.

25 JUSTICE KENNEDY: My -- my concern is that I

1 sense in this statute a congressional concern that stays
2 are too frequently granted. And one thing we could do, if
3 we were to accept your view of the statute, is to say, and
4 you must be very careful. Well, the courts don't listen to
5 that very much. And short of granting the -- accepting the
6 government's position, I don't know what you could do if
7 there were a -- a submission and understanding that stays
8 were being granted routinely and too frequently.
9 MS. HARRISON: Well, Your Honor, the -- the
10 standard that Congress intended, the traditional one, is
11 not a standard under which stays are -- are routinely
12 granted. They -- they've been denied in some of the very
13 cases where the circuits decided whether (f)(2) applies or
14 -- or whether the traditional standard applies.
15 And this Court has given guidance, for example,
16 this term in Winter, that you have to -- not just show some
17 likelihood of -- of suffering irreparable harm, but you
18 have to show a strong probability both of success on the
19 merits, and you have to show a strong probability of
20 irreparable harm. And so if down the road it seems that
21 courts are not faithfully implementing that standard, then
22 the Court could again provide guidance to that effect. But
23 I don't think that --
24 JUSTICE GINSBURG: And this case -- this case
25 could come out the same. If we remand and we say that it's

1 the traditional standard, this case might well come out the
2 same way. The -- the court might say, well, it doesn't
3 make it under the traditional -- it hasn't shown a
4 likelihood of success on the merits.
5 MS. HARRISON: That's right, Your Honor. And
6 -- and it very well could, and we feel we are entitled,
7 obviously, to make that showing to the Fourth Circuit and
8 have the Fourth Circuit apply the traditional test and make
9 a decision under that test in the first instance. But it's
10 true that the stay could be denied, and that there is no
11 guarantee. It is not automatic.
12 And that's why I think before '96 Congress used
13 the same language for aggravated felons then that it does
14 now for everyone. Because it knew that "unless a court
15 otherwise directs" doesn't mean automatic. It means that
16 only where there's a likelihood of success and where the
17 equities counsel in -- in favor of a stay, it should be
18 granted.
19 That's also how this Court interpreted that
20 similar language in Hilton in interpreting Federal Rule of
21 Appellate Procedure 23(c), which concerns a stay of a grant
22 of a writ of habeas corpus on appeal. This Court said that
23 the traditional stay standard should apply in that
24 situation interpreting virtually the same language that
25 Congress then chose to use in this provision, (b)(3)(B).

1 I would like to reserve the remainder of my
2 time.
3 CHIEF JUSTICE ROBERTS: Thank you, counsel.
4 General Kneedler.
5 ORAL ARGUMENT OF EDWIN S. KNEEDLER
6 ON BEHALF OF THE RESPONDENT
7 MR. KNEEDLER: Mr. Chief Justice, and may it
8 please the Court:
9 The statutory text, context, and background of
10 section 1252(f)(2) all demonstrate that that section
11 applies to orders granting a stay of removal pending a
12 court of appeals decision on a petition for review.
13 Indeed, if section 1252(f)(2) does not apply to such an
14 order barring removal, it is difficult to see what function
15 it would serve.
16 Now, Petitioner's counsel has suggested that
17 1252(f)(2) must be directed to what I think had been
18 referred to as fluke kind of district court orders, and
19 couldn't really be directed at the situation that we have
20 here. There are two very powerful responses to that, if I
21 make -- may make them both.
22 The first is that subsection (f)(2), which
23 appears on page 14a of our brief, refers -- it says no
24 court shall enjoin the removal, et cetera, under this
25 section, meaning that the provision is specifically

1 directed to court orders that are entered as part of the
2 proceedings on judicial review of final orders under
3 section 1252. It's not -- it's not principally directed at
4 collateral orders that might arise in some other class
5 action or other sort of suit.
6 JUSTICE SOUTER: Were the examples that she
7 gives, the two or three cases, properly examples under this
8 section, in your --
9 MR. KNEEDLER: Well, I -- I think there were
10 two different types of examples that she gave, if I may. I
11 think the first one was a situation where a -- a Department
12 of Homeland Security officer might have erroneously carried
13 out an order of removal not realizing that there was a -- a
14 stay entered.
15 JUSTICE SOUTER: May I -- may I interrupt you
16 just a second? When I meant examples, I meant the cited
17 cases. There were two or three cited cases.
18 MR. KNEEDLER: The -- the cited cases, we don't
19 think, are examples of -- of this. (f)(2) was not at issue
20 in those -- in those cases. The question in several of
21 them was whether the separate provision 1252(g), which this
22 Court discussed in the American-Arab case, whether that
23 applied, and there was -- at least one of the cases
24 involved the transitional rules under which (f)(2) doesn't
25 apply.

1 But I think the -- the more fundamental answer
2 to your point was the second point that I was -- that I was
3 going to make. There are -- there are three provisions of
4 section 1252 that make unmistakably clear that Congress did
5 not intend any challenge to a final order of removal, any
6 form of judicial review which would include an injunction
7 to take place outside of 1252 itself. And 1252(a)(1)
8 provides that judicial review shall be pursuant to chapter
9 158 of -- and that's on page 1a of the brief -- shall be
10 pursuant to chapter 158 of title 28, the Hobbs Judicial
11 Review Act.
12 But -- and then (a)(5), which is on page 4a of
13 our brief, says notwithstanding any other provision of law,
14 a petition for review filed with an appropriate court is
15 the sole and exclusive means for judicial review of the
16 removal order. Unless there be any doubt, the last
17 sentence in that section says, for purposes of this entire
18 chapter, anytime there's a reference to judicial review, it
19 refers to any sort of statutory or nonstatutory provision.
20 So anytime an alien would try to get an injunction in any
21 form of judicial review, Congress has expressly barred it
22 not only by this, but then also by section (b)(9) --
23 subsection (b)(9).
24 JUSTICE BREYER: On that particular point, just
25 specifically -- this is awfully complicated and you've had

1 to go into it pretty quickly, and so have I. All right.
2 So it seemed to me, looking at these three
3 sections, as soon as you get to (a)(2), it says certain
4 matters are not subject to judicial review, and it includes
5 1225(b)(1), which I take it is the case where somebody
6 comes in, knocks at our door, and the immigration judge
7 says goodbye, and he says, no, no, I'm entitled to be a
8 refugee or asylum.
9 Okay. Now, we look at that. It says in there
10 it's -- subsection (e) gives you judicial review of that.
11 Now we look at the thing you cited which is (5), which is
12 (a)(5), and you read it completely correctly, but you left
13 out these words "except as provided in subsection (e)."
14 So now we go to subsection (e). And lo and
15 behold, what is subsection (e) talking about, but just the
16 case I mentioned. It talks about -- it talks about
17 judicial review for orders under 1225(b)(1). Now, those
18 are the people who knock at the door and they want asylum.
19 And there are some procedures for them.
20 So, now we look at (e) to see what are the
21 procedures for them. And lo and behold, right there in
22 (2), is -- it says you can have a habeas corpus procedure
23 as to certain matters, whether he's an alien, whether he's
24 admitted, admitted as a refugee, et cetera. So it says
25 there are some you can have habeas corpus.

1 So I imagine a person who has been ordered
2 removed under (e). All right. Now it says you can have a
3 habeas corpus and now the judge says goodbye. And they go
4 to a reviewing court, which is going to be a habeas corpus
5 court, and that court decides, the alien is right. I'm
6 going to issue an injunction.
7 Now, just in case he's thinking that, in the
8 very next section (f), what we have are two provisions,
9 (f)(1) that says if his case is a case involving mass
10 action against the whole thing, you can't enter an
11 injunction.
12 And then we look at (2), and it says if his is
13 just a normal case, you can't enter an injunction unless it
14 meets this specific standard. So I looked at that. I
15 admit this is pretty quick. And I thought it's (e) and
16 it's (f), and (f) is dealing with (e), (f)(2). And it
17 makes perfect sense. They don't want a habeas corpus judge
18 telling that immigration judge what to do with the guy
19 knocking on the door and saying, I need asylum, unless they
20 meet clear and present danger -- clear and -- whatever it
21 is. Clear and present, yes.
22 Okay. Now, I admit I read that quickly. And
23 therefore, I'm probably missing something. And I don't
24 expect you necessarily to be an expert, but can you do your
25 best to tell me what I'm missing or if you think I might be

1 right?

2 MR. KNEEDLER: Yes, if I could. 1225(b)(1)

3 governs the special -- what's called expedited removal.

4 It's a special procedure, as -- as you identified, for

5 people essentially knocking at the door, and it has very

6 limited review, as you suggested. Almost everything is

7 unreviewable except possibility of asylum.

8 But it's -- that is the only provision for

9 district court review. It is the, shall we say, functional

10 equivalent of a petition for review in the court of appeals

11 and everybody else. Congress just decided to have two

12 different -- two separate procedures. And I think for

13 1225(b)(1) it's really a carryover orders of exclusion

14 prior to 1996.

15 JUSTICE BREYER: What it says here specifically

16 is it says habeas proceedings.

17 MR. KNEEDLER: Yes. No, it does -- it does say

18 -- it does say habeas, but (f) -- there's no suggestion

19 that (f), either (1), which is of general application, or

20 (f)(2) in particular, is limited to subsection (e). It --

21 it speaks of any injunction.

22 And -- and that's instructive because the --

23 the term "injunction" is used in the Hobbs Judicial Review

24 Act to describe an interlocutory order by a court of

25 appeals on judicial review that suspends the enforcement of

1 an agency order pending judicial review. And we -- we
2 quote the Hobbs Judicial Review Act in our brief.
3 And as I mentioned before, that is very
4 important to understand here, because Congress provided --
5 other than the habeas review for this special category,
6 Justice Breyer, Congress provided that judicial review in
7 the norm is in the court of appeals pursuant to the Hobbs
8 Act. And if you look at the Hobbs Act provision for
9 interlocutory stays, it -- it refers to interlocutory
10 relief as an injunction. It uses the word --
11 JUSTICE BREYER: That's good.
12 Let me add one other thing, because all I'm
13 trying to do is find some work for this section (f)(2) to
14 do. And now I seem to have found some. And I think what
15 you say was, wait a minute, we agree it's like habeas. But
16 and I think it would be like an exclusion order rather than
17 a removal order.
18 And I did notice previously when it talks about
19 1225, sometimes it uses the word "exclusion" and sometimes
20 it says "removal."
21 MR. KNEEDLER: But --
22 JUSTICE BREYER: If you were that district
23 habeas judge and you get a thing saying removal, you don't
24 really vacate it. I think what you do is order an
25 injunction against its enforcement. Here, I don't know.

1 Do you think --

2 MR. KNEEDLER: I think the habeas court would

3 have the authority and -- would have the authority to

4 vacate just as -- just as a court of appeals would have the

5 authority to vacate.

6 But my -- my basic point is both of them are --

7 are forms of judicial review. And if this heightened

8 injunction standard applies to the form of judicial review

9 that Congress has decided to leave in habeas, then there is

10 no reason to imagine why Congress wouldn't want the same

11 injunctive standard to apply to somebody who's seeking

12 judicial review in the normal way in the courts of appeals,

13 especially since Congress used the word "injunction" to

14 describe this very sort of interlocutory relief under the

15 Hobbs Judicial Review Act when -- when a person seeks

16 judicial review in a -- in a court of appeals.

17 And this conforms to the ordinary meaning of

18 the word "enjoin," which is to prohibited something, to

19 require a party to abstain from carrying out an act. Well,

20 that's exactly what a stay of removal does. It bars --

21 CHIEF JUSTICE ROBERTS: Do you -- do you agree

22 with your friend that the basic difference between your two

23 positions is that, under the stay factors, you are allowed

24 to consider irreparable harm but are not allowed to

25 consider that under (f)(2)?

1 MR. KNEEDLER: No, I think (f)(2) -- (f)(2) is
2 -- is a necessary condition for granting relief. It
3 doesn't -- it doesn't eliminate the requirement that an
4 alien show -- show harm from the -- from the removal. It's
5 -- it's a condition --
6 JUSTICE SOUTER: What difference would it make?
7 I mean, if he -- if he can satisfy the clear and convincing
8 standard, which is tantamount to saying that on final
9 judgment I win, hands down, what -- what need is there to
10 -- to go into irreparable harm?
11 MR. KNEEDLER: And that -- and that -- and that
12 may -- that may well be. I think it may well be in the
13 typical case.
14 If I -- if I could just --
15 JUSTICE SOUTER: But -- but -- but that's --
16 no, well, in any case, if he's got to show by clear and
17 convincing evidence that he's going to have success on the
18 merits, I don't see any point in any case to going into
19 irreparable harm. If he goes into irreparable harm without
20 the clear and convincing standard, he loses. If he
21 satisfies the clear and convincing standard, there's
22 nothing for irreparable harm considerations to add to -- to
23 the -- to the mix of factors.
24 MR. KNEEDLER: Well, as we understand the
25 reference to clear and convincing evidence -- and

1 admittedly it's not entirely clear how Congress intended
2 that standard to apply in this context. As we understand
3 it, it is -- it is a standard of review slightly more
4 favorable to the alien than the substantial evidence review
5 standard, which is what would apply on -- on final --
6 JUSTICE SOUTER: But it's more than a -- it's
7 certainly more than a preponderance?
8 MR. KNEEDLER: Yes. But -- but in no event,
9 even on review of the final order, is -- is the court
10 reviewing for a preponderance of the evidence. The court
11 is reviewing the case on the administrative record under
12 the substantial evidence test, in which case the court at
13 final judgment cannot set aside the -- the agency order,
14 except -- unless it finds that no reasonable fact-finder
15 could conclude that the order should stand. That's the
16 substantial evidence test.
17 JUSTICE SOUTER: But the ultimate -- the
18 ultimate standard to which they look is a preponderance
19 standard. In other words, the -- the substantial evidence
20 standard is keyed to what a reasonable fact-finder could
21 find reasonably, based upon substantial evidence. Is the
22 substantial evidence sufficient for such a fact-finder to
23 find by a preponderance that this person has failed to meet
24 or, put it the other way around, that the fact-finder has
25 unreasonably failed to find that the Petitioner has met the

1 standard?

2 So ultimately you're talking about a

3 preponderance standard, which is -- which is the key.

4 Isn't that correct?

5 MR. KNEEDLER: That -- that is -- the court --

6 you're -- you're correct in the sense that the court is

7 reviewing to see whether substantial evidence supports the

8 IJ's determination by a preponderance of the evidence.

9 But (f)(2) is written in terms of the sort of

10 showing that the alien must make to the court, and -- and

11 not -- not what he would have made to the IJ. And as we --

12 as we read it, as we try to apply the language in the

13 context of a stay, we think that means that the alien must

14 show something a little bit short of -- of the substantial

15 evidence, that no reasonable fact-finder could find it, at

16 least clear and convincing evidence that it's -- that the

17 IJ was incorrect or that the alien has a successful case.

18 JUSTICE KENNEDY: Are there other cases in

19 which clear and convincing -- the clear and convincing

20 standard applies to appellate courts? It seems to me clear

21 and convincing is more appropriate for a factual

22 determination at the trial court level.

23 MR. KNEEDLER: It -- it -- it ordinarily is.

24 And that -- and that's why the phrasing, as I was trying to

25 discuss with Justice Souter, I think, is a little awkward.

1 Another possible way to think about it -- and
2 this may be what Congress was really driving at. When it
3 was -- when it was saying clear and convincing evidence, it
4 really meant a clear and convincing showing, that the --
5 that the courts shouldn't take this too casually.
6 As we point out in our brief, the Seventh
7 Circuit has a standard that the alien just has to show more
8 than a negligible likelihood of success on the merits to
9 prevail. Well, that -- that's way below what even the
10 traditional standard would be. So it's possible to read
11 clear and convincing evidence as really driving at clear
12 and convincing showing, which is language that is -- that
13 is somewhat reminiscent of what this Court has said for
14 preliminary injunctions generally.
15 CHIEF JUSTICE ROBERTS: So I take it, at least
16 in the Seventh Circuit, these things are usually granted
17 stays.
18 MR. KNEEDLER: They're -- we do not have
19 empirical data -- and -- and I wish we did -- on the
20 percentage. But they are -- in the Ninth Circuit in our
21 experience -- again, we don't have percentages, but they
22 are granted quite frequently.
23 JUSTICE GINSBURG: But the standard is probable
24 success on the merits, and that's not an easy standard.
25 Irreparable harm and probable success on the merits, both.

1 MR. KNEEDLER: Well, if the -- if the courts
2 actually applied that standard, there would at least be
3 some improvement in the stay standards, but the -- but the
4 courts sometimes apply a sliding scale where they say if
5 there's -- you know, a serious question and a showing -- a
6 showing of substantial harm would be sufficient. Well,
7 this Court has twice reaffirmed in the -- in the last term
8 -- last term in --
9 JUSTICE BREYER: What are we supposed to do?
10 What would you had do? Suppose you're a district court
11 judge and at 2:00 in the afternoon on Friday a petition
12 comes in and it's from someone who says, I'm going to be on
13 the 5 o'clock airplane to Hong Kong and I have a real case
14 here. I think I'm right. And he has eight pages attached,
15 and you read through that. And you say, he has a point.
16 Now, how good this point is I don't know. So I'd like to
17 put this -- I'd like to have everybody in here on Monday,
18 and then I could figure it out. Now, that probably
19 happens.
20 Now, what's worrying me about your position on
21 this -- which, almost -- I think every circuit is against
22 you on this, except for this one.
23 MR. KNEEDLER: And the Eleventh.
24 JUSTICE BREYER: And -- and it seems to me it
25 would make it impossible for the district judge to do,

1 because the district judge cannot honestly say that it's
2 clear and convincing that this man is going to win. All he
3 knows is he has a point, he would like to hear more about
4 it, and he doesn't want him on the airplane 3 hours from
5 now from Hong Kong. So I -- so how is this supposed to
6 work?
7 MR. KNEEDLER: Well, it would be the court of
8 appeals, not the district judge.
9 JUSTICE BREYER: Right.
10 MR. KNEEDLER: But it -- we -- we believe that
11 the -- that 1252(f)(2) allows a court to take the time
12 necessary to rule meaningfully on the stay application. We
13 do not believe Congress intended to divest the court of the
14 ability to rule on the merits. It has a substantive
15 standard that the alien has to make a clear and -- has to
16 show by clear and convincing evidence. It -- it
17 presupposes that the alien has to make a showing.
18 Therefore, it presupposes that the court must be able to
19 evaluate that showing. We also believe that it presupposes
20 that the government is permitted to respond to it. So we
21 -- we do not object and have not objected in the lower
22 courts to the courts taking sufficient time to -- to freeze
23 the status quo by issuing a -- a short stay if necessary to
24 do that.
25 Now, in the -- in the Eleventh Circuit, for

1 example, which has operated under this heightened showing
2 for some period of time, it tends to work out, because when
3 a -- a petition for review and stay application is granted,
4 the court contacts the Office of Immigration Litigation
5 which works with DHS to inform the court of how soon the --
6 the order might be issued, and then the court is aware of
7 how quickly it might act. So -- so it wouldn't often be
8 necessary for the court to do it, but we did not challenge
9 that authority.
10 JUSTICE SOUTER: And I -- and I applaud the
11 fact that you don't, but I don't know how you can do it
12 consistently with your view that "stay" in (b)(3)(B) means
13 the same thing as "injunction" in (f) when "injunction" in
14 (f) is restricted as much as it is.
15 MR. KNEEDLER: Well, I --
16 JUSTICE SOUTER: God -- God bless you, but I
17 don't -- I don't know how under the statute, on your
18 reading of the statute, you -- you can do it.
19 MR. KNEEDLER: There are two responses. One,
20 we -- we think it's necessarily implicit in the statutory
21 framework that Congress would have wanted the court to be
22 able to rule on the -- on the interlocutory injunction.
23 But the -- but the second point I think that --
24 that reinforces this proposition -- again, if you go back
25 to the Hobbs Judicial Review Act, it has a provision not

1 only for interlocutory injunctions, which is what we're
2 really talking about here, but a provision for temporary --
3 for a court to issue a temporary stay upon a showing of
4 irreparable injury to allow the status quo to be maintained
5 pending the court's ruling on the interlocutory injunction.
6 JUSTICE SOUTER: All right. Then why doesn't
7 that provide the broader authority under (b)(3)(B) stay
8 provision that -- that your friends on the other side are
9 arguing for?
10 MR. KNEEDLER: Well, it may -- that may well be
11 the right answer, is to read (b)(3)(B) -- (b)(3)(B)'s
12 opening that -- which says a petition for review does not
13 in itself stay the order -- is -- is very similar to the
14 language in the opening of 2349(b) which is the
15 interlocutory injunction language of the Hobbs Judicial
16 Review Act. It says the mere filing of the petition
17 doesn't stay or suspend the order. It says stay or suspend
18 the order like this says stay, and then it says, but a
19 court may -- I forget the precise language -- restrain or
20 suspend the order pending judicial review, and it refers to
21 that as an interlocutory injunction.
22 But it says if the petitioner shows irreparable
23 injury would occur before the court has a chance to rule
24 even on the interlocutory injunction, it can issue what's
25 called a temporary stay to maintain the status quo until it

1 can look at the -- at the interim relief.
2 Well, if -- if that -- if that background rule
3 is not displaced, that would allow for some separation of
4 the sort of emergency motion for a stay, a hold-fast sort
5 of situation, for the court to be able to evaluate the
6 merits. But when it gets to what the Hobbs Act refers to
7 as an injunction, then (f)(2) kicks in the interlocutory
8 injunction pending -- pending judicial review.
9 So that would be -- that would be an underlying
10 statutory basis for allowing the court to -- to issue a
11 temporary order to allow the -- to allow the proceeding to
12 go forward, but we think that that should be done in a
13 timely way. The Hobbs Judicial Review Act contemplates a
14 rather casual, up to 60 days that such a temporary stay
15 should remain in effect. We think in many cases, under the
16 immigration laws, the court should be able to act on the
17 stay application more quickly than that.
18 I did want -- I did also want to stress the --
19 the policy purposes that Justice Kennedy raised in a -- in
20 an earlier question, and that is the -- the thrust -- the
21 whole thrust of the 1996 amendments to the Immigration Act
22 was to expedite the removal of aliens, particularly
23 criminal aliens, but not all -- but all aliens in fact.
24 And Congress did several things when it did that. It
25 repealed the prior provision that said the mere filing of

1 petition for review automatically stayed the removal unless
2 the court ordered -- ordered otherwise. And it also
3 repealed the prior provision that said that the alien -- if
4 the alien left the country, including -- that was construed
5 to mean pursuant to deportation order, he could no longer
6 challenge the removal order outside the country.
7 Congress completely changed that and it said
8 you can now challenge the order of removal from outside the
9 country, and it basically reversed the presumption with
10 respect to whether -- whether the filing of a petition for
11 review stays -- stays the order of removal. Congress said,
12 no, it does not unless the court ordered otherwise.
13 JUSTICE GINSBURG: And you would expect the
14 standard to be in the (b)(3)(B) provision. It says that no
15 automatic stay unless the court otherwise orders. Period.
16 That's the end of it. So if one just read this, one would
17 think that the normal standard for a stay would apply.
18 And then (f)(2) is separated by several pages
19 and (f)(1) is dealing with something where we understand
20 it. It says no mass injunctions against the enforcement of
21 a provision. But (2) is really puzzling what it relates
22 to. If it's supposed to have some relationship to (1), (1)
23 says you can't enjoin the enforcement of a provision of the
24 law.
25 MR. KNEEDLER: Well, (f)(1) is directed at --

1 in large part at programmatic challenges. It provides a --
2 it prohibits courts from enjoining or restraining the
3 operation of part 4 of the INA which -- which is the
4 provision that deals with deportation -- adjudication of
5 deportation and exclusions and carrying out those orders,
6 which, by the way, we think is the reason it says enjoin or
7 restrain because it's talking about programmatic type
8 actions. And restrain -- the word "restrain" is sometimes
9 used to be something in an absolute prohibition, just to --
10 just to limit it, whereas only "enjoin" is necessary under
11 (f)(2) because it -- because what's being enjoined or
12 stayed is a very discreet act. You either have an
13 injunction barring removal or -- or you don't.
14 But I -- I think a further answer to your
15 question, Justice Ginsburg, is that (f)(2) says, under this
16 section, which means that it is obviously referring to
17 court orders entered in the course of -- of removal
18 proceedings under section 1252. And when -- when a court
19 finally gets to the merits on -- in a petition for review
20 in a court of appeals, the -- the court, if it decides that
21 there's a flaw -- excuse me -- a legal flaw in the -- in
22 the BIA or immigration judge's decision, it vacates the
23 decision and -- and remands. Injunctions are not necessary
24 in that -- in that kind of review. So the --
25 CHIEF JUSTICE ROBERTS: So in this -- in this

1 case involving a denial of a motion to reopen, what the
2 court of appeals is supposed to do is to look ahead and see
3 if this person has shown by clear and convincing evidence
4 that they shouldn't be removed. And if they haven't, then
5 they -- their removal can't be blocked even, for example,
6 if the court of appeals thinks, well, yes, they should have
7 gotten their motion to reopen.
8 MR. KNEEDLER: No, no. The way -- the way I
9 would understand it to operate is that the -- the alien
10 would have to make a clear and convincing showing that he's
11 entitled to have the motion to reopen granted because if
12 the motion to reopen is granted, that vacates the final
13 order of removal and, therefore, there is no longer a final
14 order of removal pursuant to which the alien could be
15 removed.
16 And I did want to respond to your suggestion
17 that maybe the standard should be more lenient with respect
18 to motions to reopen. With respect, I think that's the
19 opposite of what the rule should be, if anything, because
20 the -- the final -- the review of the final order of
21 removal is the main show, and in that -- in that situation,
22 the alien is actually challenging the order of removal.
23 In a case like this where the order of removal
24 was a long time ago, and the -- and the -- the alien sought
25 judicial review of that and that was denied, the only thing

1 before the court is the -- is the motion to reopen. And
2 staying -- a judicial order staying the denial of a motion
3 to reopen is meaningless. In order to get the relief
4 preventing removal, you need a stay of removal, which --
5 which really effectively directs DHS, as we think it does
6 in all cases -- directs DHS not to execute the order of
7 removal that was -- that was already previously entered.
8 And also, the denial of a motion to reopen,
9 especially one like the one at issue in this case, where
10 the question is whether the alien has shown -- has produced
11 material evidence of changed circumstances -- that's
12 reviewed, as this Court said in its decision in Abudu,
13 under an abuse of discretion standard. So it would be very
14 likely -- very unlikely that an alien would prevail.
15 CHIEF JUSTICE ROBERTS: This provision applies
16 to us as well, I take it. Right?
17 MR. KNEEDLER: Yes, we -- we believe it would.
18 CHIEF JUSTICE ROBERTS: So if there is a cert
19 petition filed on behalf of an alien subject to removal,
20 and he asks for a stay of -- of removal, we have to decide
21 whether he meets the clear and convincing evidence
22 standard.
23 MR. KNEEDLER: For -- for purposes of granting
24 a stay, yes.
25 CHIEF JUSTICE ROBERTS: We should have -- we

1 should have done this in this case, but I assume you
2 suspended removal of the Petitioner on your own?
3 MR. KNEEDLER: Well, you -- you -- the Court
4 granted a stay in connection with the -- with the granting
5 of -- of certiorari in the case.
6 JUSTICE GINSBURG: May I ask just a technical
7 point?
8 MR. KNEEDLER: Yes.
9 JUSTICE GINSBURG: One of the -- the motion to
10 reopen was based on changed circumstances in Cameroon. But
11 there was also this independent application for adjustment
12 of his status, which was turned down because this was a
13 successive motion.
14 MR. KNEEDLER: Yes.
15 JUSTICE GINSBURG: As I understand it, the
16 status adjustment could not have been asked for earlier
17 because his wife didn't come become a citizen until after.
18 MR. KNEEDLER: If -- yes. Well, he -- he did
19 seek it. The first time around, he sought a remand for
20 consideration of his adjustment of status application, but
21 one of the requirements to be eligible for that is that a
22 visa be available, and a visa was not then available. And
23 nothing in the act requires that deportation proceedings be
24 held up until a visa -- a visa becomes available.
25 JUSTICE GINSBURG: Yes, but now -- now he would

1 qualify, except that it's a successive motion. So it seems
2 earlier he was premature and now he's too late.
3 MR. KNEEDLER: But -- but Congress was quite
4 explicit. It wanted only one -- one motion to reopen,
5 except in the case of asylum or withholding of deportation.
6 It wanted -- it wanted the proceedings to come to an end.
7 And that's -- the circumstances of this case really
8 powerfully reinforce what Congress was --
9 JUSTICE GINSBURG: May I just ask a question?
10 MR. KNEEDLER: Yes.
11 JUSTICE GINSBURG: This person is married to a
12 citizen, has an American-citizen child. Is there any way
13 that his status could be adjusted? It can't in this
14 procedural situation because it's a successive motion.
15 MR. KNEEDLER: He could -- he could apply for
16 an immigrant visa from abroad. Now, there may be
17 situations in which -- in which by virtue of having been
18 removed, there is a bar to his getting that, but that is
19 subject to waiver. So really what the alien -- adjustment
20 status in the United States is discretionary if there's a
21 visa available. It's discretionary from abroad. It's
22 really, in this sense, a venue provision where the alien
23 applies from abroad.
24 JUSTICE STEVENS: Mr. Kneedler, when we entered
25 the stay, did we violate (f)(2)?

1 MR. KNEEDLER: I -- I think it would be
2 analogous to what I was saying before, that the -- this
3 Court, like a court of appeals, has the authority to -- to
4 freeze the status quo while it can decide the -- the
5 pertinent legal issue, and the pertinent legal issue before
6 this --
7 JUSTICE STEVENS: But where do we get that
8 authority if (f)(2) means what you say?
9 MR. KNEEDLER: Well, as -- as I explained, we
10 do not -- we do not challenge the ability of -- of a court
11 to decide to freeze the status quo while it is ruling on
12 the motion for a stay.
13 JUSTICE BREYER: Well, what court would ever do
14 anything else? I mean, why, if you were granting a stay,
15 would you not want to do that so you can fully consider the
16 issues?
17 MR. KNEEDLER: Well, but there -- but there's -
18 - it's not two stages; it's three. The -- a stay of
19 removal is, under the Hobbs Act terms, an interlocutory
20 injunction. That can -- judicial review in the Ninth
21 Circuit can last 4 years. So if a stay is granted, you
22 could have an interlocutory injunction in place for a long
23 time. The temporary stay is just while the court is
24 ruling, considering the interlocutory injunction.
25 JUSTICE SOUTER: But this is a longer temporary

1 stay than you conceded a few moments ago. I mean, you were
2 talking about Friday night to -- to Monday morning, when --
3 when you were -- when you were conceding the stay on the
4 Hobbs analogy. I don't know how many months it's been, but
5 -- but this is no Friday-night-to-Monday-morning stay.
6 CHIEF JUSTICE ROBERTS: It's pretty close to
7 it, though.
8 (Laughter.)
9 MR. KNEEDLER: It feels like it, yes.
10 CHIEF JUSTICE ROBERTS: Thank you, Mr.
11 Kneedler.
12 Ms. Harrison, you have 7 minutes remaining.
13 REBUTTAL ARGUMENT OF LINDSAY C. HARRISON
14 ON BEHALF OF THE PETITIONER
15 MS. HARRISON: Thank you, Mr. Chief Justice.
16 I'd like to start with the point that the
17 government contends that this Court or any court of appeals
18 could impose a stay to consider the stay motion. And,
19 respectfully, I don't believe that is consistent with the
20 text of (f)(2), and I think that the fact that the
21 government must stray from the text is a sign of how absurd
22 the results would be if (f)(2) were applied to stays.
23 Now, the reason they must stray from the text
24 is that the text says "notwithstanding any other provision
25 of law," which means notwithstanding the Hobbs Act and

1 notwithstanding the All Writs Act, which is where I believe
2 my brother was indicating this Court would get the
3 authority to impose such a stay.
4 Now, I think the fact that there are cases
5 where such a need would arise, as in Justice Breyer's
6 hypothetical, is exactly why this Court applies a
7 presumption against interpreting statutes as -- as
8 restricting the equitable authority of the courts, unless
9 there is a clear statement to the contrary, which --
10 JUSTICE KENNEDY: Yes, but you still have a
11 differential. On -- on the Friday-to-Monday-night
12 hypothetical, you wouldn't apply, or would you, the same
13 standard that you would apply on Monday for the next --
14 after cert on Monday for the next year and a half?
15 MS. HARRISON: Well, Your Honor, the (f)(2) --
16 JUSTICE KENNEDY: Because you have the same
17 problem under your standard as the government does under
18 its.
19 MS. HARRISON: Well, that's true, Your Honor.
20 You'd have to show likelihood of success. But in -- in the
21 situation where you could consider the equities, if the
22 equities were -- were strong enough and -- and demonstrated
23 in the stay application, then it wouldn't be difficult for
24 the court to decide whether the balance of the factors
25 justified imposing a stay in that situation. Under (f)(2),

1 the court would have to decide the question outright.

2 And, again, (f)(2) does not just mean any

3 predictive language. It just says, has the individual

4 demonstrated and shown by clear and convincing evidence

5 that removal is prohibited by law? Under the traditional

6 standard, there is a -- the court is allowed to consider

7 whether the individual is likely to show success on the

8 merits.

9 JUSTICE KENNEDY: You think that if you do not

10 prevail, and we say clear and convincing evidence is the

11 standard, that courts are not entitled to consider

12 equities?

13 MS. HARRISON: Well, Your Honor, I heard my

14 brother as indicating that if you meet the (f)(2) standard,

15 then -- then the court can consider the equities so as to

16 deprive the individual of a stay, but that if you cannot

17 meet the (f)(2) standard, then the question is closed and

18 there is no consideration.

19 JUSTICE KENNEDY: Let me ask you about your

20 position. Is it your contention that if we grant -- if we

21 determine that clear and convincing is the standard, that

22 equities are not relevant to that calculus?

23 MS. HARRISON: Yes, Your Honor, in the event

24 that the individual does not meet (f)(2). If the

25 individual meets (f)(2), then I do believe the court would

1 go on to consider the equities. But in the event that the
2 individual has met the (f)(2) standard, the court can
3 simply grant the petition on the merits, and there is no
4 need to go about considering the equities because the
5 individual has shown that -- by clear and convincing
6 evidence, that removal is prohibited as a matter of law.
7 And that's the second point I want to get to,
8 which is Your Honor's question about, isn't this a standard
9 that sounds a lot more like it is directed at district
10 courts because -- I think you are right, Your Honor. And I
11 think it does sound like that standard because I do think
12 that was where it was intended to apply. And the -- the
13 phrase "under this section" does not modify the word
14 "enjoin." It modifies the word "final order of removal."
15 And to ascribe the government's reading to it would require
16 you to move that phrase from where Congress placed it in
17 the statute to after the word "enjoin."
18 CHIEF JUSTICE ROBERTS: I guess -- I guess
19 General Kneedler's point is that clear and convincing
20 shifts a little, depending on how long you've got to -- to
21 look at it. If you've only got a day or a few hours before
22 the removal is going to take place, you can say this is
23 convincing enough based on what I've had a chance to look
24 at. But -- and therefore you could enter, I guess, what
25 may be called the temporary stay to get more briefing from

1 the government or whatever. But you may find out, when you
2 look at it a little more deeply, that it's -- it's not
3 clear and convincing. What -- what's wrong with that?
4 MS. HARRISON: Well, Your Honor, if the Court
5 were to interpret clear and convincing as a more flexible
6 standard, then -- then I don't think -- you know, I don't
7 disagree with -- with Your Honor's characterization of it.
8 But I still think that, regardless of how you interpret
9 clear and convincing, that the equities would not be part
10 of the calculus.
11 And -- and I also think that the fact that
12 clear and convincing sounds like a standard Congress would
13 have addressed to district courts, the fact that (f)(2)
14 says no court, not -- not just the courts of appeals, the
15 fact that it references an alien and not a petitioner, and
16 the fact that it's addressed to instances where the entry
17 or execution is prohibited by law as opposed to the order
18 itself being unlawful are all signs that Congress intended
19 this provision to apply both in the district courts and in
20 the courts of appeals.
21 And I would also note that (a)(5), which is a
22 provision the government pointed to, was not in the '96
23 statute. It was added in 2005, and the constitutionality
24 of that provision continues to be litigated. And,
25 moreover, there are habeas cases in the district court that

1 persist where (f)(2) has real application and where
2 Congress' intent that an injunction -- not a stay, but an
3 injunction -- be very difficult to obtain --
4 JUSTICE BREYER: With 1225?
5 MS. HARRISON: Yes, sir.
6 JUSTICE BREYER: Was I right or wrong?
7 MS. HARRISON: I believe you're right, Your
8 Honor, and I believe that --
9 JUSTICE BREYER: Are you sure? Because --
10 (Laughter.)
11 JUSTICE BREYER: -- you didn't mention it. If I
12 am right, why didn't you mention it?
13 MS. HARRISON: I did not mention it in my
14 opening, Your Honor, and that was my error. I believe
15 habeas is one example -- and habeas in the expedited
16 removal context, where the provision would apply.
17 And -- and I think, as this Court made clear in
18 St. Cyr, Congress did intend for some habeas actions to
19 persist in the '96 IIRIRA statute. And in those cases,
20 (f)(2) would apply, would have real impact.
21 And I would also note that if the Court were to
22 accept the government's interpretation of the term
23 "enjoin," that it only applies in stays and that it doesn't
24 have application elsewhere, then you'd be required to
25 interpret Congress' use of the word "enjoin" to be not

1 merely inclusive of stays but as coterminous with the --
2 with the word "stay." But Congress didn't use the word
3 "stay" it (f)(2). It used the word "enjoin." And the fact
4 that that word choice was different from the word it used
5 in (b)(3)(B) I think is a clear indication that Congress
6 had something different in mind. It didn't cross-reference
7 "stays." It didn't use the word "stays," and it
8 articulated a standard that seems more appropriate for
9 district courts adjudicating permanent injunctive relief
10 than courts of appeals hearing a temporary application for
11 a stay.
12 JUSTICE GINSBURG: But -- but the standard that
13 you say should apply under (b)(3)(B) is a standard that is
14 described as applicable to temporary injunctions. The word
15 -- there is substantial likelihood of success on the merits
16 and irreparable harm -- that that's -- that's the standard
17 preliminary injunction, not preliminary stay. The
18 preliminary injunction standard. So the two words
19 certainly overlap.
20 MS. HARRISON: Yes, Your Honor. There -- there
21 is overlap, and the standard that is applied by the courts,
22 if there is no statute to the contrary, is the same. But
23 here, Congress expressed an intent to treat injunctive
24 relief differently and articulated a standard that was
25 higher for injunctive relief.

1 JUSTICE STEVENS: May I just ask this one very
2 quick? Do you understand -- is it your understanding of
3 the government's interpretation of the statute that our
4 stay in this case violated the statute?
5 MS. HARRISON: Yes, Your Honor.
6 CHIEF JUSTICE ROBERTS: Thank you, Ms.
7 Harrison.
8 General Kneedler, Ms. Harrison, the Court
9 entered a very expedited briefing and arguments schedule in
10 this case that, unfortunately, fell over the -- the holiday
11 season, and we appreciate very much that this must have
12 imposed a burden on you and your colleagues. Thank you.
13 The case is submitted.
14 (Whereupon, at 2:02 p.m., the case in the
15 above-entitled matter was submitted.)
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A

abate 16:7,9
ability 17:9 36:14 46:10
able 15:16,17 36:18 37:22 39:5,16
above-entitled 1:12 54:15
abroad 45:16,21 45:23
absence 4:7
absolute 41:9
abstain 30:19
absurd 47:21
Abudu 43:12
abuse 43:13
academic 14:2
accept 21:3 52:22
accepting 21:5
act 10:18 25:11 28:24 29:2,8,8 30:15,19 37:7 37:25 38:16 39:6,13,16,21 41:12 44:23 46:19 47:25 48:1
ACTING 1:7
action 4:2 24:5 27:10
actions 41:8 52:18
add 29:12 31:22
added 13:6 51:23
address 11:24 12:22
addressed 51:13 51:16
adjudicated 10:17
adjudicating 53:9
adjudication 41:4
adjusted 45:13
adjustment 18:12,20,20 44:11,16,20 45:19
administrative 32:11
admit 27:15,22
admitted 26:24 26:24
admittedly 32:1
afternoon 35:11
agency 12:4 20:23 29:1 32:13
aggravated 6:11 6:11 22:13
ago 6:1 42:24 47:1
agree 29:15 30:21
ahead 42:2
airplane 35:13 36:4
alien 4:3 7:4,5 9:17 10:10 17:14 19:20 25:20 26:23 27:5 31:4 32:4 33:10,13,17 34:7 36:15,17 40:3,4 42:9,14 42:22,24 43:10 43:14,19 45:19 45:22 51:15
aliens 19:14 39:22,23,23
alien's 3:11
Alleged 18:23
allow 9:3 38:4 39:3,11,11
allowed 16:23 30:23,24 49:6
allowing 39:10
allows 36:11
amendments 39:21
American-Arab 24:22
American-citi... 45:12
amnesty 10:21
analogous 46:2
analogy 47:4
analysis 18:17 18:17
answer 25:1 38:11 41:14
anytime 25:18 25:20
anyway 12:5
appeal 3:12 5:24 8:18 22:22
appealing 6:18
appeals 7:17 10:11 11:14,18 12:1 16:3,23 17:2 23:12 28:10,25 29:7 30:4,12,16 36:8 41:20 42:2,6 46:3 47:17 51:14,20 53:10
APPEARAN... 1:15
appears 12:24 17:13 19:11 23:23
appellate 20:22 22:21 33:20
appendix 19:12
applaud 37:10
applicable 3:14 53:14
application 4:11 6:14 28:19 36:12 37:3 39:17 44:11,20 48:23 52:1,24 53:10
applications 10:17
applied 15:1 18:11,11 24:23 35:2 47:22 53:21
applies 7:2 21:13,14 23:11 30:8 33:20 43:15 45:23 48:6 52:23
apply 3:18 6:22 6:24 7:4,15 9:9 11:4 22:8,23 23:13 24:25 30:11 32:2,5 33:12 35:4 40:17 45:15 48:12,13 50:12 51:19 52:16,20 53:13
appreciate 54:11
approach 7:2
appropriate 25:14 33:21 53:8
Aren't 8:13
argued 18:1,2
arguing 38:9
argument 1:13 2:2,7 3:3,6 23:5 47:13
arguments 54:9
articulated 53:8 53:24
articulating 13:13,14
ascribe 50:15
aside 32:13
asked 44:16
asks 43:20
assume 44:1
asylum 15:1,23 16:3 26:8,18 27:19 28:7 45:5
attached 35:14
attempted 11:3
ATTORNEY 1:7
authority 11:14 20:1 30:3,3,5 37:9 38:7 46:3 46:8 48:3,8
authorize 4:6
automatic 5:22 5:25 6:2,5,7,11 6:12 22:11,15 40:15
automatically 40:1
available 19:14 44:22,22,24 45:21
avoid 7:10
aware 37:6
awfully 25:25
awkward 33:25

B

b 3:21,21 5:5 10:7,7 13:17 13:17,19,19,22 13:22,23,23 20:13 22:25,25 25:22,23 37:12 37:12 38:7,7 38:11,11,11,11 40:14,14 53:5 53:5,13,13
baby 6:17
back 9:1 16:2,5 16:10,16 37:24
background 23:9 39:2
bad 11:11
balance 48:24
bar 45:18
barred 25:21
barring 23:14 41:13
bars 30:20
based 32:21 44:10 50:23
basic 30:6,22
basically 40:9

basis 15:24 16:2 17:4 18:19 39:10
behalf 1:16,19 2:4,6,9 3:7 23:6 43:19 47:14
behold 26:15,21
believe 5:7 8:22 11:23 14:9 15:18 17:25 18:13 20:2 36:10,13,19 43:17 47:19 48:1 49:25 52:7,8,14
believes 9:24
best 27:25
BIA 41:22
BIA's 11:15
bill 13:5
bit 33:14
bless 37:16
blocked 42:5
board 7:11,16
Breyer 25:24 28:15 29:6,11 29:22 35:9,24 36:9 46:13 52:4,6,9,11
Breyer's 48:5
brief 9:24 19:12 23:23 25:9,13 29:2 34:6
briefing 50:25 54:9
broader 38:7
brother 48:2 49:14
brought 11:6
burden 10:3,4 54:12

C

C 1:16 2:1,3,8 3:1,6 47:13
calculus 17:24 18:6,8 49:22 51:10
call 9:21
called 28:3 38:25 50:25
Cameroon 44:10
can't 14:8 27:10 27:13 40:23 42:5 45:13
capture 20:6
careful 21:4
carried 24:12
carrying 30:19 41:5
carryover 28:13
carved 13:7
case 3:12 4:10 4:11,11,13 6:17,18,22,24 6:25 8:7,7,19 10:12,15,18,19 11:3,12,25 12:3,16,17,21 14:7,8 16:6,9 16:17 17:13 21:24,24 22:1 24:22 26:5,16 27:7,9,9,13 31:13,16,18 32:11,12 33:17 35:13 42:1,23 43:9 44:1,5 45:5,7 54:4,10 54:13,14
cases 5:3,4,5 11:1 12:14,17 13:8,9 15:22 21:13 24:7,17 24:17,18,20,23 33:18 39:15 43:6 48:4 51:25 52:19
casual 39:14
casually 34:5
category 29:5
Catholic 10:14
cause 5:16
cert 43:18 48:14
certain 4:4 26:3 26:23
certainly 10:1 11:4 32:7 53:19
certiorari 44:5
cetera 15:9 23:24 26:24
challenge 10:24 11:6 25:5 37:8 40:6,8 46:10
challenges 41:1
challenging 10:16 42:22
chance 38:23 50:23
changed 40:7 43:11 44:10
changing 18:21 18:23
chapter 25:8,10 25:18
characterizati... 51:7
Chief 3:3,8 4:8 4:16,20 6:16 7:9,24 8:11,21 8:25 10:23 13:25 14:13,16 14:18 15:11,14 16:4,15 17:12 19:24 23:3,7 30:21 34:15 41:25 43:15,18 43:25 47:6,10 47:15 50:18 54:6
child 18:15 45:12
choice 53:4
chose 22:25
circuit 4:24 5:16 12:3,7,18 22:7 22:8 34:7,16 34:20 35:21 36:25 46:21
circuits 4:14 21:13
circumstances 43:11 44:10 45:7
citation 8:23
citations 12:14
cite 4:23
cited 24:16,17 24:18 26:11
citizen 44:17 45:12
claim 10:8
class 10:19 11:7 13:3 15:25 17:4 19:19 24:4
clear 4:7 9:5,17 13:6 14:5 16:14 18:3 19:4,15,25 25:4 27:20,20 27:21 31:7,16 31:20,21,25 32:1 33:16,19 33:19,20 34:3 34:4,11,11 36:2,15,16 42:3,10 43:21 48:9 49:4,10 49:21 50:5,19 51:3,5,9,12 52:17 53:5
clearly 17:8 19:3
clear-statement 19:1
close 47:6
closed 49:17
closing 13:11
coherent 6:23
collateral 24:4
colleagues 54:12
come 6:3 16:10 18:18 21:25 22:1 44:17 45:6
comes 26:6 35:12
committed 17:21
completely 26:12 40:7
complicated 25:25
comprehensive 5:15
conceded 47:1
conceding 47:3
concern 12:23 20:25 21:1
concerned 14:21
concerns 22:21
conclude 32:15
condition 31:2,5
conditions 18:21 18:23
conference 13:5
conforms 30:17
Congress 3:10 3:13,15,19,21 4:6 5:21 6:5 7:23 13:5,11 13:14,16,18,21 16:12 17:8,10 19:5,9,13,15 19:18,21 20:4 21:10 22:12,25 25:4,21 28:11 29:4,6 30:9,10 30:13 32:1 34:2 36:13 37:21 39:24 40:7,11 45:3,8 50:16 51:12,18 52:2,18,25 53:2,5,23
congressional 21:1
connection 44:4
consider 14:19 15:17 16:23 17:9 20:18 30:24,25 46:15

47:18 48:21 49:6,11,15 50:1
consideration 14:11 15:7 16:11,14 18:2 18:16 44:20 49:18
considerations 17:5 31:22
considering 17:18,20 46:24 50:4
consistent 47:19
consistently 37:12
consolidated 8:17
constitutionali... 51:23
construed 40:4
contacts 37:4
contain 7:7
contained 13:1
contains 9:2
contemplates 39:13
contends 47:17
contention 49:20
context 12:25 16:12 23:9 32:2 33:13 52:16
continues 51:24
contrary 48:9 53:22
Control 10:18
Convention 15:21
convincing 9:5 9:18 14:5 18:4 31:7,17,20,21 31:25 33:16,19 33:19,21 34:3 34:4,11,12 36:2,16 42:3 42:10 43:21 49:4,10,21 50:5,19,23 51:3,5,9,12
corpus 22:22 26:22,25 27:3 27:4,17
correct 15:6,7 15:13 33:4,6
correctly 26:12
coterminous 53:1
couldn't 11:6,16 23:19
counsel 4:8 22:17 23:3,16
country 16:11 17:1,23 18:16 40:4,6,9
course 13:8 41:17
court 1:1,13 3:9 3:25 6:7,13 7:1 7:17,20 9:3 10:12 11:13,14 11:15,18 12:1 15:16 16:3,23 17:2,7,18,20 18:8 19:2,6,19 20:18 21:15,22 22:2,14,19,22 23:8,12,18,24 24:1,22 25:14 27:4,5,5 28:9 28:10,24 29:7 30:2,4,16 32:9 32:10,12 33:5 33:6,10,22 34:13 35:7,10 36:7,11,13,18 37:4,5,6,8,21 38:3,19,23 39:5,10,16 40:2,12,15 41:17,18,20,20 42:2,6 43:1,12 44:3 46:3,3,10 46:13,23 47:17 47:17 48:2,6 48:24 49:1,6 49:15,25 50:2 51:4,14,25 52:17,21 54:8
courts 3:11 5:12 6:13 9:9 10:11 19:3 21:4,21 30:12 33:20 34:5 35:1,4 36:22,22 41:2 48:8 49:11 50:10 51:13,14 51:19,20 53:9 53:10,21
court's 12:22 17:9 19:1 20:1 38:5
cover 10:9 19:25
covers 10:9,10
created 13:12
crime 17:21
criminal 39:23
critical 16:12
cross-reference 13:16 53:6
curious 5:4
current 6:3
cuts 14:2
Cyr 52:18

D

D 3:1
danger 27:20
data 5:7 34:19
database 4:24
day 50:21
days 39:14
dealing 27:16 40:19
deals 41:4
death 15:9
decide 9:16,18 9:20 43:20 46:4,11 48:24 49:1
decided 5:6 15:19 21:13 28:11 30:9
decides 7:21 27:5 41:20
deciding 7:17,18 7:20 9:10,11 9:15 17:2,2,3
decision 8:4 10:2 22:9 23:12 41:22,23 43:12
declaratory 19:16
deeply 51:2
delay 11:20
demonstrate 13:21 23:10
demonstrated 48:22 49:4
demonstrates 5:20 17:8
denial 6:19 18:19 42:1 43:2,8
denied 5:19 15:1 21:12 22:10 42:25
deny 20:6
denying 8:6,16 8:19
Department 1:19 24:11
depending 14:7 50:20
deportation 17:16,22 40:5 41:4,5 44:23 45:5
deported 4:5 15:8
deporting 12:5
deprive 49:16
Deputy 1:18
describe 3:20 28:24 30:14
described 53:14
determination 33:8,22
determine 49:21
determining 7:19 14:12
DHS 37:5 43:5,6
didn't 12:15 44:17 52:11,12 53:2,6,7
difference 20:11 30:22 31:6
different 3:19 3:20,21,22,24 8:3 9:21 20:22 24:10 28:12 53:4,6
differential 48:11
differently 53:24
difficult 5:23 23:14 48:23 52:3
difficulties 16:19
difficulty 17:12
directed 4:1 20:8 23:17,19 24:1,3 40:25 50:9
directs 6:13 22:15 43:5,6
disagree 51:7
discreet 41:12
discretion 43:13
discretionary 45:20,21
discuss 33:25
discussed 24:22
displaced 39:3
dispute 14:2
district 10:12 11:13,15 23:18 28:9 29:22 35:10,25 36:1 36:8 50:9 51:13,19,25

53:9
divest 36:13
doesn't 6:19 7:7 7:8,22 9:3 10:9 11:13 14:13 19:2 20:9 22:2 22:15 24:24 31:3,3 36:4 38:6,17 52:23
don't 8:23 12:9 14:1 15:18 16:4,4 17:10 17:25 18:13 20:2,6,20 21:4 21:6,23 24:18 27:17,23 29:23 29:25 31:18 34:21 35:16 37:11,11,17,17 41:13 47:4,19 51:6,6
door 26:6,18 27:19 28:5
doubt 25:16
driving 34:2,11
D.C 1:9,16,19

E

e 2:1 3:1,1 26:10 26:13,14,15,20 27:2,15,16 28:20
earlier 16:16 39:20 44:16 45:2
easier 6:21
easy 34:24
EDWIN 1:18 2:5 23:5
effect 4:7 6:3 21:22 39:15
effective 12:20
effectively 43:5
effectuates 5:21
eight 4:14 35:14
either 12:19 28:19 41:12
Eleventh 35:23 36:25
eligible 44:21
eliminate 31:3
eliminated 6:2,5 16:13
eliminating 5:22
emergency 39:4
emphasize 19:1 19:8
empirical 4:19 4:24 34:19
empirically 4:17
enforcement 28:25 29:25 40:20,23
enjoin 3:21 7:5 7:13 10:19 11:3,8 19:19 19:21 23:24 30:18 40:23 41:6,10 50:14 50:17 52:23,25 53:3
enjoined 41:11
enjoining 41:2
enter 27:10,13 50:24
entered 24:1,14 41:17 43:7 45:24 54:9
entire 25:17
entirely 32:1
entitled 7:19,21 10:21 16:3 18:5 22:6 26:7 42:11 49:11
entry 9:6 15:2,3 51:16
equitable 18:17 19:10,13,16,22 19:25 20:6,7 48:8
equities 14:10 14:11,14 16:12 16:13 17:10 18:1,6,10
22:17 48:21,22 49:12,15,22 50:1,4 51:9
equity 18:12,14
equivalent 28:10
erroneously 24:12
error 52:14
especially 30:13 43:9
ESQ 1:16,18 2:3 2:5,8
essentially 12:7 28:5
et 15:9 23:24 26:24
evaluate 36:19 39:5
event 9:25 32:8 49:23 50:1
everybody 28:11 35:17
evidence 5:16 9:5,18,21 14:6 18:4 31:17,25 32:4,10,12,16 32:19,21,22 33:7,8,15,16 34:3,11 36:16 42:3 43:11,21 49:4,10 50:6
exactly 30:20 48:6
example 10:15 12:2 14:21,25 19:11 21:15 37:1 42:5 52:15
examples 24:6,7 24:10,16,19
exception 13:7
exclusion 28:13 29:16,19
exclusions 41:5
exclusive 25:15
excuse 41:21
execute 43:6
execution 9:6 15:3,3 51:17
executive 12:10
existed 6:10
expansive 19:9
expect 12:10 27:24 40:13
expedite 39:22
expedited 19:14 28:3 52:15 54:9
experience 34:21
expert 27:24
explained 46:9
explicit 45:4
expressed 53:23
expressly 25:21

F

f 3:21 4:5 6:22 7:4,6,7,15 9:2 10:9 11:4,24 12:23 13:2,4,6 13:7,10,15,20 13:22,23 14:10 14:19,25 15:16 17:24 19:17,18 19:20,21 21:13 23:22 24:19,24 27:8,9,16,16 27:16 28:18,19 28:20 29:13 30:25 31:1,1 33:9 37:13,14 39:7 40:18,19 40:25 41:11,15 45:25 46:8 47:20,22 48:15 48:25 49:2,14 49:17,24,25 50:2 51:13 52:1,20 53:3
face 4:4 15:8 16:19 19:5
facing 4:18
19:14
fact 3:23 5:19,22 6:18 10:20 12:6 13:17 17:19,22 18:11 18:14 37:11 39:23 47:20 48:4 51:11,13 51:15,16 53:3
factors 30:23 31:23 48:24
factual 18:3 33:21
fact-finder 32:14,20,22,24 33:15
failed 32:23,25
faithfully 21:21
fall 18:6,7
family 18:18
far 10:25
favor 5:6 22:17
favorable 32:4
Federal 20:22 22:20
feel 22:6
feels 47:9
fell 54:10
felons 6:11,12 22:13
figure 35:18
filed 5:9,10,12 5:15 25:14 43:19
filing 38:16 39:25 40:10
Filip 1:6 3:4
final 24:2 25:5 31:8 32:5,9,13 42:12,13,20,20 50:14
finally 41:19
find 9:8 11:23 14:7 29:13 32:21,23,25 33:15 51:1
finding 15:6,7

findings 20:12
finds 32:14
first 3:19 22:9 23:22 24:11 44:19
flaw 41:21,21
flexible 51:5
fluke 11:22 12:9 12:12,23 23:18
flukey 11:23
following 17:11
forget 12:13 38:19
form 20:7 25:6 25:21 30:8
forms 3:20,22 19:10,13 30:7
forth 3:16
forward 39:12
found 29:14
four 12:14
Fourth 22:7,8
framework 37:21
freeze 36:22 46:4,11
frequently 21:2 21:8 34:22
Friday 35:11 47:2
Friday-night-t... 47:5
Friday-to-Mo... 48:11
friend 30:22
friends 38:8
fully 46:15
function 23:14
functional 28:9
fundamental 25:1
further 41:14

G

G 3:1
general 1:7,18 23:4 28:19 50:19 54:8
generally 34:14
generous 4:25 5:13
getting 19:9 45:18
Ginsburg 4:21 6:1 10:13 18:10,21,23 21:24 34:23 40:13 41:15 44:6,9,15,25 45:9,11 53:12
given 21:15
gives 24:7 26:10
go 6:20,21 11:17 16:1 26:1,14 27:3 31:10 37:24 39:12 50:1,4
God 37:16,16
goes 16:16 31:19
going 7:12 14:7 15:8,15 17:19 17:22 20:19 25:3 27:4,6 31:17,18 35:12 36:2 50:22
good 16:18 29:11 35:16
goodbye 26:7 27:3
gotten 42:7
governed 3:14
governing 13:23 13:23
government 4:22,23 5:6 9:23 17:25 18:2 36:20 47:17,21 48:17 51:1,22
government's 21:6 50:15 52:22 54:3
governs 20:23 28:3
grant 19:3,4 20:1,13,13,20 22:21 49:20 50:3
granted 4:10,14 5:3,5,10 10:1,2 13:8 21:2,8,12 22:18 34:16,22 37:3 42:11,12 44:4 46:21
granting 21:5 23:11 31:2 43:23 44:4 46:14
gray 19:12
guarantee 22:11
guess 8:2 16:15 16:16 50:18,18 50:24
guidance 21:15 21:22
guy 27:18

H

habeas 22:22 26:22,25 27:3 27:4,17 28:16 28:18 29:5,15 29:23 30:2,9 51:25 52:15,15 52:18
half 48:14
hands 31:9
happen 4:17 12:19
happened 12:15
happens 35:19
hard 11:23
harm 14:14 16:1 18:18 21:17,20 30:24 31:4,10 31:19,19,22 34:25 35:6 53:16
Harrison 1:16 2:3,8 3:5,6,8 4:13,19 5:1,7 5:14 6:4 7:3,15 8:5,15,22 9:1 9:23 10:6,10 10:14 11:2,12 11:19,25 12:11 12:16 14:9,15 14:17,24 15:13 15:18 16:8,22 17:17 18:13,22 18:24 20:2,15 21:9 22:5 47:12,13,15 48:15,19 49:13 49:23 51:4 52:5,7,13 53:20 54:5,7,8
hasn't 9:19 22:3
haven't 42:4
hear 3:3 36:3
heard 49:13
hearing 53:10
heightened 30:7 37:1
held 17:8 44:24
he's 11:9 26:23 26:23 27:7 31:16,17 42:10 45:2
high 5:3 13:15
higher 10:3 53:25
Hilton 22:20
Hobbs 25:10 28:23 29:2,7,8 30:15 37:25 38:15 39:6,13 46:19 47:4,25
hold-fast 39:4
hole 13:11
holiday 54:10
Homeland 24:12
honestly 36:1
Hong 35:13 36:5
Honor 5:8 7:4 8:24 9:23 11:3 12:11,16 14:10 14:15,24 15:18 16:8,22 17:17 18:13,22,24 20:3,16 21:9 22:5 48:15,19 49:13,23 50:10 51:4 52:8,14 53:20 54:5
Honor's 50:8 51:7
hours 36:4 50:21
hypothetical 48:6,12

I

identical 6:9 9:25 13:19
identified 28:4
ignore 12:10
IIRIRA 5:21 52:19
IJ 33:11,17
IJ's 33:8
imagine 27:1 30:10
immigrant 45:16
immigration 10:17 26:6 27:18 37:4 39:16,21 41:22
impact 52:20
implementing 21:21
implicit 37:20
important 5:18 8:10 9:2 12:23 18:25 19:8 29:4
impose 47:18 48:3
imposed 54:12
imposing 48:25
imposition 12:8
impossible 35:25

improvement 35:3
INA 41:3
include 13:20 25:6
included 13:19
includes 26:4
including 40:4
inclusive 53:1
incorrect 33:17
independent 44:11
indicates 6:7
indicating 48:2 49:14
indication 53:5
individual 4:14 5:23 7:19,21 9:4,5,12 11:1,2 11:5,6 12:1,5,5 13:7,13 15:8 15:20,22 17:19 17:21,22 49:3 49:7,16,24,25 50:2,5
individuals 10:15 13:3
inform 37:5
Initially 9:16
injunction 3:24 7:13 10:11,25 12:2,6,8,21 13:13 19:4 20:5,8,13 25:6 25:20 27:6,11 27:13 28:21,23 29:10,25 30:8 30:13 37:13,13 37:22 38:5,15 38:21,24 39:7 39:8 41:13 46:20,22,24 52:2,3 53:17 53:18
injunctions 3:16 13:2,3,23 20:24 34:14 38:1 40:20 41:23 53:14
injunctive 10:18 19:16 30:11 53:9,23,25
injury 38:4,23
instance 22:9
instances 51:16
instructive 19:23 28:22
intend 25:5 52:18
intended 3:13 19:6 21:10 32:1 36:13 50:12 51:18
intends 17:9
intent 52:2 53:23
interim 39:1
interlocutory 28:24 29:9,9 30:14 37:22 38:1,5,15,21 38:24 39:7 46:19,22,24
interpret 17:10 19:6 51:5,8 52:25
interpretation 52:22 54:3
interpreted 6:14 22:19
interpreting 22:20,24 48:7
interrupt 24:15
involved 24:24
involves 6:19
involving 27:9 42:1
irreparable 14:14 16:1 18:17 21:17,20 30:24 31:10,19 31:19,22 34:25 38:4,22 53:16
isn't 8:3 33:4
issue 6:25 15:5 24:19 27:6 38:3,24 39:10 43:9 46:5,5 50:8
issued 37:6
issues 46:16
issuing 36:23
it's 5:5,18 6:21 7:18 8:17 9:1 9:21 12:12,23 13:15 17:2,3 18:25 19:4,8 20:3,7,8 21:25 22:9 24:3,3 26:10 27:15,16 28:4,8,13 29:15 31:4,5 32:1,6,6 33:16 34:10 35:12 36:1 37:20 40:22 41:7 45:1,14,21,21 46:18,18 47:4 47:6 51:2,2,16
I'd 5:4 35:16,17 47:16
I'm 4:8,8,17 8:23 11:14 13:25 15:15 17:11 26:7 27:5,23,25 29:12 35:12,14
I've 4:19 5:14 50:23

J

jail 16:10
January 1:10
JEAN 1:3
judge 14:6 17:14 20:12 26:6 27:3,17,18 29:23 35:11,25 36:1,8
judges 14:3,4
judge's 41:22
judgment 18:5 31:9 32:13
judicial 24:2 25:6,8,10,15 25:18,21 26:4 26:10,17 28:23 28:25 29:1,2,6 30:7,8,12,15 30:16 37:25 38:15,20 39:8 39:13 42:25 43:2 46:20
Justice 1:19 3:3 3:8 4:8,16,20 4:21,22 5:2,11 6:1,16 7:9,24 8:11,21,25 9:15 10:5,8,13 10:23 11:8,17 11:22 12:9,12 13:25 14:13,16 14:18 15:11,14 16:4,15 17:11 17:13 18:10,21 18:23 19:24 20:10,25 21:24 23:3,7 24:6,15 25:24 28:15 29:6,11,22 30:21 31:6,15 32:6,17 33:18 33:25 34:15,23 35:9,24 36:9 37:10,16 38:6 39:19 40:13 41:15,25 43:15 43:18,25 44:6 44:9,15,25 45:9,11,24 46:7,13,25 47:6,10,15 48:5,10,16 49:9,19 50:18 52:4,6,9,11 53:12 54:1,6
justified 48:25

K

Kennedy 4:22 5:2,11 20:10 20:25 33:18 39:19 48:10,16 49:9,19
key 14:9 33:3
keyed 32:20
kicks 39:7
killed 16:9,17,25 17:6,19,23
kind 6:17 10:24 23:18 41:24
Kneedler 1:18 2:5 23:4,5,7 24:9,18 28:2 28:17 29:21 30:2 31:1,11 31:24 32:8 33:5,23 34:18 35:1,23 36:7 36:10 37:15,19 38:10 40:25 42:8 43:17,23 44:3,8,14,18 45:3,10,15,24 46:1,9,17 47:9 47:11 54:8
Kneedler's 50:19
knew 22:14
knock 26:18
knocking 27:19 28:5
knocks 26:6
know 4:9,17 5:4 14:1 21:6 29:25 35:5,16 37:11,17 47:4 51:6
knows 36:3
Kong 35:13 36:5

L

language 6:6,9 6:10,14 7:8 9:3 19:15,17 22:13

22:20,24 33:12 34:12 38:14,15 38:19 49:3
large 41:1
late 45:2
Laughter 47:8 52:10
law 6:3 9:7,13 14:12,20 15:4 16:21 17:16 18:5 25:13 40:24 47:25 49:5 50:6 51:17
laws 39:16
lawyer 11:11
leave 30:9
left 26:12 40:4
legal 18:2,4 41:21 46:5,5
legalization 10:16,21
lenient 42:17
lesser 11:9
level 33:22
lightly 19:2
likelihood 4:3 20:18 21:17 22:4,16 34:8 48:20 53:15
limit 41:10
limited 7:13 19:13 28:6,20
LINDSAY 1:16 2:3,8 3:6 47:13
Lindstrom 12:17
listen 21:4
litigated 51:24
Litigation 37:4
little 8:3 33:14 33:25 50:20 51:2
lo 26:14,21
long 4:21 42:24 46:22 50:20
longer 40:5 42:13 46:25
look 12:24 19:11 26:9,11,20 27:12 29:8 32:18 39:1 42:2 50:21,23 51:2
looked 27:14
looking 14:3,4 26:2
loses 31:20
lot 7:6 50:9
lower 10:4 36:21

M

main 42:21
maintain 38:25
maintained 38:4
major 20:11
making 5:22
man 36:2
MARC 1:3
MARK 1:6
married 45:11
mass 27:9 40:20
material 43:11
matter 1:12 13:8 14:3,20 15:12 18:5 50:6 54:15
matters 4:9 26:4 26:23
mean 7:11,17 8:12 11:10,22 16:6 22:15 31:7 40:5 46:14 47:1 49:2
meaning 23:25 30:17
meaningfully 36:12
meaningless 43:3
means 22:15 25:15 33:13 37:12 41:16 46:8 47:25
meant 11:24 24:16,16 34:4
meet 10:3,3 27:20 32:23 49:14,17,24
meets 4:14 27:14 43:21 49:25
mention 52:11 52:12,13
mentioned 26:16 29:3
mere 38:16 39:25
merely 53:1
merits 4:4 6:20 6:21 7:2,18 8:4 9:4,12,19 10:1 14:4 21:19 22:4 31:18 34:8,24,25 36:14 39:6 41:19 49:8 50:3 53:15
met 15:20,20 32:25 50:2
mind 53:6
minute 29:15
minutes 47:12
miscommunic... 12:19
missing 13:25 27:23,25
mix 31:23
modifies 50:14
modify 50:13
moments 47:1
Monday 35:17 47:2 48:13,14
months 47:4
morning 47:2
motion 6:19 8:6 8:16,20 18:19 39:4 42:1,7,11 42:12 43:1,2,8 44:9,13 45:1,4 45:14 46:12 47:18
motions 42:18
move 8:13 50:16
murdered 17:15

N

N 2:1,1 3:1
nearly 6:9
necessarily 27:24 37:20
necessary 31:2 36:12,23 37:8 41:10,23
need 12:6 18:3,4 27:19 31:9 43:4 48:5 50:4
negligible 34:8
night 47:2
Ninth 4:24 5:16 12:3,7 34:20 46:20
Nken 1:3 3:4
nonstatutory 25:19
norm 29:7
normal 3:14,17 27:13 30:12 40:17
note 51:21 52:21
notice 29:18
notwithstandi... 25:13 47:24,25 48:1

O

O 2:1 3:1
object 36:21
objected 36:21
objection 15:12 15:14
obtain 5:23 12:6 13:2,3,12 52:3
obviously 22:7 41:16
occur 38:23
Office 37:4
officer 24:12
Okay 4:20 8:25 26:9 27:22
omission 19:21 19:22
opening 38:12 38:14 52:14
operate 42:9
operated 37:1
operation 41:3
opportunity 13:12
opposed 4:11 6:22 11:6 12:2 51:17
opposite 14:8 42:19
oral 1:12 2:2 3:6 23:5
order 3:11,25 4:1 7:1,14,22 8:1,1,5,6,8,12 8:16,17,18,19 8:20 9:6,12 11:15,16 12:22 15:3,15 20:5,9 23:14 24:13 25:5,16 28:24 29:1,16,17,24 32:9,13,15 37:6 38:13,17 38:18,20 39:11 40:5,6,8,11 42:13,14,20,22 42:23 43:2,3,6 50:14 51:17
ordered 12:7 27:1 40:2,2,12
orders 6:8 20:24 23:11,18 24:1 24:2,4 26:17 28:13 40:15 41:5,17
ordinarily 33:23
ordinary 30:17
original 8:18
originally 13:1

outright 49:1
outset 7:18
outside 25:7 40:6,8
overlap 53:19 53:21
o'clock 35:13

P

P 3:1
page 2:2 19:11 23:23 25:9,12
pages 35:14 40:18
part 17:23 18:1 24:1 41:1,3 51:9
particular 13:9 25:24 28:20
particularly 39:22
party 4:1,1 20:8 20:9 30:19
passing 5:21
pending 3:12,25 9:14 10:19 23:11 29:1 38:5,20 39:8,8
people 4:18 26:18 28:5
percentage 5:3,4 5:5 34:20
percentages 34:21
perfect 27:17
perforce 10:3
period 37:2 40:15
permanent 7:5 53:9
permanently 10:20
permissible 18:16
permit 14:11
permits 15:7
permitted 36:20
persecution 4:4 15:9,24 17:3
persist 52:1,19
person 14:5,22 16:1 17:6 20:19 27:1 30:15 32:23 42:3 45:11
pertinent 46:5,5
petition 8:8 23:12 25:14 28:10 35:11 37:3 38:12,16 40:1,10 41:19 43:19 50:3
petitioner 1:4,17 2:4,9 3:7 32:25 38:22 44:2 47:14 51:15
Petitioner's 23:16
petitions 5:8,12 5:15 6:20
phrase 50:13,16
phrasing 33:24
place 12:4 25:7 46:22 50:22
placed 50:16
please 3:9 23:8
point 7:25 8:9 9:1 25:2,2,24 30:6 31:18 34:6 35:15,16 36:3 37:23 44:7 47:16 50:7,19
pointed 51:22
policy 39:19
position 16:10 21:6 35:20 49:20
positions 30:23
possibility 28:7
possible 6:16 34:1,10
potential 13:11
power 19:3
powerful 23:20
powerfully 45:8
practical 14:3
precise 38:19
predictive 7:8 9:3 49:3
preliminary 20:13 34:14 53:17,17,18
premature 45:2
preponderance 9:20 32:7,10 32:18,23 33:3 33:8
present 27:20,21
presented 16:24 18:8
presumably 11:15
presumed 4:6
presumption 40:9 48:7
presupposes 36:17,18,19
pretty 26:1 27:15 47:6
prevail 14:4 34:9 43:14 49:10
prevails 9:20
preventing 43:4
previously 6:10 29:18 43:7
primary 3:17
principally 24:3
prior 28:14 39:25 40:3
probability 21:18,19
probable 34:23 34:25
probably 16:17 27:23 35:18
problem 48:17
procedural 15:1 15:12 17:3 45:14
procedure 11:20 20:22 22:21 26:22 28:4
procedures 10:16 26:19,21 28:12
proceeding 39:11
proceedings 8:2 8:13 20:17 24:2 28:16 41:18 44:23 45:6
produced 43:10
programmatic 41:1,7
prohibited 9:7 9:13 14:12,20 15:4 16:21 17:16 30:18 49:5 50:6 51:17
prohibition 41:9
prohibits 41:2
properly 24:7
proposition 37:24
protected 15:24 17:4
prove 18:3,5
proven 16:24
provide 6:14 21:22 38:7
provided 3:10 6:12 26:13 29:4,6
provides 8:9,16 25:8 41:1
provision 13:17 13:19 19:12,18 22:25 23:25 24:21 25:13,19 28:8 29:8 37:25 38:2,8 39:25 40:3,14 40:21,23 41:4 43:15 45:22 47:24 51:19,22 51:24 52:16
provisions 14:21 16:6 25:3 27:8
purpose 5:21
purposes 25:17 39:19 43:23
pursuant 25:8 25:10 29:7 40:5 42:14
pursue 16:5
put 16:10 32:24 35:17
puzzling 40:21
p.m 1:14 3:2 54:14

Q

qualify 45:1
question 3:12 9:11,12,13 11:18 15:2,19 15:25 16:16,24 17:1,3,5,18,20 18:8 24:20 35:5 39:20 41:15 43:10 45:9 49:1,17 50:8
questions 15:23 18:3,4
quick 27:15 54:2
quickly 26:1 27:22 37:7 39:17
quite 7:13 34:22 45:3
quo 36:23 38:4 38:25 46:4,11
quote 29:2

R

R 1:6 3:1
raised 39:19
rate 5:8,9
read 26:12 27:22 33:12

34:10 35:15 38:11 40:16
reading 37:18 50:15
reaffirmed 35:7
real 5:24 35:13 52:1,20
realizing 24:13
really 6:19 7:10 9:21 23:19 28:13 29:24 34:2,4,11 38:2 40:21 43:5 45:7,19,22
reason 11:5,21 12:20 30:10 41:6 47:23
reasonable 32:14,20 33:15
reasonably 32:21
reasons 3:17
REBUTTAL 2:7 47:13
recognize 9:2
recollection 12:13 20:11
record 32:11
reference 25:18 31:25
references 19:24 51:15
referencing 5:8
referred 23:18
referring 41:16
refers 23:23 25:19 29:9 38:20 39:6
Reform 10:17
refresh 20:10
refugee 26:8,24
regardless 51:8
reinforce 45:8
reinforces 37:24
related 3:23 13:22
relates 40:21
relationship 40:22
relevant 49:22
relief 3:20,22 7:5 10:19 15:20 19:10,13 19:16,22,25 20:6,7,20 29:10 30:14 31:2 39:1 43:3 53:9,24,25
remain 39:15
remainder 23:1
remaining 47:12
remand 12:7 21:25 44:19
remands 41:23
reminiscent 34:13
removal 3:12,13 4:11,13,18 7:1 7:6,14,22 8:1,6 8:8,12,17,18 8:20 9:6,12 10:19 11:3,9 11:10 12:4 14:12,20 15:3 15:16 16:20,21 19:14,20 23:11 23:14,24 24:13 25:5,16 28:3 29:17,20,23 30:20 31:4 39:22 40:1,6,8 40:11 41:13,17 42:5,13,14,21 42:22,23 43:4 43:4,7,19,20 44:2 46:19 49:5 50:6,14 50:22 52:16
removed 14:6 16:7 27:2 42:4 42:15 45:18
render 10:1
reopen 4:12 6:19 8:6,13,16 8:20 18:19 42:1,7,11,12 42:18 43:1,3,8 44:10 45:4
reopening 8:2
repealed 39:25 40:3
replaced 6:6
requests 7:16
require 30:19 50:15
required 9:9 52:24
requirement 31:3
requirements 44:21
requires 44:23
reserve 23:1
respect 40:10 42:17,18
respectfully 47:19
respond 36:20 42:16
Respondent 1:20 2:6 23:6
responses 23:20 37:19
restrain 19:20 19:22,25 20:2 20:3 38:19 41:7,8,8
restraining 20:5 41:2
restricted 37:14
restricting 48:8
result 4:6 5:25
results 47:22
returned 16:25 17:6,15,19,23
reversed 40:9
review 3:25 5:9 8:8 23:12 24:2 25:6,8,11,14 25:15,18,21 26:4,10,17 28:6,9,10,23 28:25 29:1,2,5 29:6 30:7,8,12 30:15,16 32:3 32:4,9 37:3,25 38:12,16,20 39:8,13 40:1 40:11 41:19,24 42:20,25 46:20
reviewed 43:12
reviewing 11:16 27:4 32:10,11 33:7
rid 19:9
right 8:11 11:1 18:22 22:5 26:1,21 27:2,5 28:1 35:14 36:9 38:6,11 43:16 50:10 52:6,7,12
risk 20:20
road 20:19 21:20
ROBERTS 3:3 4:8,16,20 6:16 7:9,24 8:11,21 8:25 10:23 13:25 14:13,16 14:18 15:11,14 16:4,15 19:24 23:3 30:21 34:15 41:25 43:15,18,25 47:6,10 50:18 54:6
routinely 21:8 21:11
rule 4:25 19:1 20:23,23 22:20 36:12,14 37:22 38:23 39:2 42:19
rules 13:18,20 20:22 24:24
ruling 38:5 46:11,24

S

s 1:18 2:1,5 3:1 23:5 38:11
satisfies 31:21
satisfy 31:7
saw 3:22 13:11 13:22
saying 4:17 6:23 7:10 27:19 29:23 31:8 34:3 46:2
says 9:4 13:2 23:23 25:13,17 26:3,7,7,9,22 26:24 27:2,3,9 27:12 28:15,16 29:20 35:12 38:12,16,17,18 38:18,22 40:14 40:20,23 41:6 41:15 47:24 49:3 51:14
scale 35:4
SCALIA 9:15 10:5,8 11:8,17 11:22 12:9
schedule 54:9
season 54:11
second 3:23 9:21 24:16 25:2 37:23 50:7
section 23:10,10 23:13,25 24:3 24:8 25:4,17 25:22 27:8 29:13 41:16,18 50:13
sections 26:3
Security 24:12
see 6:21 13:21 16:17 23:14 26:20 31:18 33:7 42:2
seek 11:8 44:19
seeking 7:4,5,12 7:14,25 8:2 15:23 30:11

seeks 10:11 11:10 30:15
seen 4:19 5:14
sense 7:7 20:17 21:1 27:17 33:6 45:22
sent 16:5
sentence 25:17
separate 8:14 13:22 24:21 28:12
separated 40:18
separately 3:15
separation 39:3
serious 35:5
serve 23:15
Services 10:15
set 3:16 32:13
Seventh 12:18 34:6,16
shape 16:18
shifts 50:20
short 21:5 33:14 36:23
shouldn't 14:6 15:15 34:5 42:4
show 9:5,7 21:16,18,19 31:4,4,16 33:14 34:7 36:16 42:21 48:20 49:7
showing 22:7 33:10 34:4,12 35:5,6 36:17 36:19 37:1 38:3 42:10
shown 9:17 14:5 22:3 42:3 43:10 49:4 50:5
shows 38:22
side 38:8
sign 47:21
signs 51:18
similar 22:20 38:13
simply 20:7 50:3
Singh 12:3,16
sir 52:5
situation 10:6 10:25 11:23 12:3 19:19 20:16 22:24 23:19 24:11 39:5 42:21 45:14 48:21,25
situations 7:12 16:18,20 19:14 45:17
sliding 35:4
slightly 32:3
Social 10:14
sole 25:15
Solicitor 1:18
somebody 26:5 30:11
somewhat 34:13
soon 26:3 37:5
sorry 8:24 11:14
sort 16:19 19:17 24:5 25:19 30:14 33:9 39:4,4
sorts 17:4
sought 10:18 12:1 42:24 44:19
sound 50:11
sounds 50:9 51:12
Souter 12:12 24:6,15 31:6 31:15 32:6,17 33:25 37:10,16 38:6 46:25
speaks 28:21
special 3:15 28:3 28:4 29:5
specific 27:14
specifically 23:25 25:25 28:15
split 6:17,17
St 52:18
stage 9:10,19 20:17,20
stages 46:18
stand 32:15
standard 3:15 3:18 4:5 5:13 5:19,21,24 6:15 7:6,7,16 9:2,10 11:4,10 13:10,14,14,15 14:7,11,25 15:10,20 20:12 21:10,11,14,21 22:1,23 27:14 30:8,11 31:8 31:20,21 32:2 32:3,5,18,19 32:20 33:1,3 33:20 34:7,10 34:23,24 35:2 36:15 40:14,17 42:17 43:13,22 48:13,17 49:6 49:11,14,17,21 50:2,8,11 51:6 51:12 53:8,12 53:13,16,18,21 53:24
standards 3:14 6:25 9:25 35:3
start 47:16
stated 9:24
statement 4:7 16:14 48:9
States 1:1,13 45:20
status 18:12,20 36:23 38:4,25 44:12,16,20 45:13,20 46:4 46:11
statute 6:12 8:9 8:15 10:22 12:24 13:1 19:5 21:1,3 37:17,18 50:17 51:23 52:19 53:22 54:3,4
statutes 19:2 48:7
statutory 23:9 25:19 37:20 39:10
stay 3:11,18,20 3:23 4:5 5:22 5:23,25 6:2,5,7 6:10,12,15,25 7:16,20 9:10 9:13 10:1,2 11:10,16 12:2 12:4,10,20 13:17 19:4 20:1,4,7,14 22:10,17,21,23 23:11 24:14 30:20,23 33:13 35:3 36:12,23 37:3,12 38:3,7 38:13,17,17,18 38:25 39:4,14 39:17 40:15,17 43:4,20,24 44:4 45:25 46:12,14,18,21 46:23 47:1,3,5 47:18,18 48:3 48:23,25 49:16 50:25 52:2 53:2,3,11,17 54:4
stayed 9:14 40:1 41:12
staying 43:2,2
stays 3:13,14 4:9 4:13,18 5:3,9 5:18 10:9 13:24 20:6,23 21:1,7,11 29:9 34:17 40:11,11 47:22 52:23 53:1,7,7
STEVENS 17:11 45:24 46:7 54:1
stray 47:21,23
stress 39:18
strict 13:10
strikes 14:2
strong 4:3 21:18 21:19 48:22
study 4:19 5:15
subject 11:9 26:4 43:19 45:19
subjects 17:21
submission 21:7
submitted 54:13 54:15
subsection 23:22 25:23 26:10,13,14,15 28:20
substantial 32:4 32:12,16,19,21 32:22 33:7,14 35:6 53:15
substantive 36:14
subtitle 13:9
succeed 9:4 20:19
success 4:4 21:18 22:4,16 31:17 34:8,24 34:25 48:20 49:7 53:15
successful 33:17
successive 44:13 45:1,14
suffer 16:1
suffering 21:17
sufficient 32:22 35:6 36:22
suggested 23:16 28:6
suggestion 28:18 42:16
suit 24:5
superfluous

10:2,7
supervisory 11:13
supports 33:7
Suppose 35:10
supposed 35:9 36:5 40:22 42:2
Supreme 1:1,13
sure 4:9 52:9
suspend 38:17 38:17,20
suspended 44:2
suspends 28:25
systemic 10:24

T

T 2:1,1
take 4:1 12:24 14:25 17:9 19:2,3 25:7 26:5 34:5,15 36:11 43:16 50:22
talking 14:14 20:4 26:15 33:2 38:2 41:7 47:2
talks 26:16,16 29:18
tantamount 31:8
technical 44:6
technicality 15:2,6
Technically 8:5
teeth 5:25
tell 27:25
telling 27:18
temporary 3:13 3:24 20:5 38:2 38:3,25 39:11 39:14 46:23,25 50:25 53:10,14
tends 37:2
term 21:16 28:23 35:7,8 52:22
terms 33:9 46:19
test 22:8,9 32:12 32:16
text 20:15 23:9 47:20,21,23,24
Thank 3:8 23:3 47:10,15 54:6 54:12
that's 7:9 10:5 10:23,23 11:22 14:6 16:15 17:7,7 18:22 19:12 22:5,12 22:19 25:9 28:22 29:11 30:20 31:15 32:15 33:24 34:9,24 40:16 42:18 43:11 45:7 48:19 50:7 53:16,16
there's 5:16 11:5,5 12:17 14:19 15:23 19:16 22:16 25:18 28:18 31:21 35:5 41:21 45:20 46:17
they'd 9:16
they're 7:12,13 7:25 8:7 16:5 16:10,17,19 17:6 34:18
they've 16:7 21:12
thing 14:18 21:2 26:11 27:10 29:12,23 37:13 42:25
things 8:14 20:21 34:16 39:24
think 5:18 6:20 7:3,24 8:9 12:11,12,14,22 13:6,10 18:7 18:25 19:8,24 20:3,5 21:23 22:12 23:17 24:9,11,19 25:1 27:25 28:12 29:14,16 29:24 30:1,2 31:1,12 33:13 33:25 34:1 35:14,21 37:20 37:23 39:12,15 40:17 41:6,14 42:18 43:5 46:1 47:20 48:4 49:9 50:10,11,11 51:6,8,11 52:17 53:5
thinking 27:7
thinks 42:6
Third 4:3
thought 4:23 27:15
three 3:17 12:14 24:7,17 25:3 26:2 46:18
thrust 39:20,21
time 6:4 9:22 10:10 23:2 36:11,22 37:2 42:24 44:19 46:23
timely 39:13
title 25:10
torture 15:9,21
tortured 14:22 15:15
traditional 4:15 5:19,20,24 6:15,25 15:10 21:10,14 22:1 22:3,8,23 34:10 49:5
transitional 13:18,20 24:24
treat 53:23
treated 20:21
trial 33:22
true 5:11 10:5 16:8 22:10 48:19
try 25:20 33:12
trying 17:13 29:13 33:24
turned 44:12
twice 7:18 9:11 9:16 35:7
two 8:13 9:24 20:21 23:20 24:7,10,17 27:8 28:11,12 30:22 37:19 46:18 53:18
type 4:10,10 6:24 41:7
types 24:10
typical 6:18 10:25 31:13
typically 7:14

U

ultimate 6:20,21 32:17,18
ultimately 5:6 33:2
unclear 18:7 20:3
underlying 8:3 39:9
understand 4:16 7:25 29:4 31:24 32:2 40:19 42:9 44:15 54:2
understanding 5:2 7:11 21:7 54:2
unfortunately 54:10
United 1:1,13 45:20
unlawful 51:18
unmistakably 25:4
unreasonably 32:25
unreviewable 28:7
use 22:25 52:25 53:2,7
uses 29:10,19
usual 20:16
usually 4:10 34:16
U.S.C 3:10

V

v 1:5 3:4
vacancy 3:25
vacate 7:14 29:24 30:4,5
vacated 7:22 8:1
vacates 41:22 42:12
vacatur 3:24
venue 45:22
versus 14:4 20:4
view 21:3 37:12
violate 45:25
violated 54:4
virtually 9:25 22:24
virtue 45:17
visa 44:22,22,24 44:24 45:16,21
visualize 14:8

W

wait 29:15
waiver 45:19
want 20:18 26:18 27:17 30:10 36:4 39:18,18 42:16 46:15 50:7
wanted 19:9 37:21 45:4,6,6
Washington 1:9 1:16,19

17:18
way 6:23 7:3,10 9:16 14:1,19 22:2 30:12 32:24 34:1,9 39:13 41:6 42:8,8 45:12
Wednesday 1:10
went 13:5,14
We'll 3:3
we're 38:1
what's 20:11 28:3 35:20 38:24 41:11 51:3
who's 30:11
wife 18:11,15 44:17
win 7:10 9:18 31:9 36:2
Winter 21:16
wish 34:19
withholding 45:5
word 19:21 29:10,19 30:13 30:18 41:8 50:13,14,17 52:25 53:2,2,3 53:4,4,7,14
words 3:19,22 6:24 26:13 32:19 53:18
work 29:13 36:6 37:2
works 37:5
worrying 35:20
wouldn't 9:15 10:24 11:17 15:17 17:15 30:10 37:7 48:12,23
writ 22:22
Writs 48:1
written 33:9
wrong 51:3 52:6

X

x 1:2,8

Y

year 48:14
years 6:1 46:21
young 18:15
you'd 19:11 48:20 52:24
you're 8:1 14:13 18:5 33:2,6,6 35:10 52:7
you've 25:25 50:20,21

0

08-681 1:5

1

1 13:2,7 19:18 27:9 28:19 40:19,22,22,25
1a 25:9
1:00 1:14 3:2
11a 19:11
1225 29:19 52:4
1225(b)(1) 26:5 26:17 28:2,13
1252 8:23 24:3 25:4,7 41:18
1252(a)(1) 25:7
1252(b)(3)(B) 3:11 6:6
1252(e)(1)(A) 19:10
1252(f)(2) 3:16 23:10,13,17 36:11
1252(g) 24:21
14a 23:23
158 25:9,10
18 20:23
1996 3:10 6:4 28:14 39:21

2

2 3:21 4:5 6:22 7:4,6,7,15 9:2 10:9 11:4,24 12:23 13:4,6 13:10,15,20,22 13:23 14:10,19 14:25 15:16 17:24 19:17,20 19:21 21:13 23:22 24:19,24 26:3,22 27:12 27:16 28:20 29:13 30:25 31:1,1 33:9 39:7 40:18,21 41:11,15 45:25 46:8 47:20,22 48:15,25 49:2 49:14,17,24,25 50:2 51:13 52:1,20 53:3
2:00 35:11
2:02 54:14
2005 51:23
2009 1:10
21 1:10
23 2:6
23(c) 22:21
2349(b) 38:14
28 25:10

3

3 2:4 3:21 10:7 13:17,19,22,23 22:25 36:4 37:12 38:7,11 38:11 40:14 53:5,13

4

4 41:3 46:21
4a 25:12
47 2:9

5

5 25:12 26:11,12 35:13 51:21

6

60 39:14

7

7 47:12

8

8 3:10 20:23

9

9 25:22,23
96 22:12 51:22 52:19