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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. Phillips.

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
14 removal be governed by the normal standards applicable
15 to States or instead by the special standard that
16 Congress separately set forth for injunctions in
17 1252(f)(2). There are three primary reasons why the
18 normal 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
22 different words because it saw these forms of relief as
23 different.

24 Second and related, a stay is in fact
25 different from an injunction. It is a temporary vacatur

1 of a court or vacancy order pending review. It is not
2 directed at a party and does not order a party to take
3 action.

4 Third, even an alien with a strong
5 likelihood of success on the merits who will face
6 certain persecution if deported cannot get a stay under
7 the (f)(2) standard, a result Congress should not be
8 presumed to authorize in the absence of a clear
9 statement to that effect.

10 CHIEF JUSTICE ROBERTS: Counsel, I'm not
11 sure this matters very much, But do you know if -- are
12 stays usually granted in this type of case? Not this
13 type of case: A removal case as opposed to an
14 application to reopen.

15 MS. HARRISON: In a removal case stays are
16 granted in eight circuits only if the individual meets
17 the traditional --

18 CHIEF JUSTICE ROBERTS: No, no, I understand
19 it. I am just saying if you happen to know empirically
20 if most people who are facing removal get a stay.

21 MS. HARRISON: I have seen no empirical --

22 CHIEF JUSTICE ROBERTS: Okay.

23 JUSTICE KENNEDY: Did the government -- I
24 thought the government said that an empirical database
25 would be the Ninth Circuit, which has the more generous

1 rule.

2 MS. HARRISON: That's --

3 JUSTICE KENNEDY: My understanding is that
4 stays are granted in a very high percentage of those
5 cases. I would be curious to know, A, the percentage of
6 the cases in which it's granted; and B, the percentage
7 of those cases that are ultimately decided in favor of
8 the government?

9 MS. HARRISON: The data that I believe Your
10 Honor is referencing was the rate at which petitions for
11 review are filed, and not the rate at which stays are
12 granted or filed.

13 JUSTICE KENNEDY: Well, is it true that
14 there are more petitions filed in the courts with the
15 more generous standards?

16 MS. HARRISON: Again, I have not seen a
17 comprehensive study. There are more petitions filed in
18 the Ninth Circuit, but there is no evidence of the cause
19 of that. And -- and I think it's important that stays
20 are in fact denied under the traditional standard,
21 because what that demonstrates is that the traditional
22 standard effectuates Congress's purpose of passing
23 IIRIRA and eliminating the automatic stay and making it
24 in fact more difficult for an individual to obtain a
25 stay on appeal. That -- the traditional standard does

1 have real teeth and it does not result in an automatic
2 stay.

3 JUSTICE GINSBURG: How many years ago was
4 the automatic stay eliminated? When did this -- the
5 current law come into effect?

6 MS. HARRISON: At the same time in 1996.
7 Congress both eliminated the automatic stay, and it
8 replaced it with the language in 1252(b)(3)(B), which
9 indicates that a stay is not automatic unless a court
10 orders otherwise. And -- now, that language was nearly
11 identical to the language that had previously existed,
12 where a stay was automatic except for aggravated felons.
13 For aggravated felons, the statute provided that a stay
14 was not automatic unless a court otherwise directs. And
15 courts had interpreted that language to provide for
16 application of the traditional stay standards.

17 CHIEF JUSTICE ROBERTS: Is it possible in
18 this case to kind of split the baby? You have a more
19 appealing fact case than is typical, because yours
20 involves a denial of a motion to reopen and doesn't
21 really go to the ultimate merits. Most of the petitions
22 I think do go to the ultimate merits, and it's easier to
23 see that (f)(2) may apply there as opposed to your case.

24 Now, is there a coherent way of saying that?
25 In other words, in your type of case, you apply the

1 traditional stay standards, but in a case where the
2 issue that is before the court is whether to order
3 removal or not on the merits, the other approach
4 applies.

5 MS. HARRISON: I think that the way to do
6 that, Your Honor, is to apply (f)(2) where the alien is
7 seeking permanent relief. And where the alien is
8 seeking to enjoin his or her removal, the (f)(2)
9 standard makes a lot of sense, but the (f)(2) standard
10 doesn't contain any predictive language. It doesn't --

11 CHIEF JUSTICE ROBERTS: Well, but that's
12 just really saying the way that you avoid that is to say
13 you win across the board. I mean, it -- my
14 understanding is that in situations in which they are
15 going to be seeking an injunction to enjoin are quite
16 limited. They are typically just seeking to vacate the
17 legal order.

18 MS. HARRISON: And if you then apply the
19 (f)(2) standard across the board to stay requests, then
20 what that would mean is that the court of appeals is
21 deciding the merits twice: It's deciding it at the
22 outset when determining whether or not the individual is
23 entitled to a stay; and then it's deciding it again when
24 the court decides whether the individual's entitled to
25 have the order of removal vacated. And that just

1 doesn't seem like what Congress had in --

2 CHIEF JUSTICE ROBERTS: No, I think I
3 understand that point when they're seeking to have the
4 order -- the removal order vacated. But here you are
5 seeking the reopening of the proceedings, which I guess
6 is a little different, isn't it, than the underlying
7 decision on the merits?

8 MS. HARRISON: Technically, the order of
9 removal is the order denying the motion to reopen, so
10 they are one and the same, in this case and in any case
11 where the petition for review is of an order of removal,
12 which is what the statute provides for. And I think
13 that point is very important --

14 CHIEF JUSTICE ROBERTS: Is that right? How
15 can that be? I mean, you have an order of removal, and
16 then you move to reopen the proceedings. Aren't they
17 two separate things?

18 MS. HARRISON: Well, the statute provides
19 that an order denying a motion to reopen is itself an
20 order of removal, and that it's consolidated with the
21 original order of removal on appeal. So that they
22 become one and the same case, and the order denying the
23 motion to reopen is the order of removal.

24 CHIEF JUSTICE ROBERTS: Where does it say
25 that?

1 MS. HARRISON: I do not believe that it is
2 in 1252 itself, and I don't have the citation for you.
3 I'm sorry, Your Honor.

4 CHIEF JUSTICE ROBERTS: Okay.

5 MS. HARRISON: Back to the point that it's
6 important to recognize that the (f)(2) standard contains
7 no predictive language, it doesn't allow a court to say,
8 is this individual likely to succeed on the merits? It
9 says can this individual show, by clear and convincing
10 evidence, that the entry or execution of the removal
11 order is prohibited by law, not likely to show, not we
12 are likely to find.

13 And so if courts were required to apply this
14 standard at the stay stage, they would be deciding the
15 very same question twice. They would be deciding both
16 the merits question of whether the individual removal
17 order is prohibited by law and also the stay question of
18 whether it should be stayed pending --

19 JUSTICE SCALIA: That wouldn't be deciding
20 it the same way twice. Initially, they would just have
21 to decide whether -- whether the alien has shown by
22 clear and convincing evidence that he should win, and if
23 they decide no, he hasn't, then at the merits stage they
24 have to decide which one prevails by a preponderance of
25 the evidence. So it's really a different call the

1 second time.

2 MS. HARRISON: Well, Your Honor, the
3 government has stated in its brief that it believes
4 these two standards to be virtually identical. And in
5 the event that a stay was granted, it would certainly
6 render the merits decision superfluous because, if a
7 stay was granted and you could meet this higher burden,
8 then perforce you could meet the lower burden.

9 JUSTICE SCALIA: That's true.

10 MS. HARRISON: And so, in that situation,
11 (b)(3)(B) would be superfluous.

12 JUSTICE SCALIA: What do you claim that
13 (f)(2) covers, if it doesn't cover these stays?

14 MS. HARRISON: It covers any time an alien
15 seeks an injunction, now, both in the courts of appeals
16 and in a district court case.

17 JUSTICE GINSBURG: How can that be?

18 MS. HARRISON: Well, the Catholic Social
19 Services case is one example where individuals were
20 challenging the procedures whereby their legalization
21 applications were adjudicated under the Immigration
22 Reform and Control Act. And in that case, they sought
23 injunctive relief as a class to enjoin their removal
24 pending that case and permanently, in fact, because they
25 said they were entitled to legalization, which was an

1 amnesty statute.

2 CHIEF JUSTICE ROBERTS: Well, that's --
3 that's kind of a systemic challenge, but you wouldn't
4 have a situation where you get an injunction in far more
5 typical individual cases, right?

6 MS. HARRISON: Well, if an individual in
7 that case, Your Honor, attempted to enjoin his or her
8 removal, then the (f)(2) standard would certainly apply
9 to that individual. And there's -- there's a reason why
10 an individual couldn't have brought that challenge as
11 opposed to a class.

12 JUSTICE SCALIA: Why would he seek to enjoin
13 his removal when he is subject to a much lesser standard
14 when he just seeks to stay the removal? I mean, does he
15 have a bad lawyer or what?

16 MS. HARRISON: Well, in that case, it would
17 be in a district court, which doesn't have supervisory
18 authority over the court of appeals -- I'm sorry --
19 over the BIA's order. And so the district court
20 presumably couldn't stay an order that it wasn't
21 reviewing.

22 JUSTICE SCALIA: Why wouldn't he go to the
23 court of appeals, is the next question.

24 MS. HARRISON: Well, he perhaps might, but
25 if there was a delay in the procedure or if there was

1 some reason why --

2 JUSTICE SCALIA: That's a fluke. I mean,
3 that is a flukey situation. And I find it hard to
4 believe that (f)(2) was meant to address just that.

5 MS. HARRISON: Well, it would be in any
6 case, even in the court of appeals, where an individual
7 sought an injunction as opposed to a stay. For example,
8 if it was a situation like the Singh case in the Ninth
9 Circuit, where there was a stay of removal in place, but
10 the agency was deporting the individual anyway. Then
11 the individual would need to obtain an injunction, and
12 in fact that was essentially what the Ninth Circuit
13 ordered, was a remand for the imposition of an
14 injunction against --

15 JUSTICE SCALIA: Also a fluke. We don't
16 expect the -- the executive to ignore a stay.

17 MS. HARRISON: No, Your Honor. I think --

18 JUSTICE SOUTER: I think it's a fluke, too,
19 but you gave -- to my recollection, I forget where it
20 was -- I think you gave citations to three or four cases
21 in which that actually happened.

22 MS. HARRISON: The Singh case, Your Honor,
23 is one of those cases. There's also the Lindstrom case
24 from the Seventh Circuit. And it does happen that,
25 either because of a miscommunication or some other

1 reason, that the stay is not effective, and in that case
2 an injunction would be.

3 And I think, in order to address the Court's
4 concern that (f)(2) is a fluke, it's important to take a
5 look at where it appears in the statute and its context.
6 Now, originally, the statute contained only (f)(1),
7 which says that you cannot obtain injunctions as a
8 class, but that individuals can obtain injunctions.
9 There was no (f)(2).

10 The bill went to conference and then
11 Congress added in (f)(2), I think to make very clear
12 that, although they had carved out this exception in
13 (f)(1) for individual cases, that it was not to be
14 granted as a matter of course, that even in particular
15 cases, which is the subtitle of (f)(2), the standard
16 should be very strict. And so I think Congress saw
17 itself as closing a potential hole here, because it had
18 created this opportunity to obtain an injunction as an
19 individual without articulating a standard. Then
20 Congress went about articulating standard in (f)(2).
21 And it's a very high standard.

22 Now, Congress did not cross-reference
23 (b)(3)(B), which is the stay provision, and in fact, in
24 the transitional rules, what Congress did was it only --
25 it only included a provision that was identical to

1 (b)(3)(B). It did not include (f)(2) in the
2 transitional rules, which -- all of which demonstrate
3 that Congress did not see (f)(2) and (b)(3)(B) as
4 related; they saw them as separate with (f)(2) governing
5 injunctions and (b)(3)(B) governing stays.

6 CHIEF JUSTICE ROBERTS: Maybe I'm missing
7 something but -- and, again, I don't know which way this
8 cuts, but the dispute strikes me as very academic as a
9 practical matter: Judges looking at whether someone is
10 likely to prevail on the merits versus judges looking at
11 whether the person has shown by clear and convincing
12 evidence that he shouldn't be removed. The judge that's
13 going to find one in one case, depending on the
14 standard, and the opposite in the same case I can't
15 visualize.

16 MS. HARRISON: Well, the key I believe, Your
17 Honor, is the equities. Now, the (f)(2) standard does
18 not permit consideration of the equities in determining
19 whether removal is prohibited by law.

20 CHIEF JUSTICE ROBERTS: It doesn't? You're
21 talking about equities or irreparable harm?

22 MS. HARRISON: Both, Your Honor.

23 CHIEF JUSTICE ROBERTS: Both standards?

24 MS. HARRISON: Yes.

25 CHIEF JUSTICE ROBERTS: Same thing. And you

1 cannot consider that at all under (f)(2)? There's no
2 way in which the removal would be prohibited as a matter
3 of law under provisions that are concerned, for example,
4 about whether the person would be tortured or something
5 like that?

6 MS. HARRISON: Well -- well, Your Honor,
7 under the (f)(2) standard, take, for example, someone
8 who had applied for asylum, and it was denied on a
9 procedural technicality, and the question is: Was the
10 entry of the execution -- entry or execution of the
11 removal order prohibited by law?

12 That -- the issue of whether the
13 technicality was a -- was a correct finding or was not a
14 correct finding permits no consideration of whether or
15 not that individual, if they are deported, is going to
16 face persecution, torture, death, et cetera. Only under
17 the -- the traditional --

18 CHIEF JUSTICE ROBERTS: Because the
19 objection is on this procedural matter?

20 MS. HARRISON: Correct.

21 CHIEF JUSTICE ROBERTS: But if the objection
22 is that I am going to be tortured so you shouldn't order
23 my removal, he would be able to -- the court under
24 (f)(2) would be able to consider that, wouldn't it?

25 MS. HARRISON: I don't believe so, Your

1 Honor, unless the very question that was being decided
2 is whether the individual had met the -- met the
3 standard for relief under the Convention Against
4 Torture. But there are also cases where an individual
5 is seeking asylum, and there are questions about whether
6 -- whether the persecution is on the basis of a
7 protected class.

8 Now, the question there is not whether or
9 not the person is likely to suffer irreparable harm if
10 they go back, but, rather, what is the basis on which
11 they may be entitled to asylum? And so the Court in
12 *Bohegan* --

13 CHIEF JUSTICE ROBERTS: Don't they get to
14 pursue that even after they are sent back? There are
15 provisions that -- that their case does not abate just
16 because they have been removed?

17 MS. HARRISON: That is true, Your Honor.
18 However, their case may abate because they are killed,
19 they are put in jail, they are not in a position to come
20 back to this country. And that is why consideration of
21 the equities in this context is so critical and why
22 Congress would not have eliminated the equities from the
23 consideration without a very clear statement--

24 CHIEF JUSTICE ROBERTS: Well, I guess that's
25 why -- I guess that goes back to my earlier question,

1 which is, I see that if they are killed the case is
2 probably not in very good shape. But -- but the
3 situations in which they are likely to face that sort of
4 difficulties upon removal it would seem to me are
5 situations where the removal would be prohibited by law.

6 MS. HARRISON: Well, Your Honor, that was --
7 the court of appeals would only be allowed to consider
8 that if the question presented was whether they had
9 proven that they were likely to be killed if they were
10 returned to the country. But that often is not what --
11 the question that the court of appeals is deciding.

12 It is deciding a procedural question. It is
13 deciding whether the persecution was on the basis of a
14 protected class, those sorts of considerations, which
15 are not the same question as: Is this person likely to
16 be killed if they are returned?

17 That's why -- that's why the -- this Court
18 has held that unless Congress demonstrates very clearly
19 that it intends to take away the court's ability to
20 consider the equities, that we don't interpret
21 Congress's --

22 JUSTICE STEVENS: Excuse me, but I'm not
23 following. I have the same difficulty that perhaps the
24 Chief Justice is trying to get at. In the case where it
25 appears to the -- the judge that the -- that the alien

1 would be murdered when he is returned, wouldn't his
2 deportation be prohibited by law?

3 MS. HARRISON: Well, not always, Your Honor,
4 if the question that the court was considering wasn't
5 whether in fact the individual was going to be killed if
6 returned. If the question the court is considering is
7 whether -- whether a crime he has committed subjects the
8 individual to deportation, then the fact that that
9 individual is going to be killed when he is returned to
10 the country is not part of the (f)(2) calculus.

11 And -- and I don't believe that the
12 government has -- has argued that the equities would be
13 part of the consideration. The government has argued
14 that for legal -- for factual questions you need to
15 prove them by clear and convincing evidence, and for
16 legal questions you need to prove you are entitled to a
17 judgment as a matter of law.

18 Where the equities fall into that calculus
19 is -- is unclear, and I think they would only fall under
20 that calculus if the very question presented to the
21 court was that one. And -- and then, moreover, when you
22 say --

23 JUSTICE GINSBURG: When you say "equities,"
24 is the fact that he has applied or his wife has applied
25 for adjustment of his status, is that an equity?

1 MS. HARRISON: No, Your Honor, I don't
2 believe that that itself would be an equity. But the
3 fact that he does have a wife and he does have a young
4 child in this country would be a permissible
5 consideration in the equitable analysis, in the analysis
6 of -- of irreparable harm that would come to him and his
7 family. The -- the basis for his motion to reopen was
8 not the denial of adjustment -- of his adjustment of
9 status.

10 JUSTICE GINSBURG: It was changing
11 conditions.

12 MS. HARRISON: That's right, Your Honor.

13 JUSTICE GINSBURG: Alleged changing
14 conditions.

15 MS. HARRISON: Yes, Your Honor.

16 And I also think that -- that it's important
17 to emphasize this Court's clear-statement rule, which is
18 that the court doesn't take for -- lightly statutes that
19 do not very, very clearly take away the power of the
20 courts to grant the stay, to grant an injunction. And
21 if it's not very clear from the face of the statute that
22 that is what Congress intended, that the court will not
23 interpret as having done so.

24 I also think that it's important to
25 emphasize that when Congress wanted to be expansive in

1 getting rid of forms of equitable relief, it was. In
2 1252(e)(1)(A), for example, which if you would like to
3 look appears on page 11a of the appendix to the gray
4 brief, that's the provision where Congress limited the
5 forms of equitable relief available to aliens facing
6 removal in expedited situations. And there Congress's
7 language was very clear that: No declaratory injunctive
8 or other equitable relief. There is no language of that
9 sort in (f)(2); the same with (f)(1).

10 In that provision Congress said no court in
11 -- in a class situation can enjoin or restrain the
12 removal of an alien. Not in (f)(2). In (f)(2) Congress
13 only used the word "enjoin" in its omission of other
14 equitable relief, and its omission of restrain are
15 instructive.

16 CHIEF JUSTICE ROBERTS: So you think
17 references to equitable relief and restrain are clear
18 enough to cover the Court's authority to grant a stay?

19 MS. HARRISON: I don't believe that restrain
20 is, Your Honor, because I think restrain -- it's unclear
21 whether Congress is talking about a stay versus a
22 temporary injunction or a restraining order. I think
23 other equitable relief does capture stays, because we
24 don't deny that a stay is a form of equitable relief.
25 It's simply not an injunction, because it's not directed

1 at a party, and it doesn't order a party to do
2 something.

3 JUSTICE KENNEDY: Just to refresh my
4 recollection, what -- what is the major difference
5 between the standards that -- or the findings that the
6 judge must make, (a) to grant a preliminary injunction
7 and (b) to grant a stay?

8 MS. HARRISON: That has to be the same, Your
9 Honor, in the usual situation, because both arise at the
10 same stage in the proceedings where it makes sense that
11 the court would want to consider: What is the
12 likelihood that this person is going to succeed down the
13 road? What -- what is the risk if I don't grant relief
14 at this stage?

15 But those two things are also treated
16 differently in the Federal Rules of Appellate Procedure
17 in Rule 8 and also Rule 18, which governs only stays of
18 agency orders and not injunctions.

19 JUSTICE KENNEDY: My -- my concern is that I
20 sense in this statute a congressional concern that stays
21 are too frequently granted. And one thing we could do,
22 if we were to accept your view of the statute, is to
23 say: And you must be very careful.

24 Well, the courts don't listen to that very
25 much. And short of granting the -- accepting the

1 government's position, I don't know what you could do if
2 there were a -- a submission and understanding that
3 stays were being granted routinely and too frequently.

4 MS. HARRISON: Well, Your Honor, the -- the
5 standard that Congress intended, the traditional one, is
6 not a standard under which stays are -- are routinely
7 granted. They -- they have been denied in some of the
8 very cases where the circuits decided whether (f)(2)
9 applies or -- or whether the traditional standard
10 applies.

11 And this Court has given guidance, for
12 example, this term in Winter, that you have to -- not to
13 show some likelihood of -- of suffering or irreparable
14 harm, but you have to show a strong probability of
15 success on the merits, and you have to show a strong
16 probability of irreparable harm. And so if down the
17 road it seems that courts are not faithfully
18 implementing that standard, then the Court could again
19 provide guidance to that effect. But I don't think --

20 JUSTICE GINSBURG: That case -- this case
21 could come out the same. If we remand and we say that
22 it's the traditional standards, this case might well
23 come out the same way. The -- the court might say,
24 well, it doesn't make it under the traditional -- it
25 hasn't shown a likelihood of success on the merits.

1 MS. HARRISON: That's right, Your Honor.
2 And -- and it very well could, and we feel we are
3 entitled, obviously, to make that showing before the
4 Fourth Circuit and have the Fourth Circuit apply the
5 traditional test and make a decision under that test in
6 the first instance. But it is true that the State could
7 be denied, and that there is no guarantee. It is not
8 automatic.

9 And that's why I think before '96 Congress
10 used the same language for aggravated felons then that
11 it does now for everyone. Because it knew that "unless
12 a court otherwise directs" doesn't mean automatic. It
13 means that only where there -- there is a likelihood of
14 success and where the equities counsel in -- in favor of
15 the stay, it should be granted.

16 That's also how this Court interpreted that
17 similar language in Hilton in interpreting Federal Rule
18 of Appellate Procedure 239(c), which concerns a stay of
19 a grant of a writ of habeas corpus on appeal. This
20 Court said that the traditional stay standard should
21 apply in that situation interpreting virtually the same
22 language that Congress then chose to use in this
23 provision, (e)(3)(B).

24 I would like to reserve the remainder of my
25 time.

1 CHIEF JUSTICE ROBERTS: Thank you, counsel.
2 General Kneedler.

3 ORAL ARGUMENT OF EDWIN S. KNEEDLER

4 ON BEHALF OF THE RESPONDENT

5 GEN. KNEEDLER: Mr. Chief Justice, and may
6 it please the Court:

7 The statutory text, context and background
8 of section 1252(f)(2) all demonstrate that that section
9 applies to orders granting a stay of removal pending a
10 court of appeals decision on a petition for review.
11 Indeed, if section 1252(f)(2) does not apply to such an
12 order barring removal, it is difficult to see what
13 function it would serve.

14 Now, Petitioner's counsel has suggested that
15 1252(f)(2) must be directed to what I think had been
16 referred to as fluke kind of district court orders, and
17 couldn't really be directed at the situation that we
18 have here. There are two very powerful responses to
19 that, if I may make them both.

20 The first is that subsection (f)(2), which
21 appear on page 14a of our brief refers, it says no court
22 shall enjoin the removal, et cetera, under this section,
23 meaning that the provision is specifically directed to
24 court orders that are entered as part of the proceedings
25 on judicial review of final orders under section 1252.

1 It's not -- it's not principally directed at collateral
2 orders that might arise in some other class action or
3 some other sort of suit.

4 JUSTICE SOUTER: Were the examples that she
5 gives, the two or three cases, properly examples under
6 this section, in your --

7 GEN. KNEEDLER: Well, I think there were two
8 different types of examples that she gave, if I may. I
9 think the first one was a situation where a Department
10 of Homeland Security officer might have erroneously
11 carried out an order of removal not realizing that there
12 was a -- a stay entered.

13 JUSTICE SOUTER: May I interrupt you just a
14 second? When I meant examples, I meant the cited cases.
15 There were two or three cited cases.

16 GEN. KNEEDLER: The -- the cited cases, we
17 don't think, are examples of this. (F)(2) was not at
18 issue in those -- in those cases. The question in
19 several of them was whether the separate provision
20 1252(g), which this Court discussed in the American-Arab
21 case, whether that applied, and there was at least one
22 other case, it involved the transitional rules under
23 which (f)(2) doesn't apply.

24 But I think the more fundamental answer to
25 your point was the second point that I was -- that I was

1 going to make. There are -- there are three provisions
2 of section 1252 that make unmistakably clear that
3 Congress did not intend any challenge to a final order
4 of removal, any form of judicial review which would
5 include an injunction to take place outside of 1252
6 itself. And 1252(a)(1) provides the judicial review
7 shall be pursuant to chapter 158 of -- and that's on
8 page 1a of the brief -- shall be pursuant to chapter 158
9 of title 28, the Hobbs Judicial Review Act.

10 And then (a)(5), which is on page 4a of our
11 brief, says notwithstanding any other provision of law,
12 a petition for review filed with an appropriate court is
13 the sole and exclusive means for judicial review of the
14 removal order. Unless there be any doubt, the last
15 sentence the in that section says for purposes of this
16 entire chapter. Any time there is a reference to
17 judicial review, it refers to any sort of statutory or
18 nonstatutory provision.

19 So any time an alien would try to get an
20 injunction in any form of judicial review, Congress has
21 expressed barred it not only by this, but then also by
22 subsection (b)(9).

23 JUSTICE BREYER: On that particular point,
24 just specifically -- this is awfully complicated and you
25 have had to go through it pretty quickly, and so have I.

1 All right.

2 So, it seems to me, looking at these three
3 sections, as soon as you get to (a)(2), it says certain
4 matter are not subject to judicial review, and it
5 includes 1225(b)(1), which I take it is the case where
6 somebody comes in, knocks at our door, and the
7 immigration judge says good-bye and he says, no, no, I
8 am entitled to be a refugee or asylum.

9 Now, we look at that, it says in there it's
10 subsection (e) gives you judicial review of that. Now we
11 look at the thing you cited which is (5) -- (a)(5), and
12 you read it completely correctly, but you left out these
13 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
16 the case I have mentioned. It talks about -- it talks
17 about judicial review for orders under 1225(b)(1). Now,
18 those are the people who knock at the door and they want
19 asylum. And there is 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), it says you can have a habeas corpus procedure as
23 to certain matters, whether he is an alien, whether he
24 has been 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
3 a habeas corpus and now the judge says good-bye. And
4 they go to a reviewing court, which is going to be a
5 habeas corpus court, and that court decides, the alien
6 is right, I am 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
13 is just a normal case, you can't enter an injunction
14 unless it meets this specific standard. So I looked at
15 that. And I admit this is pretty quick, and I thought
16 it's (e) and it's (f), and (f) is dealing with (e),
17 (f)(2). And it makes perfect sense. They don't want a
18 habeas corpus judge telling that immigration judge what
19 to do with the guy knocking on the door and saying "I
20 need asylum," unless they meet clear and present
21 danger -- clear and -- whatever it is, clear and
22 present -- yeah.

23 Okay. Now, I will admit I read that
24 quickly. And therefore, I am probably missing something.
25 And I don't expect you necessarily to be an expert, but

1 can you do your best to tell me what I am missing or if
2 you think I might be right?

3 GEN. KNEEDLER: Yes, if I could. 1225(b)(1)
4 governs the special -- what is called expedited removal.
5 It's a special procedure, as you identified, for people
6 essentially knocking at the door, and it has very
7 limited review, as you suggested. Almost everything is
8 unreviewable except possibility of asylum.

9 But it's -- that is the only provision for
10 district court review. It's the, shall we say,
11 functional equivalent of a petition for review in the
12 court of appeals and everybody else. Congress just
13 decided to have two different -- two separate
14 procedures, and I think for 1225(b)(1) it's really a
15 carryover orders of exclusion prior to 1996.

16 JUSTICE BREYER: What it says here
17 specifically is it says habeas proceedings.

18 GEN. KNEEDLER: Yes, it does -- it does
19 say -- it does say habeas, but (f) -- there is no
20 suggestion that (f), either (1), which is general
21 application, or (f)(2) in particular is limited to
22 subsection (e). It -- it speaks of any injunction.

23 And that is instructive because the term
24 "injunction" is used in the Hobbs Judicial Review Act to
25 describe an interlocutory order by a court of appeals on

1 judicial review that suspends the enforcement of an
2 agency order pending judicial review. And we quote the
3 Hobbs Judicial Review Act in our brief.

4 And as I mentioned before, that is very
5 important to understand here, because Congress
6 provided -- other than the habeas review for this
7 special category, Justice Breyer, Congress provided that
8 judicial review in the norm is in the court of appeals
9 pursuant to the Hobbs Act. And if you look at the Hobbs
10 Act provision for interlocutory stays, it refers to
11 interlocutory relief as an injunction. It uses the
12 word --

13 JUSTICE BREYER: Well, let me add one other
14 thing, because all I am trying to do is find some work
15 for this section (f)(2) to do. And I think I found
16 some. And I think what you say is wait a minute, we
17 agree it's like habeas. But and I think it would be
18 like an exclusion order rather than a removal order.

19 And I did notice previously when it talks
20 about 1225, sometimes it uses the word "exclusion" and
21 sometimes it says "removal." But if you were that
22 district habeas judge and you get a thing saying
23 removal, you don't really vacate it. I think what you
24 had do is order an injunction against its enforcement.
25 Here I don't know --

1 GEN. KNEEDLER: I think the habeas court
2 would have the authority -- would have the authority to
3 vacate just as -- just as a court of appeals would have
4 the authority to vacate.

5 But my basic point is that both of them are
6 forms of judicial review. And if this heightened
7 injunction standard applies to the form of judicial
8 review that Congress has decided to leave in habeas,
9 then there is no reason to imagine why Congress wouldn't
10 want the same injunctive standard to apply to somebody
11 who is seeking judicial review in the normal way, in the
12 court of appeals, especially since Congress used the
13 word "injunction" to describe this very sort of
14 interlocutory relief under the Hobbs Judicial Review Act
15 when -- when a person seeks judicial review in a -- in a
16 court of appeals.

17 And this conforms to the ordinary meaning of
18 the word which is "enjoin," which is to prohibit
19 something, to require a party to abstain from carrying
20 out an act. That's exactly what a stay of removal does.

21 CHIEF JUSTICE ROBERTS: Do you -- do you
22 agree with your friend that the basic difference between
23 your two positions is that under the stay factors you
24 are allowed to consider irreparable harm but are not
25 allowed to consider that under (f)(2).

1 GEN. KNEEDLER: No, I think (f)(2) -- (f)(2)
2 is -- 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.
5 It's -- it's a condition --

6 JUSTICE SOUTER: What difference would it
7 make? I mean, if he can satisfy the clear and
8 convincing standard, which is tantamount to saying that
9 on final judgment I win, hands down, what need is there
10 to -- to go into irreparable harm?

11 GEN. KNEEDLER: And that -- and that -- that
12 -- that may well be. I think it may well be in the
13 typical case. If I -- if I could just --

14 JUSTICE SOUTER: But -- but -- but that's --
15 no, but in any case, if he's got to show by clear and
16 convincing evidence that he is going to have success on
17 the merits, I don't see any point in any case of going
18 into irreparable harm. If he goes into irreparable harm
19 without the clear and convincing standard, he loses. If
20 he satisfies the clear and convincing standard, there is
21 nothing for irreparable harm considerations to -- to add
22 to -- to the mix of factors.

23 GEN. KNEEDLER: Well, as we understand the
24 reference to clear and convincing evidence, and
25 admittedly it's not entirely clear how Congress intended

1 that standard to apply in this context. As we
2 understand it it is -- it is a standard of review
3 slightly more favorable to the alien than the
4 substantial evidence review standard, which is what
5 would apply -- one final --

6 JUSTICE SOUTER: It's certainly more than a
7 preponderance?

8 GEN. KNEEDLER: Yes. But -- but in no
9 event, even on review of the final order, 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
13 at final judgment cannot set aside the -- the agency
14 order, except -- unless it finds that no reasonable
15 factfinder could conclude that the order should stand.
16 That's the 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 substantial evidence
20 standard is keyed to what a reasonable factfinder could
21 find reasonably, based upon substantial evidence. Is
22 the substantial evidence sufficient for such a
23 factfinder to find by a preponderance that this person
24 has failed to meet, or, put it the other way around,
25 that the factfinder has unreasonably failed to find that

1 the Petitioner has met the standard?

2 So ultimately you are talking about a
3 preponderance standard, which is -- which is the key,
4 isn't that correct?

5 GEN. KNEEDLER: That -- that is -- the court
6 -- you are correct in the sense that the court is
7 reviewing to see whether substantial evidence supports
8 the IJ's determination by a preponderance of the
9 evidence. But (f)(2) is written in terms of the sort of
10 showing that the alien must make to the court, and --
11 and not -- not what he would have made to the IJ. And
12 as -- and as we read it, as we try to apply the language
13 in the context of a stay, we think that means that the
14 alien must show something a little bit short of -- of
15 the substantial evidence, that no reasonable factfinder
16 could find it, at least clear and convincing evidence
17 that as -- that the IJ was incorrect or that the alien
18 has a successful case.

19 JUSTICE KENNEDY: Are there other cases in
20 which clear and convincing -- the clear and convincing
21 standard applies to appellate courts? It seems to me
22 clear and convincing is more appropriate for a factual
23 determination at the trial court level.

24 GEN. KNEEDLER: It -- it -- it ordinarily
25 is. And that --and that's why the phrasing, as I was

1 trying to discuss with Justice Souter, I think, is a
2 little awkward. Another possible way to think about it,
3 and this may be what Congress was really driving at,
4 when it was -- when it was saying clear and convincing
5 evidence, it really meant a clear and convincing
6 showing; that the -- that the courts shouldn't take this
7 too casually.

8 As we point out in our brief, the Second
9 Circuit has a standard that the alien just has to show
10 more than a negligible likelihood of success on the
11 merits to prevail. Well, that -- that's way below what
12 even the traditional standard would be. So it's
13 possible to read clear and convincing evidence as really
14 driving at clear and convincing showing, which is
15 language that is -- that is somewhat reminiscent of what
16 this Court has said for preliminary injunctions
17 generally.

18 CHIEF JUSTICE ROBERTS: So I take it at
19 least in the Seventh Circuit these things are usually
20 granted?

21 GEN. KNEEDLER: They're -- uh -- we do not
22 have empirical data, and I wish we did, on the
23 percentage, but they are -- in the Ninth Circuit in our
24 experience -- again we don't have percentages, but they
25 are granted quite frequently.

1 JUSTICE GINSBURG: But the standard is
2 probable success on the merits, and that's not an easy
3 standard. Irreparable harm and probable success on the
4 merits, both.

5 GEN. KNEEDLER: Well, if -- if the courts
6 actually applied that standard, there would at least be
7 some improvement in the stay standards, but the courts
8 sometimes apply a sliding scale, where they say if there
9 is -- you know, a serious question and a showing -- a
10 showing of substantial harm would be sufficient. Well,
11 this Court has twice reaffirmed in the last term, in the
12 last term --

13 JUSTICE BREYER: What are we supposed to do?
14 What would you had do? Suppose you are a district court
15 judge and at 2:00 in the afternoon on Friday a petition
16 comes in and it's from someone who says, "I'm going to
17 be on the 5:00 airplane to Hong Kong and I have a real
18 case here. I think I am right." And he has eight pages
19 attached and you read through that. And you say, "He
20 has a point. Now how good this point is, I don't know.
21 So I would like to put this -- I would like to have
22 everybody in here on Monday, and then I could figure it
23 out."

24 Now, that probably happens. Now what is
25 worrying me about your position on this -- which,

1 although most -- I think every circuit is against you on
2 this, except for this one.

3 GEN. KNEEDLER: And there are others.

4 JUSTICE BREYER: And it seems to me that
5 would make it impossible for the district judge to do,
6 because the district judge cannot honestly say that it's
7 clear and convincing that this man is going to win. All
8 he knows is he has a point and he would like to hear
9 more about it and he doesn't want him on the airplane
10 three hours from now from Hong Kong. So I -- so how is
11 it supposed to work?

12 GEN. KNEEDLER: Well, it would be the court
13 of appeals, not the district judge.

14 JUSTICE BREYER: Right.

15 GEN. KNEEDLER: But it -- we believe that
16 that -- that 1252(f)(2) allows a court to take the time
17 necessary to rule meaningfully on the stay application.
18 We do not believe Congress intended to divest the court
19 of the ability to rule on the merits. It has a
20 substantive standard that the alien has to make a clear
21 and convincing -- has to show by clear and convincing
22 evidence. It presupposes that the alien has to make a
23 showing; therefore it presupposes that the court must be
24 able to evaluate that showing. We also believe that it
25 presupposes that the government is permitted to respond

1 to it.

2 So we -- we do not object and have not
3 objected in the lower courts to the courts taking
4 sufficient time to -- to freeze the status quo by
5 issuing a short stay if necessary to do that.

6 Now, in the Eleventh Circuit, for example,
7 which has operated under this heightened showing for
8 some period of time, it tends to work out, because when
9 a -- a -- a petition for review and stay application is
10 granted, the court contacts the Office of Immigration
11 Litigation which works with DHS to inform the court on
12 how soon the order might be issued, and then the court's
13 aware of how quickly it might act.

14 So -- so it wouldn't often be necessary for
15 the court to do it, but we did not challenge that
16 authority.

17 JUSTICE SOUTER: But and -- and I applaud
18 the fact that you don't, but I don't know how you can do
19 it consistently with your view that "stay" in (b)(3)(B)
20 means the same thing as the "injunction" in (f) when
21 "injunction" in (f) is restricted as much as it is.

22 GEN. KNEEDLER: Well, I --

23 JUSTICE SOUTER: God bless you, but I don't
24 know how -- I don't know how under the statute, on your
25 reading of the statute, you -- you can do it.

1 GEN. KNEEDLER: There are two responses.
2 One, we -- we think it is necessarily implicit in the
3 statutory framework that Congress would have wanted the
4 court to be able to rule on the interlocutory
5 injunction, but the -- but the second point I think that
6 -- that reinforces this proposition, again, if you go
7 back to the Hobbs Judicial Review Act, it has a
8 provision not only for interlocutory injunctions, which
9 is what we're really talking about here, but a provision
10 for a temporary -- for a court to issue a temporary stay
11 upon a showing of irreparable injury to allow the status
12 quo to be maintained pending the court's ruling on the
13 interlocutory injunction.

14 JUSTICE SOUTER: All right. Then why
15 doesn't that provide the broader authority under
16 (b)(3)(B) stay provision that your friends on the other
17 side are arguing for?

18 GEN. KNEEDLER: Well, it may -- that may
19 well be the right answer, is to read (b)(3)(B) --
20 (b)(3)(B)'s opening that -- which says a petition for
21 review does not in itself stay the order -- is very
22 similar to the language in the opening of 2349(b) which
23 is the interlocutory injunctive language of the Hobbs
24 Judicial Review Act. It says the mere filing of the
25 petition doesn't stay or suspend the order. It says

1 stay or suspend the order, and it says stay, and then it
2 says but a court may -- I forget the precise language --
3 restrain or suspend the order reflecting pending
4 judicial review; and it refers to that as an
5 interlocutory injunction.

6 But it says if the Petitioner shows that
7 irreparable injury would occur before the court has a
8 chance to rule even on the interlocutory injunction, it
9 can issue what's called a temporary stay to maintain the
10 status quo until it can look at the -- at the -- at the
11 interim relief.

12 Well, if -- if that -- if that background
13 rule is not misplaced, that would allow for some
14 separation of the sort of emergency motion for a stay, a
15 hold fast sort of situation, for the court to be able to
16 evaluate the merits. But when it gets to what the Hobbs
17 Act refers to as an injunction, then (f)(2) kicks in,
18 interlocutory injunction pending -- pending judicial
19 review.

20 So that would be -- that would be an
21 underlying statutory basis for allowing the court to --
22 to issue a temporary order to allow the -- to allow the
23 proceeding to go forward, but we think it should be done
24 in a timely way. The Hobbs Judicial Review Act
25 contemplates a rather casual, up to 60 days that such a

1 temporary stay should remain in effect. We think in
2 many cases under the immigration laws the court should
3 be able to act on the stay application more quickly than
4 that.

5 I did want -- I did also want to stress the
6 -- the policy purposes that Justice Kennedy raised in --
7 in an earlier question, and that is the -- the thrust--
8 the whole thrust of the 1996 amendments to the
9 Immigration Act was to expedite the removal of aliens,
10 particularly criminal aliens, but not all -- but all
11 aliens in fact. And Congress did several things when it
12 did that. It repealed the prior provision where that
13 said the mere filing of petition for review
14 automatically stayed the removal unless the courts
15 ordered -- ordered otherwise. And it also repealed the
16 prior provision that said that the alien -- if the alien
17 left the country, including -- that was construed to
18 mean pursuant to deportation order, he could no longer
19 challenge the removal order outside the country.

20 Congress changed completely that and it said
21 you had can now challenge the order of removal from
22 outside the country, and it basically reversed the
23 presumption with respect to whether - whether the filing
24 of the petition for review stays -- stays the order of
25 removal. Congress said, No, it does not unless the

1 courts ordered otherwise.

2 JUSTICE GINSBURG: And you would expect the
3 standard to be in the (b)(3)(B) provision. It says that
4 no automatic stay unless the court otherwise orders,
5 period. That's the end of it.

6 So one wonders whether this would think that
7 the normal standard for a stay would apply. And then
8 (f)(2) is separated by several pages and (f)(1) is
9 dealing with something where we understand it. It says
10 no mass injunctions against the enforcement of a
11 provision. But (2) is really puzzling what it relates
12 to, is it supposed to have some relationship to (1)? 1
13 says you can't enjoin the enforcement of a provision of
14 the law.

15 GEN. KNEEDLER: Well, (f)(1) is directed at
16 -- in large part at programmatic challenges. It
17 provides -- it prohibits courts from enjoining or
18 restraining the operation of part 4 of the INA which --
19 which is the provision that deals with deportation,
20 adjudication of deportation and exclusions and carrying
21 out those orders, which by the way we think is the
22 reason it says enjoin or restrain, because it's talking
23 about programmatic type actions, and restrain -- the
24 word restraint is sometimes used to be something in an
25 absolute prohibition, just -- just to limit it, whereas

1 on "enjoin" is necessary under (f)(2) because it --
2 because what is being enjoined or stayed is a vary
3 discreet act. You can have an injunction barring
4 removal or -- or you don't.

5 But I -- I think a further answer to your
6 question, Justice Ginsburg, is that (f)(2) says under
7 this section, which means that it is obviously referring
8 to court orders entered in the course of -- of removal
9 proceedings under section 1252, and when a court finally
10 gets to the merits in a petition for review in a court
11 of appeals, the court if it decides that there is a flaw
12 -- excuse me -- a legal flaw in the BIA or immigration
13 judge's decision, it vacates the decision and -- and --
14 and remands.

15 Injunctions are not necessary in that -- in
16 that kind of review, so-

17 CHIEF JUSTICE ROBERTS: So in this -- in
18 this case involving a denial of a motion to reopen, what
19 the court of appeals is supposed to do is to look ahead
20 and see if this person has shown by clear and convincing
21 evidence that they shouldn't be removed; and if they
22 haven't, then their -- their removal can't be blocked,
23 even for example if the court of appeals thinks, well,
24 yes, they should have gotten their motion to reopen.

25 GEN. KNEEDLER: No, no. The way -- the way

1 I would understand it to operate is that the -- the
2 alien would have to make a clear and convincing showing
3 that he is entitled to have the motion to reopen
4 granted. Because if the motion to reopen is granted,
5 that vacates the final order of removal and therefore
6 there is no longer a final order of removal pursuant to
7 which the alien could be removed.

8 And I did want to respond to your suggestion
9 that maybe the standard should be more lenient with
10 respect to motions to reopen. With respect, I think
11 that's the opposite of what the rule should be, if
12 anything; because the final -- the review of the final
13 order of removal is the main show; and in that -- in
14 that situation, the alien is actually challenging the
15 order of removal.

16 In a case like this where the order of
17 removal was a long time ago, and the -- and the -- the
18 alien sought judicial review of that and that was
19 denied, the only thing before the court is the -- is the
20 motion to reopen. And staying -- a judicial order
21 staying the denial of a motion to reopen is meaningless.
22 In order to get the relief preventing removal you need a
23 stay of removal, which really effectively directs DHS--
24 as we think it does in all cases -- directs DHS not to
25 execute the order of removal that was -- t hat was

1 already previously entered.

2 And also the denial of a motion to reopen,
3 especially like the one at issue in this case, where the
4 question is whether the alien has shown -- has produced
5 material evidence of changed circumstances, that is
6 reviewed as this Court said in its decision in Abudu,
7 under an abuse of discretion standard. So it would be
8 very likely -- very unlikely that an alien would prevail.

9 CHIEF JUSTICE ROBERTS: This provision
10 applies to us as well, I take it, right?

11 GEN. KNEEDLER: Yes, we -- we believe it
12 would.

13 CHIEF JUSTICE ROBERTS: So if there is a
14 cert petition filed on behalf of an alien subject to
15 removal, and he asks for a stay of removal, we have to
16 decide whether he meets the clear and convincing
17 evidence standard.

18 GEN. KNEEDLER: For -- for purposes of
19 granting a stay, yes.

20 CHIEF JUSTICE ROBERTS: We should have -- we
21 should have done this in this case, but I assume you
22 suspended removal of the Petitioner on your own?

23 GEN. KNEEDLER: Well, the Court granted the
24 stay in connection with the -- with the granting of --
25 of certiorari in my case.

1 JUSTICE GINSBURG: May I ask just a
2 technical point?

3 GEN. KNEEDLER: Yes.

4 JUSTICE GINSBURG: One of the -- the motion
5 to reopen was based on changed circumstances in the
6 Cameroon. But there was also this independent
7 application for adjustment of his status, which was
8 turned down because it was a successive motion.

9 GEN. KNEEDLER: Yes.

10 JUSTICE GINSBURG: My understanding is that
11 that adjustment could not have been asked for earlier
12 because his wife didn't come with -- until after.

13 GEN. KNEEDLER: If I -- yes. Well, he -- he
14 did seek -- he did seek, the first time around he sought
15 a remand for consideration of his adjustment of status
16 application, but one of the requirements to be eligible
17 for that is that a visa be available, and a visa was not
18 then available, and nothing in the Act requires that
19 deportation hearings be held up until a visa becomes
20 available.

21 JUSTICE GINSBURG: Yes, but now he would
22 qualify, except that it's a successive motion. So it
23 seems earlier he was premature and now he's too late.

24 GEN. KNEEDLER: But -- but Congress was
25 quite explicit; it only wanted one -- one motion to

1 reopen, except in the case of asylum or withholding of
2 deportation. It wanted -- it wanted the proceedings to
3 come to an end. And that's -- the circumstances of this
4 case powerfully reinforce what Congress --

5 JUSTICE GINSBURG: May I just ask a
6 question?

7 GEN. KNEEDLER: Yes.

8 JUSTICE GINSBURG: This person is married to
9 a citizen, has an American citizen child. Is there any
10 way that his status could be adjusted? It can't in this
11 procedural situation because it is a successive motion.

12 GEN. KNEEDLER: He could -- he could apply
13 for an immigrant visa from abroad. Now there may be
14 situations in which -- in which by virtue of having been
15 removed, there is a bar to his getting that, but that is
16 subject to waiver. So really what the alien's
17 adjustment status in the United States is discretionary
18 if there is a piece of available -- it is discretionary
19 from abroad. All -- it's really a alternate venue
20 provision, where the alien applies from abroad.

21 JUSTICE STEVENS: GEN. KNEEDLER, when we
22 entered this stage, did we violate (f)(2)?

23 GEN. KNEEDLER: I -- I think it would be
24 analogous to what I was saying before, that the -- this
25 Court like a court of appeals has the authority to -- to

1 freeze the status quo while it can decide the pertinent
2 legal issue, and the pertinent legal issue before
3 this --

4 JUSTICE STEVENS: Where -- where do we get
5 that authority if (f)(2) means what you say?

6 GEN. KNEEDLER: Well, as I explained, we do
7 not -- we do not challenge the ability of a court to
8 decided -- to freeze the status quo while ruling on the
9 motion for stay.

10 JUSTICE BREYER: Well, what court would ever
11 do anything else? I mean, why if you were granting a
12 stay, would you not want to do that so you can fully
13 consider the issues?

14 GEN. KNEEDLER: Well, but there's -- it's
15 not two stages; it's three. The -- a stay of removal
16 is, under the Hobbs Act terms, an interlocutory
17 injunction. That can last -- judicial review in the
18 Ninth Circuit can last four years, so if a stay is
19 granted, you could have an interlocutory injunction in
20 place for a long time. The temporary stay is just while
21 the court is ruling, considering the interlocutory
22 injunction.

23 JUSTICE SOUTER: But this is a longer
24 temporary stay than you conceded a few moments ago. I
25 mean, you were talking about Friday night to Monday

1 morning, when you were -- when you were conceding the
2 stay on the Hobbs analogy. I don't know how many months
3 it's been, but this is no Friday night to Monday morning
4 stay.

5 CHIEF JUSTICE ROBERTS: It's pretty close to
6 it, though.

7 (Laughter.)

8 GEN. KNEEDLER: It feels like it.

9 CHIEF JUSTICE ROBERTS: Thank you, General
10 Kneedler.

11 Ms. Harrison, you have seven minutes
12 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
18 appeals could impose a stay to consider the stay motion.
19 And, respectfully, I don't believe that is consistent
20 with the text of (f)(2), and I think that the fact that
21 the government must stray from the text is a sign of how
22 absurd the results would be if (f)(2) were applied to
23 stays.

24 Now, the reason they must stray from the
25 text is that the text says "notwithstanding any other

1 provision of law," which means notwithstanding the Hobbs
2 Act and notwithstanding the All Risk Act, which is where
3 I believe my brother was indicating this Court would get
4 authority to impose such a stay.

5 Now, I think the fact that there are cases
6 where such a need would arise, as in Justice Breyer's
7 hypothetical, is exactly why this Court applies a
8 presumption against interpreting statutes as restricting
9 the equitable authority of the courts, unless there is a
10 clear statement to the contrary, which --

11 JUSTICE KENNEDY: Yes, but you still have a
12 differential on the Friday to Monday night hypothetical.
13 You wouldn't apply, or would you, the same standard that
14 you would apply on Monday for the next -- on Monday for
15 the next year and a half?

16 MS. HARRISON: Well, Your Honor, the (f)(2)
17 --

18 JUSTICE KENNEDY: Because you have the same
19 problem under your standard as the government does under
20 its.

21 MS. HARRISON: Well, that's true. You'd
22 have to show likelihood of success. But in -- in the
23 situation where you could consider the equities, if the
24 equities were strong enough and demonstrated in the stay
25 application, then it wouldn't be difficult for the court

1 to decide whether the balance of the factors justified
2 implementing a stay in that situation. Under (f)(2),
3 the court would have to decide the question outright.
4 And, again, (f)(2) does not mean any predictive
5 language; it just says, has the individual demonstrated
6 and shown by clear and convincing evidence that removal
7 is prohibited by law? Under the traditional standard,
8 there is a -- the court is allowed to consider whether
9 the individual is likely to show success on the merits.

10 JUSTICE KENNEDY: You think that if you do
11 not prevail, and we say clear and convincing evidence is
12 the standard, that courts are not entitled to consider
13 equity?

14 MS. HARRISON: Well, Your Honor, I heard my
15 brother as indicating that if you meet the (f)(2)
16 standard, then -- then the court can consider the
17 equities so as to deprive the individual of the stay,
18 but that if you cannot meet the (f)(2) standard, then
19 the question is closed and there is no consideration.

20 JUSTICE KENNEDY: About your position, is it
21 your contention that if we grant -- if we determine
22 clear and convincing is the standard, that equities are
23 not relevant to that calculus?

24 MS. HARRISON: Yes, Your Honor, in the event
25 that the individual does not meet (f)(2). If the

1 individual meets (f)(2), then I do believe the court
2 would go on to consider the equities. But in the event
3 that the individual has met the (f)(2) standard, the
4 court could simply grant the petition on the merits, and
5 there is no need to go about considering the equities
6 because the individual has shown that -- by clear and
7 convincing evidence -- that removal is prohibited as a
8 matter of law.

9 And that is the second point I want to get
10 to, which is Your Honor's question about, isn't this a
11 standard that sounds a lot more like it is directed at
12 district courts because -- I think you are right, Your
13 Honor, and I think it does sound like that standard
14 because I so think that was where it was intended to
15 apply. And the phrase "under this section" does not
16 modify the word "enjoin"; it modifies the word "final
17 order of removal." And to ascribe the government's
18 reading to it would require you to move that phrase from
19 where Congress placed it in the statute, to after the
20 word "enjoin."

21 CHIEF JUSTICE ROBERTS: I guess General
22 Kneedler's point is that clear and convincing shifts a
23 little, depending on how long you've got to look at it.
24 If you've only got a day or a few hours before the
25 removal is going to take place, you can say this is

1 convincing enough based on what I have had a chance to
2 look at. But -- and therefore you could enter, I guess,
3 what may be called the temporary stay to get more
4 briefing from the government or whatever. But you may
5 find out when you look at it a little more deeply that
6 it's not clear and convincing. What's wrong with that?

7 MS. HARRISON: Well, Your Honor, if the
8 Court were to interpret clear and convincing as a more
9 flexible standard, then I don't think -- you know, I
10 don't disagree with Your Honor's characterization of it.
11 But I still think that, regardless of how you interpret
12 clear and convincing, that the equities would not be
13 part of the calculus.

14 And I also think that the fact that clear
15 and convincing sounds like a standard Congress would
16 have addressed to district courts, the fact that (f)(2)
17 says "no" courts, not -- not just the "courts of
18 appeals," the fact that it references an "alien" and not
19 a "petitioner" are -- and the fact that it is addressed
20 to instances where the entry or execution is prohibited
21 by law as opposed to the order itself being unlawful are
22 all signs that Congress intended this provision to apply
23 both in the district courts and in the court of appeals.

24 And I would also note that (a)(5), which is
25 a provision the government pointed to, was not in the

1 1996 statute it was added in 2005, and the
2 constitutionality of that provision continues to be
3 litigated. And, moreover, there are habeas cases in the
4 district courts that persist where (f)(2) has real
5 application and where Congress's intent that an
6 injunction, not a stay, but an injunction be very
7 difficult to obtain --

8 JUSTICE BREYER: 1225?

9 MS. HARRISON: Yes, sir.

10 JUSTICE BREYER: Was I right or wrong?

11 MS. HARRISON: I believe you are right, and
12 I believe that --

13 JUSTICE BREYER: Are you sure? Because --
14 (Laughter.)

15 JUSTICE BREYER: -- you didn't mention it.
16 If I am right, why didn't you mention it?

17 MS. HARRISON: I did not mention it in my
18 opening, Your Honor, and that was my error. I believe
19 habeas is one example -- and habeas in the expedited
20 removal context, where the provisions would apply. And
21 -- and I think, as this court made clear in Saint Cyr,
22 Congress did intend for some habeas actions to persist
23 in the '96 IIRIRA statute. And in those cases, (f)(2)
24 would apply, would have real impact.

25 And I would also note that if the Court were

1 to accept the government's interpretation of the term
2 "enjoin," that it only applies in stays and that doesn't
3 have application elsewhere, then you would be required
4 to interpret Congress's use of the word "enjoin" to be
5 not really inclusive of stays but as coterminous with
6 the word "stay." But Congress didn't use the word
7 "stay" in (f)(2). It used the word "enjoin." And the
8 fact that that word choice was different from the word
9 it used in (b)(3)(B) I think is a clear indication that
10 Congress had something different. It didn't
11 cross-reference stay and didn't use the word "stays,"
12 and it articulated a standard that seems more
13 appropriate for district courts adjudicating permanent
14 injunctive relief than courts of appeals hearing a
15 temporary application for a stay.

16 JUSTICE GINSBURG: But the standard you
17 think should apply under (b)(3)(B) is a standard that
18 describes as applicable to temporary injunctions. The
19 word -- there is substantial likelihood of success on
20 the merits and irreparable harm -- that is the standard
21 preliminary injunction, not preliminary stay. The
22 preliminary injunction standard. So the two words
23 certainly overlap.

24 MS. HARRISON: Yes, Your Honor. There is
25 overlap, and the standard that is applied by the courts,

1 if there is no statute to the contrary, is the same.
2 But here Congress expressed an intention to treat
3 injunctive relief differently and articulated a standard
4 that was higher than injunctive relief.

5 JUSTICE STEVENS: May I just ask this one
6 real quick: Do you understand -- is your understanding
7 that the government's interpretation of the statute that
8 our stay in this case violated the statute?

9 MS. HARRISON: Yes, Your Honor.

10 CHIEF JUSTICE ROBERTS: Thank you, Ms.
11 Harrison.

12 General Kneedler, Ms. Harrison, the Court
13 entered a very expedited briefing and arguments schedule
14 in this case that unfortunately fell over the holiday
15 season, and we appreciate very much that this must have
16 imposed a burden on you had and your colleagues. Thank
17 you.

18 The case is submitted.

19 (Whereupon, at 2:02 p.m., the case in the
20 above-entitled matter was submitted.)

21

22

23

24

25

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