IN THE SUPREME COURT OF THE UNITED STATES

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JEAN MARC NKEN, :

Petitioner :

v. : No. 08-681

MARK R. FILIP, :

ACTING ATTORNEY GENERAL. :

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Washington, D.C.

Wednesday, January 21, 2009

The above-entitled matter came on for oral argument before the Supreme Court of the United States at 1:00 p.m.

APPEARANCES:

LINDSAY C. HARRISON, ESQ., Washington, D.C.; on behalf of the Petitioner.

GEN. EDWIN S. KNEEDLER, ESQ., Deputy Solicitor General, Department of Justice, Washington, D.C.; on behalf of the Respondent.

C O N T E N T S

P R O C E E D I N G S

(1:00 p.m.)

CHIEF JUSTICE ROBERTS: We'll hear argument next in Nken v. Phillips.

Ms. Harrison.

ORAL ARGUMENT OF LINDSAY C. HARRISON

ON BEHALF OF THE PETITIONER

MS. HARRISON: Thank you, Mr. Chief Justice, and may it please the Court:

In 1996 Congress provided in 8 U.S.C. 1252(b)(3)(B) that courts may stay an alien's order of removal pending appeal. The question in this case is whether Congress intended that temporary stays of removal be governed by the normal standards applicable to States or instead by the special standard that Congress separately set forth for injunctions in 1252(f)(2). There are three primary reasons why the normal stay standard should apply.

First, Congress used different words to describe these different forms of relief, "stay" in (b)(3)(B) and "enjoin" in (f)(2). Congress used different words because it saw these forms of relief as different.

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

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

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

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

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

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

MS. HARRISON: I have seen no empirical --

CHIEF JUSTICE ROBERTS: Okay.

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

rule.

MS. HARRISON: That's --

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

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

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

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

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

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

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

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

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

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

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

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

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

doesn't seem like what Congress had in --

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

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

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

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

CHIEF JUSTICE ROBERTS: Where does it say that?

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

CHIEF JUSTICE ROBERTS: Okay.

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

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

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

second time.

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

JUSTICE SCALIA: That's true.

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

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

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

JUSTICE GINSBURG: How can that be?

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

amnesty statute.

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

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

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

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

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

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

some reason why --

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

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

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

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

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

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

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

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

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

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

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

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

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

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

MS. HARRISON: Both, Your Honor.

CHIEF JUSTICE ROBERTS: Both standards?

MS. HARRISON: Yes.

CHIEF JUSTICE ROBERTS: Same thing. And you

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

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

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

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

MS. HARRISON: Correct.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

JUSTICE GINSBURG: It was changing conditions.

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

JUSTICE GINSBURG: Alleged changing conditions.

MS. HARRISON: Yes, Your Honor.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

I would like to reserve the remainder of my time.

CHIEF JUSTICE ROBERTS: Thank you, counsel.

General Kneedler.

ORAL ARGUMENT OF EDWIN S. KNEEDLER

ON BEHALF OF THE RESPONDENT

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

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

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

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

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

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

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

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

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

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

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

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

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

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

All right.

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

Now, we look at that, it says in there it's subsection (e) gives you judicial review of that. Now we look at the thing you cited which is (5) -- (a)(5), and you read it completely correctly, but you left out these words "except as provided in subsection (e)."

So now we go to subsection (e). And lo and behold, what is subsection (e) talking about, but just the case I have mentioned. It talks about -- it talks about judicial review for orders under 1225(b)(1). Now, those are the people who knock at the door and they want asylum. And there is some procedures for them.

So, now we look at (e) to see what are the procedures for them. And lo and behold, right there in (2), it says you can have a habeas corpus procedure as to certain matters, whether he is an alien, whether he has been admitted as a refugee, et cetera. So it says there are some you can have habeas corpus.

So I imagine a person who has been ordered removed under (e). All right. Now it says you can have a habeas corpus and now the judge says good-bye. And they go to a reviewing court, which is going to be a habeas corpus court, and that court decides, the alien is right, I am going to issue an injunction.

Now, just in case he's thinking that, in the very next section (f), what we have are two provisions, (f)(1) that says if his case is a case involving mass action against the whole thing, you can't enter an injunction.

And then we look at (2), and it says if his is just a normal case, you can't enter an injunction unless it meets this specific standard. So I looked at that. And I admit this is pretty quick, and I thought it's (e) and it's (f), and (f) is dealing with (e), (f)(2). And it makes perfect sense. They don't want a habeas corpus judge telling that immigration judge what to do with the guy knocking on the door and saying "I need asylum," unless they meet clear and present danger -- clear and -- whatever it is, clear and present -- yeah.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

GEN. KNEEDLER: No, I think (f)(2) -- (f)(2) is -- is a necessary condition for granting relief. It doesn't -- it doesn't eliminate the requirement that an alien show -- show harm from the -- from the removal. It's -- it's a condition --

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

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

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

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

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

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

GEN. KNEEDLER: Yes. But -- but in no event, even on review of the final order, is the court reviewing for a preponderance of the evidence; the court is reviewing the case on the administrative record under the substantial evidence test, in which case the court at final judgment cannot set aside the -- the agency order, except -- unless it finds that no reasonable factfinder could conclude that the order should stand. That's the substantial evidence test.

JUSTICE SOUTER: But the ultimate -- the ultimate standard to which they look is a preponderance standard. In other words, the substantial evidence standard is keyed to what a reasonable factfinder could find reasonably, based upon substantial evidence. Is the substantial evidence sufficient for such a factfinder to find by a preponderance that this person has failed to meet, or, put it the other way around, that the factfinder has unreasonably failed to find that

the Petitioner has met the standard?

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

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

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

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

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

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

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

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

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

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

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

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

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

GEN. KNEEDLER: And there are others.

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

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

JUSTICE BREYER: Right.

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

to it.

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

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

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

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

GEN. KNEEDLER: Well, I --

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

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

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

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

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

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

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

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

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

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

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

courts ordered otherwise.

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

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

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

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

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

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

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

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

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

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

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

already previously entered.

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

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

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

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

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

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

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

JUSTICE GINSBURG: May I ask just a technical point?

GEN. KNEEDLER: Yes.

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

GEN. KNEEDLER: Yes.

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

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

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

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

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

JUSTICE GINSBURG: May I just ask a question?

GEN. KNEEDLER: Yes.

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

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

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

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

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

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

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

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

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

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

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

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

(Laughter.)

GEN. KNEEDLER: It feels like it.

CHIEF JUSTICE ROBERTS: Thank you, General Kneedler.

Ms. Harrison, you have seven minutes remaining.

REBUTTAL ARGUMENT OF LINDSAY C. HARRISON

ON BEHALF OF THE PETITIONER

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

I'd like to start with the point that the government contends that this Court or any court of appeals could impose a stay to consider the stay motion. And, respectfully, I don't believe that is consistent with the text of (f)(2), and I think that the fact that the government must stray from the text is a sign of how absurd the results would be if (f)(2) were applied to stays.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

JUSTICE BREYER: 1225?

MS. HARRISON: Yes, sir.

JUSTICE BREYER: Was I right or wrong?

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

JUSTICE BREYER: Are you sure? Because --

(Laughter.)

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

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

And I would also note that if the Court were

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

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

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

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

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

MS. HARRISON: Yes, Your Honor.

CHIEF JUSTICE ROBERTS: Thank you, Ms. Harrison.

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

The case is submitted.

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