

HUGO ABISAI  
MONSALVO  
VELAZQUEZ,  
Petitioner, v. MERRICK  
B. GARLAND,  
ATTORNEY GENERAL,  
Respondent  
Oral Argument – November 12,  
2024

John G. Roberts, Jr.

We'll hear argument first this morning in Case 23-929, Velazquez versus Garland.

Mr. Cedrone.

Gerard J. Cedrone

Thank you, Mr. Chief Justice, and may it please the Court: The 60-day time period in the voluntary departure statute works like any routine legal time period.

When the last day falls on a weekend or holiday, the period continues to run until the next business day.

Congress would have expected people to read the statute this way.

In 1996, common law principles, case law, established rules and regulations, and years of consistent practice all pointed to that interpretation.

If Congress had meant to deviate from that traditional understanding, it would have said so.

Even the government now acknowledges that other deadlines in the same section of IIRIRA follow the traditional rule in light of a long-standing immigration regulation defining the word "day." So the only way to adopt the government's interpretation is to believe that Congress used two different meanings of the word "day" in the same section of the same statute.

There's simply no indication that Congress took that kind of split approach.

The government's interpretation would also spell chaos for regulatory definitions and deadlines.

In the government's view, even though Section 1001.1(h) provides a single definition for the word "day," that -- the immigration regulations actually use that term to mean different things throughout.

And so the only way to tell which deadline follows which time calculation rule is to trace each deadline's history back through earlier and earlier versions of the code and Code of Federal Regulations.

Answering a question as simple as does my deadline fall on Saturday or Monday shouldn't depend on this kind of complex historical investigation, especially when deportation's on the line.

The default rule for weekends and holidays exists precisely to avoid this kind of case-by-case guesswork. The government identifies no reason and certainly no reason grounded in the text of the statute to depart from that traditional rule.

The Court should read Section 1229c like any other statute and follow the usual rule for weekends and holidays.

I welcome the Court's questions.

Clarence Thomas

1252(a) speaks in terms of a removal -- final removal order.

Is there one involved in this case?

Gerard J. Cedrone

There is, Your Honor. And I would make two points.

First, as you point out, subsection (a)(1) speaks in terms of judicial review of a final order of removal.

That's exactly what we're seeking.

If we win in this case, the final order of removal that binds our client will say one thing.

If we lose, it will say another.

And the second point is this Court has long recognized that BIA decisions on reopening and reconsideration are separate final orders that require a separate petition and are separately reviewable in the courts of appeals.

Clarence Thomas

It seems that you're saying that a collateral consequence to a ruling on this is a part of the final order.

How is that?

Gerard J. Cedrone

So the voluntary --

Clarence Thomas

The order itself is not here, right?

Gerard J. Cedrone

I disagree, Your Honor, in two respects.

So, one, as I just pointed out, the Court has consistently explained that a reconsideration or reopening decision is --

Clarence Thomas

I thought we were talking about the 60 -- whether there are 60 days or 62 days to leave for -- voluntarily.

Gerard J. Cedrone

That's right, Your Honor.

And the voluntary departure order at pages 42a and 43a of the Petition Appendix spell out the consequences if, on the one hand, our client files a timely motion to reopen or, on the other hand, if our client fails to depart the country or files an untimely motion.

There are two alternate orders of removal waiting in the wings, one with harsh penalties, one without, and this timeliness determination directly affects which of those alternate orders of removal will take effect.

John G. Roberts, Jr.

You argue, and just did, that this is a very simple question. But a good part of your argument is taking regulatory provisions and applying them to the statute.

You say that that is the appropriate prism through which to read the statute.

The prism test doesn't sound very straightforward and clear to me.

Gerard J. Cedrone

What you have in this case is everything pointing in the same direction.

So start with the regulation. Section 1001.1 provides a definition of "day" that has governed since the creation of the INA and that remained unchanged for a decade before this particular provision passed.

And the government even acknowledges now that other deadlines in the same section of IIRIRA follow that definition.

So somebody picking up the statute in 1996 would have read the statute in light of that definition.

But it's not just the regulation.

As we point out, that regulation codifies an earlier practice that's reflected in Civil Rule 6(a), which this Court and the BIA have looked to.

That rule itself codifies earlier decisions, like this Court's decision in *Street*, that recognized a general principle that when a power can be exercised up until a certain day, if that day is a Sunday or holiday, it can be exercised the next business day.

And those decisions recognized an even -- or -- or encapsulated --

John G. Roberts, Jr.

The --

Gerard J. Cedrone

--an even --

John G. Roberts, Jr.

I'm sorry, go ahead.

Gerard J. Cedrone

Encapsulated an even earlier common law principle.

And so somebody reading this statute in '96 would have had no reason to deviate from all of those things, pointing to the same interpretation.

John G. Roberts, Jr.

But your argument evolves, right? I mean, as I read your brief anyway, the Sunday provision was pretty clear early on, but then Saturday kind of crept in there somewhere along the way.

And so, usually, we think of statutory -- timing deadlines as not sort of flexible in that way.

Gerard J. Cedrone

Two points, Your Honor. First, I would just return to the regulation and say that that definition, which was in place for years before this statute passed, encapsulated Saturday, and that's codified --

John G. Roberts, Jr.

Right, but we're talking about the statute, so --

Gerard J. Cedrone

Right, and I think that regulation encapsulates an earlier principle that has not changed over time.

So the way I would frame the principle generally is that there are certain days, you can call them -- certain legally recognized days of rest.

You can call them non-business days.

You can use the Latin term *dies non juridicus*.

That principle recognizes that when a deadline or time period expires on one of those legally recognized days of rest, it carries over to the next day.

But the days that are legally recognized days of rest can change over time. And so, with respect to Saturday, of course, there was a change in the 20th century as Saturday came to be recognized as a day that's akin to Sunday, on par with Sunday. But the prin --- the underlying principle that --

Sonia Sotomayor

Counsel, why are you going so far? You don't need the common law.

Common law provides a background for what Congress was doing when it passed this law, correct?

Gerard J. Cedrone

Yes.

Sonia Sotomayor

And your answer is that when a word comes with old soil, you transport the old soil.

Gerard J. Cedrone

That's right.

Sonia Sotomayor

All right.

And the old soil here, even according to the government, was that "day" was defined according to the regulation.

Gerard J. Cedrone

That's right.

Sonia Sotomayor

All right.

Now the question is do we follow the government's new argument that there's somehow a difference in how "day" is defined with respect to court obligations or -- I -- I don't know where they get the word "substantive" from -- or substantive obligations, correct?

Gerard J. Cedrone

That's right.

Sonia Sotomayor

But, if I look at the old soil, why don't I look at the law itself, the INA law, and when Congress wanted to talk about calendar days, it used "calendar day" instead of the word "day," correct? I'm looking at 8 U.S.C. 1228(b)(3), which has to do with the Attorney -- Attorney General not executing any order for expedited removal until 14 calendar days have passed, correct?

Gerard J. Cedrone

I confess I'm not familiar with that particular provision, but our position generally is that Congress can deviate from this principle and it --

Sonia Sotomayor

And something like this would be a clear deviation?

Gerard J. Cedrone

I think it probably would be.

Sonia Sotomayor

All right.

Now am I -- I want to go back to the jurisdictional question that Justice Thomas started with.

The government didn't raise a jurisdictional -- this jurisdictional point before the Tenth Circuit, did it?

Gerard J. Cedrone

It did not.

Sonia Sotomayor

And it raised it in its petition for opposition, but you didn't reply to it until your reply, correct?

Gerard J. Cedrone

That's correct.

Sonia Sotomayor

Has this percolated among other courts yet?

Gerard J. Cedrone

I don't believe this particular issue -- well, I should say this.

I don't think it's really disputed that there's jurisdiction --

Sonia Sotomayor

I agree --

Gerard J. Cedrone

--in this case, so no.

Sonia Sotomayor

-- because, after Mata, we said motions to reconsider have an independent jurisdictional basis, correct?

Gerard J. Cedrone

That's right.

Sonia Sotomayor

So hard to think why anybody would think they didn't have jurisdiction.

But, if we were to accept the government's ruling, do you know what other consequences this would have?

Gerard J. Cedrone

I think, if you accept the government's view of jurisdiction in this case, it would be either a real sea change for immigration law because it would mean that reopening and reconsideration decisions aren't separately reviewable, as this Court has consistently pointed out in *Reyes Mata*, in *Kucana* against *Holder* and other cases --

Sonia Sotomayor

What --

Gerard J. Cedrone

-- or --

Sonia Sotomayor

-- what other -- the government says this is a one-off case -- I don't know whether we would have granted cert if we knew it was one-off to start with -- that everybody else appeals the order to remove, but you didn't.

So I guess my question is, assuming we rule the way the government wants us to, do we know fully the consequences of that?

Gerard J. Cedrone

I think it would be a lot of make-way arguments in the courts of appeals.

The government doesn't dispute, nor could it, that courts of appeals have jurisdiction to review --

Sonia Sotomayor

Counsel, stop going to the substance.

I'm trying to ask you a question.

Given that this is a new issue before us, isn't the best way to deal with it is to let the court below address what consequences there are --

Gerard J. Cedrone

I -- I --



Sonia Sotomayor

-- to this jurisdictional issue?

Gerard J. Cedrone

I agree, the Court doesn't need to weigh into the jurisdictional issue beyond recognizing that this case falls within 1252(a)(1).

I -- I do think there would be confusion if the Court were to side with the government because the government doesn't dispute that courts of appeals can review this exact issue.

It just thinks you have to bundle it with other arguments.

There's nothing in the text of the statute that requires it.

Neil Gorsuch

Well, I think, as I understood Justice Sotomayor, Mr. Cedrone, one of -- what she was asking you to talk about was what collateral consequences, errors that the government might make in a reopening petition that's denied that would be unreviewable.

I mean, one consequence here would be say you were clearly within the 60 days, there was no doubt about it, and the government said you weren't.

That would be unreviewable, I think, on the government's jurisdictional theory because it wouldn't affect the order of -- it wouldn't affect the removability of your client, even though it would impose a 10-year bar, outside the country, erroneously.

Are there other such consequences like that that you can think of?

Gerard J. Cedrone

I think there are all sorts of things that get decided in reopening or reconsideration decisions that are distinct from removability but nevertheless go to the terms of your final order of removal.

So people -- Congress contemplated that people would seek reopening often years after a final order of removal because of changed factual circumstances or other things. And under subsection (b)(9), the statute contemplates that all of these things will get funneled into a proceeding in the court of appeals.

And so to say that there's -- that this should have been raised differently doesn't account for the fact that this is the proceeding in which these issues should be raised.

Turning --

Amy Coney Barrett

Mr. Cedrone --

Gerard J. Cedrone

Oh.

Amy Coney Barrett

-- can I ask you one question about jurisdiction and one question about the merits.

On jurisdiction, Justice Sotomayor pointed out that this seems to be a one-off case.

I just want to clarify with you -- and the government can speak to this too if the answer is different -- how often does it happen that someone like your client simply challenges the motion to reconsider and not the other -- the underlying order? Is -- is this very unusual so that this jurisdictional question wouldn't really frequently arise?

Gerard J. Cedrone

I confess that I -- I don't have a sense of the -- the balance of that, other than to say that, as I was just describing, motions to reopen often come up years after the final order of removal and may involve questions of changed factual circumstances or other things that entitle you to relief from removal.

And so I think, on the government's view, this case is a one-off, not in that the government is taking the position that this issue is never reviewable, just that you have to bundle it in your petition with some sort of challenge, however slight, to your removability to seize the court of jurisdiction.

And I don't see any support for that in the statute.

Amy Coney Barrett

Okay.

My question on the merits.

Most of the time when we think about this, and as I understand the regulatory backdrop, when we're thinking about filing something, the reason why it gets bumped over to, say, a Monday from a Saturday is that the court's closed.

But could your client have departed on a Saturday? It just -- that -- that strikes me as the difference here, that this isn't governing filing dates or something that you're doing. It's just saying that your authorization to be in the country expires, you know, at that 60-day mark.

And it's not that the court was closed.

I mean, your client could have departed, right?

Gerard J. Cedrone

That's true.

I can't dispute the factual premise that often somebody can get on a plane or drive across the border on a Saturday.

This principle is deeper than that, and there are several indications that this principle is not just about court closures or filings.

I think the best evidence of that is to go -- I'll start with the regulation and work outwards.

So the regulatory definition of "day" in Section 1001.1 says that definition of "day," which builds in the traditional rule, applies to any action in immigration regulations.

Even on the government's theory of how that deadline applies, that principle applies to things like getting married to maintain your visa status, regulatory deadlines for getting fingerprinted after you enter the country, regulatory deadlines for taking a citizenship test.

So these are all things that are not filing, not court-related. Working outward from there, Rule 6(a), as we pointed out, also applies to any applicable statute and any court order.

And so that, of course, covers things like filing in district court, but it also covers things -- we give examples at page 18 of our reply brief -- of injunctions that a court might enter imposing substantive obligations on a party.

So say you're a defendant in a trade secrets suit.

You're found liable.

The court might enter an order at the end of the case saying: Defendant, you have 30 days to turn over the misappropriated property.

Under Rule 6(a), that 30-day deadline clearly follows the traditional rule.

And then working even outward from there, we have examples like -- at page 28 of our brief, cases like the Aetna case applying this traditional principle to deadlines under ERISA, which bind private parties, private plans, requires them to take all sorts of actions vis -- vis each other outside the context of litigation.

And then this Court's decision in *Street*, which applied this principle to a statute that sets time limits on the President's authority to take action, as we explain in the brief, that statute in *Street* is parallel to this statute.

Section 1229c gives the Attorney General the authority to grant voluntary departure and then places a time limit on it.

The statute in *Street* worked similarly.

The Court applied the traditional rule there.

It should apply the traditional rule here.

Samuel A. Alito, Jr.

Counsel, you --

Elena Kagan

Just for this --

Samuel A. Alito, Jr.

-- counsel, you have an argument that there should be a rule that applies in all situations, and it just causes a lot of confusion if it's not uniform.

I -- I get that.

But put all of that aside.

Can you think of any practical reason why Congress would have wanted to give a two-day extension when what's involved is something that can be done just as easily on a Saturday or a Sunday as a Monday? There were reasons for the rules about filing, because courts were closed.

Some of the things that you mentioned are things that would be more difficult perhaps to accomplish on a weekend.

Originally, perhaps the rule for Sunday was based on religion.

You might argue that it should be extended to Saturday if your counsel -- if your -- your client has a -- if that is that -- is -- is a holy day, a special day for your particular client.

But I can't think of any practical reason why there should be a rule -- a different rule for departing the country.

Gerard J. Cedrone

Yeah.

So I think there's two -- two practical reasons, one more substantive and one more procedural.

This traditional rule, in our view, stems from a general principle that there are certain legally set-aside days where presumptively at least the government can't ask people to do stuff.

And so the persistence of this rule, even in the face of 24/7 e-filing, shows that this is a principle that's deeper than just impracticability, and --

Samuel A. Alito, Jr.

Well, I mean, that's -- that doesn't strike me as a practical reason. Why can't they say: You've got to get out of the country in 60 days? You can get out of the country just as easily on a Saturday or a Sunday as you can on a Monday.

Gerard J. Cedrone

I'll mention just as an aside some of the amicus briefs go into the fact that it -- it may well be more difficult to travel on the weekends.

But I guess putting that aside, the second practical reason, the procedural one, is that we're talking about deadlines with severe consequences.

The question of how and when your deadline runs should be easily understood and easily calculated, especially when there are severe consequences.

And on the government's view, you have to undertake a case-by-case determination for each deadline in the regulations and each deadline in the INA.

Maybe I could give an example.

So there's a 180-day deadline in the regulations, Section 1003.23, a 180-day for seeking relief from in absentia removal.

That statutory dead -- that regulatory deadline doesn't cross-reference the statute.

So you might think, if you pick up the regulation and pick up the definition, you know how it applies.

But the government --

Samuel A. Alito, Jr.

Well, but that -- that -- in seeking relief, that -- that's requiring you to file some sort of a document.

Gerard J. Cedrone

That's true, although, as my colloquy with Justice Barrett explained, there are other deadlines in the regulations, like things like getting married and getting fingerprinted.

And the point is that on the government's view, even though that regulation -- regulatory deadline is facially clear, you need to go to the INA and see if there's a statutory analogue for that 180-day deadline, it turns out there is in Section 1229a.

But even then you're not done.

On the government's view, now you have to construct a family tree for the statutory deadline and the regulatory deadline and see which one came first.

Only then can you figure out if your deadline is on a Saturday or Monday.

Samuel A. Alito, Jr.

Right.

I may understand it.

This is the argument for a uniform rule.

It makes things -- it makes things simpler.

So I -- I -- I get that.

I get that.

Gerard J. Cedrone

Yeah, and I think --

Sonia Sotomayor

Counsel, it's not only that it's simpler, but the INA is filled with provisions like this where the individual's activities are tied to the government's activities, correct?

Gerard J. Cedrone

That's right.

Sonia Sotomayor

And, here, Section 1302, going back to Justice Barrett's question in part, says that when someone's visiting the United States, if they're going to stay longer than 30 days, it says -- the provision states that noncitizens who remain in the U.S. for 30 days or longer must apply for registration and be fingerprinted before the expiration of such 30 days.

So that's very clear like our 60 days here.

Under the government's theory, I don't know whether they can be fingerprinted by the government on Saturday or Sunday.

We'd have to figure that out, correct?

Gerard J. Cedrone

Right.

Sonia Sotomayor

We'd have to figure out whether the agency is open for them to register on Saturday and Sunday, correct?

Gerard J. Cedrone

Right.

Sonia Sotomayor

So these are the practical difficulties. With respect to the issue here, yes, there's a obligation on the alien to depart, but there's also a responsibility tied to the motion to reopen, correct --

Gerard J. Cedrone

That's exact --

Sonia Sotomayor

-- which is a court activity?

Gerard J. Cedrone

That's exactly right.

Sonia Sotomayor

So it's not simply an obligation that's tied only to the individual.

If the individual does something, then the government has an obligation to -- to dismiss their order of removal and give them

additional time, correct?

Gerard J. Cedrone

That's right.

And I think it's telling that the regulations tie this departure deadline to a filing deadline.

It shows that in the government's view at least before, these things maybe aren't that different at all.

But the confusion, as your questioning highlights, there are hundreds of instances of the word "day" in Title 8 of the Code of Federal Regulations and dozens, if not a couple hundred, of instances in the INA. And in the government's view that for each of those, not only -- that the statute and regulations require somebody for each of those to undertake this intricate analysis of statutory and legislative history just doesn't make sense, especially -- I mean, it does -- it's hard enough for lawyers to figure out in an individual case an individual deadline under the government's view, is it Saturday or Monday.

The idea that pro se noncitizens --

Elena Kagan

Do you know --

Samuel A. Alito, Jr.

Are you seriously -- oh, no, go ahead.

Elena Kagan

No, go ahead.

Samuel A. Alito, Jr.

Do you seriously think that there are people in the position of your client who rely on this and say, well, this is really important for me to get out of the country or withdraw my -- my acquiescence in voluntary departure within 60 days, but, wow, I read this, so I've got another two days? I mean, seriously?

Gerard J. Cedrone

Seriously.

And let me make three points.

(Laughter.)



Gerard J. Cedrone

So, first, there are plenty of immigration organizations that provide guidance to noncitizens about how deadlines apply.

Secondly, that accords with --

Samuel A. Alito, Jr.

I mean, if you were providing advice, would you say, okay, you know, you've got the extra two days? Would you?

Gerard J. Cedrone

I mean, if the government's position is adopted in this case, certainly not, but I think, in the absence of that, everything points --

Samuel A. Alito, Jr.

Well, with how, you know, the way things are -- were at the time when -- when this came into play, would you say, well, you've got the extra two days?

Gerard J. Cedrone

Yes, I would, and -- and let me make two other points.

One is that for a noncitizen in immigration proceedings, even on the government's view, basically, every deadline up until this final order follows the traditional rule.

So, if you're a noncitizen going through immigration proceedings, you know my brief is due on a Saturday; that means it's due on a Monday.

I need to file an appeal on a Saturday; that means it's due on a Monday.

It's only this very last deadline that follows a different rule.

So I do think that would be a trap for the unwary.

And the last point I would make is that, yes, I think, when you have everything consistently pointing in the same way not just in the law, but the D.C. Circuit made this point in *Sherwood*, this rule is not just a lawyerly contrivance.

It's also meant to capture the way that things work out in the world, in business, in society.

And so just one concrete example.

The motion that was filed in this case was sent by FedEx priority overnight on a Friday.

That means it gets there Monday morning.

And I'm not suggesting that anything in our case turns on the vagaries of FedEx's shipping policies.

It's just to say that even in business, overnight on a Friday sometimes means Monday.

This is a principle that applies across the board.

Elena Kagan

Do you know whether the government, in fact, applies this rollover rule to anything that's not a filing deadline? I mean, you mentioned fingerprinting.

You mentioned marriage.

But what is the government's policy as to anything that's not a file -- filing deadline?

Gerard J. Cedrone

I think the AILA amicus brief gets into this most clearly.

It provides examples of immigration judges applying this day in and day out.

I think the -- most of the examples we've collected are actually in the voluntary departure context, but I -- I think there are other examples in that brief as well of situations where this applies.

And I should point out this is -- in the voluntary departure context, for example, it's a 60-day statutory ceiling.

So an immigration judge in an individual case could, for example, set the deadline earlier or set the deadline on a date certain.

This is just about the rule that applies, absent another indication.

John G. Roberts, Jr.

Thank you, counsel.

Justice Thomas, anything further? Justice Alito? Justice Sotomayor? Justice Gorsuch, anything? No? Justice Kavanaugh? Justice Barrett? Justice Jackson?

Ketanji Brown Jackson

Can I just ask, so it's a trap for the unwary because the filing of the motion triggers the extension, is that right?

Gerard J. Cedrone

In our view, the departure deadline and the motion deadline move together.

So it's -- it's -- the 60-day voluntary departure deadline?

Ketanji Brown Jackson

Yeah.

Gerard J. Cedrone

On the government's view, operates differently than every other deadline that's --

Ketanji Brown Jackson

Yeah.

No, I understand that, but I guess I was -- I was trying to -- I hear Justice Alito raising the point that if a person is told they have 60 days to get out of the country, when we're getting to day 58, 59, or whatever, they should be ready to go.

And so are they getting two extra days or, like, what is happening? And I guess your response is that the way that the rules operate, if that person files a motion, that motion then needs to be resolved by the court and the person can stay until that happens.

So what's really the trap is that ordinarily, when you file a motion, you get to the following Monday if the deadline is over the weekend, and that's the way it works in every other scenario.

And yet, here, you'd be filing the motion and it wouldn't.

Gerard J. Cedrone

That's exactly right.

I think that captures it, and that's what happened to our client in this case with quite severe consequences if the government's view is adopted.

Ketanji Brown Jackson

Thank you.

John G. Roberts, Jr.

Thank you, counsel.

Anthony A. Yang

Mr. Chief Justice, and may it please the Court: Section 1229c's maximum 60-day period for voluntary departure is not extended when the last day falls on a weekend or a holiday.

The requirement to arrange for travel and to depart the United States involves primary conduct in the real world.

Nothing prevents departure on weekends or holidays, when many prefer to travel.

And unlike contexts involving the timing of litigation-based or administrative acts before courts or agencies, no tradition by rule or otherwise potentially exists for extending statutory deadlines for primary conduct.

But, first, statutory jurisdiction is lacking in the highly atypical posture here. Section 1252(a)(1) grants jurisdiction to review final orders of removal.

But, in Petitioner's case, it does not involve review of a final order of removal.

It does not affect the validity of a final order of removal.

And it does not even affect how you would implement a final order of removal.

Moreover, Petitioner has other avenues for judicial review of the timing issue here. He could seek APA review after unsuccessfully seeking DHS to return his voluntary departure bond or to adjust his status in the country. Now, on the merits, Section 1229c's test reflects the default rule that the 60-day statutory minimum means what it says.

And neither common law tradition nor the definition of "day" for certain regulations supports a contextual exception here in the context of primary conduct.

Similarly, there are other statutes governing similar primary conduct.

The 90-day period to depart after entering the United States through the visa waiver program or on a K visa to marry does not allow stays of 93 days. The 29-day statutory period for a ship crewman to temporarily land does not extend to 32 days.

And Petitioner identifies no examples of extending statutory periods for engaging in such primary conduct.

Now Section 12 -- the question whether Section 1229c(d)'s penalties apply for failing to depart timely is a distinct question.

Those sanctions apply only if the noncitizen voluntarily fails to depart timely.

But Petitioner has not argued that his departure was not non-voluntary or if it was non-voluntary, and the 60-day period itself cannot be extended. I welcome the Court's questions.

Clarence Thomas

Mr. Yang, did you raise the jurisdictional issue below?

Anthony A. Yang

We raised a different one, not this one.

We raised this issue in our -- in our Op, albeit abbreviated form, but we did in our Op.

Clarence Thomas

Petitioner argues that this is, in fact, non-jurisdictional and that you waived it.

Would you respond to that?

Anthony A. Yang

Yes.

This is jurisdictional.

Section 1252(a)(1) provides for review of a final order of removal, and that's the jurisdictional provision because it applies the Hobbs Act.

The Hobbs Act provision, the -- the jurisdictional provision of the Hobbs Act is Section 2342.

It provides review in the court of appeals of seven distinct types of orders but not orders in the immigration context, only orders from other agencies.

So the way, as Mata recognizes, the way that there is jurisdiction here is 1252(a)(1) grants jurisdiction to review final orders of removal and then just plugs that into the Hobbs Act.

Elena Kagan

And -- and when you say "final order of removal," what do you think that encompasses?

Anthony A. Yang

Yeah, I -- I think there's a few things.

And this is -- after the Court's decision in *Nasrallah*, it is the following.

It is the final order of removal itself.

Elena Kagan

Now what -- what does that mean, "the final order of removal itself"?

Anthony A. Yang

That --

Elena Kagan

Is it --

Anthony A. Yang

Yeah.

Elena Kagan

-- just the determination that somebody ought to be removed, or is it everything else that appears in the final order?

Anthony A. Yang

Not the latter.

We made that argument.

It was rejected in *Nasrallah*. The -- *Nasrallah* says the final order of removal either finds the citizen deportable or orders deportation.

That's it.

Neil Gorsuch

But it also says anything that affects the validity of the final order --

Anthony A. Yang

That -- that's why there's --

Neil Gorsuch

-- doesn't it, Mr. Yang?

Anthony A. Yang

That's only the first category of things.

There are --

Neil Gorsuch

And --and --

Anthony A. Yang

-- issues that affect the validity --

Neil Gorsuch

If I might just finish.

Anthony A. Yang

Sure.

Yeah.

Neil Gorsuch

Thank you.

Anthony A. Yang

Yeah.

Neil Gorsuch

So one provision in this particular final order is that you're going to be barred for 10 years from seeking reentry into the country after -- if --if you don't voluntarily remove yourself within 60 days.

That's actually written in the final order.

And where -- this --this litigation tests the validity of that, doesn't it?

Anthony A. Yang

No.

And --

Neil Gorsuch

Okay.

Why not?

Anthony A. Yang

-- and I'll explain why. These -- this is really important.

Pages 42a and --

Neil Gorsuch

I agree with that.

Anthony A. Yang

--43 -- 42a and 43a of the appendix are what Petitioner relies upon.

That is the tail end of the BIA's decision on the appeal.

Not rehearing, not reconsideration, and not reopening.

It says two orders: Order, appeal dismissed; order, voluntary departure.

Then it has -- these are in bold, you know, all caps.

Neil Gorsuch

I've read it.

It says: Warning.

Anthony A. Yang

But it says: Notice.

It says: Notice, if you fail to voluntarily depart, there are civil penalties --

--

Neil Gorsuch

Yeah.

Anthony A. Yang

-- and you're ineligible.

Neil Gorsuch

Yeah.

Anthony A. Yang

That -- nothing's going to change with that.

That's true.

If you fail to voluntarily depart, that's -- those are -- there are sanctions.

It's just identifying --

Elena Kagan

But the order operates entirely differently under your view versus under Mr. Cedrone's view.



One might say the order operates entirely differently depending on whether one takes the view of the original immigration judge or the later view of the Board.

I mean, this rollover thing makes the order into a different order with different consequences.

Anthony A. Yang

It -- it does not change the order.

The order -- the bottom line of the order and the only thing that these orders ultimately require here that wouldn't allow for judicial review later is this alien -- noncitizen is deportable and shall be removed. That's it, period.

There are collateral consequences, but, as I noted in my intro, those collateral consequences can be challenged separately.

For instance, on every noncitizen who's granted voluntary departure, they must post a monetary bond.

We keep the bond.

If they want the bond back, they simply say: I want my bond back. DHS will adjudicate.

Here, DHS has already said: You violated your -- this is in Footnote 4 of our brief.

You violated the voluntary departure period.

Therefore, we're keeping your bond. They can -- he could challenge -- I don't -- he could challenge that before the agency's administrative process and then seek APA review.

He could, while he's in the country, for instance, seek to adjust status with DHS. DHS would probably say: Can't adjust status, you're barred.

Then you get judicial review of that through normal APA review.

What's happening here is a jurisdictional provision that is designed to review only final orders of removal is being used to review something that has nothing to do with a final order of removal.

Ketanji Brown Jackson

But, Mr. Yang -- Mr. Yang, you -- you -- you, in making that argument, seem to be relying on *Nasrallah* and suggesting that only orders that relate to the removability qualify as affecting the validity.

Anthony A. Yang

Just --

Ketanji Brown Jackson

Am I wrong about that? No?

Anthony A. Yang

I -- I haven't quite finished the -- the categories of things --

Ketanji Brown Jackson

Okay.

Sorry.

Anthony A. Yang

-- that were -- were captured.

There is the final order of removal --

Ketanji Brown Jackson

Okay.

Anthony A. Yang

-- as Nasrallah explains. There are things that affect its validity --

Ketanji Brown Jackson

Okay.

Anthony A. Yang

-- which then merge into the final order.

Ketanji Brown Jackson

Yeah.

Anthony A. Yang

In addition, you can raise issues together with the final order of removal.

And there's -- there's another category which we think is included.

Review of a final order should include rulings that affect how to implement the final order.

For instance --

Neil Gorsuch

Oh, there we go.

Anthony A. Yang

Right.

How to implement the final order.

Neil Gorsuch

There we go.

Yeah. How are you going to implement this final order?

Anthony A. Yang

This order --

Neil Gorsuch

Is -- is the fellow barred from the country for 10 years or not?

Anthony A. Yang

That's not in the final order.

Neil Gorsuch

Oh, it says -- it actually does say "Warning." But, at any rate --  
(Laughter.)

Anthony A. Yang

Thank you.

It -- it -- it -- all that simply does -- the -- the final order says several warnings.

These are all --

Neil Gorsuch

I mean, where do you get all this from 1252? I mean, I thought you were a good textualist, Mr. Yang.

Anthony A. Yang

Well, when I start --

Neil Gorsuch

And it says that we have -- we have authority -- the court of appeals has authority to review final orders of removal.

It -- it -- that's it.

That's what it says.

Anthony A. Yang

That's true.

And it says that judicial review of all other questions -- this is a zipper clause in (b)(9) -- are available only in judicial review of the final -- of a final order under this section.

Neil Gorsuch

All right.

If it's so obvious, how come you didn't raise it below?

Anthony A. Yang

That I -- I can't -- I can't speak to.

Neil Gorsuch

All right.

Neither can I.

Ketanji Brown Jackson

I guess --

Neil Gorsuch

Can we hold -- wait.

Anthony A. Yang

But this is jurisdictional. It's not something that we --

Neil Gorsuch

Why -- why -- why -- is it -- is it -- I mean, "jurisdictional," as Justice Ginsburg used to love to say, is a word of many -- too many meanings.

Is -- is --

Anthony A. Yang

This is the big "J" jurisdictional meaning.

This is -- because 1252(a)(1) only grants jurisdiction through the Hobbs Act to review final orders of removal. And we think you can expand that a little bit by knowing the case has nothing to do with the final order of removal.

It is not -- the final order, it does not affect its validity.

It does not --

Neil Gorsuch

All right.

Ketanji Brown Jackson

Mr. Yang, not only did you not raise it, I thought you affirmatively represented to the Tenth Circuit that there was jurisdiction in this case.

Anthony A. Yang

No.

We said there wasn't but for a different reason.

Ketanji Brown Jackson

You said there wasn't --

Anthony A. Yang

Was not --

Ketanji Brown Jackson

-- but for not -- not for this reason.

Anthony A. Yang

-- for a statute -- statutory prohibition on --

Ketanji Brown Jackson

All right.

So what -- what do you do about the fact that Nasrallah itself recognized that evidentiary rulings merge into final orders? I mean, most --

Anthony A. Yang

Because --

Ketanji Brown Jackson

-- most evidentiary rulings are going to be collateral in the sense that you're talking about.

So why -- why is it that this is not?

Anthony A. Yang

No, because an evidentiary ruling that's -- I mean, if it were -- if the judge admitted something and had said, well, -- 44 this is completely

irrelevant, has nothing to do with anything, maybe that would be the case, but --

Ketanji Brown Jackson

Well, this is not completely irrelevant.

I mean, this, as Justice Gorsuch keeps emphasizing, has to -- imposes serious consequences on -- on the defendant. So what I'm saying is an evidentiary ruling that doesn't go to directly whether or not a person is removable under Nasrallah counts because it's still a part of the final order for the purpose of reviewability.

Anthony A. Yang

The final order here is an order of removal.

It orders -- grants voluntary departure.

The only collateral consequences that arise arise from the decision on reopening and then reconsideration.

But Petitioner's not even seeking reconsideration -- to challenge the reopening decision.

Only through --

Ketanji Brown Jackson

So here -- here's my

Amy Coney Barrett

So would it have mattered if he -- would it matter if he had?

Anthony A. Yang

Yes, because a reopening decision, if --if -- now you can't make a frivolous claim.

I mean, Bell versus Hood and Steel Co. makes clear there's no jurisdiction over frivolous claims.

But, if you have a good -faith claim that you're challenging the motion to reopen, you're move -- moving to reopen and that itself will affect either the validity of the final order or it could affect how the final order is implemented.

Amy Coney Barrett

So what if he had done that here and not just --

Anthony A. Yang

Well, then we would be making --

Amy Coney Barrett

-- not just appealed his --

Anthony A. Yang

-- we wouldn't be making the jurisdictional argument because he would have been arguing that it should have been reopened, one, because I provided sufficient new evidence, as required --

Amy Coney Barrett

Right.

Anthony A. Yang

-- and I'm not barred.

And both of those arguments would be teed up and --

Amy Coney Barrett

Could he have -- 46 challenged the collateral consequences, as Justice Gorsuch was talking about, through a motion to reopen? Is that the government's position?

Anthony A. Yang

No.

Amy Coney Barrett

No? Okay.

Anthony A. Yang

No.

The collateral consequences come up later, right?

Amy Coney Barrett

Okay.

Anthony A. Yang

It comes up when you are denied a benefit or when you don't get your bond, and he can challenge those in those contexts in the country.

Amy Coney Barrett

Okay.

Can he make

Neil Gorsuch

So you can challenge even things that are not having to do with your categories that you just gave me --

Anthony A. Yang

Uh-huh.

Neil Gorsuch

-- so long as you have another challenge that does?

Anthony A. Yang

Yeah.

It's a normal APA challenge, not a challenge to a final order of removal --

Neil Gorsuch

And so, once --

Anthony A. Yang

-- because it would be a DHS decision.

Neil Gorsuch

-- so long -- if he had brought this Niz-Perez challenge, he could have also challenged this determination on the 10 years even though it doesn't fall, in your view, into any of your -- in any of the buckets?

Anthony A. Yang

No, it would because what he would --

Neil Gorsuch

Because I thought your view is I only have jurisdiction to do things that have to do with removability, and this isn't one of them.

Anthony A. Yang

It -- no, it would.

When he challenged -- if he had challenged the motion to reopen by saying proceedings should have reopening -- be reopened, which then has the potential to affect the final order --

Neil Gorsuch



Yeah.

But, in -- in -- in -- in that litigation, a court might say your Niz-Perez argument's no good.

Anthony A. Yang

Sure.

Neil Gorsuch

But you don't have to wait 10 years.

Anthony A. Yang

Sure.

But the fact that you --

Neil Gorsuch

And I have jurisdiction to do that.

Anthony A. Yang

The fact that you lose, might lose, doesn't mean there's not jurisdiction to -- to -- you know, to seek review.

Neil Gorsuch

Let me ask you another question on the merits if I might, and then I'll -- then I'll -- I'll let you go.

Anthony A. Yang

Sure.

Neil Gorsuch

Promise.

Well, maybe not.

(Laughter.)

Anthony A. Yang

I'm happy to be here as long as you'd like to be.

Neil Gorsuch

I take the common law point that it usually has to do with court deadlines.

But your regulation is clear.

It says all, any.

And you've had this regulation for a very long time, and, normally, the government really likes its regulations.

It used to come up here and say we have to defer to them.

Now it comes up here and says we should give them great respect when they're contemporaneous and long-standing, which check both those boxes here, right? So you're --you're running from your regulations.

I mean, it's sort of like garlic in front of a vampire.

You don't want to have anything to do with them.

Anthony A. Yang

Well, I don't know that that's quite right.

The regulation at issue here is not a general definition of "day" throughout the immigration context.

It is limited in -- textually in two specific ways. One, it only --applies only to regulations, not statutes.

Secondly, it applies only when the period of action is provided in the regulation.

And we don't think that applies. Section 1229c is a statutory provision, so 1221(a) --or 1221 --or, sorry, Section 1-1 would not apply.

No regulatory antecedent to which 1-1 would have applied exists.

And the implementing regulations --and this is on page 8a of the appendix to our brief --say that the maximum is 60 days, as set forth in Section 240B of the Act.

It's not saying that the maximum is set forth in the regulations.

It's saying that the Act is what sets forth the -- the maximum.

John G. Roberts, Jr.

Counsel, you began your argument by emphasizing the distinction between this type of deadline and general court deadlines.

I -- I -- I don't quite understand that.

I mean, this is a deadline for the courts as well.

The courts can't exercise jurisdiction if the -- you know, if the -- depending upon how we -- we rule.

I don't know how that's any different than our deadline for -- for filing a cert petition.

I mean, it's -- it affects what the -- you know, outside conduct, but it also binds the court.

Anthony A. Yang

I don't -- it's true that it can have legal consequences, but when I make the distinction between primary conduct in the real world and things that are concerning actions in litigation, things like filing deadlines or other things that are -- that's what I'm talking about.

That's where -- you know, we disagree --

Elena Kagan

So I completely understand the rationale for that, but that appears no place in any statute or in any regulation that you're talking to.

So that's -- I mean -- I mean, that would be an entirely atextual limit on this regulation in particular.

Anthony A. Yang

I don't -- I don't think so because the general rule, the default rule, is the text, and the text, we think, is clear.

The question is whether to seek a contextual exception from the text.

And our point is the exceptions, if they apply, only apply in these other contexts, not conducts -- contexts involving primary conduct.

Elena Kagan

I -- I -- I guess I don't understand this.

I thought that we had been talking about a general regulation that has a rollover principle in it and that says that's the way the agency is going to understand what the word "day" means in this -- you know, when it confronts 60-day periods or 30-day periods or what have you.

And the argument that you are making, sort of filing deadlines versus everything else or things that are about primary conduct versus things that are primarily about court conduct, that just doesn't appear in the agency's own regulation respecting this issue.

Anthony A. Yang

That's true.

The regulation, though, is itself limited only to, one, regulations that use the word "day," and, two, only those that set the time to take action itself, not statutory times to take action.

So, if you're looking for an exception, it doesn't lie there.

That's our point.

And the statute says this period shall not exceed 60 days.

That's 60 days.

I mean --

Ketanji Brown Jackson

But, Mr. Yang --

Anthony A. Yang

-- Sunday is a day.

Ketanji Brown Jackson

-- can --

Anthony A. Yang

Saturday is a day. Holidays.

Ketanji Brown Jackson

-- can I ask you, it -- it -- the period for departure may not exceed 60 days, but where is the authority that says that if you file a motion for reopening or whatnot, you can stay until that motion is -- is decided?

Anthony A. Yang

Oh, no, that's not necessarily the case.

Ketanji Brown Jackson

That's not?

Anthony A. Yang

No.

So what happens is -- this all follows from Dada in 2008 and the regulations that were enacted in response to Dada.

If you file a motion to reopen or a motion to reconsider before --

Ketanji Brown Jackson

The expiration.

Anthony A. Yang

-- the voluntary departure period ends --

Ketanji Brown Jackson

Yeah.

Anthony A. Yang

-- it withdraws your request for voluntary departure.

What happens then is you are immediately subject to an order of deportation.

Ketanji Brown Jackson

I see.

Anthony A. Yang

And we could remove you from the country like that.

Ketanji Brown Jackson

I see.

So --

Anthony A. Yang

We just don't with --

Ketanji Brown Jackson

-- so I guess my question is: Why isn't this then also implicating the courts? Several of my colleagues have sort of raised this.

I mean, if your filing of a particular motion has the consequence of affecting a withdrawal and, therefore, starting the process of actual removal --

Anthony A. Yang

Right.

Ketanji Brown Jackson

-- why wouldn't the deadlines that apply to filing motions --

Anthony A. Yang

Uh-huh.

Ketanji Brown Jackson

-- or the regulations that apply to filing motions be implicated?

Anthony A. Yang

Because the voluntary departure deadline exists regardless of whether any filing is made.

Ketanji Brown Jackson

That's the case of anything.

Anthony A. Yang

No, no, no.

Ketanji Brown Jackson

That's -- that's --

Anthony A. Yang

No, no, no, that's not, because Congress says your time to voluntary depart --

Ketanji Brown Jackson

Mm-hmm.

Anthony A. Yang

--is 60 days, period.

If you do nothing, you've got to voluntarily depart in 60 days.

There's no filing.

And the filing deadline for a motion to reopen is 90 days. It's timely if it's filed -- this motion to -- to file --reopen was timely.

It was within the 90 days.

The voluntary departure deadline is a separate one governing primary conduct.

The fact that the -- the Petitioner wanted to get it in, his motion in, before that separate deadline expired doesn't convert that separate deadline into a filing deadline.

Elena Kagan

Can -- can -- can I -- can I take you back to the jurisdictional question and --

Anthony A. Yang

Sure.

Elena Kagan

-- and make sure that I understand your answer?

Anthony A. Yang

Mm-hmm.

Elena Kagan

If this Petitioner had wanted to challenge the view of timeliness reflected in the denial of the motion to reopen --

Anthony A. Yang

Mm-hmm.

Elena Kagan

-- how would he have done that? He should have taken that straight to court, you're saying?

Anthony A. Yang

Well, he could have done it in -- in multiple ways.

He could have -- if he wanted to do it in the context of the removal proceedings -- not going to the collateral consequences, because, remember, he could challenge the withholding of the bond or he could now move DHS to adjust status and when denied because he didn't --

Elena Kagan

I -- I -- I'm --

Anthony A. Yang

-- that's separate.

Elena Kagan

This is a -- this is a really simple question --

Anthony A. Yang

Sure.

Elena Kagan

-- having to do with this Petitioner --

Anthony A. Yang

Yeah.

Elena Kagan

-- who has just found out that with --

Anthony A. Yang

Yeah.

Elena Kagan

-- very severe consequences --

Anthony A. Yang

Mm-hmm.

Elena Kagan

-- his understanding of what counts as timely conduct is wrong.

And how does he challenge that determination?

Anthony A. Yang

So if --he could challenge the motion to reopen on judicial review.

He could have sought reconsideration and then challenged both the motion to reopen and the motion for reconsideration.

Elena Kagan

Okay.

So let's stop there.

Anthony A. Yang

But it wouldn't have -- okay.

Elena Kagan

He could challenge -- he could challenge it in court, is the first thing.

And then you said the second thing is he could challenge it as long as he included a challenge to his removability.

That was the second thing.

And I guess what I want to say is, I mean, this strikes me as a -- a very strange rule that you're precluding him from doing what actually seems, from the agency's own perspective, the sensible thing.

In other words, he's seeking exhaustion of administrative remedies.



Before he goes to court, he wants to make sure that the agency itself has thought about this question sufficiently.

And then you say, well, he has to attach it to a challenge about removability. But he's saying he doesn't have a challenge about removability.

So you're asking him to make up a completely meritless claim in order to get jurisdiction. And how do either one of those things make sense? This is a man who's really trying to, like, get the agency to focus on this timeliness determination that has just arisen in his -- in the denial of his motion to reopen. He did what I would think the agency would want him to do.

Anthony A. Yang

Well, I will say that where this comes from is the text; that is, there's review only of a final order of removal.

That's 1252(a)(1).

It then goes to *Nasrallah*, which interpreted "final order of removal." Now our argument in *Nasrallah* --

Elena Kagan

Okay.

That's -- that's completely non-responsive to the question that I just asked.

Anthony A. Yang

But why -- our position is following the text and this Court's decisions.

Elena Kagan

Okay.

Well, let me ask you about the text then.

Is this a question of law and fact arising from any action taken or proceeding brought to remove an alien from the United States?

Anthony A. Yang

It is.

And the latter part of that provision --

Elena Kagan

All right.

It is.

Anthony A. Yang

-- if you continue reading --

Elena Kagan

And so what I'm reading is 1252(b)(9) --

Anthony A. Yang

Yeah.

Elena Kagan

-- otherwise known as the zipper clause, and this clearly fits into it.

It is a question of law and fact arising from an action taken or proceeding brought to remove an alien.

And then it says: Any of those questions shall be available only in judicial review of a final order under this section.

Now wouldn't you read that to say that all those other questions that fall into that first part of the provision are, in fact, reviewable --

Anthony A. Yang

Not if there's not a final order.

If there's not review of the final order of removal, it doesn't fall within that -- that's what the text says.

It's available only in judicial review of a final order.

That's --

Ketanji Brown Jackson

But didn't we in Mata --

Elena Kagan

Well, it's -- judicial review of a final order is understood to include all of those questions.

Anthony A. Yang

That was rejected by this Court in Nasrallah.

We argued that the final order included --

Ketanji Brown Jackson

But Nasrallah was not -- was --

Anthony A. Yang

No, no.

We argued that all rulings in the removal proceeding under the zipper clause, that kind of thing goes into a final order.

The Court rejected that.

They said no, no, no, that was under the fotee framework. That all changed.

Now we're going to apply the definition in the INA.

That definition means: A final order of removal either finds a noncitizen deportable or orders deportation.

There's another category, things that affect the validity of that, that merge into the final order.

Ketanji Brown Jackson

Mr.

--Mr. Yang, you keep skipping over Mata, and that's what I don't understand.

You -- you keep going to Nasrallah. But, in Mata, I thought the Court made clear that the INA's grant of jurisdiction over final orders of removal encompasses review of decisions refusing to reopen or reconsider such orders.

Anthony A. Yang

That's true.

Ketanji Brown Jackson

Here, we have a decision refusing to reconsider or reopen. Nasrallah did not involve a decision refusing to reconsider or reopen.

So why doesn't Mata's determination that those kinds of decisions actually do --

Anthony A. Yang

Because Mata recognizes that reopening and reconsideration can be subject to review.

It doesn't say everything.

So, for instance, take an alien who's a -- a -- a soccer fan and says: I want -- I move for reconsideration.

I want you to include in your opinion the statement I'm as good of a soccer player as Lionel Messi.

Now it --

Elena Kagan

I don't think you should trivialize this case, Mr. Yang.

Ketanji Brown Jackson

No, this is actually --and -- and this is --

Anthony A. Yang

No, no, no, no, because it doesn't affect the final order of removal.

Elena Kagan

Well, it is --

Ketanji Brown Jackson

But, Mr. Yang, Mata says that there are certain categories of orders, those that go to reopening and remove -- reconsideration that do count as final orders of removal.

That seems to me to be a simple, clear line that judges can apply when we determine whether or not we have jurisdiction, and it's one that makes sense.

You want us to drill down.

Only certain finals -- only certain orders of reopening or reconsideration count.

Anthony A. Yang

It's hard to avoid the "final order of removal" language because that's where the only jurisdictional grant is.

Ketanji Brown Jackson

I'm not avoiding it. I'm saying Mata interpreted it.

Anthony A. Yang

And the --

Ketanji Brown Jackson

Mata interpreted "final orders of removal" to "encompass review of decisions refusing to reopen or reconsider such orders." And we have --

Anthony A. Yang

And we're not --

Ketanji Brown Jackson

-- such a decision in this case.

What I hear you saying is, yes, but only certain decisions that refuse to reopen or reconsider count, and you want us to look at the extent to which the person, in their application, made certain arguments. It seems like a very technical way to go about this when we have a case that already interprets motions -- or -- or decisions that encompass review of refusing to reopen or reconsider as final orders of removal for this purpose.

Anthony A. Yang

Mata did not say that every motion to reopen and every motion to reconsider, regardless of what it concerns, is subject to the jurisdictional provision.

And our point is most -- most are included.

Ketanji Brown Jackson

But why -- why wouldn't it be? Why wouldn't it be? We -- we are talking about the power of the court --

Anthony A. Yang

Mm-hmm.

Ketanji Brown Jackson

-- to hear a person's claim.

We're not saying whether or not his claim is meritorious, whether or not -- why wouldn't the rule that makes sense, that Congress intended when it was talking about jurisdiction be that the final order of removal and any subsequent attempts to get the court to revisit or get the agency to revisit through a motion for reopening or a motion for reconsideration all fits in the umbrella of things that the court would review?

Anthony A. Yang

Because, when the issue concerns a matter as collateral as this and, in addition --

Ketanji Brown Jackson

It's not collateral because it relates to the final order of removal in the way that Mata indicated.

Anthony A. Yang

And, in addition, where you have judicial review elsewhere, Congress would have thought that those collateral consequences could be pursued but in a different judicial forum in a different way.

It's not unusual here, when --we're talking about removal proceedings, where it doesn't affect the order of removal in any way. It really doesn't.

This is all collateral. This order of removal is unchanged. There's not a word on that page in, what is it, 42 and 43a that would change. Nothing. They say it would change.

But, like, how are you going to change it? Notice: If you fail to voluntarily depart, the following will happen.

That's right, nothing's changing there.

The only collateral consequences arise from the subsequent --

Elena Kagan

Well, but the meaning of that provision has changed.

I mean -- and that provision is in the overall order of removal.

You're insisting on saying that the order of removal is just the --the --the conclusion as to removability.

But, in fact, it has --it makes reference to other matters, including voluntary departure.

And the meaning of the voluntary departure provision, how it's implemented, how it operates on the ground, completely changes depending on whose view of timeliness one adopts.

Anthony A. Yang

The order doesn't change. It's no different than a sentence, a criminal sentence.

If the criminal sentence says: We're going to impose supervised release, and if you commit a federal crime while on supervised release, it's a violation.

That judgment doesn't say you've committed another federal crime.

You've got to wait for a separate order about whether or not you violated the terms of supervised release. That's the same here.

This is simply saying: If the following happens, these are consequences. The -- the separate order that really addresses whether they happened is the motion to reopen, which they're not challenging, and a motion for reconsideration, which they are.

And that's the only thing they're challenging, and it doesn't affect the final order of removal.

I think it's also important to just note the consequences or the penalty that's imposed by c(d) of a monetary sanction or ineligibility for certain relief, like cancellation and adjustment of status, only applies if the noncitizen voluntarily fails to depart in the time period specified.

And the Board has interpreted that provision in a case called Zmijewska.

It's 21 I&N Decision 89.

And the court -- the Board said: You do not voluntarily fail to depart if, through no fault of your own, you're unaware of the grant of voluntary departure or you're physically unable to depart.

So my point by this discursion is to explain that whether or not the noncitizen is subject to these penalties is a separate inquiry.

If, for instance --

Amy Coney Barrett

Mr. Yang, can I -- can I just interrupt --

Anthony A. Yang

Sure.

Amy Coney Barrett

-- and ask you a question.

So you didn't make this argument in the Tenth Circuit.

Have you -- has the government made this in any court?

Anthony A. Yang

This is the -- this is a very rare case, rarely arises, so we've not made it.

And it's also an argument that builds from Nasrallah, which is very recent too.

So the combination of the two, this is the first time that we made it in this case, first in the very -- in a very summary way and now more thoroughly here.

Brett M. Kavanaugh

Can we -- this was not the question we granted cert on.

Anthony A. Yang

Jurisdiction, you're saying?

Brett M. Kavanaugh

Correct, jurisdiction.

Anthony A. Yang

Yeah.

Yeah.

Brett M. Kavanaugh

And if it were easy, then I can see just resolving it.

Anthony A. Yang

Yeah.

Brett M. Kavanaugh

But the questions reveal that maybe it's not so easy.

Anthony A. Yang

Yeah.

Brett M. Kavanaugh

In that circumstance, is the prudent thing to do to -- to vacate and send it back so that the Tenth Circuit can consider the jurisdictional issue in the first instance? To Justice Barrett's question, it hasn't really -- and Justice Sotomayor's earlier, it hasn't really percolated this kind of jurisdictional question, so I'm just trying to figure out what's sensible for us to do.

Anthony A. Yang

Yeah.

We would not object to that.

We also -- we think it's sufficiently clear ourselves as to --



Brett M. Kavanaugh

Right.

Anthony A. Yang

-- but --but, if the Court wants to, there's no harm in sending it back.

You know, percolation --

Brett M. Kavanaugh

I just don't want to make a mistake on something --

Anthony A. Yang

-- percolation helps.

Brett M. Kavanaugh

-- that is jurisdictional and could have ramifications that are unforeseen.

Anthony A. Yang

And we don't object to that.

John G. Roberts, Jr.

Thank you, counsel.

Anthony A. Yang

Thank you.

John G. Roberts, Jr.

Justice Thomas, anything further?

Clarence Thomas

Mr. Yang, you said that Nasrallah was one of the reasons we have this -- this -- this situation in this case now. Would you explain what you mean by that?

Anthony A. Yang

So our position in Nasrallah was that all rulings in a removal proceeding were within the ambit of the term "final order of removal." And we were doing that because there were exclusions of review of final orders of removal.

And the court rejected that argument. The court said: The term "final order of removal" in 1252 is something more limited, relying on the

statutory definition.

It is, one, things that find -- rulings that find the citizen -- noncitizen deportable or order deportation.

Those are -- that's it. Now, in addition, Nasrallah says that things that affect the validity of the final order will merge in the final order.

And we would like to extend that to some other things too.

We think that if you raise an issue together with, under (b)(9), the zipper clause helps you, because it says you can raise it in judicial review of a final order of removal.

But you still have to have a final order of removal you're seeking review of.

And we think things like withholding of removal, where it affects how you implement the final order of removal, even though it doesn't affect the validity of the final order of removal, that's close enough because we need to know how to implement the final order.

That is part of judicial review of the final order of removal under the zipper clause.

So those are the things that we think get covered, but all of them point back to some -- a final order of removal, and the reason is, is because the jurisdictional provision in 1252(a)(1) only grants jurisdiction over review of a final order of removal.

That's it.

John G. Roberts, Jr.

Justice Alito, anything further? Justice Sotomayor?

Sonia Sotomayor

I'd like to go to agency practice.

Anthony A. Yang

Mm-hmm.

Sonia Sotomayor

Justice Gorsuch was right that, most of the time, the agency comes in to defend its practices.

In this very case, the immigration judge told Petitioner that he had the extra two days.

It -- the summary of the March 5th oral ruling says Respondent's application for voluntary departure was granted until May 6th.

That's 62 days from March 5th.

I understand from the amicus brief filed here that that was a consistent practice by immigration judges.

Anthony A. Yang

I'm not sure that's correct, but I don't want to interrupt.

Sonia Sotomayor

But some did.

Anthony A. Yang

Some.

Sonia Sotomayor

Okay.

And --

Anthony A. Yang

And -- and it's binding precedent in the Ninth Circuit.

Sonia Sotomayor

And when did the agency correct that filing?

Anthony A. Yang

Excuse me?

Sonia Sotomayor

When did the BIA issue an actual ruling that said they were wrong?

Anthony A. Yang

Well, it hasn't yet.

In 2007, the BIA's decision in Meza-Vallejos, which is the Ninth Circuit precedential decision on the other side of this split, went the way we said.

In 2007, the Ninth Circuit disagreed and agreed with the position -- with Petitioner, although it's -- it's not quite the same position, but bottom line is basically the same.

Then, in this case, we address it again.

And --

Sonia Sotomayor

Thank you, Mr. --

Anthony A. Yang

--this is fairly rare --

Sonia Sotomayor

Thank you, Mr. Yang.

John G. Roberts, Jr.

Justice Kagan? Justice Gorsuch, anything? Justice Kavanaugh?

Brett M. Kavanaugh

If we do address the jurisdictional issue --

Anthony A. Yang

Mm-hmm.

Brett M. Kavanaugh

-- and if you lose --

Anthony A. Yang

Mm-hmm.

Brett M. Kavanaugh

-- on that --

Anthony A. Yang

Mm-hmm.

Brett M. Kavanaugh

-- what collateral or additional consequences negative from your perspective could ensue, and what language would you want us to include in the opinion so that it does not have those kinds of ripple effects?

Anthony A. Yang

Well, it -- it's a little hard to know.

It will depend on how the Court writes the opinion.

Brett M. Kavanaugh

That's why I'm asking --

Anthony A. Yang

So --

Brett M. Kavanaugh

-- how -- what you think is --

Anthony A. Yang

So I think --

Brett M. Kavanaugh

Maybe this just reinforces my prior question that we shouldn't be doing this, but assume we are doing this.

Anthony A. Yang

Yeah.

Brett M. Kavanaugh

And assume you lose.

Anthony A. Yang

Yeah.

Brett M. Kavanaugh

Then what I don't want to do is --

Anthony A. Yang

Yeah.

Brett M. Kavanaugh

-- write an opinion that has all sorts of ripple effects that we haven't foreseen that you can tell us now don't do that.

Anthony A. Yang

Totally understand.

So I think you would restate the Nasrallah.

Start with Nasrallah, right? You can seek review of a final order of removal that is -- finds the citizen deportable, orders deportation.

Two, you can seek review of rulings that merge into the final order, and the reason they merge is because they affect the validity of the final order of removal.

And I think you can also say that you can review things together with the final order of removal under the zipper clause, (b)(9), but, again, you still need to explain how there's a final order of removal being reviewed.

And then you can go even further and say that rulings that affect how to implement the final order, even if it doesn't reflect -- affect the validity of the final order -- so, for instance, can you remove to this country? Quintessential question about withholding or CAT relief, right? Can you -- how do you implement the final order? Those things could be reviewed in and of themselves because they're close enough to a final order.

Now, after you've said all that, because we don't want to carve out these -- those are -- those are, like, important categories.

We -- we came to the conclusion that, well, when you -- that's pretty generous, but there's still this category of things that just doesn't have a relevant relationship to a final order of removal.

Here, where you're seeking to change some language, an opinion with collateral consequences, I'm not sure how you then square the circle and say: And that somehow fits into those categories.

But you'd have to try to do that in some way, I think.

Brett M. Kavanaugh

Thank you.

John G. Roberts, Jr.

Justice Barrett? Justice Jackson?

Ketanji Brown Jackson

Would the ripple effects be just to allow courts to review challenges under circumstances that the government would prefer not to have to defend against? I mean, I don't understand, like -- Justice Kavanaugh says, well, if you lose, with respect to jurisdiction --

Anthony A. Yang

Mm-hmm.

Ketanji Brown Jackson

-- I guess that means that courts would just decide certain kinds of questions that the government thinks the court should not be able to, right?

Anthony A. Yang

I guess it depends on what the court says because we're not just talking about this case.

There are categories --

Ketanji Brown Jackson

Right.

I'm just trying to understand the -- the scope, the blast radius --

Anthony A. Yang

Yeah.

Ketanji Brown Jackson

-- of you losing in this case.

And it just seems to me that you'd be in a situation in which there would be certain kinds of arguments, like the one made here --

Anthony A. Yang

Mm-hmm.

Ketanji Brown Jackson

-- about this -- what you say is a collateral consequence that the court would consider under circumstances in which the government thinks you shouldn't be -- the court should not be able to do so.

Anthony A. Yang

Yeah.

I think the consequences really will flow from how the Court decides what judicial review of a final order of removal is in light of Nasrallah.

Ketanji Brown Jackson

Thank you.

John G. Roberts, Jr.

Thank you, counsel.

Rebuttal, Mr. Cedrone?

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Gerard J. Cedrone

Thank you, Your Honor. Let me say a few words about jurisdiction and then a few words about the merits.

On jurisdiction, the question of whether there's going to be a blast radius from this decision, the government explains at page 18 of its brief that it sees the jurisdictional question in this case as turning on two idiosyncratic features of this case.

What the government has tried to do is construct a view of jurisdiction that disposes of this case and no other.

For the reasons we've explained, that view of jurisdiction is wrong.

The Court doesn't have to do anything unprecedented to recognize as much.

It can start with the text of the statute, which covers a final order of removal.

On the government's view, a final order of removal is just the piece of the order that says you are removable to this country.

I don't know where that comes from.

There is -- the only thing that's unprecedented about jurisdiction is -- in this case is the government's view, which appeared for the first time in a brief in opposition and has continued to evolve, including at the lectern here today.

I heard Mr. Yang say for the first time that there's a voluntariness test that needs to be adjudicated, and he cited a BIA case that I don't believe was in his brief.

The reason for that is this is a rule that's crafted to dispose of this case.

The Court doesn't have to do anything different from what it's already said in previous cases to recognize jurisdiction.

I also heard Mr. Yang say on -- on jurisdiction that jurisdiction is available in a case where the question turns on how the removal order is implemented.

I don't know how to credibly explain to a client that the one -- the \$3,000 fine you get slapped with as you're removed from the country and the 10-year bar on return is not part of how the removal order is implemented.

So I think you can even rely on Mr. Yang's words here today to recognize that there is jurisdiction.



Turning to the merits, the government's main argument is that there's a distinction between statutes and regulations governing private -- primary conduct and statutes and regulations governing filings. I also don't know where that comes from.

If you start with the regulation, Section 1001.1, it says it applies to any action.

The government tries to read that in a way that it only applies to regulatory deadlines and not statutory deadlines.

What the government fails to grapple with is that many statutory deadlines -- excuse me, many regulatory deadlines simply parrot statutory deadlines in Title 8 of the Code of Federal Regulations and in plenty of other regulatory schemes outside of immigration.

We cite examples at page 42 of our brief where other agencies have adopted this same traditional principle.

So, at the end of the day, I think the question is, what would somebody picking up this statute in 1996 have made of it? That person would have had the immigration regulation we've been talking about.

They would have been -- they would have had Rule 6(a), which both this Court and the BIA have looked to to understand how deadlines work not only where the rule directly applies but also in other cases.

That person would have had precedent from this Court applying this traditional rule. That -- that -- that person would have had the common law principle that has applied even before that.

And there is nothing cutting in the other direction, nothing that that person would have looked to in 1996 to think that there was a different definition, a different time calculation rule that applied to this statute and this statute only.

We ask the Court to reverse.

John G. Roberts, Jr.

Thank you, counsel.

The case is submitted.

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