

SUPREME COURT OF THE UNITED STATES

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TONY H. PHAM, SENIOR OFFICIAL)
PERFORMING THE DUTIES OF THE)
DIRECTOR OF U.S. IMMIGRATION AND)
CUSTOMS ENFORCEMENT, ET AL.,)
Petitioners,)
v.) No. 19-897
MARIA ANGELICA GUZMAN CHAVEZ,)
ET AL.,)
Respondents.)
- - - - -

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Washington, D.C.
Monday, January 11, 2021

The above-entitled matter came on for
oral argument before the Supreme Court of the
United States at 10:00 a.m.

1 APPEARANCES:

2 VIVEK SURI, Assistant to the Solicitor General,
3 Department of Justice, Washington, D.C. ;
4 on behalf of the Petitioners.

5 PAUL W. HUGHES, ESQUIRE, Washington, D.C. ;
6 on behalf of the Respondents.

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1	C O N T E N T S	
2	ORAL ARGUMENT OF:	PAGE:
3	VIVEK SURI, ESQ.	
4	On behalf of the Petitioners	4
5	ORAL ARGUMENT OF:	
6	PAUL W. HUGHES, ESQ.	
7	On behalf of the Respondents	32
8	REBUTTAL ARGUMENT OF:	
9	VIVEK SURI, ESQ.	
10	On behalf of the Petitioners	64
11		
12		
13		
14		
15		
16		
17		
18		
19		
20		
21		
22		
23		
24		
25		

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

2 (10:00 a.m.)

3 CHIEF JUSTICE ROBERTS: We will hear
4 argument this morning in Case 19-897, Pham
5 versus Guzman Chavez.

6 Mr. Suri.

7 ORAL ARGUMENT OF VIVEK SURI

8 ON BEHALF OF THE PETITIONERS

9 MR. SURI: Mr. Chief Justice, and may
10 it please the Court:

11 Respondents are detained under
12 Section 1231, not under Section 1226. In the
13 first place, the text of Section 1231 refers
14 repeatedly to an order of removal or to the
15 aliens who have been ordered removed. That is
16 clear from the caption, from the operative
17 provision, and from the definition of the
18 removal period. There is no dispute here that
19 these aliens have been ordered removed. Indeed,
20 that is the definition of reinstating a removal
21 order.

22 In the second place, Section 1226
23 supports that conclusion. The best way to see
24 that is to lay Section 1226 alongside the
25 reinstatement clause. Section 1226 says that it

1 applies pending a decision on whether the alien
2 is to be removed, and the reinstatement clause
3 says that these aliens shall be removed.
4 Putting those two provisions together, it's
5 clear that in the eyes of the law, the decision
6 that has to be made -- that has to be pending
7 for Section 1226 to apply has been made in this
8 case.

9 And if the Court finds all of that
10 unconvincing, it should turn to the structure of
11 the statute. Congress put the provisions
12 governing reinstatement, withholding, and the
13 selection of the country of removal all in
14 Section 1231, not in Section 1226. That's a
15 structural indication that it's Section 1231
16 that applies.

17 I welcome the Court's questions.

18 CHIEF JUSTICE ROBERTS: Now, Mr. Suri,
19 if an alien is in withholding-only proceedings
20 and there's no country other than the one, you
21 know, as to which he claims statutory
22 withholding or CAT relief, can you remove him?

23 MR. SURI: No, we cannot, Your Honor.

24 CHIEF JUSTICE ROBERTS: Well, then so
25 your -- your emphasis that the distinction is

1 between whether and where really doesn't hold up
2 across the board, does it?

3 MR. SURI: I appreciate, Your Honor,
4 that the distinction between whether and where
5 can seem artificial in a context where there's
6 only one option and that option potentially has
7 been ruled out.

8 Nevertheless, that is the distinction
9 the statute requires us to draw, and we can see
10 that in a few ways. First of all, in
11 Section 1231(a)(7), Congress talks about a
12 situation where the alien has been ordered
13 removed, but removal to any country is
14 impracticable or impossible because all of those
15 countries have refused permission. Even in that
16 context, it's 1231 that applies. That suggests
17 that Congress did view whether and where as
18 distinct.

19 Second, that's the distinction that
20 underlies the difference between withholding of
21 removal on the one hand and asylum on the other
22 hand. The Court hasn't said in its precedents
23 about withholding and asylum that the two are
24 functionally the same simply because, as a
25 practical matter, whether and where can collapse

1 into a single inquiry. And --

2 CHIEF JUSTICE ROBERTS: Well, when you
3 say --

4 MR. SURI: -- the final --

5 CHIEF JUSTICE ROBERTS: -- "can
6 collapse," that seems to me to suggest that the
7 distinction you draw is -- is -- is not a valid
8 one. You -- you call it -- you call it
9 artificial, but it seems to me that it might be
10 wrong at -- at least in the category of cases
11 where there's no third country available. And I
12 gather that's in the vast majority, right?

13 MR. SURI: That is correct, Your
14 Honor. But one last point I'd make to defend
15 the distinction is that the very availability of
16 withholding of removal in the first place
17 depends on the Court's accepting that
18 distinction.

19 Recall that the reinstatement clause
20 says that the removal order can't be reopened,
21 can't be reviewed under any circumstances. The
22 only way to square that with withholding is to
23 say that withholding doesn't affect the removal
24 order itself; it just affects the question
25 where.

1 CHIEF JUSTICE ROBERTS: Well, but
2 isn't --

3 MR. SURI: And one --

4 CHIEF JUSTICE ROBERTS: -- why
5 isn't -- since it depends upon -- whether you
6 can actually remove the alien depends upon the
7 particular circumstances of each case, whether
8 there's a third country available.

9 Why isn't that the touchstone that
10 should be applied for -- whether it's persons in
11 1226 or 1231, the particular circumstances?

12 MR. SURI: Because, in Section 1231,
13 the words are "ordered removed." It doesn't
14 refer to the practicalities of removal. And
15 even in 1226, although the court of appeals read
16 "whether the alien is to be removed" to refer to
17 that practical question, Respondents themselves
18 have abandoned that argument because --

19 CHIEF JUSTICE ROBERTS: Thank you,
20 counsel.

21 Justice Thomas.

22 JUSTICE THOMAS: Thank you, Mr. Chief
23 Justice.

24 Counsel, just briefly, I know this
25 wasn't briefed, but could you just explain to me

1 briefly how the district court had jurisdiction
2 under 1252 in this case?

3 MR. SURI: In this case, Your Honor,
4 this was a habeas corpus petition. And the
5 court in Zadvydas said that such a habeas corpus
6 petition could be heard where the question is
7 whether the government had the authority to
8 detain the alien in the first place.

9 The claim here is that the government
10 doesn't have the authority to detain the alien
11 unless it has provided bond hearings under
12 Section 1226.

13 JUSTICE THOMAS: So that basically
14 trumps 1252?

15 MR. SURI: That is how the Court read
16 these provisions in Zadvydas, and that's the
17 precedent we've stuck with here.

18 JUSTICE THOMAS: Okay. Just, again,
19 could you explain to me what we -- exactly we're
20 reviewing here?

21 MR. SURI: The Court is reviewing a
22 determination that these aliens are entitled to
23 bond hearings. But that determination depends
24 on the contention that these aliens are detained
25 under Section 1226 rather than Section 1231. So

1 that's the issue before the Court.

2 JUSTICE THOMAS: The -- if -- could
3 you tell me what the difference is between
4 "administratively final" and -- an
5 "administratively final order" and a "final
6 order of removal," if there is one?

7 MR. SURI: Yes. The term "final order
8 of removal" is ambiguous. It could refer to a
9 situation where the agency has completed its
10 review, but the courts haven't completed their
11 review, or it could refer to a situation where
12 both the courts and the agency have completed
13 their review.

14 The use of "administratively final"
15 clarifies that ambiguity, makes clear that all
16 we need to establish is that the agencies have
17 completed their review. We don't need to ask
18 about whether the courts are involved.

19 JUSTICE THOMAS: So does that mean --
20 so why doesn't it mean capable of being executed
21 then if the agencies are done?

22 MR. SURI: The definition of
23 "finality" in 1101(a)(47) ties finality to
24 whether the agency's review has been completed.
25 And, here, the agency's review of the removal

1 order itself has certainly been completed.

2 The only question left to decide is
3 the particular country, but that's a distinct
4 question, as this Court emphasized just last
5 term in *Nasrallah*.

6 JUSTICE THOMAS: Thank you.

7 CHIEF JUSTICE ROBERTS: Justice
8 Breyer.

9 JUSTICE BREYER: Thank you. Good
10 morning.

11 What percentage, if you know, of the
12 individuals of whom it is -- you know, there's a
13 preliminary thing, does this person have a
14 reasonable fear that he will be persecuted or
15 tortured or whatever if he's removed to country
16 X?

17 So think of the group of -- of where
18 that is held by the ALJ or the administrative --
19 the immigration judge. That is held to be a
20 reason. He has a reasonable fear.

21 Then they go on to decide whether that
22 fear is, in fact, correct, to make a finding on
23 that.

24 What percentage of those who fall into
25 the reasonable fear category, so the -- the

1 immigration service will look into it, what
2 percentage is it found that they are, that they
3 do -- that they -- that they can't be sent to
4 that country? Do you know?

5 MR. SURI: Yes, I do. Our best
6 estimate is around 11 percent.

7 JUSTICE BREYER: Okay. So -- and, of
8 those 11 percent, 98 percent never are sent
9 anywhere, is that right? That's what we're told
10 in one of the briefs.

11 MR. SURI: Yes, that's right.

12 JUSTICE BREYER: So it's about
13 10 percent of those who are sent in that will
14 never leave the United States?

15 MR. SURI: That's about right, yes.

16 JUSTICE BREYER: Okay. So -- so
17 given -- that's a fairly good percentage but not
18 overwhelming percentage.

19 So, with 10 percent who will never
20 leave the United States, can we say that it is
21 administratively final? I mean, with 10 percent
22 of these people, they will not leave the United
23 States. They have a fairly good shot, a fairly
24 good shot. And why is it -- it's certainly not
25 administratively final as to those 10 percent.

1 They're never going to leave.

2 MR. SURI: The -- the best --

3 JUSTICE BREYER: What do you think
4 about that?

5 MR. SURI: The best answer I have is
6 this Court's decision last term in Nasrallah,
7 where the Court said that a removal order's
8 finality is not affected by CAT protection. And
9 it doesn't matter whether 10 percent or
10 20 percent or some other percentage do or don't
11 ultimately leave the country. The Court was
12 very emphatic that the CAT order is distinct
13 from and doesn't disturb the validity of the
14 final order of removal.

15 JUSTICE BREYER: So -- so, in your
16 view, if, in fact, 98 percent of everyone who
17 reasonably feared -- reasonably feared removal
18 for prejudice and torture, if 98 percent of them
19 ended up never leaving the United States, do you
20 think that this provision, 1330, 1231, would
21 still require them to be held in custody without
22 hope of bail for a long period of time, maybe
23 several years?

24 MR. SURI: Yes. Our --

25 JUSTICE BREYER: Is that your view?

1 MR. SURI: Yes. Our position turns on
2 what is true in the eyes of the law, not what
3 ends up happening in practice.

4 JUSTICE BREYER: Well, there also
5 are -- I'm not necessarily going to argue. I
6 will point out that there are traditions. There
7 is a constitution. There is a country where, by
8 and large, we don't keep people in prison for
9 years, whoever they are, persons, in -- for
10 years without any chance of even getting bail.

11 Now is that -- is that relevant to
12 this?

13 MR. SURI: Certainly, but the question
14 about detaining people for years doesn't arise
15 in the vast majority of these cases, and, when
16 it does arise, the procedures in Zadvydas will
17 address that problem.

18 CHIEF JUSTICE ROBERTS: Justice Alito.

19 JUSTICE ALITO: Good morning, Mr.
20 Suri. I have a couple of questions about
21 statements that you make in your reply brief.

22 You say that the statute makes
23 detention mandatory during the removal period
24 only for terrorists and criminal aliens.

25 So the two questions are these:

1 First, does that mean that the Department of
2 Homeland Security releases other aliens under
3 supervision? And, second, is there a process
4 for deciding which of these aliens will be
5 detained and which -- which aliens will be
6 released?

7 MR. SURI: Justice Alito, as to the
8 first question, if the alien is released, then,
9 yes, it would be under supervision.

10 As to the second question, the
11 Department tries to detain aliens during the
12 90-day removal period to the maximum extent
13 possible. Releases would occur only if there
14 are operational constraints, such as a lack of
15 detention space in a particular facility.

16 And, no, there's no systematic
17 framework for determining whether that decision
18 is to be made. Rather, it's a case-by-case
19 judgment depending on what's happening at that
20 facility at that time.

21 JUSTICE ALITO: And who makes that
22 decision?

23 MR. SURI: That would be made -- I --
24 I don't know the answer to that question, but I
25 would imagine it's made by the local ICE field

1 office.

2 JUSTICE ALITO: And what type of
3 supervision occurs if there's release?

4 MR. SURI: The supervised release
5 conditions are set out in Section 1231(a)(3).
6 It provides, for example, that the alien must
7 appear before an immigration officer
8 periodically for identification, must submit if
9 necessary to a medical examination, and must
10 obey written restrictions on the alien's
11 conduct.

12 JUSTICE ALITO: All right. Thank you.

13 CHIEF JUSTICE ROBERTS: Justice
14 Sotomayor.

15 JUSTICE SOTOMAYOR: Counsel, I'm not
16 altogether sure I understood Justice Alito's
17 question to you or your response.

18 Can you clarify for me, how many
19 people are held -- are denied supervised release
20 after the 90-day period?

21 MR. SURI: After the 90-day period, I
22 don't have exact statistics on that, but I took
23 Justice Alito to be asking about the initial
24 90-day period, not after the 90-day period.

25 JUSTICE SOTOMAYOR: So I'll ask about

1 after the 90-day period. How many people are
2 granted supervised release after that 90-day
3 period?

4 MR. SURI: I don't have the statistics
5 on that question, but Respondent cites a
6 study -- cite a study that claims that
7 15 percent of the aliens are released at some
8 point before the withholding-only proceedings
9 are completed.

10 JUSTICE SOTOMAYOR: So 85 percent are
11 restrained?

12 MR. SURI: That's correct.

13 JUSTICE SOTOMAYOR: Now 1231(a)
14 commands that the agency release immigrants --
15 remove immigrants within 90 days. You seem to
16 have admitted to Justice Breyer that that, in
17 most cases, is impossible for this class of
18 alien.

19 Now, if that is true, we have to pick
20 between two provisions, 1221 -- 1226 and
21 1231(a), and determine which controls the
22 question of whether these aliens can be released
23 on bond or bail or supervision.

24 Why should we not adhere to the basic
25 interpretive principle that counsels in favor of

1 a harmonious reading and against choosing an
2 interpretation that produces a substantial
3 effect that is inconsistent with the text of
4 another provision?

5 If we accept your reading, basically,
6 we're saying for this class of withholding-only
7 -- withholding applicants, that they're never
8 going to be removed within 90 days of the
9 finality of their removal order. That just
10 doesn't make any sense to me.

11 MR. SURI: I -- I appreciate the force
12 of the argument, but I have two responses to it.

13 The first is that the obligation is
14 subject by its own terms to the phrase "except
15 as otherwise provided" in this section.

16 Then, if you go down to 1231(a)(5),
17 the last sentence of that states that aliens
18 with reinstated removal orders can be removed
19 "at any time." We think that "at any time"
20 takes precedence over the 90 days.

21 The second --

22 JUSTICE SOTOMAYOR: Except --

23 MR. SURI: -- point was --

24 JUSTICE SOTOMAYOR: I'm sorry. I -- I
25 -- I'm not quite sure I follow that argument.

1 You already admitted to the Chief
2 Justice that you can't remove these people who
3 are in withholding proceedings because the law
4 doesn't permit you to.

5 MR. SURI: I admitted to the Chief
6 Justice --

7 JUSTICE SOTOMAYOR: So that --

8 MR. SURI: I'm sorry, I didn't mean to
9 interrupt. I admitted to the Chief Justice
10 that, as a practical matter, these aliens can't
11 be removed if there's no country willing to
12 accept them. That was the same situation, by
13 the way, in Zadvydas, where the government was
14 searching for a country to which to remove the
15 alien. That was analyzed under Section 1231.

16 JUSTICE SOTOMAYOR: And your second
17 point, counsel, in response to my question?

18 MR. SURI: My second point was that
19 all that would raise is a structural inference
20 about when the removal period would begin, but
21 the Court shouldn't rely on the structural
22 inference when there's an express text stating
23 when the removal period begins.

24 JUSTICE SOTOMAYOR: Thank you.

25 CHIEF JUSTICE ROBERTS: Justice Kagan.

1 JUSTICE KAGAN: Mr. Suri, if I could
2 take you back to your colloquy with the Chief
3 Justice. You were answering his question on the
4 assumption that there was no third country that
5 was available.

6 But I even want to take it a little
7 bit further and ask you, suppose you had a third
8 country that, for whatever reason, was willing
9 to accept an alien. If -- if -- if that alien
10 was currently in withholding proceed --
11 proceedings, you couldn't put him on a plane to
12 that third country, could you?

13 MR. SURI: We could after we provide
14 the alien notice that we were going to do that.

15 JUSTICE KAGAN: Right.

16 MR. SURI: But, without notice --

17 JUSTICE KAGAN: So that's what it
18 would depend on, right? That -- that you would
19 have to provide him notice, and if he had a fear
20 of persecution or torture in that country, he
21 would be given an opportunity to contest his
22 removal to that country. Isn't that right?

23 MR. SURI: Yes, that's right.

24 JUSTICE KAGAN: So, in this situation,
25 as to these aliens who are currently in

1 withholding proceedings, you can't put them on a
2 plane to anywhere right now, isn't that right?

3 MR. SURI: Certainly, I agree with
4 that, yes.

5 JUSTICE KAGAN: Okay. And that's not
6 as a practical matter. That really is, as -- as
7 you put it, in the eyes of the law. In the eyes
8 of the law, you cannot put one of these aliens
9 on a plane to any place, either the -- either
10 the country that's referenced in the removal
11 order or any other country, isn't that right?

12 MR. SURI: Yes, that's right. And in
13 order to prevail in this case, I have to
14 convince you that the line between 1231 and 1226
15 is not when the government acquires the legal
16 ability to carry out the order; rather, it's the
17 entry of the order.

18 JUSTICE KAGAN: Okay. So, like, you
19 have to convince me that it doesn't matter that
20 you cannot deport the alien?

21 MR. SURI: Exactly right, yes.

22 JUSTICE KAGAN: Okay. Let me ask
23 you -- you know, suppose there's an alien who
24 just concedes removability and then seeks
25 withholding relief. And the -- the -- the IJ

1 enters the order of removability, of -- of
2 removal, and -- and grants withholding. And
3 then that's appealed by the government.

4 Would -- would that alien be treated
5 as if he were in 1226 or as if he were under
6 1231?

7 MR. SURI: That would never arise in
8 practice, but, if it did, that alien would be
9 treated as under 1226 because, in that context,
10 which I presume is outside the reinstated
11 removal order context, what happens is that the
12 withholding proceedings and the removal
13 proceedings take part together. They're not
14 bifurcated.

15 And so, in practice, the immigration
16 judge wouldn't enter a separate removal order
17 until after the withholding issue also was
18 resolved.

19 JUSTICE KAGAN: I -- I guess the
20 reason I ask is because that seems very similar
21 to me, is that you have a final order of removal
22 and a pending withholding decision, and yet
23 you're going to treat that alien under 1226 but
24 the aliens here under 1231. And I guess I
25 wonder what difference that makes and what sense

1 that differential treatment makes.

2 MR. SURI: Yeah. If -- if we had a
3 hypothetical world where the immigration judge
4 were to enter an order of removal that everyone
5 concedes is valid and then conduct separate
6 withholding-only proceedings, then I agree, it
7 would be 1231.

8 All I'm saying is that doesn't happen.

9 CHIEF JUSTICE ROBERTS: Justice
10 Gorsuch.

11 JUSTICE GORSUCH: Good morning,
12 Mr. Suri. I wanted to ask about a passage in
13 your reply brief on pages 12 and 13. Your
14 argument, as I understand it, is, under 1231,
15 that there is a final order of removal dating
16 back to the original order of removal. But, for
17 purposes of 1252, the question becomes, is there
18 some chance for judicial review of -- of the
19 withholding-only proceedings?

20 And -- and -- and that -- that statute
21 also grants review only of the final order of
22 removal. Judge Richardson acknowledged this
23 difficulty in his dissent in the Fourth Circuit
24 and said that means that there's effectively
25 going to be no judicial review of

1 withholding-only proceedings. But the
2 government apparently in the Fourth Circuit
3 thought that there could be.

4 And, here, on 12 and 13, I -- I -- I
5 -- I see the government, forgive me, as maybe
6 hedging its bets and -- and -- and -- and not
7 really taking a position on this. And -- and my
8 -- my question for you is, which is it? Is
9 there review or not? And what do we do about
10 the fact that 1252 uses the same -- very similar
11 language as 1231, a final order of removal?

12 Surely, a final order of removal can't
13 mean one thing for -- in one statute and another
14 in another. That would -- that would seem
15 unlikely at least. So perhaps you can help me
16 with that difficulty.

17 MR. SURI: Certainly, Justice Gorsuch.

18 First, since you asked me to take a
19 position, yes, the government's position is that
20 review would be available and that "final" would
21 have to mean something different in 1252.

22 Second, if you think that "final" has
23 to have the same meaning across all contexts,
24 you should rule for us because the general
25 definition of "finality," the reinstatement

1 clause, and Nasrallah all indicate that these
2 orders are final.

3 And so we've offered up the idea that
4 "finality" can have a different meaning in order
5 to preserve the body of precedent in the lower
6 courts about review of withholding-only orders.

7 But --

8 JUSTICE GORSUCH: Explain to me how --
9 how that works, though. How -- I mean, the term
10 isn't "finality." It's a "final order of
11 removal." And it's the exact same phrase in
12 both statutes. So how would the government have
13 us interpret that differently here?

14 MR. SURI: We'd have you interpret it
15 differently on the understanding that "final"
16 can mean different things in different contexts.
17 For example, an order can be final for purposes
18 of the court of appeals when the district court
19 decides. It can be final for purposes of this
20 Court when the court of appeals decides. It can
21 be final for purposes of habeas corpus when the
22 entire direct review process is complete.

23 And so it is possible for "final" to
24 have different meanings. And the justification
25 for giving "final" a different meaning in 1252

1 would be the presumption in favor of judicial
2 review.

3 But, as I said, if the Court disagrees
4 with me about all that, then it would follow
5 that these orders are final both in this context
6 and in that context, and the aliens would lose
7 in both cases.

8 JUSTICE GORSUCH: Thank you.

9 CHIEF JUSTICE ROBERTS: Justice
10 Kavanaugh.

11 JUSTICE KAVANAUGH: Thank you, Chief
12 Justice.

13 Good morning, Mr. Suri.

14 In the Fourth Circuit's opinion by
15 Judge Harris, the opinions offered a contextual
16 argument, page 877, "The fact that the removal
17 period is limited to 90 days strongly suggests
18 that it is intended to apply only when all legal
19 barriers to removal are cleared away," in other
20 words, using the fact of the 90-day limit to
21 help interpret these two provisions together.

22 What's your response to that argument?

23 MR. SURI: Justice Kavanaugh, the
24 first response is that the purpose of the
25 removal period is to give the government time to

1 identify a country of removal and to clear away
2 the legal, diplomatic, and practical obstacles
3 to removing the alien to that particular
4 country. So it doesn't make sense to say that
5 the removal period begins only when all of the
6 legal barriers are cleared away when the whole
7 point of the period is to give time to clear
8 away some of those barriers.

9 Second, the removal period definition
10 says that the removal period begins upon the
11 completion of three specified events, and those
12 three specific legal barriers are the only ones
13 that need to be cleared away. It's inconsistent
14 with that specification to say, you know,
15 actually, the removal period begins not only
16 when those three barriers are cleared away but
17 when some other unspecified universe of
18 additional barriers also is cleared away.

19 JUSTICE KAVANAUGH: I want to pick up
20 on one of Justice Breyer's questions. I think
21 you acknowledged that some significant number of
22 noncitizens in this circumstance could be
23 detained for several years, and you indicated
24 that Zadvydas would be the answer to that,
25 claims under Zadvydas.

1 Your colleague on the other side says,
2 instead of going through that trouble, why not
3 read the statute here to avoid that potential
4 constitutional problem as a matter of
5 constitutional avoidance. And they say in their
6 brief "Congress simply did not write a statute
7 that would render constitutional violations
8 routine."

9 Why don't we follow the lead suggested
10 there?

11 MR. SURI: Let me first correct this
12 idea that detention could last for years. In
13 the vast majority of these cases, the detention
14 will last three to four months before the
15 immigration judge issues his decision, and
16 that's no problem, even on Respondents' very
17 unusual case, which will last more than six
18 months.

19 Now, more than six months, we have
20 both Zadvydas procedures, which the Zadvydas
21 court has already told us cures any
22 constitutional problem. We also have the
23 regulatory procedures for post-order custody
24 review.

25 And, finally, in all these cases, the

1 alien is being detained because we've made a
2 determination that the alien is a flight risk or
3 a risk -- or -- or a danger to the community.
4 That's the trigger we've used to detain the
5 alien under Section 1231(a)(6) for more than
6 three months.

7 Now, if those criteria are satisfied,
8 they should be detainable even on Respondents'
9 view.

10 JUSTICE KAVANAUGH: Thank you.

11 CHIEF JUSTICE ROBERTS: Justice
12 Barrett.

13 JUSTICE BARRETT: Counsel, I have a
14 question about the post-order custody review.

15 Once the removal period ends, once you
16 hit that 90-day mark, do the regulations that
17 govern the post-order custody review
18 automatically kick in so that the detained
19 noncitizen gets some sort of hearing?

20 MR. SURI: Yes, they automatically
21 kick in, and what happens in practice is that
22 the government tries to conduct the review
23 shortly before the removal period has expired.

24 JUSTICE BARRETT: And let me ask you
25 this: In your response to Justice Sotomayor,

1 you said that 85 percent of noncitizens in this
2 category remain restrained after the removal
3 period ends. And I'm wondering why the default
4 isn't set to release with supervision.

5 And -- and here's my reasoning: As I
6 look at the statute, the removal period itself
7 is 90 days. But, if it's the alien's fault that
8 the government is not able to remove the alien
9 during this 90 days -- and I'm looking at the
10 period -- the provision in (a)(1)(C), which
11 says, if the alien fails or refuses to make
12 timely application for travel documents, et
13 cetera, that removal period, as defined in the
14 statute, let's say it might be 200 days.

15 But then I'm looking at (a)(3), which
16 talks about supervision after the 90-day period
17 and says, you know, if the alien does not leave
18 or is not removed within the removal period,
19 defined as 90 days in the statute, it says the
20 alien shall be subject to supervision under the
21 regulations.

22 So why isn't the default that, if it's
23 through the fault of the government or no fault
24 of the noncitizen that removal doesn't take
25 place within the removal period, why isn't the

1 default supervision, rather than, as you
2 suggested to Justice Sotomayor, continued
3 confinement?

4 MR. SURI: Let me make two answers to
5 that, Justice Barrett.

6 The first answer is that (a)(1)(C)
7 isn't about what happens after the removal
8 period; rather, it's a tolling provision. The
9 90 days themselves are extended. It doesn't
10 talk about what happens after the 90 days.

11 And then the second answer is that we
12 agree that for aliens in general, for the whole
13 universe of aliens, not just those with
14 reinstated removal orders, yes, to provide
15 relief is the default, and the findings
16 specified in (a)(6) must be made before the
17 government can continue to detain those aliens
18 for more than 90 days.

19 Our point is simply that because these
20 particular aliens have already been removed from
21 the country, have defied their removal orders,
22 and have come back into the country illegally
23 and been caught, there's a particularly strong
24 basis for concluding that those aliens are a
25 flight risk. And within that subset of aliens,

1 it does make sense that (a)(6) kicks in.

2 JUSTICE BARRETT: Thank you.

3 CHIEF JUSTICE ROBERTS: A minute to
4 wrap up, Mr. Suri.

5 MR. SURI: Mr. Chief Justice, I think
6 a lot of the questions today have focused on the
7 practicalities and whether the government in
8 practice would have the ability to remove these
9 aliens. But I'd like to just remind the Court
10 quickly that Respondents themselves have
11 abandoned that argument.

12 Thank you.

13 CHIEF JUSTICE ROBERTS: Thank you,
14 counsel.

15 Mr. Hughes.

16 ORAL ARGUMENT OF PAUL W. HUGHES

17 ON BEHALF OF THE RESPONDENTS

18 MR. HUGHES: Mr. Chief Justice, and
19 may it please the Court:

20 This case addresses narrow
21 circumstances: individuals who, after removal
22 face persecution, returned here to escape and
23 have already been found to have a reasonable
24 fear of persecution. 1226, not 1231, governs
25 detention.

1 During withholding proceedings, the
2 INA does not authorize removal. When the
3 government lacks authority to remove, the
4 decision on whether the alien is to be removed
5 from the United States remains pending.

6 This is the language of 1226:
7 "Whether removal will occur cannot be divorced
8 from where. If withholding is granted, the
9 answer to where an individual is removed is
10 virtually always nowhere."

11 1231 is not a fit. It defines the
12 removal period as the time the government shall
13 remove the noncitizen. It is for securing
14 travel documents and effectuating removal.

15 The government's contrary view is not
16 plausible. It would have the removal period
17 begin and end long before it could remove the
18 person anywhere.

19 And 1231(a)(1)(A) is the gateway.
20 First, it defines the removal period. That time
21 cannot begin before the INA authorizes the
22 government to do the one thing required, remove.

23 Second, this conclusion is required by
24 the first clause of (a)(1)(A). It says "except
25 as otherwise provided in this section."

1 Withholding relief is provided for in 1231.
2 When there is withholding, the government cannot
3 remove, meaning there is no removal period.

4 Third, this makes sense of Congress's
5 determination that the removal period lasts 90
6 days. And all of 1226 provides indefinite
7 detention while proceedings are underway; then,
8 after the INA authorizes removal, the removal
9 period begins and 1231 applies.

10 CHIEF JUSTICE ROBERTS: Counsel, your
11 -- your clients have been ordered removed. And
12 wouldn't -- wouldn't you expect that their
13 detention would be governed by a provision that
14 is entitled "Detention and Removal of Aliens
15 Ordered Removed"? It -- it seems --

16 MR. HUGHES: Two --

17 CHIEF JUSTICE ROBERTS: -- it seems to
18 fit your clients precisely.

19 MR. HUGHES: Two responses, Your
20 Honor. That's overinclusive. As the structure
21 of 1231 makes clear, there are a variety of
22 individuals who can be described as ordered
23 removed that the statute makes plain are not
24 subject to 1231 detention. So that argument the
25 government proffers I -- I don't think can lead

1 to the conclusion.

2 The second point, though, is, what is
3 the order that is -- is critical here? And in
4 this context, you can't separate out the
5 reinstatement order. We agree that when the
6 underlying order of removal is reinstated, that
7 order, of course, has effect, but it only has
8 effect when it's merged with the reinstatement
9 order.

10 And -- and -- and let me explain that.
11 When you have a prior order of removal that's
12 being reinstated, the reinstatement order makes
13 certain critical determinations, for example,
14 that the noncitizen is actually the same person
15 as at issue in that prior order.

16 Additionally, that the noncitizen
17 unlawfully entered the United States. Until you
18 have that determination that is in the
19 reinstatement order, the underlying order of
20 removal does not have legal effect under the
21 INA.

22 CHIEF JUSTICE ROBERTS: Well, what do
23 you do --

24 MR. HUGHES: You must have both --

25 CHIEF JUSTICE ROBERTS: -- what do you

1 do about 1231(a)(5), which says that a
2 reinstated removal order "is not subject to
3 being reopened or reviewed"? I mean, you're --
4 you're taking the position that the
5 withholding-only proceedings prevent that order
6 from becoming final, and yet that would seem to
7 me to be reopening and reviewing it.

8 MR. HUGHES: Well, Your Honor, I think
9 the Court dealt with this in Fernando Vargas,
10 and the government doesn't disagree that
11 notwithstanding what does look like categorical
12 language in (a)(5), there is still the right to
13 withholding that's provided for by statute in
14 fulfillment of the United States' treaty
15 obligations.

16 And I think the best way to reconcile
17 that (a)(5) language that Fernando Vargas tells
18 us we have to reconcile with the right to
19 withholding is to understand that reinstatement
20 is a process.

21 This is how the regulations describe
22 it, for example, 8 C.F.R. 208.31(a). It talks
23 about the reinstatement process. And we think
24 that that reinstatement process is conclusive
25 and final at the time that the withholding-only

1 proceedings conclude and that order is subject
2 to execution. But --

3 CHIEF JUSTICE ROBERTS: I suppose is
4 -- is -- is your answer the same to what we said
5 in Nasrallah, that a CAT order "does not affect
6 the validity of the final order of removal"? Is
7 that --

8 MR. HUGHES: Yes, Your Honor.

9 CHIEF JUSTICE ROBERTS: Yeah. I'm
10 sorry. I'm sorry.

11 MR. HUGHES: So there's two responses
12 --

13 CHIEF JUSTICE ROBERTS: I just -- I
14 just want to make sure that your -- you'd have
15 the same answer to the previous question I
16 asked.

17 MR. HUGHES: Yes, Your Honor. Two
18 responses. It's a question of when is it that
19 it becomes final. But, second, stepping back --
20 and -- and I know -- I believe this gets to the
21 administrative finality trigger in (a)(1)(B) --
22 we believe if the Court looks there, for all the
23 reasons I just described, you would not conclude
24 it's administratively final until it -- it --
25 it's executable and that process concludes.

1 But that's --

2 CHIEF JUSTICE ROBERTS: Thank you.

3 MR. HUGHES: -- our second argument.

4 CHIEF JUSTICE ROBERTS: All right.

5 Thank you, counsel.

6 Justice Thomas.

7 JUSTICE THOMAS: Thank you, Mr. Chief

8 Justice.

9 Mr. Hughes, I'm a bit confused. Would
10 you -- so we had a removal order that Respondent
11 was subject to. We agree on that. Respondent
12 returns to the country.

13 Now what happens to that underlying
14 removal order in your assessment?

15 MR. HUGHES: Your Honor, for that
16 underlying removal order to be reinstated, there
17 has to be certain determinations that are made,
18 which includes identifying that the person at
19 issue is the same person that was subject to and
20 deported on the first time pursuant to that
21 removal order.

22 Second, that the individual, in fact,
23 unlawfully reentered the country rather than --

24 JUSTICE THOMAS: Let's assume that's
25 -- let's assume those -- that's accurate, that

1 -- that we're not debating the factual part.

2 What's the effect of the process of
3 reinstating removal?

4 MR. HUGHES: Your Honor, when you have
5 that reinstatement order, it does bring back to
6 life the underlying order of removal. And so,
7 with the underlying order of removal and the
8 reinstatement order paired together, that, when
9 that process is final, does authorize the United
10 States to remove an individual when that -- when
11 that process is concluded.

12 JUSTICE THOMAS: So what -- why is
13 that -- how -- how do you reconcile that? And
14 this goes back to the Chief Justice's point.

15 How do you reconcile that with what
16 the Court said about CAT orders in Nasrallah?

17 MR. HUGHES: Two reasons, Your Honor.
18 First is, when do we think that this process
19 reaches conclusion? And we think the process
20 reaches its conclusion, it's administratively
21 final, at the point that it's -- it's
22 executable. And that's important because,
23 otherwise, the categorical language of (a)(5)
24 would seem to allow the government to remove an
25 individual during the pendency of the

1 withholding process.

2 But the government doesn't take that
3 position. My friend on the other side made that
4 quite clear, that they cannot do so. That would
5 be in violation of the statute.

6 But my -- my first point, if I can for
7 a moment, is that we don't think the Court even
8 needs to reach (a)(1)(B) and administrative
9 finality, and that's because (a)(1)(A) is the
10 gateway that defines what the removal period is.

11 And if the removal period -- if the
12 government categorically does not have authority
13 to remove, it makes no sense to conclude that
14 the removal period, the 90 days during which the
15 government shall remove, has begun. It simply
16 doesn't meet the definition without even getting
17 into the -- the -- (a)(1)(B).

18 JUSTICE THOMAS: Thank you.

19 CHIEF JUSTICE ROBERTS: Justice
20 Breyer.

21 JUSTICE BREYER: Well, your last
22 point, "except as otherwise provided in this
23 section," what is -- what is -- where does it
24 otherwise provide that -- that -- that you have
25 this, say, the torture as the statute claim and

1 the persecution claim?

2 MR. HUGHES: Yes, Your Honor, it's in
3 (b)(3). 1231(b)(3) is the provision of 1231
4 that says, when you have a withholding claim,
5 the attorney general may not remove an alien.

6 And so Your Honor is precisely right,
7 it's that "except" clause which shows that when
8 the government does not have authority under the
9 INA to remove, the removal period does not
10 begin.

11 And -- and that makes sense of this
12 statute, that the 90 days during which the
13 government has one obligation, to remove, that's
14 why this is the time period Congress wrote in.
15 It's also why, in (a)(1)(C), the noncitizen has
16 certain obligations, for example, to cooperate
17 in obtaining travel documents.

18 That whole structure of the statute
19 makes clear that the removal period is -- as
20 that title says, removal period, it's when the
21 government shall remove. And so --

22 JUSTICE BREYER: Why -- now you -- you
23 -- you mean to -- do you mean to abandon the
24 administratively final? The way I have been
25 reading that is a possibility, though it favors

1 you -- don't tell -- tell me I'm wrong right now
2 if I'm wrong, please, because it won't do any
3 good.

4 (5), (a)(5), you know, (5) says
5 reinstatement. So you reinstate an order. The
6 order says, Smith, go. Now we cannot question
7 that order that says, Smith, go. That's what it
8 says in (5). You don't question that.

9 But there are some things you could
10 bring up. You could say: By the way, I'm
11 Jones; I'm not Smith. And now you could also
12 say: By the way, I don't want to go to country
13 X because they're going to murder me, et cetera.

14 And what supports that is the date the
15 order of removal "becomes." It doesn't say the
16 date it was reinstated. It doesn't say became
17 final. It says "becomes final."

18 And so something must have the
19 possibility of happening between the time you
20 entered the order saying -- an old order -- go,
21 Smith, and the beginning of the removal period.

22 Now is that correct?

23 MR. HUGHES: Yes, Your Honor. We
24 absolutely make and embrace that argument
25 throughout.

1 JUSTICE BREYER: All right. If -- if
2 you make and embrace that argument, I can think
3 of two things that stand between entry order,
4 go, Smith, and the beginning of the removal
5 period, i.e., administratively final: one
6 thing, when you say: Hey, I'm not Smith; I'm
7 Jones. Second thing: I won't -- don't want to
8 go to country X, they're going to murder me.

9 Are there a third, fourth, and fifth
10 thing?

11 MR. HUGHES: I -- I think that's
12 principally it, Your Honor. I'm not aware of
13 other things that would be in the way.

14 JUSTICE BREYER: Okay. Thank you.

15 MR. HUGHES: And -- thank you, Your
16 Honor.

17 CHIEF JUSTICE ROBERTS: Justice Alito.

18 JUSTICE ALITO: Mr. Hughes, I want to
19 follow up on the question that Justice Kagan
20 posed to Mr. Suri.

21 Do you agree that while an alien is in
22 withholding-only proceedings, DHS has the
23 authority, the legal authority, to remove the
24 alien to a third country so long as it provides
25 the alien with notice of that third country

1 removal and the alien does not express a fear of
2 persecution or torture with respect to the third
3 country?

4 In -- in those circumstances, do the
5 statute and regulations authorize DHS to put the
6 alien on a plane leaving the country?

7 MR. HUGHES: Yes, Your Honor, if those
8 conditions have been satisfied. And what that
9 would typically result in would be a warrant of
10 removal to that particular country, a 205
11 warrant of removal. And that would authorize,
12 under the INA, removal to that -- to that
13 country. And we would agree, when that occurs,
14 that 1231 applies.

15 But that requires, as you indicated,
16 several legal steps between where Respondent is
17 in our circumstances to the INA authorizing
18 that.

19 JUSTICE ALITO: In *Nasrallah versus*
20 *Barr*, you were successful. And I wonder how you
21 can reconcile the argument that the Court
22 accepted there about administrative finality
23 with the position that you are -- you are taking
24 here.

25 MR. HUGHES: Well, Your Honor, I think

1 there's -- there's multiple reasons, but our
2 first argument to start is the gateway provision
3 of (a)(1)(A), which is to say it defines and
4 limits the removal period as the time that the
5 government can actually execute on the removal
6 order. And that is explained by the first
7 clause, "except as otherwise provided in this
8 section." And withholding is within this
9 section and alleviates or precludes the
10 government from executing on the removal order.

11 So I don't think the Court even has to
12 get to (a)(1)(B) in order to resolve this case.
13 And that makes 1226, which this case fits
14 perfectly within that language, harmonious with
15 1231 by understanding what the very definition
16 of "removal period" is.

17 And that obviates the Court from even
18 having to address questions of finality. But,
19 if the Court does get to questions of finality,
20 and for all the reasons Justice Breyer
21 explained, the process becomes -- becomes
22 administratively final when this process
23 concludes at the time of withholding.

24 And -- and my friend on the other side
25 has --

1 JUSTICE ALITO: Let me ask you -- let
2 me squeeze in one more question. To what degree
3 is your argument dependent on the statistics
4 that were discussed earlier about the
5 feasibility of removal to a third country?

6 Suppose that there was a third country
7 or third countries that -- that were willing to
8 accept these aliens.

9 Would you have an argument then?

10 MR. HUGHES: Well, Your Honor, if
11 there was that for a third country, I don't
12 think we would even have those proceedings
13 because, presumably, instead of spending all
14 this time and effort litigating these cases, the
15 government would just remove individuals to
16 those third countries. And so I think we'd be
17 in a very different scenario.

18 If the government did have that
19 country to identify, I agree we'd be in -- in
20 very different circumstances. It -- it -- it
21 just doesn't, and that's -- that's why we're
22 here.

23 CHIEF JUSTICE ROBERTS: Justice
24 Sotomayor.

25 JUSTICE ALITO: But do you think --

1 JUSTICE SOTOMAYOR: Counsel, how much
2 of your argument depends on your due process
3 concern?

4 As I understood, one of your arguments
5 in your brief is, if we read it the government's
6 way, we're inviting the potential of due process
7 violations. Is that correct?

8 MR. HUGHES: Yes, Your Honor. The
9 government's point that Zadvydas, they think, is
10 the back-end protection here, I think, is
11 revealing on that end because that --

12 JUSTICE SOTOMAYOR: All right. So
13 that -- that's my question to you. If the
14 process provided by the government's regulations
15 are not satisfactory, can't the noncitizen do
16 what you did here, just get habeas review, and
17 why wouldn't that be enough?

18 MR. HUGHES: Your Honor, I think that
19 this goes to the very purpose of constitutional
20 avoidance, as Justice Scalia explained to the
21 Court in *Clark v. Martinez*, which is to say,
22 rather than set up a structure where the court
23 has -- courts have to do individualized
24 determinations as to whether or not detention is
25 constitutionally excessive in individual cases,

1 if there is a plausible alternative reading --
2 and we think our reading is absolutely plausible
3 -- it makes the most sense to infer that
4 Congress chose a statutory structure that was
5 not going to lead to routine and predictable
6 constitutional violations in at least some case.

7 Now my friend on the other side says
8 it might not be in most of the cases, but
9 Justice Scalia addressed that in *Clark v.*
10 *Martinez* and said, if there's any predictable
11 range of cases that leads to unconstitutional
12 outcomes, that's pretty good evidence that's not
13 the proper construction of the statute if
14 there's a plausible alternative.

15 JUSTICE SOTOMAYOR: One of the amici
16 here set out why they thought the administrative
17 review process under 1231 is not adequate.

18 Are you accepting the arguments of
19 that amici?

20 MR. HUGHES: Yes, Your Honor. I think
21 you may be referring to the ACLU. And --

22 JUSTICE SOTOMAYOR: Yes.

23 MR. HUGHES: -- it's exactly the
24 arguments that this Court in *Zadvydas* adopted,
25 which is to say there's no neutral arbitrator.

1 One of the de minimis requirements of due
2 process is before prolonged deprivation of
3 liberty having a neutral arbiter.

4 And what the Court in *Zadvydas* said is
5 it wouldn't be enough for a deprivation of
6 property if there was a non-reviewable
7 administrative agency that makes a -- a property
8 deprivation, and the same rules should govern in
9 fundamental liberty interests.

10 JUSTICE SOTOMAYOR: But answer Justice
11 Thomas's question, why wouldn't the habeas
12 proceeding be enough to give you that review?

13 MR. HUGHES: Well, again, it goes back
14 to the constitutional avoidance principle. Even
15 if there is an option to vindicate the
16 constitutional rights, here, we're addressing
17 what's the proper construction and interplay of
18 1226 and 1231.

19 And given that we believe this is very
20 plausibly read as being in 1226, the
21 constitutional avoidance doctrine in -- informs
22 us that we shouldn't select the construction of
23 the statute that is going to lead to grave
24 constitutional concerns and the need to bring
25 individualized habeas actions.

1 JUSTICE SOTOMAYOR: Thank you.

2 CHIEF JUSTICE ROBERTS: Justice Kagan.

3 JUSTICE KAGAN: Mr. Hughes, just on
4 the constitutional point again, is -- is your
5 understanding -- I guess I'm a little bit
6 confused as to what the government is -- is
7 saying about Zadvydas and -- and -- and how it
8 serves as a backdrop.

9 Is -- is your understanding that, once
10 six months passes, all of the people in your
11 clients' position will be able to get hearings
12 under Zadvydas?

13 MR. HUGHES: No, Your Honor, it's not
14 my understanding, and it's actually quite the
15 contrary. When these individualized claims are
16 brought, the government resists them, so it's
17 not the case that they get individualized
18 hearings under -- under Zadvydas, no.

19 JUSTICE KAGAN: Well, why is that?
20 What -- what grounds does the government resist
21 them on, on -- on -- on the view that removal is
22 -- is -- that they haven't satisfied the
23 standard of -- of reasonable foreseeability of
24 removal? Is that the idea?

25 MR. HUGHES: That is the argument that

1 the government advances and then the lower --
2 the courts have to address that argument on an
3 as-applied basis, yes, Your Honor.

4 JUSTICE KAGAN: I mean, could you give
5 me a little bit more on that? Like, what does
6 the government say and what have courts been
7 holding with respect to this?

8 MR. HUGHES: Your Honor, there's mixed
9 results in the lower courts, that they -- they
10 are a bit all over the map as to what they think
11 the standard for Zadvydas would be in this
12 context.

13 The government makes the argument that
14 if there are proceedings ongoing, the whole --
15 there is not reasonable foreseeability that is
16 satisfied for that due process test.

17 The -- the -- the noncitizens
18 routinely make the argument that, because of the
19 prolonged nature, regardless of that
20 foreseeability, there still needs to be an
21 individualized detention.

22 My understanding is that the district
23 courts are -- are somewhat mixed on this
24 question. And many courts have found,
25 notwithstanding the government's contrary

1 argument, that there's very serious due process
2 concerns that require a -- a hearing, an
3 individualized hearing in those circumstances
4 over the government's objection to that
5 principle.

6 JUSTICE KAGAN: But the government's
7 argument, as it goes through these cases one by
8 one by one is that -- is that aliens who are in
9 withholding proceedings even after six months do
10 not get Zadvydas hearings because, in that case,
11 detention -- in that case, removal is still
12 foreseeable?

13 MR. HUGHES: Yes, Your Honor, that's
14 correct.

15 JUSTICE KAGAN: Okay. That's all.
16 Thank you.

17 CHIEF JUSTICE ROBERTS: Justice
18 Gorsuch.

19 JUSTICE GORSUCH: Good morning, Mr.
20 Hughes. One of the government's main structural
21 arguments in response to your 1226 submission is
22 that Congress placed both the provisions
23 governing restatement of removal orders and
24 provisions governing withholding orders in 1231,
25 not 1226.

1 What -- what do you say to that?

2 MR. HUGHES: Thank you, Your Honor.

3 So, to begin with the reinstatement provision,
4 that's (a)(5), I think it's understandable that
5 it's in Section 1231 because, as we've
6 explained, in more than 98 percent of cases, the
7 individual does go immediately to Section 1231
8 detention and is promptly removed from the
9 United States.

10 This case is about the very rare
11 exception when individuals have satisfied a
12 reasonable fear interview, which is -- which is
13 a very high threshold under the standard.

14 JUSTICE GORSUCH: I understand that.
15 But, again, both the withholding as well as the
16 reinstatement are in 1231. So you're -- you're
17 just saying, well, I'm -- I want to talk about
18 withholding, but that's in 1231 too.

19 So what -- what do we do about that?

20 MR. HUGHES: Your Honor, I think one
21 way to think about withholding -- and this goes
22 to the hypothetical that I believe Justice Kagan
23 posed earlier -- is it's very normal for
24 individuals in removal proceedings to concede
25 their removability, and -- and not in

1 reinstatement cases, but just in normal removal
2 proceedings, to concede everything about
3 removability and that the removal -- to only
4 advance a withholding claim.

5 That happens day in and day out in the
6 immigration courts, and that's
7 non-controversially subject to 1226 detention.

8 These cases look exactly like that,
9 and they fit well within the category of 1226,
10 of protracted proceedings that make the
11 determination as to whether the INA --

12 JUSTICE GORSUCH: I -- I -- I
13 understand all of that, and I'm sorry to
14 interrupt, but what -- what rational explanation
15 is there for Congress to have placed that in
16 1231 then?

17 MR. HUGHES: Well, in -- because
18 Congress was placing where individuals are sent
19 in the -- the 1231(b). With (b)(2), you have
20 the list of countries and in (b)(3) the -- the
21 -- the list of countries for withholding where
22 the individual could not be sent.

23 I think that's the rational basis on
24 which this was structurally placed in 1231. But
25 I don't think that bears on the detention

1 question when we know that individuals in
2 outside reinstatement proceedings, who only have
3 withholding claims, are uncontroversially
4 subject to 1226 detention, as -- as I think my
5 colleague earlier agreed.

6 JUSTICE GORSUCH: What do we do about
7 the fact that we don't normally think of agency
8 action becoming final just because a party
9 doesn't press a request for additional agency
10 action?

11 This administrative finality argument
12 all depends on the absence of any request for
13 further agency action from an individual. That
14 seems an unusual way to define "agency
15 finality."

16 Can you help me with that?

17 MR. HUGHES: Yes, Your Honor. And,
18 again, to start with, and I hate to keep
19 repeating, but I -- we don't think you get to
20 finality.

21 But -- but, if you do get to finality,
22 you know, the key way to think of it is the
23 reinstatement process, when does that conclude,
24 and we think that when it's actually executable
25 is a natural way to think of administrative

1 finality.

2 And -- and, again, the government's
3 position, I think, has real problems here
4 because, as they articulated earlier, they think
5 that "finality" means two different things in
6 this same particular statutory scheme. They
7 agree that there's --

8 JUSTICE GORSUCH: Right. Yeah, I got
9 that argument. Thank you, Mr. Hughes. My
10 time's expired. I'm sorry.

11 MR. HUGHES: Thank you.

12 CHIEF JUSTICE ROBERTS: Justice
13 Kavanaugh.

14 JUSTICE KAVANAUGH: Thank you.

15 And good morning, Mr. Hughes.

16 Looking at the language of 1226, it of
17 course says pending a decision on whether the
18 alien is to be removed. And then when you go to
19 1231, it makes clear that that decision on
20 whether the alien is to be removed has really
21 already been made automatically in the case of
22 someone who reenters the country illegally,
23 because the prior order of removal is
24 reinstated.

25 So I know we're -- I'm covering ground

1 that's been covered, but just trying to make
2 sense of the precise text of these two
3 provisions. It gets difficult to say that
4 there's a decision pending on whether the alien
5 is to be removed when the statute itself says
6 they are to be removed. "Shall be removed" is
7 the language of 1231.

8 Can you help me on that?

9 MR. HUGHES: Yes, Your Honor, two
10 responses. First, this -- that argument rests
11 on the government separating out the whether and
12 the where. And I think for reasons the Court
13 well understands, we don't think it's anywhere
14 near plausible to say you can decide the whether
15 question or 1226. It's the question where
16 question, and 98 percent of the time it's going
17 to be nowhere. That just is not actually
18 deciding the whether question or 1226.

19 But the second point to -- to address
20 is the reinstatement provision in (a)(5). This
21 -- this goes back to the point I was earlier
22 making. We appreciate that that language reads
23 absolute in its terms. And that's why it has to
24 be reconciled withholding because if the Court
25 read that to its absolute terms, that would mean

1 it -- it would nullify withholding proceedings
2 for individuals in this category. It would mean
3 that individuals could immediately be removed.

4 The government agrees that that's not
5 a plausible reading of the -- that statutory
6 text, given the -- the U.S. obligations here.
7 And so the way that it gets reconciled is to
8 appreciate the process of reinstatement and when
9 that reinstatement can be deemed final, thus
10 triggering the obligations or the rights under
11 the -- the (a)(5) reinstatement process.

12 That, we think, is most naturally
13 understood to be when these -- the withholding
14 proceedings conclude, resulting in an order that
15 is executable and administratively final.

16 JUSTICE KAVANAUGH: And these
17 provisions, are they part of the '96 Act?

18 MR. HUGHES: Yes, Your Honor, I
19 believe -- I believe they are. The withholding
20 provisions predate that, but -- but the
21 provisions you're referencing, yes, Your Honor.

22 JUSTICE KAVANAUGH: Yeah. And the '96
23 Act, as -- as we discuss often, was of course
24 meant to be very stringent, so it's not
25 surprising that the language of (a)(5)'s worded

1 that way.

2 One of your main responses, and you
3 were talking about this with Justice Kagan, is
4 going past the -- the six-month Zadvydas period.

5 I guess my question is why don't --
6 there are -- there are cases pending in this
7 Court on that question, the constitutional
8 Zadvydas due process point.

9 Isn't that the better way to analyze
10 this, rather than reconfiguring the statute to
11 get to that result?

12 MR. HUGHES: Well, Your Honor, we
13 don't think this requires any reconfiguration of
14 the statute at all. We think we're naturally
15 within 1226.

16 And as for 1231, we think the
17 government has a substantial problem with
18 explaining how the removal period, which is the
19 time during which the government shall remove,
20 can begin and end long before the government has
21 authority to remove anyone anywhere.

22 So we certainly don't ask for any
23 reconfiguration of the statutes. We want
24 1226(a) and 1231 applied by their terms.

25 JUSTICE KAVANAUGH: Thank you.

1 CHIEF JUSTICE ROBERTS: Justice
2 Barrett.

3 JUSTICE BARRETT: Counsel, when you
4 were answering Justice Kagan's questions and
5 then again when you were answering Justice
6 Gorsuch, you've pointed out that you thought it
7 would be anomalous for those noncitizens who
8 concede removability and litigate only
9 withholding claims to remain within 1226,
10 whereas those who have reinstated orders and
11 litigate withholding-only claims would be
12 treated under 1231.

13 And I just want to make sure that I'm
14 tracking that because the government says the --
15 the dividing line here is once a final order of
16 removal has been entered. And in the normal
17 case, you know, the mine run of cases in which
18 withholding claims are litigated, as you point
19 out, those are in the removal proceedings
20 themselves.

21 So, under the government's view, it
22 would make sense that those were under 1226,
23 rather than 1231, because in that situation
24 there is no final order of removal.

25 So explain to me what the anomaly is.

1 MR. HUGHES: Well, Your Honor, the --
2 the explanation was why these three reasonably
3 exist in 1231 and why we would draw that
4 inference, because if we were, then that
5 category of cases, I think, would -- would come
6 out differently.

7 I appreciate that that is the
8 government's rule. And that's a rule that does
9 not fare well for us. Our rule, of course, is
10 quite different. It turns on whether or not the
11 INA authorized removal of the individual. And
12 that tracks directly from the text of 1226 and
13 1231. We think that's the rule the Court should
14 adopt in construing these statutes.

15 JUSTICE BARRETT: Okay. And -- and
16 let me ask you this: So we're comparing here
17 two statutes, 1226 and 1231. And I'm trying to
18 figure out how much of the scheme in 1226 that's
19 advantageous in terms of offering a bond hearing
20 to the noncitizen is regulatory and how much is
21 statutory.

22 Because in your brief on page 7, you
23 say, "after an initial custody determination by
24 DHS, Congress determined that a noncitizen is
25 entitled to a bond hearing before an IJ."

1 But, as support for that, you cite a
2 regulation, not a statutory provision. And as
3 far as I can tell, in 1226 itself, the bond
4 hearing looks discretionary because it says that
5 the alien may be released on bond.

6 So why is a bond hearing an
7 entitlement under the statute as opposed to the
8 regulations? And why would it have to be before
9 an IJ, rather than an official from ICE, as a
10 matter of the statute?

11 MR. HUGHES: Well -- thank you, Your
12 Honor. 1226(a)(2), of course, the statute
13 directly requires a -- a bond hearing where
14 there is not the -- the bond carrying
15 requirements in 1231. So it's a direct
16 distinction between the detention provisions.

17 Your Honor, of course, is correct that
18 -- that its being squarely assigned to an IJ has
19 been done by matter of regulation, 8 C.F.R.
20 236.1(b). That's certainly the way that this
21 has been implemented. I think there may be a
22 reasonable argument the bond requirement carries
23 with it the requirement of a neutral arbitrator.
24 But regardless, that is how DHS for decades has
25 implemented this.

1 So the legal structure that comes to
2 the Court is a statute that requires the bond
3 and the -- the implementing regulations that put
4 that before a neutral immigration judge.

5 JUSTICE BARRETT: Thank you, counsel.

6 CHIEF JUSTICE ROBERTS: A minute to
7 wrap up, Mr. Hughes.

8 MR. HUGHES: Thank you, Your Honor.

9 We believe that the language of 1226
10 here fits perfectly. This is absolutely
11 individuals who are in detention pending a
12 decision on whether the alien is to be removed
13 from the United States.

14 Again, we think the government's
15 position has a very critical flaw, that they
16 take the position a removal period begins and
17 almost always ends before they can remove the
18 individual anywhere.

19 And we believe that (a)(1)(A) is -- is
20 the critical provision here because it defines
21 the removal period as the time during which the
22 government must have this authority. And it
23 also excepts from the removal period other
24 provisions in -- in 1231 when the government
25 doesn't have authority to remove, which includes

1 the withholding provision. That's squarely the
2 case here.

3 And finally, we've certainly not
4 retracted in any -- our argument has been
5 consistent throughout this case. The
6 government's incorrect in saying we've somehow
7 backed away from our argument. It has always
8 been whether or not the INA authorizes removal
9 of the individual, as we said in the court of
10 appeals and the district court and consistently
11 throughout.

12 Thank you, Your Honor.

13 CHIEF JUSTICE ROBERTS: Thank you,
14 counsel.

15 Mr. Suri, you have three minutes for
16 rebuttal.

17 REBUTTAL ARGUMENT OF VIVEK SURI

18 ON BEHALF OF THE PETITIONERS

19 MR. SURI: Mr. Chief Justice, if we
20 take a fair view of this case, we've got some
21 strong arguments under the text of Section 1231,
22 particularly the title, detention and removal of
23 aliens who have been ordered removed.

24 They've got some reasonable arguments
25 under Section 1226. How can you say that

1 someone -- that there's been a decision about
2 whether to remove someone when it's not clear
3 that there's any country available?

4 So I'd like to talk in this rebuttal
5 about a few tiebreakers you might use to side
6 with 1231 over 1226. The first is that even
7 with respect to their arguments in 1226, all
8 they've been able to show is that those
9 provisions are ambiguous.

10 You can read those provisions to refer
11 to practicalities of removal or you can read it
12 to refer to the legal decision, i.e., the order
13 of removal itself.

14 The phrases in Section 1231 by
15 contrast are fairly clear. "Ordered removed"
16 means ordered removed. And these aliens have
17 certainly been ordered removed.

18 So in those circumstances, what the
19 Court should do is use the clarity of
20 Section 1231 to resolve the ambiguity in 1226.
21 It shouldn't use the alleged ambiguity in 1226
22 to override the clarity of 1231.

23 The second tiebreaker is the structure
24 of the statute. Congress put the removal --
25 reinstatement of removal provision in

1 Section 1231. It also put the withholding
2 provision in Section 1231.

3 So if you find yourself thinking that
4 the text of 1226 and 1231 pull in opposite
5 directions, the structure of the statute tells
6 you that Section 1231 should win out here.

7 The third is -- the third tiebreaker
8 is this Court's precedent. In order for
9 Respondents to prevail, they have to adopt a
10 definition of administrative finality that's
11 directly contrary to this Court's decision just
12 last term in *Nasrallah*.

13 They have to say that a CAT or
14 withholding order does reset the finality of a
15 removal order. Indeed, that a mere request for
16 such protection resets the finality.

17 We don't -- that's directly contrary
18 to what the Court said, which is that the CAT
19 order does not disturb the validity of a final
20 order of removal.

21 The other relevant precedent is this
22 Court's decision in *Zadvydas*. The aliens in
23 *Zadvydas* find themselves in precisely the same
24 circumstance that Respondents are talking about
25 here. The government's looking around for some

1 country to which it can remove them. There may
2 be no such country available.

3 The Court didn't say in those
4 circumstances, oh, the decision about whether to
5 remove these aliens hasn't been made, so we're
6 under 1226. It said those aliens were under
7 1231 and it provided certain procedural
8 protections of while they remained there.

9 That's exactly what we ask the Court
10 to do here. Thank you.

11 CHIEF JUSTICE ROBERTS: Thank you,
12 counsel. The case is submitted.

13 (Whereupon, at 11:05 a.m., the case
14 was submitted.)

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Official - Subject to Final Review

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10 [5] 12:13,19,21,25 13:9 10:00 [2] 1:20 4:2 11 [3] 1:16 12:6,8 11:05 [1] 67:13 1101(a)(47) [1] 10:23 12 [2] 23:13 24:4 1221 [1] 17:20 1226 [44] 4:12,22,24,25 5:7, 14 8:11,15 9:12,25 17:20 21:14 22:5,9,23 32:24 33: 6 34:6 45:13 49:18,20 52: 21,25 54:7,9 55:4 56:16 57:15,18 59:15 60:9,22 61: 12,17,18 62:3 63:9 64:25 65:6,7,20,21 66:4 67:6 1226(a) [1] 59:24 1226(a)(2) [1] 62:12 1231 [55] 4:12,13 5:14,15 6: 16 8:11,12 9:25 13:20 19: 15 21:14 22:6,24 23:7,14 24:11 32:24 33:11 34:1,9, 21,24 41:3 44:14 45:15 48: 17 49:18 52:24 53:5,7,16, 18 54:16,24 56:19 57:7 59: 16,24 60:12,23 61:3,13,17 62:15 63:24 64:21 65:6,14, 20,22 66:1,2,4,6 67:7 1231(a) [2] 17:13,21 1231(a)(1)(A) [1] 33:19 1231(a)(3) [1] 16:5 1231(a)(5) [2] 18:16 36:1 1231(a)(6) [1] 29:5 1231(a)(7) [1] 6:11 1231(b) [1] 54:19 1231(b)(3) [1] 41:3 1252 [6] 9:2,14 23:17 24:10, 21 25:25 13 [2] 23:13 24:4 1330 [1] 13:20 15 [1] 17:7 19-897 [1] 4:4	8 [2] 36:22 62:19 85 [2] 17:10 30:1 877 [1] 26:16	administratively [11] 10:4, 5,14 12:21,25 37:24 39:20 41:24 43:5 45:22 58:15 admitted [4] 17:16 19:1,5, 9 adopt [2] 61:14 66:9 adopted [1] 48:24 advance [1] 54:4 advances [1] 51:1 advantageous [1] 61:19 affect [2] 7:23 37:5 affected [1] 13:8 affects [1] 7:24 agencies [2] 10:16,21 agency [8] 10:9,12 17:14 49:7 55:7,9,13,14 agency's [2] 10:24,25 agree [9] 21:3 23:6 31:12 35:5 38:11 43:21 44:13 46: 19 56:7 agreed [1] 55:5 agrees [1] 58:4 AL [2] 1:6,10 alien [39] 5:1,19 6:12 8:6, 16 9:8,10 15:8 16:6 17:18 19:15 20:9,9,14 21:20,23 22:4,8,23 27:3 29:1,2,5 30: 8,11,17,20 33:4 41:5 43:21, 24,25 44:1,6 56:18,20 57:4 62:5 63:12 alien's [2] 16:10 30:7 aliens [33] 4:15,19 5:3 9:22, 24 14:24 15:2,4,5,11 17:7, 22 18:17 19:10 20:25 21:8 22:24 26:6 31:12,13,17,20, 24,25 32:9 34:14 46:8 52: 8 64:23 65:16 66:22 67:5, 6 Alito [12] 14:18,19 15:7,21 16:2,12,23 43:17,18 44:19 46:1,25 Alito's [1] 16:16 ALJ [1] 11:18 alleged [1] 65:21 alleviates [1] 45:9 allow [1] 39:24 almost [1] 63:17 alongside [1] 4:24 already [5] 19:1 28:21 31: 20 32:23 56:21 alternative [2] 48:1,14 although [1] 8:15 altogether [1] 16:16 ambiguity [3] 10:15 65:20, 21 ambiguous [2] 10:8 65:9 amici [2] 48:15,19 analyze [1] 59:9 analyzed [1] 19:15 ANGELICA [1] 1:9 anomalous [1] 60:7 anomaly [1] 60:25 another [3] 18:4 24:13,14	answer [9] 13:5 15:24 27: 24 31:6,11 33:9 37:4,15 49:10 answering [3] 20:3 60:4,5 answers [1] 31:4 apparently [1] 24:2 appealed [1] 22:3 appeals [4] 8:15 25:18,20 64:10 appear [1] 16:7 APPEARANCES [1] 2:1 applicants [1] 18:7 application [1] 30:12 applied [2] 8:10 59:24 applies [5] 5:1,16 6:16 34: 9 44:14 apply [2] 5:7 26:18 appreciate [5] 6:3 18:11 57:22 58:8 61:7 arbiter [1] 49:3 arbitrator [2] 48:25 62:23 argue [1] 14:5 argument [36] 1:19 3:2,5,8 4:4,7 8:18 18:12,25 23:14 26:16,22 32:11,16 34:24 38:3 42:24 43:2 44:21 45: 2 46:3,9 47:2 50:25 51:2, 13,18 52:1,7 55:11 56:9 57:10 62:22 64:4,7,17 arguments [7] 47:4 48:18, 24 52:21 64:21,24 65:7 arise [3] 14:14,16 22:7 around [2] 12:6 66:25 articulated [1] 56:4 artificial [2] 6:5 7:9 as-applied [1] 51:3 assessment [1] 38:14 assigned [1] 62:18 Assistant [1] 2:2 assume [2] 38:24,25 assumption [1] 20:4 asylum [2] 6:21,23 attorney [1] 41:5 authority [10] 9:7,10 33:3 40:12 41:8 43:23,23 59:21 63:22,25 authorize [4] 33:2 39:9 44: 5,11 authorized [1] 61:11 authorizes [3] 33:21 34:8 64:8 authorizing [1] 44:17 automatically [3] 29:18,20 56:21 availability [1] 7:15 available [6] 7:11 8:8 20:5 24:20 65:3 67:2 avoid [1] 28:3 avoidance [4] 28:5 47:20 49:14,21 aware [1] 43:12 away [8] 26:19 27:1,6,8,13, 16,18 64:7	b)(2) [1] 54:19 b)(3) [2] 41:3 54:20 back [8] 20:2 23:16 31:22 37:19 39:5,14 49:13 57:21 back-end [1] 47:10 backdrop [1] 50:8 backed [1] 64:7 bail [3] 13:22 14:10 17:23 Barr [1] 44:20 Barrett [9] 29:12,13,24 31: 5 32:2 60:2,3 61:15 63:5 barriers [6] 26:19 27:6,8, 12,16,18 basic [1] 17:24 basically [2] 9:13 18:5 basis [3] 31:24 51:3 54:23 bears [1] 54:25 became [1] 42:16 becomes [6] 23:17 37:19 42:15,17 45:21,21 becoming [2] 36:6 55:8 begin [6] 19:20 33:17,21 41:10 53:3 59:20 beginning [2] 42:21 43:4 begins [6] 19:23 27:5,10, 15 34:9 63:16 begun [1] 40:15 behalf [8] 2:4,6 3:4,7,10 4: 8 32:17 64:18 believe [8] 37:20,22 49:19 53:22 58:19,19 63:9,19 best [5] 4:23 12:5 13:2,5 36:16 bets [1] 24:6 better [1] 59:9 between [10] 6:1,4,20 10:3 17:20 21:14 42:19 43:3 44: 16 62:16 bifurcated [1] 22:14 bit [5] 20:7 38:9 50:5 51:5, 10 board [1] 6:2 body [1] 25:5 bond [12] 9:11,23 17:23 61: 19,25 62:3,5,6,13,14,22 63: 2 both [8] 10:12 25:12 26:5,7 28:20 35:24 52:22 53:15 Breyer [16] 11:8,9 12:7,12, 16 13:3,15,25 14:4 17:16 40:20,21 41:22 43:1,14 45: 20 Breyer's [1] 27:20 brief [5] 14:21 23:13 28:6 47:5 61:22 briefed [1] 8:25 briefly [2] 8:24 9:1 briefs [1] 12:10 bring [3] 39:5 42:10 49:24 brought [1] 50:16
2	A	7 55:11,25 66:10	C	
20 [1] 13:10 200 [1] 30:14 2021 [1] 1:16 205 [1] 44:10 208.31(a) [1] 36:22 236.1(b) [1] 62:20	a)(1)(A) [4] 33:24 40:9 45:3 63:19 a)(1)(B) [4] 37:21 40:8,17 45:12 a)(1)(C) [3] 30:10 31:6 41: 15 a)(3) [1] 30:15 a)(5) [7] 36:12,17 39:23 42:4 53:4 57:20 58:11 a)(5)'s [1] 58:25 a)(6) [2] 31:16 32:1 a.m [3] 1:20 4:2 67:13 abandon [1] 41:23 abandoned [2] 8:18 32:11 ability [2] 21:16 32:8 able [3] 30:8 50:11 65:8 above-entitled [1] 1:18 absence [1] 55:12 absolute [2] 57:23,25 absolutely [3] 42:24 48:2 63:10 accept [4] 18:5 19:12 20:9 46:8 accepted [1] 44:22 accepting [2] 7:17 48:18 accurate [1] 38:25 acknowledged [2] 23:22 27:21 ACLU [1] 48:21 acquires [1] 21:15 across [2] 6:2 24:23 Act [2] 58:17,23 action [3] 55:8,10,13 actions [1] 49:25 actually [7] 8:6 27:15 35: 14 45:5 50:14 55:24 57:17 additional [2] 27:18 55:9 Additionally [1] 35:16 address [4] 14:17 45:18 51:2 57:19 addressed [1] 48:9 addresses [1] 32:20 addressing [1] 49:16 adequate [1] 48:17 adhere [1] 17:24 administrative [9] 11:18 37:21 40:8 44:22 48:16 49:	7 55:11,25 66:10 AL [2] 1:6,10 alien [39] 5:1,19 6:12 8:6, 16 9:8,10 15:8 16:6 17:18 19:15 20:9,9,14 21:20,23 22:4,8,23 27:3 29:1,2,5 30: 8,11,17,20 33:4 41:5 43:21, 24,25 44:1,6 56:18,20 57:4 62:5 63:12 alien's [2] 16:10 30:7 aliens [33] 4:15,19 5:3 9:22, 24 14:24 15:2,4,5,11 17:7, 22 18:17 19:10 20:25 21:8 22:24 26:6 31:12,13,17,20, 24,25 32:9 34:14 46:8 52: 8 64:23 65:16 66:22 67:5, 6 Alito [12] 14:18,19 15:7,21 16:2,12,23 43:17,18 44:19 46:1,25 Alito's [1] 16:16 ALJ [1] 11:18 alleged [1] 65:21 alleviates [1] 45:9 allow [1] 39:24 almost [1] 63:17 alongside [1] 4:24 already [5] 19:1 28:21 31: 20 32:23 56:21 alternative [2] 48:1,14 although [1] 8:15 altogether [1] 16:16 ambiguity [3] 10:15 65:20, 21 ambiguous [2] 10:8 65:9 amici [2] 48:15,19 analyze [1] 59:9 analyzed [1] 19:15 ANGELICA [1] 1:9 anomalous [1] 60:7 anomaly [1] 60:25 another [3] 18:4 24:13,14	b)(2) [1] 54:19 b)(3) [2] 41:3 54:20 back [8] 20:2 23:16 31:22 37:19 39:5,14 49:13 57:21 back-end [1] 47:10 backdrop [1] 50:8 backed [1] 64:7 bail [3] 13:22 14:10 17:23 Barr [1] 44:20 Barrett [9] 29:12,13,24 31: 5 32:2 60:2,3 61:15 63:5 barriers [6] 26:19 27:6,8, 12,16,18 basic [1] 17:24 basically [2] 9:13 18:5 basis [3] 31:24 51:3 54:23 bears [1] 54:25 became [1] 42:16 becomes [6] 23:17 37:19 42:15,17 45:21,21 becoming [2] 36:6 55:8 begin [6] 19:20 33:17,21 41:10 53:3 59:20 beginning [2] 42:21 43:4 begins [6] 19:23 27:5,10, 15 34:9 63:16 begun [1] 40:15 behalf [8] 2:4,6 3:4,7,10 4: 8 32:17 64:18 believe [8] 37:20,22 49:19 53:22 58:19,19 63:9,19 best [5] 4:23 12:5 13:2,5 36:16 bets [1] 24:6 better [1] 59:9 between [10] 6:1,4,20 10:3 17:20 21:14 42:19 43:3 44: 16 62:16 bifurcated [1] 22:14 bit [5] 20:7 38:9 50:5 51:5, 10 board [1] 6:2 body [1] 25:5 bond [12] 9:11,23 17:23 61: 19,25 62:3,5,6,13,14,22 63: 2 both [8] 10:12 25:12 26:5,7 28:20 35:24 52:22 53:15 Breyer [16] 11:8,9 12:7,12, 16 13:3,15,25 14:4 17:16 40:20,21 41:22 43:1,14 45: 20 Breyer's [1] 27:20 brief [5] 14:21 23:13 28:6 47:5 61:22 briefed [1] 8:25 briefly [2] 8:24 9:1 briefs [1] 12:10 bring [3] 39:5 42:10 49:24 brought [1] 50:16	
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Official - Subject to Final Review

<p>C.F.R. [2] 36:22 62:19 call [2] 7:8,8 came [1] 1:18 cannot [8] 5:23 21:8,20 33:7,21 34:2 40:4 42:6 capable [1] 10:20 caption [1] 4:16 carries [1] 62:22 carry [1] 21:16 carrying [1] 62:14 Case [22] 4:4 5:8 8:7 9:2,3 21:13 28:17 32:20 45:12,13 48:6 50:17 52:10,11 53:10 56:21 60:17 64:2,5,20 67:12,13 case-by-case [1] 15:18 cases [17] 7:10 14:15 17:17 26:7 28:13,25 46:14 47:25 48:8,11 52:7 53:6 54:1,8 59:6 60:17 61:5 CAT [7] 5:22 13:8,12 37:5 39:16 66:13,18 categorical [2] 36:11 39:23 categorically [1] 40:12 category [6] 7:10 11:25 30:2 54:9 58:2 61:5 caught [1] 31:23 certain [4] 35:13 38:17 41:16 67:7 certainly [9] 11:1 12:24 14:13 21:3 24:17 59:22 62:20 64:3 65:17 cetera [2] 30:13 42:13 chance [2] 14:10 23:18 CHAVEZ [2] 1:9 4:5 CHIEF [48] 4:3,9 5:18,24 7:2,5 8:1,4,19,22 11:7 14:18 16:13 19:1,5,9,25 20:2 23:9 26:9,11 29:11 32:3,5,13,18 34:10,17 35:22,25 37:3,9,13 38:2,4,7 39:14 40:19 43:17 46:23 50:2 52:17 56:12 60:1 63:6 64:13,19 67:11 choosing [1] 18:1 chose [1] 48:4 Circuit [2] 23:23 24:2 Circuit's [1] 26:14 circumstance [2] 27:22 66:24 circumstances [10] 7:21 8:7,11 32:21 44:4,17 46:20 52:3 65:18 67:4 cite [2] 17:6 62:1 cites [1] 17:5 claim [5] 9:9 40:25 41:1,4 54:4 claims [8] 5:21 17:6 27:25 50:15 55:3 60:9,11,18 clarifies [1] 10:15 clarify [1] 16:18 clarity [2] 65:19,22 Clark [2] 47:21 48:9</p>	<p>class [2] 17:17 18:6 clause [7] 4:25 5:2 7:19 25:1 33:24 41:7 45:7 clear [11] 4:16 5:5 10:15 27:1,7 34:21 40:4 41:19 56:19 65:2,15 cleared [5] 26:19 27:6,13,16,18 clients [2] 34:11,18 clients' [1] 50:11 collapse [2] 6:25 7:6 colleague [2] 28:1 55:5 colloquy [1] 20:2 come [2] 31:22 61:5 comes [1] 63:1 commands [1] 17:14 community [1] 29:3 comparing [1] 61:16 complete [1] 25:22 completed [7] 10:9,10,12,17,24 11:1 17:9 completion [1] 27:11 concede [3] 53:24 54:2 60:8 concedes [2] 21:24 23:5 concern [1] 47:3 concerns [2] 49:24 52:2 conclude [5] 37:1,23 40:13 55:23 58:14 concluded [1] 39:11 concludes [2] 37:25 45:23 concluding [1] 31:24 conclusion [5] 4:23 33:23 35:1 39:19,20 conclusive [1] 36:24 conditions [2] 16:5 44:8 conduct [3] 16:11 23:5 29:22 confinement [1] 31:3 confused [2] 38:9 50:6 Congress [1] 5:11 6:11,17 28:6 41:14 48:4 52:22 54:15,18 61:24 65:24 Congress's [1] 34:4 consistent [1] 64:5 consistently [1] 64:10 constitution [1] 14:7 constitutional [12] 28:4,5,7,22 47:19 48:6 49:14,16,21,24 50:4 59:7 constitutionally [1] 47:25 constraints [1] 15:14 construction [3] 48:13 49:17,22 construing [1] 61:14 contention [1] 9:24 contest [1] 20:21 context [8] 6:5,16 22:9,11 26:5,6 35:4 51:12 contexts [2] 24:23 25:16 contextual [1] 26:15 continue [1] 31:17 continued [1] 31:2 contrary [5] 33:15 50:15</p>	<p>51:25 66:11,17 contrast [1] 65:15 controls [1] 17:21 convince [2] 21:14,19 cooperate [1] 41:16 corpus [3] 9:4,5 25:21 correct [8] 7:13 11:22 17:12 28:11 42:22 47:7 52:14 62:17 couldn't [1] 20:11 counsel [13] 8:20,24 16:15 19:17 29:13 32:14 34:10 38:5 47:1 60:3 63:5 64:14 67:12 counsels [1] 17:25 countries [5] 6:15 46:7,16 54:20,21 country [41] 5:13,20 6:13 7:11 8:8 11:3,15 12:4 13:11 14:7 19:11,14 20:4,8,12,20,22 21:10,11 27:1,4 31:21,22 38:12,23 42:12 43:8,24,25 44:3,6,10,13 46:5,6,11,19 56:22 65:3 67:1,2 couple [1] 14:20 course [6] 35:7 56:17 58:23 61:9 62:12,17 COURT [46] 1:1,19 4:10 5:9 6:22 8:15 9:1,5,15,21 10:1 11:4 13:7,11 19:21 25:18,18,20,20 26:3 28:21 32:9,19 36:9 37:22 39:16 40:7 44:21 45:11,17,19 47:21,22 48:24 49:4 57:12,24 59:7 61:13 63:2 64:9,10 65:19 66:18 67:3,9 Court's [6] 5:17 7:17 13:6 66:8,11,22 courts [11] 10:10,12,18 25:6 47:23 51:2,6,9,23,24 54:6 covered [1] 57:1 covering [1] 56:25 criminal [1] 14:24 criteria [1] 29:7 critical [4] 35:3,13 63:15,20 cures [1] 28:21 currently [2] 20:10,25 custody [5] 13:21 28:23 29:14,17 61:23 CUSTOMS [1] 1:6</p>	<p>debating [1] 39:1 decades [1] 62:24 decide [3] 11:2,21 57:14 decides [2] 25:19,20 deciding [2] 15:4 57:18 decision [17] 5:1,5 13:6 15:17,22 22:22 28:15 33:4 56:17,19 57:4 63:12 65:1,12 66:11,22 67:4 deemed [1] 58:9 default [4] 30:3,22 31:1,15 defend [1] 7:14 defied [1] 31:21 define [1] 55:14 defined [2] 30:13,19 defines [5] 33:11,20 40:10 45:3 63:20 definition [8] 4:17,20 10:22 24:25 27:9 40:16 45:15 66:10 degree [1] 46:2 denied [1] 16:19 Department [3] 2:3 15:1,11 depend [1] 20:18 dependent [1] 46:3 depending [1] 15:19 depends [6] 7:17 8:5,6 9:23 47:2 55:12 deport [1] 21:20 deported [1] 38:20 deprivation [3] 49:2,5,8 describe [1] 36:21 described [2] 34:22 37:23 detain [5] 9:8,10 15:11 29:4 31:17 detainable [1] 29:8 detained [6] 4:11 9:24 15:5 27:23 29:1,18 detaining [1] 14:14 detention [19] 14:23 15:15 28:12,13 32:25 34:7,13,14,24 47:24 51:21 52:11 53:8 54:7,25 55:4 62:16 63:11 64:22 determination [7] 9:22,23 29:2 34:5 35:18 54:11 61:23 determinations [3] 35:13 38:17 47:24 determine [1] 17:21 determined [1] 61:24 determining [1] 15:17 DHS [4] 43:22 44:5 61:24 62:24 difference [3] 6:20 10:3 22:25 different [10] 24:21 25:4,16,16,24,25 46:17,20 56:5 61:10 differential [1] 23:1 differently [3] 25:13,15 61:6 difficult [1] 57:3</p>	<p>difficulty [2] 23:23 24:16 diplomatic [1] 27:2 direct [2] 25:22 62:15 directions [1] 66:5 directly [4] 61:12 62:13 66:11,17 DIRECTOR [1] 1:5 disagree [1] 36:10 disagrees [1] 26:3 discretionary [1] 62:4 discuss [1] 58:23 discussed [1] 46:4 dispute [1] 4:18 dissent [1] 23:23 distinct [3] 6:18 11:3 13:12 distinction [8] 5:25 6:4,8,19 7:7,15,18 62:16 district [4] 9:1 25:18 51:22 64:10 disturb [2] 13:13 66:19 dividing [1] 60:15 divorced [1] 33:7 doctrine [1] 49:21 documents [3] 30:12 33:14 41:17 done [2] 10:21 62:19 down [1] 18:16 draw [3] 6:9 7:7 61:3 due [6] 47:2,6 49:1 51:16 52:1 59:8 during [9] 14:23 15:11 30:9 33:1 39:25 40:14 41:12 59:19 63:21 DUTIES [1] 1:4</p>
E				
<p>each [1] 8:7 earlier [5] 46:4 53:23 55:5 56:4 57:21 effect [5] 18:3 35:7,8,20 39:2 effectively [1] 23:24 effectuating [1] 33:14 effort [1] 46:14 either [2] 21:9,9 embrace [2] 42:24 43:2 emphasis [1] 5:25 emphasized [1] 11:4 emphatic [1] 13:12 end [3] 33:17 47:11 59:20 ended [1] 13:19 ends [4] 14:3 29:15 30:3 63:17 ENFORCEMENT [1] 1:6 enough [3] 47:17 49:5,12 enter [2] 22:16 23:4 entered [3] 35:17 42:20 60:16 enters [1] 22:1 entire [1] 25:22 entitled [3] 9:22 34:14 61:25 entitlement [1] 62:7 entry [2] 21:17 43:3</p>				

Official - Subject to Final Review

<p>escape [1] 32:22 ESQ [3] 3:3,6,9 ESQUIRE [1] 2:5 establish [1] 10:16 estimate [1] 12:6 ET [4] 1:6,10 30:12 42:13 Even [14] 6:15 8:15 14:10 20:6 28:16 29:8 40:7,16 45:11,17 46:12 49:14 52:9 65:6 events [1] 27:11 everyone [2] 13:16 23:4 everything [1] 54:2 evidence [1] 48:12 exact [2] 16:22 25:11 exactly [5] 9:19 21:21 48: 23 54:8 67:9 examination [1] 16:9 example [5] 16:6 25:17 35: 13 36:22 41:16 except [6] 18:14,22 33:24 40:22 41:7 45:7 exception [1] 53:11 excepts [1] 63:23 excessive [1] 47:25 executable [4] 37:25 39: 22 55:24 58:15 execute [1] 45:5 executed [1] 10:20 executing [1] 45:10 execution [1] 37:2 exist [1] 61:3 expect [1] 34:12 expired [2] 29:23 56:10 explain [5] 8:25 9:19 25:8 35:10 60:25 explained [4] 45:6,21 47: 20 53:6 explaining [1] 59:18 explanation [2] 54:14 61:2 express [2] 19:22 44:1 extended [1] 31:9 extent [1] 15:12 eyes [4] 5:5 14:2 21:7,7</p> <hr/> <p style="text-align: center;">F</p> <p>face [1] 32:22 facility [2] 15:15,20 fact [7] 11:22 13:16 24:10 26:16,20 38:22 55:7 factual [1] 39:1 fails [1] 30:11 fair [1] 64:20 fairly [4] 12:17,23,23 65:15 fall [1] 11:24 far [1] 62:3 fare [1] 61:9 fault [3] 30:7,23,23 favor [2] 17:25 26:1 favours [1] 41:25 fear [8] 11:14,20,22,25 20: 19 32:24 44:1 53:12 feared [2] 13:17,17 feasibility [1] 46:5</p>	<p>Fernando [2] 36:9,17 few [2] 6:10 65:5 field [1] 15:25 fifth [1] 43:9 figure [1] 61:18 final [43] 7:4 10:4,5,5,7,14 12:21,25 13:14 22:21 23: 15,21 24:11,12,20,22 25:2, 10,15,17,19,21,23,25 26:5 36:6,25 37:6,19,24 39:9,21 41:24 42:17,17 43:5 45:22 55:8 58:9,15 60:15,24 66: 19 finality [21] 10:23,23 13:8 18:9 24:25 25:4,10 37:21 40:9 44:22 45:18,19 55:11, 15,20,21 56:1,5 66:10,14, 16 finally [2] 28:25 64:3 find [2] 66:3,23 finding [1] 11:22 findings [1] 31:15 finds [1] 5:9 first [20] 4:13 6:10 7:16 9:8 15:1,8 18:13 24:18 26:24 28:11 31:6 33:20,24 38:20 39:18 40:6 45:2,6 57:10 65:6 fit [3] 33:11 34:18 54:9 fits [2] 45:13 63:10 flaw [1] 63:15 flight [2] 29:2 31:25 focused [1] 32:6 follow [4] 18:25 26:4 28:9 43:19 force [1] 18:11 foreseeability [3] 50:23 51:15,20 foreseeable [1] 52:12 forgive [1] 24:5 found [3] 12:2 32:23 51:24 four [1] 28:14 Fourth [4] 23:23 24:2 26: 14 43:9 framework [1] 15:17 friend [3] 40:3 45:24 48:7 fulfillment [1] 36:14 functionally [1] 6:24 fundamental [1] 49:9 further [2] 20:7 55:13</p> <hr/> <p style="text-align: center;">G</p> <p>gateway [3] 33:19 40:10 45:2 gather [1] 7:12 General [4] 2:2 24:24 31: 12 41:5 gets [4] 29:19 37:20 57:3 58:7 getting [2] 14:10 40:16 give [4] 26:25 27:7 49:12 51:4 given [4] 12:17 20:21 49: 19 58:6</p>	<p>giving [1] 25:25 Gorsuch [12] 23:10,11 24: 17 25:8 26:8 52:18,19 53: 14 54:12 55:6 56:8 60:6 got [3] 56:8 64:20,24 govern [2] 29:17 49:8 governed [1] 34:13 governing [3] 5:12 52:23, 24 government [45] 9:7,9 19: 13 21:15 22:3 24:2,5 25: 12 26:25 29:22 30:8,23 31: 17 32:7 33:3,12,22 34:2,25 36:10 39:24 40:2,12,15 41: 8,13,21 45:5,10 46:15,18 50:6,16,20 51:1,6,13 57:11 58:4 59:17,19,20 60:14 63: 22,24 government's [15] 24:19 33:15 47:5,9,14 51:25 52: 4,6,20 56:2 60:21 61:8 63: 14 64:6 66:25 governs [1] 32:24 granted [2] 17:2 33:8 grants [2] 22:2 23:21 grave [1] 49:23 ground [1] 56:25 grounds [1] 50:20 group [1] 11:17 guess [4] 22:19,24 50:5 59: 5 GUZMAN [2] 1:9 4:5</p> <hr/> <p style="text-align: center;">H</p> <p>habeas [6] 9:4,5 25:21 47: 16 49:11,25 hand [2] 6:21,22 happen [1] 23:8 happening [3] 14:3 15:19 42:19 happens [6] 22:11 29:21 31:7,10 38:13 54:5 harmonious [2] 18:1 45: 14 Harris [1] 26:15 hate [1] 55:18 hear [1] 4:3 heard [1] 9:6 hearing [8] 29:19 52:2,3 61:19,25 62:4,6,13 hearings [5] 9:11,23 50:11, 18 52:10 hedging [1] 24:6 held [4] 11:18,19 13:21 16: 19 help [4] 24:15 26:21 55:16 57:8 high [1] 53:13 hit [1] 29:16 hold [1] 6:1 holding [1] 51:7 Homeland [1] 15:2 Honor [38] 5:23 6:3 7:14 9: 3 34:20 36:8 37:8,17 38:</p>	<p>15 39:4,17 41:2,6 42:23 43:12,16 44:7,25 46:10 47: 8,18 48:20 50:13 51:3,8 52:13 53:2,20 55:17 57:9 58:18,21 59:12 61:1 62:12, 17 63:8 64:12 hope [1] 13:22 HUGHES [50] 2:5 3:6 32: 15,16,18 34:16,19 35:24 36:8 37:8,11,17 38:3,9,15 39:4,17 41:2 42:23 43:11, 15,18 44:7,25 46:10 47:8, 18 48:20,23 49:13 50:3,13, 25 51:8 52:13,20 53:2,20 54:17 55:17 56:9,11,15 57: 9 58:18 59:12 61:1 62:11 63:7,8 hypothetical [2] 23:3 53: 22</p> <hr/> <p style="text-align: center;">I</p> <p>i.e [2] 43:5 65:12 ICE [2] 15:25 62:9 idea [3] 25:3 28:12 50:24 identification [1] 16:8 identify [2] 27:1 46:19 identifying [1] 38:18 IJ [4] 21:25 61:25 62:9,18 illegally [2] 31:22 56:22 imagine [1] 15:25 immediately [2] 53:7 58:3 immigrants [2] 17:14,15 IMMIGRATION [9] 1:5 11: 19 12:1 16:7 22:15 23:3 28:15 54:6 63:4 implemented [2] 62:21,25 implementing [1] 63:3 important [1] 39:22 impossible [2] 6:14 17:17 42:19 impracticable [1] 6:14 INA [10] 33:2,21 34:8 35:21 41:9 44:12,17 54:11 61:11 64:8 includes [2] 38:18 63:25 inconsistent [2] 18:3 27: 13 incorrect [1] 64:6 Indeed [2] 4:19 66:15 indefinite [1] 34:6 indicate [1] 25:1 indicated [2] 27:23 44:15 indication [1] 5:15 individual [11] 33:9 38:22 39:10,25 47:25 53:7 54:22 55:13 61:11 63:18 64:9 individualized [6] 47:23 49:25 50:15,17 51:21 52:3 individuals [11] 11:12 32: 21 34:22 46:15 53:11,24 54:18 55:1 58:2,3 63:11 infer [1] 48:3 inference [3] 19:19,22 61: 4 informs [1] 49:21</p>	<p>initial [2] 16:23 61:23 inquiry [1] 7:1 instead [2] 28:2 46:13 intended [1] 26:18 interests [1] 49:9 interplay [1] 49:17 interpret [3] 25:13,14 26: 21 interpretation [1] 18:2 interpretive [1] 17:25 interrupt [2] 19:9 54:14 interview [1] 53:12 inviting [1] 47:6 involved [1] 10:18 isn't [12] 8:2,5,9 20:22 21:2, 11 25:10 30:4,22,25 31:7 59:9 issue [4] 10:1 22:17 35:15 38:19 issues [1] 28:15 itself [6] 7:24 11:1 30:6 57: 5 62:3 65:13</p> <hr/> <p style="text-align: center;">J</p> <p>January [1] 1:16 Jones [2] 42:11 43:7 judge [7] 11:19 22:16 23:3, 22 26:15 28:15 63:4 judgment [1] 15:19 judicial [3] 23:18,25 26:1 jurisdiction [1] 9:1 Justice [162] 2:3 4:3,9 5:18, 24 7:2,5 8:1,4,19,21,22,23 9:13,18 10:2,19 11:6,7,7,9 12:7,12,16 13:3,15,25 14:4, 18,18,19 15:7,21 16:2,12, 13,13,15,16,23,25 17:10, 13,16 18:22,24 19:2,6,7,9, 16,24,25,25 20:1,3,15,17, 24 21:5,18,22 22:19 23:9,9, 11 24:17 25:8 26:8,9,9,11, 12,23 27:19,20 29:10,11, 11,13,24,25 31:2,5 32:2,3, 5,13,18 34:10,17 35:22,25 37:3,9,13 38:2,4,6,7,8,24 39:12 40:18,19,19,21 41: 22 43:1,14,17,17,18,19 44: 19 45:20 46:1,23,23,25 47: 1,12,20 48:9,15,22 49:10, 10 50:1,2,2,3,19 51:4 52:6, 15,17,17,19 53:14,22 54: 12 55:6 56:8,12,12,14 58: 16,22 59:3,25 60:1,1,3,4,5 61:15 63:5,6 64:13,19 67: 11 Justice's [1] 39:14 justification [1] 25:24</p> <hr/> <p style="text-align: center;">K</p> <p>Kagan [18] 19:25 20:1,15, 17,24 21:5,18,22 22:19 43: 19 50:2,3,19 51:4 52:6,15 53:22 59:3 Kagan's [1] 60:4</p>
--	--	---	--	--

Official - Subject to Final Review

<p>Kavanaugh ^[10] 26:10,11, 23 27:19 29:10 56:13,14 58:16,22 59:25</p> <p>keep ^[2] 14:8 55:18</p> <p>key ^[1] 55:22</p> <p>kick ^[2] 29:18,21</p> <p>kicks ^[1] 32:1</p> <hr/> <p style="text-align: center;">L</p> <hr/> <p>lack ^[1] 15:14</p> <p>lacks ^[1] 33:3</p> <p>language ^[11] 24:11 33:6 36:12,17 39:23 45:14 56:16 57:7,22 58:25 63:9</p> <p>large ^[1] 14:8</p> <p>last ^[9] 7:14 11:4 13:6 18:17 28:12,14,17 40:21 66:12</p> <p>lasts ^[1] 34:5</p> <p>law ^[5] 5:5 14:2 19:3 21:7,8</p> <p>lay ^[1] 4:24</p> <p>lead ^[4] 28:9 34:25 48:5 49:23</p> <p>leads ^[1] 48:11</p> <p>least ^[3] 7:10 24:15 48:6</p> <p>leave ^[6] 12:14,20,22 13:1, 11 30:17</p> <p>leaving ^[2] 13:19 44:6</p> <p>left ^[1] 11:2</p> <p>legal ^[10] 21:15 26:18 27:2, 6,12 35:20 43:23 44:16 63:1 65:12</p> <p>liberty ^[2] 49:3,9</p> <p>life ^[1] 39:6</p> <p>limit ^[1] 26:20</p> <p>limited ^[1] 26:17</p> <p>limits ^[1] 45:4</p> <p>line ^[2] 21:14 60:15</p> <p>list ^[2] 54:20,21</p> <p>litigate ^[2] 60:8,11</p> <p>litigated ^[1] 60:18</p> <p>litigating ^[1] 46:14</p> <p>little ^[3] 20:6 50:5 51:5</p> <p>local ^[1] 15:25</p> <p>long ^[4] 13:22 33:17 43:24 59:20</p> <p>look ^[4] 12:1 30:6 36:11 54:8</p> <p>looking ^[4] 30:9,15 56:16 66:25</p> <p>looks ^[2] 37:22 62:4</p> <p>lose ^[1] 26:6</p> <p>lot ^[1] 32:6</p> <p>lower ^[3] 25:5 51:1,9</p> <hr/> <p style="text-align: center;">M</p> <hr/> <p>made ^[11] 5:6,7 15:18,23, 25 29:1 31:16 38:17 40:3 56:21 67:5</p> <p>main ^[2] 52:20 59:2</p> <p>majority ^[3] 7:12 14:15 28:13</p> <p>mandatory ^[1] 14:23</p> <p>many ^[3] 16:18 17:1 51:24</p>	<p>map ^[1] 51:10</p> <p>MARIA ^[1] 1:9</p> <p>mark ^[1] 29:16</p> <p>Martinez ^[2] 47:21 48:10</p> <p>matter ^[9] 1:18 6:25 13:9 19:10 21:6,19 28:4 62:10, 19</p> <p>maximum ^[1] 15:12</p> <p>mean ^[15] 10:19,20 12:21 15:1 19:8 24:13,21 25:9, 16 36:3 41:23,23 51:4 57:25 58:2</p> <p>meaning ^[4] 24:23 25:4,25 34:3</p> <p>meanings ^[1] 25:24</p> <p>means ^[3] 23:24 56:5 65:16</p> <p>meant ^[1] 58:24</p> <p>medical ^[1] 16:9</p> <p>meet ^[1] 40:16</p> <p>mere ^[1] 66:15</p> <p>merged ^[1] 35:8</p> <p>might ^[4] 7:9 30:14 48:8 65:5</p> <p>mine ^[1] 60:17</p> <p>minimis ^[1] 49:1</p> <p>minute ^[2] 32:3 63:6</p> <p>minutes ^[1] 64:15</p> <p>mixed ^[2] 51:8,23</p> <p>moment ^[1] 40:7</p> <p>Monday ^[1] 1:16</p> <p>months ^[6] 28:14,18,19 29:6 50:10 52:9</p> <p>morning ^[7] 4:4 11:10 14:19 23:11 26:13 52:19 56:15</p> <p>most ^[4] 17:17 48:3,8 58:12</p> <p>much ^[3] 47:1 61:18,20</p> <p>multiple ^[1] 45:1</p> <p>murder ^[2] 42:13 43:8</p> <p>must ^[7] 16:6,8,9 31:16 35:24 42:18 63:22</p> <hr/> <p style="text-align: center;">N</p> <hr/> <p>narrow ^[1] 32:20</p> <p>Nasrallah ^[7] 11:5 13:6 25:1 37:5 39:16 44:19 66:12</p> <p>natural ^[1] 55:25</p> <p>naturally ^[2] 58:12 59:14</p> <p>nature ^[1] 51:19</p> <p>near ^[1] 57:14</p> <p>necessarily ^[1] 14:5</p> <p>necessary ^[1] 16:9</p> <p>need ^[4] 10:16,17 27:13 49:24</p> <p>needs ^[2] 40:8 51:20</p> <p>neutral ^[4] 48:25 49:3 62:23 63:4</p> <p>never ^[7] 12:8,14,19 13:1, 19 18:7 22:7</p> <p>Nevertheless ^[1] 6:8</p> <p>non-controversially ^[1] 54:7</p>	<p>non-reviewable ^[1] 49:6</p> <p>noncitizen ^[9] 29:19 30:24 33:13 35:14,16 41:15 47:15 61:20,24</p> <p>noncitizens ^[4] 27:22 30:1 51:17 60:7</p> <p>normal ^[3] 53:23 54:1 60:16</p> <p>normally ^[1] 55:7</p> <p>notice ^[4] 20:14,16,19 43:25</p> <p>notwithstanding ^[2] 36:11 51:25</p> <p>nowhere ^[2] 33:10 57:17</p> <p>nullify ^[1] 58:1</p> <p>number ^[1] 27:21</p> <hr/> <p style="text-align: center;">O</p> <hr/> <p>obey ^[1] 16:10</p> <p>objection ^[1] 52:4</p> <p>obligation ^[2] 18:13 41:13</p> <p>obligations ^[4] 36:15 41:16 58:6,10</p> <p>obstacles ^[1] 27:2</p> <p>obtaining ^[1] 41:17</p> <p>obviates ^[1] 45:17</p> <p>occur ^[2] 15:13 33:7</p> <p>occurs ^[2] 16:3 44:13</p> <p>offered ^[2] 25:3 26:15</p> <p>offering ^[1] 61:19</p> <p>office ^[1] 16:1</p> <p>officer ^[1] 16:7</p> <p>OFFICIAL ^[2] 1:3 62:9</p> <p>often ^[1] 58:23</p> <p>Okay ^[9] 9:18 12:7,16 21:5, 18,22 43:14 52:15 61:15</p> <p>old ^[1] 42:20</p> <p>Once ^[4] 29:15,15 50:9 60:15</p> <p>one ^[25] 5:20 6:6,21 7:8,14 8:3 10:6 12:10 21:8 24:13, 13 27:20 33:22 41:13 43:5 46:2 47:4 48:15 49:1 52:7, 8,8,20 53:20 59:2</p> <p>ones ^[1] 27:12</p> <p>ongoing ^[1] 51:14</p> <p>only ^[14] 6:6 7:22 11:2 14:24 15:13 23:21 26:18 27:5, 12,15 35:7 54:3 55:2 60:8</p> <p>operational ^[1] 15:14</p> <p>operative ^[1] 4:16</p> <p>opinion ^[1] 26:14</p> <p>opinions ^[1] 26:15</p> <p>opportunity ^[1] 20:21</p> <p>opposed ^[1] 62:7</p> <p>opposite ^[1] 66:4</p> <p>option ^[3] 6:6,6 49:15</p> <p>oral ^[5] 1:19 3:2,5 4:7 32:16</p> <p>order ^[7] 4:14,21 7:20,24 10:5,6,7 11:1 13:12,14 18:9 21:11,13,16,17 22:1,11, 16,21 23:4,15,16,21 24:11, 12 25:4,10,17 35:3,5,6,7,9,</p>	<p>11,12,15,19,19 36:2,5 37:1, 5,6 38:10,14,16,21 39:5,6, 7,8 42:5,6,7,15,20,20 43:3 45:6,10,12 56:23 58:14 60:15,24 65:12 66:8,14,15,19, 20</p> <p>order's ^[1] 13:7</p> <p>ordered ^[11] 4:15,19 6:12 8:13 34:11,15,22 64:23 65:15,16,17</p> <p>orders ^[10] 18:18 25:2,6 26:5 31:14,21 39:16 52:23,24 60:10</p> <p>original ^[1] 23:16</p> <p>other ^[14] 5:20 6:21 13:10 15:2 21:11 26:19 27:17 28:1 40:3 43:13 45:24 48:7 63:23 66:21</p> <p>otherwise ^[6] 18:15 33:25 39:23 40:22,24 45:7</p> <p>out ^[13] 6:7 14:6 16:5 21:16 35:4 48:16 54:5 57:11 60:6,19 61:6,18 66:6</p> <p>outcomes ^[1] 48:12</p> <p>outside ^[2] 22:10 55:2</p> <p>over ^[4] 18:20 51:10 52:4 65:6</p> <p>overinclusive ^[1] 34:20</p> <p>override ^[1] 65:22</p> <p>overwhelming ^[1] 12:18</p> <p>own ^[1] 18:14</p> <hr/> <p style="text-align: center;">P</p> <hr/> <p>PAGE ^[3] 3:2 26:16 61:22</p> <p>pages ^[1] 23:13</p> <p>paired ^[1] 39:8</p> <p>part ^[3] 22:13 39:1 58:17</p> <p>particular ^[8] 8:7,11 11:3 15:15 27:3 31:20 44:10 56:6</p> <p>particularly ^[2] 31:23 64:22</p> <p>party ^[1] 55:8</p> <p>passage ^[1] 23:12</p> <p>passes ^[1] 50:10</p> <p>past ^[1] 59:4</p> <p>PAUL ^[3] 2:5 3:6 32:16</p> <p>pendency ^[1] 39:25</p> <p>pending ^[8] 5:1,6 22:22 33:5 56:17 57:4 59:6 63:11</p> <p>people ^[7] 12:22 14:8,14 16:19 17:1 19:2 50:10</p> <p>percent ^[16] 12:6,8,8,13,19, 21,25 13:9,10,16,18 17:7, 10 30:1 53:6 57:16</p> <p>percentage ^[6] 11:11,24 12:2,17,18 13:10</p> <p>perfectly ^[2] 45:14 63:10</p> <p>PERFORMING ^[1] 1:4</p> <p>perhaps ^[1] 24:15</p> <p>period ^[5] 4:18 13:22 14:23 15:12 16:20,21,24,24 17:1,3 19:20,23 26:17,25 27:5,7,9,10,15 29:15,23 30:</p>	<p>3,6,10,13,16,18,25 31:8 33:12,16,20 34:3,5,9 40:10,11, 14 41:9,14,19,20 42:21 43:5 45:4,16 59:4,18 63:16,21, 23</p> <p>periodically ^[1] 16:8</p> <p>permission ^[1] 6:15</p> <p>permit ^[1] 19:4</p> <p>persecuted ^[1] 11:14</p> <p>persecution ^[5] 20:20 32:22,24 41:1 44:2</p> <p>person ^[5] 11:13 33:18 35:14 38:18,19</p> <p>persons ^[2] 8:10 14:9</p> <p>petition ^[2] 9:4,6</p> <p>Petitioners ^[6] 1:7 2:4 3:4, 10 4:8 64:18</p> <p>PHAM ^[2] 1:3 4:4</p> <p>phrase ^[2] 18:14 25:11</p> <p>phrases ^[1] 65:14</p> <p>pick ^[2] 17:19 27:19</p> <p>place ^[6] 4:13,22 7:16 9:8 21:9 30:25</p> <p>placed ^[3] 52:22 54:15,24</p> <p>placing ^[1] 54:18</p> <p>plain ^[1] 34:23</p> <p>plane ^[4] 20:11 21:2,9 44:6</p> <p>plausible ^[6] 33:16 48:1,2, 14 57:14 58:5</p> <p>plausibly ^[1] 49:20</p> <p>please ^[3] 4:10 32:19 42:2</p> <p>point ^[19] 7:14 14:6 17:8 18:23 19:17,18 27:7 31:19 35:2 39:14,21 40:6,22 47:9 50:4 57:19,21 59:8 60:18</p> <p>pointed ^[1] 60:6</p> <p>posed ^[2] 43:20 53:23</p> <p>position ^[11] 14:1 24:7,19, 19 36:4 40:3 44:23 50:11 56:3 63:15,16</p> <p>possibility ^[2] 41:25 42:19</p> <p>possible ^[2] 15:13 25:23</p> <p>post-order ^[3] 28:23 29:14, 17</p> <p>potential ^[2] 28:3 47:6</p> <p>potentially ^[1] 6:6</p> <p>practical ^[5] 6:25 8:17 19:10 21:6 27:2</p> <p>practicalities ^[3] 8:14 32:7 65:11</p> <p>practice ^[5] 14:3 22:8,15 29:21 32:8</p> <p>precedence ^[1] 18:20</p> <p>precedent ^[4] 9:17 25:5 66:8,21</p> <p>precedents ^[1] 6:22</p> <p>precise ^[1] 57:2</p> <p>precisely ^[3] 34:18 41:6 66:23</p> <p>precludes ^[1] 45:9</p> <p>predate ^[1] 58:20</p> <p>predictable ^[2] 48:5,10</p> <p>prejudice ^[1] 13:18</p>
--	--	---	--	---

Official - Subject to Final Review

<p>preliminary [1] 11:13 preserve [1] 25:5 press [1] 55:9 presumably [1] 46:13 presume [1] 22:10 presumption [1] 26:1 pretty [1] 48:12 prevail [2] 21:13 66:9 prevent [1] 36:5 previous [1] 37:15 principally [1] 43:12 principle [3] 17:25 49:14 52:5 prior [3] 35:11,15 56:23 prison [1] 14:8 problem [5] 14:17 28:4,16, 22 59:17 problems [1] 56:3 procedural [1] 67:7 procedures [3] 14:16 28: 20,23 proceed [1] 20:10 proceeding [1] 49:12 proceedings [25] 5:19 17: 8 19:3 20:11 21:1 22:12, 13 23:6,19 24:1 33:1 34:7 36:5 37:1 43:22 46:12 51: 14 52:9 53:24 54:2,10 55: 2 58:1,14 60:19 process [25] 15:3 25:22 36: 20,23,24 37:25 39:2,9,11, 18,19 40:1 45:21,22 47:2,6, 14 48:17 49:2 51:16 52:1 55:23 58:8,11 59:8 produces [1] 18:2 proffers [1] 34:25 prolonged [2] 49:2 51:19 promptly [1] 53:8 proper [2] 48:13 49:17 property [2] 49:6,7 protection [3] 13:8 47:10 66:16 protections [1] 67:8 protracted [1] 54:10 provide [4] 20:13,19 31:14 40:24 provided [9] 9:11 18:15 33: 25 34:1 36:13 40:22 45:7 47:14 67:7 provides [3] 16:6 34:6 43: 24 provision [15] 4:17 13:20 18:4 30:10 31:8 34:13 41: 3 45:2 53:3 57:20 62:2 63: 20 64:1 65:25 66:2 provisions [15] 5:4,11 9: 16 17:20 26:21 52:22,24 57:3 58:17,20,21 62:16 63: 24 65:9,10 pull [1] 66:4 purpose [2] 26:24 47:19 purposes [4] 23:17 25:17, 19,21 pursuant [1] 38:20</p>	<p>put [9] 5:11 20:11 21:1,7,8 44:5 63:3 65:24 66:1 Putting [1] 5:4</p> <p style="text-align: center;">Q</p> <p>question [33] 7:24 8:17 9:6 11:2,4 14:13 15:8,10,24 16:17 17:5,22 19:17 20:3 23:17 24:8 29:14 37:15,18 42:6,8 43:19 46:2 47:13 49:11 51:24 55:1 57:15,15, 16,18 59:5,7 questions [8] 5:17 14:20, 25 27:20 32:6 45:18,19 60: 4 quickly [1] 32:10 quite [4] 18:25 40:4 50:14 61:10</p> <p style="text-align: center;">R</p> <p>raise [1] 19:19 range [1] 48:11 rare [1] 53:10 rather [10] 9:25 15:18 21: 16 31:1,8 38:23 47:22 59: 10 60:23 62:9 rational [2] 54:14,23 reach [1] 40:8 reaches [2] 39:19,20 read [8] 8:15 9:15 28:3 47: 5 49:20 57:25 65:10,11 reading [6] 18:1,5 41:25 48:1,2 58:5 reads [1] 57:22 real [1] 56:3 really [4] 6:1 21:6 24:7 56: 20 reason [3] 11:20 20:8 22: 20 reasonable [9] 11:14,20, 25 32:23 50:23 51:15 53: 12 62:22 64:24 reasonably [3] 13:17,17 61:2 reasoning [1] 30:5 reasons [5] 37:23 39:17 45:1,20 57:12 REBUTTAL [4] 3:8 64:16, 17 65:4 Recall [1] 7:19 reconcile [5] 36:16,18 39: 13,15 44:21 reconciled [2] 57:24 58:7 reconfiguration [2] 59:13, 23 reconfiguring [1] 59:10 reentered [1] 38:23 reenters [1] 56:22 refer [6] 8:14,16 10:8,11 65: 10,12 referenced [1] 21:10 referencing [1] 58:21 referring [1] 48:21 refers [1] 4:13</p>	<p>refused [1] 6:15 refuses [1] 30:11 regardless [2] 51:19 62:24 regulation [2] 62:2,19 regulations [7] 29:16 30: 21 36:21 44:5 47:14 62:8 63:3 regulatory [2] 28:23 61:20 reinstate [1] 42:5 reinstated [10] 18:18 22: 10 31:14 35:6,12 36:2 38: 16 42:16 56:24 60:10 reinstatement [25] 4:25 5: 2,12 7:19 24:25 35:5,8,12, 19 36:19,23,24 39:5,8 42:5 53:3,16 54:1 55:2,23 57: 20 58:8,9,11 65:25 reinstating [2] 4:20 39:3 release [6] 16:3,4,19 17:2, 14 30:4 released [5] 15:6,8 17:7,22 62:5 releases [2] 15:2,13 relevant [2] 14:11 66:21 relief [4] 5:22 21:25 31:15 34:1 rely [1] 19:21 remain [2] 30:2 60:9 remained [1] 67:8 remains [1] 33:5 remind [1] 32:9 removability [5] 21:24 22: 1 53:25 54:3 60:8 removal [12] 4:14,18,20 5: 13 6:13,21 7:16,20,23 8:14 10:6,8,25 13:7,14,17 14:23 15:12 18:9,18 19:20,23 20: 22 21:10 22:2,11,12,16,21 23:4,15,16,22 24:11,12 25: 11 26:16,19,25 27:1,5,9,10, 15 29:15,23 30:2,6,13,18, 24,25 31:7,14,21 32:21 33: 2,7,12,14,16,20 34:3,5,8,8, 14 35:6,11,20 36:2 37:6 38:10,14,16,21 39:3,6,7 40: 10,11,14 41:9,19,20 42:15, 21 43:4 44:1,10,11,12 45:4, 5,10,16 46:5 50:21,24 52: 11,23 53:24 54:1,3 56:23 59:18 60:16,19,24 61:11 63:16,21,23 64:8,22 65:11, 13,24,25 66:15,20 remove [29] 5:22 8:6 17:15 19:2,14 30:8 32:8 33:3,13, 17,22 34:3 39:10,24 40:13, 15 41:5,9,13,21 43:23 46: 15 59:19,21 63:17,25 65:2 67:1,5 removed [30] 4:15,19 5:2,3 6:13 8:13,16 11:15 18:8, 18 19:11 30:18 31:20 33:4, 9 34:11,15,23 53:8 56:18, 20 57:5,6,6 58:3 63:12 64: 23 65:15,16,17</p>	<p>removing [1] 27:3 render [1] 28:7 reopened [2] 7:20 36:3 reopening [1] 36:7 repeatedly [1] 4:14 repeating [1] 55:19 reply [2] 14:21 23:13 request [3] 55:9,12 66:15 require [2] 13:21 52:2 required [2] 33:22,23 requirement [2] 62:22,23 requirements [2] 49:1 62: 15 requires [5] 6:9 44:15 59: 13 62:13 63:2 reset [1] 66:14 resets [1] 66:16 resist [1] 50:20 resists [1] 50:16 resolve [2] 45:12 65:20 resolved [1] 22:18 respect [3] 44:2 51:7 65:7 Respondent [4] 17:5 38: 10,11 44:16 Respondents [9] 1:11 2:6 3:7 4:11 8:17 32:10,17 66: 9,24 Respondents' [2] 28:16 29:8 response [6] 16:17 19:17 26:22,24 29:25 52:21 responses [6] 18:12 34:19 37:11,18 57:10 59:2 restatement [1] 52:23 restrained [2] 17:11 30:2 restrictions [1] 16:10 rests [1] 57:10 result [2] 44:9 59:11 resulting [1] 58:14 results [1] 51:9 retracted [1] 64:4 returned [1] 32:22 returns [1] 38:12 revealing [1] 47:11 review [21] 10:10,11,13,17, 24,25 23:18,21,25 24:9,20 25:6,22 26:2 28:24 29:14, 17,22 47:16 48:17 49:12 reviewed [2] 7:21 36:3 reviewing [3] 9:20,21 36:7 Richardson [1] 23:22 rights [2] 49:16 58:10 risk [3] 29:2,3 31:25 ROBERTS [36] 4:3 5:18,24 7:2,5 8:1,4,19 11:7 14:18 16:13 19:25 23:9 26:9 29: 11 32:3,13 34:10,17 35:22, 25 37:3,9,13 38:2,4 40:19 43:17 46:23 50:2 52:17 56: 12 60:1 63:6 64:13 67:11 routine [2] 28:8 48:5 routinely [1] 51:18 rule [5] 24:24 61:8,8,9,13 ruled [1] 6:7</p>	<p>rules [1] 49:8 run [1] 60:17</p> <p style="text-align: center;">S</p> <p>same [12] 6:24 19:12 24:10, 23 25:11 35:14 37:4,15 38: 19 49:8 56:6 66:23 satisfactory [1] 47:15 satisfied [5] 29:7 44:8 50: 22 51:16 53:11 saying [6] 18:6 23:8 42:20 50:7 53:17 64:6 says [22] 4:25 5:3 7:20 27: 10 28:1 30:11,17,19 33:24 36:1 41:4,20 42:4,6,7,8,17 48:7 56:17 57:5 60:14 62: 4 Scalia [2] 47:20 48:9 scenario [1] 46:17 scheme [2] 56:6 61:18 searching [1] 19:14 second [18] 4:22 6:19 15:3, 10 18:21 19:16,18 24:22 27:9 31:11 33:23 35:2 37: 19 38:3,22 43:7 57:19 65: 23 Section [32] 4:12,12,13,22, 24,25 5:7,14,14,15 6:11 8: 12 9:12,25,25 16:5 18:15 19:15 29:5 33:25 40:23 45: 8,9 53:5,7 64:21,25 65:14, 20 66:1,2,6 securing [1] 33:13 Security [1] 15:2 see [3] 4:23 6:9 24:5 seeks [1] 21:24 seem [5] 6:5 17:15 24:14 36:6 39:24 seems [6] 7:6,9 22:20 34: 15,17 55:14 select [1] 49:22 selection [1] 5:13 SENIOR [1] 1:3 sense [10] 18:10 22:25 27: 4 32:1 34:4 40:13 41:11 48:3 57:2 60:22 sent [5] 12:3,8,13 54:18,22 sentence [1] 18:17 separate [3] 22:16 23:5 35: 4 separating [1] 57:11 serious [1] 52:1 serves [1] 50:8 service [1] 12:1 set [4] 16:5 30:4 47:22 48: 16 several [3] 13:23 27:23 44: 16 shall [7] 5:3 30:20 33:12 40:15 41:21 57:6 59:19 shortly [1] 29:23 shot [2] 12:23,24 shouldn't [3] 19:21 49:22 65:21</p>
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Official - Subject to Final Review

<p>show ^[1] 65:8 shows ^[1] 41:7 side ^[5] 28:1 40:3 45:24 48:7 65:5 significant ^[1] 27:21 similar ^[2] 22:20 24:10 simply ^[4] 6:24 28:6 31:19 40:15 since ^[2] 8:5 24:18 single ^[1] 7:1 situation ^[6] 6:12 10:9,11 19:12 20:24 60:23 six ^[4] 28:17,19 50:10 52:9 six-month ^[1] 59:4 Smith ^[6] 42:6,7,11,21 43:4,6 Solicitor ^[1] 2:2 somehow ^[1] 64:6 someone ^[3] 56:22 65:1,2 somewhat ^[1] 51:23 sorry ^[6] 18:24 19:8 37:10,10 54:13 56:10 sort ^[1] 29:19 Sotomayor ^[19] 16:14,15,25 17:10,13 18:22,24 19:7,16,24 29:25 31:2 46:24 47:1,12 48:15,22 49:10 50:1 space ^[1] 15:15 specific ^[1] 27:12 specification ^[1] 27:14 specified ^[2] 27:11 31:16 spending ^[1] 46:13 square ^[1] 7:22 squarely ^[2] 62:18 64:1 squeeze ^[1] 46:2 stand ^[1] 43:3 standard ^[3] 50:23 51:11 53:13 start ^[2] 45:2 55:18 statements ^[1] 14:21 STATES ^[12] 1:1,20 12:14,20,23 13:19 18:17 33:5 35:17 39:10 53:9 63:13 States' ^[1] 36:14 stating ^[1] 19:22 statistics ^[3] 16:22 17:4 46:3 statute ^[28] 5:11 6:9 14:22 23:20 24:13 28:3,6 30:6,14,19 34:23 36:13 40:5,25 41:12,18 44:5 48:13 49:23 57:5 59:10,14 62:7,10,12 63:2 65:24 66:5 statutes ^[4] 25:12 59:23 61:14,17 statutory ^[6] 5:21 48:4 56:6 58:5 61:21 62:2 stepping ^[1] 37:19 steps ^[1] 44:16 still ^[4] 13:21 36:12 51:20 52:11 stringent ^[1] 58:24 strong ^[2] 31:23 64:21 strongly ^[1] 26:17</p>	<p>structural ^[4] 5:15 19:19,21 52:20 structurally ^[1] 54:24 structure ^[8] 5:10 34:20 41:18 47:22 48:4 63:1 65:23 66:5 stuck ^[1] 9:17 study ^[2] 17:6,6 subject ^[9] 18:14 30:20 34:24 36:2 37:1 38:11,19 54:7 55:4 submission ^[1] 52:21 submit ^[1] 16:8 submitted ^[2] 67:12,14 subset ^[1] 31:25 substantial ^[2] 18:2 59:17 successful ^[1] 44:20 suggest ^[1] 7:6 suggested ^[2] 28:9 31:2 suggests ^[2] 6:16 26:17 supervised ^[3] 16:4,19 17:2 supervision ^[8] 15:3,9 16:3 17:23 30:4,16,20 31:1 support ^[1] 62:1 supports ^[2] 4:23 42:14 suppose ^[4] 20:7 21:23 37:3 46:6 SUPREME ^[2] 1:1,19 Surely ^[1] 24:12 SURI ^[61] 2:2 3:3,9 4:6,7,9 5:18,23 6:3 7:4,13 8:3,12 9:3,15,21 10:7,22 12:5,11,15 13:2,5,24 14:1,13,20 15:7,23 16:4,21 17:4,12 18:11,23 19:5,8,18 20:1,13,16,23 21:3,12,21 22:7 23:2,12 24:17 25:14 26:13,23 28:11 29:20 31:4 32:4,5 43:20 64:15,17,19 surprising ^[1] 58:25 systematic ^[1] 15:16</p> <hr/> <p style="text-align: center;">T</p> <p>talks ^[3] 6:11 30:16 36:22 tells ^[2] 36:17 66:5 term ^[10] 7:11 5:13 6:25 9 66:12 terms ^[5] 18:14 57:23,25 59:24 61:19 terrorists ^[1] 14:24 test ^[1] 51:16 text ^[8] 4:13 18:3 19:22 57:2 58:6 61:12 64:21 66:4 themselves ^[1] 60:20 themselves ^[4] 8:17 31:9 32:10 66:23 there's ^[24] 5:20 6:5 7:11 8:8 11:12 15:16 16:3 19:11,22 21:23 23:24 31:23 37:11 45:1,1 48:10,14,25 51:8 52:1 56:7 57:4 65:1,3 They've ^[2] 64:24 65:8 thinking ^[1] 66:3</p>	<p>third ^[17] 7:11 8:8 20:4,7,12 34:4 43:9,24,25 44:2 46:5,6,7,11,16 66:7,7 Thomas ^[12] 8:21,22 9:13,18 10:2,19 11:6 38:6,7,24 39:12 40:18 Thomas's ^[1] 49:11 though ^[3] 25:9 35:2 41:25 three ^[7] 27:11,12,16 28:14 29:6 61:2 64:15 threshold ^[1] 53:13 throughout ^[3] 42:25 64:5,11 tiebreaker ^[2] 65:23 66:7 tiebreakers ^[1] 65:5 ties ^[1] 10:23 time's ^[1] 56:10 timely ^[1] 30:12 title ^[2] 41:20 64:22 today ^[1] 32:6 together ^[4] 5:4 22:13 26:21 39:8 tolling ^[1] 31:8 TONY ^[1] 1:3 took ^[1] 16:22 torture ^[4] 13:18 20:20 40:25 44:2 tortured ^[1] 11:15 touchstone ^[1] 8:9 tracking ^[1] 60:14 tracks ^[1] 61:12 traditions ^[1] 14:6 travel ^[3] 30:12 33:14 41:17 treat ^[1] 22:23 treated ^[3] 22:4,9 60:12 treatment ^[1] 23:1 treaty ^[1] 36:14 tries ^[2] 15:11 29:22 trigger ^[2] 29:4 37:21 triggering ^[1] 58:10 trouble ^[1] 28:2 true ^[2] 14:2 17:19 trumps ^[1] 9:14 trying ^[2] 57:1 61:17 turn ^[1] 5:10 turns ^[2] 14:1 61:10 two ^[17] 5:4 6:23 14:25 17:20 18:12 26:21 31:4 34:16,19 37:11,17 39:17 43:3 56:5 57:2,9 61:17 type ^[1] 16:2 typically ^[1] 44:9</p> <hr/> <p style="text-align: center;">U</p> <p>U.S ^[2] 1:5 58:6 ultimately ^[1] 13:11 unconstitutional ^[1] 48:11 uncontroversially ^[1] 55:3 unconvincing ^[1] 5:10 under ^[34] 4:11,12 7:21 9:2,11,25 15:2,9 19:15 22:5,9,</p>	<p>23,24 23:14 27:25 29:5 30:20 35:20 41:8 44:12 48:17 50:12,18,18 53:13 58:10 60:12,21,22 62:7 64:21,25 67:6,6 underlies ^[1] 6:20 underlying ^[6] 35:6,19 38:13,16 39:6,7 understand ^[4] 23:14 36:19 53:14 54:13 understandable ^[1] 53:4 understanding ^[6] 25:15 45:15 50:5,9,14 51:22 understands ^[1] 57:13 understood ^[3] 16:16 47:4 58:13 underway ^[1] 34:7 UNITED ^[12] 1:1,20 12:14,20,22 13:19 33:5 35:17 36:14 39:9 53:9 63:13 universe ^[2] 27:17 31:13 unlawfully ^[2] 35:17 38:23 unless ^[1] 9:11 unlikely ^[1] 24:15 unspecified ^[1] 27:17 until ^[3] 22:17 35:17 37:24 unusual ^[2] 28:17 55:14 up ^[10] 6:1 13:19 14:3 25:3 27:19 32:4 42:10 43:19 47:22 63:7 uses ^[1] 24:10 using ^[1] 26:20</p> <hr/> <p style="text-align: center;">V</p> <p>valid ^[2] 7:7 23:5 validity ^[3] 13:13 37:6 66:19 Vargas ^[2] 36:9,17 variety ^[1] 34:21 vast ^[3] 7:12 14:15 28:13 versus ^[2] 4:5 44:19 view ^[8] 6:17 13:16,25 29:9 33:15 50:21 60:21 64:20 vindicate ^[1] 49:15 violation ^[1] 40:5 violations ^[3] 28:7 47:7 48:6 virtually ^[1] 33:10 VIVEK ^[5] 2:2 3:3,9 4:7 64:17</p> <hr/> <p style="text-align: center;">W</p> <p>wanted ^[1] 23:12 warrant ^[2] 44:9,11 Washington ^[3] 1:15 2:3,5 way ^[17] 4:23 7:22 19:13 36:16 41:24 42:10,12 43:13 47:6 53:21 55:14,22,25 58:7 59:1,9 62:20 ways ^[1] 6:10 welcome ^[1] 5:17 whatever ^[2] 11:15 20:8 whereas ^[1] 60:10 Whereupon ^[1] 67:13</p>	<p>whether ^[32] 5:1 6:1,4,17,25 8:5,7,10,16 9:7 10:18,24 11:21 13:9 15:17 17:22 32:7 33:4,7 47:24 54:11 56:17,20 57:4,11,14,18 61:10 63:12 64:8 65:2 67:4 whoever ^[1] 14:9 whole ^[4] 27:6 31:12 41:18 51:14 whom ^[1] 11:12 will ^[14] 4:3 11:14 12:1,13,19,22 14:6,16 15:4,5 28:14,17 33:7 50:11 willing ^[3] 19:11 20:8 46:7 win ^[1] 66:6 withholding ^[43] 5:12,22 6:20,23 7:16,22,23 18:7 19:3 20:10 21:1,25 22:2,12,17,22 33:1,8 34:1,2 36:13,19 40:1 41:4 45:8,23 52:9,24 53:15,18,21 54:4,21 55:3 57:24 58:1,13,19 60:9,18 64:1 66:1,14 withholding-only ^[11] 5:19 17:8 18:6 23:6,19 24:1 25:6 36:5,25 43:22 60:11 within ^[10] 17:15 18:8 30:18,25 31:25 45:8,14 54:9 59:15 60:9 without ^[4] 13:21 14:10 20:16 40:16 wonder ^[2] 22:25 44:20 wondering ^[1] 30:3 worded ^[1] 58:25 words ^[2] 8:13 26:20 works ^[1] 25:9 world ^[1] 23:3 wrap ^[2] 32:4 63:7 write ^[1] 28:6 written ^[1] 16:10 wrote ^[1] 41:14</p> <hr/> <p style="text-align: center;">Y</p> <p>years ^[6] 13:23 14:9,10,14 27:23 28:12 yourself ^[1] 66:3</p> <hr/> <p style="text-align: center;">Z</p> <p>Zadvydas ^[20] 9:5,16 14:16 19:13 27:24,25 28:20,20 47:9 48:24 49:4 50:7,12,18 51:11 52:10 59:4,8 66:22,23</p>
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