

**SUPREME COURT
OF THE UNITED STATES**

IN THE SUPREME COURT OF THE UNITED STATES

PIERRE YASSUE NASHUN RILEY,)
Petitioner,)
v.) No. 23-1270
PAMELA BONDI, ATTORNEY GENERAL,)
Respondent.)

Pages: 1 through 66
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3 PIERRE YASSUE NASHUN RILEY,)
4 Petitioner,)
5 v.) No. 23-1270
6 PAMELA BONDI, ATTORNEY GENERAL,)
7 Respondent.)
8 - - - - -
9
10 Washington, D.C.
11 Monday, March 24, 2025
12
13 The above-entitled matter came on for
14 oral argument before the Supreme Court of the
15 United States at 11:28 a.m.
16
17 APPEARANCES:
18 KEITH BRADLEY, Denver, Colorado; on behalf of the
19 Petitioner.
20 EPHRAIM McDOWELL, Assistant to the Solicitor General,
21 Department of Justice, Washington, D.C.; on behalf
22 of the Respondent in support of the Petitioner.
23 STEPHEN J. HAMMER, Dallas, Texas; Court-appointed
24 amicus curiae in support of the judgment below.
25

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

2 (11:28 a.m.)

3 CHIEF JUSTICE ROBERTS: We'll hear
4 argument next in Case 23-1270, Riley versus
5 Bondi.

6 Mr. Bradley.

7 ORAL ARGUMENT OF KEITH BRADLEY

8 ON BEHALF OF THE PETITIONER

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

11 A sensible scheme of judicial review
12 would provide a right to review on a petition
13 properly filed, particularly on matters of life
14 and death where errors left uncorrected are so
15 contrary to the fundamental policies of the
16 United States.

17 But it also would not have the courts
18 routinely intrude while the agency is still
19 doing its work. When the agency is deliberating
20 where a non-citizen can be sent in light of an
21 objection duly raised in the ordinary processes,
22 that work is ongoing.

23 Amicus's proposal would mean that a
24 non-citizen like Petitioner is allowed to seek a
25 Court's decision on withholding issues that the

1 agency has barely begun to assess. The INA does
2 not suggest that Congress intended that
3 surprising result. Instead, the statute is
4 consistent with common sense.

5 Regarding jurisdiction, Santos-Zacaria
6 already explained that Stone was not a holding
7 on that point. The Court should adhere to what
8 it said there. And, certainly, 1252(b)(1) does
9 not rank as jurisdictional under the modern
10 rubric.

11 I welcome the Court's questions.

12 JUSTICE THOMAS: Did Petitioner seek a
13 review of the order -- removal order?

14 MR. BRADLEY: We are seeking -- we are
15 not seeking review of his removability. We are
16 seeking review of the CAT decision, Your Honor.

17 JUSTICE THOMAS: But the -- the only
18 jurisdiction we have is over the removal order.

19 MR. BRADLEY: I -- I think that's --
20 I -- I would -- I would question that premise,
21 Your Honor. (A)(4) does also allow --

22 JUSTICE THOMAS: Or a final order.
23 Excuse me, a final order.

24 MR. BRADLEY: The -- the Court -- the
25 statute allows the Court to conduct review

1 within 30 days of a final order from removal,
2 but it also clearly says the Court has
3 jurisdiction to review a CAT order as the Court
4 explained in Nasrallah already.

5 JUSTICE THOMAS: Have we ever said
6 that you could do that independent of the final
7 order?

8 MR. BRADLEY: I -- not independent in
9 the sense -- and that is exactly the problem,
10 Your Honor. I think that the sensible approach
11 is to wait until the agency has concluded all of
12 its work, and then you have one petition that
13 encompasses removability, the order of removal,
14 and the CAT questions that are at issue.

15 JUSTICE THOMAS: Does the CAT question
16 then convert the -- the final order into a -- a
17 broader final order by attaching itself to that?

18 MR. BRADLEY: I think what Nasrallah
19 teaches us, like -- certainly, is that it does
20 not convert the -- a CAT order that says --
21 that -- that denies CAT relief is not converting
22 the final order into something else, except from
23 the timing of it and what gets decided is
24 affecting the finality, because as we explained
25 in the brief, and I believe the government

1 agrees, where you can be sent is something that
2 remains to be decided.

3 The -- the removal order under the
4 government's regulations has to tell you where
5 you're going to be sent. You have an
6 opportunity to object at -- right -- right then.
7 If the process results in that being -- that --
8 that where not working, then they are going to
9 tell you where else. And then you might proceed
10 into another.

11 So -- so it does not affect the
12 removability.

13 JUSTICE THOMAS: So do you have --
14 what's your best textual hook for that?

15 MR. BRADLEY: I'm sorry, for -- for
16 which, hook for what?

17 JUSTICE THOMAS: For your -- for your
18 argument that the CAT order has to be -- it can
19 expand the time limit of the final order.

20 MR. BRADLEY: So it -- it turns on
21 what "final" means, Your Honor. And the -- the
22 statute, we submit, obviously it explains what
23 makes something final in certain circumstances.
24 And aside from that, it's a word that this Court
25 has interpreted in many contexts to mean that

1 the agency's decision-making is full and
2 complete on all issues, that the agency has
3 disassociated itself from the decision-making
4 process. That's the word "final."

5 JUSTICE SOTOMAYOR: So one definition
6 in the statute, at least the courts on amicus's
7 side argued -- or concede that the one issue
8 that defines finality is when the Board
9 concludes its work, correct?

10 MR. BRADLEY: When the Board concludes
11 its work, that -- that -- that is correct.

12 And here when the Board concludes its
13 work as you know is --

14 JUSTICE SOTOMAYOR: It -- is after the
15 CAT, because the CAT decision --

16 MR. BRADLEY: That's right.

17 JUSTICE SOTOMAYOR: -- can change the
18 final order, correct?

19 MR. BRADLEY: Absolutely, correct.

20 JUSTICE SOTOMAYOR: Because it'll
21 change -- the final order says you're -- you are
22 removable, you're going to X country. And the
23 CAT order will say no, make it Y country. So
24 there is an amendment.

25 MR. BRADLEY: There is -- there --

1 there is an amendment, that's right. Yeah.

2 JUSTICE SOTOMAYOR: So this is almost
3 like a conviction and a sentence, meaning the
4 conviction is final in a court -- in a district
5 court, until you appeal it, and the -- but you
6 wait for the sentence for the appeal because you
7 want the court to finish with everything at
8 once.

9 MR. BRADLEY: I -- I think you have it
10 exactly right, that -- that analogy. And
11 Nasrallah was familiar with that analogy, of
12 course.

13 JUSTICE SOTOMAYOR: That's the one
14 it's -- it gave.

15 MR. BRADLEY: That's -- that's the one
16 in Nasrallah, that --

17 JUSTICE SOTOMAYOR: All right. Now,
18 Congress does use the word "administrative" in a
19 different provision, the detention provision.

20 MR. BRADLEY: Correct.

21 JUSTICE SOTOMAYOR: 1252. So there
22 they said when an order is administratively
23 filed, meaning when the agency has finished on
24 this particular question. But it uses a
25 different word, final order of removal, here.

1 That difference, how does it play into
2 your argument?

3 MR. BRADLEY: That difference, I
4 think, is -- is good support for us in that
5 "administratively final," presumably the
6 "administratively" means something. It points
7 us to that that moment is a different moment
8 from the moment when the -- when the order is
9 final for purposes of judicial review.

10 Therefore, we would expect -- not
11 necessarily in every case -- but we would expect
12 that, conceptually, administratively different
13 "final" is different from "final." And so that
14 point, that Guzman Chavez pointed out, when
15 detention can begin because one issue in the
16 case has been resolved is different from the
17 case point when everything is finished, when the
18 agency has fully finished with its work. That's
19 final for judicial review.

20 JUSTICE SOTOMAYOR: Thank you.

21 CHIEF JUSTICE ROBERTS: Just on the
22 30-day deadline, do you understand -- our
23 position to be that we're never going to find
24 jurisdictional bar again?

25 (Laughter.)

1 MR. BRADLEY: Certainly not. I -- I
2 think that there are -- there -- there may well
3 be one out there. I have not canvassed the U.S.
4 Code. But the -- the Court has been -- has --
5 has demanded something very clear from Congress
6 to indicate that a time bar is jurisdictional.

7 And there's nothing here -- more here
8 than the others that have not been
9 jurisdictional.

10 CHIEF JUSTICE ROBERTS: Well, I mean,
11 there is the fact that they applied equitable
12 tolling in the prior -- the -- the -- the --
13 the -- the -- the Stone -- case and said
14 equitable tolling was not available, which
15 sounds like something you would say if you're
16 dealing with a jurisdictional provision.

17 It referenced our -- limitations on
18 certiorari and time to appeal, which everybody
19 agrees are jurisdictional, I guess until the
20 next case comes up, but at least now everybody
21 agrees that they're -- they're jurisdictional.

22 I mean, is it really a magic words
23 case, that the statute has to say "and this is
24 jurisdictional"?

25 MR. BRADLEY: If I -- so I -- I'm

1 going to take that in two parts, if I could.

2 CHIEF JUSTICE ROBERTS: You can.

3 MR. BRADLEY: First thing is about
4 whether this is a magic words case. I think if
5 you look at everything in 1252 and the entire
6 context, there are many, many clues that this
7 particular deadline is not jurisdictional.

8 They said jurisdiction when they meant
9 it and they did not in (b)(1). In addition,
10 they removed particular wording that was in
11 the -- the pre-1996 IRA that gave a specific
12 point in time that is less clear under the
13 amendment, so there are -- there are these
14 textual clues.

15 But the second thing is to go back to
16 your observations about Stone, whether the
17 equitable tolling could be available is in --
18 Stone's an excellent example of something that
19 mentioned that in passing and made no difference
20 to the case. No one had asked for equitable
21 tolling.

22 What was asked for was a concept of
23 non-finality that is just as available for
24 jurisdictional as for non-jurisdictional
25 deadlines.

1 JUSTICE SOTOMAYOR: Mandatory claim
2 processing, which are non- -- jurisdictional --

3 MR. BRADLEY: Mm-hmm.

4 JUSTICE SOTOMAYOR: -- you can't
5 equitably toll either, correct?

6 MR. BRADLEY: Also true.

7 JUSTICE GORSUCH: Counsel, I -- I -- I
8 just want to explore whether there's any
9 daylight between your -- your position and the
10 government's position here.

11 And one area that I -- I wondered
12 about was whether you think the CAT order itself
13 is a final order of removal. Pages 47, 48 of
14 your brief kind of venture into that territory;
15 whereas the government would say: No, the final
16 order of removal is at 1228 FARRA, but it
17 doesn't become final until after the CAT
18 resolution. So which is it?

19 MR. BRADLEY: So I would say that
20 there is a -- a millimeter of deadline that will
21 not matter. So let me explain that.

22 We agree that the FARRA is an order of
23 removal. We agree with the government that that
24 order of removal became final upon the
25 conclusion of all of the administrative

1 proceedings, when everything related to the --
2 to it was resolved.

3 It -- it seems to us also that the
4 Board's order was also an order of removal that
5 was, of course, final at the same time but you
6 don't need to decide on that in --

7 JUSTICE GORSUCH: That -- that worries
8 me with Nasrallah a little bit, if we were to
9 say the CAT order is a final order of removal.
10 That seems to me run head long into Nasrallah,
11 but the government's theory doesn't.

12 MR. BRADLEY: The government's theory
13 does not, I agree with you. And we share that
14 theory as well. We think that the FARRA was an
15 order of removal that became final upon the
16 completion of the proceedings.

17 JUSTICE GORSUCH: Is there any other
18 daylight between you and the government in this
19 case?

20 MR. BRADLEY: I can't think of any.
21 Oh, actually, sorry, one more, which is that
22 also not really before the Court, which is that
23 we think that the 30-day deadline is not --
24 is -- we agree that it's non-jurisdictional. We
25 think it's not mandatory either, but that --

1 no -- no one is asking the Court to decide that
2 particular question.

3 JUSTICE JACKSON: Going back to
4 Justice Thomas's question about textual basis
5 for your position, are you relying at all on the
6 zipper clause, 1252(b)(9)?

7 MR. BRADLEY: Yes. We -- we certainly
8 are because that is a sign that what we and the
9 government ask -- are asking for is the sensible
10 way to proceed.

11 It is very clear that Congress intends
12 for there to be judicial review of CAT claims.
13 And the zipper clause is telling you that
14 everything should come up in one petition. And
15 how is that to be done?

16 That is to be done by interpreting
17 final to mean what the -- when the agency is
18 fully concluded with its process.

19 JUSTICE JACKSON: And you're getting
20 your proposition that there is supposed to be
21 judicial review of CAT claims from 1252(a)(4)?

22 MR. BRADLEY: Correct, which, of
23 course, at least we read Nasrallah to have
24 looked at that provision and -- and concluded
25 that Congress did, indeed, intend judicial

1 review of CAT claims.

2 JUSTICE ALITO: You've referred to
3 common sense and a sensible way to proceed. Do
4 you think that's a characteristic that can be
5 found in our recent related immigration
6 decisions?

7 MR. BRADLEY: I'd rather not comment
8 on that, if I could avoid it.

9 (Laughter.)

10 MR. BRADLEY: But -- but I will say
11 that --

12 JUSTICE ALITO: Well, let me ask
13 you -- let me ask you --

14 MR. BRADLEY: But the red light is on.
15 But common sense is always the goal, I -- I
16 think, Your Honor.

17 CHIEF JUSTICE ROBERTS: Justice
18 Thomas? Anything further?

19 Justice Alito?

20 JUSTICE ALITO: Well, I see the red
21 light won't save you from this -- my other
22 question. Why don't we just say it's a magic
23 words test? You know, unless Congress says it's
24 jurisdictional, then it's not jurisdictional.

25 These cases are endlessly interesting

1 and they fill up our docket, but I don't know
2 what -- what statutory provision that doesn't
3 have the magic words will ever be held to be
4 jurisdictional? Can you think of a possibility?

5 MR. BRADLEY: Well, we know three, of
6 course, Your Honor -- -

7 JUSTICE ALITO: Well --

8 MR. BRADLEY: -- 1291 -- but -- but --
9 other than --

10 JUSTICE ALITO: They -- they have
11 historical -- they have a historical pedigree.

12 MR. BRADLEY: Exactly. I cannot
13 speculate to how Congress might write a statute
14 that would do that, but I would -- I would --
15 reiterate this particular one, given the
16 structure of the statute and the way the
17 jurisdictional is used elsewhere in the statute,
18 this deadline is -- is a straightforward -- one
19 to conclude it's not jurisdictional.

20 JUSTICE SOTOMAYOR: This statute --
21 oh, I'm sorry.

22 CHIEF JUSTICE ROBERTS: No, no, you're
23 up.

24 JUSTICE SOTOMAYOR: This statute is as
25 clear as you can be.

1 MR. BRADLEY: Yeah.

2 JUSTICE SOTOMAYOR: Some provisions
3 say there's no jurisdiction.

4 MR. BRADLEY: Exactly.

5 JUSTICE SOTOMAYOR: This one doesn't.

6 MR. BRADLEY: Correct, exactly.

7 JUSTICE SOTOMAYOR: And if Congress
8 needed education, it certainly has enough
9 opinions that say: Just say it's
10 jurisdictional, and tell us that no other
11 further relief can be given. Correct?

12 MR. BRADLEY: Agreed. Agreed.

13 JUSTICE SOTOMAYOR: All right.

14 CHIEF JUSTICE ROBERTS: Justice Kagan?

15 Justice Gorsuch?

16 Justice Kavanaugh?

17 Justice Barrett?

18 Justice Jackson?

19 Thank you, counsel.

20 Mr. McDowell.

21 ORAL ARGUMENT OF EPHRAIM McDOWELL

22 ON BEHALF OF THE RESPONDENT

23 IN SUPPORT OF THE PETITIONER

24 MR. McDOWELL: Thank you, Mr. Chief

25 Justice, and may it please the Court:

1 On the first question presented, the
2 30-day filing deadline in Section 1252(b)(1) is
3 not jurisdictional. That provision fails this
4 Court's clear statement test, and Stone is not a
5 binding jurisdictional ruling.

6 On the second question, the petition
7 here was timely because it was filed within 30
8 days of the Board's CAT order. In Section
9 1252(a)(4), Congress provided for judicial
10 review of CAT claims, and Nasrallah confirms
11 that courts may review CAT orders together with
12 removal orders.

13 It follows that a CAT order becomes
14 final at the same time as a removal order so
15 that challenges to both orders can be raised
16 together in the same petition for review. Under
17 amicus's position, many CAT claims would be
18 unreviewable, but when Congress wanted to
19 preclude judicial review in the INA, it did so
20 expressly.

21 It is unlikely that Congress would
22 have precluded review of many claims indirectly
23 by way of a generic 30-day filing deadline. I
24 welcome the Court's questions.

25 JUSTICE THOMAS: Can you give us an

1 example of -- of a -- an instance in which a
2 claim, claim B can be considered with -- or
3 appeal B can be considered with appeal A, but
4 appeal B actually expands the time limit for
5 appeal A?

6 MR. McDOWELL: I -- I think the best
7 analogy is the one that Justice Sotomayor
8 pointed to, which is that a conviction cannot be
9 appealed until after the sentence, even though
10 the sentence doesn't affect the validity of the
11 conviction or merge into the conviction. And --

12 JUSTICE THOMAS: Okay. Let's try the
13 civil context. Can you think of any other
14 provision?

15 MR. McDOWELL: I suppose there the way
16 it would work in a -- in a remedial scheme, a
17 remedial decision as opposed to a liability
18 decision, the -- the remedial decision wouldn't
19 affect the liability decision, but we would
20 still under the final judgment principle not
21 allow an appeal of the liability ruling until
22 after the remedial decision is done.

23 And I think the same basic logic
24 applies here, because as Nasrallah points out, a
25 CAT order does not affect the validity of a

1 removal order, but our position is that the
2 removal order doesn't become final until the end
3 of CAT proceedings because that's when the
4 agency has finished its work on the case and
5 disassociated itself from the case, which is the
6 basic final judgment principle that always
7 applies in judicial review in the courts of
8 appeals.

9 JUSTICE GORSUCH: McDowell, can you
10 give us some examples of -- you say that
11 adopting amicus's view would leave certain CAT
12 orders unreviewable. Can you give us some
13 examples?

14 MR. McDOWELL: So I think under his
15 position, I think the CAT order in this case
16 would be unreviewable because Petitioner didn't
17 file the petition for review within 30 days of
18 the Section 1228 removal.

19 JUSTICE GORSUCH: I think your friend,
20 though, in this case would say, well, he -- he
21 could have done.

22 MR. McDOWELL: So our point is that if
23 you're referring to the premature protective
24 petition scheme idea, I think that that had --
25 there are two potential legal problems there.

1 One is the zipper clause, which
2 contemplates a single petition for review at the
3 end of the case; whereas the premature filing of
4 a petition supplemented by a later filing
5 related to the CAT claim, I think, runs counter
6 to that idea.

7 I also think that if the Court were to
8 adopt amicus's reading of the statute, one
9 potential upshot of that is that Congress
10 intended to foreclose review of these claims.
11 And if Congress wanted to foreclose review of
12 these claims, we don't see how courts and
13 litigants could adopt a work-around scheme to --
14 to get around that. But obviously our
15 front-line position is that Congress did want
16 review of these claims.

17 JUSTICE GORSUCH: I think your friend
18 on the other side would say: Well, they can
19 file these protective appeals and -- and courts
20 of appeals can hold onto them and -- and then
21 when the CAT order matures, you're good to go.

22 Would courts of appeals have to keep
23 those notices of appeal on their docket? Could
24 they -- could they -- is there a risk there
25 might dismiss them? I -- I'm just not sure --

1 I -- I -- I've not held a notice of appeal on my
2 docket as an appellate court judge on the Tenth
3 Circuit for, what, a year, two years while the
4 CAT order is ongoing.

5 MR. McDOWELL: I -- and I think
6 this --

7 JUSTICE GORSUCH: I just don't know.
8 I haven't encountered that experience.

9 MR. McDOWELL: I think this points up
10 another problem with this idea, which is that I
11 don't actually think it's a particularly
12 effective way of preserving judicial review
13 because these procedures lie within the
14 discretion of the courts of appeals. And so
15 some courts of appeals may deny a motion to hold
16 a case in abeyance.

17 So I think we would end up with a
18 patchwork system where some circuits are
19 generally preserving review of these claims;
20 others are not. And there might be even
21 variation within circuits.

22 We also see some other practical
23 problems with the system. One is that it leads
24 to a flood of meritless prophylactic petitions
25 which really aren't challenging the removal

1 order itself. They're just a placeholder for a
2 later decision that may actually go in the
3 alien's favor.

4 The second problem is that it creates
5 a trap for the unwary because many people in
6 this system are unrepresented and won't know
7 that they have to file this sort of
8 counterintuitive protective petition.

9 And then, finally, it does create
10 administrative burdens for the courts and for
11 the government.

12 And what we've seen in practice is
13 that many of these protective petitions end up
14 being abandoned at the end of the day because
15 the person gets withholding relief or because
16 they just don't want to pursue the petition. So
17 it really is just a waste of resources in many
18 cases.

19 JUSTICE SOTOMAYOR: Could I speculate
20 and say you're right, if we accept amicus's
21 argument, basically CAT orders won't be
22 reviewable because -- in those places where the
23 courts don't want to stay the appeal of a -- a
24 petition for removal. That would happen for
25 aggravated felons, and some people might say,

1 well, that's a good thing. Congress didn't want
2 them to delay deportation any longer than
3 necessary.

4 So if I could see some people saying,
5 don't worry about those guys. Okay? But
6 doesn't the Board in a fairly significant number
7 of regular asylum cases, regular petitions for
8 removal where the person's not an aggravated
9 felon or someone else who's done something other
10 than be here illegally, doesn't the Board often
11 split those decisions?

12 MR. McDOWELL: It does --

13 JUSTICE SOTOMAYOR: And --

14 MR. McDOWELL: It does, Justice
15 Sotomayor.

16 JUSTICE SOTOMAYOR: So it affirms the
17 petition for removal.

18 MR. McDOWELL: Yes.

19 JUSTICE SOTOMAYOR: But it remands.

20 MR. McDOWELL: That's correct.

21 JUSTICE SOTOMAYOR: For the CAT
22 claims. And under amici's position, those
23 people who are not aggravated felons, those
24 people then are deprived totally of the zipper
25 clause, correct?

1 MR. McDOWELL: That's right. And if I
2 could just make two points in response to this
3 idea. The first, as -- as to your initial
4 premise about aggravated felons, I do think that
5 if Congress wanted to preclude judicial review
6 of claims, of CAT claims for aggravated felons,
7 it would have said so expressly. That's what it
8 did in Section 1252(a)(2)(C) when it -- when it
9 precluded aggravated felons from raising factual
10 challenges to removal orders.

11 But as to this mixed decision idea,
12 which we raise on pages 38 to 39 of our opening
13 brief, you have it exactly right. I think the
14 upshot of amicus's reading of the statutory
15 definition would be that there would be no
16 review of the agency's withholding decision on
17 remand. And, again, that would be in an
18 ordinary removal case, outside of the expedited
19 removal context.

20 Judge Murphy's concurrence in the
21 Sixth Circuit decision that we cite flags this
22 exact issue and says that this is a potential
23 spillover consequence of reading Nasrallah and
24 the statutory definition quite broadly, as
25 amicus is doing here.

1 JUSTICE KAVANAUGH: On the first
2 point, you seem to be suggesting that there's
3 some kind of clear statement rule before
4 Congress would deprive judicial review of CAT
5 claims. I'm just wondering about the origins of
6 that or if that's what you're saying.

7 MR. McDOWELL: I -- I didn't mean to
8 be suggesting a -- a clear statement rule. It's
9 a structural point about the INA. In the INA,
10 throughout the statute, when Congress wanted to
11 preclude review of categories of claims, we see
12 it over and over that it does so with express
13 language.

14 And here amicus is not pointing to any
15 express language precluding review of CAT claims
16 by aggravated felons. Instead, he's pointing to
17 what is really just a generic 30-day filing
18 deadline as a way of arguing that Congress
19 indirectly or implicitly precluded judicial
20 review of these claims.

21 And I just think that, as a structural
22 matter, that's hard to square with the INA, its
23 context and its structure. The --

24 JUSTICE JACKSON: And -- and haven't
25 we also said in Guerrero-Lasprilla that there's

1 a presumption of judicial review, that, you
2 know, we not foreclose the possibility of
3 judicial review over agency action unless
4 there's clear and convincing evidence that
5 Congress intended that result?

6 MR. McDOWELL: That's right, Justice
7 Jackson. We don't think you actually need to
8 get to the presumption in this case because we
9 think the statutory structure and the context
10 are sufficiently clear to show that Congress
11 wanted review of these claims, particularly
12 Section 1252(a)(4), which is what I referenced
13 in my introduction. But we don't deny that if
14 the statute were truly ambiguous, that the
15 presumption would apply here. We just don't
16 think you need to get to that here.

17 And just to get back to the Section
18 1252(a)(4) point, Justice Thomas, that is
19 express textual evidence that Congress wanted
20 there to be judicial review of CAT claims. And
21 I think it stands to reason -- and then we also
22 have Nasrallah, which says that CAT orders are
23 reviewable together with removal orders.

24 And so I think it really does stand to
25 reason that a CAT order must become final at the

1 same time as a removal order so that a person
2 can consolidate challenges to both orders into
3 the same petition for review, which is what the
4 zipper clause contemplates.

5 Another way of seeing the same point
6 is that it's unlikely that Congress would have
7 given express textual evidence that CAT claims
8 are reviewable but at the same time written a
9 deadline so short as to render many of those
10 claims unreviewable. Normally, Congress doesn't
11 give with the one hand and then take with the
12 other in that sort of manner.

13 JUSTICE ALITO: Under your position,
14 is it the case that an order that is final is
15 rendered non-final by the filing of the
16 subsequent application?

17 MR. McDOWELL: No, that's not our
18 position. Our position is that when a person
19 has a withholding-only claim, the Section
20 1228(b) removal order does not ever become final
21 until the withholding-only claim is resolved.
22 It's not that it is final, then becomes
23 non-final. It's that it never became final in
24 the first instance until those proceedings are
25 resolved.

1 And that's because --

2 JUSTICE ALITO: What -- okay. What is
3 the time requirement for filing a
4 withholding-only claim?

5 MR. McDOWELL: The regulations
6 contemplate that there -- that the claim is
7 raised with the agency before the Section
8 1228(b) removal order is issued. And here it
9 was -- it was raised immediately after.

10 So if there were a situation where a
11 person didn't raise it for 30 days after the
12 entry of the Section 1228(b) removal order, we
13 would agree that -- at that point, the order
14 would be final and the petition for review
15 timeline would have run.

16 But here, and as -- as is usually the
17 case under the regulations, these claims are
18 brought contemporaneously with the entry of the
19 Section 1228 removal order. The problem is that
20 the resolution of those claims takes much longer
21 because these are often very fact-intensive
22 claims, as opposed to a Section 1228(b) removal
23 order, which has very little process because
24 it's meant to be expedited.

25 JUSTICE ALITO: And how long -- do you

1 know, by any chance, how long on average it
2 takes to resolve CAT claims?

3 MR. McDOWELL: We don't have exact
4 numbers, but my sense is it usually takes
5 several months if it's a real -- if it's a
6 serious claim. If it's a meritless claim, these
7 can be resolved fairly quickly because the
8 asylum officer will say that there's no
9 negative -- or there's no reasonable fear. Then
10 the immigration judge will sustain that. And
11 both of those officers have to make those
12 decisions within a 10-day span. So they can
13 sometimes be resolved relatively quickly.

14 But here, when it's a serious claim,
15 here the IJ actually found that he was entitled
16 to CAT -- to CAT relief, and then that was
17 reversed by the BIA. When it's a serious claim
18 like that, it could sometimes take several
19 months to even over a year. The dissent in
20 Guzman Chavez pointed to some instances where
21 they took multiple years, I believe.

22 JUSTICE ALITO: So, as between the
23 two -- in light of that, as between these two
24 options, which one is preferable and why? The
25 first would be the requirement that a

1 prophylactic petition for review be filed, and
2 the second would be your position that there's
3 no need to do anything until after the CAT claim
4 is resolved.

5 Do you think that your -- that there's
6 a risk that your position would lead to greater
7 delay?

8 MR. McDOWELL: I don't think it would
9 lead to greater delay because people are going
10 to have incentives to bring these
11 withholding-only claims no matter what because
12 they can always bring the claim before the
13 agency, and the removal order will be stayed
14 pendency -- pending the agency's resolution of
15 the claim. So these claims are going to be
16 brought either way if there's a plausible reason
17 to bring them.

18 The only additional delay, under our
19 interpretation versus amicus's -- and I'm
20 setting aside the protective petition scheme
21 which I've already discussed -- but the delay
22 here would be the time needed for the court of
23 appeals to review the withholding-only
24 determination.

25 I also want to just point out, in --

1 in terms -- in terms of the -- any public safety
2 concerns about giving this additional time or
3 additional process to aggravated felons, it's
4 important to bear in mind that they can be
5 detained throughout the entirety of the agency
6 proceedings, as well as subsequent judicial
7 review proceedings. And this Court affirmed
8 that power in Guzman Chavez.

9 JUSTICE KAGAN: So just as a matter of
10 government practice, when you have the order of
11 removal but the CAT proceedings have not yet
12 been concluded, what does the government feel
13 itself free to do with the alien?

14 MR. McDOWELL: So we -- the removal
15 order would be stayed as to the designated
16 country of removal. So we would not be able to
17 remove the person to that country.

18 There is this issue of third-country
19 removal. And in that circumstance, I -- I want
20 to first point out that under Title 8, DHS does
21 not pursue third-party -- third-country removal
22 while the withholding-only proceedings are
23 ongoing. But if it were to, the way it would
24 work is this --

25 JUSTICE KAGAN: So let me -- let me

1 make sure I understand that. You think you have
2 the -- the -- the legal right --

3 MR. McDOWELL: That's right.

4 JUSTICE KAGAN: -- to -- to send the
5 non-citizen to some other country, where he
6 doesn't have a CLAT -- CAT claim, but, in fact,
7 the U.S. government does not exercise that
8 right?

9 MR. McDOWELL: Under Title 8 we did --
10 we do not do that as a matter of practice. We
11 do think we have the legal authority to do that,
12 with the following caveat: We would have to
13 give the person notice of the third country and
14 give them the opportunity to raise a reasonable
15 fear of torture or persecution in that third
16 country.

17 If they raise that reasonable fear,
18 the withholding-only proceedings would simply
19 continue. They would just focus on the new
20 country, rather than the original one.

21 JUSTICE KAGAN: But you don't have the
22 legal power to remove the person to the country
23 for which there is a pending CAT claim?

24 MR. McDOWELL: That's exactly right.
25 The regulate -- the regulations prohibit that.

1 And that's another reason why we think that --
2 that confirms that the removal order doesn't
3 actually become final until the end of
4 withholding-only proceedings.

5 The withholding-only proceedings
6 affect the implementation of the removal order
7 for that very reason. If a person is granted
8 CAT protection, that means that the person
9 cannot be removed to the designated country of
10 removal.

11 CHIEF JUSTICE ROBERTS: Thank you,
12 counsel.

13 Justice Thomas, anything further?

14 JUSTICE THOMAS: Would the party have
15 to request consolidation with the removal order
16 proceedings?

17 MR. McDOWELL: Under our position --

18 JUSTICE THOMAS: Yeah.

19 MR. McDOWELL: -- or under our
20 frontline position, no, because the removal
21 order does not become final until the end of the
22 CAT proceedings. Only after the CAT proceedings
23 conclude would the person be able to file the
24 petition for review.

25 It would be exactly the way it works

1 in -- in -- in ordinary litigation, where the
2 appeal is filed after the entirety of the
3 district court proceedings have come to a
4 conclusion. That's what we're proposing here.

5 JUSTICE THOMAS: So how would that
6 work in -- in -- in -- in this case? You -- you
7 have a removal order that -- that's being
8 appealed, right? A final order?

9 MR. McDOWELL: So, in this case, the
10 Petitioner brought his petition for review after
11 the CAT order was issued.

12 JUSTICE THOMAS: Yeah.

13 MR. McDOWELL: And we are saying that
14 that was okay because the order of removal did
15 not become final until the end of the CAT
16 proceedings.

17 So his petition here was timely
18 because it was within 30 days of the CAT order.
19 And the CAT order was what rendered the removal
20 order final.

21 CHIEF JUSTICE ROBERTS: Justice Alito,
22 anything?

23 JUSTICE SOTOMAYOR: In this case, if
24 we were to hold that the 30-day deadline is not
25 jurisdictional -- not jurisdictionable

1 waiveable, and if we disagree with you and
 2 accept the amicus's second position that a final
 3 order of removal is final when it's issued,
 4 regardless of the CAT, will the government honor
 5 their commitment to waive the deadline for
 6 Mr. -- Mr. Riley?

7 MR. McDOWELL: Yes, we would.

8 CHIEF JUSTICE ROBERTS: Justice Kagan?
 9 Justice Gorsuch?

10 Justice Kavanaugh?

11 Justice Barrett?

12 Justice Jackson?

13 Thank you, counsel.

14 Mr. Hammer.

15 ORAL ARGUMENT OF STEPHEN J. HAMMER

16 COURT-APPOINTED AMICUS CURIAE

17 IN SUPPORT OF THE JUDGMENT BELOW

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

20 Congress has barred courts from
 21 reviewing claims under the Convention Against
 22 Torture except on a petition for review of a
 23 final order of removal. Under Section
 24 1252(b)(1) such a petition must be filed not
 25 later than 30 days after the date of the final

1 order of removal.

2 The Fourth Circuit correctly held that
3 Mr. Riley's failure to comply with that deadline
4 meant it was jurisdictionally barred from
5 reviewing his petition. The Fourth Circuit
6 rightly recognized that the filing deadline is
7 jurisdictional. This Court already held as much
8 in *Stone*, which is a jurisdictional precedent in
9 both reasoning and result.

10 And *Santos-Zacaria*, which was focused
11 on the INA's separate exhaustion provision,
12 didn't disturb the deadline's jurisdictional
13 status.

14 The Fourth Circuit also correctly held
15 that Mr. Riley's petition was untimely. The
16 only order of removal in this case is the final
17 administrative removal order. Section 1228(b),
18 the INA's statutory definition of a final order
19 of removal, and Section 1231 all confirm that a
20 final administrative removal order is, as its
21 name indicates, final when issued.

22 And as this Court explained in *Guzman*
23 *Chavez*, the finality of the order of removal
24 does not depend in any way on the outcome of the
25 withholding-only proceedings. Because Mr. Riley

1 failed to file his petition for review within 30
2 days of his final order of removal, the Fourth
3 Circuit correctly dismissed it as untimely.

4 I welcome the Court's questions.

5 JUSTICE THOMAS: How do you respond to
6 the arguments that have been made this morning
7 that the -- that this expands the time for the
8 removal order?

9 MR. HAMMER: I think that the
10 statutory deadline requires filing the order --
11 filing the petition for review within 30 days of
12 the final order of removal. And I think
13 statutory text and context make clear that a
14 final administrative removal order is final when
15 it is issued.

16 JUSTICE THOMAS: So what do you make
17 of the argument that -- you know, I asked the
18 other side whether or not -- what textual basis
19 they had for this. And, of course, their -- I
20 don't think there's much, but would you address
21 that?

22 MR. HAMMER: Your Honor, the only
23 textual basis that this Court has recognized for
24 judicial review of a CAT claim comes from filing
25 the petition for review of a final order of

1 removal, in compliance with the requirements of
2 1252.

3 Nasrallah explained that that allows
4 the Court to review a CAT claim alongside a
5 final order of removal. But if an alien does
6 not file a petition for review within 30 days of
7 the final order of removal, the Court does
8 not -- is not able to review the CAT claim.

9 JUSTICE KAGAN: Well, you seem to be
10 assuming that there is a final order of removal,
11 but maybe it's not final until the CAT claim has
12 been resolved.

13 In other words, what this order of
14 removal is saying -- it has, sort of, two parts:
15 First, you're removable; and, second, we're
16 going to remove you to country X.

17 And that second part, which is within,
18 you know, you're removable to country X, that's
19 provisional. It's -- it's only country X if you
20 fail on your CAT claim.

21 So there's -- there's sort of, like --
22 like, nothing final about a significant aspect
23 of this order.

24 MR. HAMMER: So I disagree, Your
25 Honor. Nasrallah made clear that CAT relief

1 doesn't affect the validity of the order of
2 removal and does not disturb the final order of
3 removal. And Guzman Chavez repeated all of
4 that, making clear that withholding-only does
5 not affect the finality of an order of removal.

6 And with respect to what the final
7 order of removal here actually says, I would
8 direct the Court to page 8 of the Joint
9 Appendix, which says that Mr. Riley was ordered
10 removed to Jamaica or any alternate country
11 proscribed by Section 1231.

12 So there wasn't any need -- there
13 wouldn't be any need for amendment. The
14 alternate countries are already list -- already
15 there, provided by the final administrative
16 removal order, Your Honor.

17 JUSTICE JACKSON: I don't understand
18 your distinguishing Santos-Zacaria. It seems to
19 me that if Stone's jurisdictional language was
20 binding in the way that you claim, that it would
21 have governed the outcome in that case as well.
22 Because both of them are in the same provision
23 related to judicial review.

24 So can you just help me to parse them
25 in the way that you have done?

1 MR. HAMMER: Yes, Your Honor. I think
2 Stone is a jurisdictional holding as to the
3 filing deadline that it actually considered. I
4 take Santos-Zacaria -- Zacaria to be responding
5 to the government's argument in that case that
6 the entirety of the INA's judicial review
7 provision, everything in Section 1252, was
8 jurisdictional. And Santos-Zacaria's comments
9 were in reflection to that.

10 But it was not -- I don't take any of
11 the comments in Santos-Zacaria to be saying that
12 Stone was not jurisdictional in any respect,
13 even with regard to the filing deadline that it
14 did consider. If Santos-Zacaria had been saying
15 that, it would not have needed to go on with
16 that paragraph to point out that Stone did not
17 address the exhaustion provision that was at
18 issue in Santos-Zacaria.

19 JUSTICE JACKSON: Well, true -- it's
20 true that Santos-Zacaria came up in a particular
21 context, but it was responding to the assertion
22 that Stone established the jurisdictional nature
23 of this.

24 And I thought Santos -- Zacaria
25 pointed out that Stone was a drive-by

1 jurisdictional holding, it was pre-Arbaugh, it
2 really didn't do the -- the work that was
3 necessary to establish a -- binding holding
4 related to the jurisdictional provision.

5 MR. HAMMER: So, Your Honor, I don't
6 understand either of the comments in
7 Santos-Zacaria to be saying Stone was not
8 jurisdictional with respect to the filing
9 deadline.

10 You have the "did not attend to"
11 comment in Santos-Zacaria. I understand that to
12 be a -- a reference to not applying Arbaugh's
13 clear statement rule. You have the "was not
14 central" comment, and I think that is a
15 reflection of the government's argument in
16 Santos-Zacaria about the entirety of the
17 INA's --

18 JUSTICE JACKSON: All right. Well,
19 play out the counterfactual. If you're right
20 that Santos-Zacaria was not talking about the
21 jurisdictional nature of the provision that
22 Stone was looking at, what -- where does that
23 leave Santos-Zacaria?

24 MR. HAMMER: Well, Your Honor, I think
25 it could be a reflection on the entirety of the

1 government's argument in that case that the
2 entirety of the INA's judicial review provision
3 far beyond the filing deadline was not
4 jurisdictional.

5 But even if I'm wrong about those
6 comments and those comments were meant to say
7 that Stone was not jurisdictional in any
8 respect, even with regard to the filing deadline
9 that it did consider, I don't think that was a
10 necessary to the result in Santos-Zacaria.

11 Santos-Zacaria was focused only on the
12 separate exhaustion provision that was not at
13 issue in Stone. And I think I would take the
14 lesson from this Court's decision in Thryv to be
15 that when the issue is what this Court held in a
16 prior decision, this Court should look to that
17 prior decision and not a subsequent opinion
18 interpreting it.

19 JUSTICE BARRETT: Mr. Hammer, can you
20 think of another situation in which judicial
21 review is precluded just by virtue of the way
22 the fast-track -- or the two-track system works?
23 In other words, we're not looking at a
24 situation -- I mean, putting aside the zipper
25 clause, but we're not looking at a situation

1 where Congress has said in -- expressly that in
2 this situation where you have fast-track
3 removal, judicial review is precluded. It's
4 simply by operation of the fact that the removal
5 order is going to have to be executed before the
6 withholding claim gets all the way through.

7 Is there another situation like that?

8 MR. HAMMER: So two responses, Your
9 Honor. First, I don't think judicial review of
10 orders concluding withholding-only proceedings
11 is precluded by the Fourth Circuit's reading.
12 The parties have identified various ways by
13 which aliens could obtain review of those
14 orders.

15 JUSTICE BARRETT: Well, let's
16 assume --

17 MR. HAMMER: They've acknowledged --

18 JUSTICE BARRETT: -- you know, the
19 government's kind of disclaimed that now. So
20 let's -- if -- if those aren't, let's -- in this
21 hypothetical, just assume those are off the
22 table.

23 MR. HAMMER: Yes, Your Honor. If
24 those are off the table, if those are not valid,
25 then I think this is a unique form of judicial

1 review. I'm not aware of another one that is
2 like this. It allows CAT claims to be reviewed
3 but only if you file a petition for review of a
4 final order of removal.

5 So I'm not aware of an -- an analogy
6 to it, but I don't think it would be surprising,
7 if Congress meant to restrict judicial review,
8 that it would do it for these particular classes
9 of aliens, aliens who have been convicted of
10 aggravated felon -- felonies and illegal
11 reentrance. That would not be a surprising
12 class, given Congress's interest in expediting
13 the removal of those aliens.

14 JUSTICE BARRETT: Is that consistent
15 with the presumption of judicial review?

16 MR. HAMMER: So, again, front-line
17 position is that I think there are means
18 available to get judicial review. Setting that
19 aside, I don't think the presumption -- I don't
20 think the Court needs to resort to the
21 presumption, given the plain meaning of the
22 filing deadline.

23 JUSTICE BARRETT: Would you say, then,
24 that your argument, maybe not hinges, but is
25 helped significantly by the available of these

1 alternate routes?

2 MR. HAMMER: I think it is helped, but
3 I don't -- I think it's helped, I don't think
4 the presumption needs to be raised at all
5 because I don't think the text is ambiguous with
6 respect to what the meaning of a file -- "final
7 order of removal" is, Your Honor.

8 JUSTICE KAGAN: But if your front-line
9 position is that there is judicial review, even
10 with respect to these people who are in
11 expedited proceedings, if that's your front-line
12 position, isn't it a quite odd way to write a
13 statute to say, yes, you get judicial review,
14 but we're going to set up a 30-day deadline
15 which effectively precludes you from ever
16 getting that judicial review?

17 MR. HAMMER: Well, I think it wouldn't
18 preclude you from getting the judicial review if
19 these alternative means are available. It would
20 just require you to file the protective --
21 petition and hold it in abeyance, which the
22 government represents has been done in the
23 Fourth Circuit since its decision. And I think
24 this Court has been clear that administrative
25 burden or complexity is not a reason to depart

1 from the plain meaning of the statute.

2 But I also think there was a good
3 reason for Congress to do it this way. And I
4 think this relates to the policy consequences of
5 Mr. Riley's and the government's position. So
6 Mr. Riley's and the government's position
7 separates administrative finality, on the one
8 hand, from finality for purposes of judicial
9 review, on the other.

10 And by doing so, they create a risk
11 that aliens can be removed from the country to a
12 third country during withholding-only
13 proceedings without ever having the chance to go
14 into court and get a stay. That's a significant
15 policy problem, and that's because, as everyone
16 here agrees, the final administrative removal
17 order is administratively final as soon as it's
18 issued.

19 That authorizes the government to
20 remove the alien to a third country so long as
21 the government provides notice of that and the
22 alien doesn't have a fear of persecution or
23 torture in that country. But as long as
24 withholding-only proceedings are ongoing,
25 according to Mr. Riley and the government, there

1 will not be a judicially final order, and so the
2 alien won't be able to go into court and get a
3 stay.

4 That's a particularly significant
5 problem because there will be cases in which
6 aliens both want to challenge the validity of
7 their 1228(b) orders and seek withholding
8 relief. And those aliens will be put to a
9 difficult choice. They will either need to
10 forgo their withholding proceedings so that they
11 can immediately get judicial review and a stay
12 of their 1228(b) orders, or risk it, go into
13 withholding proceedings knowing that there's a
14 chance they might be removed to a third country
15 before ever having the chance to go into court
16 and get a stay. That cannot happen on the
17 Fourth Circuit's reading because the Fourth
18 Circuit's reading marries administrative
19 finality with finality for purposes of judicial
20 review.

21 JUSTICE SOTOMAYOR: I am sorry. I
22 thought that there was a stay for the petition
23 for removal when a CAT claim is made --

24 MR. HAMMER: There --

25 JUSTICE SOTOMAYOR: -- within the

1 30-day period.

2 MR. HAMMER: There is not, Your Honor.
3 And the government explained that, that the
4 government believes itself and does in fact have
5 the authority to a remove an alien to a third
6 country --

7 JUSTICE SOTOMAYOR: To a third
8 country --

9 MR. HAMMER: Exactly.

10 JUSTICE SOTOMAYOR: -- but they
11 said -- you forgot the "subject to" -- subject
12 to notice and an opportunity to file an amended
13 CAT claim on the new designation. So it's not
14 an open-ended thing.

15 And you answered Justice Barrett by
16 saying it makes sense that aggravated felons and
17 people who have come back illegally shouldn't
18 have more -- have expanded appellate rights
19 under CAT. But the government has conceded that
20 people who haven't had either of those two
21 situations, who have appealed to the Board
22 and -- and are subject to the zipper clause in
23 terms of the 30-day period, the Board not
24 infrequently affirms the petition for removal
25 and remands the petition -- the CAT claim.

1 You're saying those people can't
2 appeal either.

3 MR. HAMMER: Your Honor, I think that,
4 generally in those cases, aliens would have the
5 opportunity to do it, and that's because of the
6 Board's particular remand policy. So under a
7 1978 Board decision called Matter of Patel, when
8 the Board remands a case, it's a general or
9 plenary remand that allows reconsideration of
10 any issue on remand, unless the Board --

11 JUSTICE SOTOMAYOR: But not the
12 petition for review if they've affirmed it.

13 MR. HAMMER: It would allow for
14 reconsideration of the removability decision by
15 the IJ unless the Board expressly limits the
16 remand to that withholding issue. So to take
17 your hypothetical, if the Board did expressly
18 limit its remand to the withholding issue, then,
19 yes, it's possible that scenario would arise.

20 JUSTICE SOTOMAYOR: Well, that's how I
21 saw it when I was on the circuit court, which is
22 the boards would affirm the petition for
23 review -- I'm sorry -- the final orders of
24 removal and remand just on the CLAT claims.
25 They did it routinely.

1 MR. HAMMER: So, yes, Your Honor, the
2 Board has the option to expressly limit its
3 remand to the withholding issue. I would just
4 note that in these situations, aliens will also
5 often be seeking asylum in addition to the
6 withholding claim. And because asylum does go
7 to the validity of the removal order, it would
8 forestall the finality of the removal order
9 while the asylum claim was being considered.

10 JUSTICE JACKSON: Can I go back to
11 Justice Barrett's question about the
12 presumption? I guess I don't understand why the
13 text of the statute is not ambiguous concerning
14 the meaning of "final order" in the expedited
15 removal context.

16 When you look at the definition, it --
17 both prongs of it are pegged to a determination
18 by the Board of Immigration Appeals, which
19 doesn't happen in the expedited removal context.
20 So why couldn't that be a basis for determining
21 that this was sufficiently ambiguous that the
22 presumption kicks in?

23 MR. HAMMER: So two points, Your
24 Honor. First, we don't think the presumption
25 comes up so long as these alternative means of

1 getting judicial review are available, like the
2 protective petitions.

3 JUSTICE JACKSON: But it's -- I'm
4 sorry. Is that -- I thought the standard was
5 whether the statute was ambiguous, not whether
6 there's some other way we could figure this out.

7 MR. HAMMER: Well, judicial review
8 would be available if those alternative -- if
9 you can file a protective petition, then
10 judicial review would be available. So the
11 presumption wouldn't help resolve anything.
12 You'd get it either way, but --

13 JUSTICE GORSUCH: Presumption -- I --
14 I think Justice Jackson's point is the
15 presumption of reviewability helps us interpret
16 statutes, and if the statute's ambiguous, then
17 it kicks in and it has nothing to do with facts
18 on the ground. And if you -- you can achieve --
19 skin the cat some other way. Do you want to
20 respond to that?

21 MR. HAMMER: Yes, Your Honor. This
22 Court has said that when -- and this is Thunder
23 Basin footnote 8: "Because court of appeals
24 review is available, this case does not
25 implicate the strong presumption that Congress

1 did not mean to prohibit" --

2 JUSTICE GORSUCH: Yeah, but --

3 MR. HAMMER: -- "all forms of judicial
4 review."

5 JUSTICE GORSUCH: Yeah, but if -- if
6 the -- the statute -- what do you say, though --
7 I mean, it seems to me 1101(a)(47), when it
8 defines final order really is pegged to the --
9 the Board's decision one way or the other. And
10 here we have none.

11 MR. HAMMER: So Your Honor, I
12 acknowledge that Congress could have spoken more
13 directly to this situation and --

14 JUSTICE GORSUCH: Well, it could have
15 spoken to this -- situation at all, right?

16 MR. HAMMER: Well, I think it could
17 have spoken more directly. I'll acknowledge
18 that, Your Honor. But I think it's clear in
19 light of Section 1228(b), which does speak
20 directly to this situation in two critical
21 places. So Section 1228(b)(4)(F) calls an order
22 entered under this -- under that subsection a
23 final order of removal, using exactly the same
24 language that Section 1252 does itself. And
25 that's only confirmed by Section 1228(b)(3),

1 which imposes a stay or a bar on the removal of
2 the alien for 14 days from the date of issuance
3 of that order and ordered that the alien has the
4 opportunity to apply for judicial review,
5 confirming that that order is final when it is
6 issued.

7 JUSTICE GORSUCH: If -- if --

8 MR. HAMMER: And I think --

9 JUSTICE GORSUCH: If we didn't have
10 Stone, just to shift gears a little bit, would
11 you read 1252(b)(1) as jurisdictional?

12 MR. HAMMER: Your Honor, I acknowledge
13 that the filing deadline likely would not
14 satisfy the clear statement test apart from
15 Stone.

16 JUSTICE GORSUCH: Okay.

17 MR. HAMMER: Just to mention that --
18 the definition a little bit more, Your Honor, I
19 think the best way to understand this, that is a
20 statute-wide definition. It applies by its
21 terms to the entirety of the INA. So it covers
22 Section 1228(b).

23 And I think the best way to read it is
24 to reconcile it with 1228(b), particularly in
25 light of the history of the two provisions. The

1 predecessor to Section 1228(b) that originally
2 dispensed with the need for a hearing before an
3 immigration judge was adopted in 1994. DOJ
4 adopted regulations implementing it in 1995.
5 They did away with the need for any Board
6 review. So by the time Congress came to AEDPA
7 in 1996 to add this definition, it already had
8 this part of the statute. It already knew this
9 statute called this "a final order of
10 deportation," and yet it adopted this
11 definition. I think the best way to read it
12 together with that is to reconcile it, to say
13 that Board -- the period for Board review
14 expires immediately when no Board review is
15 allowed.

16 But if you disagree with me on that, I
17 think Section 1228(b) itself answers this
18 question, and it's strongly supported by
19 Section 1231 and what this Court said about
20 administrative finality in *Guzman Chavez*. As
21 the government acknowledges in its reply --

22 JUSTICE GORSUCH: What do you say
23 about the possibility that some courts of
24 appeals won't allow these protective appeals to
25 sit on their books for years on end?

1 MR. HAMMER: Your Honor, I think this
2 Court could provide guidance about the
3 situations in which those motions for abeyance
4 should be granted. The Court has done something
5 similar in the habeas context in -- in Rhines
6 versus Weber, where it authorized a stay in
7 abeyance procedure for district courts so that
8 habeas petitioners could go into district courts
9 and exhaust their -- go into state court to
10 exhaust their claims before coming back. This
11 Court could authorize something like that.

12 I don't think that's necessary here,
13 Your Honor, because I think the meaning of the
14 filing deadline is plain. But the Court could
15 provide guidance in that way.

16 CHIEF JUSTICE ROBERTS: Counsel, you
17 say that Stone's rejection of tolling indicates
18 that it's a true jurisdictional holding. But
19 tolling can be unavailable in equitable
20 proceedings as well, can't it, or when the
21 deadlines are -- are equitable?

22 MR. HAMMER: Yes, Your Honor. It is
23 true that some claim processing rules also
24 foreclose tolling, but they don't do it in the
25 way that Stone did. So this Court in Irwin held

1 that non-jurisdictional statutory deadlines are
2 presumptively amenable to equitable tolling. We
3 see nothing like a rebuttal in Stone of that
4 presumption of equitable tolling. Instead, we
5 see the automatic and reflexive connection of
6 the Court's holding that the deadline is
7 jurisdictional to the consequence that it
8 doesn't allow for equitable tolling.

9 That's the exact opposite of what
10 happened in Beggerly, the Court that this -- the
11 case that this Court analyzed in Wilkins and
12 said didn't count as a definitive jurisdictional
13 precedent. It had an extensive analysis of
14 equitable tolling. And the Court said if it was
15 a true jurisdictional deadline, it wouldn't have
16 needed that extensive analysis.

17 And that's exactly what we have in
18 Stone; a direct and immediate connection between
19 the conclusion that the deadline is
20 jurisdictional and the consequence that it
21 doesn't allow for equitable tolling.

22 CHIEF JUSTICE ROBERTS: Well, you also
23 argue that the citation of the cert deadline and
24 the appeal deadline is very, very significant
25 here, but those seem to be quite different in

1 the sense that you're dealing with the vertical
2 deadlines of quite some significance.

3 And I wonder whether that is a
4 particularly compelling analogy.

5 MR. HAMMER: Your Honor, I think it
6 was the analogy that the court found compelling
7 in Stone. It was the analogy that supported the
8 Court's ultimate conclusion that the deadline
9 was jurisdictional and engaged in this extensive
10 analysis, comparing the deadline to file a
11 notice of appeal from a final order of
12 deportation to the time to notice of an appeal
13 from a district court judgment, which as you
14 point out this Court has recognized as
15 jurisdictional, both before and after Arbaugh.

16 The Court also compared the effect of
17 the motion for reconsideration to the effect of
18 a Rule 60(b) motion, which doesn't strip the
19 court of appeals of jurisdiction. And I think
20 that -- the force of that analogy is that it
21 shows the court understood the filing deadline
22 as a window of time at which the court of
23 appeals could assert jurisdiction, regardless of
24 any motion for reconsideration, and after which
25 it would could not assert jurisdiction just like

1 in the notice of appeal context.

2 I think all of that analysis supported
3 what happens on pages 405 of Stone and shows
4 that the Court truly meant what it said when it
5 said that the deadline was jurisdictional.

6 JUSTICE JACKSON: But just to
7 underscore Justice Gorsuch's point, under our
8 modern jurisprudence you would agree that it's
9 not jurisdictional, that we -- you're -- you're
10 relying on the Stone precedent as the reason why
11 we should hold that it's jurisdictional here?

12 MR. HAMMER: I am relying on the Stone
13 precedent, Your Honor. And I think this is
14 exactly the situation in which statutory stare
15 decisis has its effect. As this Court
16 recognized in *John R. Sand & Gravel*, abiding by
17 the Court's statutory decision serves important
18 system-wide reliance interests, promotes the
19 overall stability and predictability of the law,
20 and it's important -- particularly important
21 here because just a year after Stone, Congress
22 and IIRIRA further restricted the availability
23 of judicial review.

24 JUSTICE JACKSON: And we can rely on
25 Stone to reach the jurisdictional holding that

1 you would like us to reach, notwithstanding
2 Santos-Zacaria's statement that Stone -- in
3 Stone, whether the provisions were
4 jurisdictional were not central to the case?

5 MR. HAMMER: Yes, Your Honor. I don't
6 understand that statement to be reflecting on
7 Stone's analysis of the deadline. And it -- to
8 the extent I'm wrong about that, I don't think
9 that was part of Santos-Zacharia's holding. I
10 don't think it would bind this Court, just like
11 in the Thryv case, Your Honor.

12 JUSTICE KAGAN: Mr. Hammer, when I
13 asked you before why we should think of the
14 order of removal as final, given that it's
15 distinctly non-final, distinctly provisional as
16 to an important aspect, which is where you're
17 going to remove the person to, you countered to
18 me, Nasrallah.

19 Is there anything else that you would
20 say about that question or is this like you
21 think, look, that's what Nasrallah forces you to
22 do is to think of that order as final, even
23 though it's not final, as to where the person
24 can be removed to? Is there anything else other
25 than Nasrallah?

1 MR. HAMMER: Yes, Your Honor. I think
2 it's a strong point that this order allows the
3 removal, even while withholding-only proceedings
4 are ongoing of the alien to a third country.
5 The order does not have to be amended.

6 JUSTICE KAGAN: Well, it -- it -- it
7 does -- so it is -- it -- it has settled the
8 question of whether you can remove the alien to,
9 you know, any other country, but it has not
10 settled the question as to whether you can
11 remove this person to Jamaica here. So that
12 continues to be an up-for-grabs question.

13 And as I understand the government's
14 argument, it's like as long as that's an
15 up-for-grabs question, the order is not final.

16 Now, you come back and you say
17 Nasrallah. So I take the point. We have to now
18 go read Nasrallah and see what it said and what
19 it didn't say, but I'm not hearing anything else
20 from you.

21 MR. HAMMER: Your Honor, no. I think
22 the statutory text itself, so we talked about
23 1228(b) and the clear indications that that
24 order is final when issued. 1231 also confirms
25 that --

1 JUSTICE KAGAN: Yeah. I'm sorry.

2 What -- what in that tells you it's final as --
3 as issued?

4 MR. HAMMER: It's called the final
5 order of removal.

6 JUSTICE KAGAN: Well, the question is:
7 What is a final order of removal?

8 MR. HAMMER: Okay, so Section
9 1228(b)(3) indicates that you can seek judicial
10 review within 14 days of the issuance of the
11 order, which would not be possible if
12 withholding-only proceedings suspended the
13 finality of that order. So I think that's a
14 strong indication that it's final, but I would
15 also point to Section 1231 and what this Court
16 said about administrative finality in *Guzman*
17 *Chavez*, because many of these arguments were
18 also raised in *Guzman Chavez*, that indeterminacy
19 as to the "where" question suspended the
20 finality of the removal order.

21 And the Court rejected that for
22 purposes of administrative finality in *Guzman*
23 *Chavez*. I think there's a strong presumption
24 that also governs finality in Section 1252.

25 And we can see evidence of that in the

1 statutory text in Section 1252(b)(8)(A),
2 which cross-references Section 1231 and uses the
3 words "a final order of removal" to indicate the
4 beginning of the removal period under
5 Section 1231.

6 So Congress is using these two terms
7 interchangeably. And for the reasons we
8 discussed, it makes sense for them to do them so
9 because administrative finality is the point at
10 which the alien is then put at risk of being
11 removed to a third country. It doesn't make
12 sense to have judicial -- finality for purposes
13 of judicial review be suspended for some period
14 of time, while the alien is at risk of being
15 removed to a third country.

16 JUSTICE KAGAN: Thank you.

17 CHIEF JUSTICE ROBERTS: Justice
18 Thomas?

19 Justice Alito?

20 Anything further, Justice Gorsuch?

21 Justice Kavanaugh?

22 Justice Barrett?

23 Justice Jackson?

24 Thank you, counsel.

25 Mr. Bradley, rebuttal?

1 REBUTTAL ARGUMENT OF KEITH BRADLEY
2 ON BEHALF OF THE PETITIONER

3 MR. BRADLEY: Thank you. A -- a
4 couple of observations, really three things I'd
5 like to say.

6 One is on the question whether
7 somebody can be removed to a third country,
8 while the withholding proceedings are at -- in
9 process, I'd like to point the Court to the
10 regulation at our -- our Appendix 29A in the
11 petition that says, "such alien shall not be
12 excluded, deported, or removed before a decision
13 is rendered on his or her asylum application."
14 And that -- that term is defined in the
15 regulation to include the withholding claims.

16 So it is, as the government and we
17 have said, that while they have the statutory
18 authority to remove you to somewhere else, the
19 actual administrative process is that by their
20 own regulations they cannot, unless they find
21 another -- they designate another country.

22 This is actually 20A in the appendix,
23 that they must designate the country of removal
24 and then give you another chance, if that's --
25 if it's a third country, you, like, might raise

1 an objection as to that one.

2 By contrast, in the -- in the judicial
3 process, of course, there is -- is no automatic
4 stay. This was a change in IIRIRA. We have a
5 stay in this case, but that is within the
6 discretion of the circuit courts.

7 I'd like to come back to 1228(b)(3).
8 This is the provision that says that there's a
9 pause for 14 days. That has a great deal of
10 force in a case where there is no withholding
11 claim, but there's nothing about that provision
12 that -- that shows it was intended to ensure --
13 to cover every case. It is a limited protection
14 of limited benefit for certain circumstances.
15 Not all of them.

16 Third, I'd like to come back to this
17 question of the protective petitions. It is
18 more than simply that the courts would have to
19 hold them in abeyance. The government is right
20 about the volume, that you will have to petition
21 in every case because you won't even know yet
22 what the BIA's decision -- what the IJ's or
23 BIA's decision will be and whether there will be
24 grounds to challenge it.

25 In addition, you will have to be

1 filing a petition in response to which the
2 government is supposed to file the
3 administrative record for a case that is still
4 ongoing and you're still building the
5 administrative record. So the -- the headaches
6 for doing this nationwide are contrary to any
7 other judicial review scheme that I can think
8 of.

9 CHIEF JUSTICE ROBERTS: Thank you,
10 counsel.

11 Mr. Hammer, this Court appointed you
12 to brief and argue this case as an amicus curiae
13 in support of the judgment below. You have ably
14 discharged that responsibility, for which we are
15 grateful.

16 The case is submitted.

17 (Whereupon, at 12:26 p.m., the case
18 was submitted.)

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Official

<p>1</p> <p>10-day ^[1] 30:12 11:28 ^[2] 1:15 3:2 1101(a) ^[47] ^[1] 53:7 12:26 ^[1] 66:17 1228 ^[3] 12:16 20:18 29:19 1228(b) ^[13] 28:20 29:8,12, 22 37:17 48:7,12 53:19 54: 22,24 55:1,17 61:23 1228(b)(3) ^[3] 53:25 62:9 65:7 1228(b)(4)(F) ^[1] 53:21 1231 ^[7] 37:19 40:11 55:19 61:24 62:15 63:2,5 1252 ^[6] 8:21 11:5 39:2 41: 7 53:24 62:24 1252(a)(2)(C) ^[1] 25:8 1252(a)(4) ^[4] 14:21 18:9 27:12,18 1252(b)(1) ^[4] 4:8 18:2 36: 24 54:11 1252(b)(8)(A) ^[1] 63:1 1252(b)(9) ^[1] 14:6 1291 ^[1] 16:8 14 ^[3] 54:2 62:10 65:9 17 ^[1] 2:8 1978 ^[1] 50:7 1994 ^[1] 55:3 1995 ^[1] 55:4 1996 ^[1] 55:7</p>	<p>abandoned ^[1] 23:14 abeyance ^[5] 22:16 46:21 56:3,7 65:19 abiding ^[1] 59:16 able ^[4] 32:16 34:23 39:8 48:2 ably ^[1] 66:13 above-entitled ^[1] 1:13 Absolutely ^[1] 7:19 accept ^[2] 23:20 36:2 according ^[1] 47:25 achieve ^[1] 52:18 acknowledge ^[3] 53:12,17 54:12 acknowledged ^[1] 44:17 acknowledges ^[1] 55:21 action ^[1] 27:3 actual ^[1] 64:19 actually ^[10] 13:21 19:4 22: 11 23:2 27:7 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