

# SUPREME COURT OF THE UNITED STATES

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IN THE SUPREME COURT OF THE UNITED STATES

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PIERRE YASSUE NASHUN RILEY,                     )  
  Petitioner,                     )  
  v.                                     ) No. 23-1270  
PAMELA BONDI, ATTORNEY GENERAL,             )  
  Respondent.                     )  
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Pages: 1 through 66  
Place: Washington, D.C.  
Date: March 24, 2025

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PIERRE YASSUE NASHUN RILEY, )

Petitioner, )

v. ) No. 23-1270

PAMELA BONDI, ATTORNEY GENERAL, )

Respondent. )

- - - - -

Washington, D.C.

Monday, March 24, 2025

The above-entitled matter came on for oral argument before the Supreme Court of the United States at 11:28 a.m.

APPEARANCES:

KEITH BRADLEY, Denver, Colorado; on behalf of the Petitioner.

EPHRAIM McDOWELL, Assistant to the Solicitor General, Department of Justice, Washington, D.C.; on behalf of the Respondent in support of the Petitioner.

STEPHEN J. HAMMER, Dallas, Texas; Court-appointed amicus curiae in support of the judgment below.

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P R O C E E D I N G S

(11:28 a.m.)

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

Mr. Bradley.

ORAL ARGUMENT OF KEITH BRADLEY

ON BEHALF OF THE PETITIONER

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

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

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

Amicus's proposal would mean that a non-citizen like Petitioner is allowed to seek a 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 -- I  
20 -- 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  
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 -- that  
21 -- that denies CAT relief is not converting the  
22 final order into something else, except from the  
23 timing of it and what gets decided is affecting  
24 the finality, because as we explained in the  
25 brief, and I believe the government agrees,

1 where you can be sent is something that remains  
2 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 right -- right then. If  
7 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 JUSTICE SOTOMAYOR: Okay.

13 MR. BRADLEY: And here when the Board  
14 concludes its work as you know is --

15 JUSTICE SOTOMAYOR: Is after the CAT,  
16 because the CAT decision --

17 MR. BRADLEY: That's right.

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

20 MR. BRADLEY: Absolutely, correct.

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



1                   MR. BRADLEY:  There -- there -- there  
2                   is -- there is an amendment, that's right.

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

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

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

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

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

21                  MR. BRADLEY:  Correct.

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

1 different word, final order of removal, here.

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

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

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

21 JUSTICE SOTOMAYOR: Thank you.

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

1 (Laughter.)

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

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

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

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

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

1 MR. BRADLEY: If I -- so I'm going to  
2 take that in two parts, if I could.

3 CHIEF JUSTICE ROBERTS: You can.

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

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

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

25 JUSTICE SOTOMAYOR: Mandatory claim

1 processing, which are non-jurisdictional, you  
2 can't equitably toll either, correct?

3 MR. BRADLEY: Also true.

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

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

16 MR. BRADLEY: So I would say that  
17 there is a millimeter of deadline that will not  
18 matter. So let me explain that.

19 We agree that the FARRA is an order of  
20 removal. We agree with the government that that  
21 order of removal became final upon the  
22 conclusion of all of the administrative  
23 proceedings, when everything related -- relating  
24 to it was.

25 It -- it seems to us also that the

1 Board's order was also an order of removal that  
2 was, of course, final at the same time but you  
3 don't need to decide on that in --

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

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

14 JUSTICE GORSUCH: Is there any other  
15 daylight between you and the government in this  
16 case?

17 MR. BRADLEY: I can't think of any.  
18 Oh, actually, sorry, one more, which is that  
19 also not really before the Court, which is that  
20 we think that the 30-day deadline is not -- is  
21 -- we agree that it's non-jurisdictional. We  
22 think it's not mandatory either, but that -- no  
23 -- no one is asking the Court to decide that  
24 particular question.

25 JUSTICE JACKSON: Going back to

1 Justice Thomas's question about textual basis  
2 for your position, are you relying at all on the  
3 zipper clause, 1252(b)(9)?

4 MR. BRADLEY: Yes. We -- we certainly  
5 are because that is a sign that what we and the  
6 government are -- are asking for is the sensible  
7 way to proceed.

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

13 That is to be done by interpreting  
14 final to mean what -- when the agency is fully  
15 concluded with its process.

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

19 MR. BRADLEY: Correct, which, of  
20 course, at least we read Nasrallah to have  
21 looked at that provision and -- and concluded  
22 that Congress did, indeed, intend judicial  
23 review of CAT claims.

24 JUSTICE ALITO: You've referred to  
25 common sense and a sensible way way to proceed.

1 Do you think that's a characteristic that can be  
2 found in our recent related immigration  
3 decisions?

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

6 (Laughter.)

7 MR. BRADLEY: But -- but I will say --

8 JUSTICE ALITO: Well, let me ask you  
9 --

10 MR. BRADLEY: But the red light is on.  
11 But common sense is always the goal, I think,  
12 Your Honor.

13 CHIEF JUSTICE ROBERTS: Justice  
14 Thomas? Anything further?

15 Justice Alito?

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

21 These cases are endlessly interesting  
22 and they fill up our docket, but I don't know  
23 what -- what statutory provision that doesn't  
24 have the magic words will ever be held to be  
25 jurisdictional? Can you think of a possibility?



1 MR. BRADLEY: Well, we know three, of  
2 course, Your Honor -- -

3 JUSTICE ALITO: Well --

4 MR. BRADLEY: -- 1291 -- but --

5 JUSTICE ALITO: They have historical  
6 -- they have a historical pedigree.

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

15 JUSTICE SOTOMAYOR: This statute --  
16 oh, I'm sorry.

17 CHIEF JUSTICE ROBERTS: No, you're up.

18 JUSTICE SOTOMAYOR: This statute is as  
19 clear as you can be.

20 MR. BRADLEY: Yeah.

21 JUSTICE SOTOMAYOR: Some provisions  
22 say there's no jurisdiction.

23 MR. BRADLEY: Exactly.

24 JUSTICE SOTOMAYOR: This one doesn't.

25 MR. BRADLEY: Correct, exactly.

1 JUSTICE SOTOMAYOR: And if Congress  
2 needed education, it certainly has enough  
3 opinions that say: Just say it's  
4 jurisdictional, and tell us that no other  
5 further relief can be given. Correct?

6 MR. BRADLEY: Agreed.

7 JUSTICE SOTOMAYOR: All right.

8 CHIEF JUSTICE ROBERTS: Justice Kagan?  
9 Justice Gorsuch?  
10 Justice Kavanaugh?  
11 Justice Barrett?  
12 Justice Jackson?  
13 Thank you, counsel.

14 Mr. McDowell.

15 ORAL ARGUMENT OF EPHRAIM McDOWELL

16 ON BEHALF OF THE RESPONDENT

17 IN SUPPORT OF THE PETITIONER

18 MR. McDOWELL: Thank you Mr. Chief  
19 just and may it please the Court:

20 On the first question presented, the  
21 30-day filing deadline in Section 1252(b)(1) is  
22 not jurisdictional. That provision fails this  
23 Court's clear statement test, and Stone is not a  
24 binding jurisdictional ruling.

25 On the second question, the petition

1 here was timely because it was filed within 30  
2 days of the Board's CAT order. In Section  
3 1252(a)(4), Congress provided for judicial  
4 review of CAT claims, and Nasrallah confirms  
5 that courts may review CAT orders together with  
6 removal orders.

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

15           It is unlikely that Congress would  
16 have precluded review of many claims indirectly  
17 by way of a generic 30-day filing deadline. I  
18 welcome the Court's questions.

19           JUSTICE THOMAS: Can you give us an  
20 example of -- of a -- an instance in which a  
21 claim, claim B can be considered with -- or  
22 appeal B can be considered with appeal A, but  
23 appeal B actually expands the time limit for  
24 appeal A?

25           MR. McDOWELL: I think the best

1 analogy is the one that Justice Sotomayor  
2 pointed to, which is that a conviction cannot be  
3 appealed until after the sentence, even though  
4 the sentence doesn't affect the validity of the  
5 conviction or merge into the conviction. And --

6 JUSTICE THOMAS: Okay. Let's try the  
7 civil context. Can you think of any other  
8 provision?

9 MR. McDOWELL: I suppose there the way  
10 it would work in a -- in a remedial scheme, a  
11 remedial decision as opposed to a liability  
12 decision, the -- the remedial decision wouldn't  
13 affect the liability decision, but we would  
14 still under the final judgment principle not  
15 allow an appeal of the liability ruling until  
16 after the remedial decision is done.

17 And I think the same basic logic  
18 applies here, because as Nasrallah points out, a  
19 CAT order does not affect the validity of a  
20 removal order, but our position is that the  
21 removal order doesn't become final until the end  
22 of CAT proceedings because that's when the  
23 agency has finished its work on the case and  
24 disassociated itself from the case, which is the  
25 basic final judgment principle that always

1 applies in judicial review in the courts of  
2 appeals.

3 JUSTICE GORSUCH: Mr. McDowell, can  
4 you give us some examples of -- you say that  
5 adopting amicus's view would leave certain CAT  
6 orders unreviewable. Can you give us some  
7 examples?

8 MR. McDOWELL: So I think under his  
9 position, I think the CAT order in this case  
10 would be unreviewable because Petitioner didn't  
11 file the petition for review within 30 days of  
12 the Section 1228 removal.

13 JUSTICE GORSUCH: I think your friend,  
14 though, in this case would say, well, he could  
15 have done.

16 MR. McDOWELL: So our point is that if  
17 you're referring to the premature protective  
18 petition scheme idea, I think that that -- there  
19 are two potential legal problems there.

20 One is the zipper clause, which  
21 contemplates a single petition for review at the  
22 end of the case; whereas the premature filing of  
23 a petition supplemented by a later filing  
24 related to the CAT claim, I think, runs counter  
25 to that idea.

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

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

16           Would courts of appeals have to keep  
17    those notices of appeal on their docket? Could  
18    they -- could they -- is there a risk they might  
19    dismiss them? I'm just not sure -- I -- I've  
20    not held a notice of appeal on my docket as an  
21    appellate court judge on the Tenth Circuit for,  
22    what, a year, two years while the CAT order is  
23    ongoing.

24           MR. McDOWELL: And I think that's --

25           JUSTICE GORSUCH: I just don't know.

1 I haven't encountered that.

2 MR. McDOWELL: I think this points up  
3 another problem with this idea, which is that I  
4 don't actually think it's a particularly  
5 effective way of preserving judicial review  
6 because these procedures lie within the  
7 discretion of the courts of appeals. And so  
8 some courts of appeals may deny a motion to hold  
9 a case in abeyance.

10 So I think we would end up with a  
11 patchwork system where some circuits are  
12 generally preserving review of these claims;  
13 others are not. And there might be even  
14 variation within circuits.

15 We also see some other practical  
16 problems with the system. One is that it leads  
17 to a flood of meritless prophylactic petitions  
18 which really aren't challenging the removal  
19 order itself. They're just a placeholder for a  
20 later decision that may actually go in the  
21 alien's favor.

22 The second problem is that it creates  
23 a trap for the unwary because many people in  
24 this system are unrepresented and won't know  
25 that they have to file this sort of

1 counterintuitive protective petition.

2           And then, finally, it does create  
3 administrative burdens for the courts and for  
4 the government.

5           And what we've seen in practice is  
6 that many of these protective petitions end up  
7 being abandoned at the end of the day because  
8 the person gets withholding relief or because  
9 they just don't want to pursue the petition. So  
10 it really is just a waste of resources in many  
11 cases.

12           JUSTICE SOTOMAYOR: Could I speculate  
13 and say you're right, if we accept amicus's  
14 argument, basically CAT orders won't be  
15 reviewable because -- in those places where the  
16 courts don't want to stay the appeal of a  
17 petition for removal. That would happen for  
18 aggravated felons, and some people might say,  
19 well, that's a good thing. Congress didn't want  
20 them to delay deportation any longer than  
21 necessary.

22           So I could see some people saying.  
23 Don't worry about those guys. Okay? But  
24 doesn't the Board in a fairly significant number  
25 of regular asylum cases, regular petitions for



1 removal where the person's not an aggravated  
2 felon or someone else who's done something other  
3 than be here illegally, doesn't the Board often  
4 split those decisions?

5 MR. McDOWELL: It does --

6 JUSTICE SOTOMAYOR: And --

7 MR. McDOWELL: It does, Justice  
8 Sotomayor.

9 JUSTICE SOTOMAYOR: So it affirms the  
10 petition for removal.

11 MR. McDOWELL: Yes.

12 JUSTICE SOTOMAYOR: But it remands.

13 MR. McDOWELL: That's correct.

14 JUSTICE SOTOMAYOR: For the CAT  
15 claims. And under amici's position, those  
16 people who are not aggravated felons, those  
17 people then are deprived totally of the zipper  
18 clause, correct?

19 MR. McDOWELL: That's right. And if I  
20 could just make two points in response to this  
21 idea. The first, as -- as to your initial  
22 premise about aggravated felons, I do think that  
23 if Congress wanted to preclude judicial review  
24 of claims, of CAT claims for aggravated felons,  
25 it would have said so expressly. That's what it

1 did in Section 1252(a)(2)(C) when it -- when it  
2 precluded aggravated felons from raising factual  
3 challenges to removal orders.

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

13 Judge Murphy's concurrence in the  
14 Sixth Circuit decision that we cite flags this  
15 exact issue and says that this is a potential  
16 spillover consequence of reading Nasrallah and  
17 the statutory definition quite broadly, as  
18 amicus is doing here.

19 JUSTICE KAVANAUGH: On the first  
20 point, you seem to be suggesting that there's  
21 some kind of clear statement rule before  
22 Congress would deprive judicial review of CAT  
23 claims. I'm just wondering about the origins of  
24 that or if that's what you're saying.

25 MR. McDOWELL: I -- I didn't mean to

1 be suggesting a -- a clear statement rule. It's  
2 a structural point about the INA. In the INA,  
3 throughout the statute, when Congress wanted to  
4 preclude review of categories of claims, we see  
5 it over and over that it does so with express  
6 language.

7           And here amicus is not pointing to any  
8 express language precluding review of CAT claims  
9 by aggravated felons. Instead, he's pointing to  
10 what is really just a generic 30-day filing  
11 deadline as a way of arguing that Congress  
12 indirectly or implicitly precluded judicial  
13 review of these claims.

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

17           JUSTICE JACKSON: And haven't we also  
18 said in *Guerrero-Lasprilla* that there's a  
19 presumption of judicial review, that, you know,  
20 we not foreclose the possibility of judicial  
21 review over agency action unless there's clear  
22 and convincing evidence that Congress intended  
23 that result?

24           MR. McDOWELL: That's right, Justice  
25 Jackson. We don't think you actually need to

1 get to the presumption in this case because we  
2 think the statutory structure and the context  
3 are sufficiently clear to show that Congress  
4 wanted review of these claims, particularly  
5 Section 1252(a)(4), which is what I referenced  
6 in my introduction. But we don't deny that if  
7 the statute were truly ambiguous, that the  
8 presumption would apply here. We just don't  
9 think you need to get to that here.

10 And just to get back to the Section  
11 1252(a)(4) point, Justice Thomas, that is  
12 express textual evidence that Congress wanted  
13 there to be judicial review of CAT claims. And  
14 I think it stands to reason -- and then we also  
15 have *Nasrallah*, which says that CAT orders are  
16 reviewable together with removal orders.

17 And so I think it really does stand to  
18 reason that a CAT order must become final at the  
19 same time as a removal order so that a person  
20 can consolidate challenges to both orders into  
21 the same petition for review, which is what the  
22 zipper clause contemplates.

23 Another way of seeing the same point  
24 is that it's unlikely that Congress would have  
25 given express textual evidence that CAT claims

1 are reviewable but at the same time written a  
2 deadline so short as to render many of those  
3 claims unreviewable. Normally, Congress doesn't  
4 give with the one hand and then take with the  
5 other in that sort of manner.

6 JUSTICE ALITO: Under your position,  
7 is it the case that an order that is final is  
8 rendered non-final by the filing of the  
9 subsequent application?

10 MR. McDOWELL: No, that's not our  
11 position. Our position is that when a person  
12 has a withholding-only claim, the Section  
13 1228(b) removal order does not ever become final  
14 until the withholding-only claim is resolved.  
15 It's not that it is final, then becomes  
16 non-final. It's that it never became final in  
17 the first instance until those proceedings are  
18 resolved.

19 And that's because --

20 JUSTICE ALITO: Okay. What is the  
21 time requirement for filing a withholding-only  
22 claim?

23 MR. McDOWELL: The regulations  
24 contemplate that there -- that the claim is  
25 raised when with the agency before the Section

1 1228(b) removal order is issued. And here it  
2 was -- it was raised immediately after.

3 So if there were a situation where a  
4 person didn't raise it for 30 days after the  
5 entry of the Section 1228(b) removal order, we  
6 would agree that at that point, the order would  
7 be final and the petition for review timeline  
8 would have run.

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

18 JUSTICE ALITO: And how long -- do you  
19 know, by any chance, how long on average it  
20 takes to resolve CAT claims?

21 MR. McDOWELL: We don't have exact  
22 numbers, but my sense is it usually takes  
23 several months if it's a real -- if it's a  
24 serious claim. If it's a meritless claim, these  
25 can be resolved fairly quickly because the

1 asylum officer will say that there's no negative  
2 -- or there's no reasonable fear. Then the  
3 immigration judge will sustain that. And both  
4 of those officers have to make those decisions  
5 within a 10-day span. So they can sometimes be  
6 resolved relatively quickly.

7 But here, when it's a serious claim,  
8 here the IJ actually found that he was entitled  
9 to CAT -- to CAT relief, and then that was  
10 reversed by the BIA. When it's a serious claim  
11 like that, it could sometimes take several  
12 months to even over a year. The dissent in  
13 Guzman Chavez pointed to some instances where  
14 they took multiple years, I believe.

15 JUSTICE ALITO: So as between the two  
16 -- in light of that, as between these two  
17 options, which one is preferable and why? The  
18 first would be the requirement that a  
19 prophylactic petition for review be filed, and  
20 the second would be your position that there's  
21 no need to do anything until after the CAT claim  
22 is resolved.

23 Do you think that your -- that there's  
24 a risk that your position would lead to greater  
25 delay?

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

11           The only additional delay, under our  
12 interpretation versus amicus's -- and I'm  
13 setting aside the protective scheme which I've  
14 already discussed -- but the delay here would be  
15 the time needed for the court of appeals to  
16 review the withholding-only determination.

17           I also want to just point out, in  
18 terms -- in terms of the -- any public safety  
19 concerns about giving this additional time or  
20 additional process to aggravated felons, it's  
21 important to bear in mind that they can be  
22 detained throughout the entirety of the agency  
23 proceedings, as well as subsequent judicial  
24 review proceedings. And this Court affirmed  
25 that power in Guzman Chavez.



1 JUSTICE KAGAN: So just as a matter of  
2 government practice, when you have the order of  
3 removal but the CAT proceedings have not yet  
4 been concluded, what does the government feel  
5 itself free to do with the alien?

6 MR. McDOWELL: So we -- the removal  
7 order would be stayed as to the designated  
8 country of removal. So we would not be able to  
9 remove the person to that country.

10 There is this issue of third-country  
11 removal. And in that circumstance, I -- I want  
12 to first point out that under Title 8, DHS does  
13 not pursue third-party -- third-country removal  
14 while the withholding-only proceedings are  
15 ongoing. But if it were to, the way it would  
16 work is this --

17 JUSTICE KAGAN: So let me -- let me  
18 make sure I understand that. You think you have  
19 the -- the -- the legal right --

20 MR. McDOWELL: That's right.

21 JUSTICE KAGAN: -- to -- to send the  
22 non-citizen to some other country, where he  
23 doesn't have a CAT -- CAT claim, but, in fact,  
24 the U.S. government does not exercise that  
25 right?

1                   MR. McDOWELL: Under Title 8 we -- we  
2 do not do that as a matter of practice. We do  
3 think we have the legal authority to do that,  
4 with the following caveat: We would have to  
5 give the person notice of the third country and  
6 give them the opportunity to raise a reasonable  
7 fear of torture or persecution in that third  
8 country.

9                   If they raise that reasonable fear,  
10 the withholding-only proceedings would simply  
11 continue. They would just focus on the new  
12 country, rather than the original one.

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

16                   MR. McDOWELL: That's exactly right.  
17 The regulate -- the regulations prohibit that.  
18 And that's another reason why we think that --  
19 that confirms that the removal order doesn't  
20 actually become final until the end of  
21 withholding-only proceedings.

22                   The withholding-only proceedings  
23 affect the implementation of the removal order  
24 for that very reason. If a person is granted  
25 CAT protection, that means that the person

1 cannot be removed to the designated country of  
2 removal.

3 CHIEF JUSTICE ROBERTS: Thank you,  
4 counsel.

5 Justice Thomas, anything further?

6 JUSTICE THOMAS: Would the party have  
7 to request consolidation with the removal order  
8 proceedings?

9 MR. McDOWELL: Under our position --

10 JUSTICE THOMAS: Yeah.

11 MR. McDOWELL: -- or under our  
12 frontline position, no, because the removal  
13 order does not become final until the end of the  
14 CAT proceedings. Only after the CAT proceedings  
15 conclude would the person be able to file the  
16 petition for review.

17 It would be exactly the way it works  
18 in -- in -- in ordinary litigation, where the  
19 appeal is filed after the entirety of the  
20 district court proceedings have come to a  
21 conclusion. That's what we're proposing here.

22 JUSTICE THOMAS: So how would that  
23 work in -- in -- in -- in this case? You -- you  
24 have a removal order that -- that's being  
25 appealed, right? A final order?

1                   MR. McDOWELL: So -- so in this case,  
2 the Petitioner brought his petition for review  
3 after the CAT order was issued.

4                   JUSTICE THOMAS: Yeah.

5                   MR. McDOWELL: And we are saying that  
6 that was okay because the order of removal did  
7 not become final until the end of the CAT  
8 proceedings.

9                   So his petition here was timely  
10 because it was within 30 days of the CAT order.  
11 And the CAT order was what rendered the removal  
12 order final.

13                   CHIEF JUSTICE ROBERTS: Justice Alito,  
14 anything?

15                   JUSTICE SOTOMAYOR: In this case, if  
16 we were to hold that the 30-day deadline is not  
17 jurisdictional -- not jurisdictionally  
18 waiveable, and if we disagree with you and  
19 accept the amicus's second position that a final  
20 order of removal is final when it's issued,  
21 regardless of the CAT, will the government honor  
22 their commitment to waive the deadline for  
23 Mr. -- Mr. Riley?

24                   MR. McDOWELL: Yes, we would.

25                   CHIEF JUSTICE ROBERTS: Justice Kagan?

1 Justice Gorsuch?  
2 Justice Barrett?  
3 Justice Jackson?  
4 Thank you, counsel.  
5 Mr. Hammer.  
6 ORAL ARGUMENT OF STEPHEN J. HAMMER  
7 COURT-APPOINTED AMICUS CURIAE  
8 IN SUPPORT OF THE JUDGMENT BELOW  
9 MR. HAMMER: Mr. Chief Justice and may  
10 it please the Court:  
11 Congress has barred courts from  
12 reviewing claims under the Convention Against  
13 Torture except on a petition for review of a  
14 final order of removal. Under Section  
15 1252(b)(1) such a petition must be filed not  
16 later than 30 days after the date of the final  
17 order of removal.  
18 The Fourth Circuit correctly held that  
19 Mr. Riley's failure to comply with that deadline  
20 meant it was jurisdictionally barred from  
21 reviewing his petition. The Fourth Circuit  
22 rightly recognized that the filing deadline is  
23 jurisdictional. This Court already held as much  
24 in *Stone*, which is a jurisdictional precedent in  
25 both reasoning and result.

1           And Santos-Zacaria, which was focused  
2           on the INA's separate exhaustion provision,  
3           didn't disturb the deadline's jurisdictional  
4           status.

5           The Fourth Circuit also correctly held  
6           that Mr. Riley's petition was untimely. The  
7           only order of removal in this case is the final  
8           administrative removal order. Section 1228(b),  
9           the INA's statutory definition of a final order  
10          of removal, and Section 1231 all confirm that a  
11          final administrative removal order is, as its  
12          name indicates, final when issued.

13          And as this Court explained in *Guzman*  
14          *Chavez*, the finality of the order of removal  
15          does not depend in any way on the outcome of the  
16          withholding-only proceedings. Because Mr. Riley  
17          failed to file his petition for review within 30  
18          days of his final order of removal, the Fourth  
19          Circuit correctly dismissed it as untimely.

20                 I welcome the Court's questions.

21                 JUSTICE THOMAS: How do you respond to  
22                 the arguments that have been made this morning  
23                 that the -- that this expands the time for the  
24                 removal order?

25                 MR. HAMMER: I think that the

1 statutory deadline requires filing the order --  
2 filing the petition for review within 30 days of  
3 the final order of removal. And I think  
4 statutory text and context make clear that a  
5 final administrative removal order is final when  
6 it is issued.

7 JUSTICE THOMAS: So what do you make  
8 of the argument that -- you know, I asked the  
9 other side whether or not -- what textual basis  
10 they had for this. And, of course, their -- I  
11 don't think there's much, but would you address  
12 that?

13 MR. HAMMER: Your Honor, the only  
14 textual basis that this Court has recognized for  
15 judicial review of a CAT claim comes from filing  
16 the petition for review of a final order of  
17 removal, in compliance with the requirements of  
18 1252.

19 Nasrallah explained that that allows  
20 the Court to review a CAT claim alongside a  
21 final order of removal. But if an alien does  
22 not file a petition for review within 30 days of  
23 the final order of removal, the Court does  
24 not -- is not able to review the CAT claim.

25 JUSTICE KAGAN: Well, you seem to be

1 assuming that there is a final order of removal,  
2 but maybe it's not final until the CAT claim has  
3 been resolved.

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

8 And that second part, which is within,  
9 you know, you're removable to country X, that's  
10 provisional. It's -- it's only country X if you  
11 fail on your CAT claim.

12 So there's -- there's sort of, like,  
13 nothing final about a significant aspect of this  
14 order.

15 MR. HAMMER: So I disagree, Your  
16 Honor. Nasrallah made clear that CAT relief  
17 doesn't affect the validity of the order of  
18 removal and does not disturb the final order of  
19 removal. And Guzman Chavez repeated all of that  
20 by making clear that withholding-only does not  
21 affect the finality of an order of removal.

22 And with respect to what the final  
23 order of removal here actually says, I would  
24 direct the Court to page 8 of the Joint  
25 Appendix, which says that Mr. Riley was ordered



1 removed to Jamaica or any alternate country  
2 proscribed by Section 1231.

3 So there wasn't any need -- there  
4 wouldn't be any need for amendment. The  
5 alternate countries are already list -- already  
6 there, provided by the final administrative  
7 removal order, Your Honor.

8 JUSTICE JACKSON: I don't understand  
9 your distinguishing Santos-Zacaria. It seems to  
10 me that if Stone's jurisdictional language was  
11 binding in the way that you claim, that it would  
12 have governed the outcome in that case as well.  
13 Because both of them are in the same provision  
14 related to judicial review.

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

17 MR. HAMMER: Yes, Your Honor. I think  
18 Stone is a jurisdictional holding as to the  
19 filing deadline that it actually considered. I  
20 take Santos-Zacaria -- Zacaria to be responding  
21 to the government's argument in that case that  
22 the entirety of the INA's judicial review  
23 provision, everything in Section 1252, was  
24 jurisdictional. And Santos-Zacaria's comments  
25 were in reflection to that.

1           But it was not -- I don't take any of  
2           the comments in Santos-Zacaria to be saying that  
3           Stone was not jurisdictional in any respect,  
4           even with regard to the filing deadline that it  
5           did consider. If Santos-Zacaria had been saying  
6           that, it would not have needed to go on with  
7           that paragraph to point out that Stone did not  
8           address the exhaustion provision that was at  
9           issue in Santos-Zacaria.

10           JUSTICE JACKSON: Well, true -- it's  
11           true that Santos-Zacaria came up in a particular  
12           context, but it was responding to the assertion  
13           that Stone established the jurisdictional nature  
14           of this.

15           And I thought Santos-Zacaria pointed  
16           out that Stone was a drive-by jurisdictional  
17           holding, it was pre-Arbaugh, it really didn't do  
18           the -- the work that was necessary to establish  
19           a binding holding related to the jurisdictional  
20           provision.

21           MR. HAMMER: So, Your Honor, I don't  
22           understand either of the comments in  
23           Santos-Zacaria to be saying Stone was not  
24           jurisdictional with respect to the filing  
25           deadline.

1                   You have the "did not attend to"  
2                   comment in Santos-Zacaria. I understand that to  
3                   be a -- a reference to not applying Arbaugh's  
4                   clear statement rule. You have the "was not  
5                   central" comment, and I think that is a  
6                   reflection of the government's argument in  
7                   Santos-Zacaria about the entirety of the INA --

8                   JUSTICE JACKSON: All right. Well,  
9                   play out the counterfactual. If you're right  
10                  that Santos-Zacaria was not talking about the  
11                  jurisdictional nature of the provision that  
12                  Stone was looking at, where does that leave  
13                  Santos-Zacaria?

14                  MR. HAMMER: Well, Your Honor, I think  
15                  it could be a reflection on the entirety of the  
16                  government's argument in that case that the  
17                  entirety of the INA's judicial review provision  
18                  far beyond the filing deadline was not  
19                  jurisdictional.

20                  But even if I'm wrong about those  
21                  comments and those comments were meant to say  
22                  that Stone was not jurisdictional in any  
23                  respect, even with regard to the filing deadline  
24                  that it did consider, I don't think that was a  
25                  necessary to the result in Santos-Zacaria.

1           Santos-Zacaria was focused only on the  
2 separate exhaustion provision that was not at  
3 issue in Stone. And I think I would take the  
4 lesson from this Court's decision in *Thryv* to be  
5 that when the issue is what this Court held in a  
6 prior decision, this Court should look to that  
7 prior decision and not a subsequent opinion  
8 interpreting it.

9           JUSTICE BARRETT: Mr. Hammer, can you  
10 think of another situation in which judicial  
11 review is precluded just by virtue of the way  
12 the fast-track -- or the two-track system works?  
13 In other words, we're not looking at a  
14 situation -- I mean, putting aside the zipper  
15 clause, but we're not looking at a situation  
16 where Congress has said in -- expressly that in  
17 this situation where you have fast-track  
18 removal, judicial review is precluded. It's  
19 simply by operation of the fact that the removal  
20 order is going to have to be executed before the  
21 withholding claim gets all the way through.

22           Is there another situation like that?

23           MR. HAMMER: So two responses, Your  
24 Honor. First, I don't think judicial review of  
25 orders concluding withholding-only proceedings

1 is precluded by the Fourth Circuit's reading.  
2 The parties have identified various ways by  
3 which aliens could obtain review of those  
4 orders.

5 JUSTICE BARRETT: Let's assume --

6 MR. HAMMER: They've acknowledged --

7 JUSTICE BARRETT: -- the government  
8 has kind of disclaimed that now. So let's -- if  
9 -- if those aren't, let's -- in this  
10 hypothetical, just assume those are off the  
11 table.

12 MR. HAMMER: Yes, Your Honor. If  
13 those are off the table, if those are not valid,  
14 then I think this is a unique form of judicial  
15 review. I'm not aware of another one that is  
16 like this. It allows CAT claims to be reviewed  
17 but only if you file a petition for review of a  
18 final order of removal.

19 So I'm not aware of an -- an analogy  
20 to it, but I don't think it would be surprising,  
21 if Congress meant to restrict judicial review,  
22 that it would do it for these particular classes  
23 of aliens, aliens who have been convicted of  
24 felon -- felonies and illegal reentrance. That  
25 would not be a surprising class, given

1 Congress's interest in expediting the removal of  
2 those aliens.

3 JUSTICE BARRETT: Is that consistent  
4 with the presumption of judicial review?

5 MR. HAMMER: So, again, front-line  
6 position is that I think there are means  
7 available to get judicial review. Setting that  
8 aside, I don't think the presumption -- I don't  
9 think the Court needs to resort to the  
10 presumption, given the plain meaning of the  
11 filing deadline.

12 JUSTICE BARRETT: Would you say, then,  
13 that your argument, maybe not hinges, but is  
14 helped significantly by the available of these  
15 alternate routes?

16 MR. HAMMER: I think it is helped, but  
17 I don't -- I think it's helped, I don't think  
18 the presumption needs to be raised at all  
19 because I don't think the text is ambiguous with  
20 respect to what the meaning of a final -- "final  
21 order of removal" is, Your Honor.

22 JUSTICE KAGAN: But if your front-line  
23 position is that there is judicial review, even  
24 with respect to these people who are in  
25 expedited proceedings, if that's your front-line

1 position, isn't it a quite odd way to write a  
2 statute to say, yes, you get judicial review,  
3 but we're going to set up a 30-day deadline  
4 which effectively precludes you from ever  
5 getting that judicial review?

6 MR. HAMMER: Well, I think it wouldn't  
7 preclude you from getting the judicial review if  
8 these alternative means are available. It would  
9 just require you to file the protective petition  
10 and hold it in abeyance, which the government  
11 represents has been done in the Fourth Circuit  
12 since its decision. And I think this Court has  
13 been clear that administrative burden or  
14 complexity is not a reason to depart from the  
15 plain meaning of the statute.

16 But I also think there was a good  
17 reason for Congress to do it this way. And I  
18 think this relates to the policy consequences of  
19 Mr. Riley's and the government's position. So  
20 Mr. Riley's and the government's position  
21 separates administrative finality, on the one  
22 hand, from finality for purposes of judicial  
23 review, on the other.

24 And by doing so, they create a risk  
25 that aliens can be removed from the country to a

1 third country during withholding-only  
2 proceedings without ever having the chance to go  
3 into court and get a stay. That's a significant  
4 policy problem, and that's because, as everyone  
5 here agrees, the final administrative removal  
6 order is administratively final as soon as it's  
7 issued.

8 That authorizes the government to  
9 remove the alien to a third country so long as  
10 the government provides notice of that and the  
11 alien doesn't have a fear of persecution or  
12 torture in that country. But as long as  
13 withholding-only proceedings are ongoing,  
14 according to Mr. Riley and the government, there  
15 will not be a judicially final order, and so the  
16 alien won't be able to go into court and get a  
17 stay.

18 That's a particularly significant  
19 problem because there will be cases in which  
20 aliens both want to challenge the validity of  
21 their 1228(b) orders and seek withholding  
22 relief. And those aliens will be put to a  
23 difficult choice. They will either need to  
24 forgo their withholding proceedings so that they  
25 can immediately get judicial review and a stay



1 of their 1228(b) orders, or risk it, go into  
2 withholding proceedings knowing that there's a  
3 chance they might be removed to a third country  
4 before ever having the chance to go into court  
5 and get a stay. That cannot happen on the  
6 Fourth Circuit's reading because the Fourth  
7 Circuit's reading marries administrative  
8 finality with finality for purposes of judicial  
9 review.

10 JUSTICE SOTOMAYOR: I am sorry. I  
11 thought that there was a stay for the petition  
12 for removal when a CAT claim is made --

13 MR. HAMMER: There --

14 JUSTICE SOTOMAYOR: -- within the  
15 30-day period.

16 MR. HAMMER: There is not, Your Honor.  
17 And the government explained that, that the  
18 government believes itself and does in fact have  
19 the authority to a remove an alien to a third  
20 country --

21 JUSTICE SOTOMAYOR: To a third country  
22 --

23 MR. HAMMER: Exactly.

24 JUSTICE SOTOMAYOR: -- but they  
25 said -- you forgot the "subject to" -- subject

1 to notice and an opportunity to file an amended  
2 CAT claim on the new designation. So it's not  
3 an open-ended thing.

4 And you answered Justice Barrett by  
5 saying it makes sense that aggravated felons and  
6 people who have come back illegally shouldn't  
7 have more -- have expanded appellate rights  
8 under CAT. But the government has conceded that  
9 people who haven't had either of those two  
10 situations, who have appealed to the Board and  
11 -- and are subject to the zipper clause in terms  
12 of the 30-day period, the Board not infrequently  
13 affirms the petition for removal and remands the  
14 petition -- the CAT claim.

15 You're saying those people can't  
16 appeal either.

17 MR. HAMMER: Your Honor, I think that,  
18 generally in those cases, aliens would have the  
19 opportunity to do it, and that's because of the  
20 Board's particular remand policy. So under a  
21 1978 Board decision called Matter of Patel, when  
22 the Board remands a case, it's a general or  
23 plenary remand that allows reconsideration of  
24 any issue on remand, unless the Board --

25 JUSTICE SOTOMAYOR: But not the

1 petition for review if they've affirmed it.

2 MR. HAMMER: It would allow for  
3 reconsideration of the removability decision by  
4 the IJ unless the Board expressly limits the  
5 remand to that withholding issue. So to take  
6 your hypothetical, if the Board did expressly  
7 limit its remand to the withholding issue, then,  
8 yes, it's possible that scenario would arise.

9 JUSTICE SOTOMAYOR: Well, that's how I  
10 saw it when I was on the circuit court, which is  
11 the boards would affirm the petition for review  
12 -- I'm sorry -- the final orders of removal and  
13 remand just on the CAT claims. They did it  
14 routinely.

15 MR. HAMMER: So, yes, Your Honor, the  
16 Board has the option to expressly limit its  
17 remand to the withholding issue. I would just  
18 note that in these situations, aliens will also  
19 often be seeking asylum in addition to the  
20 withholding claim. And because asylum does go  
21 to the validity of the removal order, it would  
22 forestall the finality of the removal order  
23 while the asylum claim was being considered.

24 JUSTICE JACKSON: Can I go back to  
25 Justice Barrett's question about the

1 presumption? I guess I don't understand why the  
2 text of the statute is not ambiguous concerning  
3 the meaning of "final order" in the expedited  
4 removal context.

5           When you look at the definition, it --  
6 both prongs of it are pegged to a determination  
7 by the Board of Immigration Appeals, which  
8 doesn't happen in the expedited removal context.  
9 So why couldn't that be a basis for determining  
10 that this was sufficiently ambiguous that the  
11 presumption kicks in?

12           MR. HAMMER: So two points, Your  
13 Honor. First, we don't think the presumption  
14 comes up so long as these alternative means of  
15 getting judicial review are available, like the  
16 protective petitions.

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

21           MR. HAMMER: Well, judicial review  
22 would be available if those alternative means --  
23 if you can file a protective petition, then  
24 judicial review would be available. So the  
25 presumption wouldn't help resolve anything.

1 You'd get it either way, but --

2 JUSTICE GORSUCH: Presumption -- I  
3 think Justice Jackson's point is the presumption  
4 of reviewability helps us interpret statutes,  
5 and if the statute's ambiguous, then it kicks in  
6 and it has nothing to do with facts on the  
7 ground. And you -- you can achieve -- skin the  
8 cat some other way. Do you want to respond to  
9 that?

10 MR. HAMMER: Yes, Your Honor. This  
11 Court has said that when -- and this is Thunder  
12 Basin footnote 8: "Because court of appeals  
13 review is available, this case does not  
14 implicate the strong presumption that Congress  
15 did not mean to prohibit" --

16 JUSTICE GORSUCH: Yeah, but --

17 MR. HAMMER: -- "all forms of judicial  
18 review."

19 JUSTICE GORSUCH: Yeah, but if the --  
20 the statute -- what do you say, though -- I  
21 mean, it seems to me 1101(a)(47), when it  
22 defines final order really is pegged to the --  
23 the Board's decision one way or the other. And  
24 here we have none.

25 MR. HAMMER: So Your Honor, I

1 acknowledge that Congress could have spoken more  
2 directly to this situation and --

3 JUSTICE GORSUCH: Well, it could have  
4 spoken to this situation at all, right?

5 MR. HAMMER: Well, I think it could  
6 have spoken more directly. I'll acknowledge  
7 that, Your Honor. But I think it's clear in  
8 light of Section 1228(b), which does speak  
9 directly to this situation in two critical  
10 places. So Section 1228(b)(4)(F) calls an order  
11 entered under this -- under that subsection a  
12 final order of removal, using exactly the same  
13 language that Section 1252 does itself. And  
14 that's only confirmed by Section 1228(b)(3),  
15 which imposes a stay or a bar on the removal of  
16 the alien for 14 days from the date of issuance  
17 of that order and ordered that the alien has the  
18 opportunity to apply for judicial review,  
19 confirming that that order is final when it is  
20 issued.

21 JUSTICE GORSUCH: If -- if --

22 MR. HAMMER: And I think --

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

1                   MR. HAMMER: Your Honor, I acknowledge  
2                   that the filing deadline likely would not  
3                   satisfy the clear statement test apart from  
4                   Stone.

5                   JUSTICE GORSUCH: Okay.

6                   MR. HAMMER: Just to mention that --  
7                   the definition a little bit more, Your Honor, I  
8                   think the best way to understand this, that is a  
9                   statute-wide definition. It applies by its  
10                  terms to the entirety of the INA. So it covers  
11                  Section 1228(b).

12                  And I think the best way to read it is  
13                  to reconcile it with 1228(b), particularly in  
14                  light of the history of the two provisions. The  
15                  predecessor to Section 1228(b) that originally  
16                  dispensed with the need for a hearing before an  
17                  immigration judge was adopted in 1994. DOJ  
18                  adopted regulations implementing it in 1995.  
19                  They did away with the need for any Board  
20                  review. So by the time Congress came to AEDPA  
21                  in 1996 to add this definition, it already had  
22                  this part of the statute. It already knew this  
23                  statute called this "a final order of  
24                  deportation," and yet it adopted this  
25                  definition. I think the best way to read it

1 together with that is to reconcile it, to say  
2 that Board -- the period for Board review  
3 expires immediately when no Board review is  
4 allowed.

5 But if you disagree with me on that, I  
6 think Section 1228(b) itself answers this  
7 question, and it's strongly supported by  
8 Section 1231 and what this Court said about  
9 administrative finality in Guzman Chavez. As  
10 the government acknowledges in its reply --

11 JUSTICE GORSUCH: What do you say  
12 about the possibility that some courts of  
13 appeals won't allow these protective appeals to  
14 sit on their books for years on end?

15 MR. HAMMER: Your Honor, I think this  
16 Court could provide guidance about the  
17 situations in which those motions for abeyance  
18 should be granted. The Court has done something  
19 similar in the habeas context in -- in Rhines  
20 versus Weber, where it authorized a stay in  
21 abeyance procedure for district courts so that  
22 habeas petitioners could go into district courts  
23 and exhaust their -- go into state court to  
24 exhaust their claims before coming back. This  
25 Court could authorize something like that.



1           I don't think that's necessary here,  
2 Your Honor, because I think the meaning of the  
3 filing deadline is plain. But the Court could  
4 provide guidance in that way.

5           CHIEF JUSTICE ROBERTS: Counsel, you  
6 say that Stone's rejection of tolling indicates  
7 that it's a true jurisdictional holding. But  
8 tolling can be unavailable in equitable  
9 proceedings as well, can't it, or when the  
10 deadlines are -- are equitable?

11           MR. HAMMER: Yes, Your Honor. It is  
12 true that some claim processing rules also  
13 foreclose tolling, but they don't do it in the  
14 way that Stone did. So this Court in Irwin held  
15 that non-jurisdictional statutory deadlines are  
16 presumptively amenable to equitable tolling. We  
17 see nothing like a rebuttal in Stone of that  
18 presumption of equitable tolling. Instead, we  
19 see the automatic and reflexive connection of  
20 the Court's holding that the deadline is  
21 jurisdictional to the consequence that it  
22 doesn't allow for equitable tolling.

23           That's the exact opposite of what  
24 happened in Beggerly, the Court that this -- the  
25 case that this Court analyzed in Wilkins and

1 said didn't count as a definitive jurisdictional  
2 precedent. It had an extensive analysis of  
3 equitable tolling. And the Court said if it was  
4 a true jurisdictional deadline, it wouldn't have  
5 needed that extensive analysis.

6 And that's exactly what we have in  
7 Stone; a direct and immediate connection between  
8 the conclusion that the deadline is  
9 jurisdictional and the consequence that it  
10 doesn't allow for equitable tolling.

11 CHIEF JUSTICE ROBERTS: Well, you also  
12 argue that the citation of the cert deadline and  
13 the appeal deadline is very, very significant  
14 here, but those seem to be quite different in  
15 the sense that you're dealing with the vertical  
16 deadlines of quite some significance.

17 And I wonder whether that is a  
18 particularly compelling analogy.

19 MR. HAMMER: Your Honor, I think it  
20 was the analogy that the court found compelling  
21 in Stone. It was the analogy that supported the  
22 Court's ultimate conclusion that the deadline  
23 was jurisdictional and engaged in this extensive  
24 analysis, comparing the deadline to file a  
25 notice of appeal from a final order of

1 deportation to the time to notice an appeal from  
2 a district court judgment, which as you point  
3 out this Court has recognized as jurisdictional,  
4 both before and after Arbaugh.

5           The Court also compared the effect of  
6 the motion for reconsideration to the effect of  
7 a Rule 60(b) motion, which doesn't strip the  
8 court of appeals of jurisdiction. And I think  
9 that -- the force of that analogy is that it  
10 shows the court understood the filing deadline  
11 as a window of time at which the court of  
12 appeals could assert jurisdiction, regardless of  
13 any motion for reconsideration, and after which  
14 it would could not assert jurisdiction just like  
15 in the notice of appeal context.

16           I think all of that analysis supported  
17 what happens on pages 405 of Stone and shows  
18 that the Court truly meant what it said when it  
19 said that the deadline was jurisdictional.

20           JUSTICE JACKSON: But just to  
21 underscore Justice Gorsuch's point, under our  
22 modern jurisprudence you would agree that it's  
23 not jurisdictional, that we -- you're relying on  
24 the Stone precedent as the reason why we should  
25 hold that it's jurisdictional here?

1                   MR. HAMMER: I am relying on the Stone  
2 precedent, Your Honor. And I think this is  
3 exactly the situation in which statutory stare  
4 decisis has its effect. As this Court  
5 recognized in *John R. Sand & Gravel*, abiding by  
6 the Court's statutory decision serves important  
7 system-wide reliance interests, promotes the  
8 overall stability and predictability of the law,  
9 and it's important -- particularly important  
10 here because just a year after *Stone*, Congress  
11 and IIRIRA further restricted the availability  
12 of judicial review.

13                   JUSTICE JACKSON: And we can rely on  
14 *Stone* to reach the jurisdictional holding that  
15 you would like us to reach, notwithstanding  
16 Santos-Zacaria's statement that *Stone* -- in  
17 *Stone*, whether the provisions were  
18 jurisdictional were not central to the case?

19                   MR. HAMMER: Yes, Your Honor. I don't  
20 understand that statement to be reflecting on  
21 *Stone*'s analysis of the deadline. And to the  
22 extent I'm wrong about that, I don't think that  
23 was part of Santos-Zacharia's holding. I don't  
24 think it would bind this Court, just like in the  
25 *Thryv* case, Your Honor.

1                   JUSTICE KAGAN: Mr. Hammer, when I  
2 asked you before why we should think of the  
3 order of removal as final, given that it's  
4 distinctly non-final, distinctly provisional as  
5 to an important aspect, which is where you're  
6 going to remove the person to, you countered to  
7 me, Nasrallah.

8                   Is there anything else that you would  
9 say about that question or is this like you  
10 think, look, that's what Nasrallah forces you to  
11 do is to think of that order as final, even  
12 though it's not final, as to where the person  
13 can be removed to? Is there anything else other  
14 than Nasrallah?

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

20                  JUSTICE KAGAN: Well, it does -- so it  
21 has settled the question of whether you can  
22 remove the alien to, you know, any other  
23 country, but it has not settled the question as  
24 to whether you can remove this person to Jamaica  
25 here. So that continues to be

1 an up-for-grabs question.

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

5 Now, you come back and you say  
6 Nasrallah. So I take the point. We have to now  
7 go read Nasrallah and see what it said and what  
8 it didn't say, but I'm not hearing anything else  
9 from you.

10 MR. HAMMER: Your Honor, no. I think  
11 the statutory text itself, so we talked about  
12 1228(b) and the clear indications that that  
13 order is final when issued. 1231 also confirms  
14 --

15 JUSTICE KAGAN: Yeah. I'm sorry.  
16 What in that tells you it's final as issued?

17 MR. HAMMER: It's called the final  
18 order of removal.

19 JUSTICE KAGAN: My question is what is  
20 a final order of removal?

21 MR. HAMMER: So Section 1228(b)(3)  
22 indicates that you can seek judicial review  
23 within 14 days of the issuance of the order,  
24 which would not be possible if withholding-only  
25 proceedings suspended the finality of that

1 order. So I think that's a strong indication  
2 that it's final, but I would also point to  
3 Section 1231 and what this Court said about  
4 administrative finality in Guzman Chavez,  
5 because many of these arguments were also raised  
6 in Guzman Chavez, that indeterminacy as to the  
7 "where" question suspended the finality of the  
8 removal order.

9 And the Court rejected that for  
10 purposes of administrative finality in Guzman  
11 Chavez. I think there's a strong presumption  
12 that also governs finality in Section 1252.

13 And we can see evidence of that in the  
14 statutory text in Section 1252(b)(8)(A),  
15 which cross-references Section 1231 and uses the  
16 words "a final order of removal" to indicate the  
17 beginning of the removal period under  
18 Section 1231.

19 So Congress is using these two terms  
20 interchangeably. And for the reasons we  
21 discussed, it makes sense for them to do them so  
22 because administrative finality is the point at  
23 which the alien is then put at risk of being  
24 removed to a third country. It doesn't make  
25 sense to have judicial -- finality for purposes

1 of judicial review be suspended for some period  
2 of time, while the alien is at risk of being  
3 removed to a third country.

4 JUSTICE KAGAN: Thank you.

5 CHIEF JUSTICE ROBERTS: Justice  
6 Thomas?

7 Justice Alito?

8 Anything further, Justice Gorsuch?

9 Justice Kavanaugh?

10 Justice Barrett?

11 Justice Jackson?

12 Thank you, counsel.

13 Rebuttal Mr Bradley, rebuttal?

14 REBUTTAL ARGUMENT OF KEITH BRADLEY

15 ON BEHALF OF THE PETITIONER

16 MR. BRADLEY: Thank you. A couple of  
17 observations, really three things I'd like to  
18 say.

19 One is on the question whether  
20 somebody can be removed to a third country,  
21 while the withholding proceedings are in  
22 process, I'd like to point the Court to the  
23 regulation at our Appendix 29A in the petition  
24 that says, "such alien shall not be excluded,  
25 deported, or removed before a decision is



1 rendered on his or her asylum application." And  
2 that term is defined in the regulation to  
3 include the withholding claims.

4           So it is, as the government and we  
5 have said, that while they have the statutory  
6 authority to remove you to somewhere else, the  
7 actual administrative process is that by their  
8 own regulations they cannot, unless they find  
9 another -- they designate another country.

10           This is actually 20A in the appendix,  
11 that they must designate the country of removal  
12 and then give you another chance, if that's --  
13 if it's a third country, you, like, might raise  
14 an objection as to that one.

15           By contrast, in the -- in the judicial  
16 process, of course, there is no automatic stay.  
17 This was a change in IIRIRA. We have a stay in  
18 this case, but that is within the discretion of  
19 the circuit courts.

20           I'd like to come back to 1228(b)(3).  
21 This is the provision that says that there's a  
22 pause for 14 days. That has a great deal of  
23 force in a case where there is no withholding  
24 claim, but there's nothing about that provision  
25 that -- that shows it was intended to ensure --

1 to cover every case. It is a limited protection  
2 of limited benefit for certain circumstances.  
3 Not all of them.

4 Third, I'd like to come back to this  
5 question of the protective petitions. It is  
6 more than simply that the courts would have to  
7 hold them in abeyance. The government is right  
8 about the volume, that you will have to petition  
9 in every case because you won't even know yet  
10 what the BIA's decision -- what the IJ's or  
11 BIA's decision will be and whether there will be  
12 grounds to challenge it.

13 In addition, you will have to be  
14 filing a petition in response to which the  
15 government is supposed to file the  
16 administrative record for a case that is still  
17 ongoing and you're still building the  
18 administrative record. So the -- the headaches  
19 for doing this nationwide are contrary to any  
20 other judicial review scheme that I can think  
21 of.

22 CHIEF JUSTICE ROBERTS: Thank you,  
23 counsel.

24 Mr. Hammer, this Court appointed you  
25 to brief and argue this case as an amicus curiae

1 in support of the judgment below. You have ably  
2 discharged that responsibility, for which we are  
3 grateful.

4 The case is submitted.

5 (Whereupon, at 12:26 p.m., the case  
6 was submitted.)

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