

# SUPREME COURT OF THE UNITED STATES

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IN THE SUPREME COURT OF THE UNITED STATES

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NIDAL KHALID NASRALLAH, )  
 )  
 Petitioner, )  
 )  
 v. ) No. 18-1432  
 )  
 WILLIAM P. BARR, ATTORNEY GENERAL, )  
 )  
 Respondent. )  
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NIDAL KHALID NASRALLAH, )

Petitioner, )

v. ) No. 18-1432

WILLIAM P. BARR, ATTORNEY GENERAL, )

Respondent. )

- - - - -

Washington, D.C.

Monday, March 2, 2020

The above-entitled matter came on  
for oral argument before the Supreme Court of the  
United States at 10:05 a.m.

APPEARANCES:

PAUL HUGHES, ESQ., Washington, D.C.;

on behalf of the Petitioner.

MATTHEW GUARNIERI, Assistant to the Solicitor General,

Department of Justice, Washington, D.C.;

on behalf of the Respondent.

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P R O C E E D I N G S

(10:05 a.m.)

CHIEF JUSTICE ROBERTS: We'll hear argument first this morning in Case 18-1432, Nasrallah versus Barr.

Mr. Hughes.

ORAL ARGUMENT OF PAUL HUGHES  
ON BEHALF OF THE PETITIONER

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

When Congress enacted the jurisdiction-stripping provision in (2)(C), it expressly defined the key term "order of removal." It is an order that finds an individual deportable or orders deportation.

A CAT order does neither, and the government does not disagree. CAT relief is temporary, applicable only to the country where an individual is likely to be tortured or killed. If CAT relief is granted, the removal order remains enforceable. As the government says, "a grant of withholding or deferral leaves the final order of removal undisturbed."

When Congress enacted (2)(C), it also stripped jurisdiction of expedited removal

1 orders. This is Section (2)(A), reprinted in  
2 the government's brief at page 4a. It bars  
3 judicial review of "any individual determination  
4 or any other cause or claim arising from or  
5 relating to the implementation or operation" of  
6 an expedited order of removal. That broader  
7 language expanded jurisdiction stripping beyond  
8 the removal order itself, but Congress did not  
9 use that broader language in (2)(C).

10           If none of this carries the day and if  
11 some ambiguity remains, the presumption in favor  
12 of judicial review of administrative agency  
13 action would do the work. Judicial review of  
14 administrative agencies is an essential part of  
15 the Constitution's separation of powers.

16           Congress designed CAT relief to be  
17 available when all else is stripped away.  
18 Congress knowingly rendered those with criminal  
19 convictions eligible for protection from likely  
20 torture or death. By its plain terms, 2(C) does  
21 not bar review of a CAT claim. Ultimately, the  
22 CAT claim does not qualify as an order of  
23 removal.

24           Again, the government doesn't contend  
25 that it fits within the clear statutory

1 definition. And I don't think it can, because  
2 the CAT relief comes temporally after in the  
3 proceedings the order of removal is entered.

4 JUSTICE GINSBURG: Do you agree --

5 MR. HUGHES: That's both --

6 JUSTICE GINSBURG: -- do you agree  
7 that, assuming that review of the -- of BIA  
8 fact-finding, assuming that it's available,  
9 wouldn't that review be highly deferential to  
10 the BIA?

11 MR. HUGHES: Yes, Your Honor, it would  
12 be for the substantial evidence review that  
13 would govern in circumstances when (2)(C) does  
14 not apply. So I agree there is deference to the  
15 BIA. But deference doesn't mean there's no  
16 judicial review. It just is the appropriate  
17 deferential standard that would apply across the  
18 board of judicial review of administrative  
19 agency fact-finding.

20 JUSTICE ALITO: Do you agree that your  
21 CAT claim is covered by the so-called zipper  
22 clause?

23 MR. HUGHES: So I think there is an  
24 open question, Your Honor, if the zipper clause  
25 extends here. Footnote 2 of Jennings suggests

1 that the zipper clause might not apply in  
2 context of asylum, and I think this would --  
3 would be similarly qualified. But I'm willing  
4 to assume for a moment, even if the Court were  
5 to think that the zipper clause of (b)(9)  
6 applies to the CAT claim, I don't think that's  
7 any problem for our position.

8 I think the zipper clause can be  
9 thought of doing two potentially different  
10 things. The first thing it can do is,  
11 consistent with other provisions, both in FARRA  
12 and (a)(4), underscore that the various  
13 limitations of Section 1252 can be said to  
14 apply. That's one thing.

15 JUSTICE ALITO: Well, what about the  
16 language of the zipper clause and a comparison  
17 of the language of the zipper clause with the  
18 language of the criminal alien bar? The zipper  
19 clause says that "all questions of law and fact  
20 arising from an action taken or proceeding  
21 brought to remove an alien from the United  
22 States under this subchapter shall be available"  
23 -- and this is what may be important -- "only in  
24 judicial review of a final order under this  
25 section."

1           So, if your CAT claim is covered by  
2 the zipper clause, that claim can be reviewed  
3 only in judicial review of a final order under  
4 this section. And the criminal alien bar says  
5 that no court has jurisdiction to review any  
6 final order of removal.

7           So, if you put those two things  
8 together, why isn't the conclusion that the  
9 criminal alien bar prohibits review of your CAT  
10 claim?

11           MR. HUGHES: So two things about that,  
12 Your Honor. Let me say at the beginning this  
13 is not an argument the government advances, of  
14 course, so this is not an argument that the  
15 government has endorsed, and I think that's for  
16 good reason.

17           So two points. One, to say that this  
18 is part of the review of the final order of  
19 removal is not problematic for us. We don't  
20 resist the conclusion that 2(C) applies. The  
21 question is, what work does 2(C) do when 2(C)  
22 applies? And I'll unpack that for a moment.

23           My second point, however, is that  
24 (a)(4) is later in time than (b)(9) of the  
25 zipper clause and it was specifically written



1 because there was a jurisdictional gap that  
2 existed after FARRA. In the REAL ID Act,  
3 Congress sought to foreclose suspension -- the  
4 Suspension Clause problem, which led to habeas  
5 actions in the district court, and it led to a  
6 broader provision in (a)(4) to ensure  
7 stand-alone jurisdiction.

8 JUSTICE ALITO: Well, and all this is  
9 very complicated, but I still -- I -- I don't  
10 know that that answers the question about what  
11 the pretty clear meaning of the statutory  
12 language is. I mean, the zipper clause to me --  
13 and you'll tell me -- these statutes are very  
14 complicated, so maybe I don't understand how  
15 they fit together, but the zipper clause seems  
16 to me the embodiment of the same sort of rule  
17 that applies in ordinary civil litigation with  
18 respect to a review of a final decision of the  
19 -- of a district court.

20 So that -- you take an appeal from the  
21 final decision of the district court, but that  
22 permits review of everything else leading up to  
23 the final decision. And the zipper clause seems  
24 to do the same thing. It says that everything  
25 that arises in this proceeding is reviewable

1 only in review of a final order of removal.

2 MR. HUGHES: So I think that's --

3 JUSTICE ALITO: And so, therefore,  
4 your CAT claim is reviewable only in review of a  
5 final order of removal.

6 MR. HUGHES: So the title, again, is  
7 Consolidation of Questions for Judicial Review,  
8 and I agree with Your Honor that when the CAT  
9 claim occurs in situations -- circumstances  
10 where there is a final order of removal, if  
11 (b)(9) applies, it has the operation -- it's the  
12 same effect as (a)(4) in FARRA, to say those two  
13 things occur together.

14 What happens is you get review of the  
15 final order of removal to the extent that review  
16 is allowed. You also, though, independently  
17 then have review of the CAT claim.

18 And I think the critical question is,  
19 what work does 2(C) do? 2(C) bars courts from  
20 engaging in the affirmative act of reviewing the  
21 final order of removal. The key textual  
22 question here is, when 2(C) bars courts from  
23 engaging in that conduct, what is the conduct  
24 that 2(C) bars courts from doing? It's  
25 reviewing the final order of removal.

1 JUSTICE ALITO: And -- and nothing  
2 else? Not -- not all of the preliminary  
3 decisions -- all the earlier decisions that lead  
4 to the final order of removal?

5 MR. HUGHES: I think the merger  
6 principle this Court identified in Chadha is the  
7 correct one, which is to say anything on which  
8 the final order of removal is contingent would  
9 appropriately merge into that and be governed by  
10 2(C). So all of those preliminary things Your  
11 Honor references would be subject to 2(C).

12 The ultimate question is a practical  
13 one, is -- is the nature of the argument in the  
14 petition for review, is it one that challenges  
15 the validity of the final order of removal? If  
16 the answer to that question is yes, it  
17 challenges the validity of the final order of  
18 removal, we agree 2(C) applies in those  
19 circumstances.

20 The CAT order, however, does not  
21 challenge the validity of the final order of  
22 removal, and the government underscores that  
23 point. They say, you win your CAT claim, the  
24 final order of removal is undisturbed. That's  
25 because it's relief that is applicable only to

1 one country, the country that's identified in  
2 the CAT order. It's relief that's temporary; it  
3 can be undone later in time if, for example,  
4 country conditions change.

5 And, third, the government says  
6 because that order, the final order of removal,  
7 remains presently effective, they can continue  
8 to detain individuals who've been granted CAT  
9 relief on the basis of the underlying order of  
10 removal --

11 JUSTICE KAVANAUGH: It --

12 MR. HUGHES: -- that the government  
13 says is --

14 JUSTICE ALITO: Well, let me approach  
15 it one -- one other -- one other way. And under  
16 the -- under the provision dealing with CAT  
17 claims, you can file a petition under 1252,  
18 right?

19 MR. HUGHES: Yes, Your Honor.

20 JUSTICE ALITO: And what is the --  
21 what is the nature of the petition that you can  
22 file under 1252?

23 MR. HUGHES: There are two independent  
24 ways. One is a Section 2242(d) provision under  
25 FARRA. That was what was initially enacted in

1 the 1998 enactment. That is tethered into  
2 (a)(1). It couples together review of the final  
3 order of removal with the petition for review of  
4 the CAT claim.

5 That, though, led to a problem where,  
6 if there couldn't be judicial review of the  
7 final order of removal in what I would call a  
8 stand-alone CAT context or -- or where 2(C),  
9 this was prior to 2(D), where 2(C) would strip  
10 jurisdiction, there led to a problem where there  
11 would be circumstances in which FARRA 2242(d)  
12 did not supply jurisdiction.

13 JUSTICE ALITO: Now isn't it the case  
14 that the only kind of petition that you can file  
15 under 1252 is denominated a petition for review  
16 of a final order of removal?

17 MR. HUGHES: I think (a)(4), Your  
18 Honor, provides a separate basis for someone to  
19 file a petition. That was the REAL ID Act  
20 solution to this jurisdictional gap I  
21 referenced, which led to habeas problems --  
22 issues.

23 And the text of (a)(4) provides that a  
24 petition for review -- and let me say off the  
25 bat there is some awkward language in here, but

1 I think I'll explain why it's not so awkward in  
2 context. A -- (a)(4) says a petition for review  
3 is "the sole and exclusive means for judicial  
4 review."

5 JUSTICE ALITO: A petition for review  
6 under 1252, it has to be under 1252?

7 MR. HUGHES: Yes, Your Honor.

8 JUSTICE ALITO: And you agree, I take  
9 it, that all of the requirements for a petition,  
10 including a CAT petition, that are set out in  
11 subsection (b) apply? All of those requirements  
12 apply?

13 MR. HUGHES: And, Your Honor, I'll say  
14 2(C) applies. I'll say everything in 1252  
15 applies.

16 JUSTICE ALITO: All right. If you say  
17 that all of the requirements in -- in subpart  
18 (b) -- in subsection (b) apply, subsection (b)  
19 sets out the requirements for a petition for  
20 review of a final order of removal.

21 MR. HUGHES: What happened, Your  
22 Honor, this -- I -- I -- I -- I appreciate this  
23 is a bit of a Franken-statute here, but Congress  
24 enacted (a)(4) after all of the requirements in  
25 (b) had already been enacted by AEDPA and ARARA.

1 So what Congress did in (a)(4), which came later  
2 in time, by -- by referencing the section, I  
3 think it's fairly read to say we are putting  
4 (a)(4) in later and we're incorporating saying  
5 you can't get around the venue provisions or  
6 timeliness provisions or standard of review  
7 provisions by incorporating all of the  
8 requirements of this section.

9 And, again, my point that I said a  
10 moment ago, I don't resist that we could say  
11 2(C) generally could be thought to apply. The  
12 question is when it applies to a petitioner,  
13 1252, what work does it do? And the work it  
14 does is answered by the text of 2(C).

15 It very clearly bars the act of  
16 reviewing final orders of removal. It doesn't  
17 bar review of -- of -- of separately CAT claims.  
18 This --

19 JUSTICE KAVANAUGH: Doesn't the CAT  
20 order at least temporarily invalidate the order  
21 of removal as to a particular country?

22 MR. HUGHES: No, Your Honor.

23 JUSTICE KAVANAUGH: At least in common  
24 parlance?

25 MR. HUGHES: I -- I -- I don't think

1 it does because it remains effective and, if the  
2 CAT order is removed, the individual can still  
3 be sent to that country. But, to get technical  
4 about what the definition requires under A-47,  
5 it's either the finding of an individual being  
6 deportable or being ordered deported. Those are  
7 both binary determinations.

8           Either the individual is found  
9 deportable or not, and either the individual is  
10 found removable -- order of removed or ordered  
11 deported or not. And -- and, again, the  
12 government doesn't agree -- disagree with us.  
13 In the Guzman Chavez cert petition at page 10 --  
14 they filed this after their brief -- they say,  
15 "withholding does not address whether an alien  
16 is ordered removed."

17           It's the government's position that  
18 whether an alien is ordered removed, that binary  
19 determination, is made by the final order of  
20 removal, not the CAT claim. So --

21           JUSTICE KAVANAUGH: And can't --

22           JUSTICE BREYER: What -- what --  
23 sorry.

24           JUSTICE KAVANAUGH: Go ahead.

25           JUSTICE BREYER: What -- what -- two



1 things here seem to be difficult for you. I'm  
2 not sure. You'll explain why they're not.

3 In 1321, which is rather like the  
4 zipper clause, it says you can't review a CAT  
5 decision except as part of the review of a final  
6 order of removal.

7 And then, in the two provisions,  
8 (a)(4) and (a)(5), it says continuously the  
9 review in accordance with this section. Now,  
10 "in accordance with this section" in respect to,  
11 as you know, I mean, in respect to orders of  
12 removal means you can review facts, we have a  
13 mixed question in front of us, and not -- you  
14 cannot review facts for sure and, okay, and so  
15 why can you review here, particularly when it  
16 said earlier, and later in the zipper clause,  
17 you have to -- you -- you can only review this  
18 except as part of the review of a final order of  
19 removal?

20 Well, if we have a fact argument, see,  
21 the judge made a mistake of a fact, you know you  
22 can't get that reviewed as part of a final order  
23 of removal review. So how -- how can you say  
24 here they can?

25 MR. HUGHES: Well, so two answers to

1 that, Your Honor. The -- the second one, which  
2 I'll -- I'll get to, is the (a)(4) expanded  
3 beyond FARRA because there was a problem with  
4 FARRA. But starting with just with FARRA, the  
5 except for as part of the review of.

6 What that says is the way that you get  
7 review of the CAT claim is you have review of  
8 the final order of removal. You have that.  
9 That's the (a)(1) 1252 petition. And as part of  
10 that review, you have review of the CAT claim.

11 What that doesn't say is that the CAT  
12 claim itself is the final order of removal. All  
13 that does is, like (b)(9), the zipper clause,  
14 consolidates these two different sorts of  
15 arguments into the same vehicle, into the same  
16 petition for review.

17 And they're -- I agree they're all  
18 subject to 1252 limitations. But take, for  
19 example, the limitation in 2(B). We agree the  
20 limitation in 2(B) applies. That's the  
21 limitation that says that if there's a statutory  
22 conferral of discretion on the agency, there's  
23 no judicial review of that.

24 It applies in this circumstance. It  
25 just doesn't do anything because there's nothing

1 discretionary about this determination. That's  
2 the same argument we make with respect to 2(C).

3 We don't resist saying that it  
4 applies. It just doesn't do anything to the  
5 part of the petition for review that challenges  
6 the CAT claim.

7 But my second point is, if the Court  
8 disagrees with that understanding of FARRA, and  
9 I think that's right, but that takes us to the  
10 jurisdictional gap that Congress found because  
11 we know that Congress in the REAL ID Act did not  
12 want courts entertaining habeas actions in the  
13 district courts. It did not want the two layers  
14 of review. It wanted these matters going to the  
15 courts of appeals.

16 In order to ensure that there was not  
17 a jurisdictional gap, that's where Congress  
18 created (a)(4). And when I was reading the  
19 language of (a)(4), it does have the sole and  
20 exclusive language, but (a)(4) is written in  
21 just the same terms as (a)(1). (a)(1) is the  
22 provision that the government points to as  
23 providing judicial review over the final order  
24 of removal.

25 The way -- the language that (a)(1)

1 uses is "judicial review of a final order of  
2 removal is governed only by" and then it cites  
3 the Hobbs Act. It's a sort of curious way of  
4 conferring jurisdiction, not to say there is  
5 judicial review, but says judicial review is  
6 governed by the Hobbs Act.

7 (a)(4) says the exact same thing. It  
8 says judicial -- the means of judicial review is  
9 a Section 1252 petition.

10 We think that (a)(4) confers  
11 jurisdiction in just the same way that (a)(1)  
12 does. We know that Congress had to do this in  
13 order to fix the Suspension Clause problem that  
14 was at the heart of the -- the cases.

15 JUSTICE KAVANAUGH: You agree there's  
16 no review in the cancellation of removal  
17 context?

18 MR. HUGHES: The -- the --

19 JUSTICE KAVANAUGH: Cancellation of  
20 removal.

21 MR. HUGHES: That's under the 1229(b).  
22 That -- so that is a 2(C) argument, yes, Your  
23 Honor. That 1229(b) goes to whether or not  
24 there is a final order of removal entered. If  
25 somebody wins cancellation of removal relief,

1 that means there simply is no final order of  
2 removal, and that fits within the definition of  
3 A-47.

4 JUSTICE KAVANAUGH: And the denial of  
5 cancellation of removal?

6 MR. HUGHES: Yes, Your Honor. So --

7 JUSTICE KAVANAUGH: The factual -- the  
8 factual components of that?

9 MR. HUGHES: That is part of the final  
10 order of removal. That is all well within  
11 because, if somebody challenges the denial of  
12 cancellation of removal relief, or for those who  
13 still have 212(c) relief eligible, any of those  
14 things, the upshot of their argument is the  
15 final order of removal that was entered against  
16 me should be vacated. That's the relief we're  
17 --

18 JUSTICE SOTOMAYOR: How about  
19 statutory withholding, which is much more  
20 comparable to the withholding at issue here?

21 MR. HUGHES: I do think statutory  
22 withholding is the one thing in addition to CAT  
23 claims that probably our rule sweeps within.  
24 The language is less clear there. There's not  
25 the (a)(4), the (a)(5) argument, and it's not

1 before the Court. But I do think the logic of  
2 our argument, the only thing in addition to CAT  
3 relief, I think it would --

4 JUSTICE SOTOMAYOR: So what work does  
5 (a)(4) and (a)(5) do for you?

6 MR. HUGHES: So (a)(4) and (a)(5) is  
7 decisive textual evidence in our view that  
8 Congress understood for purposes of Section  
9 1252, that a cause or claim under CAT that's  
10 addressed in (a)(4) is simply not a final order  
11 of removal. That's addressed in (a)(5).

12 Congress, as I mentioned a moment ago,  
13 in the REAL ID Act, sought to ensure that all of  
14 -- review of all of these different issues would  
15 go straight to the courts of appeals. That's  
16 why Congress created both (a)(4) and (a)(5). It  
17 created two separate independent provisions that  
18 were next-door neighbors because it knew that  
19 final order of removal, as Congress used that  
20 language in 1252, just does not encompass a CAT  
21 claim.

22 And I think that's the fundamental  
23 problem with the government's argument.

24 JUSTICE SOTOMAYOR: So why does it  
25 encompass statutory withholding?

1 MR. HUGHES: Why does --

2 JUSTICE SOTOMAYOR: Why does it  
3 necessarily encompass statutory withholding?

4 MR. HUGHES: I -- I -- I'm not sure  
5 either of those arguments by their plain text  
6 encompass statutory withholding, Your Honor. I  
7 think there is potentially a gap. I think this  
8 is, to Justice Alito's point, (b)(9), the zipper  
9 clause, would tie in an argument about statutory  
10 withholding into the review of the final order  
11 of removal.

12 JUSTICE SOTOMAYOR: Well, I agree with  
13 you that everything comes up -- under your  
14 interpretation, everything comes up to the  
15 Court. That's what the zipper clause is  
16 supposed to do.

17 What you're saying, however, is that  
18 because of the definition of what order of  
19 removal is, that if it doesn't affect the actual  
20 order, that's not barred, the factual review is  
21 not barred?

22 MR. HUGHES: That's right, Your Honor.  
23 Our -- our ultimate position is a  
24 straightforward one of, if the claim in the  
25 petition for review challenges the validity of

1 the final order of removal, if it is -- and that  
2 is most things that are in a Section 1252 --

3 JUSTICE SOTOMAYOR: Like cancellation  
4 of removal, things like that affect that Act?

5 MR. HUGHES: Yes, Your Honor. The  
6 only things that I'm aware of that do not fall  
7 -- that are not swept within that are CAT  
8 relief, CAT withholding, and CAT deferral, and,  
9 as Your Honor points out --

10 JUSTICE SOTOMAYOR: All right. So --

11 MR. HUGHES: -- statutory withholding.

12 JUSTICE SOTOMAYOR: -- the -- in one  
13 of the briefs -- I can't remember if it was  
14 yours or someone else's -- there was a whole  
15 list of situations in which CAT claims would be  
16 reviewed independent of the petition for renewal  
17 -- independent of the decision on the removal.

18 MR. HUGHES: Yes, Your Honor.

19 JUSTICE SOTOMAYOR: How would there be  
20 jurisdiction? I understood from your briefs  
21 that you think (a)(4) provides independent  
22 jurisdiction or (c)(4) provides independent  
23 jurisdiction. How would it exist for statutory  
24 withholding --

25 MR. HUGHES: So I --



1 JUSTICE SOTOMAYOR: -- in those  
2 similar situations where it doesn't come up with  
3 the order of removal?

4 MR. HUGHES: I -- I think statutory  
5 withholding is more similar -- is less likely to  
6 come up in an independent circumstance than CAT.  
7 So I'm not sure that those are going to arise as  
8 frequently --

9 JUSTICE SOTOMAYOR: Why?

10 MR. HUGHES: -- as --

11 JUSTICE SOTOMAYOR: That's what I  
12 don't understand.

13 MR. HUGHES: Well, I think the CAT, as  
14 being a final backstop, is the -- the sort of  
15 claim that is often seen more independently. I  
16 -- I acknowledge, Your Honor, though, that in  
17 that -- that narrow range of cases about  
18 statutory withholding, I agree that (a)(4)  
19 doesn't apply.

20 I do think that there is not a clear  
21 answer on where statutory withholding, the  
22 jurisdiction falls. I think, though, it falls  
23 with -- most likely within (b)(9) because that  
24 is an order that then would be related to the  
25 proceedings and would be swept in together. So

1 I think (b)(9) would -- would do the work there.

2 I -- I think ultimately, though, this  
3 has to be understood against the backdrop  
4 presumptions here. One is that there is a  
5 presumption in favor of judicial review. And,  
6 second, if there was no judicial review for the  
7 withholding context, if the statutes were  
8 understood that way, there would then be the  
9 Suspension Clause problem that would allow  
10 independent, stand-alone habeas actions to  
11 challenge the denial of the withholding --

12 JUSTICE KAVANAUGH: What do you --

13 MR. HUGHES: -- of the statutory  
14 withholding.

15 JUSTICE ALITO: Can I just ask you  
16 before your time expires -- and I -- I'd like  
17 the government to answer this too -- what you  
18 have to say about -- putting aside the question  
19 of waiver, about the Eleventh Circuit's holding  
20 that the criminal alien bar applies at all in  
21 this case, since the ground for removal in this  
22 case is 1227(a)(2)(A)(i), right, not --

23 MR. HUGHES: Yes.

24 JUSTICE ALITO: -- (a)(ii)? So if --  
25 if they're wrong on that, there's really no

1 reason for us to get to this other issue. And  
2 the second part of that question is, although  
3 they have said -- they have held that the  
4 criminal alien bar applies to an alien who has  
5 committed a crime of moral turpitude, why  
6 wouldn't that fall within 1182(a)(2), which is  
7 another --

8 MR. HUGHES: Yeah.

9 JUSTICE ALITO: -- basis for the  
10 criminal alien bar?

11 MR. HUGHES: So, to the first part,  
12 what we do with that, two quick answers is, one,  
13 there's certainly no basis to -- to DIG or not  
14 -- this case or not resolve the question  
15 presented. This is simply a second defect  
16 that's been found below. The government's  
17 position should be waived if we're right about  
18 that. That would just mean there's -- there's  
19 -- it doesn't -- it's not an obstacle to the  
20 question presented.

21 I do think it is within the Court's  
22 discretion if it wishes to find plain error or  
23 to address the 1227 question in the alternative  
24 of deciding the question presented. That's, of  
25 course, within the Court's discretion, but --

1 but it's not an issue that we've presented.

2 As to Your Honor's question about why  
3 it doesn't fall within 1182, that's for two  
4 reasons. One is the reasoning of the Seventh  
5 Circuit of Wanjiru. 1182 just is not applicable  
6 in these circumstances because it's about  
7 admissibility and it applies to criminal  
8 convictions that are prior to the alien's  
9 technical admissibility. And the Seventh  
10 Circuit in Wanjiru explains that when the crime  
11 of conviction is post-admission of the  
12 non-citizen, 1182 doesn't govern in that  
13 circumstance. That -- that's the Wanjiru  
14 analysis.

15 Lee v. Gonzales, the Fifth Circuit,  
16 takes a different approach. It also agrees that  
17 a single crime of moral turpitude is not  
18 triggered, and it focuses instead on the text of  
19 2(C) because, when you look at the back-end  
20 portion of the text of 2(C), the language is a  
21 bit unclear, but it references that there are  
22 multiple crimes of moral turpitude in that 2(C),  
23 which is tying into the Romanette ii portion of  
24 the 1227, which says there has to be two or more  
25 crimes.

1           So I think those are -- both the Fifth  
2           and the Seventh Circuit have provided two  
3           independent grounds for arriving at the  
4           government's position, which we agree with, that  
5           -- that -- that 2(C) shouldn't apply for the  
6           separate reason when it's a single crime of  
7           moral turpitude.

8           JUSTICE KAVANAUGH: Can you address  
9           the government's reliance on Foti and why that  
10          decision doesn't carry forward?

11          MR. HUGHES: A few things about Foti,  
12          Your Honor. First, we think the holding in Foti  
13          is completely consistent with our position and  
14          with the --

15          JUSTICE KAVANAUGH: The language in  
16          Foti.

17          MR. HUGHES: So -- so the only issue  
18          in the language of Foti where it does sweep more  
19          broadly, Congress defined the key term, "order  
20          of deportation," after Foti, and it defined it  
21          in a way that's completely consistent with  
22          Foti's holding but is not consistent with Foti's  
23          broader language that absolutely anything that  
24          occurs in a removal proceeding falls within the  
25          order of deportation. If we were with that one

1 sentence in Foti that -- that reads more  
2 broadly, it could be a problem.

3 But that's not the case. Congress  
4 specifically defined the key term after Foti,  
5 and that statutory definition is necessarily  
6 what is going to govern here. In Foti, the  
7 Court said we have to interpret what's an  
8 ambiguous term and we're going to resort to  
9 policy, knowing that there are multiple  
10 plausible interpretations. Here, there's no  
11 resort to that sort of policy sense because  
12 Congress has filled the gap.

13 But even if we look to that underlying  
14 policy, there, the policy was ensuring that  
15 there would be consolidation in one court so you  
16 wouldn't have some actions in the district court  
17 and some in the courts of appeals. Congress has  
18 taken care of that policy issue, and now  
19 everything goes to the courts of appeals.

20 And the final point about Foti is Foti  
21 was just picking where judicial review was going  
22 to be, not whether or not judicial review would  
23 be fully stripped. This is a case in which  
24 jurisdiction -- is whether or not there is  
25 Article III jurisdiction at all, and that very

1 strong presumption here was simply not  
2 applicable in -- in Foti.

3 Thank you, Your Honor.

4 CHIEF JUSTICE ROBERTS: Thank you,  
5 counsel.

6 Mr. Guarnieri.

7 ORAL ARGUMENT OF MATTHEW GUARNIERI

8 ON BEHALF OF THE RESPONDENT

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

11 In Section 1252(a)(2)(C), the term  
12 "final order of removal" encompasses the various  
13 administrative decisions that are made in the  
14 course of removal proceedings, including the  
15 denial of an alien's claims for relief or  
16 protection from removal.

17 That has been the established  
18 understanding of the judicial review provisions  
19 of the INA since this Court's 1963 decision in  
20 Foti against INS. And Congress incorporated  
21 that same understanding into Section 1252 when  
22 it enacted IIRIRA in 1996.

23 Now the specific claims at issue here  
24 arise under the Convention Against Torture, but  
25 CAT claims are no different in this regard. And

1 we know that, in part, because, in the Foreign  
2 Affairs Reform and Restructuring Act of 1998,  
3 Congress specified that CAT claims would be  
4 reviewable only as "part of the review of a  
5 final order of removal."

6 And because CAT claims are reviewable  
7 only as part of review of a final order of  
8 removal, they are subject to Section 1252's  
9 limits on final order review, including  
10 specifically the criminal alien jurisdictional  
11 bar in 1252(a)(2)(C).

12 Petitioner's contrary view, which no  
13 court has ever embraced, rests on the premise  
14 that the denial of a CAT claim is not the same  
15 thing as an order of removal. But the denial of  
16 a CAT claim is an integral part of the removal  
17 order for purposes of judicial review. That is  
18 the lesson of *Foti* and its progeny, and that is  
19 the understanding of the statutory scheme that  
20 Congress incorporated into 1252. And as I just  
21 explained, that's precisely how FARRA describes  
22 review of CAT claims.

23 Petitioner's argument is also  
24 self-defeating, as we explain in our brief.  
25 Section 1252(a)(1) only authorizes the courts of



1 appeals to exercise Hobbs Act jurisdiction with  
2 respect to final orders of removal. If a CAT  
3 claim is not reviewable as part of a final order  
4 of removal, it is not reviewable at all.

5 Finally, as Justice Sotomayor's  
6 questions illustrated this morning, Petitioner's  
7 theory can't make sense of the judicial review  
8 of claims for statutory withholding of removal;  
9 that is, claims for withholding of removal  
10 predicated on a fear of persecution rather than  
11 a fear of torture.

12 Everything that Petitioner says about  
13 what makes CAT claims -- what makes a CAT claim  
14 distinct from an order of removal could equally  
15 be said for statutory withholding claims. And  
16 yet, we know statutory withholding claims are  
17 reviewable as part of the final order of  
18 removal --

19 JUSTICE GORSUCH: Counsel --

20 MR. GUARNIERI: -- entered at the  
21 conclusion of the proceedings.

22 JUSTICE GORSUCH: -- two questions.  
23 Take them in whatever order you want or ignore  
24 them both. First, what do we do with the fact  
25 that the government has repeatedly represented

1 that a CAT order is not a final order of removal  
2 and that a final order of removal remains  
3 effective whatever happens to the CAT order? So  
4 that's one.

5           Number two, can't something be part of  
6 a proceeding and yet be different from the --  
7 one -- two claims can come in one proceeding,  
8 right, and we often have compulsory  
9 counterclaims, for example. Why couldn't  
10 Congress want a system in which, for efficiency  
11 purposes, two distinct questions were presented  
12 to the court at the same time without indicating  
13 that they are the same issue?

14           MR. GUARNIERI: Well, Justice Gorsuch,  
15 if I may take your second question first, we  
16 think the language of FARRA is -- quite  
17 specifically identifies how Congress understood  
18 CAT claims to be reviewable in this context.

19           The relevant language is reproduced at  
20 page 18a of the government's brief. And as I  
21 quoted earlier, Congress specified that CAT  
22 claims would be reviewable only as part of  
23 review of the final order of removal, not as a  
24 -- a -- a separate proceeding that would occur  
25 at the same time as review of the final order of

1 removal.

2 JUSTICE GORSUCH: I understand,  
3 exactly. It's not a separate proceeding, but  
4 that doesn't necessarily mean it's the same  
5 thing as a final order of removal, does it?

6 MR. GUARNIERI: Well, no, I agree with  
7 that, but the -- the --

8 JUSTICE GORSUCH: Okay. So you agree  
9 that -- that one can have two distinct things in  
10 a single proceeding?

11 MR. GUARNIERI: Section 1252  
12 prescribes a mechanism whereby aliens can seek  
13 judicial review of what occurred in the removal  
14 proceedings by petitioning for review of the  
15 final order that is entered at the end of those  
16 proceedings.

17 Since this Court's decision in Foti,  
18 the -- the uniform understanding of how judicial  
19 review works in this context is that, when the  
20 alien petitions for review of that final order  
21 which concludes the administrative proceedings,  
22 then the various other decisions that were made  
23 in the course of the removal proceedings are  
24 also reviewable as part of the final order of  
25 removal. Foti described those decisions --

1 JUSTICE GORSUCH: But you agree --

2 MR. GUARNIERI: -- as an integral  
3 part.

4 JUSTICE GORSUCH: -- it's not the same  
5 thing as --

6 MR. GUARNIERI: FARRA uses the same  
7 language.

8 JUSTICE GORSUCH: You'd agree that the  
9 CAT order is not the same thing as a final order  
10 of removal?

11 MR. GUARNIERI: It -- it -- it can be  
12 distinguished from the order by which the  
13 immigration judge orders the alien to be  
14 removed. And as -- as Mr. Hughes has stressed  
15 --

16 JUSTICE GORSUCH: Why isn't that the  
17 case?

18 MR. GUARNIERI: -- the order of  
19 removal remains valid even if the alien is  
20 granted CAT protection.

21 JUSTICE GORSUCH: Once the government  
22 concedes, as I think it must, right, that --  
23 that a CAT order is distinct from, is not the  
24 same thing as a final order of removal, why --  
25 why isn't that seriously problematic, turning to

1 the first question I asked you?

2 MR. GUARNIERI: Justice Gorsuch, we --  
3 we think it is part of the final order of  
4 removal. It is an integral and constituent part  
5 of the final order of removal. That --

6 JUSTICE GORSUCH: Part of and integral  
7 to --

8 MR. GUARNIERI: -- as this Court's  
9 Foti decision --

10 JUSTICE GORSUCH: -- but distinct  
11 from. How is that?

12 MR. GUARNIERI: It -- it is distinct  
13 from the order of removal in the legal sense --

14 JUSTICE GORSUCH: Sounds pretty  
15 metaphysical, counsel. I mean, it's -- it's  
16 integral to and part of but distinct from.

17 MR. GUARNIERI: Well, Justice --

18 JUSTICE GORSUCH: It's like the Holy  
19 Trinity.

20 (Laughter.)

21 MR. GUARNIERI: One could say --  
22 Justice Gorsuch, one could make the same  
23 observation with respect to the review of final  
24 decisions of the district courts.

25 In -- in the course of litigation in

1 district court, a district court may make a  
2 variety of decisions that culminate in a final  
3 decision.

4           The final decision under the -- the --  
5 the statutory provision for review of final  
6 decisions to the district court has been  
7 universally understood that review of the final  
8 decision also encompasses review of the various  
9 decisions made earlier in the course of the  
10 district court proceedings --

11           JUSTICE KAVANAUGH: Can I ask you a --

12           JUSTICE KAGAN: Well, but --

13           MR. GUARNIERI: -- that merge into the  
14 final decision. It's a -- it's similar scheme  
15 here.

16           JUSTICE KAVANAUGH: Go ahead.

17           JUSTICE KAGAN: I -- I mean, I think  
18 that's very different. All of those decisions  
19 are ones leading up to the final decision and  
20 the final decision is contingent on them.

21           By the government's own practice and  
22 procedures, the CAT scheme does not have that  
23 relationship to the final order. I mean, every  
24 time you issue a final order, or it -- there's  
25 the final order. And when the -- the CAT

1 question comes up, the government says: This  
2 does not affect the final order, which continues  
3 to be in effect.

4 MR. GUARNIERI: It -- it certainly  
5 does affect the final order, Justice Kagan, in  
6 this sense: To take this case as a specific  
7 example, Petitioner in this case was ordered to  
8 be removed to Lebanon. His CAT claim -- the --  
9 the -- the gravamen of his CAT claim is that he  
10 cannot be removed to Lebanon because he fears  
11 that he would be tortured there.

12 If he were to succeed on his CAT  
13 claim, the order -- the existing order that he  
14 be removed to Lebanon could not be executed.  
15 Now there's still an order --

16 JUSTICE KAGAN: But the order is -- is  
17 for removal from this country. And what the CAT  
18 claim does is essentially to put a kind of  
19 external constraint on how to implement that  
20 order.

21 But the order, as the government  
22 repeatedly says when it does this, remains in  
23 effect. The person is ordered to leave this  
24 country.

25 MR. GUARNIERI: Well, respectfully,

1 Justice Kagan, the order is more specific than  
2 that. And, in fact, the implementing  
3 regulations require that the country of removal  
4 be designated in the order.

5 And if you look at page 47a of the  
6 Petition Appendix, there is an example of what  
7 these orders look like. And you will find that  
8 in here the order specified that Respondent,  
9 meaning the Petitioner in this Court, be removed  
10 from the United States to Lebanon.

11 JUSTICE BREYER: Well, why is this --  
12 why -- look, analogize it if you want. Say it's  
13 just like a final order of a district court  
14 coming up for review. Fine. We've had a lot of  
15 those, all of us, enough to review in the court  
16 of appeals. That doesn't mean you apply to the  
17 same standard for all of them.

18 If it's a witness complaint, there's a  
19 credibility standard that's more -- almost  
20 entirely up to the district judge. If it's a  
21 fact-finding, it's another thing. If it's an  
22 application of law, it's another thing. So  
23 fine. It's part of the review of the final  
24 order.

25 But, here, the question is, should



1 they review facts? And that's a different  
2 section, which says you can't review facts in  
3 the final order. And what they say to that is,  
4 look, if Congress wanted all these things to  
5 apply, it wouldn't have written two separate --  
6 4 and 5, they wouldn't have written two separate  
7 provisions.

8 That's a pretty good argument. And  
9 you have not a bad argument on the -- on the  
10 language. I agree with that.

11 So into this breach steps the  
12 presumption in favor of reviewability. Now  
13 there we are. And what do you -- what do you  
14 have -- I would like to hear what you have to  
15 say about that.

16 MR. GUARNIERI: Sure, Justice Breyer,  
17 we -- we have two responses about the  
18 presumption of the availability of judicial  
19 review.

20 First, of course, we do not think the  
21 statutory text is ambiguous. We think Congress  
22 unambiguously foreclosed judicial review of  
23 final orders of removal with respect to criminal  
24 aliens.

25 Second, independently of that, we

1 don't think the presumption in favor of judicial  
2 review can do any work in this case for the  
3 following reason that is specific to this  
4 particular case.

5           The term the Court is being asked to  
6 interpret here is the term "final orders of  
7 removal." That appears in both (a)(2)(C), which  
8 is the limitation on final order of review, and  
9 also in (a)(1), which is the provision that  
10 affirmatively authorizes judicial review.

11           And so a narrowing construction of the  
12 term "final order of removal" would sort of give  
13 with one hand and take with the other.

14           JUSTICE KAVANAUGH: Can I --

15           JUSTICE BREYER: Why is it different  
16 from -- from what I've seen 10,000 times? In a  
17 court of appeals, we are reviewing a piece of  
18 paper called a judgment, right? And it is the  
19 order of that judgment that we review.

20           But, when we review it, we have like  
21 10 different standards that you apply to  
22 different aspects depending on what the argument  
23 is. All right?

24           MR. GUARNIERI: Justice Breyer, when  
25 Congress enacted the criminal alien

1 jurisdictional bar in (a)(2)(C), it used the  
2 term "final order" in the same sense that it  
3 used that term in (a)(1). And under Foti and  
4 its progeny, that term encompasses the various  
5 other determinations made in the course of the  
6 same removal proceedings.

7 JUSTICE KAVANAUGH: Can I ask a --

8 MR. GUARNIERI: It's true that --

9 JUSTICE GINSBURG: We pledged -- we  
10 pledged to our treaty partners that we would not  
11 return a person to a place where the returnee  
12 would be likely subject to torture.

13 Does that figure into this analysis at  
14 all in how you treat a -- a CAT claim, that we  
15 -- we have undertaken and we want other  
16 countries to undertake the same pledge, that  
17 people will not be returned to places where  
18 they're subject to torture?

19 MR. GUARNIERI: No, Justice Ginsburg,  
20 I don't think so. The United States has  
21 determined that -- that Petitioner will -- is  
22 not more likely than not to be tortured if he is  
23 returned to Lebanon.

24 The issue in this case is simply  
25 whether he is entitled to an additional round of

1 judicial review of the agency fact findings, but  
2 --

3 JUSTICE GINSBURG: Is -- is there any  
4 --

5 MR. GUARNIERI: -- he will not be  
6 tortured. That -- that is the determination  
7 that the United States has made.

8 JUSTICE GINSBURG: Is there any  
9 impediment -- and this -- this is very limited  
10 -- he can be deported any place else in the  
11 world, just not to Lebanon? Is there an  
12 impediment to deporting him to some other  
13 country?

14 MR. GUARNIERI: That -- no, there is  
15 not currently an impediment. The -- the  
16 Immigration and Nationality Act itself specifies  
17 the other countries to which the alien may be  
18 removed. There's an ordering in the statute  
19 about which alternative countries would be the  
20 countries of removal. In a case in which the  
21 country of citizenship, he cannot be removed to  
22 the country of citizenship.

23 JUSTICE KAVANAUGH: Can I pick up on  
24 Justice --

25 JUSTICE ALITO: Does it matter whether

1 he's -- where his country of citizenship where  
2 he was born, where he has a residence? Would  
3 any of those apply to -- to Mr. Nasrallah?

4 MR. GUARNIERI: Well, I -- I don't  
5 know that there have been any administrative  
6 proceedings in this particular case to identify  
7 an alternative country of removal, but --

8 JUSTICE ALITO: So it would have to be  
9 --

10 MR. GUARNIERI: -- certainly, that  
11 would be in the analysis.

12 JUSTICE ALITO: -- a country that  
13 would accept him? Some country with which he  
14 has no connection would have to accept him.

15 MR. GUARNIERI: That's correct.  
16 That's correct.

17 JUSTICE KAVANAUGH: Can I pick up on  
18 --

19 MR. GUARNIERI: If I can return to a  
20 point that I was trying to --

21 JUSTICE KAVANAUGH: -- can I pick up  
22 on Justice Breyer's questions for a minute in  
23 thinking about how Congress structured this  
24 statute?

25 The factual components of the order of

1 removal often are not going to be seriously  
2 disputed because it will be convictions for  
3 prior offenses. And you've gotten judicial  
4 process with respect to those state convictions  
5 usually. And that was part of, I think, Senator  
6 Abraham's analysis back when this was put in.

7           With respect to a CAT claim, however,  
8 the factual components will not have been  
9 previously litigated and, indeed, will be very  
10 important to the CAT claims.

11           So why would Congress have wanted to  
12 preclude judicial review of those highly  
13 important factual components of a CAT claim?

14           MR. GUARNIERI: Justice Kavanaugh, the  
15 same could be said with respect to an alien's  
16 claims for asylum or to statutory withholding of  
17 removal. In both of those cases, the sort of --  
18 the factual predicate for the claim will not  
19 have been previously adjudicated in a criminal  
20 proceeding. And yet, Congress unmistakably made  
21 a judgment that aliens who come to the United  
22 States and commit crimes should be removed from  
23 the country as expeditiously as possible.

24           And as part of that judgment, Congress  
25 precluded review -- with respect to criminal

1 aliens, Congress limited the review available of  
2 a final order of removal, which, as I have said,  
3 is a term that encompasses things like --

4 JUSTICE KAVANAUGH: I just don't  
5 see --

6 JUSTICE KAGAN: Mr. Guarnieri --

7 MR. GUARNIERI: -- claims for asylum  
8 and statutory withholding.

9 JUSTICE KAVANAUGH: I just don't see  
10 any language that says the factual components of  
11 a CAT claim, which, correct me if I'm wrong, but  
12 those are going to be highly important in a lot  
13 of these cases, that we, Congress, don't want  
14 judicial review, even the deferential judicial  
15 review that Justice Ginsburg identified, we  
16 don't even want that, of the factual components  
17 of the CAT claim?

18 MR. GUARNIERI: Well, of course, (a)  
19 -- (a)(2)(C) itself broadly precludes review at  
20 all. And then Congress later added (a)(2)(D) as  
21 an exception to permit review of -- of questions  
22 of law and constitutional claims.

23 Both of those provisions are written  
24 to -- to deny review of the entire final order,  
25 which encompasses things like --

1 JUSTICE KAVANAUGH: Well, that just  
2 begs the question of whether that encompasses,  
3 as Justice Gorsuch says, the CAT claim. But  
4 there's nothing specific to say as to CAT claims  
5 -- and this doesn't defeat your argument, but it  
6 is a problem -- there's nothing specific as to  
7 CAT claims that say we, Congress, don't want any  
8 judicial review of the factual components of CAT  
9 claims, which would have been a very serious  
10 decision.

11 MR. GUARNIERI: That is -- Congress  
12 never used those precise words, but in the  
13 Foreign Affairs Reform and Restructuring Act of  
14 1998, Congress did direct that CAT claims would  
15 be reviewable only as part of the review of a  
16 final order, which, in turn, should be read  
17 against the backdrop of Section 1252 and  
18 Section 1252's limits on final order of review.

19 Congress also reinforced those  
20 limitations in the REAL ID Act of 2005, which  
21 added --

22 JUSTICE KAVANAUGH: Don't you think  
23 that --

24 MR. GUARNIERI: -- subsections (a)(4)  
25 and (a)(5).



1 JUSTICE KAVANAUGH: Sorry to  
2 interrupt. Don't you think part of that was  
3 meant to get everything straight to the court of  
4 appeals, as opposed to the district court, so  
5 that's what that was about?

6 MR. GUARNIERI: Yes, certainly, but  
7 this is a complementary part of the same  
8 project. What Congress was intending to ensure  
9 here was that review of any CAT claims occur  
10 only pursuant to Section 1252 and subject to the  
11 limitations Congress had already specified in  
12 Sections 12 -- Section 1252.

13 And I think FARRA is a problem for  
14 Petitioner here in another sense as well, and  
15 that is that FARRA, which was enacted, again, in  
16 1998, after the statutory definition on which  
17 Petitioner now relies, FARRA clearly  
18 contemplated that CAT claims would -- could be  
19 reviewed as part of a final order of removal.

20 That really makes no sense on  
21 Petitioner's understanding of the statutory  
22 scheme because Petitioner claims that there was  
23 a jurisdictional gap that Congress didn't solve  
24 until the REAL ID Act of 2005, when it added  
25 (a)(4) to the statute.

1           But, in fact, we know from FARRA that  
2 Congress anticipated that CAT claims would be  
3 reviewed as part of final order review.

4           JUSTICE BREYER: No, it doesn't say  
5 that. That's why it's difficult. It says you  
6 can't review them except as part of the review  
7 of a final order of removal.

8           And that means, I take it, that we  
9 don't really know, to be honest, whether, when  
10 you review this as part of the review of -- of  
11 the final order of removal, did it mean to pick  
12 up all the standards there in -- you know, that  
13 -- that applied to review of a final order of  
14 removal, or was it just talking about how you  
15 proceed, don't go to five courts, go to the one  
16 court and do it at the same time, you know, et  
17 cetera?

18           I can't get clear in my mind -- and  
19 you have an interest in persuading me one way or  
20 the other -- which it really means.

21           MR. GUARNIERI: Justice Breyer, we --  
22 we understand that to mean that Congress  
23 anticipated that CAT claims would be reviewable  
24 only as part of and subject to the limitations  
25 on final order review.

1           That also was the administrative  
2 understanding of the statute. The -- the  
3 implementing regulations in 1998 echoed FARRA's  
4 limitation. And the preamble to the  
5 rule-making, the attorney general explained that  
6 she understood that CAT claims would be  
7 reviewable only subject to the existing  
8 limitations in Section 1252.

9           So we think that the rule-making  
10 history also bolsters our understanding of the  
11 statute here.

12           JUSTICE KAVANAUGH: What was the  
13 nature of that review between 1998 and 2005?  
14 Because I'm a little murky on the chronology and  
15 how that would have worked in that -- those  
16 years.

17           MR. GUARNIERI: Sure. So, with  
18 respect to non-criminal aliens, aliens for whom  
19 the criminal alien jurisdictional bar is -- was  
20 not a problem --

21           JUSTICE KAVANAUGH: Let's talk about  
22 criminal aliens.

23           MR. GUARNIERI: Well, for criminal  
24 aliens, as a result of this Court's decision in  
25 INS against St. Cyr --

1 JUSTICE KAVANAUGH: Before St. Cyr.

2 MR. GUARNIERI: Well, before St. Cyr,  
3 the matter was -- was somewhat unclear because,  
4 on its face, the criminal alien jurisdictional  
5 bar, as it was then written, would preclude  
6 review of all final orders by --

7 JUSTICE KAVANAUGH: There would be no  
8 review at all, right?

9 MR. GUARNIERI: That's correct,  
10 including for CAT claims.

11 JUSTICE KAVANAUGH: And doesn't that  
12 pose a problem given that FARRA seemed to  
13 suggest that there would be some review?

14 MR. GUARNIERI: Well, but, for  
15 non-criminal aliens, there was -- review was  
16 occurring in the ordinary course. An alien who  
17 had a CAT claim that was denied in removal  
18 proceedings would file a petition for review,  
19 and the petition for review would challenge the  
20 final order, including the denial of the CAT  
21 claim. And the courts of appeals were reviewing  
22 cases like that.

23 Now, for criminal aliens, the facts on  
24 the ground were somewhat different because the  
25 criminal alien jurisdictional bar precluded

1 appellate -- precluded circuit court review  
2 entirely, at least for non-constitutional claims  
3 for criminal aliens.

4           And so, as a result of this Court's  
5 decision in INS against St. Cyr, the courts of  
6 appeals determined that FARRA Section 2242(d),  
7 which is the provision I've been emphasizing  
8 this morning that makes CAT claims reviewable  
9 only as part of the final order of removal,  
10 courts of appeals concluded that that section  
11 did not itself preclude habeas review of CAT  
12 claims under the logic of this Court's decision  
13 in St. Cyr.

14           JUSTICE BREYER: Is this right?

15           MR. GUARNIERI: Now Congress --

16           JUSTICE BREYER: Is this right? I'm  
17 trying to get this straight. I'm just trying to  
18 get it straight in my mind. All right?

19           At one point, you had the section  
20 which says: Look, person under a final order of  
21 removal, if you're a criminal, you can't appeal  
22 at all. And you also had the preexisting  
23 section that said to the CAT person: You can  
24 get review only as part of the review of a final  
25 order of removal.

1           So, if you couldn't get it all, you  
2           couldn't get it here, it seems, because there  
3           was no part -- there was no final order of  
4           removal, so it couldn't be part of it.

5           Then, later on, they had this other  
6           section say: Wait a minute, you can,  
7           Mr. Criminal -- and that's because of St. Cyr  
8           perhaps -- you see you can get review of a final  
9           order of removal. And now we can get review of  
10          our CAT claim because there's something to  
11          attach it to.

12          So the question is, did we, in fact,  
13          in saying that -- "we" being Congress -- mean  
14          that the condition that limits the final order  
15          of -- of -- of removal also limit the appeal of  
16          the CAT claim, which is no review of fact?

17          And that's why they're saying it's a  
18          different thing; this was just a vehicle. And  
19          you're saying: No, it isn't a vehicle; it's  
20          part of -- it's part of.

21          Okay. I got about that far this  
22          morning. And that's why I got to then think,  
23          well, there is this presumption in favor of  
24          reviewability. That's how I got there.

25          I guess you could tell me, forgetting

1 the reviewability presumption, am I right or  
2 wrong so far?

3 MR. GUARNIERI: Justice Breyer, if you  
4 examine the legislative history --

5 JUSTICE BREYER: Was I right or wrong?  
6 Because I'm not asking for an argument. I just  
7 want to know if my analysis is right --

8 MR. GUARNIERI: We don't --

9 JUSTICE BREYER: -- and if --

10 MR. GUARNIERI: -- we don't agree with  
11 Petitioner's account of the history that led to  
12 the REAL ID Act. According to Petitioner, in  
13 the REAL ID Act, Congress understood itself to  
14 be solving a perceived lack of jurisdiction in  
15 the courts of appeals to review CAT claims.  
16 That is -- that is unmistakably incorrect.

17 If you examine the legislative record  
18 that preceded the REAL ID Act, what Congress  
19 understood itself to be doing was softening or  
20 limiting the scope of the criminal alien  
21 jurisdictional bar in order to solve the  
22 problems that this Court identified in *St. Cyr*.

23 So Congress fixed the problem, as it  
24 were, by permitting review of legal claims and  
25 constitutional claims for criminal aliens and

1 then amending 1252 in numerous places to make  
2 clear that there would be no habeas district  
3 court proceedings to review any of the  
4 determinations that occur in the ordinary  
5 removal proceeding and that 1252 would be the  
6 sole and exclusive means for aliens to obtain  
7 review of those determinations in the courts of  
8 appeals, including and subject to the limits set  
9 forth in 1252.

10 Now, as I -- as I began to say  
11 earlier, we do think that statutory withholding  
12 of removal is -- is a very hard case for  
13 Petitioner here because everything that  
14 Petitioner says about why CAT claims are  
15 different than a final order of removal could  
16 equally be said for statutory withholding  
17 claims.

18 And, of course, in Foti, this Court  
19 itself identified withholding of removal as the  
20 kind of decision that, when it occurs in the  
21 removal proceeding, is reviewable as part of the  
22 final order that's entered at the conclusion of  
23 those proceedings.

24 Every court of appeals in the country  
25 was reviewing statutory withholding claims in



1 the years post-dating Foti and predating IIRIRA.  
2 There is no evidence that Congress meant to  
3 eliminate or abrogate that practice when it  
4 adopted the definition in 1996 that -- that  
5 Petitioner has latched onto.

6 We think also motions to reopen would  
7 not meet Petitioner's narrow understanding of  
8 what a final order of removal is. When an alien  
9 files a motion to reopen the removal proceedings  
10 and the agency denies that motion to reopen,  
11 that is not itself a separate finding of  
12 removability or an order of removal, and yet it  
13 is unmistakably clear that the denial of a  
14 motion to reopen can be reviewed as part of  
15 final order review.

16 This Court said as much in Stone  
17 against INS, and the text of 1252 continues to  
18 reflect it anticipates that there will be  
19 appellate proceedings with respect to motions to  
20 reopen.

21 So we think --

22 JUSTICE SOTOMAYOR: The problem with  
23 --

24 MR. GUARNIERI: -- that both of those  
25 are --

1 JUSTICE SOTOMAYOR: -- motions to  
2 reopen is that what you're seeking to do is to  
3 undo the order of removal, and so that fits  
4 quite clearly within your -- your -- the other  
5 side's theory.

6 We still -- what you haven't told me  
7 is where the language of defining "order of  
8 removal" -- how I read that language in the  
9 statute? It's the first definition Congress has  
10 given. Where in reading that -- those words  
11 when Congress has chosen to define them explains  
12 CAT claims, or can include CAT -- CAT -- CAT  
13 claims?

14 MR. GUARNIERI: We -- we think the  
15 language of 1101(a)(47) should be read in light  
16 of the -- the many decisions that preceded it,  
17 recognizing that --

18 JUSTICE SOTOMAYOR: The problem is --

19 MR. GUARNIERI: -- final orders of  
20 removal --

21 JUSTICE SOTOMAYOR: -- that Congress  
22 had those decisions in front of it and it could  
23 have chosen to write something much more  
24 comprehensive, but it didn't.

25 It could have said "order of removal"

1 is any order of removal and all -- all other  
2 decisions encompassed by it or all other orders  
3 encompassed by -- a part of it. But it didn't.  
4 It talked about it just as the order of removal.

5 MR. GUARNIERI: Well, we -- we think  
6 that language is naturally read to include the  
7 decisions that precede the order of removal.

8 JUSTICE SOTOMAYOR: It's only  
9 naturally --

10 MR. GUARNIERI: There's no indication  
11 --

12 JUSTICE SOTOMAYOR: -- read that way  
13 because we decided, I think it was Foti --

14 MR. GUARNIERI: That's correct.

15 JUSTICE SOTOMAYOR: -- that in terms  
16 of channeling review, we wanted everything  
17 channeled to the court of appeals. This is a  
18 very different question than whether or not  
19 you're going to put in a bar that bars review  
20 altogether.

21 MR. GUARNIERI: Well --

22 JUSTICE SOTOMAYOR: Channeling and  
23 reviewing it, so Congress looked at it and said  
24 the one thing we're barring is only removal.

25 MR. GUARNIERI: Well, the -- the

1 definition, it -- it defines a term that is --  
2 appears not only in the provisions of the  
3 statute that limit review but also in the  
4 provisions of the statute that authorize review,  
5 as I explained earlier.

6 Section 1252(a)(1) uses this term,  
7 "final orders of removal," and there is no  
8 indication, and Petitioner has yet to explain  
9 why Congress would have wanted to, excludes  
10 statutory withholding claims --

11 JUSTICE SOTOMAYOR: Well, according to  
12 him --

13 MR. GUARNIERI: -- from reviewability.

14 JUSTICE SOTOMAYOR: -- according to  
15 him, maybe they didn't.

16 MR. GUARNIERI: Well, I -- I --

17 JUSTICE SOTOMAYOR: I don't think he's  
18 taking a position in your favor. He's basically  
19 saying so what.

20 MR. GUARNIERI: Justice, I think in  
21 the reply brief Petitioner makes clear that if  
22 you accept his theory, that would mean that  
23 statutory withholding claims are not reviewable  
24 as part of a final order of removal.

25 Now, in Footnote 7 of the reply brief,

1 Petitioner has tried to hypothesize some other  
2 bases on which courts might be able to review  
3 those claims, but that would be a very startling  
4 development.

5 Now, also, I think, the def --

6 JUSTICE KAGAN: Mr. Guarnieri, this  
7 not a case where we have to figure out the  
8 meaning of a term by looking to zillions of  
9 different statutory provisions and trying to  
10 make sense of them.

11 This -- there is an explicit statutory  
12 definition here, and this statutory definition  
13 says what a final -- what an order of removal  
14 is.

15 It says "order of deportation," but  
16 nobody thinks that that makes a difference. And  
17 it says it's an order that concludes that the  
18 alien is deportable, which you agree it doesn't  
19 do, and it concludes -- and -- or it orders  
20 deportation, which you also agree it doesn't do.

21 So you're saying, well, even though  
22 there's this explicit definition here, we should  
23 look back to a bunch of cases that were decided  
24 before the statutory definition came about, that  
25 were decided before (a)(4) and (a)(5) came

1 about, that even when they were decided the  
2 Court said that the language wasn't clear, and  
3 the only reason that they were deciding the case  
4 that way was because they had a policy concern  
5 about bifurcation, which doesn't exist anymore.

6 So why would we look to those cases  
7 rather than the explicit statutory definition?

8 MR. GUARNIERI: Well, Justice Kagan,  
9 we do think the history that preceded this  
10 statute should inform the Court's understanding  
11 of it. We are also pointing the Court towards  
12 the explicit text of the Foreign Affairs Reform  
13 and Restructuring Act, which makes clear that  
14 Congress anticipated that CAT claims would be  
15 reviewable as part of a final order of review,  
16 which is consistent with our reading of the  
17 statutory definition but not Petitioner's unduly  
18 narrow understanding of that term.

19 Now, before my time expires, Justice  
20 Alito, I would like to address the question that  
21 you posed to Petitioner's counsel earlier. We  
22 -- we do think that Petitioner has waived any  
23 argument that the court of appeals erred in  
24 applying the criminal alien jurisdictional bar.  
25 In this particular case, Petitioner did not seek

1 rehearing en banc on that issue. Petitioner did  
2 not seek this Court's review on that issue.

3 Now, having said that, we think the  
4 Eleventh Circuit's rule is incorrect and  
5 ordinarily a finding of removability under  
6 Section 1227(a)(2)(A)(i) is not itself  
7 sufficient to trigger the criminal alien  
8 jurisdiction bar.

9 But that's of no moment for the  
10 purposes of deciding this particular case. We  
11 think the Court can decide the case on the  
12 premise, which Petitioner did not dispute, that  
13 --

14 JUSTICE KAVANAUGH: Back -- back to  
15 the main argument, the Seventh Circuit and the  
16 Ninth Circuit have adopted Petitioner's view of  
17 this statute, obviously, big circuits with lots  
18 of cases.

19 Are you aware of significant problems  
20 in how they've been applying substantial  
21 evidence review to factual components of CAT  
22 claims or other problems that that's generated?

23 MR. GUARNIERI: Your Honor, the -- the  
24 -- the standard has made a difference in some  
25 cases in the Ninth Circuit. There are -- there

1 are decisions in the Ninth Circuit in which, in  
2 our view, criminal aliens were able to reverse  
3 the agency's fact-finding on appeal and  
4 circumstances in which the Congress -- the --  
5 the statute should have foreclosed that kind of  
6 proceeding on appeal.

7 We also --

8 JUSTICE KAVANAUGH: Which way does  
9 that cut?

10 MR. GUARNIERI: If I may simply --

11 JUSTICE KAVANAUGH: I mean, doesn't  
12 that suggest there, at least the courts thought  
13 there were mistakes being made in the  
14 administrative process in those cases?

15 MR. GUARNIERI: Well, it's true that  
16 there are some decisions in which panels of the  
17 Ninth Circuit disagreed with the agency  
18 fact-finding.

19 But I will just add, if I may, Mr.  
20 Chief Justice, the -- the rule that the Seventh  
21 and Ninth Circuits have applied is not the rule  
22 that Petitioner has advocated here and, in fact,  
23 he has abandoned the reasoning of those courts.

24 CHIEF JUSTICE ROBERTS: Thank you,  
25 counsel.



1 Five minutes, Mr. Hughes.

2 REBUTTAL ARGUMENT OF PAUL HUGHES

3 ON BEHALF OF THE PETITIONER

4 MR. HUGHES: Thank you.

5 I'd like to first begin with a point  
6 that the government made about the notion that  
7 the removal order is limited to removal only to  
8 the country specified in the removal order.

9 Respectfully, that's just legally  
10 wrong. The regulation is 8 CFR 1240.12,  
11 subprovision (d). It does state that an  
12 immigration judge needs to identify one or more  
13 countries to which removal is to occur.

14 But the second sentence in that  
15 provision, and I quote, "In the event that the  
16 Department of Homeland Security is unable to  
17 remove the alien to the specified or alternative  
18 country or countries, the order of the  
19 immigration judge does not limit the authority  
20 of the Department of Homeland Security to remove  
21 the alien to any other country, as permitted by  
22 Section 241(b) of the Act."

23 So there is no need to amend or alter  
24 the final order of removal in the event of CAT  
25 relief to -- to Lebanon, even though that

1 Lebanon specified in that order the individual  
2 -- that DHS without further administrative  
3 action can remove the individual to any country  
4 that's specified in Section 241.

5 The second point, the government's  
6 claims that were --

7 JUSTICE SOTOMAYOR: This is just  
8 curiosity to me. Can the government change a  
9 port of deportation? Assuming a prisoner comes  
10 and says, my mother is in this other country,  
11 I'd rather go there?

12 MR. HUGHES: I -- I think there --

13 JUSTICE SOTOMAYOR: Do they have to go  
14 back to the judge to get permission to do that?

15 MR. HUGHES: No, Your Honor. This  
16 regulation allows the individual to be sent to  
17 other countries in -- in the section, this is in  
18 1231 or Section 241. One of the countries that  
19 -- can be a country that the individual agrees  
20 to go to, I believe, and that is willing to  
21 accept that person. So, if those things match  
22 up and they work with the government, that --  
23 that can be.

24 But it's all laid out, as Justice  
25 Alito mentioned a few moments ago, about the

1 different countries and orders that are  
2 permitted by the statute. Those are all swept  
3 within the order of removal, even if it says  
4 Lebanon on it by the regulation.

5           The second point, the government  
6 suggests that we're wrong about the legislative  
7 -- or about the history of the REAL ID Act. I  
8 think we're clear on the text of what (a)(4)  
9 does and explain jurisdiction and the clear  
10 purpose.

11           But, again, the -- the argument about  
12 the history, I think, is a bit misplaced  
13 because, if the only piece of legislative  
14 history that describes (a)(4) is in the  
15 conference report, and the conference report  
16 says that its purpose was to "allow aliens in  
17 Section 240 removal proceedings to seek review  
18 in -- in court," so the only snippet of  
19 legislative history that we have on (a)(4) says  
20 that the purpose of it is to create judicial  
21 review.

22           The government's contention that we're  
23 just mistaken about the history there, I think,  
24 is a misplaced argument. This is exactly what  
25 Congress sought to do.

1           Now the next point, I think this is a  
2           pretty straightforward question of textual  
3           interpretation. This -- in AEDPA, Congress  
4           stripped courts from doing one specific act.  
5           That's the act of reviewing final orders of  
6           removal.

7           For all of the reasons we've  
8           described, Mr. Nasrallah does not ask the Court  
9           here to review the final order of removal. He  
10          asks the Court to review something very  
11          different. That's the CAT claim.

12          We've described how (a)(4) and the  
13          regulations and the definition all confirm that  
14          this is not the order of deportation.

15          The government's attempt here is to  
16          effectively back-door in through all of these  
17          various different provisions a broader effect of  
18          (2)(C) than what Congress actually wrote in  
19          (2)(C).

20          But (2)(C) was pretty straightforward  
21          on its face because I remind the Court in A-47,  
22          that definition, order of deportation, was  
23          enacted by Congress for the specific purpose of  
24          defining the scope of (2)(C).

25          Congress said in Section 440(a) of --

1 of AEDPA, we are going to strip jurisdiction for  
2 criminal aliens with certain convictions. And  
3 in -- in 440(b), we're going to define the scope  
4 of that. This is just simply outside the scope  
5 of the jurisdiction-stripping statute that  
6 Congress enacted as it defined when it engaged  
7 in enacting that -- that provision.

8 But, next, if there's any doubt about  
9 this, if ultimately the Court thinks that these  
10 other provisions create multiple plausible  
11 interpretations of the statutory text, this is  
12 where the Court's strong presumption in favor of  
13 judicial review of agency action would do the  
14 work.

15 Again, it's the government's burden  
16 not to show that there are multiple plausible  
17 interpretations but that its interpretation is  
18 the only correct one. We think the text is  
19 unambiguous in our favor.

20 But, if the Court disagrees with us,  
21 at the very least, there are multiple plausible  
22 interpretations, and, there, the presumption in  
23 favor of judicial review would do the work.

24 And -- and then, finally, Congress  
25 purposefully chose to make CAT claims absolute.

1 Congress -- this was a broad recognition to the  
2 horrors of torture.

3           When there is an error in the  
4 administrative process, as the government just  
5 identified below, what that means is a court has  
6 found that the administrative agency made an  
7 error in finding that torture was not more  
8 likely than not.

9           When there -- a CAT relief -- when CAT  
10 relief is granted, that means that there is a  
11 finding that it is more than 50 percent likely  
12 that the individual is going to be tortured or  
13 extrajudicially killed upon removal to that  
14 country.

15           The United States has made a firm  
16 commitment that our deportation system is not  
17 going to be used to send an individual to a  
18 place where they are more likely than not to be  
19 subject to torture or deportation -- or torture  
20 or death.

21           It is completely sensible that  
22 Congress did not extend (2)(C) to jurisdiction  
23 stripping in these circumstances. Thank you.

24           CHIEF JUSTICE ROBERTS: Thank you,  
25 counsel. The case is submitted.

1                   (Whereupon, at 11:06 a.m., the case  
2 was submitted.)  
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## Official - Subject to Final Review

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