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1 IN THE SUPREME COURT OF THE UNITED STATES
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3 PIERRE YASSUE NASHUN RILEY,)
4 Petitioner,)
5 v.) No. 23-1270
6 PAMELA BONDI, ATTORNEY GENERAL,)
7 Respondent.)
8 - - - - -
9
10 Washington, D.C.
11 Monday, March 24, 2025
12
13 The above-entitled matter came on for
14 oral argument before the Supreme Court of the
15 United States at 1128 a.m.
16
17 APPEARANCES
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19 Petitioner.
20 EPHRAIM McDOWELL, Assistant to the Solicitor General,
21 Department of Justice, Washington, D.C.; on behalf
22 of the Respondent in support of the Petitioner.
23 STEPHEN J. HAMMER, Dallas, Texas; Court-appointed
24 amicus curiae in support of the judgment below.
25

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

2 (1128 a.m.)

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

6 Mr. Bradley.

7 ORAL ARGUMENT OF KEITH BRADLEY

8 ON BEHALF OF THE PETITIONER

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

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

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

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

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

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

11 I welcome the Court's questions.

12 JUSTICE THOMAS Did Petitioner seek
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 jurisdictional,
4 and tell us that no other further relief can be
5 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 an instance in which a claim, claim B
21 can be considered with -- or appeal B can be
22 considered with appeal A, but appeal B actually
23 expands the time limit for appeal A

24 MR. McDOWELL I think the best
25 analogy is the one that Justice Sotomayor

1 pointed pointed to, which is that a conviction
2 cannot be appealed until after the sentence,
3 even though the sentence doesn't affect the
4 validity of the conviction or merge into the
5 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 And 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 want to
12 first point out that under Title 8, DHS does not
13 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 claim, but, in fact, the U.S.
24 government does not exercise that right

25 MR. McDOWELL Under Title 8 we -- we

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

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

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

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

21 The withholding-only proceedings
22 affect the implementation of the removal order
23 for that very reason. If a person is granted
24 CAT protection, that means that the person
25 cannot be removed to the designated country of

1 removal.

2 CHIEF JUSTICE ROBERTS Thank you,
3 counsel.

4 Justice Thomas, anything further

5 JUSTICE THOMAS Would the party have
6 to request consolidation with the removal order
7 proceedings

8 MR. McDOWELL Under our position --

9 JUSTICE THOMAS Yeah.

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

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

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

25 MR. McDOWELL So -- so in this case,

1 the Petitioner brought his petition for review
2 after the CAT order was issued.

3 JUSTICE THOMAS Yeah.

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

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

12 CHIEF JUSTICE ROBERTS Justice Alito,
13 anything

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

23 MR. McDOWELL Yes, we would.

24 CHIEF JUSTICE ROBERTS Justice Kagan
25 Justice Gorsuch

1 Justice Barrett

2 Justice Jackson

3 Thank you, counsel.

4 Mr. Hammer.

5 ORAL ARGUMENT OF STEPHEN J. HAMMER

6 COURT-APPOINTED AMICUS CURIAE

7 IN SUPPORT OF THE JUDGMENT BELOW

8 MR. HAMMER Mr. Chief Justice and may

9 it please the Court

10 Congress has barred courts from
11 reviewing claims under the Convention Against
12 Torture except on a petition for review of a
13 final order of removal. Under Section
14 1252(b)(1) such a petition must be filed not
15 later than 30 days after the date of the final
16 order of removal.

17 The Fourth Circuit correctly held that
18 Mr. Riley's failure to comply with that deadline
19 meant it was jurisdictionally barred from
20 reviewing his petition. The Fourth Circuit
21 rightly recognized that the filing deadline is
22 jurisdictional. This Court already held as much
23 in *Stone*, which is a jurisdictional precedent in
24 both reasoning and result.

25 And *Santos-Zacaria*, which was focused

1 on the INA's separate exhaustion provision,
2 didn't disturb the deadline's jurisdictional
3 status.

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

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

19 I welcome the Court's questions.

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

24 MR. HAMMER I think that the
25 statutory deadline requires filing the order --

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

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

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

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

24 JUSTICE KAGAN Well, you seem to be
25 assuming that there is a final order of removal,

1 but maybe it's not final until the CAT claim has
2 been resolved.

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

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

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

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

21 And with respect to what the final
22 order of removal here actually says, I would
23 direct the Court to page 8 of the joint
24 appendix, which says that Mr. Riley was ordered
25 removed to Jamaica or any alternate country

1 proscribed by Section 1231.

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

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

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

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

25 But it was not -- I don't take any of

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

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

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

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

25 You have the did not attend to

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

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

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

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

25 Santos-Zacaria was focused only on the

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

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

21 Is there another situation like that

22 MR. HAMMER So two responses, Your
23 Honor. First, I don't think judicial review of
24 orders concluding withholding-only proceedings
25 is precluded by the Fourth Circuit's reading.

1 The parties have identified various ways by
2 which aliens could obtain review of those
3 orders.

4 JUSTICE BARRETT Let's assume --

5 MR. HAMMER They've acknowledged --

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

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

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

1 those aliens.

2 JUSTICE BARRETT Is that consistent
3 with the presumption of judicial review

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

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

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

21 JUSTICE KAGAN But if your front-line
22 position is that there is judicial review, even
23 with respect to these people who are in
24 expedited proceedings, if that's your front-line
25 position, isn't it a quite odd way to write a

1 statute to say, yes, you get judicial review,
2 but we're going to set up a 30-day deadline
3 which effectively precludes you from ever
4 getting that judicial review

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

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

23 And by doing so, they create a risk
24 that aliens can be removed from the country to a
25 third country during withholding-only

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

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

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

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

9 JUSTICE SOTOMAYOR I'm sorry. I
10 thought that there was a stay for the petition
11 for removal when a CAT claim is made --

12 MR. HAMMER There --

13 JUSTICE SOTOMAYOR -- within the
14 30-day period.

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

20 JUSTICE SOTOMAYOR To a third country
21 --

22 MR. HAMMER Exactly.

23 JUSTICE SOTOMAYOR -- but they
24 said -- you forgot the subject to -- subject
25 to notice and an opportunity to file an amended

1 CAT claim on the new designation. So it's not
2 an open-ended thing.

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

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

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

24 JUSTICE SOTOMAYOR But not the
25 petition for review if they've affirmed it.

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

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

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

23 JUSTICE JACKSON Can I go back to
24 Justice Barrett's question about the
25 presumption I guess I don't understand why the

1 text of the statute is not ambiguous concerning
2 the meaning of final order in the expedited
3 removal context.

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

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

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

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

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

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

15 JUSTICE GORSUCH Yeah, but --

16 MR. HAMMER -- all forms of judicial
17 review.

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

24 MR. HAMMER So Your Honor, I
25 acknowledge that Congress could have spoken more

1 directly to this situation and --

2 JUSTICE GORSUCH Well, it could have
3 spoken to this situation at all, right

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

20 JUSTICE GORSUCH If -- if --

21 MR. HAMMER And I think --

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

25 MR. HAMMER Your Honor, I acknowledge

1 that the filing deadline likely would not
2 satisfy the clear statement test apart from
3 Stone.

4 JUSTICE GORSUCH Okay.

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

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

1 the period for Board review expires immediately
2 when no Board review is allowed.

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

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

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

24 I don't think that's necessary here,
25 Your Honor, because I think the meaning of the

1 filing deadline is plain. But the Court could
2 provide guidance in that way.

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

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

21 That's the exact opposite of what
22 happened in Beggerly, the court that this -- the
23 case that this Court analyzed in Wilkins and
24 said didn't count as a definitive jurisdictional
25 precedent. It had an extensive analysis of

1 equitable tolling. And the Court said if it was
2 a true jurisdictional deadline, it wouldn't have
3 needed that extensive analysis.

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

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

15 And I wonder whether that is a
16 particularly compelling analogy.

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

1 out this Court has recognized as jurisdictional,
2 both before and after Arbaugh.

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

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

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

24 MR. HAMMER I am relying on the Stone
25 precedent, Your Honor. And I think this is

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

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

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

24 JUSTICE KAGAN Mr. Hammer, when I
25 asked you before why we should think of the

1 order of removal as final, given that it's
2 distinctly non-final, distinctly provisional as
3 to an important aspect, which is where you're
4 going to remove the person to, you countered to
5 me, Nasrallah.

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

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

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

25 And as I understand the government's

1 argument, it's like as long as that's an
2 up-for-grabs question, the order is not final.

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

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

13 JUSTICE KAGAN Yeah. I'm sorry.
14 What in that tells you it's final as issued

15 MR. HAMMER It's called the final
16 order of removal.

17 JUSTICE KAGAN My question is what is
18 a final order of removal

19 MR. HAMMER So Section 1228(b)(3)
20 indicates that you can seek judicial review
21 within 14 days of the issuance of the order,
22 which would not be possible if withholding-only
23 proceedings suspended the finality of that
24 order. So I think that's a strong indication
25 that it's final, but I would also point to

1 Section 1231 and what this Court said about
2 administrative finality in Guzman Chavez,
3 because many of these arguments were also raised
4 in Guzman Chavez, that indeterminacy as to the
5 where question suspended the finality of the
6 removal order.

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

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

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

1 removed to a third country.
2 JUSTICE KAGAN Thank you.
3 CHIEF JUSTICE ROBERTS Justice
4 Thomas
5 Justice Alito
6 Anything further, Justice Gorsuch
7 Justice Kavanaugh
8 Justice Barrett
9 Justice Jackson
10 Thank you, counsel.
11 Rebuttal Mr Bradley, rebuttal
12 REBUTTAL ARGUMENT OF KEITH BRADLEY
13 ON BEHALF OF THE PETITIONER
14 MR. BRADLEY Thank you. A couple of
15 observations, really three things I'd like to
16 say.
17 One is on the question whether
18 somebody can be removed to a third country,
19 while the withholding proceedings are in
20 process, I'd like to point the Court to the
21 regulation at our Appendix 29A in the petition
22 that says, such alien shall not be excluded,
23 deported, or removed before a decision is
24 rendered on his or her asylum application. And
25 that term is defined in the regulation to

1 include the withholding claims.

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

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

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

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

1 Not all of them.

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

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

19 CHIEF JUSTICE ROBERTS Thank you,
20 counsel.

21 Mr. Hammer, this Court appointed you
22 to brief and argue this case as an amicus curiae
23 in support of the judgment below. You have ably
24 discharged that responsibility, for which we are
25 grateful.

1 The case is submitted.

2 (Whereupon, at 1226 p.m., the case
3 was submitted.)

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