SUPREME COURT OF THE UNITED STATES

No. 08–681

JEAN MARC NKEN, PETITIONER *v.* ERIC H. HOLDER, JR., ATTORNEY GENERAL

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

[April 22, 2009]

JUSTICE ALITO, with whom JUSTICE THOMAS joins, dissenting.

The Court's decision nullifies an important statutory provision that Congress enacted when it reformed the immigration laws in 1996. I would give effect to that provision, and I therefore respectfully dissent.

I

When an alien is charged with being removable from the United States, an Immigration Judge (IJ) conducts a hearing, receives and considers evidence, and determines whether the alien is removable. See 8 U. S. C. §1229a(a); 8 CFR §§1240.1(a)(1)(i), (c) (2008). If the IJ enters an order of removal, that order becomes final when the alien's appeal to the Board of Immigration Appeals (Board) is unsuccessful or the alien declines to appeal to the Board. See 8 U. S. C. §1101(47)(B); 8 CFR §§1241.1, 1241.31. Once an order of removal has become final, it may be executed at any time. See 8 U. S. C. §§1231(a)(1)(B)(i), 1252(b)(8)(C); 8 CFR §1241.33. Removal orders "are self-executing orders, not dependent upon judicial enforcement." *Stone* v. *INS*, 514 U. S. 386, 398 (1995).

After the removal order is final and enforceable, the alien may file a motion to reopen before the IJ, see 8 U. S. C. §1229a(c)(7), or a petition for review before the

appropriate court of appeals, see §1252(a)(1). While either challenge is pending, the alien may ask the Executive Branch to stay its own hand. See 8 CFR §§241.6(a)–(b), 1241.6(a)–(b). If, however, the alien wants *a court* to restrain the Executive from executing a final and enforceable removal order, the alien must seek an injunction to do so. See 8 U. S. C. §1252(a)(1) (making a final order of removal subject to 28 U. S. C. §2349(b), which provides that an "interlocutory injunction" can "restrain" the "execution of" a final order). The plain text of the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (IIRIRA), Div. C, 110 Stat. 3009–546, provides the relevant legal standard for granting such relief: "Notwithstanding any other provision of law, no court shall enjoin the removal of any alien pursuant to a final order under this section unless the alien shows by clear and convincing evidence that the entry or execution of such order is prohibited as a matter of law." 8 U. S. C. §1252(f)(2).

II

In my view, petitioner's request for an order preventing his removal pending disposition of his current petition for review was governed by 8 U. S. C. §1252(f)(2). Petitioner is "remova[ble] . . . pursuant to a final order," and he sought a court order to "enjoin" the Executive Branch's execution of that removal.

A

There is no dispute that petitioner is "remova[ble] . . . pursuant to a final order." *Ibid.* On March 4, 2005, the IJ determined that petitioner was removable under §1227(a)(1)(B) and denied his claims for asylum, withholding of removal, and protection under the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (CAT), Dec. 10, 1984, S. Treaty Doc. No. 100–20, 1465 U. N. T. S. 85. See App. 32–43.

Petitioner appealed to the Board, and on June 16, 2006, the Board affirmed. *Id.*, at 44–49. On that date, petitioner's order of removal became administratively final, and the Executive Branch became legally entitled to remove him from the United States. See 8 U. S. C. §1231(a)(1)(B)(i); 8 CFR §1241.33(a).

B

The only remaining question, therefore, is whether the interim equitable relief that petitioner sought was an order "enjoin[ing]" his removal as that term is used in 8 U. S. C. §1252(f)(2). I believe that it was.

In ordinary usage, the term "enjoin" means to "require," "command," or "direct" an action, or to "require a person . . . to perform, or to abstain or desist from, some act." Black's Law Dictionary 529 (6th ed. 1990) (hereinafter Black's). See also Webster's Third New International Dictionary 754 (1993) (defining "enjoin" to mean "to direct, prescribe, or impose by order"; "to prohibit or restrain by a judicial order or decree"). When an alien subject to a final order of removal seeks to bar executive officials from acting upon that order pending judicial consideration of a petition for review, the alien is seeking to "enjoin" his or her removal. The alien is seeking an order "restrain[ing]" those officials and "requir[ing]" them to "abstain" from executing the order of removal.

The Court concludes that §1252(f)(2) does not apply in this case because, in the Court's view, that provision applies only to requests for an injunction and not to requests for a stay. That conclusion is wrong for at least three reasons.

1

First, a stay is "a kind of injunction," Black's 1413, as even the Court grudgingly concedes, see *ante*, at 10 (an order blocking an alien's removal pending judicial review

"might technically be called an injunction"). See also *Teshome-Gebreegziabher* v. *Mukasey,* 528 F. 3d 330, 333 (CA4 2008) (the term "stay" "is a subset of the broader term 'enjoin,'"); *Kijowska* v. *Haines*, 463 F. 3d 583, 589 (CA7 2006) (a stay "is a form of injunction"); *Weng* v. *United States Atty. Gen.*, 287 F. 3d 1335, 1338 (CA11 2002) ("[T]he plain meaning of enjoin includes the grant of a stay").*

Both statutes and judicial decisions refer to orders that "stay" legal proceedings as injunctions. For example, the Anti-Injunction Act provides that "[a] court of the United States may not grant an injunction to stay proceedings in a State court." 28 U. S. C. §2283. See also *Hill* v. *McDonough,* 547 U. S. 573, 578–580 (2006) (habeas petitioner sought injunction to stay his execution); *McMillen*

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*Thus, it is unremarkable that we have used the word "stay" to describe an injunction blocking an administrative order pending judicial review. See *Scripps-Howard Radio, Inc.* v. *FCC*, 316 U. S. 4 (1942); *ante*, at 9–10, n. Indeed, our decision in *Scripps-Howard*, *supra*, at 11—like the Court's decision today, *ante*, at 7, 14—relied heavily on *Virginian R. Co.* v. *United States*, 272 U. S. 658 (1926), the latter of which referred to "stays" as a subset of "injunctions." See *id.*, at 669 (noting that the power to issue a "stay" "to preserve the *status quo* pending appeal" is "an incident" of the power "to enjoin" an administrative order); see also *id.*, at 671–672 (referring interchangeably to a three-judge district court's power to issue "injunctions" and "stays"). In any event, both *Scripps-Howard* and *Virginian* are inapposite because petitioner here did not seek to "stay" his removal order pending judicial review of that order; rather, he sought to enjoin the Executive Branch from enforcing his removal order pending judicial review of an entirely separate order. See *Stone* v. *INS*, 514 U. S. 386, 395 (1995) (holding that the IJ's removal order and the Board's denial of a motion to reopen are "two separate final orders"); *Bak* v. *INS*, 682 F. 2d 441, 442 (CA3 1982) *(per curiam)* ("The general rule is that a motion to reopen deportation proceedings is a new, independently reviewable order"); Brief for Respondent 51–52 (differentiating petitioner's challenge to the IJ's removal order, which "became final well over a year ago," from "petitioner's latest challenge[, which] is currently pending" before the Court of Appeals); *id.*, at 13–14, 36–37 (similar).

v. *Anderson,* 95 U. S. 37, 42 (1877) ("[Petitioner] can, if he is wrongfully taxed, stay the proceeding for its collection by process of injunction"); *Nivens* v. *Gilchrist,* 319 F. 3d 151, 153 (CA4 2003) (denial of "injunction" to "stay [a] trial"); *Jove Eng., Inc.* v. *IRS,* 92 F. 3d 1539, 1546 (CA11 1996) (automatic stay is "essentially a court-ordered injunction"). And it is revealing that the standard that the Court adopts for determining whether a stay should be ordered is the standard that is used in weighing an application for a preliminary injunction. *Ante,* at 14 (adopting preliminary injunction standard set out in *Winter* v. *Natural Resources Defense Council, Inc.*, 555 U. S. ___, ___ (2008) (slip op., at 14)).

2

Second, the context surrounding IIRIRA's enactment suggests that §1252(f)(2) was an important—not a superfluous—statutory provision. This Court should interpret it accordingly.

IIRIRA was designed to expedite removal and restrict the ability of aliens to remain in this country pending judicial review. Before IIRIRA, the filing of a petition for review automatically stayed removal unless the court of appeals directed otherwise. 8 U. S. C. §1105a(a)(3) (1994 ed.) (repealed 1996). IIRIRA repealed this provision and, to drive home the point, specifically provided that "[s]ervice of the petition [for judicial review] . . . *does not* stay the removal of an alien pending the court's decision on the petition, unless the court orders otherwise." §1252(b)(3)(B) (2006 ed.) (emphasis added). In addition, "many provisions of IIRIRA are aimed at protecting the Executive's discretion from the courts." *Reno* v. *American-Arab Anti-Discrimination Comm.*, 525 U. S. 471, 486 (1999) (emphasis deleted). Indeed, "protecting the Executive's discretion from the courts . . . can fairly be said to be the theme of the legislation." *Ibid.* Section 1252(f)(2),

which provides that a court may not block removal during the judicial review process unless a heightened standard is met, fits perfectly within this scheme.

The Court's interpretation, by contrast, produces anomalous results. If §1252(f)(2) does not provide the standard to be used by the courts in determining whether an alien should be permitted to remain in this country pending judicial review, then IIRIRA left the formulation of that standard entirely to the discretion of the courts. A Congress that sought to expedite removal and limit judicial discretion is unlikely to have taken that approach.

More important, if §1252(f)(2) does not set the standard for blocking removal pending judicial review, then, as the Court concedes, "the exact role of subsection (f)(2) . . . is not easy to explain." *Ante*, at 12. "In construing a statute we are obliged to give effect, if possible, to every word Congress used." *Reiter* v. *Sonotone Corp.*, 442 U. S. 330, 339 (1979). We should not lightly conclude that Congress enacted a provision that serves no function, and the Court's hyper-technical distinction between an injunction and a stay does not provide a sufficient justification for adopting an interpretation that renders §1252(f)(2) meaningless. That result is particularly anomalous in the context of §1252(f)(2), which Congress said should apply "[n]otwithstanding any other provision of law."

3

Third, if stays and injunctions really are two entirely distinct concepts, the order that petitioner sought here is best viewed as an injunction. Insofar as there is a difference between the two concepts, I agree with the Court that it boils down to this: "A stay 'simply suspend[s] judicial alteration of the status quo,'" whereas an injunction "'grants judicial intervention that has been withheld by lower courts.'" *Ante*, at 9 (quoting *Ohio Citizens for Responsible Energy, Inc.* v. *NRC*, 479 U. S. 1312, 1313 (1986)

(SCALIA, J., in chambers)). See also Black's 1413 (defining a stay as an "act of arresting a judicial proceeding by the order of a court"). Here, petitioner did not seek an order "suspend[ing] judicial alteration of the status quo." Instead, he sought an order barring Executive branch officials from removing him from the country. Such an order is best viewed as an injunction. See *McCarthy* v. *Briscoe*, 429 U. S. 1317, 1317, n. 1 (1976) (Powell, J., in chambers) (although applicants claimed to seek a "stay," the court granted an "injunction" because "the applicants actually [sought] affirmative relief" against executive officials).

Even if petitioner had sought to block his removal pending judicial review of the order of removal, any interim order blocking his removal would best be termed an injunction. When the Board affirmed petitioner's final removal order in 2006, it gave the Executive Branch all of the legal authority it needed to remove petitioner from the United States immediately. An order preventing an executive officer from exercising that authority does not "simply suspend judicial alteration of the status quo." *Ohio Citizens for Responsible Energy*, *supra*, at 1313. Instead, such an order is most properly termed an injunction because it blocks executive officials from carrying out what they view as proper enforcement of the immigration laws. And in that regard, it is significant that the Hobbs Act—which governs judicial review under IIRIRA, see 8 U. S. C. §1252(a)(1)—refers to an "application for an *interlocutory injunction* restraining or suspending the enforcement, operation, or execution of, or setting aside" a final administrative order. 28 U. S. C. §2349(b) (emphasis added).

In the present case, however, petitioner did not seek to block his removal pending judicial review of his final order of removal. That review concluded long ago. What petitioner asked for was an order barring the Executive Branch from removing him pending judicial review of an

entirely different order, the Board's order denying his third motion to reopen the proceedings. Petitioner's current petition for review does not contest the correctness of the removal order. Rather, he argues that the Board should have set aside that order due to alleged changes in conditions in his home country. A motion to reopen an administrative proceeding that is no longer subject to direct judicial review surely seeks "'an order *altering* the status quo.'" *Ante,* at 9 (quoting *Turner Broadcasting System, Inc.* v. *FCC*, 507 U. S. 1301, 1302 (1993) (Rehnquist, C. J., in chambers)). Consequently, the relief that petitioner sought here is best categorized as an injunction.

III

In addition to its highly technical distinction between an injunction and a stay, the Court advances several other justifications for its decision, but none is persuasive.

The Court argues that applying 8 U. S. C. §1252(f)(2) would "deprive" us of our "'customary' stay power." *Ante*, at 13. As noted above, however, restricting judicial discretion was "the theme" of IIRIRA, *American-Arab Anti-Discrimination Comm.*, 525 U. S., at 486. And Congress is free to regulate or eliminate the relief that federal courts may award, within constitutional limits that the Court does not invoke here. Cf. *INS* v. *St. Cyr*, 533 U. S. 289, 299–300 (2001).

The Court opines that subsection (b)(3)(B)—not subsection (f)(2)—is "the natural place to locate an amendment to the traditional standard governing the grant of stays." *Ante*, at 11. But I would not read too much into Congress' decision to locate such a provision in one subsection rather than in another subsection of the same provision. In addition, there is also nothing "unnatural" about Congress' use of two separate subsections of §1252 to address a common subject. For example, §1252(a)(2)(A) lists several

matters over which "no court shall have jurisdiction to review," while §1252(g) lists another subject over which "no court shall have jurisdiction to hear any cause or claim." The fact that those provisions are separated by five subsections and framed in slightly different terms does not justify ignoring them, just as the space and difference in terminology between §1252(b)(3)(B) and §1252(f)(2) cannot justify the Court's result.

Noting that the term "stay" is used in §1252(b)(3)(B) but not in §1252(f)(2), the Court infers that Congress did not intend that the latter provision apply to stays. *Ante*, at 10–11. But the use of the term "stay" in subsection (b)(3)(B) is easy to explain. As noted above, prior to IIRIRA, the Immigration and Nationality Act provided for an automatic "stay" of deportation upon the filing of a petition for review unless the court of appeals directed otherwise. See 8 U. S. C. §1105a(a)(3) (1994 ed.) (repealed 1996). The statute provided:

> "The service of the petition for review upon [the Attorney General's agents] shall *stay* the deportation of the alien pending determination of the petition by the court . . . unless the court otherwise directs . . . ." *Ibid.* (emphasis added).

In IIRIRA, Congress repealed that provision and, to make sure that the pre-IIRIRA practice would not be continued, enacted a new provision that explicitly inverted the prior rule:

> "Service of the petition on the officer or employee does not *stay* the removal of an alien pending the court's decision on the petition, unless the court orders otherwise." §1252(b)(3)(B) (2006 ed.) (emphasis added).

It is thus apparent that §1252(b)(3)(B) uses the term "stay" because that is the term that was used in the provision that it replaced.

Finally, the Court worries that applying §1252(f)(2) would create inequitable results by allowing removable aliens to remain in the United States only if they can prove the merits of their claims under a "higher standard" than the one they would otherwise have to satisfy. *Ante*, at 13. But as the Court acknowledges, *ante*, at 4, IIRIRA specifically contemplated that most aliens wishing to contest final orders of removal would be forced to pursue their appeals from abroad. See §306(b), 110 Stat. 3009–612 (repealing 8 U. S. C. §1105a (1994 ed.)). If such an alien seeks to remain in the United States pending judicial review, IIRIRA provides that the alien must make the heightened showing required under §1252(f)(2). Congress did not think that this scheme is inequitable, and we must heed what §1252(f)(2) prescribes.

* * *

In my view, the Fourth Circuit was correct to apply §1252(f)(2) and to deny petitioner's application for an order barring his removal pending judicial review. Therefore, I would affirm the judgment of the Court of Appeals.