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1 IN THE SUPREME COURT OF THE UNITED STATES

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3 AGRON KUCANA, :

4 Petitioner :

5 v. : No. 08-911

6 ERIC H. HOLDER, JR., :

7 ATTORNEY GENERAL :

8 - - - - - x

9 Washington, D.C.

10 Tuesday, November 10, 2009

11

12 The above-entitled matter came on for oral
13 argument before the Supreme Court of the United States
14 at 10:04 a.m.

15 APPEARANCES:

16 RICK M. SCHOENFIELD, ESQ., Chicago, Ill.; on behalf of
17 the Petitioner.

18 NICOLE A. SAHARSKY, ESQ., Assistant to the
19 Solicitor General, Department of Justice, Washington,
20 D.C.; on behalf of the Respondent in support of the
21 Petitioner.

22 AMANDA C. LEITER, ESQ., Washington, D.C.; as amicus
23 curiae in support of the judgement below. Invited to
24 brief and argue.

25

Official - Subject to Final Review

1	C O N T E N T S	
2	ORAL ARGUMENT OF	PAGE
3	RICK M. SCHOENFIELD, ESQ.	
4	On behalf of the Petitioner	3
5	NICOLE A. SAHARSKY, ESQ.	
6	On behalf of the Respondent in support of	
7	the Petitioner	13
8	AMANDA C. LEITER, ESQ.	
9	As amicus curiae in support of the judgement	
10	below	29
11	REBUTTAL ARGUMENT OF	
12	RICK SCHOENFIELD, ESQ.	
13	On behalf of the Petitioner	54
14		
15		
16		
17		
18		
19		
20		
21		
22		
23		
24		
25		

Official - Subject to Final Review

1
2
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P R O C E E D I N G S

(10:04 a.m.)

CHIEF JUSTICE ROBERTS: We will hear argument first this morning in Case 08-911, Kucana v. Holder.

Mr. Schoenfield.

ORAL ARGUMENT OF RICK M. SCHOENFIELD

ON BEHALF OF THE PETITIONER

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

In enacting section 1252(a)(2)(B), Congress limited its reduction of judicial review to where the authority for the Attorney General's discretion is specified under subchapter 2 of chapter 12 of Title 8.

Congress did not express any intent to remove the Court's jurisdiction to review discretionary decisions, the authority for which is specified under any other subchapter or in regulations, nor did Congress express any intent to delegate its constitutional responsibility to determine Federal jurisdiction to the Attorney General --

CHIEF JUSTICE ROBERTS: Under what authority were these regulations issued?

MR. SCHOENFIELD: The regulation that grants discretion with regard to motions to reopen comes from a

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1 section in subchapter 1, not subchapter 2, of the
2 regulations. And that was authorized by section 1103 of
3 Title 8.

4 I should say it authorized the statute for
5 the regulations in subchapter 1, not subchapter 2. And
6 that's --

7 JUSTICE SCALIA: How does that -- how does
8 that read? I -- I recall the briefs say that, but I
9 don't recall reading it. Is it -- does it appear
10 somewhere?

11 MR. SCHOENFIELD: Section 1103, Your Honor?

12 JUSTICE SCALIA: The -- the provision that
13 -- that you contend provides the authority for the
14 Attorney General's regulation.

15 MR. SCHOENFIELD: Section 1103(g)(2)
16 authorizes the Attorney General --

17 JUSTICE SCALIA: I know. Where is it, I'm
18 asking? Is it -- is it in the brief somewhere?

19 You know, it's nice to know what we are
20 talking about. When -- when you are relying on a
21 section, it would be nice to have it in the materials.
22 I mean, I guess I could send for it, but --

23 MR. SCHOENFIELD: Sure. It -- it indicates
24 on page 18 of the reply brief, that, quote, "Establish
25 such regulations... as he deems necessary for carrying

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1 out his authority under the provisions of this chapter."

2 The fact that the statute we are focused on
3 states that authority must be specified in this
4 subchapter -- being subchapter 2 --

5 JUSTICE GINSBURG: 2. The -- the key word
6 that is emphasized in this case is, it's "under,"
7 instead of "in."

8 MR. SCHOENFIELD: The words used in the --
9 in the statute is "under," which, of course, has a
10 variety of definitions. We believe that taking the
11 statute in context, that the correct definition to apply
12 is "according to" or "within."

13 JUSTICE GINSBURG: It would be clearer if
14 they had said "in."

15 MR. SCHOENFIELD: Congress could have said
16 "in," but I think Congress made it clear by using the
17 phrase "authority specified under," so we are not -- we
18 don't have a situation where, as Congress usually would
19 do, they would say "a regulation under such-and-such a
20 statute," where Congress uses the word "regulation."
21 There is the -- the term "regulation" is not used in the
22 statute.

23 CHIEF JUSTICE ROBERTS: If you were to
24 evaluate the validity of the regulation, as opposed to,
25 like, an APA case or similar to that, what statutory

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1 provision would you look to to see if the regulation was
2 consistent with that statutory provision?

3 MR. SCHOENFIELD: We would look to section
4 1103 in subchapter 1.

5 JUSTICE SCALIA: So it really doesn't matter
6 what "under" means, right? I mean, even -- even if you
7 accept the other interpretation of "under," to wit, that
8 it includes regulations pursuant to the subchapter, your
9 point is that this regulation is not even pursuant to
10 the subchapter.

11 MR. SCHOENFIELD: That's absolutely correct,
12 Your Honor. Although we don't think regulations are
13 included, even if they were, it's not in the subchapter.

14 JUSTICE SCALIA: I understand. Yes.

15 CHIEF JUSTICE ROBERTS: Well, but -- is that
16 right? Would -- would subchapter 1 give you much
17 insight into the scope of the regulation and how it was
18 a fair interpretation of the authority under which the
19 Attorney General purported to act?

20 MR. SCHOENFIELD: I think that in terms of
21 looking at the discretion of the Attorney General,
22 historically, on motions to reopen, there have been --
23 there has been discretion.

24 What the regulation did was to codify that
25 historical authority and to be consistent with what the

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1 Court said is always done, but I think, in interpreting
2 the scope of Congress's intent to reduce judicial
3 review, we need to be very careful about that,
4 obviously. And so, therefore, when it says "as under
5 authority specified in this subchapter," we need to find
6 the authority in the subchapter, which we don't.

7 JUSTICE KENNEDY: The -- the subchapter 2
8 does talk about a special rule on reopening for battered
9 spouses, children, and parents. Is that a statute where
10 the discretion is committed to the Attorney General?

11 MR. SCHOENFIELD: No, Your Honor, because
12 subchapter 2 does not say that the Attorney General has
13 discretion to decide motions to reopen. That language
14 is only found in the regulation. The only reference--

15 JUSTICE KENNEDY: So it -- so, absent the
16 regulation, you would interpret the statute as saying
17 there is no discretion?

18 MR. SCHOENFIELD: Absent the regulation, I
19 would interpret the statute as being silent as to the --

20 JUSTICE KENNEDY: No, that wasn't my
21 question. Let's say there is no regulation. And the
22 statute says, number one, there shall -- so subchapter 2
23 of the statute says, number one, there shall be motions
24 to reopen, and then there is a special rule for battered
25 spouses.

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1 Now, you would interpret that statute,
2 absent any regulation, as saying this is not within the
3 discretion of the Attorney General?

4 MR. SCHOENFIELD: I would interpret the
5 statute as not providing for discretion, yes, Your
6 Honor.

7 JUSTICE KENNEDY: Well, how does an Attorney
8 General decide without -- without using discretion? He
9 must grant, in any case? Whether a battered spouse
10 waits for 15 years, he must grant?

11 Just under the statute, now.

12 MR. SCHOENFIELD: No.

13 JUSTICE KENNEDY: This is hypothetical.

14 MR. SCHOENFIELD: Yes.

15 No. I'm -- I'm not trying to say that, Your
16 Honor. What I'm trying to say is --

17 JUSTICE KENNEDY: Well, then there must be a
18 discretionary component implicit.

19 MR. SCHOENFIELD: I would disagree in -- in
20 this way: If the statute is silent as to whether there
21 is discretion, the Court can look to -- the Court could
22 look to other sources to determine --

23 JUSTICE GINSBURG: Could you clarify, what
24 is the provision about battered spouses? I thought that
25 that had to do with you could have more than one

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1 petition to reopen.

2 MR. SCHOENFIELD: That's correct, Your
3 Honor.

4 JUSTICE GINSBURG: But the rule is, you may
5 reopen once in that -- that provision on battered
6 spouses, but if you are in that category, you can reopen
7 again?

8 MR. SCHOENFIELD: I believe that's correct,
9 Your Honor. I believe that the provision on battered
10 spouses creates in a -- allows you to bring more than
11 one motion to reopen. It does -- it does not address
12 the issue of discretion.

13 JUSTICE SCALIA: Why -- why would it -- I
14 don't -- the big obstacle I find with your position is
15 that it doesn't make any sense.

16 Why would Congress want to exclude review
17 for discretionary judgments by the Attorney General that
18 are recited explicitly to be discretionary in the
19 statute, but provide judicial review for judgments that
20 are just as lawfully discretionary because the Attorney
21 General is given the authority to make them
22 discretionary and has done so?

23 I mean, a discretionary judgment is a
24 discretionary judgment. Why -- at least if it's a
25 legitimate one, I can understand why you would say

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1 discretion which is given to the Attorney General under
2 the statute, as opposed to discretion which he has
3 wrongfully assumed, but -- but both -- both exercises of
4 discretion are just as lawful, right, under the statute?
5 One is explicit in the statute, and the other is
6 pursuant to the authority of the Attorney General to
7 make it discretionary.

8 Why would Congress want the one to be
9 subject to judicial review and not the other?

10 MR. SCHOENFIELD: Judicial review of motions
11 to reopen has -- has been the traditional normal process
12 for the Court to take. I think what Congress was doing
13 here was saying: In certain specified instances, we are
14 going to remove judicial review, but not in all
15 instances.

16 And the question is, where did Congress draw
17 the line?

18 JUSTICE SCALIA: Yes, and I'm saying: Why
19 is it a rational line to say -- I think it's a rational
20 line to say, when lawful discretion is being exercised,
21 since it's a discretionary judgment, you're not entitled
22 to it anyway, and therefore, we won't review it. That
23 makes some sense.

24 And I -- but where discretion is lawfully
25 exercised, why would -- why would Congress go, Oh, when

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1 the discretion is lawfully exercised because the statute
2 says so, we have one approach, but where discretion is
3 lawfully exercised only because the statute allows the
4 Attorney General to prescribe discretion, we will not
5 allow? I don't understand why -- why it would want to
6 do that.

7 MR. SCHOENFIELD: Well, let me suggest
8 several reasons, Your Honor.

9 JUSTICE SCALIA: Okay.

10 MR. SCHOENFIELD: First, if the Court was to
11 read the statute as allowing a regulation to create
12 discretion and, therefore, to remove judicial review --

13 JUSTICE SCALIA: Well, you -- you don't --
14 you don't contest that the regulation can provide
15 discretion. You -- you don't say the regulation is
16 invalid.

17 MR. SCHOENFIELD: That's correct.

18 JUSTICE SCALIA: So it is a valid exercise
19 of discretion, right?

20 MR. SCHOENFIELD: And courts frequently
21 review decisions for abuse of discretion. And motions
22 to reopen, I would suggest, are particularly important
23 because it creates a safety net for review. It deals
24 with -- like, rule 60 of the Federal rules deals with
25 potentially new evidence, matters that weren't available

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1 to bring initially, and it's important that potential
2 mistakes be reviewed.

3 JUSTICE KENNEDY: I just want to return for
4 a moment to the battered spouse provision. The battered
5 spouse provision specifically says that in the Attorney
6 General's discretion, he may waive the time limit for
7 the one year for the battered spouse.

8 Now, that surely is discretion specified --
9 and I think the word "specified" is important here --
10 specified in subchapter 2. So there should be no
11 judicial review as to that.

12 You would have to agree with that, wouldn't
13 you?

14 MR. SCHOENFIELD: Yes, as to the -- as to
15 waiving -- as to waiving the -- on the number of
16 motions, yes. From that point on.

17 JUSTICE KENNEDY: All right. So then the
18 thing that Congress cares about most is something the
19 Court can't review. That is counterintuitive.

20 MR. SCHOENFIELD: Congress specified some 30
21 instances of discretion to the Attorney General in
22 subchapter 2, and I believe it drew the line there and
23 said, if we did not specify it in subchapter 2, then it
24 is reviewable, just as courts have traditionally
25 reviewed these matters.

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1 JUSTICE GINSBURG: The ones that have been
2 codified by statute, those prior to the codification
3 will, by regulation. Is that -- is that so?

4 MR. SCHOENFIELD: The regulation regarding
5 motions to reopen existed before the statute. Congress
6 could readily have made that part of the statutory
7 scheme if it had chosen to do so, but it did not.

8 If there are no further questions, I would
9 like to reserve the rest of my time for rebuttal.

10 CHIEF JUSTICE ROBERTS: Thank you, Counsel.
11 Miss Saharsky.

12 ORAL ARGUMENT OF NICOLE A. SAHARSKY

13 ON BEHALF OF THE RESPONDENT

14 IN SUPPORT OF THE PETITIONER

15 MS. SAHARSKY: Mr. Chief Justice, and may it
16 please the Court:

17 The statute at issue does not bar judicial
18 review of denials of motions to reopen. And I would
19 like to go right to one of the questions that was asked
20 by Justice Scalia, which is: How do you make sense out
21 of this statute, in terms of what Congress is doing in
22 not allowing judicial review of specifications of
23 discretion in regulations, but -- I'm sorry, and
24 allowing judicial review of things that are specified in
25 regulations, but not things that are specified in the

Official - Subject to Final Review

1 subchapter?

2 And I think that the answer to this question
3 comes from the text of the statute, particularly if you
4 compare the two things that are in 1252(a)(2)(B)(i) and
5 (ii), that all of the things that are listed in (i) and
6 that are covered by (ii) are subsumate decisions that
7 are made by the Executive in the immigration context as
8 a matter of grace, things that involve whether aliens
9 can stay in the country or not. And those are matters,
10 at the end of the day, that the Executive, in the
11 exercise of its immigration and foreign affairs power,
12 has the authority to decide and that Congress did not
13 want the Federal courts in the business of reviewing.

14 But what the Federal courts have often
15 reviewed are things where discretion is committed by
16 regulation, and these are procedural matters that
17 relates to whether an alien had a fair shot of getting
18 his claim heard by the agency and by the Federal courts.
19 Things like --

20 JUSTICE KENNEDY: What about my question
21 with reference to motions to -- to reopen? That is
22 specified under subchapter 2. That's right there in
23 subchapter 2: There shall be a motion to reopen.

24 Now, if you had no regulations on it,
25 wouldn't you say that would be within the discretion of

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1 the Attorney General?

2 MS. SAHARSKY: I would say that the Attorney
3 General has the discretion to issue regulations with
4 regard to --

5 JUSTICE KENNEDY: No. No, that's not my
6 question. Hypothetical; not a real case. Just a
7 hypothetical.

8 MS. SAHARSKY: Yes.

9 JUSTICE KENNEDY: Just so we can talk about
10 the statute. The statute says there -- subchapter 2,
11 the one we are most interested in, specifies -- and
12 that's one of the words -- that there shall be a motion
13 to reopen.

14 Now, don't you think that's within the
15 discretion of the Attorney General absent any
16 regulations.

17 MS. SAHARSKY: Yes, because the statute --

18 JUSTICE KENNEDY: All right. So absent a
19 regulation, there would be jurisdiction stripping under
20 that provision, right?

21 MS. SAHARSKY: No.

22 JUSTICE KENNEDY: Why?

23 MS. SAHARSKY: Because in the case that you
24 are positing, the discretion of the Attorney General is
25 implicit in the statute. It's not specified in the

Official - Subject to Final Review

1 statute. And here, Congress didn't say any time there
2 is a discretionary decision, which is what implicit
3 discretion would go to. It says: When discretionary
4 authority is specified.

5 Under this subchapter, that means that there
6 needs to be something specific, specified, explicit,
7 specifically noted in the text of the statute.

8 JUSTICE KENNEDY: All right. But you would
9 give me, or would you, the concession that -- or
10 agreement that the Attorney General's discretion to
11 waive the time limit for battered spouses is committed
12 to him? And that's non-judiciary review, wouldn't you
13 think?

14 MS. SAHARSKY: That's right. That wouldn't
15 be reviewable. Congress viewed the language of
16 discretion --

17 JUSTICE KENNEDY: Again, that seems odd,
18 that the thing Congress cares about so much that it
19 makes a specific provision can't be subject to judicial
20 review.

21 MS. SAHARSKY: I think that that is like the
22 -- the various matters that Congress listed as specified
23 as discretionary within the text of the relevant
24 subchapter, that it decided that this was a matter of
25 Executive grace that it did not want the Federal courts

Official - Subject to Final Review

1 involved in.

2 But the Federal courts have long reviewed
3 things like denials of motions to reopen, continuance
4 denials, where you have a situation in which the Federal
5 courts wanted to make sure that aliens were getting a
6 fair chance to have their claims heard.

7 JUSTICE BREYER: So, in fact, if -- what we
8 have is a motion in the category of grace, except for
9 asylum, saying, of course, the Justice Department makes
10 a decision that can't be reviewed. But then the
11 department, let's imagine, has a regulation, and it
12 says: Anyone can ask the department for rehearing in
13 such a matter, and we'll decide as a matter of grace
14 whether to give you one.

15 Now, you're saying that would be reviewed?

16 MS. SAHARSKY: No, I'm not saying that.

17 JUSTICE BREYER: Why wouldn't it be
18 reviewed? You just said it was. You said every
19 procedural decision is reviewed, which to me, makes no
20 sense to begin with, because I can't imagine that
21 Congress, while they don't want them to review the
22 substance at all, is perfectly happy to have the courts
23 review every detailed matter of extra time to file a
24 brief, extra time to have an oral argument. All those
25 matters would be reviewable, I guess, in your view.

Official - Subject to Final Review

1 MS. SAHARSKY: Two answers, Your Honor.
2 First, the standard review here is abuse of discretion.
3 It has long been abuse of discretion. That doesn't mean
4 the Federal courts are involved in second-guessing --

5 JUSTICE BREYER: Exactly the same is true of
6 the substantive decision. I mean, that has nothing to
7 do with it.

8 I want to know -- look, this is where I'm
9 going. I don't think your -- I can't find a reading of
10 this statute that makes sense, except for one which I am
11 trying on, and I'm sure there is a lot wrong with it,
12 that what Congress meant to do here is to take all the
13 procedural decisions including reopening ones, and treat
14 them the same way that they are treating the substantive
15 decisions. So that in his case, he wins. Because he
16 gets review of the substance, he should get review of a
17 reopening. It's the same thing. And in some other
18 case, they'd lose, because if you don't get review of
19 the substance, you shouldn't get review of the
20 reopening. Both are the same thing. They are just
21 filed at different times.

22 So that, to me, is the only reading of this
23 statute that I have yet found that made sense. But
24 since no one argues for it, I'm sure I must be making
25 some huge mistake. But that's what you can tell me.

Official - Subject to Final Review

1 MS. SAHARSKY: I don't think you are. If I
2 am understanding you correctly, we actually have a
3 footnote in our opening brief where --

4 JUSTICE BREYER: Yeah, but you are on the
5 wrong side, if you agree with it, because -- no, you are
6 on the right side, because he wins. No, you're on the
7 right side. He wins. I take that back. I'm sorry.

8 MS. SAHARSKY: Well, let me try to explain.
9 There are a number of matters that are committed to the
10 Agency's discretion after (i), things like adjustment of
11 status. And if the alien sought review, judicial
12 review, of an adjustment of status determination, we
13 would say that's unreviewable under -- under (i).

14 Let's say that he then files a motion to
15 reopen. Well, he is essentially trying to relitigate
16 his adjustment of status.

17 JUSTICE BREYER: Oh, but -- well, new things
18 have happened. He doesn't just want to relitigate it.
19 New things have happened; that's why he wants it
20 reopened.

21 MS. SAHARSKY: What the courts of appeals
22 have said is if what he's challenging is a discretionary
23 determination that the Executive has already made, that
24 that motion to reopen would not be --

25 JUSTICE BREYER: No, he's not, but his

Official - Subject to Final Review

1 motion to reopen is -- it's my hypothetical; I want to
2 deal with it; I accept yours. My hypothetical is,
3 something new came up. That's why he wants it reopened.

4 MS. SAHARSKY: If something new came up --

5 JUSTICE BREYER: Something new came up.

6 That's why he -- I think, isn't it true, often people
7 want it reopened because something new came up?

8 MS. SAHARSKY: Well, certainly that's what
9 the statute requires them to do. It's not our
10 experience that every case that's filed is that way.

11 But in your hypothetical, when something new
12 comes up, we understand Congress as have -- wanting that
13 to have been judicially reviewable.

14 JUSTICE BREYER: And I'm asking you, what
15 possible sense could it make?

16 MS. SAHARSKY: Because Congress wants to
17 make sense that the alien is getting -- make sure that
18 the alien is getting a fair shot in terms of the
19 process.

20 JUSTICE BREYER: Look, we're -- two issues.
21 One is grace in respect to -- let's call it fraud, and
22 he loses. Something new comes up, and what does he
23 want? Grace in respect of fraud in light of this new
24 fact.

25 Now, my question would be: What possible

Official - Subject to Final Review

1 sense does it make to say the courts cannot review the
2 first, but they could review the second?

3 MS. SAHARSKY: If what he's seeking is a
4 review of an exercise of discretion, then that is not
5 reviewable, because of the reason that the initial
6 determination is not reviewable.

7 JUSTICE BREYER: Oh, by the way, this
8 reopening is done by regulation, not done by statute.
9 That's where I get to the problem.

10 You are trying to distinguish between
11 whether it's done by regulation or done by statute. And
12 I'm trying to distinguish on a very different context.
13 Treat the motion to reopen the same as you treat the
14 initial motion, whether it's done by regulation or
15 whether it's done by statute.

16 MS. SAHARSKY: Right, and what I'm
17 suggesting is that the difference there is between a
18 substantive determination that's a matter of grace and a
19 procedural determination to make sure that an alien gets
20 a fair shot, and --

21 CHIEF JUSTICE ROBERTS: Counsel, I -- I'm
22 sorry, do you want to finish?

23 Okay.

24 I -- I find it curious -- and maybe you can
25 illuminate it for me -- that the Justice Department is

Official - Subject to Final Review

1 before us, arguing that the Justice Department can't be
2 trusted without judicial review. And I find that doubly
3 curious when the Justice Department won on the opposite
4 position below.

5 I mean, are you suggesting that the statute
6 is so absolutely clear that you could not stand there
7 and say that your colleague down the hall in the Justice
8 Department could be trusted to exercise his discretion,
9 but in fact you are saying: I know we won on that, but
10 we are not going to defend it because we think the
11 Attorney General needs judicial review to help him stay
12 in line?

13 MS. SAHARSKY: In the vast majority of
14 cases, of course we believe that the Board can be
15 trusted, and that's why review is for an abuse of
16 discretion, and it has been for many years. This Court
17 has said in Dada --

18 CHIEF JUSTICE ROBERTS: Yes, but if you take
19 -- if you continued to argue the position you won on
20 before the -- before the Seventh Circuit, it wouldn't be
21 that the standard of review is -- is so deferential that
22 it is okay. It would be there is no review at all.

23 MS. SAHARSKY: That's right, but we did not
24 argue to the Seventh Circuit that there was no
25 jurisdiction here.

Official - Subject to Final Review

1 In fact, it has been our position since 2004
2 that the text of this statute, particularly the text,
3 the context, the history, is so clear that we could not
4 reasonably take the alternate position in --

5 CHIEF JUSTICE ROBERTS: And the position of
6 the Department of Justice was the opposite before 2004,
7 correct?

8 MS. SAHARSKY: There are only a handful of
9 cases, and in those cases, several individual attorneys
10 argued that there was no jurisdiction. And as soon as
11 the leadership of the Office of Immigration Litigation
12 heard of those cases, it sat down with the text of the
13 statute and said: We think that the text here is clear,
14 and we don't think the jurisdiction is taken away. And
15 it directed all of the attorneys in the Office of
16 Immigration and Litigation not to be making this
17 jurisdiction-stripping argument any more.

18 And it has been the United States's
19 consistent position since then, and we urged it to the
20 Seventh Circuit below, that when you look at the text of
21 the statute, you look at authorities specified under
22 this subchapter. It is Congress that specifies
23 authority. "Specified under this subchapter" means "in
24 this subchapter." It means "in the text of the
25 subchapter." And we have to answer this question in

Official - Subject to Final Review

1 this case by looking at the text that Congress enacted.

2 I acknowledge that there is not legislative
3 history, for example, to tell us what Congress intended
4 to do here, but we think that the answer comes from the
5 text of the statute. That if you are looking at the
6 substantive determinations that Congress was most
7 concerned about in 1996 when it enacted IIRIRA, those
8 were the things where Executive discretion was
9 exercised. It did not want the Federal courts getting
10 involved in --

11 JUSTICE KENNEDY: Can you give me an idea of
12 how many motions to reopen are brought to the courts for
13 review each year?

14 MS. SAHARSKY: Well, there are approximately
15 between 8 and 10,000 motions to reopen filed by the
16 Board of -- before the Board of Immigration Appeals each
17 year, and about between 15 and 20 percent of those are
18 granted.

19 So if you look at the -- the remaining 80 to
20 85 percent that are denied, the general appeal rate for
21 the courts of appeals is about 30 percent from the Board
22 of Immigration Appeals. So if you assume that the
23 appeal rate is about the same for motions to reopen, you
24 could get a number that way. So, you know, we -- there
25 are a substantial number of --

Official - Subject to Final Review

1 JUSTICE KENNEDY: So we are talking about 2
2 or 3,000 petitions to the court each year?

3 MS. SAHARSKY: But the -- the point that we
4 are making is that there are these circumstances that
5 Congress has recognized, and this Court recognized it in
6 Dada. The motions to reopen serve several important
7 purposes, and, yes, they are reviewed under a very
8 deferential abuse-of-discretion standard. We do not
9 think in many cases that the Board was doing something
10 wrong and that it needs to be overturned.

11 But, for example, in the -- in a similar
12 context of continuance denials, say there was an
13 immigration judge who did not allow an alien to seek a
14 continuance in order to get an attorney to bring forth
15 his case before the immigration judge. Continuance
16 denials, some circuits, including the Seventh Circuit,
17 have said, are barred under this language.

18 We don't think that judicial review of that
19 is barred. We think that in the rare case --

20 JUSTICE KENNEDY: Well, because that would
21 be a question of law which is accepted.

22 MS. SAHARSKY: I -- I am not sure that it
23 would be a question of law in that circumstance.

24 CHIEF JUSTICE ROBERTS: So if you think it's
25 so bad, the Attorney General doesn't have to do it. Why

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1 do you need a court to tell you that?

2 MS. SAHARSKY: I think that the courts have
3 long served a very important check on the Board's
4 authority and on the Board's exercise, and the Board has
5 many cases before it. In rare instances, the Federal
6 courts --

7 CHIEF JUSTICE ROBERTS: You keep saying "the
8 Board." You keep saying "the Board." Under the
9 statute, it is the Attorney General, correct?

10 MS. SAHARSKY: Yes, that's right, but the
11 statute also -- the Attorney General -- the Board acts
12 on behalf of the Attorney General under the statute,
13 so the Board --

14 CHIEF JUSTICE ROBERTS: And if he doesn't
15 like what they do, he has the authority to act himself.
16 Whenever somebody delegates authority, they retain
17 authority to act themselves.

18 MS. SAHARSKY: That's right. The Attorney
19 General does police the Board, but the courts of appeals
20 have long done that too, particularly in the context of
21 motions to reopen.

22 This Court, just a couple of years ago in
23 Dada, recognized the important functions that motions to
24 reopen serve and assumed that there would be judicial
25 review of motions to reopen. In fact, it noted that

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1 judicial review of motions to reopen, albeit under the
2 abuse-of-discretion standards, goes back to 1916, and we
3 just didn't see anything in 1996 that suggests that
4 Congress wanted to change that. And I think --

5 JUSTICE GINSBURG: Do we know where the
6 motion -- where -- where did it originate? But it -- it
7 was -- we now know it's in the regulations. It's in the
8 statute. But how did motions to reopen BIA decisions
9 originate?

10 MS. SAHARSKY: Before the BIA existed, so
11 back in the 1916 context, there were immigration
12 officers, and you could ask them to reconsider or reopen
13 your case. In -- I think it was 1940 or 1941, the Board
14 came into being, and the Attorney General quickly
15 enacted regulations that provided for either a sua
16 sponte reopening or for the filing of a motion to
17 reopen. And those regulations existed in substantially
18 the same form until 1996, when they were amended to make
19 discretion explicit in the regulation, and the 1996 is
20 essentially the same form that it is in today. So there
21 has -- there has always been an assumption that there
22 could be such a thing as reopening.

23 And I -- I just want to focus on what
24 Congress was doing in 1996, because I think it's very
25 telling. We know that Congress was focused on enacting

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1 bars to judicial review, and we also know that Congress
2 was codifying for the first time an alien's right to
3 file one motion to reopen.

4 But Congress just didn't make any effort to
5 make denials of motions to reopen judicially
6 unreviewable, and that's very telling, because there is
7 any number of ways that Congress could have done that.

8 JUSTICE ALITO: I didn't do the math fast
9 enough in my head when you were answering Justice
10 Kennedy's question, but is he correct that the effect of
11 accepting your argument is about 2,000 additional
12 appeals that -- that the Department of Justice will have
13 to brief and the courts of appeals will have to decide?

14 MS. SAHARSKY: You know, I -- I haven't done
15 the math on that, either, and I think it requires the
16 assumptions that I set out --

17 JUSTICE ALITO: On the assumptions that you
18 made, do you know what the -- the result is?

19 MS. SAHARSKY: I -- I don't, because we
20 haven't calculated the number of motions throughout, and
21 we only have total numbers in the courts of appeals.

22 But let me say, if you are concerned about
23 the burden on the courts of appeals, every court but the
24 Seventh Circuit that has considered the issue has found
25 that the provision at issue doesn't bar judicial review.

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1 So I don't think that --

2 JUSTICE KENNEDY: Have any of those courts
3 said that they don't have a workload problem?

4 MS. SAHARSKY: I think you would know better
5 than I would. We ask the judgment below to be reversed.

6 JUSTICE GINSBURG: May I ask you, before you
7 sit down: Your response to the briefs here suggests
8 that all of this is beside the point because this was
9 the -- a second motion to reopen, and the statute allows
10 only one?

11 MS. SAHARSKY: Well, this is comprehensively
12 addressed in footnote 18 in our reply brief, so I will
13 just address it briefly here, but if you have follow-up
14 questions -- which is: If you look at the statutory
15 language, it says that an alien may file one motion to
16 reopen. It doesn't limit the Attorney General's
17 authority to allow more than one motion to reopen in
18 certain circumstances. And, in fact, it --

19 CHIEF JUSTICE ROBERTS: Thank you, Counsel.
20 Ms. Leiter.

21 ORAL ARGUMENT OF AMANDA C. LEITER

22 AS AMICUS CURIAE SUPPORTING THE JUDGMENT BELOW

23 MS. LEITER: Mr. Chief Justice, and may it
24 please the Court:

25 Congress enacted IIRIRA to reduce the burden

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1 that immigration cases imposed, and continue to impose,
2 on the Federal courts. The plain language of the act
3 strictly limits Federal court jurisdiction to review the
4 discretionary decisions of immigration officials. In
5 fact, as this Court has explained, the theme of the
6 legislation was to protect the Attorney General's
7 discretion from the courts.

8 Section 1252(a)(2)(B)(ii) is central to that
9 theme.

10 Before I discuss the language and meaning of
11 the section, I want to make one point very clear. The
12 section does not preclude judicial review of legal and
13 constitutional claims. Both of those are expressly
14 preserved by section 1252(a)(2)(D).

15 JUSTICE SOTOMAYOR: But that provision came
16 after the original jurisdictional stripping, a number of
17 years after. So why should we look to that to inform
18 what Congress intended at an earlier time with respect
19 to judicial review or the scope of the review?

20 MS. LEITER: Well, I have -- I have two
21 answers to that, Your Honor. The first is, to the
22 extent that the Court is concerned now about taking away
23 judicial review of the really sort of important central
24 motions to reopen, that is not a problem. With respect
25 --

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1 JUSTICE SOTOMAYOR: You are talking about us
2 acting as policymakers. The question is: Why should we
3 be looking to that to define what Congress intended
4 then, when it --

5 MS. LEITER: With respect, Your Honor --

6 JUSTICE SOTOMAYOR: -- stripped jurisdiction
7 earlier or granted it?

8 MS. LEITER: I believe this Court always
9 would have understood and Congress understood that its
10 jurisdiction strip would have had an exception for
11 constitutional claims even as of 1996.

12 In 1988, this Court issued Webster v. Doe,
13 finding that section 701(a)(2), which is quite parallel
14 to this provision, recognizes certain claims as
15 committed to agency discretion by law. Congress --
16 excuse me, this Court in 1988 recognized that provision
17 as requiring a constitutional exception. And I think
18 Congress, acting in 1996, would have recognized that the
19 same -- that there are very similar language in section
20 1252(a)(2)(B)(ii) would also have a constitutional
21 exception.

22 I agree with you that there would not have
23 been a legal exception but for the enactment of
24 1252(a)(2)(D).

25 JUSTICE SOTOMAYOR: Well, couldn't we look

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1 at the fact that when Congress was considering whether
2 to put back into the jurisdiction-stripping statute an
3 exception for constitutional claims, it then knew,
4 because the courts of appeals accepted the Seventh, who
5 just recently did it, were routinely taking jurisdiction
6 over motions to reopen?

7 Don't you think that was the time for them
8 to tell us: Hey, you guys got it wrong; we are going to
9 make motions to reopen statutorily discretionary, so if
10 there is any doubt about this, let's clear up what our
11 intent is?

12 MS. LEITER: Well, Justice Sotomayor,
13 certainly had Congress done that, we wouldn't be here.
14 However, it is not true that the courts of appeals as of
15 that date had been uniform in their view that section
16 1252(a)(2)(B)(ii) did not extend to regulation.

17 None had extended it to motions to reopen,
18 but in *CDI Services v. Reno* in 2002, the Sixth Circuit
19 recognized section 1252(a)(2)(B)(ii) as extending to
20 regulations. That was in the context of a -- a petition
21 for a Visa extension. And *Onyinkwa v. Ashcroft* in 2004,
22 the -- excuse me -- Eighth Circuit similarly recognized
23 that. And then in *Yerkovich v. Ashcroft* in the same
24 year, the Eighth -- excuse me -- the Tenth Circuit also
25 recognized 1252(a)(2)(B)(ii) as extended to regulation.

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1 So the confusion plainly existed as of the
2 date of the real idea. And I think the burden was on
3 Congress, frankly, in that position, actually to clarify
4 the reverse. If Congress wanted to make clear at that
5 point --

6 JUSTICE SOTOMAYOR: Wait a minute, you
7 are -- you are arguing from a real negative, because
8 some courts had said that other statutes were covered by
9 the jurisdictional bar. You are arguing that they knew
10 that no court had held that motions to reopen -- that
11 there was no jurisdiction for motions to reopen, that
12 somehow it should have --

13 MS. LEITER: With respect, Your Honor, it is
14 the same statute as section 1252(a)(2)(B)(ii). And they
15 were holding exactly what the Seventh Circuit held and
16 what we argue here, which is that section
17 1252(a)(2)(B)(ii) extends two things specified as
18 discretionary in regulations issued under the act.

19 They had not yet considered the issue with
20 respect to motions to reopen, but with respect to other
21 issues specified as discretionary in regulation, they
22 held that the -- that the act clearly extended to those
23 issues and stripped the courts of jurisdiction.

24 JUSTICE GINSBURG: But on the motion to
25 reopen, there is -- Seventh Circuit stands alone,

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1 doesn't it?

2 MS. LEITER: It does, Your Honor.

3 JUSTICE GINSBURG: And how many circuits are
4 on the other side?

5 MS. LEITER: I believe there are six.

6 JUSTICE GINSBURG: Was there any -- ever a
7 decision in any of those six circuits that went the way
8 the Seventh Circuit went on the motion to reopen?

9 MS. LEITER: No, Your Honor. And that
10 appears to be because the circuits, even the Sixth,
11 Eighth, and Tenth, were persuaded by the existence of
12 the consolidation provision, section 1252(b)(6), but
13 motions to reopen should for some reason be treated
14 differently than other things specified as discretionary
15 in regulations. But their --

16 JUSTICE SCALIA: Have they adhered -- have
17 those other courts that you said originally said that
18 other discretionary judgments made discretionary by
19 regulation were non-reviewable, have they adhered to
20 the -- to that view as to those other --

21 MS. LEITER: They have not repudiated the
22 view, but they have not adhered to it with respect to
23 motions to reopen. They seem to be reading the
24 statute --

25 JUSTICE SCALIA: Oh, I understand. I am

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1 asking: Have they treated motions to reopen
2 differently?

3 MS. LEITER: Yes, they seem to treat motions
4 to reopen differently as reviewable, and they have been
5 persuaded to do that by the existence of section
6 1252(b)(6), the consolidation provision.

7 But as I explained earlier --

8 JUSTICE SCALIA: Has any of them, since
9 switching to -- or since holding this with respect to
10 motions to reopen, reaffirmed their view with regard to
11 other discretionary judgments?

12 MS. LEITER: Not that I have found, Your
13 Honor, but nor have they repudiated it. I haven't found
14 a situation in which, after considering motions to
15 reopen, they went back again to consider -- do the
16 extensions, for example.

17 JUSTICE KENNEDY: But we are talking about
18 what is specified under subchapter 2. I think that's an
19 important word, in addition to "under." And motions to
20 reopen are specified, and it doesn't say discretion. It
21 just says, there shall be a motion to reopen.

22 Do you get any mileage from that, or you
23 seem to rest your argument instead on the regulations?
24 And I think that's almost a weaker argument.

25 MS. LEITER: Frankly, Your Honor, I do not

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1 think that specification of discretion -- with the
2 exception of the battered spouse's provision that you --
3 that you raised earlier, I do not think the
4 specification of discretion with respect to other
5 aspects of motions to reopen is sufficiently clear in
6 the statute to convey discretion.

7 JUSTICE KENNEDY: So you -- you consider --
8 you -- you think it's plausible to have a regime where
9 motions to reopen are not discretionary at all, absent
10 regulation? That would seem very odd to me.

11 MS. LEITER: No, Your Honor. I think when
12 Congress referred to a specification of discretion in
13 section 1252(a)(2)(B)(ii), they intended, effectively,
14 to provide a notice requirement. There are many things
15 that the Attorney General did under the Immigration Act
16 prior to the enactment of IIRIRA, after the enactment of
17 IIRIRA, that were understood to be discretionary.

18 What the statute calls for is a different
19 category of discretionary decisions: Those things that
20 are specified as discretionary to be unreviewable; other
21 things that have long been understood to be
22 discretionary remain reviewable.

23 JUSTICE BREYER: Do you want to say anything
24 about, apparently, this idiosyncratic thought that I
25 have had? This is -- is -- my thought is that both

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1 sides are arguing. We just looked to see if it's
2 discretion given by statute or given by regulation. And
3 we draw the line on reviewability there.

4 Now, what we're talking about is a big set
5 of cases, including frauds and various things where
6 there is some discretion substantively to let the person
7 stay. Now, on that big set of cases, the statute says
8 if it's fraud, et cetera, we don't want review. But if
9 it's asylum, we want review; isn't that how it works,
10 basically, basically?

11 MS. LEITER: Basically.

12 JUSTICE BREYER: Okay. Fine. So, I'm
13 saying instead of looking to see whether it's a
14 rehearing or procedural or reopening matter, period, you
15 look to see whether it has to do with the basic
16 category. If it's something that Congress doesn't want
17 courts to meddle in, that carries over to reopening,
18 which is the same thing; it carries over to rehearing
19 petitions, they are all about the same thing. And if
20 it's something that Congress did want courts to meddle
21 in, like asylum, it carries over to reopening, and it
22 carries over to a rehearing petitions and other such
23 matters.

24 So Congress has one simple judgment: We
25 want courts to meddle in these affairs substantively or

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1 we don't. And our job would be to say, right, that's
2 what you want, unless its unconstitutional, that's what
3 we give you.

4 Do you see the way -- I'm just drawing the
5 line vertically instead of horizontally. But I agree,
6 nobody has. Now, to me that makes sense, but apparently
7 to no one else. So I would like to be talked out.

8 (Laughter.)

9 MS. LEITER: With respect, Your Honor, I
10 think that no one includes Congress. I think that
11 that -- that that line --

12 JUSTICE BREYER: I didn't leave anyone out.
13 No one is universal.

14 (Laughter.)

15 MS. LEITER: That line might have made sense
16 had Congress drawn it, but Congress --

17 JUSTICE BREYER: How do we know they didn't?
18 I mean, there is such a thing in the law called -- what
19 we think of often, they often use the word "ancillary"
20 describing. And when Congress passes a thing that has
21 to do with X, you often interpret a statute to carry
22 with it the application to ancillary matters, the thing
23 that are bound up in X, even though they don't have a
24 separate sentence because you can't think of everything
25 that describes every matter ancillary to X. That's

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1 normal in law.

2 MS. LEITER: The words Congress used here,
3 though, are those decisions specified as
4 discretionary --

5 JUSTICE BREYER: Yes, and we would say those
6 decisions specified includes those decisions that are
7 totally wrapped up in the same thing. So that if a
8 person tries to escape this, by simply making his main
9 argument in a rehearing petition, he can't escape it,
10 because it's really the same thing.

11 MS. LEITER: I agree, Your Honor, that that
12 category of things is unreviewable. What I'm struggling
13 with is that the regulation at issue here, regulation
14 1003.2, specifies in no uncertain terms that motions to
15 reopen are discretionary, and therefore, if "specified
16 under" extends to regulations, there is no way in my
17 view not to extend.

18 JUSTICE BREYER: Well, why not? This is not
19 a matter that is the subject of the special provision.
20 A reopening petition is the same kind of thing,
21 identical to the initial petition, and so something that
22 applies to the initial petition applies to the reopening
23 petition because they were the same kind of animal. If
24 you have a -- you know -- I mean, okay. Forget it. I
25 see the point, no point going further.

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1 MS. LEITER: With respect, Your Honor, I
2 think the language Congress used was clear here and
3 extends clearly to decisions -- decisions specified as
4 discretionary under the subchapter. Congress could
5 easily have said decisions specified as discretionary in
6 the subchapter, but it did not. And in paragraph --

7 JUSTICE GINSBURG: Is there any rhyme or
8 reason why some universe of things that could be
9 reviewed in court, Congress put some of the them in the
10 statute and left others out?

11 MS. LEITER: Well, Justice Ginsburg, the
12 description of something as discretionary has
13 consequences for the Attorney General, for the
14 administrative process. It has only the ancillary
15 consequence of stripping the courts of jurisdiction. So
16 court -- excuse me, the Attorney General needs to
17 determine a rule of evidence for motions before it,
18 needs to determine rules of procedure, needs to
19 determine a rule of decision, and so there are -- there
20 are categories of matters where I could imagine Congress
21 saying to itself, the rule of decision here is really
22 not something with which we need to concern ourselves.
23 It is up to the Attorney General to decide whether this
24 is a discretionary decision or whether this is instead a
25 decision that he or she would like to -- to constrain in

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1 some way by having certain specific rules of decision to
2 go by.

3 JUSTICE GINSBURG: Well, it's -- the
4 question isn't whether the Attorney General or the BIA
5 exercises discretion. In all of these the Attorney
6 General exercises discretion. The question is immunity
7 from court review, and ordinarily that's done by
8 statute. And I do not know of another instance, perhaps
9 you do, where the decision was a matter that the agency
10 rules on will be exempt from judicial review if made by
11 the agency itself -- the very agency that makes the
12 decision, rather than by the legislature.

13 MS. LEITER: I will answer your question
14 first. I can imagine Congress believing that there are
15 categories of decisions where even the rules of decision
16 are best left to the agency to determine. And in that
17 category Congress leaves it open to the agency to decide
18 whether to specify those matters as discretionary or
19 instead to specify more constraining rules of decision.

20 With respect to your question about
21 example --

22 JUSTICE GINSBURG: And I'm not questioning
23 the discretion. The Attorney General has been given
24 discretion to rule on the matter, but the question is,
25 does that mean that the exercise of discretion will be

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1 immune from judicial review? Congress might well say,
2 agency, you decide what is in your discretion, but not
3 say, and agency, we delegate to you, too, the matter
4 whether the court will -- will review your exercise of
5 discretion.

6 MS. LEITER: Right. Two things, Your Honor.
7 First, the jurisdictional consequence of the
8 discretionary specification here attached after the
9 Attorney General applied the label. So here this is not
10 a situation in which the Attorney General was making a
11 determination as to what things should be reviewable.
12 The Attorney General was making a -- a decision as to
13 what rule of decision to apply in motions to reopen, and
14 Congress later attached the jurisdictional significance.

15 JUSTICE GINSBURG: If -- if your
16 interpretation of "under" is right.

17 MS. LEITER: Well, Congress acted later and
18 may, if our interpretation is correct, have attached the
19 jurisdictional significance at that point, yes.

20 With respect to your question about other
21 examples of situations in which an agency is left to
22 make a determination that has jurisdictional
23 consequences, I have a few examples. The first is the
24 Communications Act of 1934. This Court recognized in
25 Global Crossing that the agency there could determine

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1 that a -- that conduct under the act was unreasonable.
2 That is an administrative determination under one
3 section of the act. It has the consequence under
4 another section of the act of creating a cause of action
5 for individuals to recover in damages.

6 The second example is actually section
7 701(a)(2) of the Administrative Procedure Act which
8 refers to categories of decisions that are committed to
9 agency discretion by law. Courts have understood that
10 that is not the broad subset of discretionary decisions
11 but instead that subcategory of discretionary decision
12 for which there is no law to apply, and many courts
13 recognize that the agencies may create the law to apply
14 in those circumstances.

15 So an agency may enact a regulation that
16 binds the agency's own discretion and renders the issue
17 reviewable where it would not otherwise have been. So
18 there --

19 JUSTICE KENNEDY: Do you think absent the
20 special provisions of the -- of the immigration act that
21 we are considering if we were just under the APA, that a
22 motion to reopen would be committed by law to agency
23 discretion under 702? Because it seems to me that, you
24 know there are sources we could look to to see whether
25 or not it's rationally exercised.

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1 MS. LEITER: I do not, Your Honor. I
2 believe there is law to apply in this circumstance.
3 Particularly after enactment of IIRIRA, Congress now has
4 provided guidelines for when some motions to reopen
5 should be granted, the timeliness of motions to reopen,
6 et cetera. So I do not think this is the broad
7 category of -- or sorry, the narrow category of things
8 that are committed to agency discretion by law. I was
9 using the example to describe there are other
10 circumstances in which an agency action has the
11 consequence of restoring --

12 JUSTICE KENNEDY: Well, I actually think it
13 helps you because -- there is -- there is something to
14 review, the agency does have discretion. But this
15 statute strips it, because it provides for motions to
16 reopen, specifically. But of course --

17 MS. LEITER: Yes --

18 JUSTICE KENNEDY: -- you don't take that --

19 JUSTICE SCALIA: Are you going to talk about
20 "under"?

21 MS. LEITER: I would love to talk about
22 under, Your Honor.

23 JUSTICE SCALIA: Yeah.

24 MS. LEITER: And if I may, I would like to
25 start on pages 6a and 7a. I have an illustration

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1 here -- excuse me, of the -- of the government's opening
2 brief. I have an illustration here of the fact that
3 Congress knows what it is doing when it chooses
4 prepositions. If you look at the section that
5 immediately precedes 1252(a)(2)(B)(11) -- that is
6 section 1252(a)(2)(A). In (a)(2)(A) --

7 JUSTICE SCALIA: Where is this?

8 JUSTICE KENNEDY: What page? Page 6 --

9 MS. LEITER: I'm sorry. Pages 6a and 7a of
10 the government's opening brief. So --

11 JUSTICE SCALIA: -- the government's --

12 MS. LEITER: And pages 6a and 7a in the
13 appendix. This is -- this is provision 1252(a)(2)(A),
14 and borrowing the term Romanette, Romanette (i),(ii) and
15 (iv), refer clearly to things provided in subsection (e)
16 in the statute whereas Romanette (iii) refers to the
17 application of such section to individual aliens
18 including the determination made under section
19 1225(b)(1)(B) of this title. That is a determination by
20 immigration officials at the border as to whether an
21 individual who is otherwise inadmissible may have
22 grounds to be retained and go through asylum
23 proceedings. Clearly there, where Congress recognized
24 that there was an administrative determination to be
25 made, it used the preposition "under" to reach through

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1 the statute to the administration determination.

2 I also have three examples, Your Honor, of
3 situations in chapter 8 in which Congress actually uses
4 the phrase "specified under," the same phrase at issue
5 here, to refer again through the statute to
6 administrative determinations. These are not
7 unfortunately in the briefs.

8 8 U.S.C. 1227 -- excuse me. Let me start
9 with 8 U.S.C. 1375a(a)(4) and (a)(6). This is a
10 provision that calls for the preparation of a pamphlet
11 on the legal rights of immigrant victims of domestic
12 violence. Paragraph 1375a(a)(6) calls for the pamphlet
13 to be distributed and made available, quote "in the
14 language as specified under paragraph (4)." Turning to
15 paragraph (4) then, it clearly anticipates an
16 administrative determination, because it says the
17 Secretary of Homeland Security in consultation with the
18 Attorney General and the State Department shall
19 determine at least 14 languages into which the pamphlet
20 is translated.

21 So that's an example of Congress using
22 "specified under" to refer, yes, in the first instance
23 to statutory language, as it does in our provision,
24 specified under subchapter 2, but it is a situation in
25 which the statutory language to which "specified under"

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1 refers clearly anticipates some exercise of
2 administrative authority.

3 Here, the exercise of administrative
4 authority is to specification of languages.

5 In our example, it is the specification of
6 procedures for motions to reopen.

7 JUSTICE STEVENS: May I ask this question
8 before you -- this is an appropriate time.

9 What is your response to their argument they
10 raise in the reply brief that this was specified under
11 subchapter 1, rather than subchapter 2?

12 MS. LEITER: Your Honor, subchapter 1
13 includes the language that grants authority broadly to
14 the Attorney General to issue regulations implementing
15 the chapter, and the language implemented by the motions
16 to reopen regulations exists in subchapter 2.

17 The motion to reopen regulations very
18 clearly implements Section 1229(a), which is in
19 subchapter 2, and a question asked earlier was where one
20 would look to determine whether Regulation 1003.2 is a
21 valid regulation, a reasonable interpretation of the
22 statute, and for that, I believe one would have to look
23 at the content of Section 1229(a), which is in
24 subchapter 2, so although --

25 JUSTICE SCALIA: Except that the text refers

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1 not just to the -- the discretion, it refers -- it says
2 the authority for which is specified under this
3 subchapter and the authority to issue that -- the
4 authority to issue the regulation is under subchapter 1.

5 MS. LEITER: Yes, Justice Scalia. I am
6 certainly not --

7 JUSTICE SCALIA: No. You would have to say,
8 no, Justice Scalia, if you want to win this.

9 (Laughter.)

10 MS. LEITER: Yes. The phrase includes the
11 word the authority, Justice Scalia, but I don't think it
12 can bear the weight that Petitioner and the government
13 put on it. I believe the authority there references the
14 authority that is clearly granted in Section 1103 to
15 implement the entire chapter.

16 But what the section does is to indicate
17 where the specification of discretion must be located,
18 and in this case, it must be located in either the
19 statute or the regulations issued under it, and to see
20 that, I think the easiest illustration is to suppose
21 that the statute read: No court shall have jurisdiction
22 to review any decision specified as discretionary --
23 excuse me -- decision, the authority for which is
24 specified as discretionary in the subchapter or in
25 regulations issued thereunder.

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1 If Congress had used belts and suspenders in
2 that way and made itself doubly clear, there would be no
3 question here that the word "authority" was somehow
4 superfluous or misplaced.

5 JUSTICE BREYER: Do you have any reason why
6 Congress would have taken great trouble to make certain
7 that courts can review asylum decisions, that Congress
8 would not have wanted a court to review a reopening of
9 an asylum matter, which can be done, after all, only if
10 something new comes up that justifies asylum?

11 For example, a new government comes and
12 takes over the country, and now, they are going to
13 murder the person, and that couldn't be considered the
14 first time because the old government was there, and
15 they were just going to torture him, all right? So --
16 so there's something new here.

17 Now, why would any human being say, we want
18 to get courts involved in the first decision, but we
19 want to keep them out of the second decision?

20 MS. LEITER: The -- the best answer I have,
21 Justice Breyer, is that Congress wanted to cut off
22 review at some point, and it was a question of numbers
23 of bites at the apple. I understand your point, that --
24 that --

25 JUSTICE BREYER: Reopening is not a bite at

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1 the apple. Reopening is a new thing; at least, by and
2 large, it is supposed to be -- a change.

3 MS. LEITER: And that may have been part of
4 Congress's concern, that, of course, by and large, it's
5 supposed to be, but it may not always be used in that
6 way, and, at some point, Congress wanted to draw the
7 line, and I note here that Congress did not -- I mean
8 what Congress did here was to set up a regime under
9 which things that are specified as discretionary are
10 unreviewable.

11 But there is some room here for the Attorney
12 General to remove the specification of discretion if
13 that system is unlawful --

14 JUSTICE SCALIA: And, of course, if your
15 interpretation produces the anomaly that Justice Breyer
16 just described, the government's interpretation produces
17 the opposite anomaly. Right?

18 MS. LEITER: Certainly, Your Honor.

19 JUSTICE BREYER: Exactly, and that's why I
20 ended up with this unusual --

21 (Laughter.)

22 CHIEF JUSTICE ROBERTS: And I suppose it's a
23 large question, if you are talking about, presumably,
24 the unusual cases in which the motion to reopen is -- is
25 justified, that you are talking about 2,000 or

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1 3,000 cases, and the question is whether or not those
2 are -- should be reviewed in the executive branch or
3 should be reviewed in the judicial branch.

4 MS. LEITER: Well, the math that we were
5 given earlier, I believe, does come out to about 2,000
6 appeals per year, but I remind the Court that Section
7 1252(a)(2)(D) preserves those that raise questions of
8 law or constitutional questions for review.

9 So this is a far narrower -- I assume,
10 although I do not have the numbers, but I assume a far
11 narrower subset of those decisions that would be
12 rendered unreviewable here, only those for which a
13 discretionary factual determination has been made by the
14 agency.

15 CHIEF JUSTICE ROBERTS: So we are looking
16 for needles in -- in a haystack, right?

17 MS. LEITER: I don't have the numbers, Your
18 Honor. I don't know what percent. I am not sure
19 whether it's a fraction of the haystack or a needle
20 within it, but -- but it is certainly a subset of the --
21 of the category of cases.

22 JUSTICE GINSBURG: Do you have other
23 examples where the under is commonly used statute and
24 regulations thereunder, but in the appendix that you
25 have given us, it says, "under regulations." Under is

Official - Subject to Final Review

1 always coupled with regulations, and you want us to
2 transpose that to a statute that conspicuously did not
3 say, "regulations."

4 MS. LEITER: Justice Ginsburg, we included
5 the appendix to illustrate how Congress uses the
6 preposition under, when it is talking about regulations,
7 so we specifically looked for examples where Congress
8 was talking already about regulations, and the
9 preposition that accompanies that is always under. I do
10 have --

11 JUSTICE SCALIA: You said, earlier, that you
12 had three examples --

13 MS. LEITER: I have --

14 JUSTICE SCALIA: -- that were not in your
15 brief. You better spit them out, or we won't know about
16 them. What are the other two?

17 (Laughter.)

18 MS. LEITER: Thank you, Justice Scalia. The
19 other two are Section 1227(a)(1)(H), which refers to
20 1182(a)(5)(A), 1227(a)(1)(H), both in Chapter 8, refers
21 to grounds of inadmissibility -- excuse me -- specified
22 under paragraph (5)(A) of Section 1182(a).

23 Turning to paragraph (5)(A) of Section
24 1182(a), that calls for the Labor Department to
25 determine whether the United States needs immigrant

Official - Subject to Final Review

1 laborers in a particular category.

2 So, again, it's a use of the phrase
3 "specified under" to refer to statutory language, but
4 through the statutory language to what is clearly an
5 anticipated exercise of administrative discretion.

6 JUSTICE SCALIA: 1227(a)(1)(H). What is the
7 third one? And then I am going to ask you what the
8 first one was because I forgot it.

9 MS. LEITER: Okay. The third one is
10 Section -- again, Chapter 8, Section 1537(b)(1) and
11 (b)(2). (B)(1) says that, after judicial review
12 affirming a removal order, the Attorney General "shall
13 remove the alien to a country specified under paragraph
14 2."

15 And then, in paragraph 2, the statute says
16 that the alien may choose the country, but that the
17 Attorney General has the authority to review the alien's
18 choice of country, and if the alien refuses to choose a
19 country, the Attorney General has the authority to
20 specify the country.

21 The first --

22 JUSTICE SCALIA: Yes. What was the first
23 one? Just -- just give me the -- the cite for the first
24 one. I didn't write it down. I should have.

25 MS. LEITER: 1375(a) -- (a)(4) and (a)(6).

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1 JUSTICE SCALIA: Thank you.

2 MS. LEITER: If there are no further
3 questions, Your Honor?

4 CHIEF JUSTICE ROBERTS: Thank you, counsel.
5 Mr. Schoenfield, you have three minutes
6 remaining.

7 REBUTTAL ARGUMENT OF RICK M. SCHOENFIELD

8 ON BEHALF OF THE PETITIONER

9 MR. SCHOENFIELD: Section 1252(b)(6)
10 mandates that review of the underlying decision should
11 be consolidated with review of a motion to reopen. I
12 think that tells us several things.

13 The first and foremost of which is Congress
14 intended there to be review of motions to reopen -- at
15 least some motions to reopen. To try to go back to
16 Justice Breyer's questions, I think one can extrapolate
17 from the consolidation provision that, if it is
18 impossible to consolidate because there is no review of
19 the underlying decision, you do not get to have a review
20 of those motions to reopen.

21 And that is referenced, I believe, in the
22 government's brief, at footnote 15 -- excuse me, with
23 some cases cited, where courts have so held.

24 We did not focus on that because that is not
25 Mr. Kucana's issue. As the court has alluded to,

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1 Mr. Kucana's issue is the nature of asylum based upon
2 changed country provisions, and those situations are
3 where it may be a matter of life and death, certainly,
4 also a matter of -- of liberty, to be able to bring
5 forward new evidence, which did not exist before, about
6 changed country conditions, and it is not two bites at
7 the apple. It's the first bite at current conditions,
8 which is essential.

9 With regard to the case of Webster v. Doe,
10 that my colleague cited orally, that was an extremely
11 unusual case in which the Court essentially said that it
12 could not -- it did not have any criteria to evaluate
13 the discretion used by the director of the CIA.

14 That is certainly not the situation we have
15 here, where we are dealing with motions to reopen, which
16 are analogous to Rule 60 (b) and which are routinely
17 reviewed on abuse of discretion standard.

18 Additionally, let me note that, if you were
19 to determine that the statutory language specified under
20 is ambiguous that the applicable canons both point us to
21 favoring judicial review, favoring judicial -- favoring
22 judicial review and not essentially allowing the
23 executive to pass a regulation which insulates itself
24 from judicial review.

25 That would be both the clear statements

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1 requirement, as well as the principle laid down by this
2 Court that, in an ambiguous situation dealing with
3 deportation, ambiguities are to be construed in favor of
4 the alien.

5 If there are no further questions?

6 CHIEF JUSTICE ROBERTS: Thank you, counsel.

7 MR. SCHOENFIELD: Thank you.

8 CHIEF JUSTICE ROBERTS: Ms. Leiter, you
9 briefed and argued this case in support of the judgment
10 below, at the invitation of the Court, and have ably
11 discharged that responsibility, for which we are
12 grateful.

13 The case is submitted.

14 (Whereupon, at 11:06 a.m., the case in the
15 above-entitled matter was submitted.)

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A				
able 55:4	40:14 43:2,7	55:20 56:2	approximately	30:6 36:15
ably 56:10	45:24 46:6,16	amended 27:18	24:14	40:13,16,23
above-entitled	47:2,3 53:5	amicus 1:22 2:9	argue 1:24	41:4,5,23 42:9
1:12 56:15	affairs 14:11	29:22	22:19,24 33:16	42:10,12 46:18
absent 7:15,18	37:25	analogous 55:16	argued 23:10	47:14 50:11
8:2 15:15,18	affirming 53:12	ancillary 38:19	56:9	53:12,17,19
36:9 43:19	agencies 43:13	38:22,25 40:14	argues 18:24	attorneys 23:9
absolutely 6:11	agency 14:18	animal 39:23	arguing 22:1	23:15
22:6	31:15 41:9,11	anomaly 50:15	33:7,9 37:1	authorities
abuse 11:21	41:11,16,17	50:17	argument 1:13	23:21
18:2,3 22:15	42:2,3,21,25	answer 14:2	2:2,11 3:4,7	authority 3:13
55:17	43:9,15,22	23:25 24:4	13:12 17:24	3:17,22 4:13
abuse-of-discr...	44:8,10,14	41:13 49:20	23:17 28:11	5:1,3,17 6:18
25:8 27:2	51:14	answering 28:9	29:21 35:23,24	6:25 7:5,6 9:21
accept 6:7 20:2	agency's 19:10	answers 18:1	39:9 47:9 54:7	10:6 14:12
accepted 25:21	43:16	30:21	Ashcroft 32:21	16:4 23:23
32:4	ago 26:22	anticipated 53:5	32:23	26:4,15,16,17
accepting 28:11	agree 12:12 19:5	anticipates	asked 13:19	29:17 47:2,4
accompanies	31:22 38:5	46:15 47:1	47:19	47:13 48:2,3,4
52:9	39:11	anyway 10:22	asking 4:18	48:11,13,14,23
acknowledge	agreement	APA 5:25 43:21	20:14 35:1	49:3 53:17,19
24:2	16:10	apparently	aspects 36:5	authorized 4:2,4
act 6:19 26:15	AGRON 1:3	36:24 38:6	Assistant 1:18	authorizes 4:16
26:17 30:2	albeit 27:1	appeal 24:20,23	assume 24:22	available 11:25
33:18,22 36:15	alien 14:17	appeals 19:21	51:9,10	46:13
42:24 43:1,3,4	19:11 20:17,18	24:16,21,22	assumed 10:3	a.m 1:14 3:2
43:7,20	21:19 25:13	26:19 28:12,13	26:24	56:14
acted 42:17	29:15 53:13,16	28:21,23 32:4	assumption	
acting 31:2,18	53:18 56:4	32:14 51:6	27:21	B
action 43:4	aliens 14:8 17:5	appear 4:9	assumptions	b 53:11,11 55:16
44:10	45:17	APPEARAN...	28:16,17	back 19:7 27:2
acts 26:11	alien's 28:2	1:15	asylum 17:9	27:11 32:2
addition 35:19	53:17	appears 34:10	37:9,21 45:22	35:15 54:15
additional 28:11	ALITO 28:8,17	appendix 45:13	49:7,9,10 55:1	bad 25:25
Additionally	allow 11:5 25:13	51:24 52:5	attached 42:8,14	bar 13:17 28:25
55:18	29:17	apple 49:23 50:1	42:18	33:9
address 9:11	allowing 11:11	55:7	attorney 1:7	barred 25:17,19
29:13	13:22,24 55:22	applicable 55:20	3:13,21 4:14	bars 28:1
addressed 29:12	allows 9:10 11:3	application	4:16 6:19,21	based 55:1
adhered 34:16	29:9	38:22 45:17	7:10,12 8:3,7	basic 37:15
34:19,22	alluded 54:25	applied 42:9	9:17,20 10:1,6	basically 37:10
adjustment	alternate 23:4	applies 39:22,22	11:4 12:5,21	37:10,11
19:10,12,16	AMANDA 1:22	apply 5:11 42:13	15:1,2,15,24	battered 7:8,24
administration	2:8 29:21	43:12,13 44:2	16:10 22:11	8:9,24 9:5,9
46:1	ambiguities	approach 11:2	25:14,25 26:9	12:4,4,7 16:11
administrative	56:3	appropriate	26:11,12,18	36:2
	ambiguous	47:8	27:14 29:16	bear 48:12

behalf 1:16,20 2:4,6,13 3:8 13:13 26:12 54:8	briefed 56:9 briefly 29:13 briefs 4:8 29:7 46:7	41:17 44:7,7 51:21 53:1	25:23 44:2	concerned 24:7 28:22 30:22
believe 5:10 9:8 9:9 12:22 22:14 31:8 34:5 44:2 47:22 48:13 51:5 54:21	bring 9:10 12:1 25:14 55:4	cause 43:4 CDI 32:18	circumstances 25:4 29:18 43:14 44:10	concession 16:9
believing 41:14	broad 43:10 44:6	central 30:8,23	cite 53:23	conditions 55:6 55:7
belts 49:1	broadly 47:13	certain 10:13 29:18 31:14 41:1 49:6	cited 54:23 55:10	conduct 43:1
best 41:16 49:20	brought 24:12	certainly 20:8 32:13 48:6 50:18 51:20 55:3,14	claim 14:18	confusion 33:1
better 29:4 52:15	burden 28:23 29:25 33:2	cetera 37:8 44:6	claims 17:6 30:13 31:11,14 32:3	Congress 3:11 3:15,18 5:15 5:16,18,20 9:16 10:8,12 10:16,25 12:18 12:20 13:5,21 14:12 16:1,15 16:18,22 17:21 18:12 20:12,16 23:22 24:1,3,6 25:5 27:4,24 27:25 28:1,4,7 29:25 30:18 31:3,9,15,18 32:1,13 33:3,4 36:12 37:16,20 37:24 38:10,16 38:16,20 39:2 40:2,4,9,20 41:14,17 42:1 42:14,17 44:3 45:3,23 46:3 46:21 49:1,6,7 49:21 50:6,7,8 52:5,7 54:13
BIA 27:8,10 41:4	business 14:13	challenging 19:22	clear 5:16 22:6 23:3,13 30:11 32:10 33:4 36:5 40:2 49:2 55:25	congress's 7:2 50:4
big 9:14 37:4,7	<hr/> C <hr/> C 1:22 2:1,8 3:1 29:21	change 27:4 50:2	clarify 8:23 33:3	consequence 40:15 42:7 43:3 44:11
binds 43:16	calculated 28:20	changed 55:2,6	clearer 5:13	consequences 40:13 42:23
bite 49:25 55:7	call 20:21	chapter 3:14 5:1 46:3 47:15 48:15 52:20 53:10	clearly 33:22 40:3 45:15,23 46:15 47:1,18 48:14 53:4	consider 35:15 36:7
bites 49:23 55:6	calls 36:18 46:10 46:12 52:24	check 26:3	codification 13:2	considered 28:24 33:19 49:13
Board 22:14 24:16,16,21 25:9 26:4,8,8 26:11,13,19 27:13	canons 55:20	Chicago 1:16	codified 13:2	considering 32:1 35:14 43:21
Board's 26:3,4	careful 7:3	Chief 3:3,9,22 5:23 6:15 13:10,15 21:21 22:18 23:5 25:24 26:7,14 29:19,23 50:22 51:15 54:4 56:6,8	codify 6:24	
border 45:20	cares 12:18 16:18	children 7:9	codifying 28:2	
borrowing 45:14	carries 37:17,18 37:21,22	choice 53:18	colleague 22:7 55:10	
bound 38:23	carry 38:21	choose 53:16,18	come 51:5	
branch 51:2,3	carrying 4:25	chooses 45:3	comes 3:25 14:3 20:12,22 24:4 49:10,11	
Breyer 17:7,17 18:5 19:4,17 19:25 20:5,14 20:20 21:7 36:23 37:12 38:12,17 39:5 39:18 49:5,21 49:25 50:15,19	case 3:4 5:6,25 8:9 15:6,23 18:15,18 20:10 24:1 25:15,19 27:13 48:18 55:9,11 56:9 56:13,14	chosen 13:7	committed 7:10 14:15 16:11 19:9 31:15 43:8,22 44:8	
Breyer's 54:16	cases 22:14 23:9 23:9,12 25:9 26:5 30:1 37:5 37:7 50:24 51:1,21 54:23	CIA 55:13	commonly 51:23	
brief 1:24 4:18 4:24 17:24 19:3 28:13 29:12 45:2,10 47:10 52:15 54:22	case 3:4 5:6,25 8:9 15:6,23 18:15,18 20:10 24:1 25:15,19 27:13 48:18 55:9,11 56:9 56:13,14	Circuit 22:20,24 23:20 25:16 28:24 32:18,22 32:24 33:15,25 34:8	Communicati... 42:24	
	categories 40:20 41:15 43:8	circuits 25:16 34:3,7,10	compare 14:4	
	category 9:6 17:8 36:19 37:16 39:12	circumstance	component 8:18	
			comprehensiv... 29:11	
			concern 40:22 50:4	

consistent 6:2 6:25 23:19	49:12 53:13,16 53:18,19,20 55:2,6	29:22	42:3	3:25 6:21,23
consolidate 54:18	couple 26:22	curious 21:24 22:3	delegates 26:16	7:10,13,17 8:3
consolidated 54:11	coupled 52:1	current 55:7	denials 13:18 17:3,4 25:12 25:16 28:5	8:5,8,21 9:12 10:1,2,4,20,24 11:1,2,4,12,15 11:19,21 12:6 12:8,21 13:23 14:15,25 15:3 15:15,24 16:3 16:10,16 18:2 18:3 19:10 21:4 22:8,16 24:8 27:19 30:7 31:15 35:20 36:1,4,6 36:12 37:2,6 41:5,6,23,24 41:25 42:2,5 43:9,16,23 44:8,14 48:1 48:17 50:12 53:5 55:13,17
consolidation 34:12 35:6 54:17	course 5:9 17:9 22:14 44:16 50:4,14	cut 49:21	denied 24:20	
conspicuously 52:2	court 1:1,13 3:10 7:1 8:21 8:21 10:12 11:10 12:19 13:16 22:16 25:2,5 26:1,22 28:23 29:24 30:3,5,22 31:8 31:12,16 33:10 40:9,16 41:7 42:4,24 48:21 49:8 51:6 54:25 55:11 56:2,10	<hr/> D <hr/>	department 1:19 17:9,11 17:12 21:25 22:1,3,8 23:6 28:12 46:18 52:24	
constitutional 3:19 30:13 31:11,17,20 32:3 51:8	courts 11:20 12:24 14:13,14 14:18 16:25 17:2,5,22 18:4 19:21 21:1 24:9,12,21 26:2,6,19 28:13,21,23 29:2 30:2,7 32:4,14 33:8 33:23 34:17 37:17,20,25 40:15 43:9,12 49:7,18 54:23	Dada 22:17 25:6 26:23	deportation 56:3	
constrain 40:25	Court's 3:16	damages 43:5	describe 44:9	
constraining 41:19	covered 14:6 33:8	date 32:15 33:2	described 50:16	
construed 56:3	create 11:11 43:13	day 14:10	describes 38:25	
consultation 46:17	creates 9:10 11:23	deal 20:2	describing 38:20	
contend 4:13	creating 43:4	dealing 55:15 56:2	description 40:12	
content 47:23	criteria 55:12	deals 11:23,24	detailed 17:23	
contest 11:14	Crossing 42:25	death 55:3	determination 19:12,23 21:6 21:18,19 42:11 42:22 43:2 45:18,19,24 46:1,16 51:13	discretionary 3:16 8:18 9:17 9:18,20,22,23 9:24 10:7,21 16:2,3,23 19:22 30:4 32:9 33:18,21 34:14,18,18 35:11 36:9,17 36:19,20,22 39:4,15 40:4,5 40:12,24 41:18 42:8 43:10,11 48:22,24 50:9 51:13
context 5:11 14:7 21:12 23:3 25:12 26:20 27:11 32:20	curiae 1:23 2:9	decide 7:13 8:8 14:12 17:13 28:13 40:23 41:17 42:2	determinations 24:6 46:6	
continuance 17:3 25:12,14 25:15		decided 16:24	determine 3:20 8:22 40:17,18 40:19 41:16 42:25 46:19 47:20 52:25 55:19	
continue 30:1		decision 16:2 17:10,19 18:6 34:7 40:19,21 40:24,25 41:1 41:9,12,15,19 42:12,13 43:11 48:22,23 49:18 49:19 54:10,19		
continued 22:19		decisions 3:17 11:21 14:6 18:13,15 27:8 30:4 36:19 39:3,6,6 40:3,3 40:5 41:15 43:8,10 49:7 51:11		
convey 36:6		deems 4:25	difference 21:17	
correct 5:11 6:11 9:2,8 11:17 23:7 26:9 28:10 42:18		defend 22:10	different 18:21 21:12 36:18	
correctly 19:2		deferential 22:21 25:8	differently 34:14 35:2,4	
counsel 13:10 21:21 29:19 54:4 56:6		define 31:3	directed 23:15	
counterintuitive 12:19		definition 5:11	director 55:13	
country 14:9		definitions 5:10	disagree 8:19	
		delegate 3:19	discharged 56:11	
			discretion 3:13	
				doing 10:12 13:21 25:9 27:24 45:3 domestic 46:11

doubly 22:2 49:2	55:12	35:7	filing 27:16	3:21 4:16 6:19
doubt 32:10	evidence 11:25 40:17 55:5	explicit 10:5 16:6 27:19	find 7:5 9:14 18:9 21:24 22:2	6:21 7:10,12 8:3,8 9:17,21 10:1,6 11:4 12:21 15:1,3 15:15,24 22:11 24:20 25:25
draw 10:16 37:3 50:6	exactly 18:5 33:15 50:19	explicitly 9:18	finding 31:13	26:9,11,12,19 27:14 36:15 40:13,16,23 41:4,6,23 42:9 42:10,12 46:18 47:14 50:12 53:12,17,19
drawing 38:4	example 24:3 25:11 35:16	express 3:15,19	Fine 37:12	General's 3:13 4:14 12:6 16:10 29:16 30:6
drawn 38:16	41:21 43:6	expressly 30:13	finish 21:22	getting 14:17 17:5 20:17,18 24:9
drew 12:22	44:9 46:21	extend 32:16 39:17	first 3:4 11:10 18:2 21:2 28:2 30:21 41:14 42:7,23 46:22 49:14,18 53:8 53:21,22,23 54:13 55:7	Ginsburg 5:5,13 8:23 9:4 13:1 27:5 29:6 33:24 34:3,6 40:7,11 41:3 41:22 42:15 51:22 52:4
D.C 1:9,20,22	47:5 49:11	extended 32:17 32:25 33:22	focus 27:23 54:24	give 6:16 16:9 17:14 24:11 38:3 53:23
E	examples 42:21 42:23 46:2 51:23 52:7,12	extending 32:19	focused 5:2 27:25	given 9:21 10:1 37:2,2 41:23 51:5,25
e 2:1 3:1,1 45:15	exception 31:10 31:17,21,23 32:3 36:2	extends 33:17 39:16 40:3	follow-up 29:13	going 10:14 18:9 22:10 32:8 39:25 44:19 49:12,15 53:7
earlier 30:18 31:7 35:7 36:3 47:19 51:5 52:11	exclude 9:16	extension 32:21	footnote 19:3 29:12 54:22	government 48:12 49:11,14
easiest 48:20	excuse 31:16 32:22,24 40:16 45:1 46:8 48:23 52:21 54:22	extensions 35:16	foreign 14:11	government's 45:1,10,11
easily 40:5	executive 14:7 14:10 16:25 19:23 24:8 51:2 55:23	extent 30:22	foremost 54:13	
effect 28:10	exempt 41:10	extra 17:23,24	Forget 39:24	
effectively 36:13	exercise 11:18 14:11 21:4 22:8 26:4 41:25 42:4 47:1,3 53:5	extrapolate 54:16	forgot 53:8	
effort 28:4	exercised 10:20 10:25 11:1,3 24:9 43:25	extremely 55:10	form 27:18,20	
Eighth 32:22,24 34:11	exercises 10:3 41:5,6	F	forth 25:14	
either 27:15 28:15 48:18	exist 55:5	fact 5:2 17:7 20:24 22:9 23:1 26:25 29:18 30:5 32:1 45:2	forward 55:5	
emphasized 5:6	existed 13:5 27:10,17 33:1	fair 6:18 14:17 17:6 20:18 21:20	found 7:14 18:23 28:24 35:12,13	
enact 43:15	existence 34:11 35:5	far 51:9,10	fraction 51:19	
enacted 24:1,7 27:15 29:25	exists 47:16	fast 28:8	frankly 33:3 35:25	
enacting 3:11 27:25	experience 20:10	favor 56:3	fraud 20:21,23 37:8	
enactment 31:23 36:16,16 44:3	explain 19:8	favoring 55:21 55:21,21	frauds 37:5	
ended 50:20	explained 30:5	Federal 3:20 11:24 14:13,14 14:18 16:25 17:2,4 18:4 24:9 26:5 30:2 30:3	frequently 11:20	
entire 48:15		file 17:23 28:3 29:15	functions 26:23	
entitled 10:21		filed 18:21 20:10 24:15	further 13:8 39:25 54:2 56:5	
ERIC 1:6		files 19:14	G	
escape 39:8,9			G 3:1	
ESQ 1:16,18,22 2:3,5,8,12			general 1:7,19	
essential 55:8				
essentially 19:15 27:20 55:11,22				
Establish 4:24				
et 37:8 44:6				
evaluate 5:24				

50:16 54:22 grace 14:8 16:25 17:8,13 20:21 20:23 21:18 grant 8:9,10 granted 24:18 31:7 44:5 48:14 grants 3:24 47:13 grateful 56:12 great 49:6 grounds 45:22 52:21 guess 4:22 17:25 guidelines 44:4 guys 32:8	9:9 11:8 18:1 30:21 31:5 33:13 34:2,9 35:13,25 36:11 38:9 39:11 40:1 42:6 44:1 44:22 46:2 47:12 50:18 51:18 54:3 horizontally 38:5 huge 18:25 human 49:17 hypothetical 8:13 15:6,7 20:1,2,11	immunity 41:6 implement 48:15 implemented 47:15 implementing 47:14 implements 47:18 implicit 8:18 15:25 16:2 important 11:22 12:1,9 25:6 26:3,23 30:23 35:19 impose 30:1 imposed 30:1 impossible 54:18 inadmissibility 52:21 inadmissible 45:21 included 6:13 52:4 includes 6:8 38:10 39:6 47:13 48:10 including 18:13 25:16 37:5 45:18 indicate 48:16 indicates 4:23 individual 23:9 45:17,21 individuals 43:5 inform 30:17 initial 21:5,14 39:21,22 initially 12:1 insight 6:17 instance 41:8 46:22 instances 10:13 10:15 12:21 26:5 insulates 55:23	intended 24:3 30:18 31:3 36:13 54:14 intent 3:15,19 7:2 32:11 interested 15:11 interpret 7:16 7:19 8:1,4 38:21 interpretation 6:7,18 42:16 42:18 47:21 50:15,16 interpreting 7:1 invalid 11:16 invitation 56:10 Invited 1:23 involve 14:8 involved 17:1 18:4 24:10 49:18 issue 9:12 13:17 15:3 28:24,25 33:19 39:13 43:16 46:4 47:14 48:3,4 54:25 55:1 issued 3:23 31:12 33:18 48:19,25 issues 20:20 33:21,23 iv 45:15	judicial 3:12 7:2 9:19 10:9,10 10:14 11:12 12:11 13:17,22 13:24 16:19 19:11 22:2,11 25:18 26:24 27:1 28:1,25 30:12,19,23 41:10 42:1 51:3 53:11 55:21,21,22,24 judicially 20:13 28:5 jurisdiction 3:16,20 15:19 22:25 23:10,14 30:3 31:6,10 32:5 33:11,23 40:15 48:21 jurisdictional 30:16 33:9 42:7,14,19,22 jurisdiction-st... 23:17 32:2 Justice 1:19 3:3 3:9,22 4:7,12 4:17 5:5,13,23 6:5,14,15 7:7 7:15,20 8:7,13 8:17,23 9:4,13 10:18 11:9,13 11:18 12:3,17 13:1,10,15,20 14:20 15:5,9 15:18,22 16:8 16:17 17:7,9 17:17 18:5 19:4,17,25 20:5,14,20 21:7,21,25 22:1,3,7,18 23:5,6 24:11 25:1,20,24 26:7,14 27:5 28:8,9,12,17 29:2,6,19,23
<hr/> H <hr/>	<hr/> I <hr/>			
H 1:6 hall 22:7 handful 23:8 happened 19:18 19:19 happy 17:22 haystack 51:16 51:19 head 28:9 hear 3:3 heard 14:18 17:6 23:12 held 33:10,15,22 54:23 help 22:11 helps 44:13 Hey 32:8 historical 6:25 historically 6:22 history 23:3 24:3 Holder 1:6 3:5 holding 33:15 35:9 Homeland 46:17 Honor 4:11 6:12 7:11 8:6,16 9:3	idea 24:11 33:2 identical 39:21 idiosyncratic 36:24 ii 14:5,6 45:14 iii 45:16 IIRIRA 24:7 29:25 36:16,17 44:3 Ill 1:16 illuminate 21:25 illustrate 52:5 illustration 44:25 45:2 48:20 imagine 17:11 17:20 40:20 41:14 immediately 45:5 immigrant 46:11 52:25 immigration 14:7,11 23:11 23:16 24:16,22 25:13,15 27:11 30:1,4 36:15 43:20 45:20 immune 42:1		<hr/> J <hr/>	
			job 38:1 JR 1:6 judge 25:13,15 judgement 1:23 2:9 judgment 9:23 9:24 10:21 29:5,22 37:24 56:9 judgments 9:17 9:19 34:18 35:11	

30:15 31:1,6 31:25 32:12 33:6,24 34:3,6 34:16,25 35:8 35:17 36:7,23 37:12 38:12,17 39:5,18 40:7 40:11 41:3,22 42:15 43:19 44:12,18,19,23 45:7,8,11 47:7 47:25 48:5,7,8 48:11 49:5,21 49:25 50:14,15 50:19,22 51:15 51:22 52:4,11 52:14,18 53:6 53:22 54:1,4 54:16 56:6,8 justified 50:25 justifies 49:10	51:18 52:15 knows 45:3 Kucana 1:3 3:5 Kucana's 54:25 55:1	30:20 31:5,8 32:12 33:13 34:2,5,9,21 35:3,12,25 36:11 37:11 38:9,15 39:2 39:11 40:1,11 41:13 42:6,17 44:1,17,21,24 45:9,12 47:12 48:5,10 49:20 50:3,18 51:4 51:17 52:4,13 52:18 53:9,25 54:2 56:8 let's 7:21 17:11 19:14 20:21 32:10 liberty 55:4 life 55:3 light 20:23 limit 12:6 16:11 29:16 limited 3:12 limits 30:3 line 10:17,19,20 12:22 22:12 37:3 38:5,11 38:15 50:7 listed 14:5 16:22 Litigation 23:11 23:16 located 48:17,18 long 17:2 18:3 26:3,20 36:21 look 6:1,3 8:21 8:22 18:8 20:20 23:20,21 24:19 29:14 30:17 31:25 37:15 43:24 45:4 47:20,22 looked 37:1 52:7 looking 6:21 24:1,5 31:3 37:13 51:15 lose 18:18	loses 20:22 lot 18:11 love 44:21	moment 12:4 morning 3:4 motion 9:11 14:23 15:12 17:8 19:14,24 20:1 21:13,14 27:6,16 28:3 29:9,15,17 33:24 34:8 35:21 43:22 47:17 50:24 54:11 motions 3:25 6:22 7:13,23 10:10 11:21 12:16 13:5,18 14:21 17:3 24:12,15,23 25:6 26:21,23 26:25 27:1,8 28:5,20 30:24 32:6,9,17 33:10,11,20 34:13,23 35:1 35:3,10,14,19 36:5,9 39:14 40:17 42:13 44:4,5,15 47:6 47:15 54:14,15 54:20 55:15 murder 49:13
K	L	M	N	
keep 26:7,8 49:19 KENNEDY 7:7 7:15,20 8:7,13 8:17 12:3,17 14:20 15:5,9 15:18,22 16:8 16:17 24:11 25:1,20 29:2 35:17 36:7 43:19 44:12,18 45:8 Kennedy's 28:10 key 5:5 kind 39:20,23 knew 32:3 33:9 know 4:17,19,19 18:8 22:9 24:24 27:5,7 27:25 28:1,14 28:18 29:4 38:17 39:24 41:8 43:24	label 42:9 Labor 52:24 laborers 53:1 laid 56:1 language 7:13 16:15 25:17 29:15 30:2,10 31:19 40:2 46:14,23,25 47:13,15 53:3 53:4 55:19 languages 46:19 47:4 large 50:2,4,23 Laughter 38:8 38:14 48:9 50:21 52:17 law 25:21,23 31:15 38:18 39:1 43:9,12 43:13,22 44:2 44:8 51:8 lawful 10:4,20 lawfully 9:20 10:24 11:1,3 leadership 23:11 leave 38:12 leaves 41:17 left 40:10 41:16 42:21 legal 30:12 31:23 46:11 legislation 30:6 legislative 24:2 legislature 41:12 legitimate 9:25 Leiter 1:22 2:8 29:20,21,23	M M 1:16 2:3 3:7 54:7 main 39:8 majority 22:13 making 18:24 23:16 25:4 39:8 42:10,12 mandates 54:10 materials 4:21 math 28:8,15 51:4 matter 1:12 6:5 14:8 16:24 17:13,13,23 21:18 37:14 38:25 39:19 41:9,24 42:3 49:9 55:3,4 56:15 matters 11:25 12:25 14:9,16 16:22 17:25 19:9 37:23 38:22 40:20 41:18 mean 4:22 6:6 9:23 18:3,6 22:5 38:18 39:24 41:25 50:7 meaning 30:10 means 6:6 16:5 23:23,24 meant 18:12 meddle 37:17,20 37:25 mileage 35:22 minute 33:6 minutes 54:5 misplaced 49:4 mistake 18:25 mistakes 12:2	N N 2:1,1 3:1 narrow 44:7 narrower 51:9 51:11 nature 55:1 necessary 4:25 need 7:3,5 26:1 40:22 needle 51:19 needles 51:16 needs 16:6 22:11 25:10 40:16,18 40:18 52:25 negative 33:7	

net 11:23	45:1,10	persuaded 34:11 35:5	preserved 30:14	Q
new 11:25 19:17 19:19 20:3,4,5 20:7,11,22,23 49:10,11,16 50:1 55:5	opposed 5:24 10:2	petition 9:1 32:20 39:9,20 39:21,22,23	preserves 51:7	question 7:21 10:16 14:2,20 15:6 20:25 23:25 25:21,23 28:10 31:2 41:4,6,13,20 41:24 42:20 47:7,19 49:3 49:22 50:23 51:1
nice 4:19,21	opposite 22:3 23:6 50:17	Petitioner 1:4 1:17,21 2:4,7 2:13 3:8 13:14 48:12 54:8	principle 56:1	questioning 41:22
NICOLE 1:18 2:5 13:12	oral 1:12 2:2 3:7 13:12 17:24 29:21	petitions 25:2 37:19,22	prior 13:2 36:16	questions 13:8 13:19 29:14 51:7,8 54:3,16 56:5
non-judiciary 16:12	orally 55:10	phrase 5:17 46:4 46:4 48:10 53:2	problem 21:9 29:3 30:24	quickly 27:14
non-reviewable 34:19	order 25:14 53:12	plain 30:2	procedural 14:16 17:19 18:13 21:19 37:14	quite 31:13
normal 10:11 39:1	ordinarily 41:7	plainly 33:1	procedure 40:18 43:7	quote 4:24 46:13
note 50:7 55:18	original 30:16	plausible 36:8	procedures 47:6	R
noted 16:7 26:25	originally 34:17	please 3:10 13:16 29:24	proceedings 45:23	R 3:1
notice 36:14	originate 27:6,9	point 6:9 12:16 25:3 29:8 30:11 33:5 39:25,25 42:19 49:22,23 50:6 55:20	process 10:11 20:19 40:14	raise 47:10 51:7
November 1:10	overturned 25:10	police 26:19	produces 50:15 50:16	raised 36:3
number 7:22,23 12:15 19:9 24:24,25 28:7 28:20 30:16	P	policymakers 31:2	protect 30:6	rare 25:19 26:5
numbers 28:21 49:22 51:10,17	P 3:1	positing 15:24	provide 9:19 11:14 36:14	rate 24:20,23
O	page 2:2 4:24 45:8,8	position 9:14 22:4,19 23:1,4 23:5,19 33:3	provided 27:15 44:4 45:15	rational 10:19 10:19
O 2:1 3:1	pages 44:25 45:9 45:12	possible 20:15 20:25	provides 4:13 44:15	rationally 43:25
obstacle 9:14	pamphlet 46:10 46:12,19	potential 12:1	provision 4:12 6:1,2 8:24 9:5 9:9 12:4,5 15:20 16:19 28:25 30:15 31:14,16 34:12 35:6 36:2 39:19 45:13 46:10,23 54:17	reach 45:25
obviously 7:4	paragraph 40:6 46:12,14,15 52:22,23 53:13 53:15	potentially 11:25	providing 8:5	read 4:8 11:11 48:21
odd 16:17 36:10	parallel 31:13	power 14:11	provision 4:12 6:1,2 8:24 9:5 9:9 12:4,5 15:20 16:19 28:25 30:15 31:14,16 34:12 35:6 36:2 39:19 45:13 46:10,23 54:17	readily 13:6
Office 23:11,15	parents 7:9	precedes 45:5	provisions 5:1 43:20 55:2	reading 4:9 18:9 18:22 34:23
officers 27:12	part 13:6 50:3	preclude 30:12	purported 6:19	reaffirmed 35:10
officials 30:4 45:20	particular 53:1	preparation 46:10	purposes 25:7	real 15:6 33:2,7 really 6:5 30:23 39:10 40:21
Oh 10:25 19:17 21:7 34:25	particularly 11:22 14:3 23:2 26:20 44:3	preposition 45:25 52:6,9	pursuant 6:8,9 10:6	reason 21:5 34:13 40:8 49:5
okay 11:9 21:23 22:22 37:12 39:24 53:9	pass 55:23	prepositions 45:4	put 32:2 40:9 48:13	reasonable 47:21
old 49:14	passes 38:20	prescribe 11:4		reasonably 23:4
once 9:5	people 20:6			
ones 13:1 18:13	percent 24:17 24:20,21 51:18			
Onyinkwa 32:21	perfectly 17:22			
open 41:17	period 37:14			
opening 19:3	person 37:6 39:8 49:13			

reasons 11:8	39:13,13 43:15	29:17 30:24	return 12:3	16:14 19:6,7
rebuttal 2:11	47:20,21 48:4	32:6,9,17	reverse 33:4	21:16 22:23
13:9 54:7	55:23	33:10,11,20,25	reversed 29:5	26:10,18 28:2
recall 4:8,9	regulations 3:18	34:8,13,23	review 3:12,16	38:1 42:6,16
recited 9:18	3:23 4:2,5,25	35:1,4,10,15	7:3 9:16,19	49:15 50:17
recognize 43:13	6:8,12 13:23	35:20,21 36:5	10:9,10,14,22	51:16
recognized 25:5	13:25 14:24	36:9 39:15	11:12,21,23	rights 46:11
25:5 26:23	15:3,16 27:7	42:13 43:22	12:11,19 13:18	ROBERTS 3:3
31:16,18 32:19	27:15,17 32:20	44:4,5,16 47:6	13:22,24 16:12	3:22 5:23 6:15
32:22,25 42:24	33:18 34:15	47:16,17 50:24	16:20 17:21,23	13:10 21:21
45:23	35:23 39:16	54:11,14,15,20	18:2,16,16,18	22:18 23:5
recognizes	47:14,16,17	55:15	18:19 19:11,12	25:24 26:7,14
31:14	48:19,25 51:24	reopened 19:20	21:1,2,4 22:2	29:19 50:22
reconsider	51:25 52:1,3,6	20:3,7	22:11,15,21,22	51:15 54:4
27:12	52:8	reopening 7:8	24:13 25:18	56:6,8
recover 43:5	rehearing 17:12	18:13,17,20	26:25 27:1	Romanette
reduce 7:2 29:25	37:14,18,22	21:8 27:16,22	28:1,25 30:3	45:14,14,16
reduction 3:12	39:9	37:14,17,21	30:12,19,19,23	room 50:11
refer 45:15 46:5	relates 14:17	39:20,22 49:8	37:8,9 41:7,10	routinely 32:5
46:22 53:3	relevant 16:23	49:25 50:1	42:1,4 44:14	55:16
reference 7:14	relitigate 19:15	reply 4:24 29:12	48:22 49:7,8	rule 7:8,24 9:4
14:21	19:18	47:10	49:22 51:8	11:24 40:17,19
referenced	relying 4:20	repudiated	53:11,17 54:10	40:21 41:24
54:21	remain 36:22	34:21 35:13	54:11,14,18,19	42:13 55:16
references 48:13	remaining 24:19	requirement	55:21,22,24	rules 11:24
referred 36:12	54:6	36:14 56:1	reviewability	40:18 41:1,10
refers 43:8	remind 51:6	requires 20:9	37:3	41:15,19
45:16 47:1,25	removal 53:12	28:15	reviewable	
48:1 52:19,20	remove 3:16	requiring 31:17	12:24 16:15	S
refuses 53:18	10:14 11:12	reserve 13:9	17:25 20:13	S 2:1 3:1
regard 3:25 15:4	50:12 53:13	respect 20:21,23	21:5,6 35:4	safety 11:23
35:10 55:9	rendered 51:12	30:18,24 31:5	36:22 42:11	Saharsky 1:18
regarding 13:4	renders 43:16	33:13,20,20	43:17	2:5 13:11,12
regime 36:8	Reno 32:18	34:22 35:9	reviewed 12:2	13:15 15:2,8
50:8	reopen 3:25	36:4 38:9 40:1	12:25 14:15	15:17,21,23
regulation 3:24	6:22 7:13,24	41:20 42:20	17:2,10,15,18	16:14,21 17:16
4:14 5:19,20	9:1,5,6,11	Respondent	17:19 25:7	18:1 19:1,8,21
5:21,24 6:1,9	10:11 11:22	1:20 2:6 13:13	40:9 51:2,3	20:4,8,16 21:3
6:17,24 7:14	13:5,18 14:21	response 29:7	55:17	21:16 22:13,23
7:16,18,21 8:2	14:23 15:13	47:9	reviewing 14:13	23:8 24:14
11:11,14,15	17:3 19:15,24	responsibility	rhyme 40:7	25:3,22 26:2
13:3,4 14:16	20:1 21:13	3:20 56:11	RICK 1:16 2:3	26:10,18 27:10
15:19 17:11	24:12,15,23	rest 13:9 35:23	2:12 3:7 54:7	28:14,19 29:4
21:8,11,14	25:6 26:21,24	restoring 44:11	right 6:6,16 10:4	29:11
27:19 32:16,25	26:25 27:1,8	result 28:18	11:19 12:17	sat 23:12
33:21 34:19	27:12,17 28:3	retain 26:16	13:19 14:22	saying 7:16 8:2
36:10 37:2	28:5 29:9,16	retained 45:22	15:18,20 16:8	10:13,18 17:9

17:15,16 22:9 26:7,8 37:13 40:21 says 7:4,22,23 11:2 12:5 15:10 16:3 17:12 29:15 35:21 37:7 46:16 48:1 51:25 53:11,15 Scalia 4:7,12,17 6:5,14 9:13 10:18 11:9,13 11:18 13:20 34:16,25 35:8 44:19,23 45:7 45:11 47:25 48:5,7,8,11 50:14 52:11,14 52:18 53:6,22 54:1 scheme 13:7 Schoenfield 1:16 2:3,12 3:6 3:7,9,24 4:11 4:15,23 5:8,15 6:3,11,20 7:11 7:18 8:4,12,14 8:19 9:2,8 10:10 11:7,10 11:17,20 12:14 12:20 13:4 54:5,7,9 56:7 scope 6:17 7:2 30:19 second 21:2 29:9 43:6 49:19 second-guessing 18:4 Secretary 46:17 section 3:11 4:1 4:2,11,15,21 6:3 30:8,11,12 30:14 31:13,19 32:15,19 33:14 33:16 34:12 35:5 36:13	43:3,4,6 45:4,6 45:17,18 47:18 47:23 48:14,16 51:6 52:19,22 52:23 53:10,10 54:9 Security 46:17 see 6:1 27:3 37:1 37:13,15 38:4 39:25 43:24 48:19 seek 25:13 seeking 21:3 send 4:22 sense 9:15 10:23 13:20 17:20 18:10,23 20:15 20:17 21:1 38:6,15 sentence 38:24 separate 38:24 serve 25:6 26:24 served 26:3 Services 32:18 set 28:16 37:4,7 50:8 Seventh 22:20 22:24 23:20 25:16 28:24 32:4 33:15,25 34:8 shot 14:17 20:18 21:20 side 19:5,6,7 34:4 sides 37:1 significance 42:14,19 silent 7:19 8:20 similar 5:25 25:11 31:19 similarly 32:22 simple 37:24 simply 39:8 sit 29:7 situation 5:18 17:4 35:14	42:10 46:24 55:14 56:2 situations 42:21 46:3 55:2 six 34:5,7 Sixth 32:18 34:10 Solicitor 1:19 somebody 26:16 soon 23:10 sorry 13:23 19:7 21:22 44:7 45:9 sort 30:23 Sotomayor 30:15 31:1,6 31:25 32:12 33:6 sought 19:11 sources 8:22 43:24 special 7:8,24 39:19 43:20 specific 16:6,19 41:1 specifically 12:5 16:7 44:16 52:7 specification 36:1,4,12 42:8 47:4,5 48:17 50:12 specifications 13:22 specified 3:14 3:17 5:3,17 7:5 10:13 12:8,9 12:10,20 13:24 13:25 14:22 15:25 16:4,6 16:22 23:21,23 33:17,21 34:14 35:18,20 36:20 39:3,6,15 40:3 40:5 46:4,14 46:22,24,25 47:10 48:2,22	48:24 50:9 52:21 53:3,13 55:19 specifies 15:11 23:22 39:14 specify 12:23 41:18,19 53:20 spit 52:15 sponte 27:16 spouse 8:9 12:4 12:5,7 spouses 7:9,25 8:24 9:6,10 16:11 spouse's 36:2 stand 22:6 standard 18:2 22:21 25:8 55:17 standards 27:2 stands 33:25 start 44:25 46:8 State 46:18 statements 55:25 states 1:1,13 5:3 52:25 States's 23:18 status 19:11,12 19:16 statute 4:4 5:2,9 5:11,20,22 7:9 7:16,19,22,23 8:1,5,11,20 9:19 10:2,4,5 11:1,3,11 13:2 13:5,17,21 14:3 15:10,10 15:17,25 16:1 16:7 18:10,23 20:9 21:8,11 21:15 22:5 23:2,13,21 24:5 26:9,11 26:12 27:8 29:9 32:2 33:14 34:24	36:6,18 37:2,7 38:21 40:10 41:8 44:15 45:16 46:1,5 47:22 48:19,21 51:23 52:2 53:15 statutes 33:8 statutorily 32:9 statutory 5:25 6:2 13:6 29:14 46:23,25 53:3 53:4 55:19 stay 14:9 22:11 37:7 STEVENS 47:7 strictly 30:3 strip 31:10 stripped 31:6 33:23 stripping 15:19 30:16 40:15 strips 44:15 struggling 39:12 sua 27:15 subcategory 43:11 subchapter 3:14 3:18 4:1,1,5,5 5:4,4 6:4,8,10 6:13,16 7:5,6,7 7:12,22 12:10 12:22,23 14:1 14:22,23 15:10 16:5,24 23:22 23:23,24,25 35:18 40:4,6 46:24 47:11,11 47:12,16,19,24 48:3,4,24 subject 10:9 16:19 39:19 submitted 56:13 56:15 subsection 45:15 subset 43:10
---	---	---	--	---

51:11,20 substance 17:22 18:16,19 substantial 24:25 substantially 27:17 substantive 18:6 18:14 21:18 24:6 substantively 37:6,25 subsumate 14:6 such-and-such 5:19 sufficiently 36:5 suggest 11:7,22 suggesting 21:17 22:5 suggests 27:3 29:7 superfluous 49:4 support 1:20,23 2:6,9 13:14 56:9 SUPPORTING 29:22 suppose 48:20 50:22 supposed 50:2,5 Supreme 1:1,13 sure 4:23 17:5 18:11,24 20:17 21:19 25:22 51:18 surely 12:8 suspenders 49:1 switching 35:9 system 50:13	takes 49:12 talk 7:8 15:9 44:19,21 talked 38:7 talking 4:20 25:1 31:1 35:17 37:4 50:23,25 52:6 52:8 tell 18:25 24:3 26:1 32:8 telling 27:25 28:6 tells 54:12 Tenth 32:24 34:11 term 5:21 45:14 terms 6:20 13:21 20:18 39:14 text 14:3 16:7,23 23:2,2,12,13 23:20,24 24:1 24:5 47:25 Thank 13:10 29:19 52:18 54:1,4 56:6,7 theme 30:5,9 thereunder 48:25 51:24 they'd 18:18 thing 12:18 16:18 18:17,20 27:22 37:18,19 38:18,20,22 39:7,10,20 50:1 things 13:24,25 14:4,5,8,15,19 17:3 19:10,17 19:19 24:8 33:17 34:14 36:14,19,21 37:5 39:12 40:8 42:6,11 44:7 45:15 50:9 54:12	think 5:16 6:12 6:20 7:1 10:12 10:19 12:9 14:2 15:14 16:13,21 18:9 19:1 20:6 22:10 23:13,14 24:4 25:9,18 25:19,24 26:2 27:4,13,24 28:15 29:1,4 31:17 32:7 33:2 35:18,24 36:1,3,8,11 38:10,10,19,24 40:2 43:19 44:6,12 48:11 48:20 54:12,16 third 53:7,9 thought 8:24 36:24,25 three 46:2 52:12 54:5 time 12:6 13:9 16:1,11 17:23 17:24 28:2 30:18 32:7 47:8 49:14 timeliness 44:5 times 18:21 title 3:14 4:3 45:19 today 27:20 torture 49:15 total 28:21 totally 39:7 traditional 10:11 traditionally 12:24 translated 46:20 transpose 52:2 treat 18:13 21:13,13 35:3 treated 34:13 35:1 treating 18:14	tries 39:8 trouble 49:6 true 18:5 20:6 32:14 trusted 22:2,8 22:15 try 19:8 54:15 trying 8:15,16 18:11 19:15 21:10,12 Tuesday 1:10 Turning 46:14 52:23 two 14:4 18:1 20:20 30:20 33:17 42:6 52:16,19 55:6	unusual 50:20 50:24 55:11 urged 23:19 use 38:19 53:2 uses 5:20 46:3 52:5 usually 5:18 U.S.C 46:8,9
V				
				v 1:5 3:5 31:12 32:18,21,23 55:9 valid 11:18 47:21 validity 5:24 variety 5:10 various 16:22 37:5 vast 22:13 vertically 38:5 victims 46:11 view 17:25 32:15 34:20,22 35:10 39:17 viewed 16:15 violence 46:12 Visa 32:21
W				
				Wait 33:6 waits 8:10 waive 12:6 16:11 waiving 12:15 12:15 want 9:16 10:8 11:5 12:3 14:13 16:25 17:21 18:8 19:18 20:1,7 20:23 21:22 24:9 27:23 30:11 36:23 37:8,9,16,20 37:25 38:2 48:8 49:17,19
T				
T 2:1,1 take 10:12 18:12 19:7 22:18 23:4 44:18 taken 23:14 49:6				

52:1	wrongfully 10:3	32:16,19,25	3
wanted 17:5	X	33:14,17 36:13	3 2:4
27:4 33:4 49:8	x 1:2,8 38:21,23	1252(a)(2)(B)(i)	3,000 25:2 51:1
49:21 50:6	38:25	14:4	30 12:20 24:21
wanting 20:12	Y	1252(a)(2)(B)(...	4
wants 19:19	Yeah 19:4 44:23	45:5	4 46:14,15 53:25
20:3,16	year 12:7 24:13	1252(a)(2)(D)	5
Washington 1:9	24:17 25:2	30:14 31:24	5 52:22,23
1:19,22	32:24 51:6	51:7	54 2:13
wasn't 7:20	years 8:10 22:16	1252(b)(6) 34:12	6
way 8:20 18:14	26:22 30:17	35:6 54:9	6 45:8 46:9
20:10 21:7	Yerkovich	13 2:7	53:25
24:24 34:7	32:23	1375a(a)(4) 46:9	6a 44:25 45:9,12
38:4 39:16	0	1375a(a)(6)	60 11:24 55:16
41:1 49:2 50:6	08-911 1:5 3:4	46:12	7
ways 28:7	1	1375(a) 53:25	7a 44:25 45:9,12
weaker 35:24	1 4:1,5 6:4,16	14 46:19	701(a)(2) 31:13
Webster 31:12	47:11,12 48:4	15 8:10 24:17	43:7
55:9	53:11	54:22	702 43:23
weight 48:12	10 1:10	1537(b)(1) 53:10	8
went 34:7,8	10,000 24:15	18 4:24 29:12	8 3:14 4:3 24:15
35:15	10:04 1:14 3:2	1916 27:2,11	46:3,8,9 52:20
weren't 11:25	1003.2 39:14	1934 42:24	53:10
we'll 17:13	47:20	1940 27:13	80 24:19
we're 20:20 37:4	11:06 56:14	1941 27:13	85 24:20
win 48:8	1103 4:2,11 6:4	1988 31:12,16	
wins 18:15 19:6	48:14	1996 24:7 27:3	
19:7	1103(g)(2) 4:15	27:18,19,24	
wit 6:7	1182(a) 52:22,24	31:11,18	
won 22:3,9,19	1182(a)(5)(A)	2	
word 5:5,20	52:20	2 3:14 4:1,5 5:4	
12:9 35:19	12 3:14	5:5 7:7,12,22	
38:19 48:11	1225(b)(1)(B)	12:10,22,23	
49:3	45:19	14:22,23 15:10	
words 5:8 15:12	1227 46:8	25:1 35:18	
39:2	1227(a)(1)(H)	45:6 46:24	
workload 29:3	52:19,20 53:6	47:11,16,19,24	
works 37:9	1229(a) 47:18,23	53:11,14,15	
wouldn't 12:12	1252(a)(2)(A)	2,000 28:11	
14:25 16:12,14	45:6,13	50:25 51:5	
17:17 22:20	1252(a)(2)(B)	20 24:17	
32:13	3:11	2002 32:18	
wrapped 39:7	1252(a)(2)(B)(...	2004 23:1,6	
write 53:24	30:8 31:20	32:21	
wrong 18:11		2009 1:10	
19:5 25:10		29 2:10	
32:8			