SUPREME COURT
OF THE UNITED STATES

IN THE SUPREME COURT OF THE UNITED STATES

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PANKAJKUMAR S. PATEL, ET AL.,)

Petitioners,)

v.) No. 20-979

MERRICK B. GARLAND,)

ATTORNEY GENERAL,)

Respondent.)

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11 Washington, D.C.

12 Monday, December 6, 2021

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14 The above-entitled matter came on for

15 oral argument before the Supreme Court of the

16 United States at 10:00 a.m.

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1 APPEARANCES:

2 MARK C. FLEMING, ESQUIRE, Boston, Massachusetts; on

3 behalf of the Petitioners.

4 AUSTIN L. RAYNOR, Assistant to the Solicitor General,

5 Department of Justice, Washington, D.C.; on behalf

6 of the Respondent in support.

7 TAYLOR A.R. MEEHAN, ESQUIRE, Chicago, Illinois;

8 Court-appointed amicus curiae in support of the

9 judgment below.

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1 C O N T E N T S

2 ORAL ARGUMENT OF: PAGE:
3 MARK C. FLEMING, ESQ.
4 On behalf of the Petitioners 4
5 ORAL ARGUMENT OF:
6 AUSTIN L. RAYNOR, ESQ.
7 On behalf of the Respondent 31
8 in support
9 ORAL ARGUMENT OF:
10 TAYLOR A.R. MEEHAN, ESQ.
11 Court-appointed amicus curiae
12 in support of the judgment below 59
13 REBUTTAL ARGUMENT OF:
14 MARK C. FLEMING, ESQ.
15 On behalf of the Petitioners 98
16
17
18
19
20
21
22
23
24
25

1 P R O C E E D I N G S
2 (10:00 a.m.)
3 CHIEF JUSTICE ROBERTS: We'll hear
4 argument first this morning in Case 20-979,
5 Patel versus Garland.
6 Mr. Fleming.
7 ORAL ARGUMENT OF MARK C. FLEMING
8 ON BEHALF OF THE PETITIONERS
9 MR. FLEMING: Mr. Chief Justice, and
10 may it please the Court:
11 As the government agrees, section
12 1252(a)(2)(B)(i) does not bar review of the
13 agency's threshold determination that Mr. Patel
14 is ineligible for adjustment of status. That
15 understanding is consistent with the statutory
16 text, context, and history, and it's also
17 consistent with this Court's explanation in
18 Kucana that the (B)(i) bar is limited to
19 decisions made discretionary by legislation.
20 Congress could have written (B)(i)
21 differently. It could have barred review of any
22 individual determination, as it did in
23 subsection (A)(1), or of the final order of
24 removal, as it did in subsection (C).
25 But Congress didn't use those words.

1 It used "judgment" and specifically "any
2 judgment regarding the granting of relief." And
3 nobody has identified any instance in which the
4 INA uses "judgment" in the sweeping way
5 suggested by the Eleventh Circuit.
6 To the extent there's any doubt,
7 though, it is resolved by the strong presumption
8 of reviewability of agency action, and that's
9 especially so because the Eleventh Circuit's
10 position, undisputedly, bars all judicial
11 review, even for errors of law, of the numerous
12 adjustment-of-status decisions that are made
13 outside of removal proceedings by U.S.
14 Citizenship and Immigration Services. The
15 Court-appointed amicus does not deny that or
16 attempt to justify it.
17 That's enough to resolve this case.
18 The Court does not need to resolve the slight
19 difference between our reading and the
20 government's. We all agree it does not affect
21 Mr. Patel's situation. And to the -- to the
22 extent that this Court does reach it, we believe
23 our reading is preferable, both because it gives
24 full meaning to the phrase "regarding the
25 granting of relief" -- the government does not,

1 but rather treats it as though it weren't even
2 in the statute -- and also because our reading
3 is easily administrable.
4 Jurisdictional lines should be clear,
5 and our line is clear. Threshold decisions
6 regarding eligibility are not subject to (B)(i);
7 the discretionary decision to grant relief to an
8 eligible non-citizen is. And, again, if there's
9 any doubt, the strong presumption of
10 reviewability breaks the tie in our favor.
11 And I'd welcome the Court's questions.
12 JUSTICE THOMAS: Counsel, normally we
13 review judgments or orders and not reasoning.
14 It seems as though you're asking us to review
15 reasoning as opposed to the order itself.
16 MR. FLEMING: So, Justice Thomas, the
17 review in an immigration case is of a final
18 order of removal. And as this Court said in
19 Chadha, the final order of removal subsumes
20 everything that goes before.
21 The question for purposes of
22 interpreting the jurisdictional bar is what
23 Congress meant by the phrase "any judgment
24 regarding the granting of relief."
25 JUSTICE THOMAS: Well, that seems

1 pretty broad.
2 MR. FLEMING: Well, it -- Congress
3 in -- immediately in neighboring sections used
4 far broader terms. In the preamble to (B), it
5 says "judgment, decision, or action," but then
6 (B)(i) only catches "judgment," whereas (B)(ii)
7 uses "decision or action," which are broader
8 terms. Subsection (A)(1) talks about "any
9 individual determination," which is much
10 broader.
11 Had Congress wished to bar any
12 possible determination that goes into evaluating
13 an application for adjustment of status, it
14 could have said any individual determination,
15 any decision or action, or the final order of
16 removal, which is, in administrative law and
17 certainly in immigration law, the final decision
18 of the agency that includes everything that has
19 gone before. Congress didn't do that.
20 JUSTICE THOMAS: So, if you wanted to
21 accomplish what amicus argues, how would you
22 have written it?
23 MR. FLEMING: "Any decision or action
24 under sections," and then the five types of
25 removal, which is the language that Congress

1 used in (B)(ii). It simply qualified it by
2 saying the decision or action has to be
3 specified by statute as in the Attorney
4 General's discretion. And that is -- and there
5 are additional contextual clues, but I think
6 those are the main ones.
7 JUSTICE THOMAS: But I don't --
8 MR. FLEMING: Congress --
9 JUSTICE THOMAS: -- I don't see any
10 real difference between what you -- you suggest
11 would do the job versus what's already there.
12 MR. FLEMING: So there -- there are
13 two differences, Justice Thomas.
14 One is the word "judgment" in
15 administrative law and immigration law is used
16 in a narrow way to mean a discretionary
17 determination or discretionary decision.
18 No one in this case, not the Eleventh
19 Circuit, not the amicus, not the parties, have
20 come up with any use of "judgment" in the INA
21 that refers to factual findings or refers to
22 judgment in the broad sense we would think of it
23 under the Federal Rules of Civil Procedure.
24 It's just not used that way in administrative
25 law and certainly not in -- in immigration law.

1 Moreover, we have additional
2 contextual cues. Most importantly, it's the
3 reasoning that this Court employed in Kucana
4 because (B)(ii) uses "any other decision or
5 action," which links (B)(i) and (B)(ii) together
6 in a way that this Court said shows that both
7 sections were directed to decisions made
8 discretionary by statute. There is no way to
9 reconcile the Eleventh Circuit's view with that
10 language in Kucana.
11 With respect to the five forms of
12 relief that are enumerated, what is it that is
13 specified as discretionary by legislation? It's
14 not the eligibility factors. It's not whether
15 someone like Mr. Patel is admissible to the
16 United States. That is a factual issue or an
17 issue of mixed law and fact that is frequently
18 reviewable and, in fact, is reviewed because it
19 is a basis for holding someone removable from
20 the country.
21 And if the government in this case had
22 charged Mr. Patel with being removable because
23 he misrepresented U.S. citizenship, it would
24 have been reviewable. That very issue would
25 have been reviewed on an appeal of the final

1 order of removal.

2 But, because it was not charged as a

3 removability ground but simply as a bar to

4 discretionary relief of adjustment of status,

5 under the Eleventh Circuit's view, that very

6 same issue was not removable. That, we think,

7 must be incorrect because Congress does not

8 typically allow the jurisdiction of the federal

9 courts to turn on the charging decisions of the

10 executive. This Court said that much in Kucana.

11 JUSTICE KAGAN: Mr. Fleming, just on

12 -- on this same line, I mean, are you saying

13 that judgment regarding the granting of relief

14 means what you say it means as a matter of just

15 ordinary meaning, or are you saying that it's a

16 term of art in the immigration statutes? And,

17 if so, which portion -- you know, is -- is it

18 the whole phrase "judgment regarding the

19 granting of relief"? Is it just the word

20 "judgment"? I mean, what -- what are you saying

21 we should read your way and why?

22 MR. FLEMING: Well, so I -- there --

23 there are a couple of answers to that, Justice

24 Kagan.

25 First of all, I think we would all

1 agree, and the Eleventh Circuit agreed,
2 "judgment" by itself, in isolation, can have
3 several meanings, and so one needs to look at it
4 in the context in which it is used.
5 "Regarding the granting of relief," we
6 believe, calls in the traditional distinction
7 which this Court has noted several times, going
8 back to Foti versus INS and St. Cyr, that
9 there's -- that these discretionary grants of
10 relief happen in two stages.
11 First, there's a determination whether
12 the non-citizen is eligible for relief, and
13 those are not discretionary. Those are issues
14 of fact, except to the extent Congress has
15 specified them as discretionary, in which case
16 they're not reviewable under (B)(ii).
17 But then, once someone is found to be
18 eligible, then the agency looks at whether to
19 grant relief, and the "granting of relief" --
20 this Court used that very phrase in St. Cyr --
21 refers to the second-stage decision --
22 JUSTICE KAGAN: And -- and --
23 MR. FLEMING: -- whether to grant
24 relief.
25 JUSTICE KAGAN: -- do you have places,

1 other places in the statute or in regulations
2 where that phrase means what you're saying it
3 means, which is, in other words, that it refers
4 only to the stage 2 discretionary determination
5 as opposed to the stage 1 eligibility
6 determination?
7 MR. FLEMING: I --
8 JUSTICE KAGAN: And, again, I'm
9 talking about this, you know, judgment regarding
10 the granting of relief, or the granting of
11 relief, whether that phrase is specifically used
12 to invoke the step 2 determination as opposed to
13 the step 1 determination?
14 MR. FLEMING: So I think the best
15 example for that, Justice Kagan, is the asylum
16 carveout in (B)(ii), which does use the phrase
17 "the granting of relief," and it carves out of
18 the jurisdictional bar of (B)(ii) the granting
19 of relief under the asylum statute, and that
20 must refer to the second-stage discretionary
21 decision whether to grant asylum to someone who
22 is eligible for asylum.
23 Why? Because the eligibility
24 requirements for asylum are not specified as
25 discretionary. So it would not make sense to

1 carve them out of (B)(ii) because they don't
2 fall within (B)(ii) by their own terms.
3 The only thing that would otherwise
4 fall under (B)(ii) and, therefore, needs a
5 carveout is the second-stage discretionary
6 decision by the executive to grant asylum to
7 someone who is eligible for it, and that's why
8 the granting of relief is used in (B)(ii).
9 I think this -- this Court in St. Cyr
10 uses the words "the actual granting of relief"
11 on pages 307 and 308 of the opinion, which, of
12 course, is not statutory, but it does show how
13 the -- how that language has been used to
14 distinguish the second-stage granting of relief
15 in the exercise of discretion as opposed to
16 eligibility.
17 There's also a provision that
18 distinguishes the two with respect to the
19 non-citizens' burdens of proof, and that's
20 1229a, subparagraph (c)(4)(a), which talks about
21 how the non-citizen has the burden to prove
22 eligibility in the first place but then
23 separately also whether they're entitled to
24 relief in the exercise of discretion.
25 JUSTICE BARRETT: Mr. --

1 MR. FLEMING: And --
2 JUSTICE BARRETT: Sorry, you can
3 finish.
4 MR. FLEMING: I -- I was simply going
5 to conclude if I may that, at the very least,
6 even if -- even if the Court believes that
7 there's -- that there are reasonable
8 interpretations on both sides, we're talking
9 about a situation that's governed by the
10 presumption of reviewability.
11 And so, you know, we -- we think this
12 is -- we think that we're right in terms of the
13 best reading of the statute. But, at the very
14 least, under the presumption which this Court
15 just as recently as last year called well
16 settled and strong, that, we think, breaks the
17 tie in our favor.
18 JUSTICE BARRETT: Mr. Fleming, I'm
19 just wondering, you know, amicus says of both
20 your interpretation and the government's that if
21 you make all of the preliminary determinations
22 reviewable, that the jurisdictional bar doesn't
23 -- or that the bar to judicial review doesn't
24 have that much work to do.
25 How do you respond to that?

1 MR. FLEMING: So we think that's
2 incorrect, Justice Barrett, and that's because,
3 before IIRIRA, before 1996, the -- the courts
4 were reviewing the second-stage determination
5 whether to grant relief in the exercise of
6 discretion, and we cite a number of those cases
7 in Footnote 6 of our reply that, you know,
8 reversed the BIA or the immigration judge on an
9 exercise of discretion.
10 And that is what Congress through
11 (B)(i) was trying to get rid of, was trying to
12 say you can review, we believe, the -- the
13 eligibility factors.
14 But, once someone is found to be
15 eligible, if the -- if the agency says,
16 nonetheless, we are going to deny relief in the
17 exercise of discretion, that is not reviewable,
18 except, you know, for purposes of -- of
19 subsection (d), it restored the possibility of
20 review for errors of law or constitutional
21 errors.
22 JUSTICE ALITO: Well, then I don't
23 understand --
24 MR. FLEMING: But that is the work
25 that's being done.

1 JUSTICE ALITO: -- then I -- I -- I
2 don't understand where your argument is going
3 if the -- ultimately, what you want is
4 adjustment of status, right?
5 MR. FLEMING: Yes, Your Honor.
6 JUSTICE ALITO: And that's a
7 discretionary determination?
8 MR. FLEMING: Yes.
9 JUSTICE ALITO: And you want that
10 reviewed, you want that overturned?
11 MR. FLEMING: Well --
12 JUSTICE ALITO: Isn't that right?
13 MR. FLEMING: -- at the moment, what
14 we want is the Eleventh Circuit to review our
15 argument that the agency made an error in
16 finding Mr. Patel ineligible.
17 JUSTICE ALITO: Yeah.
18 MR. FLEMING: And then, if that is
19 reversed, it would go back to the agency that
20 would then have to determine whether to grant
21 relief in -- in the exercise of discretion,
22 which is a determination that hasn't been made
23 yet.
24 JUSTICE SOTOMAYOR: Do you know how
25 many people apply for adjustment of status that

1 are found eligible but for whom the agency
2 exercises or the agent exercises discretion not
3 to grant adjustment of status?
4 MR. FLEMING: I'm afraid I don't have
5 those numbers, Justice Sotomayor. I'm not sure
6 they're reported in that level of detail. I
7 think you can find numbers as to the number that
8 are granted and denied, but I'm not sure of any
9 statistics. The government may be better able
10 to answer this question that -- that parsed it
11 out.
12 JUSTICE SOTOMAYOR: Could you tell me
13 what the state of the law was in 2005 with
14 respect to (B)(i)? How had the circuits ruled
15 up to that point?
16 MR. FLEMING: Before 2005, my
17 understanding is most of the circuits had said
18 that review was possible of factual
19 determinations to do with eligibility, which is
20 part of the acquiescence argument we make.
21 Again, we don't think that's
22 necessary, however, because, again, the focus
23 would have been on -- on 1996 and what it is
24 Congress was trying to accomplish then.
25 It's certainly true that Congress

1 could have changed things in 2005 if it wasn't
2 pleased with them.
3 CHIEF JUSTICE ROBERTS: Mr. Fleming, I
4 understand about the presumption of
5 reviewability, but this area, the exercise of
6 discretion by the Attorney General with respect
7 to immigration and refugee matters, there's --
8 there is a presumption also that the discretion
9 is broad and, to an unusual extent compared to
10 other areas, unreviewable.
11 Don't those two presumptions kind of
12 cancel each other out, and we're left with just
13 reading the statute as it -- as it's written?
14 MR. FLEMING: I -- I don't think so,
15 Mr. Chief Justice, because we're talking about a
16 situation where -- I mean, we're not saying that
17 the discretion -- the discretionary decision
18 whether to grant relief is reviewable. We
19 didn't even get to that stage in Mr. Patel's
20 case.
21 We're talking about the application of
22 statutory factors that Congress has created, one
23 of them being inadmissibility to the United
24 States, which is the one that's at issue here.
25 That's reviewable all the time because it is a

1 ground of removal.

2 And the mere fact that it was charged

3 in this case as a bar to adjustment of status

4 rather than as a ground of removal doesn't

5 change the leeway that the BIA has to adjudicate

6 it. It's still taking Congress's --

7 CHIEF JUSTICE ROBERTS: Well, I

8 wonder, I mean, I think that's an argument based

9 on the statute itself. I'm just suggesting that

10 presumptions don't seem to me to give too much

11 weight in this case because they do -- do cancel

12 out.

13 MR. FLEMING: Well --

14 CHIEF JUSTICE ROBERTS: You don't --

15 you don't dispute that there's a presumption in

16 -- in favor of discretion in the exercise of

17 admission, removal, that -- that the breadth of

18 discretion to the Executive Branch here is quite

19 broad.

20 MR. FLEMING: I -- I -- I -- I don't

21 know that I would agree with that, Mr. Chief

22 Justice, certainly not when it comes to applying

23 standards, factors, that are either factual or

24 legal that Congress has determined.

25 I mean, this Court applied the

1 presumption of reviewability in Kucana, just
2 last year in Guerrero-Lasprilla. Those were
3 interpreting these very same provisions, and
4 there was no suggestion that the presumption had
5 any less force in those cases or that it should
6 have any less force here because the presumption
7 implements the important separation of powers
8 consideration that we don't assume that Congress
9 is allowing the Executive Branch to have the
10 last word on whether it's complying with
11 congressional mandates --
12 CHIEF JUSTICE ROBERTS: Thank --
13 MR. FLEMING: -- unless there's very
14 clear language.
15 CHIEF JUSTICE ROBERTS: -- thank you,
16 counsel.
17 Justice Thomas, anything further?
18 JUSTICE THOMAS: Nothing for me,
19 Chief.
20 CHIEF JUSTICE ROBERTS: Justice
21 Breyer?
22 JUSTICE ALITO: Why isn't the most
23 relevant context here the review by a court of a
24 decision by a lower-level tribunal?
25 In that context, judgment has a pretty

1 clear meaning. There are judgments of the
2 district court defined by the federal rules of
3 procedure, civil and criminal. There are
4 judgments of the courts of appeals. There are
5 judgments of this Court.
6 Why isn't that the most relevant
7 context?
8 MR. FLEMING: Because that's not how
9 the word is used in the context of
10 administrative law. The APA, 5 U.S.C. 551(6),
11 calls the order the final disposition of -- of
12 an agency in a matter other than rulemaking.
13 This Court in INS versus Chadha said
14 the term "final orders" includes all matters on
15 which the validity of the final order is
16 contingent. The statute itself talks about
17 review of the final order.
18 Your Honor is quite right. If we were
19 talking about review of a district court, the
20 Federal Rules of Civil Procedure and the
21 judiciary code use judgment in that way.
22 In administrative law and especially
23 in immigration law, judgment's not used that
24 way.
25 JUSTICE ALITO: Well, what is your

1 strongest point to show that this APA definition
2 applies under the INA?
3 MR. FLEMING: Oh. Well, if one looks
4 at 1252(a)(1): Judicial review of a final order
5 of removal is governed only by Chapter 158 of
6 Title 28, except as provided.
7 And that's -- that's the general grant
8 of review in immigration cases, is review of a
9 final order of removal. And this Court -- and
10 -- and I -- I don't know of any other court that
11 has taken the view that --
12 JUSTICE ALITO: But that's not what's
13 being reviewed here.
14 MR. FLEMING: Yes, it is, a final
15 order of removal --
16 JUSTICE ALITO: Well, the adjustment
17 of status is the part that you -- that you're
18 contesting.
19 MR. FLEMING: Well, that's the --
20 that's the issue we have appealed because there
21 was a concession of removability, but the
22 immigration judge still entered a final order of
23 removal.
24 JUSTICE ALITO: In this con -- in this
25 particular case, but the two things don't always

1 go together.
2 MR. FLEMING: They generally do
3 because, under the zipper clause, 1252(b)(9),
4 appeal of all issues that are -- that come up in
5 a removal proceeding are channeled into the
6 petition for review.
7 JUSTICE ALITO: They generally do.
8 They don't always.
9 MR. FLEMING: I -- the only situation
10 I can think of where adjustment of status would
11 come up without a removal order would be in a
12 situation where someone has, for instance, a --
13 is here lawfully, is not subject to being
14 removed, they're on a temporary visa, student
15 visa, employment visa, they marry a U.S.
16 citizen, and then they seek adjustment of status
17 by filing an application with U.S. CIS.
18 And if that's denied, normally you
19 would expect, again, under the presumption of
20 reviewability and also under the APA, that you
21 would file an action in district court to
22 challenge the legality of U.S. CIS's
23 determination. This is a major flaw in the
24 Eleventh Circuit's approach because the Eleventh
25 Circuit would say you can't challenge that at

1 all, even for an issue of law, because, in their
2 view, that is a judgment that is barred by
3 (B)(i).
4 And the -- the notion that Congress
5 would have prevented any form of judicial
6 review, even for legal error, in a vast quantity
7 of cases where adjustment of status is sought
8 from, is simply not plausible and would require
9 much clearer language than we have here.
10 CHIEF JUSTICE ROBERTS: Justice
11 Sotomayor, anything further?
12 JUSTICE SOTOMAYOR: No.
13 CHIEF JUSTICE ROBERTS: Justice Kagan?
14 JUSTICE KAGAN: Mr. Fleming, I think,
15 in response to Justice Alito's question, I'm --
16 I'm not sure why it matters to your position
17 very much what the word "judgment" means,
18 whether it means the final determination, the
19 official order, or something else.
20 I mean, I understand why it matters to
21 the government, but why does it matter to you?
22 As I understood your position, your position is
23 just that the entire phrase "judgment regarding
24 the granting of relief" refers to the step 2
25 determination rather than the step 1

1 determination, and whatever "judgment" means,
2 whether it refers to the official order or some
3 kind of discretionary decision-making along the
4 way or both, your position would still stand,
5 wouldn't it?
6 MR. FLEMING: I -- I think that's
7 right, Justice Kagan. I was just trying to give
8 Justice Alito's question a fulsome answer and
9 also to make sure that there was no confusion
10 that -- that we didn't -- to make sure that the
11 Court recognizes that we don't think "judgment"
12 as used here subsumes everything. We don't
13 think that's a correct reading of how the word
14 is used in immigration law.
15 But it's certainly true that even if
16 "judgment" means the ultimate final order, the
17 -- the thing that is made not reviewable by
18 (B)(i) is the judgment regarding the granting of
19 relief. And we think that is the second-stage
20 determination whether to grant relief in the
21 exercise of discretion to someone who has been
22 found to be eligible for it.
23 JUSTICE KAGAN: As opposed to the step
24 1 eligibility determination?
25 MR. FLEMING: Step 1 eligibility

1 determinations are reviewable. There -- there
2 could be a situation. If Congress in the future
3 wanted to say this one -- we're specifying this
4 as being in the discretion of the attorney
5 general, then it would be unreviewable under
6 (B)(ii). But (B)(i) has nothing to say about
7 that.
8 CHIEF JUSTICE ROBERTS: Justice
9 Gorsuch, anything?
10 JUSTICE KAVANAUGH: In -- in the
11 removal context, where this arises, I just want
12 to make sure I understand the difference in the
13 two positions. Everything related to the
14 removal would be reviewable, and with respect to
15 the denial of discretionary relief, legal
16 questions and mixed questions, everyone in the
17 room, I think, agrees would be reviewable,
18 correct?
19 MR. FLEMING: I believe that's right,
20 yes.
21 JUSTICE KAVANAUGH: So only questions
22 of historical fact or questions of fact -- I
23 don't have to add the word "historical" -- is
24 the -- is the dispute here, review of those, is
25 that correct?

1 MR. FLEMING: Well, so as to -- as to
2 the --
3 JUSTICE KAVANAUGH: In the removal
4 context.
5 MR. FLEMING: So, as to the -- so not
6 talking about denials of discretionary --
7 denials of discretionary relief? I don't think
8 there's a dispute as to what is reviewable in
9 terms of removability. So, if someone has
10 actually contested removability -- and let's
11 leave out the cases of criminal --
12 JUSTICE KAVANAUGH: Right. On --
13 MR. FLEMING: -- criminal convictions.
14 JUSTICE KAVANAUGH: Sorry to
15 interrupt. On removability, I agree. On the
16 denial -- the denial of discretionary relief,
17 we're just talking about fact questions,
18 correct?
19 MR. FLEMING: Yes.
20 JUSTICE KAVANAUGH: That's the dispute
21 here.
22 MR. FLEMING: If any --
23 JUSTICE KAVANAUGH: It's solely about
24 fact questions, because everyone agrees, I
25 think, that legal questions and mixed questions

1 will get judicial review.

2 MR. FLEMING: Yes, that's right, and

3 only fact questions at the -- at the first --

4 what I'm calling the first stage with respect to

5 eligibility requirements --

6 JUSTICE KAVANAUGH: And on the fact --

7 MR. FLEMING: -- that's what the

8 definition is.

9 JUSTICE KAVANAUGH: -- questions, how

10 could an appellate court -- and this question

11 cuts both ways, so -- but how can an appellate

12 court look at a cold record and determine a

13 factual error when it relates to credibility,

14 for example, or something like that? Just give

15 me some examples where this will matter, I

16 guess.

17 MR. FLEMING: Well, there -- as the

18 amici, the American Immigration Lawyers

19 Association and the EOIR judges, point out, it

20 -- it's not uncommon. I mean, the standard is

21 still substantial evidence. So most cases do

22 fail on the merits.

23 But it is not uncommon for courts of

24 appeals to find serious problems with how the

25 agency determines credibility. Credibility is,

1 of course, a question of fact. This Court said
2 this in -- in Nasrallah. It's a factual issue
3 that is reviewable on appeal deferentially. We
4 don't dispute that.
5 But, you know, in this case, for
6 example, we think that the credibility
7 determination against Mr. Patel was sorely
8 informed by the judge's misunderstanding of what
9 was required in order to get a license in
10 Georgia. And, you know, we -- that is an issue
11 that we fully briefed to the Eleventh Circuit.
12 It didn't reach it because it believed it lacked
13 jurisdiction.
14 But I think this will matter in not
15 very many cases, but in the cases where it does
16 matter, that is a very desirable result because
17 we do not want the agency to be making such
18 serious decisions on the basis of anything less
19 than substantial evidence.
20 JUSTICE KAVANAUGH: Thank you.
21 MR. FLEMING: Thank you, Your Honor.
22 CHIEF JUSTICE ROBERTS: Justice
23 Barrett?
24 Thank you, counsel.
25 JUSTICE SOTOMAYOR: If I might, Chief?

1 I'm sorry.

2 CHIEF JUSTICE ROBERTS: Sure.

3 JUSTICE SOTOMAYOR: If they're going

4 to get review in the remove -- removability

5 context, why isn't that enough?

6 MR. FLEMING: Because -- because of

7 what happened in this case, Justice Sotomayor.

8 In this case, for reasons that the government

9 trial attorney could not explain when asked by

10 the immigration judge, the government did not

11 charge this inadmissibility issue, the

12 misrepresentation of citizenship, as a ground of

13 removability. That was only raised as a defense

14 to adjustment of status.

15 Had they charged it as a removability

16 ground, we wouldn't be here because it would

17 have gotten reviewed in that context. But it

18 was --

19 JUSTICE SOTOMAYOR: So why does that

20 matter? Meaning is it because no one now will

21 decide this issue?

22 MR. FLEMING: Unless this Court

23 reverses, no one other than the agency is going

24 to decide it. The agency will have been the

25 last word on an issue of inadmissibility, which

1 is an issue frequently reviewed by the courts as
2 either a fact question or a mixed question.
3 JUSTICE SOTOMAYOR: Thank you.
4 CHIEF JUSTICE ROBERTS: Thank you,
5 counsel.
6 MR. FLEMING: Thank you, Your Honor.
7 CHIEF JUSTICE ROBERTS: Mr. Raynor.
8 ORAL ARGUMENT OF AUSTIN L. RAYNOR
9 ON BEHALF OF THE RESPONDENT IN SUPPORT
10 MR. RAYNOR: Mr. Chief Justice, and
11 may it please the Court:
12 Section 1252(a)(2)(B) precludes review
13 of any judgment regarding the granting of relief
14 under five enumerated provisions, as well as any
15 other decision or action of the Secretary or the
16 Attorney General, the authority for which is
17 specified to be in their discretion. By its
18 terms, that provision bars review of
19 discretionary determinations, not
20 non-discretionary determinations like the
21 question of fact at issue here.
22 Petitioners now largely agree with
23 that reading as a practical matter, conceding
24 that even discretionary eligibility criteria
25 will be reviewable under the second clause, if

1 not the first.

2 Amicus's principal counterargument is

3 that questions of fact are unreviewable because

4 they fall outside the scope of subparagraph (D),

5 which preserves review over questions of law.

6 That argument fails because this case involves a

7 scope of a different provision, subparagraph

8 (B)(i). This Court should reverse the judgment

9 below and remand for further proceedings.

10 JUSTICE THOMAS: Mr. Raynor, could you

11 tell me what -- how would the outcome or in

12 which cases would the outcome be different under

13 your analysis as opposed to Petitioners'

14 analysis or approach?

15 MR. RAYNOR: Justice Thomas, I think

16 the main difference is analytical at this point.

17 They concede, as my friend suggested this

18 morning and in note 2 of their reply brief, that

19 eligibility criteria, if they're specified to be

20 in the Attorney General's discretion, will be

21 unreviewable under the second clause.

22 We would put those under the first

23 clause. We think the first clause, with its

24 phrase "judgment regarding the granting of

25 relief," is more naturally read to pick up those

1 discretionary eligibility criteria. But there
2 is an analytical difference.
3 JUSTICE THOMAS: One --
4 MR. RAYNOR: I don't want to put words
5 in my friend's mouth, but it may also be that
6 they think there's a higher level of
7 explicitness required for what counts as being
8 in the -- specified in the discretion of the
9 Attorney General.
10 JUSTICE THOMAS: One final question.
11 We agree that if you asked Mr. Patel whether he
12 checked the box in the -- for his app -- in his
13 application for a license in Georgia, we agree
14 that's just looking at the application and
15 determine a fact, right? You checked that
16 you're a citizen?
17 MR. RAYNOR: That's correct. Whether
18 he checked the incorrect box is a question of
19 historical fact.
20 JUSTICE THOMAS: Okay. Now, whether
21 or not he lied in checking the box, I want you
22 to tell me why that is also a fact --
23 MR. RAYNOR: It's a fact --
24 JUSTICE THOMAS: -- as opposed to a --
25 a determination that includes some discretion.

1 MR. RAYNOR: I don't think findings of
2 historical fact like that include any measure of
3 discretion. There's a right answer and a wrong
4 answer to this particular question. Did he tell
5 a lie, or did he not tell a lie?
6 JUSTICE THOMAS: So how is that a
7 fact?
8 MR. RAYNOR: It's a fact because it's
9 something about the state of the world at the
10 time that he acted, and it can be determined
11 either correctly or incorrectly.
12 JUSTICE THOMAS: So it's exactly like
13 checking the box?
14 MR. RAYNOR: Yes. In our view,
15 questions of subjective intent at the time an
16 action was taken are the same as did he check
17 the box or did he not check the box.
18 JUSTICE BARRETT: But how can that be?
19 Because it seems like credibility
20 determinations -- and Justice Kavanaugh alluded
21 to this -- require -- in contrast to when you
22 look at them in a cold record, require some
23 element of judgment, right? Like looking at
24 him, listening to his testimony, and drawing a
25 conclusion, you know, which requires the

1 exercise of some discretion about whether or not
2 Mr. Patel was telling the truth.
3 It just seems hard for -- it's hard
4 for me to see why that's exactly the same as
5 checking the box or not.
6 MR. RAYNOR: I agree it may be a
7 little more complicated of a factual inquiry. I
8 don't think it's fair to say that it involves
9 discretion, though. If -- if the judge --
10 immigration judge were to determine I think the
11 evidence shows that this person lied, but I'm
12 going to exercise my discretion to find that he
13 told the truth, everyone would agree that that's
14 impermissible.
15 Questions of credibility are
16 traditionally treated as questions of fact. If
17 you look at Section 1229a, it specifies the
18 different criteria that a court should consider
19 in assessing credibility, and they're all
20 factual considerations, although I -- I
21 acknowledge that it's a slightly more
22 complicated one than the question did he check
23 the box or not.
24 JUSTICE SOTOMAYOR: Didn't you just
25 give the answer in part by saying, generally, a

1 judge doesn't say I just think he lied. A judge
2 gives reasons for why he thinks the person lies.
3 And those reasons are supported by the record or
4 not, correct?
5 MR. RAYNOR: Correct. Yes. But I
6 don't --
7 JUSTICE SOTOMAYOR: That's why we
8 think of them as facts, as every judgment
9 doesn't necessarily mean discretion.
10 MR. RAYNOR: Yes. Agreed. There are
11 multiple meanings to the word "judgment." Here,
12 the statute uses the term "judgment" to include
13 a discretionary component, and that's evident
14 not just from the dictionary definitions that
15 were contemporaneous with the time, although
16 those did include a discretionary component.
17 They define "judgment" as notion,
18 estimate, opinion. But the statutory context
19 also indicates that the term "judgment" here
20 includes a discretionary component.
21 The title says Denials of
22 Discretionary Relief. Even more critically, the
23 second clause refers to "any other decision or
24 action specified to be in the discretion of the
25 Attorney General or" -- "or the Secretary."

1 JUSTICE ALITO: But isn't your
2 argument that findings of fact never constitute
3 discretionary -- never constitute a judgment?
4 MR. RAYNOR: Our position is that
5 objective findings of historical fact will not
6 constitute a judgment within the meaning of this
7 particular provision. I'm not disputing that
8 colloquially it -- it might be used to refer to
9 findings of fact, but the contextual cues here
10 indicate that that's not the case.
11 JUSTICE ALITO: So you -- you are not
12 making the argument that simply looking at the
13 -- the dictionary definition of the term
14 "judgment" is sufficient to support your
15 position?
16 MR. RAYNOR: No, Justice Alito. The
17 dictionary definitions support our position.
18 They do define this to have a subjective
19 component, but they're not alone enough. And I
20 think the -- the most important contextual --
21 JUSTICE ALITO: Why do they support
22 your position at all? Because any factual
23 determination involves some exercise of
24 judgment, doesn't it? Some are -- some involve
25 questions about which no reasonable person could

1 disagree, but many, like a determination of
2 credibility, involve consideration of a number
3 of factors, and -- and it's very natural to say,
4 in my judgment, this person was telling the
5 truth or, in my judgment, this person was not
6 telling the truth, right?
7 MR. RAYNOR: It -- it is possible to
8 speak in that way. The dictionary definition --
9 JUSTICE ALITO: Is there anything odd
10 about speaking in that way?
11 MR. RAYNOR: Well, the dictionary
12 definitions at the time tend to have a little
13 more nuance to the meaning of the term
14 "judgment." They define it in terms of
15 subjectivity, discerning competing factors,
16 weighing competing factors.
17 And the INA similarly consistently
18 uses the term "judgment" in this way. The INA
19 uses the term "judgment" 12 times outside of
20 this provision. Eight of those times it's
21 referring to a court judgment, which wouldn't
22 apply here, and then two of those times it's
23 referring to a discretionary judgment and it
24 uses --
25 JUSTICE ALITO: What is your

1 definition of a "discretionary judgment"?
2 MR. RAYNOR: I think there it's just a
3 bootstrapping example. Congress is just making
4 absolutely clear that judgment has the
5 discretionary component.
6 JUSTICE ALITO: But what -- All right.
7 What is a discretionary decision? What is your
8 definition of a "discretionary decision"?
9 MR. RAYNOR: A discretionary decision
10 in terms of identifying one for purposes of this
11 statute would be something that is value-laden,
12 requires weighing of competing factors. There
13 may often be a history of non-reviewability, as
14 there is with the hardship criterion. It may be
15 traditionally have been reviewed for abuse of
16 discretion under Pierce v. Underwood, looking at
17 those kind of factors.
18 And sometimes there will be an express
19 textual indicator that it's discretionary, for
20 example, if the statute says "in the opinion of
21 the Attorney General" or "in the opinion of the
22 Secretary."
23 CHIEF JUSTICE ROBERTS: Well, we treat
24 a credibility determination as a question of
25 fact. You don't have discretion, right? That

1 -- that's your position?

2 MR. RAYNOR: Correct, Mr. Chief

3 Justice.

4 CHIEF JUSTICE ROBERTS: But -- but

5 can't you have people who, when they're making a

6 judgment about whether an applicant is lying or

7 not, somebody could say: I place a lot of

8 weight on demeanor. I mean, if a person looks

9 nervous or something, I -- I tend to think she's

10 -- she's -- she's more likely lying.

11 And somebody else says: No, I don't

12 do that. I don't regard it at all because I

13 think people applying for, you know, this type

14 of relief, they're going to be nervous. They're

15 facing a lot of things.

16 Now isn't it an exercise of discretion

17 what type of criteria you apply in determining a

18 -- what you say is a -- ultimately a factual

19 question?

20 MR. RAYNOR: I don't think so, Mr.

21 Chief Justice, and I don't -- I don't think

22 there's any dispute that credibility

23 determinations would be non-discretionary fact

24 questions.

25 I don't want to get hung up too much

1 on the colloquial meaning, though, because the
2 statutory context here is very important. And
3 the second clause, this Court interpreted in
4 Kucana to cover "the same genre" of decisions as
5 the first clause, in other words, decisions made
6 discretionary by legislation.
7 And the only way to read those two
8 clauses together, as Kucana did, in this case,
9 is our interpretation. We read the first clause
10 to be limited to discretionary determinations
11 and to cover all discretionary determinations
12 underlying the listed forms of relief.
13 CHIEF JUSTICE ROBERTS: So I guess I
14 don't understand whether you've answered my
15 question, is what would you call it if somebody
16 says, I put a lot of weight on -- on personal
17 demeanor, and somebody else says, well, I don't
18 put any weight on demeanor? Isn't that an
19 exercise of discretion in determining a factual
20 issue?
21 MR. RAYNOR: No, Your Honor. I think
22 that would require a searching inquiry. They --
23 they would have to be paying close attention,
24 sorting what they find more persuasive or not,
25 but I don't think that we would say that they

1 have the discretion to choose what the right
2 answer is to this factual question.
3 JUSTICE KAGAN: Mr. Raynor --
4 CHIEF JUSTICE ROBERTS: But they have
5 the discretion to determine, I take it, that
6 they're going to regard nervousness or they're
7 not going to regard nervousness.
8 MR. RAYNOR: That's not typically how
9 this Court talks about credibility
10 determinations. When it talks about complex
11 factual questions like this, it will review them
12 for clear error or substantial evidence. It
13 won't typically review them for abuse of
14 discretion. And I think the same approach is
15 appropriate here.
16 JUSTICE KAGAN: Mr. Raynor, I think
17 I'm a bit confused. The factual issue here is
18 not the ordinary kind of was he lying in the
19 legal proceeding, right, in which we usually
20 say, oh, it's a credibility determination as to
21 whether he was lying on the stand.
22 The factual issue here, if I
23 understand correctly, is whether he was -- what
24 his intent was when he checked the box. So it's
25 a question of historical intent. It's not a

1 question of his credibility in the particular
2 legal proceeding. Is that right?
3 MR. RAYNOR: I agree with that,
4 Justice Kagan. I don't want to run from the
5 fact that the immigration judge did find his
6 testimony to be non-credible. The judge did say
7 that. But I agree with you it is an objective
8 question of historical fact.
9 JUSTICE KAGAN: But the -- the factual
10 issue at issue here is not that. It's what --
11 what was his intent when he checked the box.
12 MR. RAYNOR: Correct. Did he tell a
13 lie or not.
14 CHIEF JUSTICE ROBERTS: Well, but he's
15 asked questions about what his intent was,
16 right, and that -- credibility comes into that,
17 right?
18 MR. RAYNOR: In terms of assessing the
19 answer to this historical question, the
20 immigration judge did consider his credibility
21 on the stand.
22 JUSTICE KAGAN: But he's -- he's
23 always -- he's -- he's asked questions about a
24 lot of factual issues, right?
25 MR. RAYNOR: Yes.

1 JUSTICE KAGAN: That doesn't make them
2 any less factual.
3 MR. RAYNOR: I agree.
4 JUSTICE KAGAN: You know, did you
5 check the box with a pen or a pencil or did, you
6 know, I mean, and, I mean, the fact that he's
7 later asked questions and his credibility is --
8 is at issue doesn't make the underlying factual
9 issue less factual.
10 MR. RAYNOR: I agree, Justice Kagan.
11 And nobody is suggesting that the -- the -- the
12 --
13 CHIEF JUSTICE ROBERTS: Well, what are
14 you agreeing to? I mean, I don't understand.
15 Is it -- is it an exercise? You -- you think no
16 discretion is involved in examining credibility,
17 which is a predicate determination in
18 determining what you think the historical fact
19 is, right?
20 MR. RAYNOR: Credibility was important
21 here in determining the historical fact. That
22 won't always be the case. But I agree that it
23 was here.
24 CHIEF JUSTICE ROBERTS: Well, I know,
25 but it would be an exercise of discretion, for

1 example, if you think it is, the extent to which
2 you think it is pertinent.
3 MR. RAYNOR: Mr. Chief Justice, I
4 don't think this Court has traditionally
5 described credibility determinations as
6 discretionary determinations.
7 However, if -- if the Court were
8 inclined to go this way, to agree with us that
9 this is limited to discretionary determinations
10 but to be unsure about whether credibility fell
11 within that bucket, I think a remand would
12 probably be appropriate here.
13 That would be a second-order analysis,
14 because the first-line question is -- is does
15 this cover discretionary determinations.
16 JUSTICE BREYER: Yeah, yeah, all
17 right. But look -- look at the -- the
18 discussion you've just been having.
19 What I don't really see is the virtue,
20 legal virtue, of taking the government's
21 position as compared with Mr. Fleming's.
22 I mean, if those were the choices,
23 what you seem to have done, think about this,
24 step 1/step 2 is at least comprehensible to an
25 ordinary person and even to a judge. Okay? I

1 got that.
2 And now what we're doing, we're going
3 to have, like we have in the code here, about
4 eight pages of tiny print in some of these
5 things about what goes before the Attorney
6 General may. I'll grant you the "may" could be
7 discretionary.
8 And you want to throw in the box
9 called discretionary things like good character,
10 extremely unusual hardship, et cetera. And who
11 knows what else. We just have an example here.
12 So all we're going to do is introduce,
13 if we take yours, a new issue, and this new
14 issue is going to be whether any of these words
15 -- and there are loads of them -- fit within the
16 government's idea of special discretion or not.
17 And at that point, I foresee lots of
18 arguments of this kind. But all we need to say
19 is: Wait a minute. B has to do with the step 2
20 kind of discretion. And if you look through all
21 five, you find in the first sentence of each of
22 those five either the word "discretion" or at
23 least the word "may."
24 Do you see my question? How did the
25 government get to this point? I don't get it.

1 MR. RAYNOR: Justice Breyer,
2 respectfully, I don't think Petitioners'
3 position allows you to avoid this issue. They
4 concede that certain eligibility criteria will
5 be unreviewable under the second clause. So
6 you're going to have to do precisely the same
7 analysis, simply under the second clause.
8 JUSTICE KAGAN: I don't think that
9 that's what they concede. They concede that
10 under the second clause, there may be
11 overlapping judgments. But they would say the
12 initial eligibility criteria are always
13 reviewable.
14 Now, if -- if in the second -- if in
15 the second stage the Attorney General or the
16 Secretary or whoever makes this decision, you
17 know, talks about overlapping issues, that's
18 what they've conceded. But their -- theirs is a
19 very, very simple line: Step 1, eligibility,
20 reviewable. Step 2, discretionary, not
21 reviewable.
22 MR. RAYNOR: Justice Kagan, with
23 respect, their footnote says subsection (B)(i)
24 does not strip review of first-step eligibility
25 determinations. Review of such a determination

1 may be barred if it satisfied subsection
2 (B)(ii)'s requirement. And I think that's --
3 JUSTICE KAGAN: Well, I think I read
4 that differently than you. I just read them as
5 saying, once you get to the step 2 stage,
6 everything is not reviewable any longer. But
7 the step 1 stage, everything is reviewable.
8 MR. RAYNOR: I just don't think
9 there's -- it's inconceivable that that's their
10 actual position because certain eligibility
11 criteria are expressly in the Attorney General's
12 discretion, to take inadmissibility as an
13 example. Some -- in some cases, the non-citizen
14 will seek waiver of inadmissibility at the
15 eligibility stage, and that's in the Attorney
16 General's discretion. The statute expressly
17 says that.
18 And if all step 1 questions are
19 reviewable, that means courts would be able to
20 review even waiver decisions. And I just don't
21 think there's any way to read the statute that
22 that kind of thing is reviewable simply because
23 it happens to fall under step 1.
24 JUSTICE BREYER: Okay. Got it.
25 CHIEF JUSTICE ROBERTS: Justice

1 Thomas, anything?

2 JUSTICE THOMAS: No.

3 CHIEF JUSTICE ROBERTS: Justice

4 Breyer?

5 JUSTICE BREYER: No, thank you.

6 JUSTICE ALITO: What is the mens rea

7 requirement, if any, for the inadmissibility

8 determination here? I don't have the statutory

9 language in front of me, but my recollection is

10 that it says someone is inadmissible if the

11 person represents -- falsely represents being a

12 U.S. citizen. Isn't that what it says?

13 MR. RAYNOR: It does say that, Justice

14 Alito, but it also says for a purpose or a

15 benefit. And the Board of Immigration Appeals

16 has read that to mean that you have to make the

17 representation for the sake of obtaining the

18 benefit. So a mere mistake in checking the

19 box --

20 JUSTICE ALITO: So the BIA has read in

21 a mens rea requirement?

22 MR. RAYNOR: That's correct. And we

23 --

24 JUSTICE ALITO: Okay.

25 MR. RAYNOR: -- we didn't challenge

1 that below.

2 JUSTICE SOTOMAYOR: I do want to make

3 clear the difference between you and the

4 Petitioner is irrelevant to this case, correct?

5 MR. RAYNOR: That's correct. We both

6 agree that this particular fact question is

7 reviewable.

8 JUSTICE SOTOMAYOR: So the

9 conversation we've been having is more on a

10 theoretical level?

11 MR. RAYNOR: I don't know that it's

12 theoretical, Justice Sotomayor. I do think, if

13 this Court's going to draw a line between

14 discretionary --

15 JUSTICE SOTOMAYOR: But we don't have

16 to? That's what you're telling us. On the

17 facts of this case, we don't have to?

18 MR. RAYNOR: I don't know that there's

19 any way that this Court could hold that fact

20 questions are reviewable without drawing some

21 kind of a line based on the text of the statute,

22 and the only one --

23 JUSTICE SOTOMAYOR: Well, but you're

24 conceding here that these are facts.

25 MR. RAYNOR: Yes, Justice Sotomayor.

1 But the -- the reason we think fact questions
2 are reviewable is because the term "judgment
3 regarding the granting of relief" only applies
4 to discretionary determinations.
5 CHIEF JUSTICE ROBERTS: Justice Kagan,
6 anything further?
7 JUSTICE KAGAN: Much of Ms. Meehan's
8 article rests on the meaning of 1252(a)(2)(D),
9 and, essentially, she says that ought to be read
10 back into the provision that we're interpreting.
11 It says that law questions, constitutional
12 questions, are reviewable.
13 The natural implication of that is
14 that factual questions are not. What is your
15 answer to that?
16 MR. RAYNOR: Justice Kagan,
17 structurally, that's not how the statute works.
18 The statute establishes review bars, including
19 this one, and then it carves out an exception in
20 subparagraph (D). And if a determination
21 doesn't fall within the review bar in the first
22 place, you never need to reference subparagraph
23 (D).
24 So this was -- this was at issue in
25 Nasrallah, for example. The determination there

1 simply didn't fall within the review bar in the
2 first place, so whether it fell within
3 subparagraph (D) was irrelevant. Sub --
4 JUSTICE KAGAN: If Congress had
5 thought that there was review of these sorts of
6 factual issues, wouldn't it have been concerned
7 in adding that provision that the implication
8 was to the opposite effect?
9 MR. RAYNOR: I don't think so because
10 the provision actually says "shall not be
11 construed." So, if anything, it's confirmatory
12 of the existing circuit consensus. Eight
13 circuits had held that this was limited to
14 discretionary determinations. The REAL ID Act
15 was what enacted subparagraph (D), and that was
16 nine years after IIRIRA enacted this (B)(i).
17 And there's just no indication that in the REAL
18 ID Act Congress meant to constrict or expand the
19 scope of the review bar in (B)(i).
20 CHIEF JUSTICE ROBERTS: Justice
21 Gorsuch?
22 JUSTICE KAVANAUGH: Has this been the
23 government's position since 1996 consistently?
24 MR. RAYNOR: No, Justice Kavanaugh.
25 This was our position starting in 2001. I

1 acknowledge that before 2001 the government took
2 the court of appeals' position. After St. Cyr,
3 when it became clear there might be
4 constitutional issues with that position, the
5 government flipped, acknowledged its flip in
6 light of St. Cyr, and argued for the position
7 that we have now held since that time.
8 JUSTICE KAVANAUGH: And I guess one of
9 the questions that comes up -- and this follows
10 on Justice Kagan's question -- is I think
11 there's a little bit of a mismatch between the
12 government's position starting in 2001 and the
13 statutory language of the provisions that
14 include the subsequent REAL ID Act.
15 So I understand why the government in
16 2001 would have said St. Cyr, we need to do
17 something different. And the courts of appeals
18 cases were out there, some of them were out
19 there at that time as well.
20 But then what St. Cyr said was
21 questions of law. It didn't say discretionary.
22 So the government's position seems to be a
23 little bit of a mismatch, which then becomes
24 more of a problem once you have the REAL ID Act,
25 the mismatch. Tell me how to work my way

1 through that.

2 MR. RAYNOR: Our constitutional

3 avoidance reading in 2001, you're correct, was

4 slightly overbroad with respect to the concerns

5 that St. Cyr identified, but that's because that

6 was the plausible way to read the text. There

7 really wasn't any way to read the text to just

8 exclude questions of law and precisely track the

9 concerns identified in St. Cyr. So we took the

10 position in 2001 this is the best reading of the

11 text, and it takes care of the concerns in St.

12 Cyr.

13 Now, once that was justified as the

14 constitutional avoidance reading, the addition

15 of subparagraph (D) ameliorating the

16 constitutional concerns doesn't retroactively

17 change what the best reading of the text is.

18 Clark v. Martinez says whether constitutional

19 concerns come or go, we're not going to change

20 our reading of the text.

21 And in the REAL ID Act, Congress left

22 intact the operative language here.

23 JUSTICE KAVANAUGH: I guess the REAL

24 -- if the REAL ID Act had been present as of

25 '01, maybe the government would have adopted a

1 different position, but that's speculative, I
2 suppose.
3 Let me ask two -- sorry to prolong
4 this -- but two questions. What are the
5 problems if we adopt the Petitioners' position
6 and what are the problems if we adopt the
7 amicus's position from the perspective of the
8 government, which has had a consistent position
9 on this since 2001?
10 MR. RAYNOR: Yes. With respect to
11 Petitioners, again, I think their position is
12 largely aligned with ours, except for perhaps an
13 analytical distinction in that they would put
14 discretionary eligibility criteria under (B)(ii)
15 rather than (B)(i).
16 So, if an inadmissibility waiver comes
17 up at the eligibility stage, for example, I
18 think they would acknowledge that's unreviewable
19 under the second clause but not the first.
20 That's purely an analytical difference.
21 With respect to amicus, obviously,
22 there are large practical differences. As my
23 friend pointed out this morning, the starkest
24 practical difference is at the district court
25 level. When DHS makes these adjudications

1 outside of removal proceedings, there's going to
2 be no review whatsoever.
3 But then, of course, there's also a
4 practical difference at the court of appeals
5 stage in that we think factual questions are
6 reviewable --
7 JUSTICE KAVANAUGH: On the --
8 MR. RAYNOR: -- albeit under a very
9 deferential standard of review.
10 JUSTICE KAVANAUGH: -- on the district
11 court point, what's the volume there?
12 MR. RAYNOR: Unfortunately and
13 somewhat surprisingly, there's not a lot of
14 clear data that precisely tracks this question.
15 Based on some internal calculations, it appears
16 that there were probably north of a thousand
17 challenges in district court to DHS
18 determinations in the past year.
19 Petitioners' reply brief at Note 8
20 cites some additional statistics, but those
21 don't precisely map onto 1255 adjudications. It
22 includes a slightly broader set of adjustment
23 applications.
24 So I think it's fair to say that U.S.
25 CIS likely adjudicates or receives more

1 applications than does the Executive Office for
2 Immigration Review, but, unfortunately, I don't
3 have very good data on that question.
4 JUSTICE KAVANAUGH: Thank you.
5 CHIEF JUSTICE ROBERTS: Justice
6 Barrett?
7 JUSTICE BARRETT: I just have one
8 question, Mr. Raynor, and this is following up
9 on Justice Breyer's point.
10 I mean, the -- the virtue of both the
11 amicus's positions and the Petitioners'
12 position, both positions are easily
13 administrable, and they both draw a bright line.
14 I find the treating the discretionary part -- as
15 Justice Breyer pointed out, it introduces
16 complications for courts, then have to figure
17 out which bucket something falls into.
18 And so, given that the bar also
19 applies to judgments regarding cancellation of
20 removal, can you just explain, you know, how the
21 court is supposed to decide whether the -- the
22 quality -- the -- the factor whether the removal
23 would result in exceptional and extremely
24 unusual hardship to spouse or child or parent,
25 how do -- how does a court decide

1 discretionary/non-discretionary?
2 MR. RAYNOR: There's --
3 JUSTICE BARRETT: Isn't that also
4 mixed fact and -- but it also has some
5 discretion mixed in?
6 MR. RAYNOR: Your Honor, we would not
7 agree that it's a mixed question of law and fact
8 under Guerrero, but there is some question about
9 that in the lower courts right now.
10 In terms of identifying discretionary
11 determinations, you would look to several
12 factors. One is, does it include express
13 discretionary language, like "in the opinion of
14 the Attorney General"? The example you gave
15 doesn't happen to include that language, but
16 some hardship criteria, as, for example, under
17 1255, do include such language.
18 Then you would look at whether it
19 requires value-laden decision-making and you
20 would also look at whether there was a history
21 of non-reviewability.
22 For example, there was a fair amount
23 of pre-IIRIRA case law treating hardship
24 determinations as discretionary, and we think it
25 would be appropriate for the Court to look at

1 that in making that -- that determination.
2 I would just note in terms of the
3 practical concerns here, the courts of appeals
4 have been doing this for 20 years. The
5 executive has stood behind this interpretation
6 for 20 years. And we obviously have a strong
7 interest in a practical line.
8 And, regardless of what you hold about
9 (B)(i), this type of parsing is indisputably
10 required under (B)(ii). (B)(ii) requires you to
11 identify precise criterion -- criteria and then
12 determine whether they're discretionary or not.
13 So courts are going to be doing this
14 under one of the two provisions.
15 JUSTICE BARRETT: Thank you.
16 CHIEF JUSTICE ROBERTS: Thank you,
17 counsel.
18 MR. RAYNOR: Thank you.
19 CHIEF JUSTICE ROBERTS: Ms. Meehan.
20 ORAL ARGUMENT OF TAYLOR A.R. MEEHAN,
21 COURT-APPOINTED AMICUS CURIAE IN SUPPORT
22 OF THE JUDGEMENT BELOW
23 MS. MEEHAN: Mr. Chief Justice, and
24 may it please the Court:
25 I'd like to come back to some of the

1 questions about an alternative meaning of
2 "judgment" and why that will still bar review
3 here. But, before I do that, I'd like to start
4 with what I think is the only correct meaning of
5 "judgment" as used by Congress here in the
6 jurisdictional bar.
7 "Judgment" here means any decision
8 with a connotation of formality or
9 authoritativeness. That formal decision or
10 judgment is the overall denial of discretionary
11 relief. Like all judgments, it subsumes any
12 discretion -- subsidiary determination made
13 along the way to denying relief. So whatever
14 the reasons leading to the denial of relief, the
15 resulting judgment is barred.
16 The only exceptions to that
17 jurisdictional bar are in subparagraph (d)'s
18 exceptions clause, precluding review of
19 constitutional claims and questions of law.
20 Congress left no doubt in 2005 that
21 these are the only exceptions. How? By also
22 adding to the text of the jurisdictional bar.
23 In the jurisdictional bar itself,
24 Congress added, except as provided in
25 subparagraph (d), meaning except for

1 constitutional claims or questions of law, no
2 court shall have jurisdiction to review any
3 judgment regarding the granting of relief.
4 There is not a lurking third exception
5 for some findings of fact un-enumerated in
6 either the jurisdictional bar or the exceptions
7 clause. To say that there is would be contrary
8 to the text of the statute, contrary to the
9 structure of the statute, and contrary to one of
10 IIRIRA's overarching purposes, to streamline
11 judicial review, here, leaving fact-finding in
12 the hands of the Executive Branch, consistent
13 with historical practice.
14 Mr. Patel's factual claim is
15 concededly not a question of law or a
16 constitutional claim. The Eleventh Circuit was
17 right to reject it on jurisdictional grounds.
18 I welcome the Court's questions.
19 JUSTICE THOMAS: Ms. Meehan, you seem
20 to rely quite a bit on re -- the clause
21 regarding the granting of relief as having a
22 broadening effect on judgment.
23 How would you interpret the statute if
24 that -- if that clause did not exist?
25 MS. MEEHAN: I -- I think I would

1 still interpret it the same, but -- but here is
2 why it needs to exist, especially for the
3 statute as written in -- in 1996.
4 The statute in 1996 was directed at
5 appeals from removal proceedings, and so that
6 phrase, "regarding the granting of relief,"
7 under those five subsections, at its most basic
8 level is serving an identifying function,
9 because, in the removal proceeding, you will
10 have judgments regarding the granting of relief
11 under these five statutes.
12 You'll also have a removability
13 decision, and perhaps you'll also have, say, the
14 denial of asylum. And what that phrase
15 "regarding" is doing is telling you the set of
16 decisions, the discretionary relief denial, that
17 is what is barred by the jurisdictional bar, but
18 the removability decision is still appealable.
19 And that's one of the -- the larger
20 problems with Petitioners' alternative reading,
21 that Congress should have just said final order.
22 Mr. Patel has every right to appeal the
23 removability decision.
24 And if you say that he can't appeal
25 the final order of removal, that brings along

1 with it that removability decision.
2 Now "regarding" also has a broadening
3 function. I think it's Congress's way of
4 explaining that a -- a judgment denying relief
5 for eligibility reasons stands on the same
6 footing as a judgment denying relief for
7 discretionary reasons or perhaps a judgment
8 denying relief for a mix of reasons falling into
9 either category.
10 One way to think about it is
11 "regarding" was Congress's way of rejecting
12 Petitioners' interpretation here.
13 And -- and to Petitioners' argument
14 that -- that -- that "regarding" is -- is -- is
15 a term of art or is a way of thinking about
16 targeting those second-step decisions, I think
17 that's just wrong, and -- and Section 1252 shows
18 us why.
19 So, in the next subparagraph, in
20 1252(b)(4)(D), Congress did exactly what
21 Petitioners said it should have done here.
22 In (b)(4)(D), regarding asylum,
23 Congress refers to the Attorney General's
24 discretionary decision whether to grant asylum
25 relief. And that comparison between

1 1252(b)(4)(D) and the much more categorical
2 language here in the jurisdictional bar, I
3 think, is the end of Petitioners' argument.
4 We don't assume that the language
5 Congress used in (b)(4)(D) is that same
6 "regarding" language we here -- we see here in
7 the jurisdictional bar.
8 JUSTICE SOTOMAYOR: Counsel, I don't
9 understand your answer at all because I don't
10 see how your interpretation in the various
11 subdivisions you gave us give any meaning to
12 "regarding the granting of relief" whatsoever.
13 Congress need not have specified any
14 judgment in (B)(i) as distinct from a decision
15 or action in (B)(ii). Why didn't it just say
16 any decision or action, if it used different
17 words, judgment regarding? And it seems to me
18 that if "decision or action" is as broad as you
19 claim it is, then "judgment regarding the
20 granting of relief" has to be more narrow. You
21 can't make it broad at the same time because,
22 otherwise, they would have used identical
23 language.
24 Second, I'm not sure how we ignore
25 neighboring subsections (a) and (c) that show

1 when Congress wanted to strip jurisdiction
2 broadly in the way that you want it to. You
3 want it to strip both factual and legal
4 jurisdiction. Congress knew how to do that in
5 (a) and (c). And it could have just copied that
6 language. Yet it used distinctive language
7 altogether.
8 Then add to all of this, I think all
9 of this means that, at best, the statute is
10 ambiguous. It's not clear. And if it's
11 ambiguous, I don't know what to do with the
12 presumption favoring judicial review. That's so
13 well embedded in our jurisprudence. It's what
14 made us decide Kucana last year.
15 This makes no sense to me. So give me
16 a reason why Congress would do something
17 different in (B)(i) and (B)(ii) --
18 MS. MEEHAN: Well, to your first
19 question --
20 JUSTICE SOTOMAYOR: -- that would give
21 -- that would give meaning to all of the words.
22 MS. MEEHAN: To your first question,
23 Justice, I actually think looking at the full --
24 the context, I agree with you we should look at
25 the surrounding provisions and the differences

1 in language Congress used here. I think,
2 actually, once you do that, it all points in the
3 direction that the jurisdictional bar means the
4 overall denial of relief.
5 Second, with respect to (a) and (c),
6 those are -- those are helpful examples of
7 having to use different language for different
8 things.
9 So I -- I read (a)(2)(A) actually as a
10 bit narrower. I think it's interesting that
11 Congress in that -- in that provision says "any
12 individual determination" and doesn't say "any
13 judgment." And -- and when Congress says that,
14 they're reserving the right to -- to have a
15 legal challenge or whatever else about expedited
16 removal proceedings.
17 With respect to (c), the real problem
18 is what I mentioned earlier with Justice Thomas.
19 You can't speak categorically like a final order
20 of removal in subparagraph (b) in the
21 jurisdictional bar here because, if you did
22 that, you'd be precluding Mr. Patel from
23 appealing anything related to the removability
24 decision.
25 And -- and he's not -- he's not

1 subject to the criminal alien bar. He has every
2 right to appeal the criminal alien -- pardon,
3 the removability decision. And so what's left
4 is Congress's choice of words to bar instead
5 just the denial of discretionary relief.
6 And -- and -- and, again, "any
7 judgment" is much different here than any --
8 "the Attorney General's discretionary judgment,"
9 for example, in 1252(b)(4)(D) or the Attorney
10 General's discretionary judgment in 1226(e) or
11 the other examples that Petitioner and the
12 government point to, where "judgment" is being
13 used as the object of the preposition, in the
14 judgment of someone.
15 I would agree if the state -- if -- if
16 the provision here said something about "a
17 determination in the judgment of the Attorney
18 General," it's a closer case.
19 JUSTICE SOTOMAYOR: So give me a
20 reason why Congress would want to separate out
21 judicial review regarding factual matters on
22 removability, which it sort of -- it has
23 permitted, from those that have to do with the
24 decisions of agents like this.
25 MS. MEEHAN: Before 2005, I think,

1 arguably, what Congress was doing here was
2 prohibiting review of the entire denial of
3 discretionary relief.
4 I think that's the easiest way to make
5 sense of the jurisdictional bar then amended by
6 the exceptions clause.
7 But even if that's not what Congress
8 was doing and it was just making fact review
9 different for removability or discretionary
10 relief, one reason Congress might have wanted to
11 do that is the removability decision itself has
12 higher stakes. There are greater due process
13 concerns. And so we would want to afford a
14 non-citizen the ability to appeal that in a way
15 that discretionary relief is but a matter of
16 grace. And so, in streamlining judicial review,
17 as one -- as was one of IIRIRA's overarching
18 purposes, Congress took off the table that fact
19 review.
20 JUSTICE SOTOMAYOR: Thank you.
21 JUSTICE KAGAN: Ms. -- Ms. --
22 JUSTICE BREYER: Well, there's a part
23 you left out. I mean, I think Justice Sotomayor
24 brought up a set of relevant factors. Where --
25 where I am at the moment, I think it would be

1 very -- if you really ask a congressman have you
2 ever thought about this, he -- he probably would
3 say before St. Cyr we wanted no review. At
4 least I didn't. But that isn't what they said.
5 And so then what we have now, we have
6 (D) and we have the St. Cyr, anti-St. Cyr review
7 or whatever. Then we go and you look at (A),
8 (B), and (C). Okay. When I read it, the music
9 of those words, look, the -- "any individual
10 determination or to entertain any other cause or
11 claim." God, it sounds like we really mean it.
12 And, of course, that makes sense
13 because, in my mind, those are people standing
14 up in line at Ellis Island or in the -- and we
15 don't -- the courts don't look at visas from --
16 given in Paris and we're not going to have them
17 look at the people in line in Ellis Island now
18 that we really mean it. Okay?
19 And then you look at (C), and these
20 are criminals. Get rid of them. Okay?
21 And then we look at (B), and (B) uses
22 softer language. "Any judgment regarding the"
23 is softer language. Moreover, we look at the
24 title, and the first one in effect says the Line
25 at Ellis Island, and the third one says

1 Criminals, and the second one says Discretionary
2 Relief. Oh.
3 And then we have awfully good reasons,
4 which Justice Sotomayor brought up, to say, hey,
5 the Attorney General is supposed to decide this
6 discretionary deal. I mean, keep the courts out
7 of that.
8 But that reason doesn't quite apply to
9 all the subsidiary fact things. So now we stick
10 in (D) and maybe they carry along with it. I
11 don't know how to do that, but it just looks
12 different to me.
13 So, once it looks different, well,
14 then you call in the presumption of review, you
15 see? And -- and I -- and once we get the
16 presumption in review, that sort of pushes
17 against what was a good brief. I mean, that
18 pushes the other way. Hmm.
19 And so I'm slightly stuck and I -- and
20 I'm slightly stuck on this presumption of
21 review. And I can see how to deal with the
22 government. You say, discretion, you know,
23 discretionary decision, which is that last
24 decision, stay here, my friend. And anything in
25 the 19,000 words in 1182(B) or wherever, that's

1 the same, and we don't have to decide what's the
2 same in this case.
3 So -- so I can see it both ways, but I
4 think that presumption is tough for you.
5 MS. MEEHAN: I'll take your questions
6 in reverse order, Justice, which -- I'd like to
7 say something about the presumption of review
8 first. It hangs together with the text, right?
9 So the -- the starting point here for the
10 presumption is this is a jurisdictional bar.
11 Right out of the gate, Congress has indicated
12 with clear language that it anticipates some set
13 of decisions will beyond -- will be beyond
14 review.
15 And then, when you combine that --
16 that observation that we have a juris- --
17 JUSTICE KAGAN: Well, still, Ms.
18 Meehan, wouldn't the presumption apply in terms
19 of deciding what the scope of that provision is?
20 I mean, it doesn't just disappear because we're
21 dealing with a review bar.
22 MS. MEEHAN: I -- I agree. I agree.
23 But this is unlike a case like Bowen, for
24 example, where the statute doesn't say one way
25 or another. It's silent. But -- but I agree.

1 So you combine that jurisdictional bar --
2 JUSTICE KAGAN: I mean, not to press
3 the point if you agree, but, I mean, you might
4 think that Congress acts with the presumption in
5 mind, especially when it's doing a review bar,
6 as opposed to when it's silent.
7 MS. MEEHAN: You might and in which
8 case you go to the next order of analysis, which
9 is you exhaust every canon of construction.
10 That includes grappling with what subparagraph
11 (D) can possibly mean if subparagraph (B) means
12 what the government says it means in particular.
13 And you're left with a clear -- you're
14 left with a clear implication -- or, pardon,
15 you're left with a clear conclusion that the
16 jurisdictional bar must mean the overall denial
17 of relief. And if that is clear, there's no
18 reason to apply a presumption of review. It is
19 only a tiebreaker only if once you --
20 JUSTICE KAGAN: I didn't mean to take
21 you off of Justice Breyer's main point.
22 MS. MEEHAN: So the -- well, to
23 Justice Breyer's question, the -- the main
24 reason I would -- I would not apply the
25 presumption of reviewability here is because,

1 once you exhaust the canons of construction, I
2 do think the only correct way to read the
3 statute is as the Eleventh Circuit read it.
4 But even if you disagree with me on
5 that, this would be an awfully strange case to
6 apply the presumption of reviewability if you
7 consider the origins for the presumption of
8 reviewability, how it's ordinarily applied, and
9 then historic reviewability of immigration
10 decisions more broadly.
11 The presumption of reviewability
12 largely originated with the APA. The -- the
13 purpose of it was to review questions of law
14 about whether agencies were following their own
15 rules, whether they were following Congress's
16 rules. No one disputes here that Mr. Patel
17 could -- could appeal a question of law of that
18 order.
19 But I am not aware of any of this
20 Court -- Court's cases in an immigration case
21 where the Court has applied the presumption of
22 review to allow a petitioner to relitigate a
23 question of fact.
24 JUSTICE BREYER: Yeah, but, I mean,
25 we're going to -- if we take that view, we're in

1 the same mess as the other because, you know,
2 the APA has them all in the same place,
3 substantial evidence, on the record as a whole,
4 and that's in review law, fact. It's all in the
5 same place in the statute. And we start making
6 those distinctions, at least if we don't have
7 to, between a review for substantial evidence
8 and review for -- that's a question of law
9 and -- and really -- I mean, it really is. You
10 call it a question of fact, but -- but, God, I
11 -- I can think we'll get into a mess or the
12 courts will get into a mess. Is this -- I've
13 not seen it distinguished, in other words, and I
14 don't see why it should be.
15 MS. MEEHAN: The best example of that
16 distinction is in McNary, which is helpfully an
17 immigration case where the presumption of review
18 was at issue. In McNary, the Court reviewed
19 what it called a generic question of statutory
20 interpretation about visas for these special
21 agricultural workers.
22 The Court went out of its way in
23 McNary to say, to be clear, we are not
24 reviewing, no one asked us to review, the merit
25 of the individual applicant's applications here.

1 We are only reviewing the more abstract, the
2 more generic question of what the statute means,
3 and then we're leaving it to the agency to
4 determine how to apply that in this case.
5 And that is consistent with decades of
6 this Court's case law and other federal courts'
7 case law acknowledging that they take executive
8 officials' facts as found. And the courts' only
9 role is to answer the questions of law that
10 would arise --
11 JUSTICE BREYER: We actually say facts
12 as found, even if not supported by substantial
13 evidence?
14 MS. MEEHAN: St. Cyr is -- St. Cyr is
15 the best --
16 JUSTICE BREYER: No, St. Cyr didn't
17 deal with that. It dealt with the law, and it
18 dealt with what you have to have in habeas.
19 MS. MEEHAN: On -- on page 306 of St.
20 Cyr, the Court actually distinguishes between
21 fact review and these historical habeas
22 decisions and questions of law. And I actually
23 take that passage of St. Cyr to mean that if Mr.
24 St. Cyr had come to this Court with a factual
25 dispute, the case would not come out the same.

1 JUSTICE BREYER: But that's habeas.
2 MS. MEEHAN: It is habeas. And -- and
3 that -- that is only more helpful here. So, if
4 it is true that this Court was reluctant or
5 unwilling or -- to -- to review factual
6 questions in a habeas case about an alien
7 detained pending removal, then it must
8 necessarily follow that it would be odd to apply
9 the presumption of judicial review here for a
10 denial of discretionary relief, a fact question
11 about the denial of discretionary relief.
12 JUSTICE BARRETT: Ms. Meehan, I want
13 to clarify the scope of your position. So isn't
14 it true that your position does lead to the
15 conclusion that, in district court, even legal
16 questions are not reviewable?
17 MS. MEEHAN: I -- I think that is --
18 that is the -- the right way to interpret the
19 statute as amended in 2005. So, before 2005, I
20 -- I actually don't think that was true.
21 In 2005, one of the REAL ID Act
22 amendments was to -- if you look at pages 10 and
23 11 of my brief, Congress adds the phrase
24 "regardless of whether the judgment, decision,
25 or action" occurs during a removal proceeding.

1 And the courts of appeals are relatively uniform
2 that that means a petitioner must wait until
3 they're placed into removal proceedings to
4 dispute a -- a denial of discretionary relief.
5 Now I -- I -- I think that is an issue
6 of Congress's own making and could be something
7 that Congress could -- could solve. There's a
8 good reason why Congress wants that to be the
9 case, which is exhaustion. But, before I say
10 more about that, I would like to address some of
11 the statistics questions and put it all in
12 perspective.
13 So, first off, this concern about U.S.
14 CIS denials being -- not being immediately
15 reviewable affects only one of the four
16 categories of discretionary relief in the
17 jurisdictional bar. As best I can tell, it
18 affects only adjustment of status. It doesn't
19 affect cancellation or some of the
20 inadmissibility waivers, including because
21 something like cancellation or voluntary removal
22 is only happening in the context of a removal
23 proceeding.
24 Second off, even for that set of
25 adjustment-of-status applicants, the vast

1 majority are unaffected by this. I think we're
2 only dealing with a very small percentage. This
3 year alone, the average approval rate for one of
4 these U.S. CIS adjustment-of-status applications
5 has hovered around 87 percent. Two hundred
6 thirteen thousand adjustment-of-status
7 applications have been granted this year.
8 And of those 10 to 15 percent of cases
9 of adjustment-of status-applications that are
10 denied, again, there's good reason. Congress
11 expected those individuals to exhaust their
12 administrative remedies before involving the
13 courts of appeals, as Mr. Patel did here. He
14 applied for adjustment of status with U.S. CIS
15 in 2007, 2008. Then he had a hearing before the
16 immigration court. Then he had an appeal before
17 the BIA. He has an opportunity to file a
18 reopening motion within a certain amount of
19 time, and only then does the Eleventh Circuit
20 get involved. And -- and, again, this is, I --
21 I think, what Congress anticipated by that
22 amended text in 2005.
23 There are additional issues with
24 Petitioners and the government's interpretation
25 that are not what Congress -- that were not

1 problems of Congress's own making.

2 JUSTICE KAGAN: Ms. -- Ms. -- can I

3 stop you there and just can I take you back to

4 the basic question here, which is "judgment

5 regarding the granting of relief" and what that

6 phrase means.

7 And -- and I think, you know, you come

8 into this with a kind of good, ordinary meaning

9 argument. And I -- I take Mr. Patel to be

10 saying it's really not the ordinary meaning

11 here. This is a kind of term of art that refers

12 to the step 2 determination as opposed to the

13 step 1 eligibility functions.

14 And I'm just going to give you a bunch

15 of places in which that language is -- it -- it

16 sort of supports his argument and -- and ask you

17 for your response to it.

18 So 1229a, which is the overarching

19 statute governing how removal proceedings work,

20 that statute basically breaks it down into two

21 steps, in just the way that Mr. Patel does, and

22 says the non-citizen has to prove that she

23 satisfies the initial eligibility requirements.

24 And then -- this is number 2 -- with

25 respect to any form of relief that is granted in

1 the exercise of discretion, that she merits a
2 favorable exercise of discretion. So the
3 granting of relief is in that part.
4 Then, similarly, there's a regulation
5 that breaks the relief down into two steps and
6 in that second step says it should be "granted
7 in the exercise of discretion," a phrase that
8 does not appear in the first step, which is
9 eligibility.
10 And then Mr. Fleming, I think, cited
11 1252(b)(4)(D), whether to grant relief under
12 1158(a) of the asylum title, which pretty
13 clearly has to be about the -- the -- the -- the
14 second-stage inquiry rather than any first-step
15 factual issues.
16 Then -- I'm -- I'm sorry to do this to
17 you -- but we several times, we in St. Cyr, in
18 Bagamasbad, in Pereida, very, very recently,
19 cases spanning nearly 50 years of immigration
20 law, all of them distinguish between eligibility
21 and the step 2 discretionary determination, and
22 all of them talk about the discretionary
23 determination as being about whether relief
24 should be granted.
25 So using that exact same language,

1 basically coming from the statute and appearing
2 in all of our cases. So that's my question to
3 you. Sorry.
4 MS. MEEHAN: I'll try to hit each of
5 them, and then please tell me if I don't.
6 So I -- I agree with you as a general
7 matter. Certainly, the Court has observed and
8 then the statutes seem to observe that there are
9 eligibility questions or issues and there are
10 discretionary issues.
11 I agree with that. Often, the reason
12 that is so is the Court here has had -- has had
13 to make clear that those eligibility
14 considerations are a floor and that the Attorney
15 General doesn't have discretion always to go
16 beneath that floor. You can't grant
17 cancellation, for example, to someone who has
18 committed an aggravated felony, and that floor
19 remains.
20 I don't think those observations about
21 the two-step mean anything for the -- the
22 jurisdictional bar because Congress didn't, in
23 -- in codifying the jurisdictional bar, say
24 eligibility or say discretion.
25 JUSTICE KAGAN: It's -- it's true, but

1 it keeps on using the word "granted." And --
2 and, you know -- excuse me, it -- it says, you
3 know, "granting relief," which is the phrase
4 that appears in the two-step -- in the
5 second-step part of all these provisions and our
6 cases rather than in the first step part. But
7 we just don't talk about granting relief with
8 respect to making these eligibility
9 determinations.
10 MS. MEEHAN: I -- I agree with you
11 there, and I think this would be a much harder
12 case if the word "regarding" and if the word
13 "any" were not involved.
14 But -- but I don't think the word
15 "granting" can carry that amount of weight, and
16 the -- the -- the reason for that is -- is how
17 Congress used "granting" in Section
18 1252(b)(4)(D), whether to grant relief, or,
19 here, a harder statute would be the granting of
20 relief in the discretion of Attorney -- of the
21 Attorney General.
22 I -- I -- I don't think the granting
23 of relief is necessarily limited to the
24 second-step. If it were, the statute would be
25 phrased as the asylum statute is phrased in

1 (b)(4)(D).

2 With respect to 1229a in particular,

3 it's setting out a two-step for the immigration

4 courts. That is a provision that governs the

5 immigration proceedings.

6 But, even as this Court said in

7 Bagamasbad, the immigration court doesn't

8 necessarily need to do step 1. They can go

9 straight to step 2 and deny relief for

10 discretionary reasons, which would -- which

11 would be unreviewable.

12 JUSTICE KAGAN: Well, they could do

13 that and that would be unreviewable. I guess

14 the -- the -- the point that Mr. Patel is making

15 is that, when you're doing step 1, step 1 is not

16 about the granting of relief, and so it is

17 reviewable.

18 MS. MEEHAN: One way -- one way to

19 think about the difference between the granting

20 of relief and granting of relief, which I think

21 is the main textual problem with Petitioners'

22 argument, they're reading them the same.

23 You -- if I told you we're making

24 decisions about -- we're making decisions

25 regarding the sending of astronauts to Mars, you

1 would know that means something different than
2 decisions regarding sending astronauts to Mars,
3 right? At least the latter feels a little bit
4 narrower. The granting of relief naturally
5 encompasses decisions based both on eligibility
6 grounds and on discretionary grounds.
7 JUSTICE KAGAN: So I take that
8 argument, you know, the/of as a different sort
9 of formulation, but -- but in a context in which
10 there's a review -- presumption of
11 reviewability, that starts looking like, whoa,
12 that's a little bit fine for, you know, this
13 context.
14 MS. MEEHAN: As -- as this Court has
15 said, there is both a presumption of
16 reviewability and there is an expectation with
17 jurisdictional bars that the Court will construe
18 the jurisdictional bar with strict fidelity to
19 its terms.
20 Just as much as the Court has to
21 preserve its power of review, Congress has its
22 power to restrict review. And, here, Congress
23 did so.
24 And think about regarding of the
25 granting of relief as a way of eliminating that

1 ambiguity. "Regarding the granting of relief"
2 has that broadening effect, and it shouldn't be
3 read in isolation.
4 I -- I agree this might have been a
5 harder case before 2005. But there's no way to
6 understand the exceptions clause or there's no
7 great way to understand the exceptions clause if
8 altogether any judgment regarding the granting
9 of relief under these five discretionary forms
10 doesn't mean the overall denial, so that when
11 Congress, in the exceptions clause, restores
12 jurisdiction for constitutional claims and
13 questions of law, there's something to restore.
14 In the -- in the government's view,
15 the -- the judgment has always excluded
16 questions of law and constitutional claims, and
17 that makes very little sense then why Congress
18 would cross-reference the jurisdictional bar in
19 the exceptions clause in 2005.
20 The presumption of reviewability
21 doesn't hang only on the phrase "regarding the
22 granting of relief." It requires interpretation
23 of the whole statute. And once --
24 JUSTICE KAVANAUGH: Sorry.
25 MS. MEEHAN: And -- and once you do

1 that, I think there's more than a clear
2 statement that review here for this -- for
3 fact-finding is barred.
4 JUSTICE KAVANAUGH: Can I pick up on
5 your reference there to the government's
6 argument and just get your reaction to what I
7 think is the music of their argument?
8 So you have the '96 act and they agree
9 with your position for the first five years.
10 Then St. Cyr comes along, 2001, and the Bush
11 Administration decides we need to interpret this
12 statute in a way to avoid the constitutional
13 problem, and they come up then, the government
14 comes up with its current position, the
15 discretionary position relying on the title and
16 other things.
17 Then 2005, the REAL ID Act comes in,
18 really talks again like St. Cyr about questions
19 of law and constitutional questions.
20 So a little bit of a mismatch with the
21 government's position. But I think what the
22 government's saying is we've now done it this
23 way through four administrations, for 20 years,
24 and the courts have interpreted it that way, and
25 at least after St. Cyr, we found enough

1 ambiguity in this, the title provision, other
2 things, of how they fit together, that our
3 interpretation should be good enough.
4 I think that's something. I don't
5 want to put words in their mouths, what they're
6 saying. Why -- why do you think that isn't good
7 enough in this instance? We don't usually have
8 the government coming in in an immigration case
9 through four administrations and saying, we want
10 courts to review issues.
11 MS. MEEHAN: I -- I don't think it's
12 good enough for two reasons. First, it doesn't
13 abide by the text, and, second, there are
14 serious workability issues.
15 So, first, even if the statute was
16 unclear before 2005, the exceptions make it
17 clearer. And the way I -- I have made sense of
18 the government's mismatch, Justice Kavanaugh, is
19 the government is saying that Congress did
20 something along the following lines: In 1996,
21 Congress told everyone you can't even junk food.
22 And then in 2005, Congress said: Except you can
23 eat peas and carrots.
24 If I told you can't eat junk food
25 except you can eat peas and carrots, that

1 doesn't make a whole lot of sense. You know
2 what does make sense? You can't eat junk food,
3 but you can eat burgers and fries. And so junk
4 food is the larger category. Burgers and fries
5 are in that category. They're the exception.
6 And by implication, everything else is still
7 unreviewable.
8 Now, the workability problem: I think
9 there's an alternative meaning of "judgment"
10 somewhere between -- there's obviously an
11 alternative meaning of "judgment" in the
12 dictionary definitions, something about forming
13 -- forming an opinion, a judgment call,
14 exercising judgment.
15 That's not the right use of "judgment"
16 here. I think, on the outcome, it fairly
17 encompasses reviewability -- it fairly
18 encompasses credibility. But the government
19 will have this Court walking into a circuit
20 split if it -- if it adopts that meaning.
21 A judgment call. Again, not the right
22 usage, completely unworkable. The Court would
23 have to be creating a federal common law of what
24 is too discretionary or not discretionary
25 enough.

1 CHIEF JUSTICE ROBERTS: Thank you,
2 counsel.
3 Justice Thomas?
4 JUSTICE THOMAS: Nothing further.
5 CHIEF JUSTICE ROBERTS: Justice
6 Breyer? Anything further? No?
7 Justice Sotomayor?
8 JUSTICE SOTOMAYOR: I'm assuming your
9 answer to Justice Barrett was yes, you admit
10 that your reading bars review by the district
11 court of questions of law, but we shouldn't care
12 too much because it's a very small number of
13 people that are affected by that?
14 MS. MEEHAN: It bars immediate review
15 of questions of law in the same way this Court
16 in Reno versus AADC and Reno versus Catholic
17 Social Services barred immediate review, but
18 there will be some --
19 JUSTICE SOTOMAYOR: But I did think
20 that there are immediate consequences to this
21 failure to adjust. I thought the government
22 moves very slowly, and removal proceedings,
23 actual removal notices take ages. But a
24 decision like this can affect a person's work
25 authorization, sponsoring of family members to

1 come here. It affects the pathway to
2 citizenships after three to five years. There's
3 a lot of consequences to not having immediate
4 review.
5 MS. MEEHAN: I -- I agree there are
6 consequences. Those are consequences, I think,
7 Congress anticipated in amending the statute in
8 2005. It could correct those. And I think the
9 Court's decision in Reno versus AADC is exactly
10 on point here, where there were immediate
11 constitutional claims, First Amendment claims
12 and Fifth Amendment claims about the
13 government's selective prosecution. And the
14 Court here held that those claims would have to
15 wait. There couldn't be immediate review. It
16 would have to wait until the end of removal
17 proceedings.
18 JUSTICE SOTOMAYOR: Tell me something
19 in the history of this statute or in the logic
20 of St. Cyr, which made very clear that on the
21 habeas statute, at least, suspending review of
22 questions of law provides a constitutional
23 problem, and what the government's basically
24 saying to us, once they got St. Cyr, a reading
25 that precludes judicial review is not the best

1 reading one should give to a statute. You
2 should go back to the first principles and look
3 at the ambiguity and figure out what the best
4 reading not to do that is.
5 And that's what they've come up with.
6 But your reading does exactly what the
7 government says we shouldn't do.
8 MS. MEEHAN: Do -- do you mean with
9 respect to the USCIS denial and any question of
10 law?
11 JUSTICE SOTOMAYOR: Yes.
12 MS. MEEHAN: So, again, I -- I think
13 the statute is relatively clear that the review
14 of that question has to wait until it has been
15 exhausted through the agency process and it's
16 before the court of appeals and it --
17 JUSTICE SOTOMAYOR: Well, this has
18 nothing to do -- well, I'm sorry. Go ahead.
19 MS. MEEHAN: And it -- and it's in a
20 petition for review. And it also has nothing to
21 do with the case here. Mr. Patel, again,
22 exhausted his administrative remedies. He got
23 review of his question of law in the Eleventh
24 Circuit. The only question here is whether fact
25 findings are beyond review. With respect to the

1 history, that's fully consistent with the
2 history.
3 JUSTICE SOTOMAYOR: Thank you.
4 JUSTICE KAGAN: So fast-food one, it's
5 -- it's good, but isn't -- isn't really the
6 government or -- or Mr. Patel saying you can't
7 eat fast food at lunch but you can eat burgers
8 and fries at dinner?
9 MS. MEEHAN: That's possible --
10 possibly that is what they're saying. I -- as
11 with any hypothetical, it is imperfect. And so
12 then I just go right back to the text. And the
13 text speaks in a categorical way, in the way
14 that Congress didn't otherwise speak
15 categorically when referring to judgments,
16 discretionary judgments.
17 And if there were any doubt about
18 that, you've got to look at the transitional
19 rules. In the transitional rules, Congress took
20 a more modest approach, discretionary decisions.
21 The discretionary comes out in the permanent
22 rules. And we get "any judgment."
23 You can't read those two the same. So
24 even if we're having fast food sometimes and not
25 always, the transitional rules, I think, give us

1 an important key to that -- to the -- to the
2 text here.
3 JUSTICE KAGAN: Thank you.
4 CHIEF JUSTICE ROBERTS: Justice
5 Gorsuch?
6 JUSTICE GORSUCH: You're not going to
7 like this question. Assume for the moment the
8 Court were to disagree with you. As between the
9 two other options, there's slight variations
10 between the Petitioner and the government's
11 theories.
12 But you -- you've raised good metrics
13 for us to measure any interpretation on, the
14 text and the workability. Would -- would you
15 care to grade the two alternatives
16 comparatively?
17 MS. MEEHAN: I -- I think that
18 Petitioners' -- the Petitioners' interpretation
19 doesn't abide by the text and has arbitrariness
20 problems. The government's interpretation
21 doesn't abide by the text and has workability
22 problems. There's actually an interpretation, a
23 fourth interpretation, lurking out there that
24 uses the government's definitions but doesn't
25 have the same workability problems.

1 So if you'll permit me, I'll tell you
2 what the government-adjacent position is, which
3 is if you look at pages 16 and 17 of their
4 brief, and if you look at that more informal
5 meaning of "judgment," the formation of a -- the
6 formation of an opinion exercising discernment,
7 that clearly encompasses fact findings. The
8 fact finding here is the best example of that.
9 The -- the immigration judge heard the
10 direct testimony of Mr. Patel, watched the
11 cross-examination, compared it to the record
12 evidence, and then, in his judgment, deemed him
13 not to be credible.
14 You could adopt that more informal
15 interpretation. It's -- it's close to the
16 government's, but it's not unworkable, so long
17 as you agree that a credibility determination is
18 a judgment and not a non-judgment, as -- as the
19 Court says.
20 Now, in context, considering
21 everything else, I think that's a really
22 difficult interpretation after 2005, but it's
23 the second best alternative.
24 JUSTICE GORSUCH: That's the second
25 best. What's the third and the fourth?

1 MS. MEEHAN: I don't know if I would
2 take arbitrariness versus workability. I mean,
3 the arbitrariness problem in the Petitioners'
4 interpretation is real. The -- the Petitioners
5 explain there are fact findings all along the
6 way to denying discretionary relief. And the
7 government says half of them are reviewable and
8 the other half aren't reviewable.
9 I -- I think that's a -- that's a
10 difficult rule to adopt. I'm not sure which
11 other one I would take. I -- and perhaps --
12 perhaps Petitioners' despite the arbitrariness
13 because it's -- it's administrable, but, again,
14 I think the text leaves us -- I'm having trouble
15 with your question because I --
16 JUSTICE GORSUCH: I --
17 MS. MEEHAN: -- find that --
18 JUSTICE GORSUCH: -- I told you
19 weren't going to like it. So thank you very
20 much, counsel. I appreciate it.
21 JUSTICE KAVANAUGH: Can I just pick up
22 on your answer to the government's position,
23 which were -- as I described, the overall
24 situation was, one, text and, two, workability.
25 So on text, if -- you gave a forceful

1 answer there. I think your argument is even
2 after St. Cyr, they're scrambling, they do a new
3 interpretation, maybe they get some leeway on
4 constitutional avoidance, but once Congress
5 responds to St. Cyr in 2005, the text is
6 sufficiently clear that they no longer have the
7 ambiguity hook to continue with that
8 interpretation. Is that --
9 MS. MEEHAN: I think that's exactly
10 right. And one of the ways to think about the
11 -- the circuit courts before St. Cyr is they
12 were grappling with exactly what the government
13 says.
14 And what's nice about the 2005
15 amendment is Congress solves the problem for
16 everyone. Congress says no
17 discretionary/non-discretionary. There's -- you
18 know, there's no mention of it. But Congress
19 says we're going to give you a line between
20 constitutional claims and questions of law and
21 everything else going forward. And -- and
22 importantly, courts -- other courts of appeal
23 since then have abided by that line.
24 I think that's a way to understand
25 some of the confusion in 2001 that is no longer

1 with us today after 2005.
2 JUSTICE KAVANAUGH: And then your
3 other answer to the -- to the government's kind
4 of overarching position was workability. I
5 think they would respond, well, it's been 20
6 years now, it's out there, and a lot of courts
7 were -- were getting along okay.
8 Do you want to respond to that?
9 MS. MEEHAN: I don't think the courts
10 are getting along okay. And if you look at the
11 Trejo decision from the Fifth Circuit that's
12 cited, I think, in all the briefs here, that's
13 the existing circuit split, it's the best
14 illustration of the unworkability of the
15 government's approach where some circuits have
16 said some eligibility determination is too
17 discretionary; other circuits have said no, it's
18 not discretionary. And then, as I take footnote
19 5 of the government's brief, they think there's
20 also somewhere in the middle where we can review
21 some parts because they're not discretionary but
22 not other parts. And I think that itself
23 illustrates the unworkability.
24 JUSTICE KAVANAUGH: Thank you very
25 much.

1 CHIEF JUSTICE ROBERTS: Thank you,
2 counsel.
3 Rebuttal, Mr. Fleming.
4 REBUTTAL ARGUMENT OF MARK C. FLEMING
5 ON BEHALF OF THE PETITIONERS
6 MR. FLEMING: Thank you, Your Honor.
7 Ms. Meehan said that exhaustion would
8 have to be required, I think in response to
9 Justice Barrett's question. For people who are
10 not removable, there is no further exhaustion.
11 The American Immigration Lawyers
12 Association brief gives the example of Dr. Abu
13 Zaid, whose case is stayed in the D.C. Circuit
14 right now awaiting the decision in this case.
15 He has an H-1B visa. He's working as a doctor
16 at Augusta University Medical Hospital in
17 Georgia.
18 He's not going to go into removal
19 proceedings. He's here lawfully. He's trying
20 to get a green card so that he can have
21 permanent status here as opposed to temporary
22 status.
23 There is no further exhaustion he can
24 do. He has a final order of USCIS denying his
25 application. The only way for him to get review

1 of that is, not under the Eleventh Circuit's
2 vision of the statute, but under ours.
3 Credibility is an issue of fact. In
4 this Court's decision in Nasrallah on page 1693,
5 the Court says those factual issues, regarding a
6 convention against torture order, may range from
7 the non-citizen's past experiences in the
8 designated country of removal, to the
9 non-citizen's credibility, to the political or
10 other current conditions of the country. And
11 the BIA in this very case referred to the issues
12 as factual reviewed for clear error. That's on
13 page 106 of the Petition Appendix.
14 Justice Kavanaugh raised the issue of
15 the REAL ID Act. I think what's important there
16 is that the REAL ID Act was reacting to the fact
17 St. Cyr had taken legal issues that were being
18 pressed by people covered by (c), who had
19 qualifying criminal convictions, and put them
20 into habeas, instead of into petitions for
21 review. REAL ID fixed that, moved them back
22 into petitions for review.
23 But it did not change the situation of
24 people like Mr. Patel who are not subject to (c)
25 because they do not have criminal convictions.

1 Those people have always been able to appeal
2 factual matters, before IIRIRA and after.
3 REAL ID didn't change that. IIRIRA
4 didn't change that.
5 Finally, to clear up any confusion
6 about the difference between our position and
7 the government's, and I -- I don't think our
8 position is arbitrary, with all respect to Ms.
9 Meehan. Our position I think is pretty clear,
10 which is that (B)(i) doesn't bar review of any
11 first step decision.
12 Now, I -- I -- I think that -- we
13 admit because I think we have to that under the
14 language of (B)(ii), Congress could, if it
15 wished, pluck out an individual eligibility
16 requirement and specify in the statute that that
17 is in the discretion of the Attorney General.
18 And, if it were to do that, then there would be
19 no review under (B)(ii).
20 And now I think we -- I think Kucana
21 supports this. However, that is not just a
22 theoretical distinction from what the government
23 is doing. There is a real practical distinction
24 there.
25 And that is because the government

1 seems to think, as the colloquy has
2 demonstrated, that some of the factors where the
3 statute doesn't specify the Attorney General's
4 discretion are somehow, according to some
5 nebulous multi-factor test, sufficiently
6 discretionary that they should fall under
7 (B)(i).
8 But the question then becomes a sharp
9 one of administrability, how do you determine
10 whether something is discretionary under their
11 view of (B)(i). We think our line is clear.
12 Their's is not.
13 But as everyone recognizes, for Mr.
14 Patel, that issue does not have to be resolved.
15 Everyone agrees that his appeal is of a
16 non-discretionary factor.
17 We would respectfully submit the
18 decision of the Eleventh Circuit should be
19 reversed.
20 CHIEF JUSTICE ROBERTS: Thank you,
21 counsel.
22 Ms. Meehan, this Court appointed you
23 to brief and argue this case as an amicus curiae
24 in support of the judgment below. You have ably
25 discharged that responsibility, for which we are

1 grateful.

2 The case is submitted.

3 (Whereupon, at 11:32 a.m., the case

4 was submitted.)

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01 [1] **54:**25

1

1 [13] **12:**5,13 **24:**25 **25:**24, 25 **47:**19 **48:**7,18,23 **79:**13 **83:**8,15,15
1/step [1] **45:**24
10 [2] **76:**22 **78:**8
10:00 [2] **1:**16 **4:**2
106 [1] **99:**13
11 [1] **76:**23
11:32 [1] **102:**3
1158(a [1] **80:**12
1182(B [1] **70:**25
12 [1] **38:**19
1226(e [1] **67:**10
1229a [4] **13:**20 **35:**17 **79:**18 **83:**2
1252 [1] **63:**17
1252(a)(1 [1] **22:**4
1252(a)(2)(B [1] **31:**12
1252(a)(2)(B)(i [1] **4:**12
1252(a)(2)(D [1] **51:**8
1252(b)(4)(D [5] **63:**20 **64:**1 **67:**9 **80:**11 **82:**18
1252(b)(9 [1] **23:**3
1255 [2] **56:**21 **58:**17
15 [1] **78:**8
158 [1] **22:**5
16 [1] **94:**3
1693 [1] **99:**4
17 [1] **94:**3
19,000 [1] **70:**25
1996 [6] **15:**3 **17:**23 **52:**23 **62:**3,4 **87:**20

2

2 [12] **12:**4,12 **24:**24 **32:**18 **45:**24 **46:**19 **47:**20 **48:**5 **79:**12,24 **80:**21 **83:**9
20 [4] **59:**4,6 **86:**23 **97:**5
20-979 [1] **4:**4
2001 [9] **52:**25 **53:**1,12,16 **54:**3,10 **55:**9 **86:**10 **96:**25
2005 [19] **17:**13,16 **18:**1 **60:**20 **67:**25 **76:**19,19,21 **78:**22 **85:**5,19 **86:**17 **87:**16,22 **90:**8 **94:**22 **96:**5,14 **97:**1
2007 [1] **78:**15
2008 [1] **78:**15
2021 [1] **1:**12
28 [1] **22:**6

3

306 [1] **75:**19
307 [1] **13:**11
308 [1] **13:**11
31 [1] **3:**7

4

4 [1] **3:**4

5

5 [2] **21:**10 **97:**19
50 [1] **80:**19
551(6 [1] **21:**10
59 [1] **3:**12

6

6 [2] **1:**12 **15:**7

8

8 [1] **56:**19
87 [1] **78:**5

9

96 [1] **86:**8
98 [1] **3:**15

A

A)(1 [2] **4:**23 **7:**8
a)(2)(A [1] **66:**9
a.m [3] **1:**16 **4:**2 **102:**3
A.R [3] **2:**7 **3:**10 **59:**20
AADC [2] **89:**16 **90:**9
abide [3] **87:**13 **93:**19,21
abided [1] **96:**23
ability [1] **68:**14
able [3] **17:**9 **48:**19 **100:**1
ably [1] **101:**24
above-entitled [1] **1:**14
absolutely [1] **39:**4
abstract [1] **75:**1
Abu [1] **98:**12
abuse [2] **39:**15 **42:**13
accomplish [2] **7:**21 **17:**24
according [1] **101:**4
acknowledge [3] **35:**21 **53:**1 **55:**18
acknowledged [1] **53:**5
acknowledging [1] **75:**7
acquiescence [1] **17:**20
Act [11] **52:**14,18 **53:**14,24 **54:**21,24 **76:**21 **86:**8,17 **99:**15,16
acted [1] **34:**10
action [15] **5:**8 **7:**5,7,15,23 **8:**2 **9:**5 **23:**21 **31:**15 **34:**16 **36:**24 **64:**15,16,18 **76:**25
acts [1] **72:**4
actual [3] **13:**10 **48:**10 **89:**23
actually [10] **27:**10 **52:**10 **65:**23 **66:**2,9 **75:**11,20,22 **76:**20 **93:**22
add [2] **26:**23 **65:**8
added [1] **60:**24
adding [2] **52:**7 **60:**22
addition [1] **54:**14
additional [4] **8:**5 **9:**1 **56:**20 **78:**23
address [1] **77:**10
adds [1] **76:**23
adjudicate [1] **19:**5
adjudicates [1] **56:**25
adjudications [2] **55:**25 **56:**21
adjust [1] **89:**21
adjustment [15] **4:**14 **7:**13 **10:**4 **16:**4,25 **17:**3 **19:**3 **22:**16 **23:**10,16 **24:**7 **30:**14 **56:**22 **77:**18 **78:**14
adjustment-of [1] **78:**9
adjustment-of-status [4] **5:**12 **77:**25 **78:**4,6
administrability [1] **101:**9
administrable [3] **6:**3 **57:**13 **95:**13
Administration [1] **86:**11
administrations [2] **86:**23 **87:**9
administrative [7] **7:**16 **8:**15,24 **21:**10,22 **78:**12 **91:**22
admissible [1] **9:**15
admission [1] **19:**17
admit [2] **89:**9 **100:**13
adopt [4] **55:**5,6 **94:**14 **95:**10
adopted [1] **54:**25
adopts [1] **88:**20
affect [3] **5:**20 **77:**19 **89:**24
affected [1] **89:**13
affects [3] **77:**15,18 **90:**1
afford [1] **68:**13
afraid [1] **17:**4
agencies [1] **73:**14
agency [14] **5:**8 **7:**18 **11:**18 **15:**15 **16:**15,19 **17:**1 **21:**12 **28:**25 **29:**17 **30:**23,24 **75:**3 **91:**15
agency's [1] **4:**13
agent [1] **17:**2
agents [1] **67:**24
ages [1] **89:**23
aggravated [1] **81:**18
agree [30] **5:**20 **11:**1 **19:**21 **27:**15 **31:**22 **33:**11,13 **35:**6,13 **43:**3,7 **44:**3,10,22 **45:**8 **50:**6 **58:**7 **65:**24 **67:**15 **71:**22,22,25 **72:**3 **81:**6,11 **82:**10 **85:**4 **86:**8 **90:**5 **94:**17
agreed [2] **11:**1 **36:**10
agreeing [1] **44:**14
agrees [4] **4:**11 **26:**17 **27:**24 **101:**15
agricultural [1] **74:**21
ahead [1] **91:**18
AL [1] **1:**3
albeit [1] **56:**8
alien [3] **67:**1,2 **76:**6
aligned [1] **55:**12
ALITO [23] **15:**22 **16:**1,6,9,12,17 **20:**22 **21:**25 **22:**12,16,24 **23:**7 **37:**1,11,16,21 **38:**9,25 **39:**6 **49:**6,14,20,24
Alito's [2] **24:**15 **25:**8
allow [2] **10:**8 **73:**22
allowing [1] **20:**9
allows [1] **47:**3
alluded [1] **34:**20
alone [2] **37:**19 **78:**3
already [1] **8:**11
alternative [5] **60:**1 **62:**20 **88:**9,11 **94:**23
alternatives [1] **93:**15
although [2] **35:**20 **36:**15
altogether [2] **65:**7 **85:**8
ambiguity [4] **85:**1 **87:**1 **91:**3 **96:**7
ambiguous [2] **65:**10,11
ameliorating [1] **54:**15
amended [3] **68:**5 **76:**19 **78:**22
amending [1] **90:**7
Amendment [3] **90:**11,12 **96:**15
amendments [1] **76:**22
American [2] **28:**18 **98:**11
amici [1] **28:**18
amicus [9] **2:**8 **3:**11 **5:**15 **7:**21 **8:**19 **14:**19 **55:**21 **59:**21 **101:**23
Amicus's [3] **32:**2 **55:**7 **57:**11
amount [3] **58:**22 **78:**18 **82:**15
analysis [5] **32:**13,14 **45:**13 **47:**7 **72:**8
analytical [4] **32:**16 **33:**2 **55:**13,20
another [1] **71:**25
answer [14] **17:**10 **25:**8 **34:**3,4 **35:**25 **42:**2 **43:**19 **51:**15 **64:**9 **75:**9 **89:**9 **95:**22 **96:**1 **97:**3
answered [1] **41:**14
answers [1] **10:**23
anti-St [1] **69:**6
anticipated [2] **78:**21 **90:**7
anticipates [1] **71:**12
APA [5] **21:**10 **22:**1 **23:**20 **73:**12 **74:**2
app [1] **33:**12
appeal [12] **9:**25 **23:**4 **29:**3 **62:**22,24 **67:**2 **68:**14 **73:**17 **78:**16 **96:**22 **100:**1 **101:**15
appealable [1] **62:**18
appealed [1] **22:**20
appealing [1] **66:**23
appeals [10] **21:**4 **28:**24 **49:**15 **53:**17 **56:**4 **59:**3 **62:**5 **77:**1 **78:**13 **91:**16
appeals' [1] **53:**2
appear [1] **80:**8
APPEARANCES [1] **2:**1
appearing [1] **81:**1
appears [2] **56:**15 **82:**4
appellate [2] **28:**10,11
Appendix [1] **99:**13
applicant [1] **40:**6
applicant's [1] **74:**25
applicants [1] **77:**25
application [6] **7:**13 **18:**21 **23:**17 **33:**13,14 **98:**25
applications [5] **56:**23 **57:**1 **74:**25 **78:**4,7
applied [4] **19:**25 **73:**8,21 **78:**14
applies [3] **22:**2 **51:**3 **57:**19
apply [10] **16:**25 **38:**22 **40:**17 **70:**8 **71:**18 **72:**18,24 **73:**6 **75:**4 **76:**8
applying [2] **19:**22 **40:**13
appointed [1] **101:**22
appreciate [1] **95:**20
approach [5] **23:**24 **32:**14 **42:**14 **92:**20 **97:**15
appropriate [3] **42:**15 **45:**12 **58:**25
approval [1] **78:**3
arbitrariness [4] **93:**19 **95:**2,3,12
arbitrary [1] **100:**8
area [1] **18:**5
areas [1] **18:**10
aren't [1] **95:**8
arguably [1] **68:**1
argue [1] **101:**23
argued [1] **53:**6
argues [1] **7:**21
argument [26] **1:**15 **3:**2,5,9,13 **4:**4,7 **16:**2,15 **17:**20 **19:**8 **31:**8 **32:**6 **37:**2,12 **59:**20 **63:**13 **64:**3 **79:**9,16 **83:**22 **84:**8 **86:**6,7 **96:**1 **98:**4
arguments [1] **46:**18
arise [1] **75:**10
arises [1] **26:**11
around [1] **78:**5
art [3] **10:**16 **63:**15 **79:**11
article [1] **51:**8
assessing [2] **35:**19 **43:**18
Assistant [1] **2:**4
Association [2] **28:**19 **98:**12
assume [3] **20:**8 **64:**4 **93:**7
assuming [1] **89:**8
astronauts [2] **83:**25 **84:**2
asylum [11] **12:**15,19,21,22,24 **13:**6 **62:**14 **63:**22,24 **80:**12 **82:**25
attempt [1] **5:**16
attention [1] **41:**23
ATTORNEY [25] **1:**7 **8:**3 **18:**6 **26:**4 **30:**9 **31:**16 **32:**20 **33:**9 **36:**25 **39:**21 **46:**5 **47:**15 **48:**11,15 **58:**14 **63:**23 **67:**8,9,17 **70:**5 **81:**14 **82:**20,21 **100:**17 **101:**3
Augusta [1] **98:**16
AUSTIN [3] **2:**4 **3:**6 **31:**8
authoritativeness [1] **60:**9
authority [1] **31:**16
authorization [1] **89:**25
average [1] **78:**3
avoid [2] **47:**3 **86:**12
avoidance [3] **54:**3,14 **96:**4
awaiting [1] **98:**14

aware [1] 73:19
awfully [2] 70:3 73:5

B

b)(4)(D [3] 63:22 64:5 83:1
B)(i [21] 4:18,20 6:6 7:6 9:5 15:11 17:14 24:3 25:18 26:6 32:8 47:23 52:16,19 55:15 59:9 64:14 65:17 100:10 101:7,11
B)(ii [19] 7:6 8:1 9:4,5 11:16 12:16,18 13:1,2,4,8 26:6 55:14 59:10,10 64:15 65:17 100:14,19
B)(ii)'s [1] 48:2
back [8] 11:8 16:19 51:10 59:25 79:3 91:2 92:12 99:21
Bagamasbad [2] 80:18 83:7
bar [38] 4:12,18 6:22 7:11 10:3 12:18 14:22,23 19:3 51:21 52:1,19 57:18 60:2,6,17,22,23 61:6 62:17 64:2,7 66:3,21 67:1,4 68:5 71:10,21 72:1,5,16 77:17 81:22,23 84:18 85:18 100:10
barred [7] 4:21 24:2 48:1 60:15 62:17 86:3 89:17
BARRETT [12] 13:25 14:2,18 15:2 29:23 34:18 57:6,7 58:3 59:15 76:12 89:9
Barrett's [1] 98:9
bars [6] 5:10 31:18 51:18 84:17 89:10,14
based [4] 19:8 50:21 56:15 84:5
basic [2] 62:7 79:4
basically [3] 79:20 81:1 90:23
basis [2] 9:19 29:18
became [1] 53:3
becomes [2] 53:23 101:8
behalf [8] 2:3,5 3:4,7,15 4:8 31:9 98:5
behind [1] 59:5
believe [4] 5:22 11:6 15:12 26:19
believed [1] 29:12
believes [1] 14:6
below [6] 2:9 3:12 32:9 50:1 59:22 101:24
beneath [1] 81:16
benefit [2] 49:15,18
best [14] 12:14 14:13 54:10,17 65:9 74:15 75:15 77:17 90:25 91:3 94:8,23,25 97:13
better [1] 17:9
between [15] 5:19 8:10 50:3,13 53:11 63:25 74:7 75:20 80:20 83:19 88:10 93:8,10 96:19 100:6
beyond [3] 71:13,13 91:25
BIA [5] 15:8 19:5 49:20 78:17 99:11
bit [8] 42:17 53:11,23 61:20 66:10 84:3,12 86:20
Board [1] 49:15
bootstrapping [1] 39:3
Boston [1] 2:2
both [14] 5:23 9:6 14:8,19 25:4 28:11 50:5 57:10,12,13 65:3 71:3 84:5,15
Bowen [1] 71:23
box [13] 33:12,18,21 34:13,17,17 35:5,23 42:24 43:11 44:5 46:8 49:19
Branch [3] 19:18 20:9 61:12
breadth [1] 19:17
breaks [4] 6:10 14:16 79:20 80:5
Breyer [13] 20:21 45:16 47:1 48:24 49:4,5 57:15 68:22 73:24 75:11,16 76:1 89:6
Breyer's [3] 57:9 72:21,23
brief [8] 32:18 56:19 70:17 76:23 94:4 97:19 98:12 101:23
briefed [1] 29:11
briefs [1] 97:12
bright [1] 57:13
brings [1] 62:25
broad [6] 7:1 8:22 18:9 19:19 64:18,21
broadening [3] 61:22 63:2 85:2
broader [4] 7:4,7,10 56:22
broadly [2] 65:2 73:10
brought [2] 68:24 70:4
bucket [2] 45:11 57:17
bunch [1] 79:14
burden [1] 13:21
burdens [1] 13:19
burgers [3] 88:3,4 92:7
Bush [1] 86:10

C

c)(4)(a [1] 13:20
calculations [1] 56:15
call [5] 41:15 70:14 74:10 88:13,21
called [3] 14:15 46:9 74:19
calling [1] 28:4
calls [2] 11:6 21:11
came [1] 1:14
cancel [2] 18:12 19:11
cancellation [4] 57:19 77:19,21 81:17
canon [1] 72:9
canons [1] 73:1
card [1] 98:20
care [3] 54:11 89:11 93:15
carrots [2] 87:23,25
carry [2] 70:10 82:15
carve [1] 13:1
carveout [2] 12:16 13:5
carves [2] 12:17 51:19
Case [43] 4:4 5:17 6:17 8:18 9:21 11:15 18:20 19:3,11 22:25 29:5 30:7,8 32:6 37:10 41:8 44:22 50:4,17 58:23 67:18 71:2,23 72:8 73:5,20 74:17 75:4,6,7,25 76:6 77:9 82:12 85:5 87:8 91:21 98:13,14 99:11 101:23 102:2,3
cases [16] 15:6 20:5 22:8 24:7 27:11 28:21 29:15,15 32:12 48:13 53:18 73:20 78:8 80:19 81:2 82:6
catches [1] 7:6
categorical [2] 64:1 92:13
categorically [2] 66:19 92:15
categories [1] 77:16
category [3] 63:9 88:4,5
Catholic [1] 89:16
cause [1] 69:10
certain [3] 47:4 48:10 78:18
certainly [6] 7:17 8:25 17:25 19:22 25:15 81:7
cetera [1] 46:10
Chadha [2] 6:19 21:13
challenge [4] 23:22,25 49:25 66:15
challenges [1] 56:17
change [6] 19:5 54:17,19 99:23 100:3,4
changed [1] 18:1
channeled [1] 23:5
Chapter [1] 22:5
character [1] 46:9
charge [1] 30:11
charged [4] 9:22 10:2 19:2 30:15
charging [1] 10:9
check [4] 34:16,17 35:22 44:5
checked [5] 33:12,15,18 42:24 43:11
checking [4] 33:21 34:13 35:5 49:18
Chicago [1] 2:7
CHIEF [43] 4:3,9 18:3,15 19:7,14,21 20:12,15,19,20 24:10,13 26:8 29:22,25 30:2 31:4,7,10 39:23 40:2,4,21 41:13 42:4 43:14 44:13,24 45:3 48:25 49:3 51:5 52:20 57:5 59:16,19,23 89:1,5 93:4 98:1 101:20
child [1] 57:24
choice [1] 67:4
choices [1] 45:22
choose [1] 42:1
Circuit [17] 5:5 8:19 11:1 16:14 23:25 29:11 52:12 61:16 73:3 78:19 88:19 91:24 96:11 97:11,13 98:13 101:18
Circuit's [5] 5:9 9:9 10:5 23:24 99:1
circuits [5] 17:14,17 52:13 97:15,17
CIS [5] 23:17 56:25 77:14 78:4,14
CIS's [1] 23:22
cite [1] 15:6
cited [2] 80:10 97:12
cites [1] 56:20
citizen [3] 23:16 33:16 49:12
Citizenship [3] 5:14 9:23 30:12
citizenships [1] 90:2
Civil [3] 8:23 21:3,20
claim [4] 61:14,16 64:19 69:11
claims [9] 60:19 61:1 85:12,16 90:11,11,12,14 96:20
clarify [1] 76:13
Clark [1] 54:18
clause [22] 23:3 31:25 32:21,23,23 36:23 41:3,5,9 47:5,7,10 55:19 60:18 61:7,20,24 68:6 85:6,7,11,19
clauses [1] 41:8
clear [25] 6:4,5 20:14 21:1 39:4 42:12 50:3 53:3 56:14 65:10 71:12 72:13,14,15,17 74:23 81:13 86:1 90:20 91:13 96:6 99:12 100:5,9 101:11
clearer [2] 24:9 87:17
clearly [2] 80:13 94:7
close [2] 41:23 94:15
closer [1] 67:18
clues [1] 8:5
code [2] 21:21 46:3
codifying [1] 81:23
cold [2] 28:12 34:22
colloquial [1] 41:1
colloquially [1] 37:8
colloquy [1] 101:1
combine [2] 71:15 72:1
come [11] 8:20 23:4,11 54:19 59:25 75:24,25 79:7 86:13 90:1 91:5
comes [8] 19:22 43:16 53:9 55:16 86:10,14,17 92:21
coming [2] 81:1 87:8
committed [1] 81:18
common [1] 88:23
comparatively [1] 93:16
compared [3] 18:9 45:21 94:11
comparison [1] 63:25
competing [3] 38:15,16 39:12
completely [1] 88:22
complex [1] 42:10
complicated [2] 35:7,22
complications [1] 57:16
complying [1] 20:10
component [5] 36:13,16,20 37:19 39:5
comprehensible [1] 45:24
con [1] 22:24
concede [4] 32:17 47:4,9,9
conceded [1] 47:18
concededly [1] 61:15
conceding [2] 31:23 50:24
concern [1] 77:13
concerned [1] 52:6
concerns [7] 54:4,9,11,16,19 59:3 68:13
concession [1] 22:21
conclude [1] 14:5
conclusion [3] 34:25 72:15 76:15
conditions [1] 99:10
confirmatory [1] 52:11
confused [1] 42:17
confusion [3] 25:9 96:25 100:5
Congress [66] 4:20,25 6:23 7:2,11,19,25 8:8 10:7 11:14 15:10 17:24,25 18:22 19:24 20:8 24:4 26:2 39:3 52:4,18 54:21 60:5,20,24 62:21 63:20,23 64:5,13 65:1,4,16 66:1,11,13 67:20 68:1,7,10,18 71:11 72:4 76:23 77:7,8 78:10,21,25 81:22 82:17 84:21,22 85:11,17 87:19,21,22 90:7 92:14,19 96:4,15,16,18 100:14
Congress's [7] 19:6 63:3,11 67:4 73:15 77:6 79:1
congressional [1] 20:11
congressman [1] 69:1
connotation [1] 60:8
consensus [1] 52:12
consequences [4] 89:20 90:3,6,6
consider [3] 35:18 43:20 73:7
consideration [2] 20:8 38:2
considerations [2] 35:20 81:14
considering [1] 94:20
consistent [6] 4:15,17 55:8 61:12 75:5 92:1
consistently [2] 38:17 52:23
constitute [3] 37:2,3,6
constitutional [18] 15:20 51:11 53:4 54:2,14,16,18 60:19 61:1,16 85:12,16 86:12,19 90:11,22 96:4,20
constrict [1] 52:18
construction [2] 72:9 73:1

construe [1] **84**:17
construed [1] **52**:11
contemporaneous [1] **36**:15
contested [1] **27**:10
contesting [1] **22**:18
context [17] **4**:16 **11**:4 **20**:23,25 **21**:7,9 **26**:11 **27**:4 **30**:5,17 **36**:18 **41**:2 **65**:24 **77**:22 **84**:9,13 **94**:20
contextual [4] **8**:5 **9**:2 **37**:9,20
contingent [1] **21**:16
continue [1] **96**:7
contrary [3] **61**:7,8,9
contrast [1] **34**:21
convention [1] **99**:6
conversation [1] **50**:9
convictions [3] **27**:13 **99**:19,25
copied [1] **65**:5
correct [16] **25**:13 **26**:18,25 **27**:18 **33**:17 **36**:4,5 **40**:2 **43**:12 **49**:22 **50**:4,5 **54**:3 **60**:4 **73**:2 **90**:8
correctly [2] **34**:11 **42**:23
couldn't [1] **90**:15
Counsel [10] **6**:12 **20**:16 **29**:24 **31**:5 **59**:17 **64**:8 **89**:2 **95**:20 **98**:2 **101**:21
counterargument [1] **32**:2
country [3] **9**:20 **99**:8,10
counts [1] **33**:7
couple [1] **10**:23
course [4] **13**:12 **29**:1 **56**:3 **69**:12
COURT [73] **1**:1,15 **4**:10 **5**:18,22 **6**:18 **9**:3,6 **10**:10 **11**:7,20 **13**:9 **14**:6,14 **19**:25 **20**:23 **21**:2,5,13,19 **22**:9,10 **23**:21 **25**:11 **28**:10,12 **29**:1 **30**:22 **31**:11 **32**:8 **35**:18 **38**:21 **41**:3 **42**:9 **45**:4,7 **50**:19 **53**:2 **55**:24 **56**:4,11,17 **57**:21,25 **58**:25 **59**:24 **61**:2 **73**:20,21 **74**:18,22 **75**:20,24 **76**:4,15 **78**:16 **81**:7,12 **83**:6,7 **84**:14,17,20 **88**:19,22 **89**:11,15 **90**:14 **91**:16 **93**:8 **94**:19 **99**:5 **101**:22
Court's [8] **4**:17 **6**:11 **50**:13 **61**:18 **73**:20 **75**:6 **90**:9 **99**:4
Court-appointed [4] **2**:8 **3**:11 **5**:15 **59**:21
courts [24] **10**:9 **15**:3 **21**:4 **28**:23 **31**:1 **48**:19 **53**:17 **57**:16 **58**:9 **59**:3,13 **69**:15 **70**:6 **74**:12 **77**:1 **78**:13 **83**:4 **86**:24 **87**:10 **96**:11,22,22 **97**:6,9
courts' [2] **75**:6,8
cover [3] **41**:4,11 **45**:15
covered [1] **99**:18
created [1] **18**:22
creating [1] **88**:23
credibility [24] **28**:13,25,25 **29**:6 **34**:19 **35**:15,19 **38**:2 **39**:24 **40**:22 **42**:9,20 **43**:1,16,20 **44**:7,16,20 **45**:5,10 **88**:18 **94**:17 **99**:3,9
credible [1] **94**:13
criminal [7] **21**:3 **27**:11,13 **67**:1,2 **99**:19,25
criminals [2] **69**:20 **70**:1
criteria [11] **31**:24 **32**:19 **33**:1 **35**:18 **40**:17 **47**:4,12 **48**:11 **55**:14 **58**:16 **59**:11
criterion [2] **39**:14 **59**:11
critically [1] **36**:22
cross-examination [1] **94**:11
cross-reference [1] **85**:18
cues [2] **9**:2 **37**:9
curiae [4] **2**:8 **3**:11 **59**:21 **101**:23
current [2] **86**:14 **99**:10
cuts [1] **28**:11
Cyr [29] **11**:8,20 **13**:9 **53**:2,6,16,20 **54**:5,9,12 **69**:3,6,6 **75**:14,14,16,20,23,24 **80**:17 **86**:10,18,25 **90**:20,24 **96**:2,5,11 **99**:17

D

d)'s [1] **60**:17
D.C [3] **1**:11 **2**:5 **98**:13
data [2] **56**:14 **57**:3
deal [3] **70**:6,21 **75**:17
dealing [2] **71**:21 **78**:2
dealt [2] **75**:17,18
decades [1] **75**:5
December [1] **1**:12
decide [7] **30**:21,24 **57**:21,25 **65**:14 **70**:5 **71**:1
decides [1] **86**:11
deciding [1] **71**:19
decision [43] **6**:7 **7**:5,7,15,17,23 **8**:2,17 **9**:4 **11**:21 **12**:21 **13**:6 **18**:17 **20**:24 **31**:15 **36**:23 **39**:7,8,9 **47**:16 **60**:7,9 **62**:13,18,23 **63**:1,24 **64**:14,16,18 **66**:24 **67**:3 **68**:11 **70**:23,24 **76**:24 **89**:24 **90**:9 **97**:11 **98**:14 **99**:4 **100**:11 **101**:18
decision-making [2] **25**:3 **58**:19
decisions [20] **4**:19 **5**:12 **6**:5 **9**:7 **10**:9 **29**:18 **41**:4,5 **48**:20 **62**:16 **63**:16 **67**:24 **71**:13 **73**:10 **75**:22 **83**:24,24 **84**:2,5 **92**:20
deemed [1] **94**:12
defense [1] **30**:13
deferential [1] **56**:9
deferentially [1] **29**:3
define [3] **36**:17 **37**:18 **38**:14
defined [1] **21**:2
definition [6] **22**:1 **28**:8 **37**:13 **38**:8 **39**:1,8
definitions [5] **36**:14 **37**:17 **38**:12 **88**:12 **93**:24
demeanor [3] **40**:8 **41**:17,18
demonstrated [1] **101**:2
denial [16] **26**:15 **27**:16,16 **60**:10,14 **62**:14,16 **66**:4 **67**:5 **68**:2 **72**:16 **76**:10,11 **77**:4 **85**:10 **91**:9
denials [4] **27**:6,7 **36**:21 **77**:14
denied [3] **17**:8 **23**:18 **78**:10
deny [3] **5**:15 **15**:16 **83**:9
denying [6] **60**:13 **63**:4,6,8 **95**:6 **98**:24
Department [1] **2**:5
described [2] **45**:5 **95**:23
designated [1] **99**:8
desirable [1] **29**:16
despite [1] **95**:12
detail [1] **17**:6
detained [1] **76**:7
determination [41] **4**:13,22 **7**:9,12,14 **8**:17 **11**:11 **12**:4,6,12,13 **15**:4 **16**:7,22 **23**:23 **24**:18,25 **25**:1,20,24 **29**:7 **33**:25 **37**:23 **38**:1 **39**:24 **42**:20 **44**:17 **47**:25 **49**:8 **51**:20,25 **59**:1 **60**:12 **66**:12 **67**:17 **69**:10 **79**:12 **80**:21,23 **94**:17 **97**:16
determinations [21] **14**:21 **17**:19 **26**:1 **31**:19,20 **34**:20 **40**:23 **41**:10,11 **42**:10 **45**:5,6,9,15 **47**:25 **51**:4 **52**:14 **56**:18 **58**:11,24 **82**:9
determine [8] **16**:20 **28**:12 **33**:15 **35**:10 **42**:5 **59**:12 **75**:4 **101**:9
determined [2] **19**:24 **34**:10
determines [1] **28**:25
determining [4] **40**:17 **41**:19 **44**:18,21
DHS [2] **55**:25 **56**:17
dictionary [6] **36**:14 **37**:13,17 **38**:8,11 **88**:12
difference [11] **5**:19 **8**:10 **26**:12 **32**:16 **33**:2 **50**:3 **55**:20,24 **56**:4 **83**:19 **100**:6
differences [3] **8**:13 **55**:22 **65**:25
different [15] **32**:7,12 **35**:18 **53**:17 **55**:1 **64**:16 **65**:17 **66**:7,7 **67**:7 **68**:9 **70**:12,13 **84**:1,8
differently [2] **4**:21 **48**:4
difficult [2] **94**:22 **95**:10
dinner [1] **92**:8
direct [1] **94**:10
directed [2] **9**:7 **62**:4
direction [1] **66**:3
disagree [3] **38**:1 **73**:4 **93**:8
disappear [1] **71**:20
discerning [1] **38**:15
discernment [1] **94**:6
discharged [1] **101**:25
discretion [50] **8**:4 **13**:15,24 **15**:6,9,17 **16**:21 **17**:2 **18**:6,8,17 **19**:16,18 **25**:21 **26**:4 **31**:17 **32**:20 **33**:8,25 **34**:3 **35**:1,9,12 **36**:9,24 **39**:16,25 **40**:16 **41**:19 **42**:1,5,14 **44**:16,25 **46**:16,20,22 **48**:12,16 **58**:5 **60**:12 **70**:22 **80**:1,2,7 **81**:15,24 **82**:20 **100**:17 **101**:4
discretionary [90] **4**:19 **6**:7 **8**:16,17 **9**:8,13 **10**:4 **11**:9,13,15 **12**:4,20,25 **13**:5 **16**:7 **18**:17 **25**:3 **26**:15 **27**:6,7,16 **31**:19,24 **33**:1 **36**:13,16,20,22 **37**:3 **38**:23 **39**:1,5,7,8,9,19 **41**:6,10,11 **45**:6,9,15 **46**:7,9 **47**:20 **50**:14 **51**:4 **52**:14 **53**:21 **55**:14 **57**:14 **58**:10,13,24 **59**:12 **60**:10 **62**:16 **63**:7,24 **67**:5,8,10 **68**:3,9,15 **70**:1,6,23 **76**:10,11 **77**:4,16 **80**:21,22 **81**:10 **83**:10 **84**:6 **85**:9 **86**:15 **88**:24,24 **92**:16,20,21 **95**:6 **97**:17,18,21 **101**:6,10
discretionary/non-discretionary [2] **58**:1 **96**:17
discussion [1] **45**:18
disposition [1] **21**:11
dispute [8] **19**:15 **26**:24 **27**:8,20 **29**:4 **40**:22 **75**:25 **77**:4
disputes [1] **73**:16
disputing [1] **37**:7
distinct [1] **64**:14
distinction [5] **11**:6 **55**:13 **74**:16 **100**:22,23
distinctions [1] **74**:6
distinctive [1] **65**:6
distinguish [2] **13**:14 **80**:20
distinguished [1] **74**:13
distinguishes [2] **13**:18 **75**:20
district [8] **21**:2,19 **23**:21 **55**:24 **56**:10,17 **76**:15 **89**:10
doctor [1] **98**:15
doing [9] **46**:2 **59**:4,13 **62**:15 **68**:1,8 **72**:5 **83**:15 **100**:23
done [4] **15**:25 **45**:23 **63**:21 **86**:22
doubt [4] **5**:6 **6**:9 **60**:20 **92**:17
down [2] **79**:20 **80**:5
draw [2] **50**:13 **57**:13
drawing [2] **34**:24 **50**:20
due [1] **68**:12
during [1] **76**:25

E

each [3] **18**:12 **46**:21 **81**:4
earlier [1] **66**:18
easiest [1] **68**:4
easily [2] **6**:3 **57**:12
eat [7] **87**:23,24,25 **88**:2,3 **92**:7,7
effect [4] **52**:8 **61**:22 **69**:24 **85**:2
Eight [3] **38**:20 **46**:4 **52**:12
either [6] **19**:23 **31**:2 **34**:11 **46**:22 **61**:6 **63**:9
element [1] **34**:23
Eleventh [16] **5**:5,9 **8**:18 **9**:9 **10**:5 **11**:1 **16**:14 **23**:24,24 **29**:11 **61**:16 **73**:3 **78**:19 **91**:23 **99**:1 **101**:18
eligibility [34] **6**:6 **9**:14 **12**:5,23 **13**:16,22 **15**:13 **17**:19 **25**:24,25 **28**:5 **31**:24 **32**:19 **33**:1 **47**:4,12,19,24 **48**:10,15 **55**:14,17 **63**:5 **79**:13,23 **80**:9,20 **81**:9,13,24 **82**:8 **84**:5 **97**:16 **100**:15
eligible [8] **6**:8 **11**:12,18 **12**:22 **13**:7 **15**:15 **17**:1 **25**:22
eliminating [1] **84**:25
Ellis [3] **69**:14,17,25
embedded [1] **65**:13
employed [1] **9**:3
employment [1] **23**:15
enacted [2] **52**:15,16
encompasses [4] **84**:5 **88**:17,18 **94**:7
end [2] **64**:3 **90**:16
enough [8] **5**:17 **30**:5 **37**:19 **86**:25 **87**:3,7,12 **88**:25
entered [1] **22**:22
entertain [1] **69**:10
entire [2] **24**:23 **68**:2
entitled [1] **13**:23
enumerated [2] **9**:12 **31**:14
EOIR [1] **28**:19
error [5] **16**:15 **24**:6 **28**:13 **42**:12 **99**:12
errors [3] **5**:11 **15**:20,21
especially [4] **5**:9 **21**:22 **62**:2 **72**:5
ESQ [4] **3**:3,6,10,14
ESQUIRE [2] **2**:2,7
essentially [1] **51**:9
establishes [1] **51**:18
estimate [1] **36**:18
ET [2] **1**:3 **46**:10
evaluating [1] **7**:12

even [22] 5:11 6:1 14:6,6 18:19 24:1,6 25:15 31:24 36:22 45:25 48:20 68:7 73:4 75:12 76:15 77:24 83:6 87:15,21 92:24 96:1
everyone [7] 26:16 27:24 35:13 87:21 96:16 101:13,15
everything [9] 6:20 7:18 25:12 26:13 48:6,7 88:6 94:21 96:21
evidence [8] 28:21 29:19 35:11 42:12 74:3,7 75:13 94:12
evident [1] 36:13
exact [1] 80:25
exactly [7] 34:12 35:4 63:20 90:9 91:6 96:9,12
examining [1] 44:16
example [19] 12:15 28:14 29:6 39:3,20 45:1 46:11 48:13 51:25 55:17 58:14,16,22 67:9 71:24 74:15 81:17 94:8 98:12
examples [3] 28:15 66:6 67:11
except [8] 11:14 15:18 22:6 55:12 60:24,25 87:22,25
exception [3] 51:19 61:4 88:5
exceptional [1] 57:23
exceptions [10] 60:16,18,21 61:6 68:6 85:6,7,11,19 87:16
exclude [1] 54:8
excluded [1] 85:15
excuse [1] 82:2
executive [8] 10:10 13:6 19:18 20:9 57:1 59:5 61:12 75:7
exercise [19] 13:15,24 15:5,9,17 16:21 18:5 19:16 25:21 35:1,12 37:23 40:16 41:19 44:15,25 80:1,2,7
exercises [2] 17:2,2
exercising [2] 88:14 94:6
exhaust [3] 72:9 73:1 78:11
exhausted [2] 91:15,22
exhaustion [4] 77:9 98:7,10,23
exist [2] 61:24 62:2
existing [2] 52:12 97:13
expand [1] 52:18
expect [1] 23:19
expectation [1] 84:16
expected [1] 78:11
expedited [1] 66:15
experiences [1] 99:7
explain [3] 30:9 57:20 95:5
explaining [1] 63:4
explanation [1] 4:17
explicitness [1] 33:7
express [2] 39:18 58:12
expressly [2] 48:11,16
extent [5] 5:6,22 11:14 18:9 45:1
extremely [2] 46:10 57:23

F

facing [1] 40:15
fact [52] 9:17,18 11:14 19:2 26:22,22 27:17,24 28:3,6 29:1 31:2,21 32:3 33:15,19,22,23 34:2,7,8 35:16 37:2,5,9 39:25 40:23 43:5,8 44:6,18,21 50:6,19 51:1 58:4,7 61:5 68:8,18 70:9 73:23 74:4,10 75:21 76:10 91:24 94:7,8 95:5 99:3,16
fact-finding [2] 61:11 86:3
factor [2] 57:22 101:16
factors [12] 9:14 15:13 18:22 19:23 38:3,15,16 39:12,17 58:12 68:24 101:2
facts [5] 36:8 50:17,24 75:8,11
factual [32] 8:21 9:16 17:18 19:23 28:13 29:2 35:7,20 37:22 40:18 41:19 42:2,11,17,22 43:9,24 44:2,8,9 51:14 52:6 56:5 61:14 65:3 67:21 75:24 76:5 80:15 99:5,12 100:2
fail [1] 28:22
fails [1] 32:6
failure [1] 89:21
fair [3] 35:8 56:24 58:22
fairly [2] 88:16,17
fall [7] 13:2,4 32:4 48:23 51:21 52:1 101:6
falling [1] 63:8
falls [1] 57:17
falsely [1] 49:11
family [1] 89:25
far [1] 7:4
fast [2] 92:7,24
fast-food [1] 92:4
favor [3] 6:10 14:17 19:16
favorable [1] 80:2
favoring [1] 65:12
Federal [6] 8:23 10:8 21:2,20 75:6 88:23
feels [1] 84:3
fell [2] 45:10 52:2
felony [1] 81:18
fidelity [1] 84:18
Fifth [2] 90:12 97:11
figure [2] 57:16 91:3
file [2] 23:21 78:17
filing [1] 23:17
final [21] 4:23 6:17,19 7:15,17 9:25 21:11,14,15,17 22:4,9,14,22 24:18 25:16 33:10 62:21,25 66:19 98:24
Finally [1] 100:5
find [8] 17:7 28:24 35:12 41:24 43:5 46:21 57:14 95:17
finding [2] 16:16 94:8
findings [9] 8:21 34:1 37:2,5,9 61:5 91:25 94:7 95:5
fine [1] 84:12
finish [1] 14:3
first [28] 4:4 10:25 11:11 13:22 28:3,4 32:1,22,23 41:5,9 46:21 51:21 52:2 55:19 65:18,22 69:24 71:8 77:13 80:8 82:6 86:9 87:12,15 90:11 91:2 100:11
first-line [1] 45:14
first-step [2] 47:24 80:14
fit [2] 46:15 87:2
five [10] 7:24 9:11 31:14 46:21,22 62:7,11 85:9 86:9 90:2
fixed [1] 99:21
flaw [1] 23:23
FLEMING [59] 2:2 3:3,14 4:6,7,9 6:16 7:2,23 8:8,12 10:11,22 11:23 12:7,14 14:1,4,18 15:1,24 16:5,8,11,13,18 17:4,16 18:3,14 19:13,20 20:13 21:8 22:3,14,19 23:2,9 24:14 25:6,25 26:19 27:1,5,13,19,22 28:2,7,17 29:21 30:6,22 31:6 80:10 98:3,4,6
Fleming's [1] 45:21
flip [1] 53:5
flipped [1] 53:5
floor [3] 81:14,16,18
focus [1] 17:22
follow [1] 76:8
following [4] 57:8 73:14,15 87:20
follows [1] 53:9
food [6] 87:21,24 88:2,4 92:7,24
footing [1] 63:6
Footnote [3] 15:7 47:23 97:18
force [2] 20:5,6
forceful [1] 95:25
foresee [1] 46:17
form [2] 24:5 79:25
formal [1] 60:9
formality [1] 60:8
formation [2] 94:5,6
forming [2] 88:12,13
forms [3] 9:11 41:12 85:9
formulation [1] 84:9
forward [1] 96:21
Foti [1] 11:8
found [7] 11:17 15:14 17:1 25:22 75:8,12 86:25
four [3] 77:15 86:23 87:9
fourth [2] 93:23 94:25
frequently [2] 9:17 31:1
friend [3] 32:17 55:23 70:24
friend's [1] 33:5
fries [3] 88:3,4 92:8
front [1] 49:9
full [2] 5:24 65:23
fully [2] 29:11 92:1
fulsome [1] 25:8
function [2] 62:8 63:3
functions [1] 79:13
further [8] 20:17 24:11 32:9 51:6 89:4,6 98:10,23
future [1] 26:2

G

GARLAND [2] 1:6 4:5
gate [1] 71:11
gave [3] 58:14 64:11 95:25
GENERAL [18] 1:7 2:4 18:6 22:7 26:5 31:16 33:9 36:25 39:21 46:6 47:15 58:14 67:18 70:5 81:6,15 82:21 100:17
General's [8] 8:4 32:20 48:11,16 63:23 67:8,10 101:3
generally [3] 23:2,7 35:25
generic [2] 74:19 75:2
genre [1] 41:4
Georgia [3] 29:10 33:13 98:17
getting [2] 97:7,10
give [13] 19:10 25:7 28:14 35:25 64:11 65:15,20,21 67:19 79:14 91:1 92:25 96:19
given [2] 57:18 69:16
gives [3] 5:23 36:2 98:12
God [2] 69:11 74:10
Gorsuch [7] 26:9 52:21 93:5,6 94:24 95:16,18
got [5] 46:1 48:24 90:24 91:22 92:18
gotten [1] 30:17
governed [2] 14:9 22:5
governing [1] 79:19
government [27] 4:11 5:25 9:21 17:9 24:21 30:8,10 46:25 53:1,5,15 54:25 55:8 67:12 70:22 72:12 86:13 87:8,19 88:18 89:21 91:7 92:6 95:7 96:12 100:22,25
government's [24] 5:20 14:20 45:20 46:16 52:23 53:12,22 78:24 85:14 86:5,21,22 87:18 90:13,23 93:10,20,24 94:16 95:22 97:3,15,19 100:7
government-adjacent [1] 94:2
governs [1] 83:4
grace [1] 68:16
grade [1] 93:15
grant [16] 6:7 11:19,23 12:21 13:6 15:5 16:20 17:3 18:18 22:7 25:20 46:6 63:24 80:11 81:16 82:18
granted [6] 17:8 78:7 79:25 80:6,24 82:1
granting [41] 5:2,25 6:24 10:13,19 11:5,19 12:10,10,17,18 13:8,10,14 24:24 25:18 31:13 32:24 51:3 61:3,21 62:6,10 64:12,20 79:5 80:3 82:3,7,15,17,19,22 83:16,19,20 84:4,25 85:1,8,22
grants [1] 11:9
grappling [2] 72:10 96:12
grateful [1] 102:1
great [1] 85:7
greater [1] 68:12
green [1] 98:20
ground [5] 10:3 19:1,4 30:12,16
grounds [3] 61:17 84:6,6
Guerrero [1] 58:8
Guerrero-Lasprilla [1] 20:2
guess [5] 28:16 41:13 53:8 54:23 83:13

H

H-1B [1] 98:15
habeas [7] 75:18,21 76:1,2,6 90:21 99:20
half [2] 95:7,8
hands [1] 61:12
hang [1] 85:21
hangs [1] 71:8
happen [2] 11:10 58:15
happened [1] 30:7
happening [1] 77:22
happens [1] 48:23
hard [2] 35:3,3
harder [3] 82:11,19 85:5
hardship [5] 39:14 46:10 57:24 58:16,23
hear [1] 4:3
heard [1] 94:9
hearing [1] 78:15
held [3] 52:13 53:7 90:14
helpful [2] 66:6 76:3
helpfully [1] 74:16
higher [2] 33:6 68:12
historic [1] 73:9
historical [12] 26:22,23 33:19 34:2 37:5 42:25 43:8,19 44:18,21 61:13 75:21
history [6] 4:16 39:13 58:20 90:19 92:1,2
hit [1] 81:4
Hmm [1] 70:18
hold [2] 50:19 59:8
holding [1] 9:19
Honor [7] 16:5 21:18 29:21 31:6 41:21 58:6 98:6
hook [1] 96:7
Hospital [1] 98:16
hovered [1] 78:5
however [3] 17:22 45:7 100:21
hundred [1] 78:5

hung [1] **40:**25
hypothetical [1] **92:**11

I

ID [12] **52:**14,18 **53:**14,24 **54:**21,24 **76:**21 **86:**17 **99:** 15,16,21 **100:**3
idea [1] **46:**16
identical [1] **64:**22
identified [3] **5:**3 **54:**5,9
identify [1] **59:**11
identifying [3] **39:**10 **58:**10 **62:**8
ignore [1] **64:**24
IIRIRA [4] **15:**3 **52:**16 **100:**2, 3
IIRIRA's [2] **61:**10 **68:**17
Illinois [1] **2:**7
illustrates [1] **97:**23
illustration [1] **97:**14
immediate [6] **89:**14,17,20 **90:**3,10,15
immediately [2] **7:**3 **77:**14
Immigration [30] **5:**14 **6:** 17 **7:**17 **8:**15,25 **10:**16 **15:** 8 **18:**7 **21:**23 **22:**8,22 **25:** 14 **28:**18 **30:**10 **35:**10 **43:**5, 20 **49:**15 **57:**2 **73:**9,20 **74:** 17 **78:**16 **80:**19 **83:**3,5,7 **87:**8 **94:**9 **98:**11
imperfect [1] **92:**11
impermissible [1] **35:**14
implements [1] **20:**7
implication [4] **51:**13 **52:**7 **72:**14 **88:**6
important [6] **20:**7 **37:**20 **41:**2 **44:**20 **93:**1 **99:**15
importantly [2] **9:**2 **96:**22
INA [5] **5:**4 **8:**20 **22:**2 **38:**17, 18
inadmissibility [8] **18:**23 **30:**11,25 **48:**12,14 **49:**7 **55:** 16 **77:**20
inadmissible [1] **49:**10
inclined [1] **45:**8
include [7] **34:**2 **36:**12,16 **53:**14 **58:**12,15,17
includes [6] **7:**18 **21:**14 **33:** 25 **36:**20 **56:**22 **72:**10
including [2] **51:**18 **77:**20
inconceivable [1] **48:**9
incorrect [3] **10:**7 **15:**2 **33:** 18
incorrectly [1] **34:**11
indicate [1] **37:**10
indicated [1] **71:**11
indicates [1] **36:**19
indication [1] **52:**17
indicator [1] **39:**19
indisputably [1] **59:**9
individual [7] **4:**22 **7:**9,14 **66:**12 **69:**9 **74:**25 **100:**15
individuals [1] **78:**11
ineligible [2] **4:**14 **16:**16
informal [2] **94:**4,14
informed [1] **29:**8
initial [2] **47:**12 **79:**23
inquiry [3] **35:**7 **41:**22 **80:** 14
INS [2] **11:**8 **21:**13
instance [3] **5:**3 **23:**12 **87:** 7
instead [2] **67:**4 **99:**20
intact [1] **54:**22
intent [5] **34:**15 **42:**24,25 **43:**11,15
interest [1] **59:**7
interesting [1] **66:**10
internal [1] **56:**15
interpret [4] **61:**23 **62:**1 **76:** 18 **86:**11
interpretation [19] **14:**20 **41:**9 **59:**5 **63:**12 **64:**10 **74:** 20 **78:**24 **85:**22 **87:**3 **93:**13, 18,20,22,23 **94:**15,22 **95:**4 **96:**3,8
interpretations [1] **14:**8
interpreted [2] **41:**3 **86:**24
interpreting [3] **6:**22 **20:**3 **51:**10
interrupt [1] **27:**15
introduce [1] **46:**12
introduces [1] **57:**15
invoke [1] **12:**12
involve [2] **37:**24 **38:**2
involved [3] **44:**16 **78:**20 **82:**13
involves [3] **32:**6 **35:**8 **37:** 23
involving [1] **78:**12
irrelevant [2] **50:**4 **52:**3
Island [3] **69:**14,17,25
Isn't [14] **16:**12 **20:**22 **21:**6 **30:**5 **37:**1 **40:**16 **41:**18 **49:** 12 **58:**3 **69:**4 **76:**13 **87:**6 **92:**5,5
isolation [2] **11:**2 **85:**3
issue [30] **9:**16,17,24 **10:**6 **18:**24 **22:**20 **24:**1 **29:**2,10 **30:**11,21,25 **31:**1,21 **41:**20 **42:**17,22 **43:**10,10 **44:**8,9 **46:**13,14 **47:**3 **51:**24 **74:**18 **77:**5 **99:**3,14 **101:**14
issues [15] **11:**13 **23:**4 **43:** 24 **47:**17 **52:**6 **53:**4 **78:**23 **80:**15 **81:**9,10 **87:**10,14 **99:** 5,11,17
itself [7] **6:**15 **11:**2 **19:**9 **21:** 16 **60:**23 **68:**11 **97:**22

J

job [1] **8:**11
judge [12] **15:**8 **22:**22 **30:**10 **35:**9,10 **36:**1,1 **43:**5,6,20 **45:**25 **94:**9
judge's [1] **29:**8
JUDGEMENT [1] **59:**22
judges [1] **28:**19
judgment [85] **2:**9 **3:**12 **5:**1, 2,4 **6:**23 **7:**5,6 **8:**14,20,22 **10:**13,18,20 **11:**2 **12:**9 **20:** 25 **21:**21 **24:**2,17,23 **25:**1, 11,16,18 **31:**13 **32:**8,24 **34:** 23 **36:**8,11,12,17,19 **37:**3,6, 14,24 **38:**4,5,14,18,19,21, 23 **39:**1,4 **40:**6 **51:**2 **60:**2,5, 7,10,15 **61:**3,22 **63:**4,6,7 **64:**14,17,19 **66:**13 **67:**7,8, 10,12,14,17 **69:**22 **76:**24 **79:**4 **85:**8,15 **88:**9,11,13,14, 15,21 **92:**22 **94:**5,12,18 **101:**24
judgment's [1] **21:**23
judgments [10] **6:**13 **21:**1, 4,5 **47:**11 **57:**19 **60:**11 **62:** 10 **92:**15,16
judicial [11] **5:**10 **14:**23 **22:** 4 **24:**5 **28:**1 **61:**11 **65:**12 **67:**21 **68:**16 **76:**9 **90:**25
judiciary [1] **21:**21
junk [4] **87:**21,24 **88:**2,3
juris [1] **71:**16
jurisdiction [6] **10:**8 **29:**13 **61:**2 **65:**1,4 **85:**12
Jurisdictional [25] **6:**4,22 **12:**18 **14:**22 **60:**6,17,22,23 **61:**6,17 **62:**17 **64:**2,7 **66:**3, 21 **68:**5 **71:**10 **72:**1,16 **77:** 17 **81:**22,23 **84:**17,18 **85:** 18
jurisprudence [1] **65:**13
Justice [220] **2:**5 **4:**3,9 **6:**12, 16,25 **7:**20 **8:**7,9,13 **10:**11, 23 **11:**22,25 **12:**8,15 **13:**25 **14:**2,18 **15:**2,22 **16:**1,6,9, 12,17,24 **17:**5,12 **18:**3,15 **19:**7,14,22 **20:**12,15,17,18, 20,20,22 **21:**25 **22:**12,16, 24 **23:**7 **24:**10,10,12,13,13, 14,15 **25:**7,8,23 **26:**8,8,10, 21 **27:**3,12,14,20,23 **28:**6,9 **29:**20,22,22,25 **30:**2,3,7,19 **31:**3,4,7,10 **32:**10,15 **33:**3, 10,20,24 **34:**6,12,18,20 **35:** 24 **36:**7 **37:**1,11,16,21 **38:**9, 25 **39:**6,23 **40:**3,4,21 **41:**13 **42:**3,4,16 **43:**4,9,14,22 **44:** 1,4,10,13,24 **45:**3,16 **47:**1, 8,22 **48:**3,24,25,25 **49:**2,3, 3,5,6,13,20,24 **50:**2,8,12, 15,23,25 **51:**5,5,7,16 **52:**4, 20,20,22,24 **53:**8,10 **54:**23 **56:**7,10 **57:**4,5,5,7,9,15 **58:** 3 **59:**15,16,19,23 **61:**19 **64:** 8 **65:**20,23 **66:**18 **67:**19 **68:** 20,21,22,23 **70:**4 **71:**6,17 **72:**2,20,21,23 **73:**24 **75:**11, 16 **76:**1,12 **79:**2 **81:**25 **83:** 12 **84:**7 **85:**24 **86:**4 **87:**18 **89:**1,3,4,5,5,7,8,9,19 **90:**18 **91:**11,17 **92:**3,4 **93:**3,4,4,6 **94:**24 **95:**16,18,21 **97:**2,24 **98:**1,9 **99:**14 **101:**20
justified [1] **54:**13
justify [1] **5:**16

K

KAGAN [35] **10:**11,24 **11:** 22,25 **12:**8,15 **24:**13,14 **25:** 7,23 **42:**3,16 **43:**4,9,22 **44:** 1,4,10 **47:**8,22 **48:**3 **51:**5,7, 16 **52:**4 **68:**21 **71:**17 **72:**2, 20 **79:**2 **81:**25 **83:**12 **84:**7 **92:**4 **93:**3
Kagan's [1] **53:**10
KAVANAUGH [25] **26:**10, 21 **27:**3,12,14,20,23 **28:**6,9 **29:**20 **34:**20 **52:**22,24 **53:**8 **54:**23 **56:**7,10 **57:**4 **85:**24 **86:**4 **87:**18 **95:**21 **97:**2,24 **99:**14
keep [1] **70:**6
keeps [1] **82:**1
key [1] **93:**1
kind [11] **18:**11 **25:**3 **39:**17 **42:**18 **46:**18,20 **48:**22 **50:** 21 **79:**8,11 **97:**3
knows [1] **46:**11
Kucana [9] **4:**18 **9:**3,10 **10:** 10 **20:**1 **41:**4,8 **65:**14 **100:** 20

L

lacked [1] **29:**12
language [25] **7:**25 **9:**10 **13:** 13 **20:**14 **24:**9 **49:**9 **53:**13 **54:**22 **58:**13,15,17 **64:**2,4,6, 23 **65:**6,6 **66:**1,7 **69:**22,23 **71:**12 **79:**15 **80:**25 **100:**14
large [1] **55:**22
largely [3] **31:**22 **55:**12 **73:** 12
larger [2] **62:**19 **88:**4
last [6] **14:**15 **20:**2,10 **30:**25 **65:**14 **70:**23
later [1] **44:**7
latter [1] **84:**3
law [44] **5:**11 **7:**16,17 **8:**15, 15,25,25 **9:**17 **15:**20 **17:**13 **21:**10,22,23 **24:**1 **25:**14 **32:** 5 **51:**11 **53:**21 **54:**8 **58:**7, 23 **60:**19 **61:**1,15 **73:**13,17 **74:**4,8 **75:**6,7,9,17,22 **80:** 20 **85:**13,16 **86:**19 **88:**23 **89:**11,15 **90:**22 **91:**10,23 **96:**20
lawfully [2] **23:**13 **98:**19
Lawyers [2] **28:**18 **98:**11
lead [1] **76:**14
leading [1] **60:**14
least [9] **14:**5,14 **45:**24 **46:** 23 **69:**4 **74:**6 **84:**3 **86:**25 **90:**21
leave [1] **27:**11
leaves [1] **95:**14
leaving [2] **61:**11 **75:**3
leeway [2] **19:**5 **96:**3
left [8] **18:**12 **54:**21 **60:**20 **67:**3 **68:**23 **72:**13,14,15
legal [11] **19:**24 **24:**6 **26:**15 **27:**25 **42:**19 **43:**2 **45:**20 **65:** 3 **66:**15 **76:**15 **99:**17
legality [1] **23:**22
legislation [3] **4:**19 **9:**13 **41:**6
less [5] **20:**5,6 **29:**18 **44:**2,9
level [5] **17:**6 **33:**6 **50:**10 **55:** 25 **62:**8
license [2] **29:**9 **33:**13
lie [3] **34:**5,5 **43:**13
lied [3] **33:**21 **35:**11 **36:**1
lies [1] **36:**2
light [1] **53:**6
likely [2] **40:**10 **56:**25
limited [5] **4:**18 **41:**10 **45:**9 **52:**13 **82:**23
line [13] **6:**5 **10:**12 **47:**19 **50:** 13,21 **57:**13 **59:**7 **69:**14,17, 24 **96:**19,23 **101:**11
lines [2] **6:**4 **87:**20
links [1] **9:**5
listed [1] **41:**12
listening [1] **34:**24
little [8] **35:**7 **38:**12 **53:**11, 23 **84:**3,12 **85:**17 **86:**20
loads [1] **46:**15
logic [1] **90:**19
long [1] **94:**16
longer [3] **48:**6 **96:**6,25
look [25] **11:**3 **28:**12 **34:**22 **35:**17 **45:**17,17 **46:**20 **58:** 11,18,20,25 **65:**24 **69:**7,9, 15,17,19,21,23 **76:**22 **91:**2 **92:**18 **94:**3,4 **97:**10
looking [6] **33:**14 **34:**23 **37:** 12 **39:**16 **65:**23 **84:**11
looks [5] **11:**18 **22:**3 **40:**8 **70:**11,13
lot [8] **40:**7,15 **41:**16 **43:**24 **56:**13 **88:**1 **90:**3 **97:**6
lots [1] **46:**17
lower [1] **58:**9
lower-level [1] **20:**24
lunch [1] **92:**7
lurking [2] **61:**4 **93:**23
lying [4] **40:**6,10 **42:**18,21

M

made [11] **4:**19 **5:**12 **9:**7 **16:** 15,22 **25:**17 **41:**5 **60:**12 **65:** 14 **87:**17 **90:**20
main [5] **8:**6 **32:**16 **72:**21, 23 **83:**21
major [1] **23:**23
majority [1] **78:**1
mandates [1] **20:**11
many [3] **16:**25 **29:**15 **38:**1
map [1] **56:**21
MARK [5] **2:**2 **3:**3,14 **4:**7 **98:** 4

marry [1] **23:**15
Mars [2] **83:**25 **84:**2
Martinez [1] **54:**18
Massachusetts [1] **2:**2
matter [11] **1:**14 **10:**14 **21:** 12 **24:**21 **28:**15 **29:**14,16 **30:**20 **31:**23 **68:**15 **81:**7
matters [6] **18:**7 **21:**14 **24:** 16,20 **67:**21 **100:**2
McNary [3] **74:**16,18,23
mean [34] **8:**16 **10:**12,20 **18:** 16 **19:**8,25 **24:**20 **28:**20 **36:** 9 **40:**8 **44:**6,6,14 **45:**22 **49:** 16 **57:**10 **68:**23 **69:**11,18 **70:**6,17 **71:**20 **72:**2,3,11,16, 20 **73:**24 **74:**9 **75:**23 **81:**21 **85:**10 **91:**8 **95:**2
meaning [19] **5:**24 **10:**15 **21:**1 **30:**20 **37:**6 **38:**13 **41:** 1 **51:**8 **60:**1,4,25 **64:**11 **65:** 21 **79:**8,10 **88:**9,11,20 **94:**5
meanings [2] **11:**3 **36:**11
means [18] **10:**14,14 **12:**2,3 **24:**17,18 **25:**1,16 **48:**19 **60:** 7 **65:**9 **66:**3 **72:**11,12 **75:**2 **77:**2 **79:**6 **84:**1
meant [2] **6:**23 **52:**18
measure [2] **34:**2 **93:**13
Medical [1] **98:**16
MEEHAN [41] **2:**7 **3:**10 **59:** 19,20,23 **61:**19,25 **65:**18, 22 **67:**25 **71:**5,18,22 **72:**7, 22 **74:**15 **75:**14,19 **76:**2,12, 17 **81:**4 **82:**10 **83:**18 **84:**14 **85:**25 **87:**11 **89:**14 **90:**5 **91:** 8,12,19 **92:**9 **93:**17 **95:**1,17 **96:**9 **97:**9 **98:**7 **100:**9 **101:** 22
Meehan's [1] **51:**7
members [1] **89:**25
mens [2] **49:**6,21
mention [1] **96:**18
mentioned [1] **66:**18
mere [2] **19:**2 **49:**18
merit [1] **74:**24
merits [2] **28:**22 **80:**1
MERRICK [1] **1:**6
mess [3] **74:**1,11,12
metrics [1] **93:**12
middle [1] **97:**20
might [7] **29:**25 **37:**8 **53:**3 **68:**10 **72:**3,7 **85:**4
mind [2] **69:**13 **72:**5
minute [1] **46:**19
mismatch [5] **53:**11,23,25 **86:**20 **87:**18
misrepresentation [1] **30:** 12
misrepresented [1] **9:**23
mistake [1] **49:**18
misunderstanding [1] **29:** 8
mix [1] **63:**8
mixed [7] **9:**17 **26:**16 **27:**25 **31:**2 **58:**4,5,7
modest [1] **92:**20
moment [3] **16:**13 **68:**25 **93:**7
Monday [1] **1:**12
Moreover [2] **9:**1 **69:**23
morning [3] **4:**4 **32:**18 **55:** 23
Most [7] **9:**2 **17:**17 **20:**22 **21:**6 **28:**21 **37:**20 **62:**7
motion [1] **78:**18
mouth [1] **33:**5
mouths [1] **87:**5
moved [1] **99:**21
moves [1] **89:**22
Ms [43] **51:**7 **59:**19,23 **61:**19, 25 **65:**18,22 **67:**25 **68:**21, 21 **71:**5,17,22 **72:**7,22 **74:** 15 **75:**14,19 **76:**2,12,17 **79:** 2,2 **81:**4 **82:**10 **83:**18 **84:** 14 **85:**25 **87:**11 **89:**14 **90:**5 **91:**8,12,19 **92:**9 **93:**17 **95:** 1,17 **96:**9 **97:**9 **98:**7 **100:**8 **101:**22
much [15] **7:**9 **10:**10 **14:**24 **19:**10 **24:**9,17 **40:**25 **51:**7 **64:**1 **67:**7 **82:**11 **84:**20 **89:** 12 **95:**20 **97:**25
multi-factor [1] **101:**5
multiple [1] **36:**11
music [2] **69:**8 **86:**7
must [5] **10:**7 **12:**20 **72:**16 **76:**7 **77:**2

N

narrow [2] **8:**16 **64:**20
narrower [2] **66:**10 **84:**4
Nasrallah [3] **29:**2 **51:**25 **99:**4
natural [2] **38:**3 **51:**13
naturally [2] **32:**25 **84:**4
nearly [1] **80:**19
nebulous [1] **101:**5
necessarily [4] **36:**9 **76:**8 **82:**23 **83:**8
necessary [1] **17:**22
need [7] **5:**18 **46:**18 **51:**22 **53:**16 **64:**13 **83:**8 **86:**11
needs [3] **11:**3 **13:**4 **62:**2
neighboring [2] **7:**3 **64:**25
nervous [2] **40:**9,14
nervousness [2] **42:**6,7
never [3] **37:**2,3 **51:**22
new [3] **46:**13,13 **96:**2
next [2] **63:**19 **72:**8
nice [1] **96:**14
nine [1] **52:**16
nobody [2] **5:**3 **44:**11
non-citizen [6] **6:**8 **11:**12 **13:**21 **48:**13 **68:**14 **79:**22
non-citizen's [2] **99:**7,9
non-citizens' [1] **13:**19
non-credible [1] **43:**6
non-discretionary [3] **31:** 20 **40:**23 **101:**16
non-judgment [1] **94:**18
non-reviewability [2] **39:** 13 **58:**21
nonetheless [1] **15:**16
normally [2] **6:**12 **23:**18
north [1] **56:**16
note [3] **32:**18 **56:**19 **59:**2
noted [1] **11:**7
Nothing [5] **20:**18 **26:**6 **89:** 4 **91:**18,20
notices [1] **89:**23
notion [2] **24:**4 **36:**17
nuance [1] **38:**13
number [5] **15:**6 **17:**7 **38:**2 **79:**24 **89:**12
numbers [2] **17:**5,7
numerous [1] **5:**11

O

object [1] **67:**13
objective [2] **37:**5 **43:**7
observation [1] **71:**16
observations [1] **81:**20
observe [1] **81:**8
observed [1] **81:**7
obtaining [1] **49:**17
obviously [3] **55:**21 **59:**6 **88:**10
occurs [1] **76:**25
odd [2] **38:**9 **76:**8
Office [1] **57:**1
official [2] **24:**19 **25:**2
officials' [1] **75:**8
often [2] **39:**13 **81:**11
Okay [9] **33:**20 **45:**25 **48:**24 **49:**24 **69:**8,18,20 **97:**7,10
once [14] **11:**17 **15:**14 **48:**5 **53:**24 **54:**13 **66:**2 **70:**13,15 **72:**19 **73:**1 **85:**23,25 **90:**24 **96:**4
One [42] **8:**14,18 **11:**3 **18:**22, 24 **22:**3 **26:**3 **30:**20,23 **33:** 3,10 **35:**22 **39:**10 **50:**22 **51:** 19 **53:**8 **57:**7 **58:**12 **59:**14 **61:**9 **62:**19 **63:**10 **68:**10,17, 17 **69:**24,25 **70:**1 **71:**24 **73:** 16 **74:**24 **76:**21 **77:**15 **78:**3 **83:**18,18 **91:**1 **92:**4 **95:**11, 24 **96:**10 **101:**9
ones [1] **8:**6
only [28] **7:**6 **12:**4 **13:**3 **22:**5 **23:**9 **26:**21 **28:**3 **30:**13 **41:** 7 **50:**22 **51:**3 **60:**4,16,21 **72:**19,19 **73:**2 **75:**1,8 **76:**3 **77:**15,18,22 **78:**2,19 **85:**21 **91:**24 **98:**25
operative [1] **54:**22
opinion [7] **13:**11 **36:**18 **39:** 20,21 **58:**13 **88:**13 **94:**6
opportunity [1] **78:**17
opposed [10] **6:**15 **12:**5,12 **13:**15 **25:**23 **32:**13 **33:**24 **72:**6 **79:**12 **98:**21
opposite [1] **52:**8
options [1] **93:**9
oral [7] **1:**15 **3:**2,5,9 **4:**7 **31:** 8 **59:**20
order [26] **4:**23 **6:**15,18,19 **7:**15 **10:**1 **21:**11,15,17 **22:** 4,9,15,22 **23:**11 **24:**19 **25:**2, 16 **29:**9 **62:**21,25 **66:**19 **71:** 6 **72:**8 **73:**18 **98:**24 **99:**6
orders [2] **6:**13 **21:**14
ordinarily [1] **73:**8
ordinary [5] **10:**15 **42:**18 **45:**25 **79:**8,10
originated [1] **73:**12
origins [1] **73:**7
other [27] **9:**4 **12:**1,3 **18:**10, 12 **21:**12 **22:**10 **30:**23 **31:** 15 **36:**23 **41:**5 **67:**11 **69:**10 **70:**18 **74:**1,13 **75:**6 **86:**16 **87:**1 **93:**9 **95:**8,11 **96:**22 **97:**3,17,22 **99:**10
otherwise [3] **13:**3 **64:**22 **92:**14
ought [1] **51:**9
out [25] **12:**17 **13:**1 **17:**11 **18:**12 **19:**12 **27:**11 **28:**19 **51:**19 **53:**18,18 **55:**23 **57:** 15,17 **67:**20 **68:**23 **70:**6 **71:** 11 **74:**22 **75:**25 **83:**3 **91:**3 **92:**21 **93:**23 **97:**6 **100:**15
outcome [3] **32:**11,12 **88:** 16
outside [4] **5:**13 **32:**4 **38:**19 **56:**1
over [1] **32:**5
overall [5] **60:**10 **66:**4 **72:** 16 **85:**10 **95:**23
overarching [4] **61:**10 **68:** 17 **79:**18 **97:**4
overbroad [1] **54:**4
overlapping [2] **47:**11,17
overturned [1] **16:**10
own [4] **13:**2 **73:**14 **77:**6 **79:** 1

P

PAGE [4] **3:**2 **75:**19 **99:**4,13
pages [4] **13:**11 **46:**4 **76:**22 **94:**3
PANKAJKUMAR [1] **1:**3
pardon [2] **67:**2 **72:**14
parent [1] **57:**24
Paris [1] **69:**16
parsed [1] **17:**10
parsing [1] **59:**9
part [8] **17:**20 **22:**17 **35:**25 **57:**14 **68:**22 **80:**3 **82:**5,6
particular [7] **22:**25 **34:**4 **37:**7 **43:**1 **50:**6 **72:**12 **83:**2
parties [1] **8:**19
parts [2] **97:**21,22
passage [1] **75:**23
past [2] **56:**18 **99:**7
PATEL [21] **1:**3 **4:**5,13 **9:**15, 22 **16:**16 **29:**7 **33:**11 **35:**2 **62:**22 **66:**22 **73:**16 **78:**13 **79:**9,21 **83:**14 **91:**21 **92:**6 **94:**10 **99:**24 **101:**14
Patel's [3] **5:**21 **18:**19 **61:** 14
pathway [1] **90:**1
paying [1] **41:**23
peas [2] **87:**23,25
pen [1] **44:**5
pencil [1] **44:**5
pending [1] **76:**7
people [10] **16:**25 **40:**5,13 **69:**13,17 **89:**13 **98:**9 **99:**18, 24 **100:**1
percent [2] **78:**5,8
percentage [1] **78:**2
Pereida [1] **80:**18
perhaps [5] **55:**12 **62:**13 **63:**7 **95:**11,12
permanent [2] **92:**21 **98:** 21
permit [1] **94:**1
permitted [1] **67:**23
person [8] **35:**11 **36:**2 **37:** 25 **38:**4,5 **40:**8 **45:**25 **49:** 11
person's [1] **89:**24
personal [1] **41:**16
perspective [2] **55:**7 **77:**12
persuasive [1] **41:**24
pertinent [1] **45:**2
petition [3] **23:**6 **91:**20 **99:** 13
Petitioner [5] **50:**4 **67:**11 **73:**22 **77:**2 **93:**10
Petitioners [11] **1:**4 **2:**3 **3:** 4,15 **4:**8 **31:**22 **55:**11 **63:** 21 **78:**24 **95:**4 **98:**5
Petitioners' [14] **32:**13 **47:** 2 **55:**5 **56:**19 **57:**11 **62:**20 **63:**12,13 **64:**3 **83:**21 **93:**18, 18 **95:**3,12
petitions [2] **99:**20,22
phrase [16] **5:**24 **6:**23 **10:** 18 **11:**20 **12:**2,11,16 **24:**23 **32:**24 **62:**6,14 **76:**23 **79:**6 **80:**7 **82:**3 **85:**21
phrased [2] **82:**25,25
pick [3] **32:**25 **86:**4 **95:**21
Pierce [1] **39:**16
place [6] **13:**22 **40:**7 **51:**22 **52:**2 **74:**2,5
placed [1] **77:**3
places [3] **11:**25 **12:**1 **79:** 15
plausible [2] **24:**8 **54:**6
please [4] **4:**10 **31:**11 **59:** 24 **81:**5
pleased [1] **18:**2
pluck [1] **100:**15
point [14] **17:**15 **22:**1 **28:**19 **32:**16 **46:**17,25 **56:**11 **57:**9 **67:**12 **71:**9 **72:**3,21 **83:**14

90:10
pointed [2] 55:23 57:15
points [1] 66:2
political [1] 99:9
portion [1] 10:17
position [39] 5:10 24:16,22, 22 25:4 37:4,15,17,22 40:1 45:21 47:3 48:10 52:23,25 53:2,4,6,12,22 54:10 55:1, 5,7,8,11 57:12 76:13,14 86:9,14,15,21 94:2 95:22 97:4 100:6,8,9
positions [3] 26:13 57:11, 12
possibility [1] 15:19
possible [4] 7:12 17:18 38:7 92:9
possibly [2] 72:11 92:10
power [2] 84:21,22
powers [1] 20:7
practical [7] 31:23 55:22, 24 56:4 59:3,7 100:23
practice [1] 61:13
pre-IIRIRA [1] 58:23
preamble [1] 7:4
precise [1] 59:11
precisely [4] 47:6 54:8 56:14,21
precludes [2] 31:12 90:25
precluding [2] 60:18 66:22
predicate [1] 44:17
preferable [1] 5:23
preliminary [1] 14:21
preposition [1] 67:13
present [1] 54:24
preserve [1] 84:21
preserves [1] 32:5
press [1] 72:2
pressed [1] 99:18
presumption [31] 5:7 6:9 14:10,14 18:4,8 19:15 20:1,4,6 23:19 65:12 70:14,16, 20 71:4,7,10,18 72:4,18,25 73:6,7,11,21 74:17 76:9 84:10,15 85:20
presumptions [2] 18:11 19:10
pretty [4] 7:1 20:25 80:12 100:9
prevented [1] 24:5
principal [1] 32:2
principles [1] 91:2
print [1] 46:4
probably [3] 45:12 56:16 69:2
problem [8] 53:24 66:17 83:21 86:13 88:8 90:23 95:3 96:15
problems [8] 28:24 55:5,6 62:20 79:1 93:20,22,25
Procedure [3] 8:23 21:3, 20
proceeding [6] 23:5 42:19 43:2 62:9 76:25 77:23
proceedings [11] 5:13 32:9 56:1 62:5 66:16 77:3 79:19 83:5 89:22 90:17 98:19
process [2] 68:12 91:15
prohibiting [1] 68:2
prolong [1] 55:3
proof [1] 13:19
prosecution [1] 90:13
prove [2] 13:21 79:22
provided [2] 22:6 60:24
provides [1] 90:22
provision [13] 13:17 31:18 32:7 37:7 38:20 51:10 52:7,10 66:11 67:16 71:19 83:4 87:1
provisions [6] 20:3 31:14 53:13 59:14 65:25 82:5
purely [1] 55:20
purpose [2] 49:14 73:13
purposes [5] 6:21 15:18 39:10 61:10 68:18
pushes [2] 70:16,18
put [8] 32:22 33:4 41:16,18 55:13 77:11 87:5 99:19

Q

qualified [1] 8:1
qualifying [1] 99:19
quality [1] 57:22
quantity [1] 24:6
question [51] 6:21 17:10 24:15 25:8 28:10 29:1 31:2,2,21 33:10,18 34:4 35:22 39:24 40:19 41:15 42:2,25 43:1,8,19 45:14 46:24 50:6 53:10 56:14 57:3,8 58:7, 8 61:15 65:19,22 72:23 73:17,23 74:8,10,19 75:2 76:10 79:4 81:2 91:9,14,23,24 93:7 95:15 98:9 101:8
questions [53] 6:11 26:16, 16,21,22 27:17,24,25,25 28:3,9 32:3,5 34:15 35:15, 16 37:25 40:24 42:11 43:15,23 44:7 48:18 50:20 51:1,11,12,14 53:9,21 54:8 55:4 56:5 60:1,19 61:1,18 71:5 73:13 75:9,22 76:6,16 77:11 81:9 85:13,16 86:18, 19 89:11,15 90:22 96:20
quite [4] 19:18 21:18 61:20 70:8

R

raised [3] 30:13 93:12 99:14
range [1] 99:6
rate [1] 78:3
rather [6] 6:1 19:4 24:25 55:15 80:14 82:6
RAYNOR [57] 2:4 3:6 31:7, 8,10 32:10,15 33:4,17,23 34:1,8,14 35:6 36:5,10 37:4,16 38:7,11 39:2,9 40:2, 20 41:21 42:3,8,16 43:3,12, 18,25 44:3,10,20 45:3 47:1, 22 48:8 49:13,22,25 50:5, 11,18,25 51:16 52:9,24 54:2 55:10 56:8,12 57:8 58:2, 6 59:18
re [1] 61:20
rea [2] 49:6,21
reach [2] 5:22 29:12
reacting [1] 99:16
reaction [1] 86:6
read [18] 10:21 32:25 41:7, 9 48:3,4,21 49:16,20 51:9 54:6,7 66:9 69:8 73:2,3 85:3 92:23
reading [19] 5:19,23 6:2 14:13 18:13 25:13 31:23 54:3, 10,14,17,20 62:20 83:22 89:10 90:24 91:1,4,6
real [17] 8:10 52:14,17 53:14,24 54:21,23,24 66:17 76:21 86:17 95:4 99:15,16, 21 100:3,23
really [11] 45:19 54:7 69:1, 11,18 74:9,9 79:10 86:18 92:5 94:21
reason [11] 51:1 65:16 67:20 68:10 70:8 72:18,24 77:8 78:10 81:11 82:16
reasonable [2] 14:7 37:25
reasoning [3] 6:13,15 9:3
reasons [10] 30:8 36:2,3 60:14 63:5,7,8 70:3 83:10 87:12
REBUTTAL [3] 3:13 98:3, 4
receives [1] 56:25
recently [2] 14:15 80:18
recognizes [2] 25:11 101:13
recollection [1] 49:9
reconcile [1] 9:9
record [5] 28:12 34:22 36:3 74:3 94:11
refer [2] 12:20 37:8
reference [2] 51:22 86:5
referred [1] 99:11
referring [3] 38:21,23 92:15
refers [9] 8:21,21 11:21 12:3 24:24 25:2 36:23 63:23 79:11
refugee [1] 18:7
regard [3] 40:12 42:6,7
regarding [38] 5:2,24 6:6, 24 10:13,18 11:5 12:9 24:23 25:18 31:13 32:24 51:3 57:19 61:3,21 62:6,10,15 63:2,11,14,22 64:6,12,17, 19 67:21 69:22 79:5 82:12 83:25 84:2,24 85:1,8,21 99:5
regardless [2] 59:8 76:24
regulation [1] 80:4
regulations [1] 12:1
reject [1] 61:17
rejecting [1] 63:11
related [2] 26:13 66:23
relates [1] 28:13
relatively [2] 77:1 91:13
relevant [3] 20:23 21:6 68:24
relief [84] 5:2,25 6:7,24 9:12 10:4,13,19 11:5,10,12, 19,19,24 12:10,11,17,19 13:8,10,14,24 15:5,16 16:21 18:18 24:24 25:19,20 26:15 27:7,16 31:13 32:25 36:22 40:14 41:12 51:3 60:11,13,14 61:3,21 62:6,10, 16 63:4,6,8,25 64:12,20 66:4 67:5 68:3,10,15 70:2 72:17 76:10,11 77:4,16 79:5, 25 80:3,5,11,23 82:3,7,18, 20,23 83:9,16,20,20 84:4, 25 85:1,9,22 95:6
relitigate [1] 73:22
reluctant [1] 76:4
rely [1] 61:20
relying [1] 86:15
remains [1] 81:19
remand [2] 32:9 45:11
remedies [2] 78:12 91:22
removability [17] 10:3 22:21 27:9,10,15 30:4,13,15 62:12,18,23 63:1 66:23 67:3,22 68:9,11
removable [4] 9:19,22 10:6 98:10
removal [38] 4:24 5:13 6:18,19 7:16,25 10:1 19:1,4, 17 22:5,9,15,23 23:5,11 26:11,14 27:3 56:1 57:20,22 62:5,9,25 66:16,20 76:7,25 77:3,21,22 79:19 89:22,23 90:16 98:18 99:8
remove [1] 30:4
removed [1] 23:14
Reno [3] 89:16,16 90:9
reopening [1] 78:18
reply [3] 15:7 32:18 56:19
reported [1] 17:6
representation [1] 49:17
represents [2] 49:11,11
require [4] 24:8 34:21,22 41:22
required [4] 29:9 33:7 59:10 98:8
requirement [4] 48:2 49:7, 21 100:16
requirements [3] 12:24 28:5 79:23
requires [5] 34:25 39:12 58:19 59:10 85:22
reserving [1] 66:14
resolve [2] 5:17,18
resolved [2] 5:7 101:14
respect [18] 9:11 13:18 17:14 18:6 26:14 28:4 47:23 54:4 55:10,21 66:5,17 79:25 82:8 83:2 91:9,25 100:8
respectfully [2] 47:2 101:17
respond [3] 14:25 97:5,8
Respondent [4] 1:8 2:6 3:7 31:9
responds [1] 96:5
response [3] 24:15 79:17 98:8
responsibility [1] 101:25
restore [1] 85:13
restored [1] 15:19
restores [1] 85:11
restrict [1] 84:22
rests [1] 51:8
result [2] 29:16 57:23
resulting [1] 60:15
retroactively [1] 54:16
reverse [2] 32:8 71:6
reversed [3] 15:8 16:19 101:19
reverses [1] 30:23
review [90] 4:12,21 5:11 6:13,14,17 14:23 15:12,20 16:14 17:18 20:23 21:17, 19 22:4,8,8 23:6 24:6 26:24 28:1 30:4 31:12,18 32:5 42:11,13 47:24,25 48:20 51:18,21 52:1,5,19 56:2,9 57:2 60:2,18 61:2,11 65:12 67:21 68:2,8,16,19 69:3, 6 70:14,16,21 71:7,14,21 72:5,18 73:13,22 74:4,7,8, 17,24 75:21 76:5,9 84:10, 21,22 86:2 87:10 89:10,14, 17 90:4,15,21,25 91:13,20, 23,25 97:20 98:25 99:21, 22 100:10,19
reviewability [15] 5:8 6:10 14:10 18:5 20:1 23:20 72:25 73:6,8,9,11 84:11,16 85:20 88:17
reviewable [31] 9:18,24 11:16 14:22 15:17 18:18,25 25:17 26:1,14,17 27:8 29:3 31:25 47:13,20,21 48:6,7, 19,22 50:7,20 51:2,12 56:6 76:16 77:15 83:17 95:7,8
reviewed [9] 9:18,25 16:10 22:13 30:17 31:1 39:15 74:18 99:12
reviewing [3] 15:4 74:24 75:1
rid [2] 15:11 69:20
ROBERTS [33] 4:3 18:3 19:7,14 20:12,15,20 24:10,13 26:8 29:22 30:2 31:4,7 39:23 40:4 41:13 42:4 43:14 44:13,24 48:25 49:3 51:5 52:20 57:5 59:16,19 89:1,

5 93:4 98:1 101:20
role [1] 75:9
room [1] 26:17
rule [1] 95:10
ruled [1] 17:14
rulemaking [1] 21:12
Rules [9] 8:23 21:2,20 73:15,16 92:19,19,22,25
run [1] 43:4

S

sake [1] 49:17
same [23] 10:6,12 20:3 34:16 35:4 41:4 42:14 47:6 62:1 63:5 64:5,21 71:1,2 74:1,2,5 75:25 80:25 83:22 89:15 92:23 93:25
satisfied [1] 48:1
satisfies [1] 79:23
saying [16] 8:2 10:12,15,20 12:2 18:16 35:25 48:5 79:10 86:22 87:6,9,19 90:24 92:6,10
says [33] 7:5 14:19 15:15 36:21 39:20 40:11 41:16,17 47:23 48:17 49:10,12,14 51:9,11 52:10 54:18 66:11,13 69:24,25 70:1 72:12 79:22 80:6 82:2 91:7 94:19 95:7 96:13,16,19 99:5
scope [5] 32:4,7 52:19 71:19 76:13
scrambling [1] 96:2
searching [1] 41:22
second [18] 31:25 32:21 36:23 41:3 47:5,7,10,14,15 55:19 64:24 66:5 70:1 77:24 80:6 87:13 94:23,24
second-order [1] 45:13
second-stage [7] 11:21 12:20 13:5,14 15:4 25:19 80:14
second-step [3] 63:16 82:5,24
Secretary [4] 31:15 36:25 39:22 47:16
section [5] 4:11 31:12 35:17 63:17 82:17
sections [3] 7:3,24 9:7
see [10] 8:9 35:4 45:19 46:24 64:6,10 70:15,21 71:3 74:14
seek [2] 23:16 48:14
seem [4] 19:10 45:23 61:19 81:8
seems [7] 6:14,25 34:19 35:3 53:22 64:17 101:1
seen [1] 74:13
selective [1] 90:13
sending [2] 83:25 84:2
sense [9] 8:22 12:25 65:15 68:5 69:12 85:17 87:17 88:1,2
sentence [1] 46:21
separate [1] 67:20
separately [1] 13:23
separation [1] 20:7
serious [3] 28:24 29:18 87:14
Services [2] 5:14 89:17
serving [1] 62:8
set [5] 56:22 62:15 68:24 71:12 77:24
setting [1] 83:3
settled [1] 14:16
several [4] 11:3,7 58:11 80:17
shall [2] 52:10 61:2
sharp [1] 101:8
she's [3] 40:9,10,10
shouldn't [3] 85:2 89:11 91:7
show [3] 13:12 22:1 64:25
shows [3] 9:6 35:11 63:17
sides [1] 14:8
silent [2] 71:25 72:6
similarly [2] 38:17 80:4
simple [1] 47:19
simply [8] 8:1 10:3 14:4 24:8 37:12 47:7 48:22 52:1
since [4] 52:23 53:7 55:9 96:23
situation [8] 5:21 14:9 18:16 23:9,12 26:2 95:24 99:23
slight [2] 5:18 93:9
slightly [5] 35:21 54:4 56:22 70:19,20
slowly [1] 89:22
small [2] 78:2 89:12
Social [1] 89:17
softer [2] 69:22,23
solely [1] 27:23
Solicitor [1] 2:4
solve [1] 77:7
solves [1] 96:15
somebody [4] 40:7,11 41:15,17
somehow [1] 101:4
someone [12] 9:15,19 11:17 12:21 13:7 15:14 23:12 25:21 27:9 49:10 67:14 81:17
sometimes [2] 39:18 92:24
somewhat [1] 56:13
somewhere [2] 88:10 97:20
sorely [1] 29:7
Sorry [8] 14:2 27:14 30:1 55:3 80:16 81:3 85:24 91:18
sort [4] 67:22 70:16 79:16 84:8
sorting [1] 41:24
sorts [1] 52:5
SOTOMAYOR [31] 16:24 17:5,12 24:11,12 29:25 30:3,7,19 31:3 35:24 36:7 50:2,8,12,15,23,25 64:8 65:20 67:19 68:20,23 70:4 89:7,8,19 90:18 91:11,17 92:3
sought [1] 24:7
sounds [1] 69:11
spanning [1] 80:19
speaking [1] 38:10
speaks [1] 92:13
special [2] 46:16 74:20
specifically [2] 5:1 12:11
specified [9] 8:3 9:13 11:15 12:24 31:17 32:19 33:8 36:24 64:13
specifies [1] 35:17
specify [2] 100:16 101:3
specifying [1] 26:3
speculative [1] 55:1
split [2] 88:20 97:13
sponsoring [1] 89:25
spouse [1] 57:24
St [28] 11:8,20 13:9 53:2,6,16,20 54:5,9,11 69:3,6 75:14,14,16,19,23,24 80:17 86:10,18,25 90:20,24 96:2,5,11 99:17
stage [10] 12:4,5 18:19 28:4 47:15 48:5,7,15 55:17 56:5
stages [1] 11:10
stakes [1] 68:12
stand [3] 25:4 42:21 43:21
standard [2] 28:20 56:9
standards [1] 19:23
standing [1] 69:13
stands [1] 63:5
starkest [1] 55:23
start [2] 60:3 74:5
starting [3] 52:25 53:12 71:9
starts [1] 84:11
state [3] 17:13 34:9 67:15
statement [1] 86:2
STATES [4] 1:1,16 9:16 18:24
statistics [3] 17:9 56:20 77:11
status [16] 4:14 7:13 10:4 16:4,25 17:3 19:3 22:17 23:10,16 24:7 30:14 77:18 78:14 98:21,22
status-applications [1] 78:9
statute [45] 6:2 8:3 9:8 12:1,19 14:13 18:13 19:9 21:16 36:12 39:11,20 48:16,21 50:21 51:17,18 61:8,9,23 62:3,4 65:9 71:24 73:3 74:5 75:2 76:19 79:19,20 81:1 82:19,24,25 85:23 86:12 87:15 90:7,19,21 91:1,13 99:2 100:16 101:3
statutes [3] 10:16 62:11 81:8
statutory [8] 4:15 13:12 18:22 36:18 41:2 49:8 53:13 74:19
stay [1] 70:24
stayed [1] 98:13
step [25] 12:12,13 24:24,25 25:23,25 45:24 46:19 47:19,20 48:5,7,18,23 79:12,13 80:6,8,21 82:6 83:8,9,15,15 100:11
steps [2] 79:21 80:5
stick [1] 70:9
still [9] 19:6 22:22 25:4 28:21 60:2 62:1,18 71:17 88:6
stood [1] 59:5
stop [1] 79:3
straight [1] 83:9
strange [1] 73:5
streamline [1] 61:10
streamlining [1] 68:16
strict [1] 84:18
strip [3] 47:24 65:1,3
strong [4] 5:7 6:9 14:16 59:6
strongest [1] 22:1
structurally [1] 51:17
structure [1] 61:9
stuck [2] 70:19,20
student [1] 23:14
Sub [1] 52:3
subdivisions [1] 64:11
subject [4] 6:6 23:13 67:1 99:24
subjective [2] 34:15 37:18
subjectivity [1] 38:15
submit [1] 101:17
submitted [2] 102:2,4
subparagraph [14] 13:20 32:4,7 51:20,22 52:3,15 54:15 60:17,25 63:19 66:20 72:10,11
subsection [6] 4:23,24 7:8 15:19 47:23 48:1
subsections [2] 62:7 64:25
subsequent [1] 53:14
subsidiary [2] 60:12 70:9
substantial [6] 28:21 29:19 42:12 74:3,7 75:12
subsumes [3] 6:19 25:12 60:11
sufficient [1] 37:14
sufficiently [2] 96:6 101:5
suggest [1] 8:10
suggested [2] 5:5 32:17
suggesting [2] 19:9 44:11
suggestion [1] 20:4
support [10] 2:6,8 3:8,12 31:9 37:14,17,21 59:21 101:24
supported [2] 36:3 75:12
supports [2] 79:16 100:21
suppose [1] 55:2
supposed [2] 57:21 70:5
SUPREME [2] 1:1,15
surprisingly [1] 56:13
surrounding [1] 65:25
suspending [1] 90:21
sweeping [1] 5:4

T

table [1] 68:18
talks [7] 7:8 13:20 21:16 42:9,10 47:17 86:18
targeting [1] 63:16
TAYLOR [3] 2:7 3:10 59:20
temporary [2] 23:14 98:21
tend [2] 38:12 40:9
term [11] 10:16 21:14 36:12,19 37:13 38:13,18,19 51:2 63:15 79:11
terms [13] 7:4,8 13:2 14:12 27:9 31:18 38:14 39:10 43:18 58:10 59:2 71:18 84:19
test [1] 101:5
testimony [3] 34:24 43:6 94:10
text [22] 4:16 50:21 54:6,7,11,17,20 60:22 61:8 71:8 78:22 87:13 92:12,13 93:2,14,19,21 95:14,24,25 96:5
textual [2] 39:19 83:21
the/of [1] 84:8
Their's [1] 101:12
theirs [1] 47:18
theoretical [3] 50:10,12 100:22
theories [1] 93:11
there's [40] 5:6 6:8 11:9,11 13:17 14:7 18:7 19:15 20:13 27:8 33:6 34:3 40:22 48:9,21 50:18 52:17 53:11 56:1,3,13 58:2 68:22 72:17 77:7 78:10 80:4 84:10 85:5,6,13 86:1 88:9,10 90:2 93:9,22 96:17,18 97:19
therefore [1] 13:4
they've [2] 47:18 91:5
thinking [1] 63:15
thinks [1] 36:2
third [3] 61:4 69:25 94:25
thirteen [1] 78:6
THOMAS [23] 6:12,16,25 7:20 8:7,9,13 20:17,18 32:10,15 33:3,10,20,24 34:6,12 49:1,2 61:19 66:18 89:3,4
though [5] 5:7 6:1,14 35:9 41:1
thousand [2] 56:16 78:6
three [1] 90:2
threshold [2] 4:13 6:5
throw [1] 46:8
tie [2] 6:10 14:17
tiebreaker [1] 72:19
tiny [1] 46:4
Title [6] 22:6 36:21 69:24

80:12 86:15 87:1
today [1] 97:1
together [5] 9:5 23:1 41:8 71:8 87:2
took [4] 53:1 54:9 68:18 92:19
torture [1] 99:6
tough [1] 71:4
track [1] 54:8
tracks [1] 56:14
traditional [1] 11:6
traditionally [3] 35:16 39:15 45:4
transitional [3] 92:18,19,25
treat [1] 39:23
treated [1] 35:16
treating [2] 57:14 58:23
treats [1] 6:1
Trejo [1] 97:11
trial [1] 30:9
tribunal [1] 20:24
trouble [1] 95:14
true [6] 17:25 25:15 76:4,14,20 81:25
truth [4] 35:2,13 38:5,6
try [1] 81:4
trying [5] 15:11,11 17:24 25:7 98:19
turn [1] 10:9
two [19] 8:13 11:10 13:18 18:11 22:25 26:13 38:22 41:7 55:3,4 59:14 78:5 79:20 80:5 87:12 92:23 93:9,15 95:24
two-step [3] 81:21 82:4 83:3
type [3] 40:13,17 59:9
types [1] 7:24
typically [3] 10:8 42:8,13

U

U.S [10] 5:13 9:23 23:15,17,22 49:12 56:24 77:13 78:4,14
U.S.C [1] 21:10
ultimate [1] 25:16
ultimately [2] 16:3 40:18
un-enumerated [1] 61:5
unaffected [1] 78:1
unclear [1] 87:16
uncommon [2] 28:20,23
under [39] 7:24 8:23 10:5 11:16 12:19 13:4 14:14 22:2 23:3,19,20 26:5 31:14,25 32:12,21,22 39:16 47:5,7,10 48:23 55:14,19 56:8 58:8,16 59:10,14 62:7,11 80:11 85:9 99:1,2 100:13,19 101:6,10
underlying [2] 41:12 44:8
understand [13] 15:23 16:2 18:4 24:20 26:12 41:14 42:23 44:14 53:15 64:9 85:6,7 96:24
understanding [2] 4:15 17:17
understood [1] 24:22
Underwood [1] 39:16
undisputedly [1] 5:10
Unfortunately [2] 56:12 57:2
uniform [1] 77:1
UNITED [4] 1:1,16 9:16 18:23
University [1] 98:16
unless [2] 20:13 30:22
unlike [1] 71:23
unreviewable [9] 18:10 26:5 32:3,21 47:5 55:18 83:11,13 88:7
unsure [1] 45:10
until [3] 77:2 90:16 91:14
unusual [3] 18:9 46:10 57:24
unwilling [1] 76:5
unworkability [2] 97:14,23
unworkable [2] 88:22 94:16
up [18] 8:20 17:15 23:4,11 32:25 40:25 53:9 55:17 57:8 68:24 69:14 70:4 86:4,13,14 91:5 95:21 100:5
usage [1] 88:22
USCIS [2] 91:9 98:24
uses [10] 5:4 7:7 9:4 13:10 36:12 38:18,19,24 69:21 93:24
using [2] 80:25 82:1

V

validity [1] 21:15
value-laden [2] 39:11 58:19
variations [1] 93:9
various [1] 64:10
vast [2] 24:6 77:25
versus [8] 4:5 8:11 11:8 21:13 89:16,16 90:9 95:2
view [8] 9:9 10:5 22:11 24:2 34:14 73:25 85:14 101:11
virtue [3] 45:19,20 57:10
visa [4] 23:14,15,15 98:15
visas [2] 69:15 74:20
vision [1] 99:2
volume [1] 56:11
voluntary [1] 77:21

W

Wait [5] 46:19 77:2 90:15,16 91:14
waiver [3] 48:14,20 55:16
waivers [1] 77:20
walking [1] 88:19
wanted [5] 7:20 26:3 65:1 68:10 69:3
wants [1] 77:8
Washington [2] 1:11 2:5
watched [1] 94:10
way [48] 5:4 8:16,24 9:6,8 10:21 21:21,24 25:4 38:8,10,18 41:7 45:8 48:21 50:19 53:25 54:6,7 60:13 63:3,10,11,15 65:2 68:4,14 70:18 71:24 73:2 74:22 76:18 79:21 83:18,18 84:25 85:5,7 86:12,23,24 87:17 89:15 92:13,13 95:6 96:24 98:25
ways [3] 28:11 71:3 96:10
weighing [2] 38:16 39:12
weight [5] 19:11 40:8 41:16,18 82:15
welcome [2] 6:11 61:18
whatever [4] 25:1 60:13 66:15 69:7
whatsoever [2] 56:2 64:12
whereas [1] 7:6
Whereupon [1] 102:3
wherever [1] 70:25
whether [40] 9:14 11:11,18,23 12:11,21 13:23 15:5 16:20 18:18 20:10 24:18 25:2,20 33:11,17,20 35:1 40:6 41:14 42:21,23 45:10 46:14 52:2 54:18 57:21,22 58:18,20 59:12 63:24 73:14,15 76:24 80:11,23 82:18 91:24 101:10
whoa [1] 84:11
whoever [1] 47:16
whole [4] 10:18 74:3 85:23 88:1
whom [1] 17:1
will [20] 28:1,15 29:14 30:20,24 31:25 32:20 37:5 39:18 42:11 47:4 48:14 60:2 62:9 71:13,13 74:12 84:17 88:19 89:18
wished [2] 7:11 100:15
within [8] 13:2 37:6 45:11 46:15 51:21 52:1,2 78:18
without [2] 23:11 50:20
wonder [1] 19:8
wondering [1] 14:19
word [15] 8:14 10:19 20:10 21:9 24:17 25:13 26:23 30:25 36:11 46:22,23 82:1,12,12,14
words [13] 4:25 12:3 13:10 33:4 41:5 46:14 64:17 65:21 67:4 69:9 70:25 74:13 87:5
work [5] 14:24 15:24 53:25 79:19 89:24
workability [8] 87:14 88:8 93:14,21,25 95:2,24 97:4
workers [1] 74:21
working [1] 98:15
works [1] 51:17
world [1] 34:9
written [4] 4:20 7:22 18:13 62:3

Y

year [6] 14:15 20:2 56:18 65:14 78:3,7
years [8] 52:16 59:4,6 80:19 86:9,23 90:2 97:6

Z

Zaid [1] 98:13
zipper [1] 23:3