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No. 08 OFFICE OF THE CLERK

IN THE
Supreme Court of the United States

SOLOMON D. TESFAGABER,

Petitioner,

v.

MICHAEL B. MUKASEY, ATTORNEY GENERAL,

Respondent.

On Petition for a Writ of Certiorari
to the United States Court of Appeals
for the Fourth Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether a circuit court's decision to stay an alien's removal pending consideration of the alien's petition for review is governed by section 242(f)(2) of the Immigration and Nationality Act, 8 U.S.C. § 1252(f)—which provides that no court shall “enjoin” the removal of an alien unless the alien shows by clear and convincing evidence that the entry or execution of such order is prohibited as a matter of law—as the court below and one other court of appeals have held, or whether that determination is instead governed by the traditional (and substantially less demanding) multifactor balancing test for stays and preliminary injunctive relief, as eight other courts of appeal have held.

PARTIES TO THE PROCEEDING

The parties to the proceeding below are contained in the caption of the case.

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OPINIONS BELOW

The order of the United States Court of Appeals for the Fourth Circuit denying Petitioner's request for a stay of removal (Pet. App. 1a) is unreported. The order of the Board of Immigration Appeals dismissing Petitioner's appeal (Pet. App. 2a-3a) and the decision and order of the Immigration Court denying his motion to reopen (Pet. App. 4a-10a) are also unreported.

JURISDICTION

Petitioner seeks review of an interlocutory order of the court of appeals before entry of judgment in that court. The order was entered on November 12, 2008. This Court has jurisdiction pursuant to 28 U.S.C. § 1254(1).

STATUTE INVOLVED

This case involves section 242 of the Immigration and Nationality Act, 8 U.S.C. § 1252, which provides in relevant part:

(b)(3)(B) Stay of order

Service of the petition [for review] . . . does not stay the removal of an alien pending the court's decision on the petition, unless the court orders otherwise.

....

(f) Limit on injunctive relief

(1) In general

Regardless of the nature of the action or claim or of the identity of the party or parties bringing the

action, no court (other than the Supreme Court) shall have jurisdiction or authority to enjoin or restrain the operation of the provisions of part IV of this subchapter, as amended by the Illegal Immigration Reform and Immigrant Responsibility Act of 1996, other than with respect to the application of such provisions to an individual alien against whom proceedings under such part have been initiated.

(2) Particular cases

Notwithstanding any other provision of law, no court shall enjoin the removal of any alien pursuant to a final order under this section unless the alien shows by clear and convincing evidence that the entry or execution of such order is prohibited as a matter of law.

STATEMENT OF THE CASE

Petitioner seeks review of the Fourth Circuit's denial of his motion for a stay of removal pending disposition of his petition for review of an order of the Board of Immigration Appeals ("BIA" or "Board"). The BIA order under review in the Fourth Circuit denied on procedural grounds Petitioner's motion to reopen the removal proceedings that resulted in an *in absentia* order of his removal. Petitioner's motion to reopen is premised upon, *inter alia*, a claim that he will be tortured if returned to Ethiopia, thus rendering his removal illegal under the Convention Against Torture ("CAT"), as implemented by federal law.

Petitioner is an ethnic Eritrean who was born and raised in Ethiopia. Pet. App. 11a. While living in Ethiopia from 1965 until approximately 1986, Petitioner was persecuted and tortured by government authorities on account of his Eritrean ethnicity and his family's political affiliation with the pro-independence opposition group, the Eritrean Liberation Front. *Id.* On account of these affiliations and supposed wrongs against the ruling regime, Petitioner was frequently detained without charges by Ethiopian authorities. Pet. App. 12a. In one instance, he was arrested for not participating in pro-Ethiopian political activities, and during the ensuing detention was whipped to such an extent that he required hospitalization following his release. *Id.* On another occasion, he was detained in a tiny cell without a bed for two weeks as part of a government round up of Eritreans in retaliation for an Ethiopian military defeat at the hands of Eritrean forces. *Id.* During this detention, government officials savagely beat Petitioner into unconsciousness. *Id.* Once, Petitioner was fired upon by Ethiopian soldiers and was fortunate to escape with his life. *Id.* Petitioner's father and five siblings also suffered abuse at the hands of the Ethiopian regime. Pet. App. 11a. As a result of this persecution, Petitioner's five siblings were each granted asylum or similar status in the United States, Canada or Italy. *Id.*

In September 1986, Petitioner entered the United States via Greece as a refugee from Ethiopia. Pet. App. 12a-13a. While in the United States, Petitioner attended college, worked a steady job, paid taxes on a

timely basis and assisted in the care of family members. Pet. App. 13a. In 1995, Petitioner entered an *Alford* plea to charges of conspiracy to possess cocaine with intent to distribute and was sentenced to three years, all but 139 days of which were suspended. Pet. App. 13a–14a. Although Petitioner maintains his innocence, *id.*, he was, as a result of this conviction, detained and placed into removal proceedings in approximately June 1999. Pet. App. 14a.

In December 1999, Petitioner appeared without counsel in Immigration Court in Baltimore for a removal hearing. *Id.* Despite being present in the courtroom, Petitioner did not hear his case called and was told at the end of the hearing that he had been ordered removed *in absentia*. *Id.* At the instruction of the Immigration Judge, Petitioner immediately sought assistance from the clerk of the Immigration Court. *Id.* The clerk helped Petitioner file a motion to reopen, but failed to properly instruct him on service of the motion, causing Petitioner to mistakenly serve the Immigration Judge's clerk rather than counsel for the government. *Id.* Based solely on this procedural defect, the court denied the motion. Upon learning of this problem, Petitioner diligently attempted to remedy the error by re-filing the motion to reopen, but was told that he was not permitted to do so. *Id.* Petitioner therefore believed that his opportunity to reopen his removal proceedings was foreclosed.

Unbeknownst to Petitioner, on March 22, 2001, the Board of Immigration Appeals overruled the Immigration Judge's denial of the motion to reopen and ordered the removal proceedings reopened. Pet. App. 7a. Neither Petitioner nor the undersigned counsel learned of this order or the subsequent hearing until after the filing of the motion to reopen that is the subject of the instant proceedings. *See* Mot. Stay of Removal at 4 n.3.

On March 28, 2001, the Immigration Court mailed a notice to appear for a hearing to Petitioner. Pet. App. 7a. Notice was sent to Petitioner's permanent address at St. Michael's Circle in Odenton, Maryland. Pet. App. 2a. This address is the home of Petitioner's sister, with whom he maintains a residence to this day. Pet. App. 3a, 13a. At the time the hearing notice was sent, however, Petitioner was temporarily absent (Pet. App. 3a) as a result of a domestic dispute with his sister. *See* Mot. Stay Removal at 3-4 & n.3. Petitioner's sister returned the notices to the Immigration Court. Pet. App. 7a.

On June 13, 2001, the Immigration Court held a removal hearing in Petitioner's case, but Petitioner was not present due to lack of notice. *Id.* As a result, the Immigration Judge ordered Petitioner removed *in absentia*. *Id.*

In August 2007, Petitioner was taken into custody by Immigration and Customs Enforcement. *Id.* In March 2008, Petitioner, still proceeding without the assistance of counsel, unsuccessfully attempted to file another motion to reopen. *Id.* Then, in June 2008,

the undersigned counsel was retained to assist Petitioner on a *pro bono* basis. Counsel filed a motion to reopen along with a motion for stay of removal. *Id.* Emphasizing that Petitioner had never been heard on the merits, counsel sought a hearing on, *inter alia*, Petitioner's claim that his removal is prohibited by the Convention Against Torture ("CAT" or "Convention"), as implemented by 8 C.F.R. § 208.16(c)(2). *Id.* In support, counsel submitted a declaration by Petitioner that detailed his past persecution in Ethiopia and the substantial grounds for believing that Petitioner, as an ethnic Eritrean, will be subjected to torture if removed to Ethiopia. Pet. App. 11a–15a.

Without holding a hearing or allowing counsel to present evidence, the Immigration Judge denied Petitioner's motions as procedurally barred and (in the alternative) on the ground that, notwithstanding his un rebutted declaration, Petitioner had "presented no independent evidence" in support of his CAT claim. Pet. App. 9a–10a. Petitioner appealed to the BIA, challenging both conclusions.

On October 1, 2008, the BIA dismissed Petitioner's appeal of the Immigration Judge's ruling in a one-paragraph order. Pet. App. 2a. The Board did not address whether Petitioner had presented sufficient evidence in support of his CAT claim. Pet. App. 2a–3a. Regarding the Immigration Judge's procedural holding, the Board acknowledged that "there is evidence in the record to support the fact that when the [2001] hearing notice was sent, [Petitioner]

temporarily was not living at [his address of record]" and therefore did not receive the notice. Pet. App. 3a. The Board noted, however, that "[Petitioner] does not claim that he filed a proper notice of a new address." *Id.* The Board therefore concluded that the Immigration Judge's denial of the motion to reopen on procedural grounds was proper. *Id.*

Petitioner filed a petition for review of the BIA's order with the Fourth Circuit on October 9, 2008, along with a motion for a stay of removal pending that court's consideration of the petition for review. Although Petitioner raised and preserved the issue of the proper standard for the issuance of a stay of removal, both parties assumed in their briefing that the Fourth Circuit would follow its new precedent, *Teshome-Gebreegziabher*, 528 F.3d 330 (4th Cir. 2008), *reh'g en banc denied*, No. 08-1060, 2008 WL 4741721 (4th Cir. Oct. 30, 2008), and apply the stringent standard of review set forth in section 242(f)(2) of the INA.

On November 12, 2008, a panel of the Fourth Circuit denied Petitioner's motion for stay of removal pending consideration of his petition for review. Pet. App. 1a. Although the court's order did not expressly cite section 242(f)(2), the parties (as noted) had litigated the propriety of the stay under that section and the government had proffered no alternative basis for decision. In addition, the order was issued just thirteen days after the court denied rehearing en banc in *Teshome-Gebreegziabher*. See 2008 WL 4741721, at *1. The panel in this case was keenly

aware of that decision, given that all three judges had authored or joined an opinion respecting that denial of rehearing and discussing in detail the applicability of section 242(f)(2) to stay requests. *Id.*; see also *Bell v. Cone*, 543 U.S. 447, 456 (2005) (“absent an affirmative indication to the contrary,” the Court “presume[s]” that courts follow their own precedent).

REASONS FOR GRANTING THE PETITION

This case presents the question whether section 242(f)(2) of the INA supplies the standard governing the issuance of a stay of removal pending an alien’s petition for review of a BIA order. Section 242(f)(2) provides that no court shall “enjoin” the removal of an alien absent clear and convincing evidence that removal is prohibited as a matter of law. The Fourth Circuit (in this case and others) and the Eleventh Circuit read the word “enjoin” in section 242(f)(2) to encompass the issuance of a stay pending judicial review. In contrast, eight other Circuits reject the applicability of section 242(f)(2) to stay applications, and instead apply the traditional (and substantially less demanding) multifactor balancing test for stays and preliminary injunctive relief.

This Court should grant the petition because the question presented is an important and recurring one on which the circuit courts are hopelessly divided. Justice Kennedy has previously opined—when the circuit split was far less pronounced than it is today—that the question presented warrants the Court’s review in an appropriate case. This is such a

case because the Fourth Circuit's choice of standard likely affected the outcome of Petitioner's request for a stay. Moreover, as in *Barefoot v. Estelle*, 463 U.S. 880, 887 (1983), because the question presented involves "the appropriate standard for granting or denying a stay . . . pending disposition of [a case on the merits] by a federal court of appeals," certiorari before the court of appeals renders final judgment is both appropriate and necessary.

I. THE FEDERAL COURTS ARE DEEPLY DIVIDED ON THE IMPORTANT QUESTION WHETHER SECTION 242(F) GOVERNS THE ISSUANCE OF STAYS OF REMOVAL PENDING JUDICIAL REVIEW OF BIA ORDERS

The question presented is which of two competing standards controls a circuit court's determination whether to stay an alien's removal pending consideration of the alien's petition for review of a BIA order. Before 1996, most removable aliens were entitled to automatic stays of their removal orders pending circuit-court review of those orders. *See* INA § 106, 8 U.S.C. § 1105a(a)(3) (repealed 1996). That changed with enactment of the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 ("IIRIRA"), which amended the INA to provide that the filing of a petition for review with the circuit court "does not stay the removal of [the] alien pending the court's decision on the petition, unless the court orders otherwise." INA § 242(b)(3)(B), 8 U.S.C. § 1252(b)(3)(B). Section 242(b)(3)(B) does

not, however, specify the standard that a court should use in deciding whether to grant a stay.

The United States has taken the position that a separate provision of the INA added by the IIRIRA, namely section 242(f), 8 U.S.C. § 1252(f), provides the applicable standard. That subsection, entitled “Limit on injunctive relief,” contains two subparts. The first subpart restricts the availability of class-action and pre-enforcement injunctions in the immigration context by providing that “no court (other than the Supreme Court) shall have jurisdiction or authority to enjoin or restrain the operation of the [immigration laws], other than with respect to the application of such provisions to an individual alien against whom proceedings under such part have been initiated.” INA § 242(f)(1), 8 U.S.C. § 1252(f)(1). The second subpart, in turn, provides a standard for injunctions in the case of an individual against whom enforcement proceedings have been initiated: “[N]o court shall enjoin the removal of any alien pursuant to a final order under this section unless the alien shows by clear and convincing evidence that the entry or execution of such order is prohibited as a matter of law.” INA § 242(f)(2), 8 U.S.C. § 1252(f)(2).

With four judges dissenting from the denial of rehearing en banc, the Fourth Circuit recently joined the Eleventh Circuit in adopting the government’s position and concluding that section 242(f)(2) provides the standard for a stay pending circuit-court review of a BIA order. *See Teshome-Gebreegziabher*, 528 F.3d at 332–35, *reh’g en banc denied*, 2008 WL

4741721, at *1; *Weng v. U.S. Att’y Gen.*, 287 F.3d 1335, 1336–40 (11th Cir. 2002). These courts have reasoned that “stay’ is a subset of the broader term ‘enjoin’”; that “it is a ‘kind of injunction’ directed at a judicial case or proceedings within it”; and that section 242(f)(2) therefore applies to requests for stays pending review. *Teshome-Gebreegziabher*, 258 F.3d at 333; *accord Weng*, 287 F.3d at 1338.

By contrast, eight circuit courts have rejected the reasoning of the Fourth and Eleventh Circuits and have held instead that an alien’s request for a stay is governed by the traditional multifactor test for stays and preliminary injunctive relief, pursuant to which a court measures and balances the applicant’s likelihood of success on the merits, the respective hardships to the parties, and the public interest. *See Tesfamichael v. Gonzales*, 411 F.3d 169, 171–76 (5th Cir. 2005); *Hor v. Gonzales*, 400 F.3d 482, 483–85 (7th Cir. 2005); *Douglas v. Ashcroft*, 374 F.3d 230, 233–34 (3d Cir. 2004); *Lim v. Ashcroft*, 375 F.3d 1011, 1012 (10th Cir. 2004); *Arevalo v. Ashcroft*, 344 F.3d 1, 6–9 (1st Cir. 2003); *Mohammed v. Reno*, 309 F.3d 95, 98–100 (2d Cir. 2002); *Bejjani v. INS*, 271 F.3d 670, 687–89 (6th Cir. 2001); *Andreiu v. Ashcroft*, 253 F.3d 477, 480–83 (9th Cir. 2001) (en banc). These courts take the position that stays and injunctions are distinct legal concepts and that the issuance of a stay for the duration of an alien’s petition for review therefore does not “enjoin” the alien’s removal within the meaning of section 242(f)(2).

Justice Kennedy opined on the necessity of resolving this circuit split—at a time when just four circuits had considered the matter—in his in-chambers opinion in *Kenyeres v. Ashcroft*, 538 U.S. 1301, 1303–05 (2003). He observed then that “[t]he courts on each side of the split have considered the contrary opinions of their sister Circuits and have adhered to their own expressed views.” *Id.* at 1304. Since *Kenyeres*, the split has only deepened, with several of the nation’s circuit judges rendering additional comprehensive and well-reasoned opinions on both sides of the issue. Moreover, the Eleventh Circuit’s ruling is no longer just an early outlier. The Fourth Circuit’s decision to adopt the minority view is the most recent ruling in this area, and that court, in the face of contrary authority from eight of its sister Circuits, firmly rejected a request to reconsider the holding en banc. *See Teshome-Gebreegziabher*, 2008 WL 4741721, at *1–4 (Shedd, J., concurring in the denial of rehearing en banc); *see also id.*, 2008 WL 4741721, at *4–9 (Michael, J., dissenting from the denial of rehearing en banc).

As Justice Kennedy further noted, “[t]he issue is important” because the “opportunity to present one’s meritorious grievances to a court”—which might be lost if an excessively stringent standard is applied to stay applications—“supports the legitimacy and public acceptance of a statutory regime,” “particularly . . . in the immigration context.” *Id.* at 1305. This is especially so where, as here, “[a]pplying a heightened burden of proof to temporary stays of deportation will have a unique effect on a great

number of litigants.” *Dorelien v. U.S. Att’y Gen.*, 1325 (11th Cir. 2003) (Barkett, J.) (dissenting from denial of rehearing en banc). In the Fourth and the Eleventh Circuits, all but an infinitesimally few number of aliens will be subject to removal pending judicial review of the merits of their claims. *See Hor*, 400 F.3d at 483. Many of these aliens may be subject to persecution or torture upon their removal to the designated country. And although the INA allows aliens to continue to litigate certain claims from abroad, and to return to the United States if victorious, this right “would not be worth much if the alien has been maimed or murdered in the interim.” *Id.* at 485.

Because the heightened standard of review is all but insurmountable, and the repercussions may be life-threatening, Justice Kennedy’s conclusion in *Kenyeres* holds true today: “Given the significant nature of the issue and the acknowledged disagreement among the lower courts, the Court . . . should examine and resolve the question in an appropriate case.” 538 U.S. at 1305.

II. THIS CASE IS A GOOD VEHICLE FOR RESOLVING THE CIRCUIT SPLIT

Kenyeres was not an appropriate case for certiorari in Justice Kennedy’s view because the alien there was unlikely to prevail in his request for a stay under either of the competing standards. *Id.* This is an appropriate case, by contrast, because the Fourth Circuit’s application of section 242(f)(2) led to the denial of a stay that would have been warranted

under the less demanding multifactor balancing test. *See Kenyeres*, 538 U.S. at 1306–07 (“[m]y assessment likely would be different in a case where the choice of [the] standard applicable to a request for a stay *could influence* the outcome” (emphasis added)).

For one thing, in applying section 242(f)(2), the Fourth Circuit was prohibited from taking into account three of the four traditional elements, each of which strongly counsels in favor of a stay in this case. There is no question that Petitioner will suffer irreparable harm if he is removed to Ethiopia: he will arguably lose all opportunity for judicial review of the denial of his motion to reopen because once an alien leaves the United States, “pursuant to regulation, the motion to reopen will be deemed withdrawn.” *Dada v. Mukasey*, 128 S. Ct. 2307, 2318 (2008); *accord* 8 C.F.R. § 1003.2(d) (“[a]ny departure from the United States, including the deportation or removal of a person . . . occurring after the filing of a motion to reopen or a motion to reconsider, *shall constitute a withdrawal of such motion*” (emphasis added)); *see also Alimi v. Ashcroft*, 391 F.3d 888, 893 (7th Cir. 2004) (alien’s loss of “all possibility of judicial review” constitutes “irreparable injury”). *But see William v. Gonzales*, 499 F.3d 329, 334 (4th Cir. 2007) (holding 8 C.F.R. § 1003.2(d) invalid).

Even more importantly, Petitioner will likely be tortured if returned to Ethiopia. As set forth in his uncontroverted declaration, Pet. App. 11a–15a, when he lived in Ethiopia, Petitioner was, because of his ethnicity and political beliefs, the victim of arbitrary

arrests and detentions, beatings and attempted murder, all perpetrated by the Ethiopian government. *See supra* pp. 2–3.¹ In addition, as a result of ongoing tensions between Ethiopia and Eritrea, which obtained independence from Ethiopia in 1993 after a war of almost thirty years, the Ethiopian regime continues to engage in the unlawful killing, beating, abuse, mistreatment, and arbitrary arrest and detention of ethnic Eritreans. *See* U.S. Dep’t of State, *2007 Country Reports on Human Rights Practices, Ethiopia* (2008). This ongoing tension and simmering conflict between the two nations creates a significant risk of harm for someone like Petitioner, who will be considered an enemy to Ethiopia’s ruling party and will be a prime target for torture and detention. *See id.*

As courts have recognized, the physical and psychological injuries from torture are irreparable harms that can never be fully redressed. *See INS v. Cardoza-Fonseca*, 480 U.S. 421, 449 (1987); *Hor*, 400 F.3d at 485. Moreover, this grievous and irreparable harm far outweighs the “lesser ‘injury’ to the Government” of permitting Mr. Tesfagaber, who

¹ Such “personal prior detention and physical abuse at the hands of the [government],” as well as the “physical abuse . . . of [Petitioner’s] family members” (*see* Pet. App. 11a), are precisely the kind of circumstances that “establish *prima facie* eligibility under CAT.” *Kay v. Ashcroft*, 387 F.3d 664, 675 (7th Cir. 2004); *see also Woldemichael v. Gonzales*, 197 F. App’x 712, 714 (9th Cir. 2006) (“[d]etention, beatings, and threats of death by [Ethiopian] government officials because of his Eritrean heritage are sufficient to establish past persecution”).

has lived in the United States for more than two decades, to remain here for a few extra months pending appeal. *Mohammed v. Reno*, 309 F.3d 95, 102 (2d Cir. 2002). And a stay of removal also serves the public good of ensuring that the United States complies with its treaty obligations and does not inappropriately send an alien to a regime in which he will be tortured without ever giving that alien a single opportunity to be heard on the merits of his CAT claim. *See Khouzam v. Hogan*, 497 F. Supp. 2d 615, 627 (M.D. Pa. 2007).

Just as significantly, although Petitioner was unable (to the circuit court's satisfaction) to demonstrate "by clear and convincing evidence" that his removal is "prohibited as a matter of law," Petitioner nevertheless can also satisfy the fourth element of the traditional standard by demonstrating (as shown below) a high likelihood of success on the merits of his petition for review. There is, of course, nothing incongruous about this situation. As several courts have recognized, aliens with meritorious claims will often find it difficult to satisfy the requirements of section 242(f)(2). *See, e.g., Hor*, 400 F.3d at 483 ("[a]s a practical matter, removal is 'prohibited by law' only when the person is a citizen of the United States or holds a visa of unquestioned validity"); *Arevalo*, 344 F.3d at 8 (noting that section 242(f)(2) would "require the alien to carry a burden of proof *higher* than she would have to carry on the merits"). This is especially so in a case like this one, in which the alien's principal argument is that equitable considerations require the tolling or

suspension of certain procedural bars to relief. Such equitable relief excuses strict compliance with legal requirements; by definition, then, removal in the face of equitable considerations is not “prohibited as a matter of law.”

Regarding his likelihood of success on the merits, *first*, Petitioner is likely to succeed on his argument that the BIA should have granted the motion to reopen because the Petitioner lacked notice of the hearing that resulted in the *in absentia* order of removal. Binding circuit precedent holds that the Board should grant a motion to reopen a hearing that resulted in an *in absentia* removal order if the alien can prove that he did not receive notice of the hearing. *Nibagwire v. Gonzales*, 450 F.3d 153, 156 (4th Cir. 2006) (citing 8 U.S.C. § 1229a(b)(5)(C)(ii)); *see also Silva-Carvalho Lopes v. Mukasey*, 517 F.3d 156, 158–60 (2d Cir. 2008) (collecting cases). Here, it is undisputed that Petitioner did not receive actual notice of the 2001 removal hearing that resulted in the outstanding *in absentia* removal order: as the Immigration Judge found, the notices of that hearing “were returned to the [Immigration] Court by an individual who appear[ed] to live at” Petitioner’s St. Michael’s Circle address and who told the Immigration Court that “she [was] not able to contact” Petitioner. Pet. App. 7a. This individual was Petitioner’s sister, and when the notice was mailed, Petitioner had temporarily moved from her home, Pet. App. 3a, as the result of a domestic dispute. *See* Mot. Stay Removal at 3–4 & n.3.

Nor is there merit to the Board's contention that the motion to reopen should be denied because Petitioner failed to notify the immigration authorities that he had moved from the St. Michael's Circle address. As the BIA noted, Petitioner's departure was "temporar[y]," and he "has . . . used [that address] since that time," including in connection with his 2008 application for asylum. *Id.* While the INA does require "the alien . . . [to] provide the Attorney General immediately with a written record of any change of the alien's address," INA § 239(a)(1)(F)(ii), 8 U.S.C. § 1229(a)(1)(F)(ii), this provision does not require notice of temporary absences due to domestic circumstances. *See Santiago v. Att'y Gen.*, 216 F. App'x 232, 233–34, 236 (3d Cir. 2007) (per curiam) (alien moved from address of record to avoid spousal abuse).

Second, even if Petitioner's temporary move somehow constitutes a forfeiture of his right under the INA to a reopening for lack of notice, Petitioner is likely to succeed on the merits of his argument that equitable considerations nevertheless require the BIA to reopen his removal proceedings. Courts, including the Fourth Circuit, have held that procedural requirements in the immigration context should give way where "it would be unconscionable to enforce [those requirements] against the party and gross injustice would result." *Amegashie v. Gonzales*, 188 F. App'x 226, 227 (4th Cir. 2006) (per curiam) (internal quotation marks omitted); *see also Davies v. INS*, 10 F. App'x 223, 224 (4th Cir. 2001) (per curiam)

(holding procedural requirements equitably tolled given facts and circumstances of case).

As Petitioner argued in his motion for a stay, numerous considerations warrant equitable relief from the Act's procedural requirements in this case. Among these are Petitioner's prior *pro se* status, *see, e.g., LeSane v. Hall's Sec. Analyst, Inc.*, 239 F.3d 206, 209 (2d Cir. 2001); *Sembiring v. Gonzales*, 499 F.3d 981, 990 (9th Cir. 2007); the fact that Petitioner diligently attempted to comply with the immigration laws but was thwarted in his efforts to have his case heard by the immigration court's several errors (*supra* pp. 4–5) and by his sister (*supra* p. 5), *see, e.g., Alrefae v. Chertoff*, 471 F.3d 353, 360 (2d Cir. 2006); *Tairova v. Gonzales*, 207 F. App'x 886, 887 (9th Cir. 2006); and the fact that Petitioner has never had a hearing on the merits of his claims even though, as discussed above, his uncontested declaration establishes a likelihood of torture should he be returned to Ethiopia. Given these circumstances, Petitioner is likely to convince the reviewing court that the decision to remove him to Ethiopia without a hearing would be "unconscionable" and a "gross injustice," *Amegashie*, 188 F. App'x at 227, and therefore to exercise its equity jurisdiction to require the BIA to excuse any procedural bars that might stand in the way of Petitioner's motion to reopen.

Third, these same equitable considerations also entitle Petitioner to a reopening of his removal proceedings pursuant to section 240(b)(5)(C)(i) of the INA, 8 U.S.C. § 1229a(b)(5)(C)(i), which provides for

reopening “if the alien demonstrates that the failure to appear was because of exceptional circumstances.” The circumstances described above, all of which were “beyond the control of” Petitioner, INA § 240(e)(1), 8 U.S.C. § 1229a(e)(1), certainly qualify as exceptional. Moreover, although the INA requires a motion under this subsection to be filed within 180 days after the date of the order of removal, that procedural requirement, too, is subject to equitable tolling. *See Amegashie*, 188 F. App’x at 227 (citing cases); *Borges v. Gonzales*, 402 F.3d 398, 406 (3d Cir. 2005). The 180-day time limit should be equitably tolled here for all of the reasons discussed above, and also because Petitioner did not learn about the 2001 *in absentia* order until after he filed the instant motion to reopen. *See* Mot. Stay Removal at 4 n.3.

In sum, it is likely that Petitioner would have prevailed below in his motion for a stay under the traditional criteria by demonstrating a likelihood of success on the merits of his petition for review, irreparable harm if the stay were not granted, and a balance of equities tilting strongly in his favor. The Fourth Circuit’s selection of the more demanding standard therefore likely changed the outcome below. As a result, this case is a particularly appropriate vehicle for resolving the question presented.

III. RESOLUTION OF THE QUESTION PRESENTED REQUIRES REVIEW OF AN INTERLOCUTORY ORDER

Although this Court does not regularly grant certiorari to review interlocutory orders of the courts

of appeals, it plainly has jurisdiction to do so. *See* 28 U.S.C. §§ 1254(1) & 2101(e). Moreover, this is the unusual case in which such review is warranted. The very issue on which the circuits are split is the standard for issuing that interlocutory order. And if certiorari is not granted prior to judgment on the merits by the court of appeals, that issue will evade review by this Court. In every case, once a court of appeals renders judgment on the underlying merits of a petition for review, the question whether the alien was entitled to an interim stay pending that decision will have become moot.

This case is therefore identical in all relevant respects to *Barefoot v. Estelle*, 463 U.S. 880 (1983). In *Barefoot*, the court of appeals denied a stay of execution pending its review of the merits of the habeas petitioner's appeal. The denial of the stay itself raised substantial legal questions requiring this Court's review. *See id.* at 888-96. Accordingly, the Court treated the petitioner's application for a stay as a petition for a writ of certiorari before judgment, and granted certiorari to review "the appropriate standard for granting or denying a stay of execution pending disposition of an appeal by a federal court of appeals." *Id.* at 887.² Similarly, in *United Auto Workers v. Scofield*, this Court granted certiorari to

² In *Barefoot*, the Court simultaneously granted certiorari before judgment on the underlying merits of the petitioner's habeas petition. Petitioner here does not seek this Court's review of the merits of the BIA's ruling because the court of appeals is best positioned to consider those merits issues in the first instance.

review the standard governing the issuance by the court of appeals of an interlocutory order (the denial of a motion to intervene) and stayed further proceedings in the court of appeals until this Court's completion of that review. *See UAW, Local 283 v. Scofield*, 382 U.S. 205, 207 (1965).

In sum, where, as in *Barefoot*, *Scofield*, and this case, the standard governing the issuance by the courts of appeals of a class of interlocutory orders is the very question at issue, the Court must, if it is to review the question at all, grant certiorari before the case proceeds to judgment on the merits in the court of appeals.

IV. THE COURT BELOW APPLIED THE INCORRECT STANDARD

For several reasons, the Fourth Circuit erred below in interpreting section 242(f)(2) to apply to an alien's motion for a stay of removal pending merits review of an order of the BIA.

First, both history and common usage establish a difference between injunctions, which are expressly governed by section 242(f), and stays of judicial or quasi-judicial proceedings. As Judge Easterbrook has explained, the two concepts "cover different domains":

An "injunction" is an order issued as the relief in independent litigation, while a "stay" is an order integral to a system of judicial review: an appellate court may stay a district judge's order, or its own mandate, or an agency's decision when the agency

plays the role of the district court and the initial judicial tribunal is a court of appeals.

Hor, 400 F.3d at 484; *accord Tesfamichael*, 411 F.3d at 173 (“history and usage counsel that the two words carry different legal meanings”). “Treating a rule addressed to ‘injunctions’ as covering ‘stays,’” Judge Easterbrook concluded, “would impoverish the language and make the legislative task more difficult. Our legal vocabulary contains distinct words for distinctive judicial actions. Keeping them separate makes it easy to address one, both, or neither” *Hor*, 400 F.3d at 484. Indeed, this Court has held in another context that “[a]n order by a federal court that relates only to the conduct or progress of litigation before that court ordinarily is not considered an injunction.” *Gulfstream Aerospace Corp. v. Mayacamas Corp.*, 485 U.S. 271, 279 (1988).

The procedure employed by courts in connection with the issuance of stays of removal supports this interpretation. As Judge Michael noted:

If [the circuit court] had agreed to the petitioner’s request, a simple stay would have done the job. It would not have been necessary for [the court] to enjoin or restrain the Attorney General of the United States (the named respondent) individually. To turn a stay into an injunction in these circumstances is overkill, and it depreciates the traditional force of a simple stay, which assumes automatic respect for our orders without the need for formal restraint or prohibition of individual parties.

Teshome-Gebreegziabher, 2008 WL 4741721, at *6 (Michael, J., dissenting); *accord Andreiu*, 253 F.3d at 483 (“injunctions run against parties; stays run against courts and judgments”).

The distinction between stays and injunctions is recognized in the very provisions governing the issuance of stays by the courts of appeals. Rule 8 of the Federal Rules of Appellate Procedure, entitled “Stay or Injunction Pending Appeal,” recognizes a “stay” and an “injunction” as two separate and distinct legal orders, with the “stay” acting upon “the judgment or order of a district court pending appeal.” Fed. R. App. P. 8(a)(1)(A) & (C). And Rule 18, which applies to petitions for review of agency decisions, characterizes an order from the circuit court restraining enforcement of an agency decision or order as a “stay.” Fed. R. App. P. 18. “It is noteworthy,” in other words, “that rule 18 nowhere uses the word ‘enjoin’ or ‘injunction’ but maintains the linguistic distinction [recognized in Rule 8] by discussing ‘stays’—a peculiar procedural medium.” *Tesfamichael*, 411 F.3d at 174.

The structure and language of the IIRIRA confirms this understanding. For one thing, stays pending appellate review are specifically addressed in section 242(b)(3)(B) of the INA, 8 U.S.C. § 1252(b)(3)(B), which abrogates the pre-IIRIRA rule that such stays were, in most cases, automatic. “This provision, consequently, would have been the natural place to locate an amendment to the operative standard governing their issuance, but no such standard is

found [there].” *Tesfamichael*, 411 F.3d at 174. This silence is “deafening.” *Id.*; *see also Andreiu*, 253 F.3d at 481 (“[i]t would be quite strange to announce the abolition of automatic stay orders in [one provision], but announce the replacement standards in [another]”). “[I]f Congress had wanted to break from the routine of the past and apply a heightened standard to stays pending appeal, it most likely would have included such a standard in INA § 242(b)(3) itself.” *Arevalo*, 344 F.3d at 8. Indeed, if Congress had truly intended that a court could issue a stay only upon a showing that the order was “prohibited as a matter of law,” there would have been “no need” to state in section 242(b)(3)(B) that stays are not automatic. *Tesfamichael*, 411 F.3d at 175–76 (internal quotation marks omitted); *accord Andreiu*, 253 F.3d at 481 (noting that if section 242(f)(2) has the effect the government claims, then “all of [section 242(b)(3)(B)] would be reduced to surplusage”).

In addition, subsection (f)(1) refers to the authority of courts, in the class-action and pre-enforcement contexts, “to enjoin or restrain” the operation of the immigration laws. Subsection (f)(2), by contrast, uses only the term “enjoin,” thus evincing a congressional recognition that injunctions do not include the entire universe of judicial restraints. “[T]his linguistic shift makes it appear likely that Congress intended the words ‘enjoin’ and ‘restrain’ to have different meanings,” for otherwise “the use of the word ‘restrain’ in subsection (f)(1) would be pointless.” *Arevalo*, 344 F.3d at 7; *see also Hor*, 400 F.3d at 485

("Title 8 as a whole refers to 'stay' 14 times . . . and 'enjoin' or 'injunction' a total of 7 times; these words are not treated as coterminous in any provision."). Congress would have understood that "the word 'enjoin' . . . refer[s] to permanent injunctions and the word 'restrain' . . . refer[s] to temporary injunctive relief (such as a stay)," a distinction found in the Hobbs Act, 28 U.S.C. § 2349(a) & (b), which is expressly incorporated in the INA. *Arevalo*, 344 F.3d at 7 (citing INA § 242(a)(1)).

The practical consequences of applying section 242(f) to temporary stays pending review also counsel against doing so. As several circuits have recognized, "the adoption of the standard [set forth in section 242(f)] would render stays of deportation almost impossible to obtain." *Tesfamichael*, 411 F.3d at 173; *accord Hor*, 400 F.3d at 483. Whether or not this is an "absurd result[]," *Andreiu*, 253 F.3d at 482, it is at least a peculiar one. It would, for example, "require full-scale briefing at the beginning of the appellate process, often before the petitioner has even received a copy of the administrative record." *Id.* at 482. As Judge Selya observed, applying section 242(f) to stays would prematurely "necessitate full deliberation on the merits of the underlying case and, in the bargain, require the alien to carry a burden of proof *higher* than she would have to carry on the merits." *Arevalo*, 344 F.3d at 8. The inevitable result would be "the removal of some aliens with meritorious claims against removal." *Mohammed*, 309 F.3d at 100.

For all of these reasons, section 242(f)(2) is inapplicable to requests for stays pending judicial review of BIA orders. Accordingly, the court below applied the incorrect standard to Petitioner's motion for a stay.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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