No. _____

IN THE

Supreme Court of the United States

JEAN MARC NKEN,

Applicant/Petitioner,

v.

MICHAEL MUKASEY, UNITED STATES ATTORNEY GENERAL,

Respondent.

EMERGENCY MOTION FOR A STAY OF REMOVAL PENDING ADJUDICATION OF THE PETITION FOR REVIEW IN THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT, OR IN THE ALTERNATIVE, PETITION FOR A WRIT FOR CERTIORARI AND A STAY OF REMOVAL PENDING RESOLUTION OF THE PETITION

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page(s)

CASES

STATUTES

OTHER MATERIALS

TO THE HONORABLE JOHN G. ROBERTS, JR., CHIEF JUSTICE OF THE SUPREME COURT OF THE UNITED STATES AND CIRCUIT JUSTICE FOR THE FOURTH CIRCUIT:

Applicant Jean Marc Nken ("Mr. Nken" or "Applicant") respectfully requests an order staying his removal pending adjudication of his Petition for Review by the United States Court of Appeals for the Fourth Circuit. In the alternative, Mr. Nken requests that the Court treat this motion as a petition for a writ of certiorari, grant the petition, and grant Mr. Nken a stay of removal during the Court's consideration of the petition.

Mr. Nken is currently in the custody of the Department of Homeland Security and may be deported at any time. He sought and was denied a stay of removal from the Fourth Circuit.

Several days before denying the stay, the Fourth Circuit held, over the dissent of four judges from the denial of rehearing en banc, that 8 U.S.C. § 1252(f)(2) bars a court order staying 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.'" *Teshome-Gebreegziabher v. Mukasey*, 528 F.3d 330 (4th Cir. 2008), *rehearing en banc denied*, __ F.3d __, 2008 WL 4741721, at *1 (Oct. 30, 2008) (quoting 8 U.S.C. § 1252(f)(2)). The Fourth Circuit's interpretation, while consistent with that of the Eleventh Circuit, conflicts with that of eight other circuits, all of which have held that the heightened standard of § 1252(f)(2) applies only to injunctions against an alien's removal, but not to temporary stays sought for the duration of the alien's petition for review. In those eight circuits, the courts of appeals use their traditional standard for granting injunctive relief in the immigration context, which measures an applicant's likelihood of success on the merits and takes into account the equity interests involved.

Justice Kennedy previously recognized the circuit split and stated that the "issue is important." *Kenyeres v. Ashcroft*, 538 U.S. 1301 (2003) (Kennedy, J., in chambers). He

concluded that "[g]iven the significant nature of the issue and the acknowledged disagreement among the lower courts, the Court, in my view, should examine and resolve the question in an appropriate case." *Id.* at 1305 (Kennedy, J., in chambers).

This is an appropriate case to review the issue. Under the traditional standard adopted by eight of the circuits, Mr. Nken's request for a stay of deportation would likely have been granted: the merits of Mr. Nken's petition for review are strong because the Board of Immigration Appeals ("BIA") ignored or misconstrued the most material evidence submitted in support of his motion to reopen, and the equities demand a stay because Mr. Nken may face arrest, torture, and death upon his removal to Cameroon and, if removed, will leave behind his U.S. citizen wife and U.S. citizen young son.

Because the Fourth Circuit has adopted an incorrect interpretation of § 1252(f)(2) in denying Mr. Nken's motion for a stay and because Mr. Nken was entitled to a stay under the correct standard applicable in eight other courts of appeals, Mr. Nken respectfully requests that the Court grant Mr. Nken's emergency motion for a stay of removal pending adjudication of his petition for review in the Court of Appeals for the Fourth Circuit.

In the alternative, Mr. Nken respectfully requests that the Court treat this stay application as a petition for certiorari, grant the petition to determine the proper standard for adjudicating motions to stay removal pending resolution of an alien's petition for review, and grant Mr. Nken a stay of removal during the Court's consideration of the petition for certiorari. *See Purcell v. Gonzalez*, 549 U.S. 1, 6 (2006) (treating application to stay injunction pending appeal as petition for certiorari, granting certiorari, and vacating injunction); *Barefoot v. Estelle*, 463 U.S. 880, 887 (1983) (treating application for stay of execution as a petition for writ of certiorari); *see generally* EUGENE GRESSMAN ET AL., SUPREME COURT PRACTICE 418-19 (2007).

ORDER AND OPINION BELOW

The order of the United States Court of Appeals for the Fourth Circuit denying Mr. Nken's Motion to Stay Deportation Pending Review is Order, *Nken v. Mukasey*, Case No. 08-1813 (4th Cir. Nov. 5, 2008). That Order is an unpublished opinion. *See* Exhibit 1.

STATEMENT OF THE CASE

Mr. Nken is confined in DHS custody and may be removed at any time pursuant to a final order of removal by the BIA denying his motion to reopen his application for asylum, withholding of removal, and relief under the Convention Against Torture ("CAT") based on changed country conditions.

Mr. Nken is a native and citizen of Cameroon who fled due to persecution based on his democratic opposition to the oppressive Biya regime. Mr. Nken entered the United States legally and has been law-abiding since he arrived in 2001. Removal proceedings were initiated because he overstayed his visa. Mr. Nken then applied for asylum, withholding of removal, and CAT relief. His application alleged that Mr. Nken had participated in pro-democratic activities in Cameroon which made him an enemy of the Biya administration. He alleged that he had twice been arrested for these activities and had been detained for approximately one month and frequently beaten and interrogated about them. Mr. Nken's application for asylum, withholding of removal, and CAT relief was denied in 2003.

Over the period during which these proceedings were taking place, Nken met Brigitte Beloeck, a then-permanent resident and now-U.S. citizen. Nken and Beloeck married on November 4, 2004 and subsequently had a child together who is a U.S. citizen.

On May 7, 2008, Nken filed a motion to reopen his petition for asylum, withholding of removal, and CAT relief based on changed country conditions in his native country of

Cameroon. *See* Exhibit 2. Nken submitted numerous pieces of evidence demonstrating dramatic changes in the Cameroonian political landscape in the wake of President Biya's announcement that he would amend the Cameroonian constitution to allow him to be a dictator for life. Foremost among these was a detailed letter from Nken's younger brother, Lucien Nounga, in which Nounga, who still resides in Cameroon, told his brother that the Biya regime was arresting political opponents, including Nounga himself, that the government was looking over lists of students from the 1990s who were demonstrating against the government, and that Nken's name was on those lists. The letter warned Nken that "it is really dangerous for you being one of those with problems from the past" and that Nken's "life will be in a real danger" if he returned to Cameroon.

On June 23, 2008, a single judge of the BIA issued an order less than two pages long which denied Nken's motion. *See* Exhibit 3.

On July 23, 2008, Mr. Nken filed a petition for review in the Fourth Circuit Court of Appeals. *See* Exhibit 4.

On August 6, 2008, Mr. Nken filed a motion to stay deportation pending resolution of his petition for review. *See* Exhibit 5. Mr. Nken contended that he was entitled to a stay of removal under the standard announced by the Fourth Circuit in *Teshome-Gebreegziabher*, 528 F.3d 330 (4th Cir. 2008), which held that § 1252(f)(2) bars an order staying removal pending resolution of a petition for review unless an alien meets a very strict burden of proof. Mr. Nken also argued that the standard adopted by the Fourth Circuit in *Teshome-Gebreegziabher* was incorrect and that he was entitled to a stay of removal under the traditional standard for granting injunctive relief.

Mr. Nken asserted that the BIA abused its discretion in denying his motion to reopen. Mr. Nken argued that the BIA abused its discretion by ignoring or misconstruing material evidence, in particular the letter from Mr. Nken's brother. The BIA stated that the evidence demonstrated general civil unrest rather than persecution specific to Mr. Nken. But the BIA ignored the arrest of Mr. Nken's brother, the brother's warning to Mr. Nken that Mr. Nken would be especially subject to arrest because his name appeared on the lists being targeted by the Biya regime, and the brother's statement that Mr. Nken's life would be endangered should he return to Cameroon because of the current persecution of dissidents and his and his family's political opposition activities. By ignoring this evidence, Mr. Nken argued, the BIA abused its discretion.

Mr. Nken also argued that the BIA erred in denying Mr. Nken's motion based on the fact that he did not submit a personal statement in support of his motion to reopen based on changed country conditions. Mr. Nken argued that this was an abuse of discretion because no statute or regulation and no BIA precedents require the submission of such a statement, particularly when corroborating evidence demonstrates a prima facie persecution claim. Whether a petitioner must submit such a statement in support of a motion to reopen based on changed country conditions is a question of first impression in the Fourth Circuit.

On August 13, 2006, the Attorney General filed a response opposing the stay and arguing that the proper standard for determining whether a stay is warranted is the one articulated in 8 U.S.C. § 1252(f)(2). *See* Exhibit 6. The Government made no claim that Mr. Nken failed to meet the traditional standard for a stay which is applied in eight other circuits.

On October 30, 2008, the Fourth Circuit denied rehearing *en banc* in *Teshome-Gebreegziabher* and held that 8 U.S.C. § 1252(f)(2) shall apply to motions to stay removal

pending resolution of an alien's petition for review. *See Teshome-Gebreegziabher v. Mukasey*, __ F.3d __, 2008 WL 4741721 (4th Cir. Oct. 30, 2008).

On November 5, 2008, the Fourth Circuit denied Mr. Nken's stay motion. *See* Exhibit 1.

Briefing on the merits of Mr. Nken's petition for review is incomplete at this time. Mr. Nken filed his opening brief on October 30, 2008. *See* Exhibit 7. The government's response is due on December 1, 2008.

Mr. Nken remains in DHS custody and may be deported at any time.

REASONS FOR GRANTING THE STAY OF REMOVAL OR ALTERNATIVE RELIEF

THE COURT SHOULD STAY MR. NKEN'S REMOVAL TO PERMIT ORDERLY RESOLUTION OF MR. NKEN'S PETITION FOR REVIEW AND TO RESOLVE THE CIRCUIT SPLIT CONCERNING THE PROPER INTERPRETATION OF § 1252(f)(2).

Mr. Nken seeks a stay of removal pending the Fourth Circuit's resolution of his petition for review. The standard under which the Fourth Circuit denied Mr. Nken's motion to stay is the subject of a circuit split concerning the proper interpretation of 8 U.S.C. § 1252(f)(2). That section provides that "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." The Fourth Circuit and Eleventh Circuit have interpreted this provision to apply to motions for a temporary stay of removal pending judicial review and thus apply a "clear and convincing evidence" standard to such motions. *See Teshome-Gebreegziabher v. Mukasey*, 528 F.3d 330 (4th Cir. 2008), *reh'g denied*, __ F.3d __ (4th Cir. Oct. 30, 2008) (en banc); *Weng v. Attorney General*, 287 F.3d 1335 (11th Cir. 2002) (per curiam).

Eight other circuits have interpreted this provision as inapplicable to such motions. These circuits evaluate requests for a stay under their traditional standard for granting injunctive

relief in the immigration context, which measures an applicant's likelihood of success on the merits and takes account of the equity interests involved. *See Tesfamichael v. Gonzales*, 411 F.3d 169 (5th Cir. 2005); *Hor v. Gonzales*, 400 F.3d 482 (7th Cir. 2005); *Douglas v. Ashcroft*, 374 F.3d 230 (3d Cir. 2004); *Lim v. Ashcroft*, 375 F.3d 1011 (10th Cir. 2004); *Arevalo v. Ashcroft*, 344 F.3d 1 (1st Cir. 2003); *Mohammed v. Reno*, 309 F.3d 95 (2d Cir. 2002); *Bejjani v. INS*, 271 F.3d 670 (6th Cir. 2001); *Andreiu v. Ashcroft*, 253 F.3d 477 (9th Cir. 2001) (en banc); *see also Bonhomme-Ardouin v. United States Attorney General*, 291 F.3d 1289, 1290 (11th Cir. 2002) (Barkett, J., concurring) (expressing disagreement with the Eleventh Circuit's interpretation of 8 U.S.C. § 1252(f)(2) and urging reconsideration en banc).

The circuit split on this precise issue was noted by Justice Kennedy in 2003, before the Fourth Circuit adopted the minority view of § 1252(f)(2). *See Kenyeres v. Ashcroft*, 538 U.S. 1301 (2003) (Kennedy, J., in chambers). In *Kenyeres*, Justice Kennedy explained:

> The issue is important. If the exacting standard of § 1252(f)(2) applies to requests for temporary stays, then to obtain judicial review aliens subject to removal must do more than show a likelihood of success on the merits. *See Addington v. Texas*, 441 U.S. 418, 425, 99 S. Ct. 1804, 60 L.Ed.2d 323 (1979) (The "intermediate standard of clear and convincing evidence" lies "between a preponderance of the evidence and proof beyond a reasonable doubt"). An opportunity to present one's meritorious grievances to a court supports the legitimacy and public acceptance of a statutory regime. It is particularly so in the immigration context, where seekers of asylum and refugees from persecution expect to be treated in accordance with the rule-of-law principles often absent in the countries they have escaped. A standard that is excessively stringent may impede access to the courts in meritorious cases. On the other hand, § 1252(f)(2) is a part of Congress' deliberate effort to reform the immigration law in order to relieve the courts from the need to consider meritless petitions, and so devote their scarce judicial resources to meritorious claims for relief. *Cf. Reno v. American-Arab Anti-Discrimination Comm.*, 525 U.S. 471, 486, 119 S. Ct. 936, 142 L.Ed.2d 940 (1999). If the interpretation adopted by the Second, Sixth, and Ninth Circuits is

> erroneous, and § 1252(f)(2) governs requests for stays, this congressional effort will be frustrated.

Id. at 1305 (Kennedy, J., in chambers).

The issue presented by this circuit split presents an important question of federal law. The number of petitions for review from immigration decisions has increased substantially in recent years to between 1,000 and 1,200 per month. *See* Executive Office for Immigration Review, Fact Sheet: BIA Streamlining 2 (Sept. 15, 2004), http://www.usdoj.gov/eoir/press/04/BIAStreamlining2004.pdf (hereinafter "EOIR Fact Sheet"); *see also* Admin. Office of the U.S. Courts, Judicial Business of the United States Courts 2006, tbl.B-3 (Mar. 31, 2007), available at http://www.uscourts.gov/judbus2006/appendices/b3.pdf. Nearly every alien filing a petition for review of a final order of removal seeks a stay of removal pending judicial review of his or her claims. EOIR Fact Sheet at 2. Thus the issue presented in Mr. Nken's case is one that arises thousands of times each month in the federal courts. The standard applied to these motions—and thus the likelihood that a petitioner will obtain a stay of removal—differs not based on the strength of the petitioner's claims, but rather on how the petitioner's circuit interprets a federal statute. Judge Michael observed in dissent from the Fourth Circuit's denial of rehearing en banc that the Fourth Circuit's interpretation of § 1252(f)(2) "will lead to nonuniform application of the immigration laws and to unjust results in our circuit . . . ." *Teshome-Gebreegziabher*, 2008 WL 4741721 at *4 (Michael, J., dissenting from the denial of rehearing en banc). For these reasons, in *Kenyeres*, Justice Kennedy stated that "[g]iven the significant nature of the issue and the acknowledged disagreement among the lower courts, the Court, in my view, should examine and resolve the question in an appropriate case." *Kenyeres*, 538 U.S. at 1305 (Kennedy, J., in chambers).

The *Kenyeres* case was not an appropriate vehicle for resolution of this circuit split because Justice Kennedy concluded that the petitioner was unlikely to prevail in his request for a stay under either standard. *Id.* at 1306 (Kennedy, J., in chambers).

In this case, by contrast, the issue is squarely presented. Mr. Nken would have obtained a stay of removal under the preliminary injunction standard applied in eight circuits, which requires only a reasonable likelihood of success on the merits, or a likelihood of prevailing on appeal that is "better than negligible." *Sofinet v. INS*, 188 F.3d 703, 707 (7th Cir. 1999); *Mohammed v. Reno*, 309 F.3d 95, 102 (2d Cir. 2002) (stating that the "likelihood of success on appeal need not be set too high" for asylum applicants to secure a stay of removal).

Under these standards, Mr. Nken has at least a reasonable likelihood of success on the merits given that his case is closely analogous to others where petitioners have succeeded on appeal. *See* Exhibit 5 at 10-13; Exhibit 7 at 17-21. For instance, Mr. Nken argues in his Petition for Review that the BIA erred in ignoring material evidence of changed country conditions in Cameroon—namely, a detailed letter from Mr. Nken's younger brother, Lucien Nounga, in which Nounga, who still resides in Cameroon, told his brother: that the Biya regime was arresting political opponents, including Nounga himself; that the government was looking over lists of students from the 1990s who were demonstrating against the government, and that Nken's name was on those lists; that "it is really dangerous for you being one of those with problems from the past"; and that Nken's "life will be in a real danger" if he returned to Cameroon. The BIA did not find that Mr. Nounga's letter was not credible. Rather, the BIA simply failed to consider the substance of Mr. Nounga's letter and dismissed it in a single line which characterized the letter as describing "the civil unrest that 'started with the taxi-cab drivers' strike because of the high price of gas and which transformed this strike into a social

movement.'" The BIA did not even mention the most material aspects of this letter—namely, the arrest of Nken's brother and the numerous statements in the letter describing the danger Nken would face were he now to return to Cameroon. The letter from Mr. Nounga thus belies any assertion that Mr. Nken's motion to reopen failed to link changes in Cameroon to his claim for relief. *See, e.g.*, Exhibit 6 at 9.

Under similar factual circumstances, the Courts of Appeals have found the BIA's decision to be arbitrary and capricious. *See, e.g., Shing Jiang Lui v. BIA*, 237 F. App'x 647, 649 (2d Cir. 2007) (finding that the BIA abused its discretion when it "did not comment on" a letter submitted from petitioner's home country in support of changed country conditions); *Qing Ming Liu v. Mukasey*, 276 F. App'x 93, 94 (2d Cir. 2008) (holding that BIA abused its discretion where denied a motion to reopen based on changed country conditions but "failed to consider the complete record," including news articles submitted by petitioner); *Shardar v. Att'y Gen. of the U.S.*, 503 F.3d 308, 316-17 (3d Cir. 2007) (finding that the BIA abused its discretion by failing to consider and appraise the material evidence before it, including an "affidavit from his brother in Bangladesh that stated that he (the brother) had been recently threatened with a gun and beaten by 'BNP goons' for being a 'collaborator of Jatiya Party'"); *Diallo v. Gonzales*, 175 F. App'x 74, 75-76 (7th Cir. 2006) (holding that BIA abused its discretion because petitioner submitted documents that described "ominous developments" in native country but BIA merely "brushed off this evidence"); *Shou Yung Guo v. Gonzales*, 463 F.3d 109, 115 (2d Cir. 2006) (stating that "[i]t is not apparent to us that the BIA ever really paid any attention to the documents" and "IJs and the BIA have a duty to explicitly consider any country conditions evidence submitted by an applicant that materially bears on his claim" (quotation marks omitted)); *Reyes v. INS* 673 F.2d 1087, 1089 (9th Cir. 1982) ("When the Board distorts or disregards important aspects of the

alien's claim, denial of the alien's motion to reopen is arbitrary and the Board has abused its discretion."). Given that Mr. Nken's case is factually analogous to these cases where the petitioner prevailed, he has demonstrated at least a reasonable likelihood of success on the merits of his petition for review.

Furthermore, the BIA erred in placing dispositive weight on the absence of "[Mr. Nken's] own statement or asylum application articulating his persecution claim." Exhibit 3 at 1. The BIA concluded that Nken's failure to submit his own statement was "significant in this case where the Immigration Judge's adverse credibility determination remains undisturbed." Exhibit 3 at 1. Yet neither the relevant statute nor the relevant regulations require the submission of such statements on a motion to reopen. In fact, "[t]he statute provides little guidance on the form or sufficiency of a motion to reopen; it simply directs that the motion 'shall state the new facts that will be proven at a hearing to be held if the motion is granted, and shall be supported by affidavits or other evidentiary material.'" *Fessehaye v. Gonzales*, 414 F.3d 746, 753 (7th Cir. 2005) (quoting 8 U.S.C. § 1229a(c)(7)(B)). The regulations repeat this directive: "A motion to reopen proceedings shall state the new facts that will be proven at a hearing to be held if the motion is granted and shall be supported by affidavits or other evidentiary material." 8 C.F.R. § 1003.2(c)(1). Moreover, the BIA has never required a petitioner to submit a personal statement in support of a motion to reopen based on changed country conditions, and the BIA cited no cases in which it had even considered such statements, much less any case where it had regarded the absence of such a statement as "significant." By pulling from thin air the requirement that Nken submit his own personal statement on a motion to reopen, the BIA ignored the plain language of the statute and regulation and "inexplicably depart[ed] from established policies," *Cao v. U.S. Dep't of Justice*, 421 F.3d 149, 157 (2d Cir. 2005). In so doing, the BIA abused its

discretion. *See Billeke-Tolosa v. Ashcroft*, 385 F.3d 708, 712 (6th Cir. 2004) ("[T]he BIA ha[s] no discretion to ignore its own precedent."); *Singh v. U.S. Dep't of Justice*, 461 F.3d 290, 295 (2d Cir. 2006) ("[A]n administrative agency must adhere to its own regulations."); *Henry v. INS*, 74 F.3d 1, 6 (1st Cir. 1996) ("An agency cannot merely flit serendipitously from case to case, like a bee buzzing from flower to flower, making up the rules as it goes along.").

Finally, under the standard applied in the majority of circuits, the equities would demand a stay. First, the courts applying the traditional preliminary injunction standard have noted that the equities particularly favor the alien facing deportation in immigration cases where failure to grant the stay would result in deportation before the alien has been able to obtain judicial review. *See, e.g.*, *Thapa v. Gonzalez*, 460 F.3d 323, 336 (2d Cir. 2006) ("[T]his Circuit has granted a stay pending appeal where the likelihood of success is not high but the balance of hardships favors the applicant." (quotation marks omitted)); *Mohammed*, 309 F.3d at 102 ("In the context of a stay of removal of an alien pending appeal of an adverse habeas decision, the gravity of the injury to the alien if a stay is denied, compared to the lesser 'injury' to the Government if one alien is permitted to remain while an appeal is decided, suggests that the degree of likelihood of success on appeal need not be set too high."); *Tesfamichael*, 411 F.3d at 178 (discussing the "extraordinary likelihood of irreparable harm the petitioners face if deported (in the form of forced separation and likely persecution), and the public interest in having the immigration laws applied correctly and evenhandedly").

Second, the equities in Mr. Nken's case are particularly strong. For four years, Mr. Nken has been married to a U.S. citizen with whom he has a young son who is also a U.S. citizen. Mr. Nken's motion to reopen alleged that he would face significant risk of arrest, torture, and death were he removed back to Cameroon, where he is considered an enemy of the Biya

administration. The letter from Mr. Nken's brother, submitted in support of his motion, indicated that Mr. Nken's name appears on the lists of political opponents being reviewed by the Biya regime, that Biya is arresting those on the list, and that Mr. Nken's life will be in danger should he return to Cameroon. The BIA did not question the credibility of this letter in its decision denying Mr. Nken's motion to reopen. Given the absence of any injury to the public interest in comparison to the devastating consequences to Mr. Nken and his family if he were removed, the equities counsel strongly in favor of a stay of removal under the traditional standard for such stays. Accordingly, because Mr. Nken has a reasonable likelihood of success on the merits of his petition for review and because the equities favor a stay of removal, a stay of removal would be appropriate under the traditional standard for preliminary injunctive relief.

By contrast, under the Fourth Circuit's standard, Mr. Nken was virtually foreclosed from obtaining a stay of removal. The Fourth Circuit's interpretation of § 1252(f)(2) required Mr. Nken to demonstrate "by clear and convincing evidence" that a discretionary decision of the BIA was "prohibited as a matter of law." As Judge Easterbook has explained, "[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. . . . [A]n alien . . . who contends only that the immigration judge's conclusion is unsupported by substantial evidence will be unable to demonstrate 'by clear and convincing evidence that the entry or execution of [the removal] order is prohibited as a matter of law' and thus would have no hope of a stay if § 1252(f)(2) applies to requests for stays." *Hor*, 400 F.3d at 483; *see also Tesfamichael*, 411 F.3d at 173 ("[A]s a practical matter, the adoption of the standard urged by the government would render stays of deportation almost impossible to obtain."). Judge Michael similarly explained in his dissent from the denial of rehearing en banc that the Fourth Circuit's standard "means that an alien presenting a meritorious issue of first

impression or challenging a substantial evidence determination can *never* be granted a stay . . . ." *Teshome-Gebreegziabher*, 2008 WL 4741721, at *8 (Michael, J., dissenting from the denial of rehearing en banc).

Mr. Nken's case vividly illustrates the problem. While Mr. Nken can demonstrate that the BIA abused its discretion in ignoring material evidence, it is virtually impossible for him to show in a motion to stay, before the merits have been heard, that the BIA's order was clearly prohibited as a matter of law. Moreover, since the Fourth Circuit has never spoken to the requirement that a petitioner submit a personal statement to accompany a motion to reopen based on changed country conditions, it is impossible for Mr. Nken to demonstrate at the stay stage that the BIA's order so requiring was clearly prohibited as a matter of law.

Finally, making matters worse, the equities are utterly irrelevant under the Fourth Circuit's analysis. Thus, the inherent inequity in deporting an alien prior to any judicial review of the BIA decision and the specific equities present in Mr. Nken's stay were of no consequence, even though they would have counseled strongly in favor of a stay under the traditional analysis. In short, the Fourth Circuit's application of 8 U.S.C. § 1252(f)(2) in adjudicating Mr. Nken's stay was almost certainly outcome-determinative.

Moreover, the Fourth Circuit's application of 8 U.S.C. § 1252(f)(2) to Mr. Nken's motion to stay removal pending review was erroneous. The term "enjoin" in subsection (f)(2) was not meant to apply to motions to stay removal temporarily pending judicial review. The Supreme Court itself has distinguished between injunctions and stays in *Gulfstream Aerospace Corp. v. Mayacamas Corp.*, 485 U.S. 271 (1988), which held that the two remedies are distinct for purposes of interlocutory appeal. The eight circuits taking the majority view have also correctly noted that a stay and an injunction are distinct. The distinction is likewise made by

Federal Rule of Appellate Procedure 18 and in 28 U.S.C. § 2349, which govern the issuance of "stays" pending appellate review of federal agencies' decisions. The legal distinction reflects a functional one: "an injunction is relief obtained through independent litigation and directed at a particular party, not a tribunal," while "a stay is a mechanism intrinsic to judicial review." *Tesfamichael*, 411 F.3d at 173-74.

Moreover, the structure and language of § 1252 confirm that Congress intended to maintain this distinction between "stays" and "injunctions" when it enacted IIRIRA. *Teshome-Gebreegziabher*, 2008 WL 4741721, at *6 (Michael, J., dissenting from the denial of rehearing en banc). Congress explicitly chose to use the word "stay" in eliminating automatic stays pending appeal in 8 U.S.C. § 1252(b)(3)(B). Congress separately uses the terms "enjoin" and "injunction" 7 times in Title 8. *Hor*, 400 F.3d at 485. "[T]hese words are not treated as coterminous in any provision." *Id.* And in § 1252(f), the section relevant here, Congress referred only to injunctions with no mention of stays, titling the heading of § 1252(f) as a "[l]imit on injunctive relief." Nowhere in § 1252, nor anywhere else in IIRIRA, did Congress define "injunctive relief" or "injunctions" to include stays.

Judge Easterbrook, writing on this issue, stated that "treating a rule addressed to 'injunctions' as covering 'stays' would impoverish the language and make the legislative task more difficult." *Hor*, 400 F.3d at 484. "[T]reating a subsection that mentions injunctions but not stays as covering both would force Congress to add provisos each time it sought to regulate one but not the other. Once a legal community develops a stable nomenclature, it is best to apply it mechanically so that no one is taken unawares, and so that drafting can be uncluttered by provisos." *Id.* For these reasons, and because the Fourth Circuit's reading of § 1252(f)(2) would virtually eliminate the ability of most aliens to obtain stay of removal pending review of their

claims—something not clearly intended from the language Congress chose to use—a majority of the circuits have rejected the interpretation of § 1252(f)(2) as applying to temporary stays of removal pending judicial review.

Had the Fourth Circuit applied the proper standard for such motions—the standard utilized by eight other courts of appeals under similar circumstances—Mr. Nken would have obtained a stay of removal pending resolution of his petition for review. Because the Fourth Circuit applied the incorrect standard and is entitled to a stay of removal pending resolution of his petition for review under the proper standard, the Court should grant his application for a stay. In the alternative, the Court should treat his application for a stay as a petition for certiorari, grant the petition for certiorari since Mr. Nken's claim is sufficiently meritorious to create a reasonable probability that four Members of the Court will vote to grant certiorari in this case, and grant Mr. Nken a stay of deportation pending full review.

CONCLUSION

This Court should grant a stay of removal pending resolution of the Applicant's petition for review or, in the alternative, the Court should treat this stay application as a petition for certiorari, grant the petition, and stay deportation pending full review.

Respectfully submitted,

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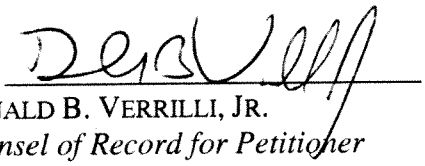
BY: 
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CERTIFICATE OF SERVICE

I hereby certify that true copies of the Emergency Motion For A Stay Of Removal Pending Adjudication Of The Petition For Review In The United States Court Of Appeals For The Fourth Circuit have been served by first-class mail upon those listed below, on this day, November 7, 2008.

Gregory G. Garre, Solicitor General
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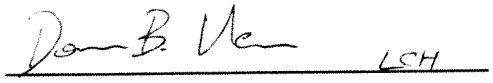

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