No. 08A413

IN THE

Supreme Court of the United States

JEAN MARC NKEN,

Applicant/Petitioner,

v.

MICHAEL MUKASEY, UNITED STATES ATTORNEY GENERAL,

Respondent.

REPLY IN SUPPORT OF 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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Mr. Nken respectfully submits this reply memorandum in support of his 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 of certiorari and a stay of removal pending resolution of the petition.

ARGUMENT

The Attorney General concedes (as he must) that there is a clear and deep Circuit split on the applicability of Section 1252(f)(2) to a request for a stay of removal pending judicial review. Opp. 15-16. And the Attorney General does not contest that the issue presented is of overriding importance. *See* Opp. 14 (noting, and then ignoring, Mr. Nken's contention that the issue involves an "important and recurring question of federal law"). Indeed, the Attorney General does not dispute that the question confronting the Court is an important question of federal law that arises in thousands of immigration appeals in the federal courts of appeals every month, yet one that has evaded review in the nearly five years since Justice Kennedy noted the importance of the issue and the need to resolve the Circuit split. The Attorney General nevertheless contends that the stay should be denied, for three reasons. None of those arguments holds water.[1]

1. The Attorney General's brief suggests that this case is a poor vehicle for resolving the Circuit split because the Fourth Circuit did not explicitly "state that its decision was in any way contingent on its holding in *Teshome-Gebreeziabher*," the en banc decision from the Fourth

[1] The Solicitor General's brief suggests that the burden in obtaining a stay is "especially heavy" because the Court of Appeals denied Mr. Nken's motion for a stay. Opp. 13. This case, however, presents the unusual situation of a petitioner seeking a stay in the Supreme Court so that the Court may review the standard under which the court of appeals adjudicated the petitioner's stay motion. It is counterintuitive to give special weight to a stay denial issued by the Court of Appeals when the principal argument is that the court of appeals applied the wrong legal standard in evaluating the stay.

Circuit that expressly held that that § 1252(f)(2) applies to all applications for a stay of removal pending judicial review. Opp. 20-21. That is incorrect.

First, although Mr. Nken filed his motion for a stay of removal with the Fourth Circuit on August 6, 2008, the Fourth Circuit waited until November 5, 2008 to resolve it — just six days after publication of its en banc decision in *Teshome-Gebreegziabher v. Mukasey*, 528 F.3d 330 (4th Cir. 2008), *reh'g denied*, __ F.3d __, 2008 WL 4741721 (4th Cir. Oct. 30, 2008) (en banc). The timing alone makes clear that the panel in Mr. Nken's case was waiting for the court to resolve the standard question and, once resolved, the standard determined the outcome. And in any event, the government's suggestion that a panel of the Fourth Circuit refused to apply or otherwise ignored a deeply divided en banc decision issued just six days earlier is meritless.

Second, the decision below is precisely what one would expect in a Circuit, such as the Fourth Circuit, that has definitively resolved the standard of review for stay motions. Once a Circuit has taken a clear position on the meaning of § 1252(f)(2), it is highly unlikely that any three-judge panel would describe in detail the rationale for applying § 1252(f)(2) in an order resolving an alien petitioner's stay motion. Nor it is likely that the panel would state in such an order that had another standard been applied, the motion would be granted. Panels in the Fourth Circuit are obligated to follow the precedent set forth in *Teshome-Gebreegziabher*, and need not explain that obvious fact. Moreover, given that application of § 1252(f)(2) is essentially outcome-determinative, *see Tesfamichael v. Gonzales*, 411 F.3d 169, 173 (5th Cir. 2005) ("[A]s a practical matter, the adoption of th[is] standard . . . would render stays of deportation almost impossible to obtain"), a lengthy discussion of the facts is superfluous.[2] Accordingly, the fact

[2] The orders resolving (and all denying) stay motions in the weeks since the Fourth Circuit decided *Teshome-Gebreegziabher* bear this out: each of the other Fourth Circuit orders denying motions for a stay pending removal do so in only one sentence and without any articulation of a

that the panel did not describe the standard or specify in detail why Mr. Nken could not meet it does not make his case any less appropriate a vehicle to resolve the issue.

2. The bulk of the government's argument is devoted to the proposition that a stay is inappropriate because Mr. Nken would not prevail even under the traditional standard for granting a stay — examining likelihood of success and the possibility of irreparable harm, *Kenyeres v. Ashcroft*, 538 U.S. 1301, 1303-04 (2003) (Kennedy, J.) — that prevails in eight circuits.[3] Opp. 21-29. This has been the Attorney General's usual response to applications such as Mr. Nken's. *See, e.g.*, Brief for the Respondent in Opposition, *Kenyeres v. Ashcroft*, No. 02A777 (U.S., filed Mar. 19, 2003); Brief for the Respondent in Opposition, *Rangloan v. Mukasey*, No. 07-1169, 2008 WL 2066103, *11-*12 (U.S., filed May 14, 2008) (arguing that "[t]his case would be a poor vehicle for resolving" the Circuit split because petitioner "could not prevail under either the Section 1252(f)(2) standard or the traditional injunctive relief standard").[4] In this case, because Mr. Nken would satisfy the traditional standard, the Attorney General's response is meritless.

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specific rationale. *See* Order, *Fei Feng Yang v. Mukasey*, No. 08-2082 (4th Cir. Oct. 30, 2008); Order, *Jia Qiang Tang v. Mukasey*, No. 08-2050 (4th Cir. Nov. 5, 2008); Order, *Tesfabager v. Mukasey*, No. 08-2118 (4th Cir. Nov. 12, 2008); Order, *Rathore v. Mukasey*, No. 08-2144 (4th Cir. Nov. 12, 2008).

[3] The Attorney General states that the Tenth Circuit has not explicitly addressed the issue of whether § 1252(f)(2) applies to stays pending appeal. Opp. 16 n.3. The court continues to apply the traditional standard for motions to stay removal pending review notwithstanding the government's claim that the legal standard was heightened by § 1252(f)(2), *see Lim v. Ashcroft*, 375 F.3d 1011 (10th Cir. 2004), placing the Tenth Circuit with the seven other circuits on the majority side of the Circuit split.

[4] Although the Court denied the stay in *Rangloan*, the United States had argued there that a stay was not appropriate because the Fourth Circuit had not yet decided the Section 1252(f)(2) question, and had not done so in that case. Brief for the Respondent in Opposition, *Rangloan v. Mukasey*, No. 07-1169, 2008 WL 2066103, *11-*12 (U.S., filed May 14, 2008). As noted in the Application here, the Fourth Circuit has now definitively held that Section 1252(f)(2) applies.

Likelihood of Success on the Merits. "Success" on the merits of a motion to reopen does not mean that Mr. Nken would have obtained asylum — only that Mr. Nken would have had his case reopened for purposes of *seeking* asylum or other relief. The standard for a motion to reopen based upon changed country conditions requires only presentation of evidence that "is material and was not available and would not have been discovered or presented at the previous proceeding." 8 U.S.C. § 1229a(c)(7)(C)(ii); 8 C.F.R. § 1003.2(c)(3)(ii) (2006). A petitioner must only "state the new facts that will be proven at a hearing to be held if the motion is granted" and support those facts "by affidavits or other evidentiary material." 8 C.F.R. § 1003.2(c)(1).

Mr. Nken did so. In his motion to reopen, he presented evidence that conditions in Cameroon had changed so substantially as to pose a serious threat to his freedom and to his life should he be removed there. This evidence was unavailable prior to the time it was presented because the evidence consists of changes that took place in Cameroon *after* his first asylum hearing. Moreover, it was material. The letter from Mr. Nken's brother stated that Mr. Nken would be targeted because of his prior democratic activism should he return to Cameroon and that his life would be in danger as a result.

While an Immigration Judge had previously made an adverse credibility determination with respect to his *original* application for asylum, the BIA in adjudicating Mr. Nken's motion to reopen made absolutely no adverse credibility determinations. Because the BIA did not make any adverse credibility findings, it was required to accept the allegations in Mr. Nken's motion to reopen as true. *See Shardar v. Att'y Gen. of the U.S.*, 503 F.3d 308, 313 (3d Cir. 2007) (stating that facts presented in support of a motion to reopen must be "accepted as true unless inherently unbelievable") (quotation marks omitted); *Fessehaye v. Gonzales*, 414 F.3d 746, 755 (7th Cir. 2005). The BIA did not find the letter lacking in credibility much less "inherently unbelievable"

— rather, the BIA appears to have rejected the letter *solely* because the BIA misapprehended its subject matter to be general civil unrest as opposed to danger and persecution specific to Mr. Nken. The BIA thus ignored the substance of the letter and violated its "'duty to explicitly consider any country conditions evidence submitted by an applicant that materially bears on his claim.'" *Shou Yung Guo v. Gonzales*, 463 F.3d 109, 115 (2d Cir. 2006) (citation omitted) (holding that BIA's failure to seriously consider material evidence in support a motion to reopen based on changed country conditions was an abuse of discretion).

The Attorney General's brief ignores this critical legal principle. Instead, the Attorney General argues that because the IJ had previously made a specific adverse credibility finding, Mr. Nken was required to rebut that finding in his motion to reopen. Opp. 22-23. First, that was not the basis for the BIA's decision. The BIA did not evaluate the letter submitted by Mr. Nken and hold that it was incredible or not sufficiently credible to overcome a prior adverse credibility determination. Under the *Chenery* doctrine, the government may not defend the BIA's decision on grounds that are not stated or at least discernible in the decision itself. *See Gebreeyesus v. Gonzales*, 482 F.3d 952, 956 (7th Cir. 2007).

Second, even if the prior adverse credibility finding had been the basis for the BIA's rejection of the evidence presented in Mr. Nken's motion to reopen, that would be arbitrary and capricious and grounds for granting a petition for review. A petitioner "may prevail on a theory of future persecution despite an IJ's adverse credibility ruling as to past persecution, so long as the factual predicate of [his] claim of future persecution is independent of the testimony that the IJ found not to be credible." *Paul v. Gonzales*, 444 F.3d 148, 154 (2d Cir. 2006); *see also Guo v. Ashcroft*, 386 F.3d 556, 562 (3d Cir. 2004); *Kamalthas v. INS*, 251 F.3d 1279, 1284 (9th Cir. 2001).

The Attorney General incorrectly asserts that the factual predicate for Mr. Nken's motion to reopen is "inextricably linked" with his initial asylum application. Opp. 25. That assertion appears nowhere in the BIA decision and misconstrues the record. Mr. Nken's initial application for asylum asserted that he was entitled to asylum because he had been persecuted in Cameroon in the past.[5] The facts asserted in Mr. Nken's motion to reopen are distinct. Mr. Nken's motion to reopen asserts that he faces a credible risk of future persecution because of a new crackdown on democratic activists in Cameroon. The letter from Mr. Nken's brother submitted in support of his motion to reopen asserts a new development whereby the government is rounding up and arresting activists from the 1990s who appear on enrollment lists obtained from local universities. The letter states that Mr. Nken's brother himself was arrested and that because Mr. Nken's name appears on those lists, Mr. Nken faces an even greater threat of arrest and even death should he return to Cameroon.

A published Seventh Circuit decision is *directly* on-point and suggests Mr. Nken had a strong likelihood of success on the merits under the standard of review applied by other circuits. In *Gebreeyesus v. Gonzales*, 482 F.3d 952 (7th Cir. 2007), a petitioner's asylum claim had been rejected by an immigration judge. The IJ had found the petitioner's claims that she was detained and beaten for participating in a specific anti-government organization — the very same claims Mr. Nken presented in his initial asylum claim — not to be credible. The petitioner later moved to reopen on the basis that conditions in Ethiopia had changed because of a new "government crackdown against opposition sympathizers including her brother," *id.* at 955 — the very same

[5] The IJ did not find that the facts in support of that initial application were false but posed "questions" about his detention and about the nature of his participation in these groups. Moreover, the government did not find that the affidavits in support of Mr. Nken petition had been fabricated or doctored in any way; rather, the IJ found that because the documents were not authenticated, they were subject to "diminished weight."

basis for Mr. Nken's motion to reopen. The BIA — using virtually the same language as its order in Mr. Nken's case — denied the motion to reopen on the basis that "the new evidence, particularly in view of the [IJ]'s adverse credibility determination which this Board affirmed, was insufficient to change the result of its previous decision." *Id.* (internal quotation marks omitted). The BIA also denied the motion on the basis that — as in Mr. Nken's case — the new evidence, which consisted of letters from family members, was not properly authenticated. *Id.* The Seventh Circuit held that the BIA erred. First, it held that "[a]lthough official records require authentication, *see* 8 C.F.R. § 287.6, that rule does not apply to unsworn statements of facts or letters from family members." *Id.* Second, the Seventh Circuit stated that "[t]he factual basis for Worku's theory of future persecution - a government crackdown against opposition sympathizers including her brother - is distinct from her evidence of past persecution concerning her detention and beating for participating in the AAPO. Given these distinct facts, the prior adverse finding need not undermine Worku's theory of future persecution." *Id.* (footnote omitted). The Seventh Circuit emphasized that facts presented in a motion to reopen are assumed true unless they are found to be "inherently unbelievable," which they were not. *Id.* at 955 n.3. Because the BIA erred in relying on a past adverse credibility determination to discount evidence of future persecution and holding letters from family members to an incorrectly high standard of authentication, the Seventh Circuit granted the petition for review and remanded. *Id.* at 955. The result in this virtually identical case suggests that Mr. Nken had, at the very least, a "better than negligible chance of success on the merits." *Sofinet v. INS*, 188 F.3d 703, 708 (7th Cir. 1999) (internal quotation marks omitted).

Further definitive evidence that Mr. Nken would have obtained a stay had the Fourth Circuit applied the standard applied in eight other circuits is that petitioners presenting analogous

claims in those circuits have not only prevailed on the merits, but have prevailed in obtaining stays of removal pending appeal. In *Gebreeyesus*, the Seventh Circuit granted the petitioner's emergency motion for a stay of removal pending appeal. *See* Order, *Gebreeyesus v. Gonzales*, No. 06-2407 (7th Cir. May 24, 2006). Orders staying removal were similarly granted in comparable cases in jurisdictions applying the traditional, majority view standard for adjudicating stay motions. *See* Order, *Shing Jiang Lui v. BIA*, Case No. 06-5266-ag, (2d Cir. June 27, 2007); Order, *Qing Ming Liu v. Mukasey*, Case No. 07-5228-ag, (2d Cir. May 5, 2008). Petitioners in those cases raised almost identical arguments to those of Mr. Nken[6]—the only reason they prevailed in obtaining a stay from the court of appeals while Mr. Nken did not is that the Seventh and Second Circuits applied a different standard than the Fourth Circuit. Had the Fourth Circuit applied the same standard, Mr. Nken would have obtained a stay of removal.

Irreparable Harm. Irreparable harm is certain should the Court deny Mr. Nken's motion. The government will in all likelihood deport Mr. Nken to Cameroon while his appeal remains pending before the Fourth Circuit. Deporting Mr. Nken will mean breaking up his family, leaving his wife without a husband in this country and his child without a father. The Attorney General suggests that Mr. Nken should not be entitled to raise equities that arose after Mr. Nken was ordered removed. This argument is not supported by any law, and the implication that Mr. Nken married his wife and had a child to "stall" his deportation, *see* Opp. 28, is unsupported and directly refuted by the record — in fact, it was DHS that stalled by sitting on the I-130

[6] The Attorney General suggests that because the petitioners in *Shing Jiang* and *Qing Ming* did not have a prior adverse credibility determination the decisions in those cases are not analogous. *See* Opp. 25 n.5. But the BIA in Mr. Nken's case did not dismiss the evidence he presented as incredible after evaluating it. Rather, the BIA entirely failed to discuss the substance of the evidence presented. Mr. Nken's case is thus on point with *Shing Jiang* and *Qing Ming*.

application of Mr. Nken's wife for nearly two years before granting it (which DHS could only do if it found their marriage to be bona fide).

Moreover, deporting Mr. Nken will also mean sending him to a country where he faces grave danger because of his political activities as a supporter of democracy in opposition to a dictatorial regime. The BIA judge presented with Mr. Nken's motion to reopen did not find the evidence set forth in the motion to reopen about the *new* danger posed to Mr. Nken to be incredible. And it is well-established that an adverse credibility determination must be explicit. *Krotova v. Gonzales*, 416 F.3d 1080, 1084 (9th Cir. 2005) ("When the BIA's decision is silent on the issue of credibility . . . , we may presume that the BIA found the petitioner to be credible."); *cf.* 8 U.S.C. § 1158(b)(1)(B)(iii) (stating that "if no adverse credibility determination is explicitly made, the applicant or witness shall have a rebuttable presumption of credibility on appeal"). The threat to Mr. Nken, combined with the risk of harm to his family should he be removed, thus demonstrates that a stay is necessary to avoid irreparable harm.

In contrast, the cost to the United States if Mr. Nken's removal is stayed is minimal. Mr. Nken has never been arrested for, charged with, or convicted of a crime in the nearly eight years that he has resided in the United States.[7] And the costs of detaining Mr. Nken while he sees his petition through to completion are miniscule relative to the stakes faced by Mr. Nken and his family.

Accordingly, Mr. Nken has demonstrated a substantial likelihood of success on the merits and strong equities counseling in favor of a stay. Had the Fourth Circuit applied the standard used in eight other circuits, Mr. Nken would very likely have obtained a stay. *Mohammed v.*

[7] Mr. Nken is being detained only because he was unable to comply with an extraordinarily rigorous supervision order, which is currently the subject of separate habeas litigation in a federal district court. *See Nken v. Chertoff*, No. 1:08-cv-01010-CKK (D.D.C.).

Reno, 309 F.3d 95, 102 (2d Cir. 2002) (noting that "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").[8]

3. The government also contends that, because the Fourth Circuit was correct when it held in *Teshome-Gebreegziabher* that Section 1252(f)(2) was applicable, there is not a fair prospect that five justices will conclude that the denial of Mr. Nken's application was erroneous. Opp. 16-20. That too is meritless.

The Attorney General's brief argues that the Fourth Circuit has properly interpreted § 1252(f)(2), but the vast majority of Circuits disagree. That alone is sufficient to demonstrate a fair prospect that five Justices would conclude that the case was erroneously decided below.

The Attorney General's construction of the statute is in any event incorrect. Section 1252(f)(2) by its terms does not limit the grant of a "stay" pending review; to the contrary, it applies only to a court order that would "enjoin" review. Although the Attorney General suggests that the terms are interchangeable, that is not the case. The dictionary definition of "stay" describes relief that is principally temporary in nature: a "postponement," a "halting." By contrast, the term "enjoin" is more permanent: to "prohibit" or "restrain." *See Andreiu v. Reno*,

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[8] *Kenyeres* is not to the contrary. In *Kenyeres*, the petitioner argued that the immigration judge erred in finding that withholding of removal was unavailable because Kenyeres committed a serious nonpolitical crime outside the United States before he arrived in the United States. *See* 8 U.S.C. § 1231(b)(3)(B)(iii). Justice Kennedy found that Kenyeres would not have prevailed under either standard for a stay of removal because the immigration judge's findings that Kenyeres had committed embezzlement and fraud in Hungary were "conclusive unless any reasonable adjudicator would be compelled to conclude to the contrary." *Kenyeres*, 538 U.S. at 1306 (quoting 8 U.S.C. § 1252(b)(4)(B)). Kenyeres's own testimony did not dispute that he was engaged in money laundering for organized crime. *Id.* Thus he seemingly had no likelihood of success, much less a substantial one. Moreover, Kenyeres did not even make an argument about the equities of removal in his case in his motion for a stay of removal from the Supreme Court.

223 F.3d 1111, 1126 (9th Cir. 2000) (Thomas, J., dissenting) (citing Black's Law Dictionary 788 (7th ed. 1999)), *rev'd*, *Andreiu v. Ashcroft*, 253 F.3d 477 (9th Cir. 2001) (en banc). Moreover, when Congress enacted IIRIRA, it understood the relief Mr. Nken is seeking to be a "stay," because it used that term when it provided that a petition for review does not automatically "stay" removal pending appellate review. *See* 8 U.S.C. § 1252(b)(3)(B) ("Service of the petition on the officer or employee does not stay the removal of an alien pending the court's decision on the petition, unless the court orders otherwise."). Congress's use of different statutory terms must be given effect. *INS v. Cardoza-Fonseca*, 480 U.S. 421, 432 (1987).

Nor is that the only flaw in the Attorney General's construction of the statute. Under the Attorney General's view, § 1252(b)(3)(B) is reduced to mere surplusage. If § 1252(f)(2) clearly means that courts can only issue stays of deportation upon a showing that the order of deportation was "prohibited as a matter of law," there would be no need to state in section 1252(b)(3)(B) that stays are not automatic. *See Andreiu v. Ashcroft*, 253 F.3d 477, 481 (9th Cir. 2001) (en banc).

The Attorney General argues that if § 1252(f)(2) does not apply to stay motions, then it is unclear what § 1252(f)(2) is intended to do. Opp. 18-19. Subsection (f) is concerned with limiting the power of courts to enjoin the operation of the immigration laws. The subsection's provisions were designed by Congress to prevent courts from granting classwide injunctive and declaratory relief as a result of the new IIRIRA procedures pursuant to paragraph (f)(1), while preserving the ability of courts of appeals to grant injunctive relief under very limited circumstances in individual cases pursuant to paragraph (f)(2). *See Andreiu*, 253 F.3d at 481; *Reno v. Am.-Arab Anti-Discrimination Comm.*, 525 U.S. 471, 481-82 (1999). Section 1252(f)(2) thus "provides the standard for adjudicating individual challenges that seek to enjoin the

operation of the immigration laws on the grounds of constitutional or other legal deficiencies; it explains that the alien will only succeed on such a claim if he can demonstrate 'by clear and convincing evidence' that the operation of the statute in his case 'is prohibited as a matter of law.'" *Teshome-Gebreegziabher v. Mukasey*, 2008 WL 4741721, at *7 (4th Cir. Oct. 30, 2008) (Michael, J., dissenting from the denial of rehearing en banc). To read subsection (f)(2) as having the completely separate and unrelated significance of changing the standard for stay motions in individual asylum cases is anomalous, especially given the existence of an entirely separate section specifically concerning such motions. *See* 8 U.S.C. § 1252(b)(3)(B).

The Attorney General argues that Mr. Nken's interpretation of the statute is at odds with Congress' judgment that "it is generally appropriate to require an alien whose removal proceedings have become administratively final to pursue any further challenges to the validity of his removal from outside the United States." Opp. 26. But while Congress eliminated *automatic* stays pending review in IIRIRA, the Attorney General's argument only begs the question presented by the Circuit split, namely, what showing is required to obtain a non-automatic stay. In those Circuits which apply the traditional stay standard in immigration cases, stay pending review is by no means automatic. By evaluating stay motions on their merits rather than providing for automatic stays pending review (or automatic denials, as is the case in the Fourth Circuit), those Circuits are carrying out Congress's intent.

Finally, this Court has stated that "we should not construe a statute to displace courts' traditional equitable authority absent the 'clearest command,' or an 'inescapable inference' to the contrary." *Miller v. French*, 530 U.S. 327, 340-41 (2000) (citations omitted). Thus, even if the Attorney General's reading of the statute were deemed plausible, the decision below, which sharply limits the courts' "traditional equitable authority," cannot stand.

CONCLUSION

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

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that true copies of the Reply in Support of 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 18, 2008.

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