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Supreme Court Report

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This *Report* summarizes cases granted review on October 4 and 18, 2019 (Part I).

I. Cases Granted Review

● *June Medical Services L.L.C. v. Gee*, 18-1323; *Gee v. June Medical Services, LLC*, 18-1460. The Court will resolve whether a Louisiana law requiring a physician who performs abortions to have admitting privileges at a local hospital is unconstitutional under *Whole Woman's Health v. Hellerstedt*, 136 S. Ct. 2292 (2016). The Court will also address whether abortion providers have third-party standing to challenge such a law. In *Whole Woman's Health*, the Court invalidated a Texas law requiring a physician who performs abortions to have admitting privileges at a local hospital, holding that the law did not "confer[] medical benefits sufficient to justify the burdens upon access" that it imposed. The district court here struck down the Louisiana law under *Whole Woman's Health*. A divided panel of the Fifth Circuit panel reversed. 905 F.3d 787. The Supreme Court granted petitioners' application for a stay, and later granted the petition.

The Fifth Circuit held that *Whole Woman's Health* did not apply because, although the statutes in the two cases were "substantially similar," the facts were "remarkably different." The court found that Louisiana's law, in contrast to Texas's, provides certain "minimal benefits" by performing a "credentialing function." The court also found that, while 32 out of 40 clinics in Texas closed because of the admitting privileges law in *Whole Woman's Health*, there was no evidence that any of the five abortion clinics in Louisiana would have to close. The court rejected as clearly erroneous the district court's finding that only one abortion provider would remain in Louisiana if the law went into effect, concluding instead that all but one of the six doctors who performed elective abortions in Louisiana could obtain the necessary admitting privileges if they put forward a good-faith effort. The cessation of one doctor's practice would affect, the Fifth Circuit majority found, "at most, only 30% of women" in Louisiana, "and even then not substantially." The court contrasted *Whole Woman's Health*, in which the law affected essentially every woman seeking an abortion in Texas. An "insubstantial burden on a small fraction of women," the court found, was not sufficient to support a facial challenge.

Petitioners assert that the Fifth Circuit's decision directly conflicts with *Whole Woman's Health*, and portray the decision as an attempt to circumvent binding precedent. The petition focuses on what it describes as the three most egregious errors in the decision. First, they argue that the Fifth Circuit's finding that the Louisiana law performs a credentialing function is foreclosed by *Whole Woman's Health*. Second, they assert that the Fifth Circuit erred as a matter of law in finding that the burden imposed by the Louisiana law could be attributed to intervening causes. Third, they argue that the Fifth Circuit misapplied the undue burden test. The state disputes all these claims, asserting that the Fifth Circuit faithfully applied Court precedent. As a secondary position, the state suggests that the Court consider clarifying or overruling *Whole Woman's Health.*

In a conditional cross-petition, the state asks the Court to decide whether petitioners have properly asserted third-party standing in this case. The state contends that courts have improperly failed to require abortion providers to meet standard rules of third-party standing when suing on behalf of patients. It argues that application of those rules shows that third-party standing is not satisfied here, both because the interests of the abortion providers conflict with the interests of their

patients and because patients can assert their own rights in court. The state also asks the Court to decide whether objections to third-party standing are waivable, asserting a circuit split on this issue. It argues that third-party standing should be considered non-waivable—and thus reachable at this stage despite the lack of discussion of the issue in earlier stages of the case—because third-party standing protects the judicial process and fosters efficient administration of justice. Petitioners respond that the state clearly waived the third-party standing issue, and there is no reason to excuse that waiver here. On the underlying third-party standing issue, petitioners argue that decades of precedent support abortion providers' assertion of standing to sue on behalf of their patients. They note that most recently, the Court struck down a law identical to Louisiana's in *Whole Woman's Health* without even remarking on whether third-party standing was appropriate, even though Justice Thomas raised the issue in dissent. Petitioners dispute the state's position that courts must conduct a case-by-case factual inquiry into whether abortion providers have third-party standing, and argue that, in any event, the facts support a finding of third-party standing here.

● *Seila Law LLC v. Consumer Financial Protection Bureau*, 19-7. The petition asks whether the structure of the Consumer Financial Protection Bureau (Bureau), which is an independent agency led by a single director removable only for cause, violates the separation of powers. The Court also directed the parties to brief and argue the following question: "If the [Bureau] is found unconstitutional on the basis of the separation of powers, can 12 U.S.C. §5491(c)(3)"—which provides that the President may remove the director of the Bureau only for cause—"be severed from the Dodd-Frank Act [which created the Bureau]?" Petitioner Seila Law LLC is a firm that provides consumer debt-relief assistance. The Bureau issued a civil investigative demand to Seila Law in the course of investigating whether the firm had violated a telemarketing sales regulation. Seila Law objected to the demand on the basis that the Bureau's structure violates the separation of powers. The Bureau successfully moved to enforce the civil investigative demand in district court. Seila Law appealed, renewing its separation of powers claim. The Ninth Circuit affirmed the validity of the civil investigative demand, finding the Bureau's structure constitutional. 923 F.3d 680.

The Ninth Circuit primarily relied on *Humphrey's Executor v. United States*, 295 U.S. 602 (1935), and *Morrison v. Olson*, 487 U.S. 654 (1988). The court found the structure of the Bureau to be similar to the structure of the Federal Trade Commission (FTC), which withstood a separation of powers challenge in *Humphrey's Executor*. In that case, the Court found that the five FTC commissioners exercised "mostly quasi-legislative and quasi-judicial powers, rather than purely executive powers." As a result, the for-cause removal restriction did not violate the separation of powers and instead served an important function of ensuring independence from the President's control. Similarly, the Ninth Circuit found that the Bureau exercises quasi-legislative and quasi-judicial powers. Although the Bureau has more executive power than the FTC did in *Humphrey's Executor*, the court found that Congress subsequently gave the FTC similar executive powers. The Ninth Circuit reasoned that the Supreme Court appeared to sanction that delegation by upholding for-cause removal restrictions for officials exercising analogous executive powers in *Morrison* (approving powers of independent counsel) and in *Free Enterprise Fund v. Public Company Accounting Oversight Board*, 561 U.S. 477 (2010) (approving powers of Securities and Exchange Commissioners). The Ninth Circuit explicitly rejected the argument that the Bureau's structure is materially different from the FTC's structure because the Bureau is led by a single director while the FTC is led by five commissioners.

The court reasoned that the result in *Humphrey's Executor* did not turn on the number of FTC commissioners, and that *Morrison* upheld a for-cause removal restriction for a prosecution team led by a single independent counsel. In a reversal of its position in the Ninth Circuit, the Bureau now agrees with Seila Law that the for-cause removal restriction violates the separation of powers as applied to its single director. The Supreme Court has appointed former U.S. Solicitor General Paul Clement as amicus curiae to defend the Ninth Circuit's opinion.

The Bureau and Seila Law make similar arguments that the for-cause removal restriction on the single director of the Bureau is unconstitutional, but differ on the appropriate remedy. The Bureau advocates severing the for-cause removal provision from the rest of the statute, relying on *Free Enterprise Fund*. In that case, the Court severed the removal restriction on members of the Public Company Accounting Oversight Board, despite the lack of a statutory severability clause, and left the members' positions intact but made the members removable at will. The Bureau reasons that the Dodd-Frank Act (which created the Bureau) includes a severability clause, signaling congressional intent to retain the Bureau even in a modified form. Seila Law indicates that it will take—but has not yet briefed—the contrary position that the appropriate remedy is to invalidate the entire Bureau, or at least to find that the civil investigative demand is not enforceable.

Regarding the for-cause removal restriction, the Bureau views *Humphrey's Executor* as a narrow exception to the general rule that the President may fire principal officers of the United States at will, and distinguishes that case from this one in four ways. First, it emphasizes that a key feature of the multi-member FTC is members' staggered terms, such that the commission retains continuity of leadership and institutional expertise at all times. In its view, this was an essential component of *Humphrey's Executor*'s holding. Second, it argues that a single director is more likely to take actions inconsistent with the President's policies, particularly in contrast with a multi-member group with staggered terms and a bipartisanship requirement. Third, it emphasizes that the single-headed independent agency is a recent and unusual innovation, unsupported by historical precedent. Lastly, the Bureau argues that separation of powers would no longer have meaning if it does not prohibit such a single-headed structure, given the difficulty of delineating executive versus quasi-legislative powers today. Many of these arguments are based in part on the dissenting opinion of then-Judge Kavanaugh in a fractured en banc D.C. Circuit decision, *PHH Corporation v. Consumer Financial Protection Bureau*, 881 F.3d 75 (D.C. Cir 2018), in which the majority held that the Bureau's for-cause removal provision is constitutional.

Seila Law, which also relies heavily on then-Judge Kavanaugh's dissent in *PHH*, emphasizes that the single director of the Bureau presents a novel concentration of executive power in one individual. It also argues that the Bureau is different from the 1935 FTC because the Bureau is not solely reliant on congressional appropriations for its core funding—thus insulating the Bureau from one form of congressional control, as well as executive control. Seila distinguishes *Morrison* by noting that, in that case, (1) no party raised the argument that the independent counsel's position was unconstitutional because he was a single person, so the issue was not considered, and (2) the independent counsel was only an inferior officer, with limited jurisdiction and power. As an alternative argument, both petitioner and respondent suggest that *Humphrey's Executor* and/or *Morrison* should be overruled.

● *Lomax v. Ortiz-Marquez*, 18-8369. At issue is whether a dismissal of an action without prejudice for failure to state a claim counts as a strike under 28 U.S.C. §1915(g). That provision of the Prison Litigation Reform Act (PLRA) prevents prisoners from filing or appealing federal civil actions *in forma pauperis* if they have, on three or more occasions, filed a federal action or appeal "that was dismissed on the ground that it is frivolous, malicious, or fails to state a claim upon which relief may be granted." Lomax is a Colorado prisoner who sued various corrections employees in federal district court, alleging violations of the Fifth, Eighth, Ninth, and Fourteenth Amendments based on his expulsion from a sex offender treatment and monitoring program. He filed a motion to proceed *in forma pauperis*. Lomax had previously filed three actions in federal district court, each of which was dismissed for failure to state a claim. Two of those actions were dismissed without prejudice under *Heck v. Humphrey*, 512 U.S. 477 (1994), which bars §1983 claims challenging the legitimacy of a conviction unless the conviction has been invalidated. The federal district court found that all three prior dismissals qualified as strikes under §1915(g), and refused to allow Lomax to proceed *in forma pauperis*. The Tenth Circuit affirmed, relying on circuit precedent holding that whether a dismissal is with or without prejudice is immaterial for purposes of §1915(g). 754 Fed. Appx. 756.

Lomax filed his petition *pro se*, but was represented by counsel by the time he filed a reply brief. Lomax identifies a circuit split on the question presented, noting that dismissals without prejudice do not count as strikes under §1915(g) in the Third and Fourth Circuits, contrary to the rule in the Tenth and several other circuits. On the merits, Lomax argues that a dismissal based on "fail[ure] to state a claim upon which relief may be granted"—the phrase used in §1915(g)—is, by accepted legal understanding, a dismissal *with* prejudice, so Congress would have incorporated that understanding into the statute. He also points to the purpose of the PLRA, which he argues was to deter frivolous filings rather than to penalize prisoners who inadvertently make curable procedural errors in filing their complaints. Respondents, represented by Colorado's attorney general, argue that the plain text of the statute forecloses Lomax's petition because the statute does not differentiate between dismissals with and without prejudice, but rather applies to any dismissal on one of the listed grounds. Respondents also assert that their interpretation furthers the purpose of the PLRA, which they argue was to reduce the volume and improve the quality of prisoner litigation.

● *Department of Homeland Security v. Thuraissigiam*, 19-161. The Court will decide whether, as applied to respondent Thuraissigiam, 8 U.S.C. §1252(e)(2) is unconstitutional under the Suspension Clause, which provides that the "Privilege of the Writ of Habeas Corpus shall not be suspended, unless when in Cases of Rebellion or Invasion the public Safety may require it." Vijayakumar Thuraissigiam is a noncitizen from Sri Lanka who was arrested near the United States border and placed into expedited removal proceedings. His asylum claim was rejected by an asylum officer and an immigration judge, and a final expedited removal order issued. Thuraissigiam then filed a habeas petition, alleging that the government did not follow correct procedures and did not apply correct legal standards in evaluating his asylum claim. The district court dismissed the petition for lack of jurisdiction, holding that the Immigration and Nationality Act precludes review of Thuraissigiam's challenges to his expedited removal order. In particular, 8 U.S.C. §1252(e)(2) limits judicial review on habeas corpus in the expedited removal process to three determinations: "whether the petitioner is an alien"; "whether the petitioner was ordered removed" through the expedited review process; and whether the petitioner is a lawfully admitted alien or was previously granted refugee or asylum status. The

Ninth Circuit reversed, agreeing with the district court's interpretation of the statute, but concluding that the statute violates the Suspension Clause as applied here. 917 F.3d 1097.

The Ninth Circuit found that *Boumediene v. Bush*, 553 U.S. 723 (2008), sets out a two-step test for considering a Suspension Clause challenge: under step one, the court determines whether the Suspension Clause applies; if so, under step two, the court evaluates whether the substitute procedure satisfies the Clause. The Ninth Circuit held, under the first *Boumediene* step, that the Suspension Clause applies to Thuraissigiam, concluding based on a survey of precedents and common law history that the writ is available to nonenemy aliens. At step two, the court concluded, relying on *Boumediene*, that §1252(e)(2) impermissibly prevents any judicial consideration of whether the government complied with procedures and followed relevant law in the expedited removal context. The Ninth Circuit declined to apply the doctrine of constitutional avoidance to save the statute, finding that the statute was not susceptible of a reading that would avoid a constitutional violation.

In its petition, the United States argues that Thuraissigiam should be treated as "an alien seeking initial admission" into the country and that, as such, he has no constitutional rights—under the Suspension Clause or any other part of the Constitution—relating to his admission application. And even if any rights apply, the United States contends, the process here was adequate. It notes that Thuraissigiam failed to pass the threshold screening for asylum, which is intended to weed out applications least likely to succeed, and that if he had passed this hurdle he would have received additional process. It also notes that Thuraissigiam received *de novo* review of his application from an immigration judge. On a pragmatic level, the United States suggests that adoption of Thuraissigiam's position would lead to more favorable treatment of immigrants entering the country clandestinely than of immigrants arriving at a port of entry, creating perverse incentives. And it argues that the procedures Thuraissigiam demands would make expedited removal impossible, imposing a severe burden on the immigration system. The United States distinguishes *Boumediene*, noting that it involved an entirely different context: prisoners subject to detention under the law of war who were attempting to return to their home countries. It also argues that *INS v. St. Cyr*, 533 U.S. 289 (2001), another decision relied on by the Ninth Circuit, is not controlling because it involved a lawful permanent resident and because it did not make any holding about the scope of the Suspension Clause.

Thuraissigiam asserts that the Ninth Circuit faithfully applied *Boumediene* and *St. Cyr* to find that §1252(e)(2) is unconstitutional as applied to him. He argues that, as a person detained within United States borders, he was entitled to invoke the Suspension Clause to challenge his expedited removal order—regardless of the fact that he was not legally admitted into the country and was apprehended near the border. And since *Boumediene* found the Suspension Clause applicable to noncitizens who had never been in the United States, Thuraissigiam argues, the Clause must certainly apply to persons detained within the country. Thuraissigiam also accuses the government of conflating the question whether the Suspension Clause applies with the separate question whether he has due process rights under the Fifth Amendment. On step two of the *Boumediene* test, Thuraissigiam argues that the "nearly nonexistent" review provided by §1252(e)(2) falls far short of the minimum required by the Suspension Clause. Thuraissigiam also urges the Court to reject the government's pragmatic arguments, asserting that the very purpose of the Suspension Clause is to "provide a check against the political branches' incentives to streamline procedures and eliminate judicial scrutiny."

● *U.S. Forest Service v. Cowpasture River Preservation Ass'n*, 18-1584; *Atlantic Coast Pipeline v. Cowpasture River Preservation Ass'n*, 18-1587. The U.S. Forest Service granted a permit authorizing construction of the natural gas-bearing Atlantic Coast Pipeline project through the George Washington National Forest, with a right-of-way crossing the Appalachian National Scenic Trail. At issue is whether the Forest Service had the authority to grant a right-of-way across the Appalachian Trail, or whether that trail is protected from pipeline crossings on federal land by a statutory exemption for "lands in the National Park System." The Forest Service issued its permit pursuant to the Mineral Leasing Act, 30 U.S.C. §185, which allows federal agencies to grant rights-of-way for new oil and gas pipelines over federal land. But the Mineral Leasing Act contains an exception for "lands in the National Park System"; federal agencies may not grant pipeline rights-of-way over such lands. The Fourth Circuit vacated the permit and remanded, finding in pertinent part that the Appalachian Trail constitutes land in the National Park System and, as a result, the Mineral Leasing Act does not allow the Forest Service to authorize a pipeline across it. 911 F.3d 150.

The Fourth Circuit noted that, according to the National Trails System Act, 16 U.S.C. §1244, the Appalachian Trail as a whole is "administered" by the Secretary of the Interior, who oversees the National Parks System. In contrast, several other National Scenic Trails are "administered" by the Secretary of Agriculture, who oversees national forests. The court found that the National Trails System Act distinguishes *administration* of the trail as a whole from *management* of certain sections of the trail. As a result, the court determined that the entire Appalachian Trail constitutes land in the National Park System, even when a part of the trail passes through a national forest and is managed by the National Forest Service. The court also found that all parties consider the trail to be a "unit" of the National Parks System.

The Forest Service's petition argues that the relevant part of the Appalachian Trail constitutes a right-of-way across lands that are properly considered part of the National Forest System, and therefore the Appalachian Trail itself is not "*land*s in the National Parks System" and not exempt from pipeline crossings under the Mineral Leasing Act. The Forest Service emphasizes language in the National Trails System Act stating that "[t]he Appalachian Trail shall be administered primarily as a footpath by the Secretary of the Interior." The Forest Service also points to an amendment to the same Act, which states that "[n]othing contained in this [Act] shall be deemed to transfer among Federal agencies any management responsibilities established under any other law for federally administered lands which are components of the National Trails System." 16 U.S.C. §1246. And other parts of the Act describe some portions of trails as constituting "rights-of-way across Federal lands under the jurisdiction of another Federal agency." The Forest Service argues that the statutory description of the Appalachian Trail as a "footpath," combined with the non-transfer amendment and the acknowledgment that trails may constitute "rights-of-way" across other federal lands, dictates that the Appalachian Trail does not include the underlying land.

Respondents counter that, by broadly exempting "land in the National Park System" from the Mineral Leasing Act, Congress protected all federal lands administered by the Park Service, regardless of which agency holds title to the lands. Respondents point to the statutory definition of the National Park System, which states: "The System shall include *any* area of land and water administered by the Secretary [of the Interior], acting through the Director [of the Park Service] . . ." 54 U.S.C. §100501 (emphasis added). At the time Congress adopted that definition, respondents argue, it had

already established the Appalachian Trail to be "administered" by the Secretary of the Interior, who had delegated that administration to the Park Service. As a result, respondents argue that the National Park System includes all portions of the Appalachian Trail on federal land. Moreover, this arrangement of trail administration and the statutory definition of the National Park System were each well established by the time Congress passed the Mineral Leasing Act and exempted "lands in the National Park System" from that Act. Thus, in respondent's view, Congress clearly protected the Appalachian Trail from pipeline crossings.

● *United States v. Sineneng-Smith*, 19-67. At issue is whether 8 U.S.C. §1324(a)(1)(A)(iv) ("Subsection iv"), a provision that criminalizes "encourag[ing] or induc[ing] an alien to come to, enter, or reside in the United States, knowing or in reckless disregard of the fact that such coming to, entry, or residence is or will be in violation of law," is facially unconstitutional under the First Amendment. Respondent Evelyn Sineneng-Smith, an immigration consultant, was indicted on charges of mail fraud, filing of false tax returns, and violation of Subsection iv in connection with advice she provided to undocumented workers. In particular, the government asserts that Sineneng-Smith induced the undocumented workers to remain in the country on false pretenses and charged them money to file futile immigration applications. Sineneng-Smith pled guilty to the tax counts and a jury found her guilty of the mail fraud and Subsection iv counts. On appeal, the Ninth Circuit reversed Sineneng-Smith's Subsection iv conviction, finding the encouragement provision of the statute to be unconstitutionally overbroad in violation of the First Amendment. 910 F.3d 461.

First, the Ninth Circuit found that the phrase "encourage or induce" in Subsection iv could refer to speech, to conduct, or to both. Second, the Ninth Circuit concluded that Subsection iv does not limit only speech that constitutes incitement or speech that is integral to criminal conduct—categories of speech not protected under the First Amendment—but extends to protected speech as well. Finally, the Ninth Circuit found that Subsection iv restricts a substantial amount of protected speech in relation to its legitimate sweep. The court noted a number of reasonable scenarios in which Subsection iv could implicate protected speech, such as a person encouraging a family member to remain in the country, an attorney encouraging her client to remain in the country while contesting removal, and certain types of marches, speeches, and public debate. The Ninth Circuit also rejected the argument that the statute is constitutional because it includes an enhancement where the defendant acted for financial gain, finding this enhancement irrelevant to the overbreadth issue.

In its petition, the United States argues that the Ninth Circuit improperly invalidated an important federal criminal law, and that Subsection iv is mainly directed at conduct rather than speech. To the extent Subsection iv implicates speech, the United States argues that this happens only incidentally and affects unprotected speech—specifically, speech that "foster[s] unlawful activity by particular individuals." The United States notes that overbreadth can invalidate a criminal law only if a substantial number of its applications are unconstitutional, compared to its legitimate applications, and argues that this requirement is not satisfied here. It claims that the Ninth Circuit invalidated Subsection iv based on a series of hypotheticals that Subsection iv does not in fact encompass. And it asserts that the Ninth Circuit, in considering the overbreadth issue, improperly ignored the statute's financial gain enhancement, since in the United States' view, punishing conduct falling under this enhancement would never or almost never raise First Amendment concerns.

● *Nasrallah v. Barr*, 18-1432. Federal law provides that even noncitizens who are ineligible for immigration relief such as asylum—*e.g.*, aliens who committed certain serious criminal offenses ("criminal aliens")—may obtain a withholding or deferral of removal if they can show a likelihood they would be tortured if removed to the proposed country of removal. And they may appeal the denial of such relief to the courts of appeals. The Immigration and Nationality Act, however, includes a "criminal bar" which provides that courts lack jurisdiction to review a "final order of removal against" a criminal alien except for constitutional claims and questions of law. 8 U.S.C. §1252(a)(2)(C). At issue here is "[w]hether, notwithstanding Section 1252(a)(2)(C), the courts of appeals possess jurisdiction to review factual findings underlying denials of withholding (and deferral) of removal relief." The answer to that question turns in large part on whether a denial of withholding (and deferral) of removal relief is a "final order of removal."

Nidal Nasrallah, a citizen of Lebanon and long-term permanent resident of the United States, was convicted of receiving stolen property in interstate commerce. An immigration judge decided that Nasrallah was subject to removal because his conviction counts both as a "crime of moral turpitude" (thus making him removable) and as a "particularly serious crime" (thus making him ineligible for withholding of removal). But the judge granted him a deferral of removal based on a finding that he had established a clear probability of torture from Hezbollah and ISIS if he returned to Lebanon, where he is a member of a religious minority. On appeal, the Board of Immigration Appeals (Board) upheld the two findings as to the nature of Nasrallah's crime, but reversed as to the likelihood of torture and therefore vacated Nasrallah's deferral of removal. The Eleventh Circuit did not disturb the Board's ruling, finding in relevant part that it lacked jurisdiction to review any of the judge or Board's factual findings—including whether his conviction involved a "particularly serious crime" or whether he faces a likelihood of torture in Lebanon—due to the criminal bar of §1252(a)(2)(C).

Nasrallah argues that there is a strong presumption in favor of judicial review of administrative action, even where a statute may be read as imposing an absolute bar on such review. He contends that this presumption should apply to the criminal bar for two reasons. First, in his view, a denial of a request for deferral of removal is not a "final order of removal" itself; it is more like an injunction against a final order of removal, as found in *Wanjiru v. Holder*, 705 F.3d 258 (7th Cir. 2013). Nasrallah notes that other statutory sections distinguish between petitions for judicial review of "an order of removal" and petitions for judicial review of "any cause or claim under the Convention Against Torture," which is the basis for his request for deferral. Second, Nasrallah argues that a decision denying a request for deferral—which is available to those with and without criminal convictions—is not the same as a decision determining removability "by reason of having committed a criminal offense," as reasoned in *Lemus-Galvan v. Mukasey*, 518 F.3d 1081 (9th Cir. 2008). In Nasrallah's view, a decision on the merits of a deferral request is independent of a decision on the merits of removability; while the second is barred from judicial review by §1252(a)(2)(C), the first is not.

The government responds that §1252(a)(2)(C) applies to bar judicial review of Nasrallah's claim because he "is (1) an 'alien,' who was (2) 'removable,' (3) 'by reason of having committed a criminal offense covered' by one of the specified grounds for removal." The government notes that the majority of courts of appeals agree with this interpretation. In the government's view, a denial of deferral of removal fits within the statutory definition of an order of removal, which is "the order . . . concluding that the alien is deportable or ordering deportation." 8 U.S.C. §1101(a)(47)(A).

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