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NOTE: Where it is feasible, a syllabus (headnote) will be released, as is being done in connection with this case, at the time the opinion is issued. The syllabus constitutes no part of the opinion of the Court but has been prepared by the Reporter of Decisions for the convenience of the reader. See *United States* v. *Detroit Timber & Lumber Co.,* 200 U. S. 321, 337.

SUPREME COURT OF THE UNITED STATES

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NKEN *v.* HOLDER, ATTORNEY GENERAL

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

No. 08–681. Argued January 21, 2009—Decided April 22, 2009

Petitioner Nken sought an order from the Fourth Circuit staying his removal to Cameroon while his petition for review of a Board of Immigration Appeals order denying his motion to reopen removal proceedings was pending. Nken acknowledged that Circuit precedent required an alien seeking such a stay to satisfy 8 U. S. C. §1252(f)(2), which sharply restricts the availability of injunctions blocking the removal of an alien from this country, but argued that a court's authority to stay a removal order should instead be controlled by the traditional criteria governing stays. The Court of Appeals denied the stay motion without comment.

Held: Traditional stay factors, not the demanding §1252(f)(2) standard, govern a court of appeals' authority to stay an alien's removal pending judicial review. Pp. 3–17.

(a) This question stems from changes made in the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (IIRIRA), which "repealed the old judicial-review scheme set forth in [8 U. S. C.] §1105a [(1994 ed.),] and instituted a new (and significantly more restrictive) one in . . . §1252," *Reno* v. *American-Arab Anti-Discrimination Comm.*, 525 U. S. 471, 475 (*AAADC*). Because courts of appeals lacked jurisdiction before IIRIRA to review the removal order of an alien who had already left the United States, see §1105a(c), most aliens who appealed such a decision were given an automatic stay of the removal order pending judicial review, see §1105a(a)(3). Three changes IIRIRA made are of particular importance here. First, the repeal of §1105a allows courts to adjudicate a petition for review even if the alien is removed while the petition is pending. Second, the presumption of an automatic stay was repealed and replaced with a provision stating that "[s]ervice of the petition

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. . . does not stay the removal of an alien pending the court's decision on the petition, unless the court orders otherwise." §1252(b)(3)(B). Finally, IIRIRA provided that "no court shall enjoin the removal of any alien . . . unless [he] shows by clear and convincing evidence that the entry or execution of such order is prohibited as a matter of law." §1252(f)(2). Pp. 3–5.

(b) The parties dispute what standard a court should apply when determining whether to grant a stay. Petitioner argues that the "traditional" stay standard should apply, meaning a court should consider "(1) whether the stay applicant has made a strong showing that he is likely to succeed on the merits; (2) whether [he] will be irreparably injured absent a stay; (3) whether issuance of the stay will substantially injure the other parties . . . ; and (4) where the public interest lies." *Hilton* v. *Braunskill*, 481 U. S. 770, 776. The Government argues that §1252(f) should govern, meaning an alien must show "by clear and convincing evidence that the entry or execution of [the removal] order is prohibited as a matter of law." Pp. 5–6.

(c) An appellate court's power to hold an order in abeyance while it assesses the order's legality has been described as inherent, and part of a court's "traditional equipment for the administration of justice." *Scripps-Howard Radio, Inc.* v. *FCC*, 316 U. S. 4, 9–10. That power allows a court to act responsibly, by ensuring that the time the court takes to bring considered judgment to bear on the matter before it does not result in irreparable injury to the party aggrieved by the order under review. But a stay "is not a matter of right, even if irreparable injury might otherwise result to the appellant." *Virginian R. Co.* v. *United States*, 272 U. S. 658, 672. The parties and the public, while entitled to both careful review and a meaningful decision, are also entitled to the prompt execution of orders that the legislature has made final. Pp. 6–7.

(d) Section 1252(f) does not refer to "stays," but rather to authority to "enjoin the removal of any alien." An injunction and a stay serve different purposes. The former is the means by which a court tells someone what to do or not to do. While in a general sense many orders may be considered injunctions, the term is typically used to refer to orders that operate *in personam*. By contrast, a stay operates upon the judicial proceeding itself, either by halting or postponing some portion of it, or by temporarily divesting an order of enforceability. An alien seeking a stay of removal pending adjudication of a petition for review does not ask for a coercive order against the government, but instead asks to temporarily set aside the removal order. That kind of stay, "relat[ing] only to the conduct or progress of litigation before th[e] court[,] ordinarily is not considered an injunction." *Gulfstream Aerospace Corp.* v. *Mayacamas Corp.*, 485 U. S. 271, 279.

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That §1252(f)(2) does not comfortably cover stays is evident in Congress's use of the word "stay" in subsection (b)(3)(B) but not subsection (f)(2), particularly since those subsections were enacted as part of a unified overhaul of judicial review. The statute's structure also clearly supports petitioner's reading: Because subsection (b)(3)(B) changed the basic rules covering stays of removal, the natural place to locate an amendment to the standard governing stays would have been subsection (b)(3)(B), not a provision four subsections later that makes no mention of stays. Pp. 8–12.

(e) Subsection (f)(2)'s application would not fulfill the historic office of a stay, which is to hold the matter under review in abeyance to allow the appellate court sufficient time to decide the merits. Under subsection (f)(2), a stay would only be granted after the court in effect *decides* the merits, in an expedited manner. The court would have to do so under a "clear and convincing evidence" standard that does not so much preserve the availability of subsequent review as render it redundant. Nor would subsection (f)(2) allow courts "to prevent irreparable injury to the parties or to the public" pending review, *Scripps-Howard*, 316 U. S., at 9; the subsection on its face does not permit any consideration of harm, irreparable or otherwise. In short, applying §1252(f)(2) in the stay context would result in something that does not remotely look like a stay. As in *Scripps-Howard*, the Court is loath to conclude that Congress would, "without clearly expressing such a purpose, deprive the Court of Appeals of its customary power to stay orders under review." *Id.*, at 11. The Court is not convinced Congress did so in §1252(f)(2). Pp. 12–13.

(f) The parties dispute what the traditional four-factor standard entails. A stay is not a matter of right, and its issuance depends on the circumstances of a particular case. The first factor, a strong showing of a likelihood of success on the merits, requires more than a mere possibility that relief will be granted. Similarly, simply showing some possibility of irreparable injury fails to satisfy the second factor. See *Winter* v. *Natural Resources Defense Council, Inc.*, 555 U. S. ___, ___. Although removal is a serious burden for many aliens, that burden alone cannot constitute the requisite irreparable injury. An alien who has been removed may continue to pursue a petition for review, and those aliens who prevail can be afforded effective relief by facilitation of their return, along with restoration of the immigration status they had upon removal. The third and fourth factors, harm to the opposing party and the public interest, merge when the Government is the opposing party. In considering them, courts must be mindful that the Government's role as the respondent in every removal proceeding does not make its interest in each one negligible. There is always a public interest in prompt execution of removal or-

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ders, see *AAADC, supra*, at 490, and that interest may be heightened by circumstances such as a particularly dangerous alien, or an alien who has substantially prolonged his stay by abusing the processes provided to him. A court asked to stay removal cannot simply assume that the balance of hardships will weigh heavily in the applicant's favor. Pp. 13–16.

Vacated and remanded.

ROBERTS, C. J., delivered the opinion of the Court, in which STEVENS, SCALIA, KENNEDY, SOUTER, GINSBURG, and BREYER, JJ., joined. KENNEDY, J., filed a concurring opinion, in which SCALIA, J., joined. ALITO, J., filed a dissenting opinion, in which THOMAS, J., joined.