SUPREME COURT OF THE UNITED STATES

No. 08–681

JEAN MARC NKEN, PETITIONER *v.* ERIC H. HOLDER, JR., ATTORNEY GENERAL

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

[April 22, 2009]

JUSTICE KENNEDY, with whom JUSTICE SCALIA joins, concurring.

I join the Court's opinion and agree that the traditional four-part standard governs an application to stay the removal of an alien pending judicial review. This is the less stringent of the two standards at issue. See *Kenyeres* v. *Ashcroft*, 538 U. S. 1301, 1303–1305 (2003) (KENNEDY, J., in chambers).

It seems appropriate to underscore that in most cases the debate about which standard should apply will have little practical effect provided the court considering the stay application adheres to the demanding standard set forth. A stay of removal is an extraordinary remedy that should not be granted in the ordinary case, much less awarded as of right. *Virginian R. Co.* v. *United States*, 272 U. S. 658, 672–673 (1926); see also *Winter* v. *Natural Resources Defense Council, Inc.*, 555 U. S. ___, ___ (2008) (slip op., at 14).

No party has provided the Court with empirical data on the number of stays granted, the correlation between stays granted and ultimate success on the merits, or similar matters. The statistics would be helpful so that experience can demonstrate whether this decision yields a fair and effective result. Then, too, Congress can evaluate whether its policy objectives are being realized by the

legislation it has enacted. Based on the Government's representations at oral argument, however, there are grounds for concern. See Tr. of Oral Arg. 35 ("[W]e do not have empirical data, . . . but [stays of removal] are—in the Ninth Circuit in our experience— . . . granted quite frequently"). This concern is of particular importance in those Circuits with States on our international borders. The Court of Appeals for Ninth Circuit, for example, considers over half of all immigration petitions filed nationwide, and immigration cases compose nearly half of the Ninth Circuit's docket. See Catterson, Symposium, Ninth Circuit Conference: Changes in Appellate Caseload and Its Processing, 48 Ariz. L. Rev. 287, 297 (2006).

Under either standard, even the less stringent standard the Court adopts today, courts should not grant stays of removal on a routine basis. The passage of the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (IIRIRA), 110 Stat. 3009–546, reinforces this point. Before IIRIRA, aliens who left the United States no longer had the ability to seek review of their removal orders, see 8 U. S. C. §1105a(c) (1994 ed.) (repealed 1996), so they could more easily have established irreparable harm due to their removal. It is perhaps for this reason Congress decided to "stay the deportation of [an] alien pending determination of the petition by the court, unless the court otherwise direct[ed]." §1105a(a)(3) (same). IIRIRA, however, removed that prohibition (as well as the automatic stay provision), and courts may now review petitions after aliens have been removed. See Brief for Respondent 44; *ante*, at 4, 15; *post*, at 5, 9 (ALITO, J., dissenting).

This change should mean that obtaining a stay of removal is more difficult. Under the Court's four-part standard, the alien must show both irreparable injury and a likelihood of success on the merits, in addition to establishing that the interests of the parties and the public weigh in his or her favor. *Ante*, at 14–15. As the Court

explains, because aliens may continue to seek review and obtain relief after removal, "the burden of removal alone cannot constitute the requisite irreparable injury." *Ante*, at 15. As a result of IIRIRA there must be a particularized, irreparable harm beyond mere removal to justify a stay.

That is not to say that demonstration of irreparable harm, without more, is sufficient to justify a stay of removal. The Court has held that "[a] stay is not a matter of right, even if irreparable injury might otherwise result." *Virginian R. Co., supra*, at 672. When considering success on the merits and irreparable harm, courts cannot dispense with the required showing of one simply because there is a strong likelihood of the other. This is evident in the decisions of Justices of the Court applying the traditional factors. See, *e.g.*, *Curry* v. *Baker*, 479 U. S. 1301, 1302 (1986) (Powell, J., in chambers) ("It is no doubt true that, absent [a stay], the applicant here will suffer irreparable injury. This fact alone is not sufficient to justify a stay"); *Ruckelshaus* v. *Monsanto Co.*, 463 U. S. 1315, 1317 (1983) (Blackmun, J., in chambers) ("[L]ikelihood of success on the merits need not be considered . . . if the applicant fails to show irreparable injury from the denial of the stay"). As those decisions make clear, "'the applicant must meet a heavy burden of showing not only that the judgment of the lower court was erroneous on the merits, but also that the applicant will suffer irreparable injury if the judgment is not stayed pending his appeal.'" *Williams* v. *Zbaraz*, 442 U. S. 1309, 1311 (1979) (STEVENS, J., in chambers) (quoting *Whalen* v. *Roe*, 423 U. S. 1313, 1316 (1975) (Marshall, J., in chambers)).