

No. 08-911

IN THE
Supreme Court of the United States

AGRON KUCANA,
Petitioner,

v.

ERIC H. HOLDER, JR.,
UNITED STATES ATTORNEY GENERAL,
Respondent.

On Writ of Certiorari to the
United States Court of Appeals
for the Seventh Circuit

BRIEF FOR PETITIONER

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QUESTION PRESENTED

Whether 8 U.S.C. § 1252(a)(2)(B)(ii) strips jurisdiction from federal courts to review rulings on motions to reopen by the Board of Immigration Appeals.

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OPINION BELOW

The opinion of the United States Court of Appeals for the Seventh Circuit is reported at 533 F.3d 534 (7th Cir. 2008), and is reprinted in the Appendix to the Petition at Pet. App. 1a-21a.

JURISDICTION

The judgment of the Court of Appeals was entered on July 7, 2008. On that same date, pursuant to Seventh Circuit Rule 40(e), the Court of Appeals voted not to rehear *en banc* the issue presented. The petition for a writ of certiorari was timely filed on October 3, 2008. This Court has jurisdiction pursuant to 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

Illegal Immigration Reform and Immigrant Responsibility Act of 1996 § 242(a)(2)(B), 8 U.S.C. § 1252(a)(2)(B), provides:

(B) Denials of discretionary relief

Notwithstanding any other provision of law (statutory or nonstatutory), including section 2241 of Title 28, or any other habeas corpus provision, and sections 1361 and 1651 of such title, and except as provided in subparagraph (D), and regardless of whether the judgment, decision, or action is made in removal proceedings, no court shall have jurisdiction to review—

(i) any judgment regarding the granting of relief under section 1182(h), 1182(i), 1229b, 1229c, or 1255 of this title, or

(ii) any other decision or action of the Attorney General or the Secretary of Homeland Security the authority for which is specified under this subchapter to be in the discretion of the Attorney General or the Secretary of Homeland Security, other than the granting of relief under section 1158(a) of this title.

Additional statutory provisions are set forth in an Appendix to this Brief (“Pet. Br. App.”).

STATEMENT OF THE CASE

1. In 1996, Congress amended the Immigration and Nationality Act (“INA”), 8 U.S.C. § 1101 *et seq.*, to streamline judicial review of the legal claims of immigrants. *See* Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (“IIRIRA”), Pub. L. No. 104-208, Div. C, 110 Stat. 3009-546. Three aspects of IIRIRA are particularly relevant here.

First, Congress enacted 8 U.S.C. § 1252(a)(2)(B), which addresses courts’ jurisdiction over “Denials of Discretionary Relief” and applies “[n]otwithstanding any other provision of law (statutory or nonstatutory).”¹ Section 1252(a)(2)(B) begins by setting forth a number of specific forms of immigration-related discretionary relief that the courts lack jurisdiction to review: those addressed in §§ 1182(h), 1182(i), 1229b, 1229c, and 1255 of Title 8. *See* 8 U.S.C. § 1252(a)(2)(B)(i) (stating that “no court

¹ The phrase “(statutory or nonstatutory)” was added by amendment in 2005. *See* REAL ID Act § 105(a)(1)(A)(i).

shall have jurisdiction to review . . . any judgment regarding the granting of relief under” the specified sections). Each of these provisions is one in which Congress expressly addressed the scope of the Attorney General’s authority, either by using the word “discretion” or by couching the statute in terms of how the Attorney General “may” act or decide.²

² Sections 1182(h) and (i), both governing waiver of inadmissibility for aliens convicted of certain crimes, provide that “[t]he Attorney General *may*, in his *discretion*, waive,” 8 U.S.C. § 1182(h) (emphasis added), and that “[t]he Attorney General *may*, in the *discretion of the Attorney General*, waive,” *id.* § 1182(i)(1) (emphasis added). Section 1229b, governing cancellation of removal and adjustment of status, provides that “[t]he Attorney General *may* cancel removal,” *id.* § 1229b(a) (emphasis added), and that “[t]he Attorney General *may* cancel removal of, and adjust to the status of an alien lawfully admitted for permanent residence,” *id.* § 1229b(b) (emphasis added). Section 1229c, governing voluntary departure, provides that “[t]he Attorney General *may* permit an alien voluntarily to depart the United States,” *id.* § 1229c(a)(1), (b)(1) (emphasis added), and that “[t]he Attorney General *may* by regulation limit eligibility for voluntary departure under this section,” *id.* § 1229c(e) (emphasis added). Finally, section 1255, governing adjustment of status to permanent residency, provides that “[t]he status of an alien . . . *may* be adjusted by the Attorney General, in his *discretion*.” *Id.* § 1255(a) (emphasis added); *see also id.* § 1255(h)(2)(B) (“the Attorney General *may* waive” (emphasis added)); *id.* § 1255(i)(1) (“[t]he Attorney General *may* accept such application” (emphasis added)); *id.* § 1255(i)(2), (j)(1), (j)(2), (l)(1) (“the Attorney General *may* adjust the status of the alien”; “in the sole *discretion* of the Attorney General” (emphasis added)); *id.* § 1255(l)(2) (“in the Attorney General’s *discretion*” (emphasis added; footnote omitted)).

Section 1252(a)(2)(B) then goes on to state that “no court shall have jurisdiction to review . . . any other decision or action of the Attorney General or the Secretary of Homeland Security³ the authority for which is specified under this subchapter to be in the discretion of the Attorney General or the Secretary of Homeland Security, other than the granting of relief under section 1158(a) of this title.” 8 U.S.C. § 1252(a)(2)(B)(ii). Like the provisions set forth in § 1252(a)(2)(B)(i), section 1158 specifically gives the Attorney General leeway to act: section 1158(a) discusses when an alien may apply for asylum, and section 1158(b) specifies that the “Secretary of Homeland Security or the Attorney General *may* grant asylum.” *Id.* § 1158(b) (emphasis added).

After this Court’s decision in *INS v. St. Cyr*, 533 U.S. 289 (2001), Congress amended the statute in 2005 to clarify the existence of an exception to § 1252(a)(2)(B). That exception is set forth in § 1252(a)(2)(D), which permits review of “constitutional claims or questions of law.” *See* REAL ID Act § 106(a)(1)(A)(iii), 8 U.S.C. § 1252(a)(2)(D) (“Nothing in subparagraph (B) or (C), or in any other provision of this chapter (other than this section) which limits or eliminates judicial review, shall be construed as precluding review of constitutional claims or questions of law raised upon

³ The phrase “or the Secretary of Homeland Security” was added in 2005. *See* REAL ID Act § 101(e)(1).

a petition for review filed with an appropriate court of appeals in accordance with this section.”).

Second, IIRIRA codified procedures concerning motions to reopen immigration proceedings. The reopening process is “a judicial creation,” *Dada v. Mukasey*, 128 S. Ct. 2307, 2315 (2008), but in IIRIRA, Congress for the first time enacted a provision substantively addressing reopening motions before the agency. That provision, 8 U.S.C. § 1229a (Pet. Br. App. 1a-15a), sets forth various procedural requirements with which the movant must comply: “[a]n alien may file one motion to reopen,” 8 U.S.C. § 1229a(c)(7)(A); 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,” *id.* § 1229a(c)(7)(B); and the motion shall be filed within 90 days of the date of entry of a final administrative order of removal, unless the alien meets certain requirements, *id.* § 1229a(c)(7)(C). Section 1229a does not allude to the discretion of the Attorney General except in § 1229a(c)(7)(C)(iv)(III), which provides that under certain circumstances the “Attorney General may, in the Attorney General’s discretion, waive this time limitation” for filing a motion to reopen. Pet. Br. App. 14a.

Third, Congress enacted as part of IIRIRA various provisions related to appellate review of orders denying motions to reopen. For example, Congress provided that when a petitioner seeks judicial review of an order of removal, “any review sought of a motion to reopen or reconsider the order

shall be consolidated with the review of the order” itself. *See id.* § 1252(b)(6) (Pet. Br. App. 16a). In another section, Congress provided that in the event an order of removal issues after an alien fails to appear for a hearing on written notice, it may be rescinded only on a motion to reopen, and that ultimately appellate review is limited to an assessment of the validity of the notice provided to the alien, the reasons why the alien did not attend the proceeding, and whether or not the alien is removable. *See id.* § 1229a(b)(5)(D) (Pet. Br. App. 5a).

2. Agron Kucana is a native and citizen of Albania. AR 543.⁴ He applied for political asylum on the basis of persecution on account of his political involvement in Albania, where he actively campaigned in the early 1990s against the government and for the Albanian Democratic Party. Mr. Kucana’s efforts were aimed at promoting democratic governance and political pluralism. AR 550-60; AR 270-84. As a result of his activism, Mr. Kucana was often threatened, arrested, and beaten. AR 272, 274-76, 280, 552, 555-56, 558.

This persecution persisted even after the Albanian Democratic Party’s victory in the March 1992 election. At that time, the Party splintered into factions, and members of the former Communist secret police held influence within the newly

⁴ Citations to “AR” refer to the administrative record that was before the Immigration Judge and the Board of Immigration Appeals.

empowered party. AR 276, 279. On one occasion, Mr. Kucana was held by the police for 20 hours and beaten for his political activity. AR 220, 558. On another occasion, he was seriously injured when his vehicle was forced off the road and down a mountainside. AR 275-76, 556. In addition, men came to Kucana's home looking for him in a threatening manner, which he reported to the police to no avail. AR 559. He was then fired from his job and removed from his post in the Democratic Party. AR 280-81, 559. Ultimately, the Democratic Party filed charges against him alleging that he was "agitating against the party." AR 281.

Mr. Kucana fled to Turkey after receiving a warrant for his arrest in Albania, AR 282, and entered the United States in July 1995 on a B1/B2 visitor visa, AR 282, 543. After the Department of Justice issued an order to show cause, Mr. Kucana applied for political asylum and withholding of removal with the Executive Office for Immigration Review. AR 543-87.

Mr. Kucana failed to appear for a hearing and was ordered deported *in absentia* by the Immigration Judge ("IJ") on October 9, 1997. JA 29-32; AR 268. Mr. Kucana's attorney submitted a timely motion to reopen, with supporting affidavits, explaining that Mr. Kucana had missed his hearing because he slept through his alarm and had arrived shortly after the IJ ordered him deported *in absentia*. JA 29-32; AR 240-48. The IJ denied the motion to reopen, and Mr. Kucana appealed to the Bureau of Immigration Appeals ("BIA"). JA 28, 29-32; AR 139-47, 234-38,

253-54. On May 7, 2002, the BIA affirmed and dismissed Mr. Kucana's appeal. JA 28; AR 135.

On June 26, 2006, Mr. Kucana filed a second motion to reopen with the IJ based on new evidence, changed country conditions, and the fact that he was now the beneficiary of an approved 1-130 immediate relative petition filed by his mother. JA 16-27. Mr. Kucana contended that he would face serious political persecution if removed to Albania as a result of material changes in the political conditions there, which had deteriorated severely since his original asylum application was denied. JA 18, 22-26. His motion was supported by an affidavit from Professor Bernd Fischer, a professor of Balkan history who is chair of the Department of History at Indiana University Fort Wayne and a scholar on modern Albanian society and politics. AR 108-22. Professor Fischer described the political developments in Albania, explained why State Department reports discounting the danger to people like Mr. Kucana were both factually wrong and out of date, and concluded that "Agron Kucana has a reasonable and objective basis to fear future persecution" in Albania. AR 118-21.

The immigration judge denied this motion to reopen, JA 6-15, and on appeal the BIA held that the IJ lacked jurisdiction because successive motions to reopen must be filed directly with the BIA itself, Pet. App. 23a. Treating Mr. Kucana's papers as a new motion to reopen, the BIA denied reopening because it found that conditions in Albania had improved since 1997. *Id.* at 25a-26a. However, the BIA failed

to mention or discuss the expert affidavit of Professor Fischer in its decision.

Mr. Kucana petitioned for review of the BIA decision, arguing that that the Board erred by ignoring the material evidence he submitted in support of his motion. The parties briefed the matter and argued the case, but the Seventh Circuit subsequently ordered the submission of post-argument memoranda on whether the court lacked jurisdiction over the petition based on 8 U.S.C. § 1252(a)(2)(B)(ii), which states that “no court shall have jurisdiction to review . . . any other decision or action of the Attorney General or the Secretary of Homeland Security the authority for which is specified under this subchapter to be in the discretion of the Attorney General or the Secretary of Homeland Security.”

Although both Mr. Kucana and the Department of Justice argued that § 1252(a)(2)(B)(ii) does not cover decisions by the BIA not to reopen because the authority to reopen is not “specified” to be discretionary “under [the relevant] subchapter,” the Seventh Circuit held that it lacked jurisdiction to hear the appeal. Pet. App. 10a (*Kucana v. Mukasey*, 533 F.3d 534 (7th Cir. 2008)). The court found that it was bound by a prior circuit decision, *Ali v. Gonzales*, 502 F.3d 659 (7th Cir. 2007), *cert. denied*, 128 S. Ct. 1870 (2008), which held that § 1252(a)(2)(B)(ii) applies to decisions that are specified to be discretionary by regulations that implement the Immigration and Nationality Act. Pet. App. 8a. The discretionary decision in *Ali* was

whether to grant an alien's request for a continuance of a hearing, but – with almost no discussion – the *Kucana* court extended that holding to the decision of whether to grant a motion to reopen, which is within the Attorney General's discretion pursuant to regulation. *Id.* at 4a-5a. The *Kucana* court did not identify anything in the statute that specified the Attorney General's discretion, but concluded that “§ 1252(a)(2)(B)(ii) applies when the agency's discretion is specified by a regulation rather than a statute.” Pet. App. 4a.

One member of the panel concurred *dubitante* (Ripple, J.), *id.* at 12a, and one member of the panel dissented (Cudahy, J.), *id.* at 15a. Judge Ripple concurred only because he believed the panel to be bound by the holding in *Ali*, but noted that the court was “chart[ing] a course” that did not “closely adhere[] to the statutory language chosen and enacted by Congress.” *Id.* at 15a. Judge Ripple concluded that “had Congress intended to deprive this court of jurisdiction of specific substantive decisions, it would have done so explicitly.” *Id.* Similarly, in his dissent Judge Cudahy stated that the majority's decision gave “the executive branch the authority to insulate its decisions from judicial review where there is no clear indication in the statute that Congress intended to strip us of our jurisdiction,” in contravention of the “strong presumption that Congress intends judicial review of administrative action.” *Id.* at 16a-18a (internal quotation marks omitted). He also noted that every other court to decide the question has held that

§ 1252(a)(2)(B)(ii) does not remove appellate jurisdiction over petitions to review orders denying reopening motions. *See id.*; *see also, e.g., Singh v. Mukasey*, 536 F.3d 149, 153-54 (2d Cir. 2008); *Miah v. Mukasey*, 519 F.3d 784, 789 n.1 (8th Cir. 2008); *Jahjaga v. Att’y Gen.*, 512 F.3d 80, 82 (3d Cir. 2008); *Zafar v. U.S. Att’y Gen.*, 461 F.3d 1357, 1361 (11th Cir. 2006); *Zhao v. Gonzales*, 404 F.3d 295, 303 (5th Cir. 2005); *Infanzon v. Ashcroft*, 386 F.3d 1359, 1361-62 (10th Cir. 2004); *Medina-Morales v. Ashcroft*, 371 F.3d 520, 528-29 (9th Cir. 2004).

In addition, on the same day the panel opinion was issued, four members of the Seventh Circuit dissented from the Court’s refusal to rehear *en banc* the issue presented. Pet. App. 20a (Ripple, Rovner, Wood, and Williams, JJ.); *see also* Seventh Cir. R. 40(e). These dissenters objected to the expansion of *Ali*, a decision about review of a procedural motion, into the “realm of outcome determinative decisions,” which “takes us a long way from the statutory language chosen and enacted by Congress.” Pet. App. 20a-21a. The dissenters resisted going “down a path so contrary to the manifest intent of Congress and to the Supreme Court’s understanding of that intent.” *Id.* at 21a.

SUMMARY OF ARGUMENT

The plain text of 8 U.S.C. § 1252(a)(2)(B)(ii) does not strip the courts of appeals of jurisdiction except in a circumscribed category of immigration cases: those in which the petitioner seeks judicial review of decisions or actions “the authority for which is *specified under this subchapter* to be in the

discretion of the Attorney General or the Secretary of Homeland Security.” 8 U.S.C. § 1252(a)(2)(B)(ii) (emphasis added). The phrase “specified under this subchapter” is unambiguous. In selecting it, Congress made clear its intent to bar judicial review only where the Attorney General’s authority to decide or act is expressly made discretionary by a provision in the relevant statutory subchapter, 8 U.S.C. §§ 1151-1381.

The BIA’s denial of an alien’s motion to reopen is not such a decision or action. The subchapter is silent as to the BIA’s discretion to deny a motion to reopen, which is specified by regulation alone. Reopening thus stands in stark contrast to the other types of decisions or actions specifically identified in § 1252(a)(2)(B), all of which specify the Attorney General’s discretion in the relevant statutory subchapter.

The Seventh Circuit’s reading of the statute fails to satisfy the statutory requirement that authority be “specified under this subchapter to be in the discretion of the Attorney General.” Thus, the statutory interpretation question presented in this case is not a close one – it can readily be resolved on the face of the statute itself. The authority to deny a motion to reopen is not “specified under” the relevant subchapter, and the courts of appeals therefore retain jurisdiction over petitions such as Mr. Kucana’s.

Even if there were any ambiguity here (which there is not), the Seventh Circuit’s reading would be untenable in light of three well-established

principles of statutory construction applied by this Court: first, the “well-settled presumption favoring interpretations of statutes that allow judicial review of administrative action,” *Reno v. Catholic Social Servs., Inc.*, 509 U.S. 43, 63-64 (1993) (quoting *McNary v. Haitian Refugee Ctr., Inc.*, 498 U.S. 479, 496 (1991)); second, the requirement that a statute “be construed so that effect is given to all its provisions, so that no part will be inoperative or superfluous, void or insignificant,” *Corley v. United States*, 129 S. Ct. 1558, 1566 (2009) (citation and internal quotation marks omitted); and third, “the longstanding principle of construing any lingering ambiguities in deportation statutes in favor of the alien,” *Dada*, 128 S. Ct. at 2318 (internal quotation marks omitted). Each of these principles counsels against deviating from the plain text of the statute to deprive the courts of jurisdiction over reopening decisions.

The Seventh Circuit’s rule would also have extremely disruptive effects on the orderly administration of immigration law. Congress legislated the reopening process recognizing the need for such a process when country conditions change, new evidence is located after a hearing, or justice so requires for whatever reason. The Seventh Circuit’s reading of the statute would make abuses of discretion in deciding these motions nonreviewable, notwithstanding the BIA’s high rate of error in deciding them. Moreover, the Seventh Circuit’s reading would make countless other discretionary decisions nonreviewable, and would invite the

executive to insulate many more administrative immigration decisions from review simply by making them “discretionary” through regulation. These consequences are directly contrary to what Congress contemplated and intended when it limited the reach of § 1252(a)(2)(B)(ii) to only those circumstances where the Attorney General’s discretion is “specified under this subchapter.”

ARGUMENT

- I. **By Its Plain Terms, § 1252(a)(2)(B)(ii) Does Not Apply To Decisions Denying Motions To Reopen.**
 - A. **The Unambiguous Text Of § 1252(a)(2)(B)(ii) Strips Courts Of Jurisdiction Only Where The Executive’s Authority To Act Or Decide Is Specified To Be Discretionary By Statute.**

Section 1252(a)(2)(B)(ii) eliminates the jurisdiction of the courts of appeals to review petitions seeking judicial review of decisions or actions “the authority for which is *specified under this subchapter* to be in the discretion of the Attorney General or the Secretary of Homeland Security.” 8 U.S.C. § 1252(a)(2)(B)(ii) (emphasis added). The meaning of “specified under this subchapter” is unambiguous. “[U]nder this subchapter” refers to particular provisions of the immigration statutes – those set forth in 8 U.S.C. §§ 1151-1381. “Specify” means “to name or state explicitly or in detail.” *Webster’s Third New International Dictionary* 2187 (1971); *see also Barnett Bank of Marion County, N.A. v. Nelson*, 517

U.S. 25, 38 (1996) (“‘Specifically’ can mean ‘explicitly, particularly, [or] definitely,’ . . . thereby contrasting a *specific* reference with an *implicit* reference made by more general language to a broader topic.” (quoting *Black’s Law Dictionary* 1398 (6th ed. 1990)); *Black’s Law Dictionary* 1399 (6th ed. 1990) (defining “[s]pecify” as “to mention specifically; to state in full and explicit terms,” or “to tell or state precisely”).⁵

Because “specified” requires an explicit statement, the reach of § 1252(a)(2)(B)(ii) is limited to those instances where the statutory subchapter explicitly grants the Attorney General or the Director of Homeland Security discretionary authority to act.⁶ Where such authority comes from any source other than the statutory subchapter, the resulting actions are outside the scope of the statute and therefore remain reviewable by the federal courts of appeals. The clear statutory text “forecloses” other interpretations. *Massachusetts v. EPA*, 549 U.S. 497, 528-29 (2007); *see also Carcieri v. Salazar*, 129 S. Ct. 1058, 1063-64 (2009) (“[W]e must first determine whether the statutory text is plain

⁵ *See also generally, e.g., Limtiaco v. Comacho*, 549 U.S. 483, 488-89 (2007) (relying on *Black’s Law Dictionary*); *MCI Telecomms. Corp. v. Am. Tel. & Tel. Co.*, 512 U.S. 218, 225 (1994) (relying on *Webster’s Third New International Dictionary* (1976) and *Black’s Law Dictionary* (6th ed. 1990)).

⁶ Because the decision at issue in this case was a decision by the Attorney General, this brief sometimes refers for convenience to the Attorney General only when discussing the proper interpretation of the provision.

and unambiguous. If it is, we must apply the statute according to its terms.” (citation omitted)).

This straightforward reading of § 1252(a)(2)(B)(ii) is confirmed by language elsewhere in § 1252(a)(2)(B) itself, which demonstrates that Congress carefully distinguished among the statutory subchapter, statutes other than those within the subchapter, and nonstatutory sources of law like regulations. *See Dada*, 128 S. Ct. at 2317 (“In reading a statute we must not ‘look merely to a particular clause,’ but consider ‘in connection with it the whole statute.’” (quoting *Kokoszka v. Belford*, 417 U.S. 642, 650 (1974)). Section 1252(a)(2)(B) applies “[n]otwithstanding any other provision of law (statutory or nonstatutory),” a reference that demonstrates that Congress knows how to describe and give force to “nonstatutory” provisions like regulations if it so chooses. The contrast between Congress’s identification of “statutory or nonstatutory” provisions in the introduction to § 1252(a)(2)(B) and its use of “specified under this subchapter” in § 1252(a)(2)(B)(ii) is telling. *See Nken v. Holder*, 129 S. Ct. 1749, 1759 (2009); *Sosa v. Alvarez-Machain*, 542 U.S. 692, 711 n.9 (2004) (“[W]hen the legislature uses certain language in one part of the statute and different language in another, the court assumes different meanings were intended.” (quoting 2A N. Singer, *Statutes and Statutory Construction* § 46:06, at 194 (6th rev. ed. 2000))); *see also Touche Ross & Co. v. Redington*, 442 U.S. 560, 571-72 (1979) (“Further justification for our decision not to imply the private remedy . . . may be

found in the statutory scheme [W]hen Congress wished to provide a private damages remedy, it knew how to do so and did so expressly.”).

Also telling is Congress’s use of the word “other” to link together § 1252(a)(2)(B)(i) and § 1252(a)(2)(B)(ii). Section 1252(a)(2)(B)(i), the subsection immediately preceding (a)(2)(B)(ii), enumerates specific forms of relief that courts lack the power to review; every statutory provision referenced explicitly mentions the scope of the Attorney General’s authority. Section 1252(a)(2)(B)(ii)’s reference to “any *other* decision or action of the Attorney General . . . the authority for which is specified under this subchapter to be in the discretion of the Attorney General,” 8 U.S.C. § 1252(a)(2)(B)(ii) (emphasis added), is plainly meant to be read consistently with § 1252(a)(2)(B)(i). That is, both § 1252(a)(2)(B)(i) and § 1252(a)(2)(B)(ii) limit the proscription on judicial review to situations in which Congress itself has specified the Attorney General’s discretion. *See Hall Street Associates, L.L.C. v. Mattel, Inc.*, 128 S. Ct. 1396, 1404 (2008) (explaining that “when a statute sets out a series of specific items ending with a general term, that general term is confined to covering subjects comparable to the specifics it follows”); *Wash. State Dep’t of Soc. & Health Servs. v. Guardianship Estate of Keffeler*, 537 U.S. 371, 383 (2003) (“Where general words follow specific words in a statutory enumeration, the general words are construed to embrace only objects similar in nature

to those objects enumerated by the preceding specific words.” (citation omitted)).

The final clause of § 1252(a)(2)(B)(ii), which creates an exception to jurisdiction-stripping for review of “the granting of relief under section 1158(a) of this title,” is fully consistent with this understanding of the provision. Without this exception, the granting of relief under section 1158 would fall within the scope of § 1252(a)(2)(B)(ii), because granting asylum is something for which the authority is specified under the subchapter to be in the Attorney General’s discretion. *See* 8 U.S.C. § 1158(a), (b) (the “Secretary of Homeland Security or the Attorney General *may* grant asylum” (emphasis added)).⁷ In carving out an exception for something that would otherwise be covered by the jurisdictional bar, Congress indicated the type of expressly discretionary decisions it intended to

⁷ While it is clear that Congress viewed the grant of discretion to provide § 1158(a) relief as within the scope of § 1252(a)(2)(B)(ii) (absent express language excepting it), that does not necessarily mean that every use of the term “may” sufficiently confers discretion within the meaning of § 1252(a)(2)(B)(ii). *See Zhu v. Gonzales*, 411 F.3d 292, 295-96 (D.C. Cir. 2005) (stating that “the term ‘may’ ‘does not necessarily suggest unlimited discretion’” but that the “usual presumption” is that “‘may’ confers discretion” (quoting *Zadvydas v. Davis*, 533 U.S. 678, 697 (2001))). This Court need not decide for purposes of this case whether language such as “may” is sufficiently specific to bring a decision or action within the reach of § 1252(a)(2)(B)(ii), because the relevant subchapter does not specify that the BIA “may” grant or deny a motion to reopen, or use any other language that might conceivably be indicative of discretionary authority.

insulate from judicial review. *See, e.g., Molzof v. United States*, 502 U.S. 301, 310-11 (1992) (examining specifically enumerated exceptions to statute in order to determine meaning and purpose of statute's general provisions).

The relevant subchapter details many such decisions, giving § 1252(a)(2)(B)(ii) plenty of independent work to do in the statutory scheme. Indeed, there are no fewer than thirty-four statutory provisions in that subchapter that expressly state that the Attorney General has “discretion” to act (and that are not listed in § 1252(a)(2)(B)(i)). *See Alaka v. Att’y Gen.*, 456 F.3d 88, 96-97 (3d Cir. 2006) (collecting examples). For instance, 8 U.S.C. § 1158(b)(2)(A)(v) provides that the Attorney General can determine “in [his] discretion that there are not reasonable grounds for regarding the aliens as a danger to the security of the United States.” And 8 U.S.C. § 1227(a)(1)(E)(iii) provides that under certain circumstances the “Attorney General may, in his discretion for humanitarian purposes, to assure family unity, or when it is otherwise in the public interest, waive application of” a provision making deportable an alien who has encouraged or abetted another alien to illegally enter the United States. Section 1252(a)(2)(B)(ii) strips the federal courts of jurisdiction to review these decisions because the Attorney General’s discretion to make them is “specified under” the relevant subchapter.

Thus, when read as a whole, § 1252(a)(2)(B) describes a reasonable and consistent scheme in which Congress maintained strict control over which

immigration decisions are unreviewable by the courts of appeals. In so structuring the statute, Congress declined to let the agency make determinations of when the Attorney General's authority to act is unreviewable, or to let courts guess as to when that might be so based on less than explicit statutory language. Such a state of affairs could lead to tremendous uncertainty, with constantly shifting and varying rules about what is reviewable. *Cf. Sosa*, 542 U.S. at 711-12 (“The idea that Congress would have intended any such jurisdictional variety is too implausible to drive the analysis . . .”).

Instead, in an “uncharacteristically pellucid” manner, *Zhao*, 404 F.3d at 303, Congress drew a line between those decisions and actions as to which the Attorney General's authority is specified to be discretionary under the subchapter, and those as to which it is not. When Congress wanted to specify that the Attorney General had unreviewable discretionary authority to take action or make a decision, it knew how to do so and did so clearly. And although Congress could readily have framed the jurisdiction-stripping provision as one that broadly covered (for instance) “any discretionary decision,” it chose not to do so. *Compare* § 1252(a)(2)(B)(ii) *with* IIRIRA § 309(c)(4)(E), 110 Stat. at 3009-626 (enacting “transitional rules” applicable to certain cases pending when IIRIRA was passed and withdrawing judicial review over “any discretionary decision” made under specific provisions of the statute).

For all of these reasons, it is plain that § 1252(a)(2)(B)(ii) removes jurisdiction only for review of a decision that the Attorney General has discretionary authority to make by virtue of specific language in the relevant subchapter.

B. The Denial Of A Motion To Reopen Is Not A Decision Or Action “Specified Under This Subchapter.”

The authority of the Attorney General to deny a motion to reopen is not “specified . . . to be” discretionary in 8 U.S.C. §§ 1151-1381. Rather, the Attorney General’s discretion to deny such a motion is conferred exclusively by regulation. *See* 8 C.F.R. § 1003.2(a) (“The decision to grant or deny a motion to reopen or reconsider is within the discretion of the Board The Board has discretion to deny a motion to reopen even if the party moving has made out a prima facie case for relief.”); *id.* § 1003.23(b)(3) (providing that an immigration judge has discretion to grant or deny a motion to reopen).

Congress first enacted statutory provisions governing agency determination of motions to reopen as part of IIRIRA in 1996. When it did so, Congress did not give the Attorney General discretionary authority to decide such motions, or even state that the Attorney General “may” decide them. Indeed, Congress did not address the Attorney General’s authority to permit reopening at all.⁸ Rather,

⁸ That is unsurprising given that, as this Court recently noted, “reopening is a judicial creation.” *Dada*, 128 S. Ct. at 2315. The Attorney General (acting through the Board of

Congress elected only to set forth certain procedures that an alien must follow when filing a motion to reopen. Thus, 8 U.S.C. § 1229a (Pet. Br. App. 12a-15a) provides that “[a]n alien may file one motion to reopen,” 8 U.S.C. § 1229a(c)(7)(A); 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,” *id.* § 1229a(c)(7)(B); and that the motion shall be filed by a certain deadline, *id.* § 1229a(c)(7)(C). None of these provisions, by any stretch of the imagination, “specifie[s]” that a motion to reopen may be granted or denied “in the discretion of the Attorney General.” *Id.* § 1252(a)(2)(B)(ii). Nor does any other provision of the subchapter in question expressly grant the Attorney General any discretionary authority that is relevant to Mr. Kucana’s case.

Notably, however, there is one provision in § 1229a that grants the Attorney General discretionary authority to act with respect to a particular procedural aspect of a motion to reopen that is not at issue here. As to the statutory time limitation for filing a motion to reopen, § 1229a(c)(7)(C)(iv)(III) provides that under certain circumstances the “Attorney General may, in the Attorney General’s discretion, waive this time limitation.” Thus, Congress chose to grant the

Immigration Appeals) granted and denied motions to reopen long before Congress first made mention of the procedure in a statute. *See id.*; *see also INS v. Doherty*, 502 U.S. 314, 322 (1992).

Attorney General “specifi[c]” discretion over this one aspect of motions to reopen. *See* § 1252(a)(2)(B)(ii). But Congress did not do so with respect to the ultimate decision to grant or deny such a motion (or any other decision regarding a motion to reopen). This distinction is a highly meaningful indicator of congressional intent. *See Nken*, 129 S. Ct. at 1759.

The Seventh Circuit nevertheless purported to find some discretionary authority over the denial of motions to reopen that was specified under the relevant subchapter. Although the court’s reasoning is not especially clear, it concluded that “§ 1252(a)(2)(B)(ii) applies when the agency’s discretion is specified by a regulation rather than a statute.” Pet. App. 4a. The court seems to have reasoned that the reopening regulations are indirectly “specified” in the statute because the “regulations draw their force from provisions in the Act allowing immigration officials to govern their own proceedings.” *Id.* at 5a (citing 8 U.S.C. § 1229a(c)(7)); *see also Ali*, 502 F.3d at 660-61, 663 (stating that “an immigration judge’s denial of a continuance motion is a discretionary ‘decision or action’ the ‘authority for which’ is committed to the immigration judge by the relevant subchapter of the INA,” which gives the agency “plenary authority to conduct removal proceedings,” and concluding that the statutory authority “necessarily encompasses the discretion to continue the proceedings”).

This reading of the statute elides the critical requirement that the authority in question be “specified under this subchapter to be in the

discretion of the Attorney General.” 8 U.S.C. § 1252(a)(2)(B)(ii). There is nothing in the statute that purports to grant the Attorney General authority to deny a motion to reopen – certainly, the Seventh Circuit did not identify any such provision. And even if it were possible to find that the statutory provisions governing motions to reopen “specified” that the Attorney General has some general authority to make the ultimate decision on reopening, it is wholly impossible to find anything under the subchapter that specifies that the Attorney General’s authority in this regard is discretionary. Implied authority or implied discretion is not sufficient. As then-Judge Alito explained:

[W]e do not think . . . that the use of marginally ambiguous statutory language, without more, is adequate to “specif[y]” that a particular action is within the Attorney General’s discretion for the purposes of § 1252(a)(2)(B)(ii). Of course, in a sense, an agency generally has “discretion” under *Chevron* to interpret ambiguous language used in a statute it administers. But if that sort of ubiquitous “discretion” were sufficient by itself to satisfy § 1252(a)(2)(B)(ii), the effects of that jurisdictional bar would be sweeping indeed. We

do not believe that Congress intended such a result.

Soltane v. U.S. Dep't of Justice, 381 F.3d 143, 147-48 (3d Cir. 2004).

It may make sense for the Attorney General to have discretionary authority to deny motions to reopen, and the relevant regulations may be an eminently reasonable embodiment of this very rule. But those regulations are not a specification under the subchapter, and that is what the statute clearly and expressly requires.¹⁰

Because specification of discretionary authority in a regulation is insufficient to insulate a decision or action from appellate review under § 1252(a)(2)(B)(ii), § 1252(a)(2)(B)(ii) cannot be applied to deprive the courts of jurisdiction over Mr. Kucana's petition for review. Any argument that courts should be stripped of jurisdiction to review a denial of a motion to reopen like the one at issue here is an argument that is properly addressed to Congress, and not to this Court. "[U]nless and until Congress makes such a decision," this Court "must follow the current direction [§ 1252(a)(2)(B)(ii)] provides." *Kawaauhau v. Geiger*, 523 U.S. 57, 64 (1998).

¹⁰ Of course, there is no difficulty in judicially reviewing a discretionary agency decision; such review simply takes place under the familiar abuse of discretion standard. *See Doherty*, 502 U.S. at 323 ("[T]he abuse-of-discretion standard applies to motions to reopen . . .").

II. Assuming *Arguendo* Any Ambiguity In The Statutory Text, All Relevant Principles Of Interpretation Weigh Heavily Against The Seventh Circuit's Reading Of The Statute.

Although the meaning of § 1252(a)(2)(B)(ii) is clear on its face, if there were any doubt about its proper interpretation (which there is not), that doubt would be erased by three different principles of statutory interpretation that are directly applicable here: the presumption favoring judicial review of administrative action; the basic rule that a statute should be interpreted to avoid rendering any of its provisions superfluous; and the immigration rule of lenity.¹¹

A. The Presumption Favoring Judicial Review Of Administrative Action Counsels Against The Seventh Circuit's Interpretation.

This Court has long recognized a “well-settled presumption favoring interpretations of statutes that allow judicial review of administrative action.” *Reno*, 509 U.S. at 63-64 (quoting *McNary*, 498 U.S. at 496). Pursuant to this presumption, this Court will “find an intent to preclude such review only if presented with ‘clear and convincing evidence.’” *Id.* at 64; *see also McNary*, 498 U.S. at 496 (explaining

¹¹ No other consideration points in the other direction. In this regard, it is notable that the legislative history of the relevant statutory provisions is quite sparse. *See* Division C of the Omnibus Consolidated Appropriations Act of 1997, Pub. L. No. 104-208, § 301(a), 110 Stat. 3009-546, 3009-575 (Sept. 30, 1996).

that “[i]t is presumable that Congress legislates with knowledge of” the presumption).

This canon counsels strongly against any interpretation of § 1252(a)(2)(B)(ii) that would sweep denials of motions to reopen within the scope of that jurisdiction-stripping provision. Indeed, the Seventh Circuit’s reading of § 1252(a)(2)(B)(ii) would effectively insulate from judicial review virtually all discretionary immigration decisions – including many decisions outside the reopening context. *See infra* at pp. 37-39. There is no “clear and convincing evidence” that Congress intended that extraordinary result. In fact, there is no evidence whatever to that effect, and Congress made a clear statement to the contrary.

Accordingly, were there any question about the proper interpretation of § 1252(a)(2)(B)(ii), this canon alone would resolve it. As in many prior cases that have cited and relied on the canon, this Court should interpret the immigration statutes to preserve the jurisdiction of the federal courts. *See St. Cyr*, 533 U.S. at 298 (holding that AEDPA and IIRIRA did not deprive federal courts of jurisdiction to review alien’s habeas petition); *Reno*, 509 U.S. at 63-64 (noting that INA provision cannot be interpreted to bar judicial review for certain plaintiffs); *McNary*, 498 U.S. at 496 (holding that INA provision does not preclude all judicial review); *United States v. Mendoza-Lopez*, 481 U.S. 828 (1987) (holding that, despite INA provision limiting judicial review of deportation orders, aliens prosecuted for illegal entry following deportation may assert the invalidity of the

underlying administrative deportation order in a constitutional proceeding).¹²

B. The Rule That A Statutory Provision Should Not Be Construed To Render Other Provisions In The Statute Superfluous Counsels Against The Seventh Circuit's Interpretation.

In provisions enacted at the same time as § 1252(a)(2)(B)(ii), Congress expressly contemplated judicial review of denials of motions to reopen and indicated its intent for there to be such judicial review. Under the Seventh Circuit's interpretation of § 1252(a)(2)(B)(ii), these provisions would have been superfluous the moment they went into effect. This illogical result is "at odds with one of the most basic interpretive canons, that '[a] statute should be construed so that effect is given to all its provisions, so that no part will be inoperative or superfluous, void or insignificant.'" *Corley*, 129 S. Ct. at 1560 (citation omitted); *see also, e.g., Stone v. INS*, 514

¹² *See also, e.g., Hamdan v. Rumsfeld*, 548 U.S. 557, 575-76 (2006) (declining to interpret the Detainee Treatment Act to preclude review by this Court); *Traynor v. Turnage*, 485 U.S. 535, 542 (1988) (declining to interpret statute to preclude judicial review of claim that Veterans Affairs regulation violated Rehabilitation Act); *Bowen v. Michigan Acad. of Family Physicians*, 476 U.S. 667, 670 (1986) (holding that Congress has not barred judicial review of regulations promulgated under Part B of Medicare program); *Johnson v. Robison*, 415 U.S. 361, 366 (1974) (declining to interpret a statute to preclude judicial review of a decision of the Administrator of Veterans Affairs and noting that the statute would otherwise raise constitutional concerns).

U.S. 386, 397 (1995); *King v. St. Vincent's Hospital*, 502 U.S. 215, 221 (1991); *Moskal v. United States*, 498 U.S. 103, 109-110 (1990) (discussing “the established principle that a court should give effect, if possible, to every clause and word of a statute” (internal quotation marks omitted)).

One statutory provision that cannot be reconciled with the Seventh Circuit’s interpretation of § 1252(a)(2)(B)(ii) is 8 U.S.C. § 1252(b)(6), which was passed in 1996 as part of IIRIRA and provides that when a petitioner seeks judicial review of an order of removal, “any review sought of a motion to reopen or reconsider the order [of removal] shall be consolidated with the review of the order” itself. *See* § 1252(b)(6). If Congress had not intended for the courts to have jurisdiction to review decisions denying motions to reopen, there would have been no need for a provision specifying that such review is to be consolidated on appeal with review of removal orders. *See, e.g., Stone*, 514 U.S. at 397; *Infanzon*, 386 F.3d at 1361-62 (noting that the consolidation provision would be “unnecessary” if motions to reconsider were unreviewable).¹³

Another provision that expressly contemplates judicial review of denials of motions to reopen is 8 U.S.C. § 1229a(b)(5)(A), which was also enacted as part of IIRIRA in 1996. It addresses orders of

¹³ The regulations giving the Attorney General discretion to grant or deny a motion to reopen were in effect when this statutory provision became law, and have remained so ever since. *See* 61 Fed. Reg. 18,904 (1996).

removal issued *in absentia* if an alien fails to appear for hearing and the government proves that the alien is removable. Such an order can be rescinded “only . . . upon a motion to reopen” that is filed within certain time limits and that demonstrates that the failure to appear “was because of exceptional circumstances,” or that “the alien did not receive notice” or “was in Federal or State custody.” 8 U.S.C. § 1229a(b)(5)(C)(i)-(ii). The statute then expressly limits the substantive scope of review of those decisions, but does not deprive courts of jurisdiction to review them: “[a]ny petition for review under section 1252 of this title of an order entered in absentia under this paragraph shall . . . be confined to (i) the validity of the notice provided to the alien, (ii) the reasons for the alien’s not attending the proceeding, and (iii) whether or not the alien is removable.” § 1229a(b)(5)(D)(i)-(iii).¹⁴ If § 1252(a)(2)(B)(ii) made motions to reopen unreviewable, then § 1229a(b)(5)(D)’s careful delineation of the circumstances under which review is available for motions to reopen orders entered *in absentia* would have been meaningless when it was enacted. *See Stone*, 514 U.S. at 397.

The Seventh Circuit’s opinion claims that its reading of § 1252(a)(2)(B)(ii) does not create any

¹⁴ Because a removal order entered *in absentia* may be challenged on appeal only after an alien has filed a motion to reopen and the BIA has denied it, *see id.* § 1229a(b)(5)(C); 8 C.F.R. § 1003.23(b)(4)(ii), a petition for judicial review in this context necessarily challenges the denial of the motion to reopen.

superfluity, basing this argument on § 1252(a)(2)(D), the 2005 enactment providing that nothing in § 1252(a)(2)(B) that “limits or eliminates judicial review[] shall be construed as precluding review of constitutional claims or questions of law raised upon a petition for review filed with an appropriate court of appeals.” 8 U.S.C. § 1252(a)(2)(D). Pet. App. 8a-10a. According to the Seventh Circuit, § 1252(a)(2)(D) permits judicial review of legal and constitutional questions relating to discretionary decisions, so that any statutory provision contemplating judicial review of motions to reopen remains operative and serves a purpose, even if § 1252(a)(2)(B)(ii) bars review where § 1252(a)(2)(D) does not apply. Pet. App. 8a-10a. In other words, according to the Seventh Circuit, because denials of motions to reopen remain reviewable in certain limited circumstances, the consolidation and *in absentia* provisions described above are not superfluous.

This argument fails on several grounds. First, Congress’s later enactment of § 1252(a)(2)(D) – nine years after the passage of IIRIRA – cannot alter the original meaning of the jurisdiction-stripping provision at issue in this case. The relevant question in interpreting § 1252(a)(2)(B)(ii) is Congress’s intent at the time that the provision was enacted. *See Ngiraingas v. Sanchez*, 495 U.S. 182, 187 (1990) (“We seek, therefore, indicia of congressional intent *at the time the statute was enacted*.” (emphasis added)); *cf. Almendarez-Torres v. United States*, 523 U.S. 224, 237 (1998) (stating that “later enacted laws” do not

“declare the meaning of earlier law”). Moreover, § 1252(a)(2)(D) was plainly intended to *permit* judicial review, with no indication that it would eliminate review in other circumstances. The Seventh Circuit’s reading of the safety-valve provision to restrict judicial review is perverse.

Second, the safety-valve provision of § 1252(a)(2)(D) does not in fact eliminate the superfluity problem that the Seventh Circuit’s view creates. Congress provided that judicial review of a motion to reopen an order entered *in absentia* must take into account three factors, one of which is “the reasons for the alien’s not attending the proceeding.” 8 U.S.C. § 1229a(b)(5)(D)(i)-(iii). But that factor – which Congress expressly contemplated would be the subject of decisions by the courts of appeals – is primarily fact- and equity-based, and will virtually never give rise to a constitutional claim or a question of law. In this respect, § 1229a(b)(5)(D) remains superfluous under the Seventh Circuit’s interpretation, even if § 1252(a)(2)(D) can somehow be interpreted to change the meaning of a jurisdiction-stripping provision enacted nine years earlier.

Petitioner’s straightforward interpretation rationalizes all of these provisions rather than giving rise to inconsistencies among them. It is therefore Petitioner’s interpretation, and not the Seventh Circuit’s, that makes the subchapter as a whole

coherent and meaningful. That is the result that Congress clearly intended.¹⁵

C. The Immigration Rule Of Lenity Counsels Against The Seventh Circuit's Interpretation.

Finally, there is a “longstanding principle of construing any lingering ambiguities in deportation statutes in favor of the alien.” *Dada*, 128 S. Ct. at 2318 (internal quotation marks omitted); *see also St. Cyr*, 533 U.S. at 320; *INS v. Cardoza-Fonseca*, 480 U.S. 421, 449 (1987); *INS v. Errico*, 385 U.S. 214, 225 (1966) (“Even if there were some doubt as to the correct construction of the statute, the doubt should be resolved in favor of the alien.”). This rule is animated by the understanding that “the stakes are considerable for the individual” who seeks legal permission to remain in this country. *Errico*, 385 U.S. at 225. Accordingly, this Court has held that “we will not assume that Congress meant to trench

¹⁵ There is only one reading of the statute under which the provisions discussed above were not superfluous when enacted: a reading under which § 1252(a)(2)(B)(ii) permits appellate review of factual (and legal) errors and bars only *purely* discretionary decisions. *See, e.g., Spencer Enters., Inc. v. United States*, 345 F.3d 683, 690 (9th Cir. 2003) (holding that § 1252(a)(2)(B)(ii) bars only review of “matters of pure discretion, rather than discretion guided by legal standards”). *But see Suvorov v. Gonzales*, 441 F.3d 618, 622 (8th Cir. 2006) (“We lack jurisdiction to review questions of fact underlying discretionary decisions of the Attorney General.”). But, in any event, Mr. Kucana prevails under this reading as well, because his petition for review alleges that the BIA decided the facts erroneously – a decision that is not a matter of pure discretion.

on [the alien's] freedom beyond that which is required by the narrowest of several possible meanings of the words used." *Id.* (internal quotation marks omitted); *see also Costello v. INS*, 376 U.S. 120, 128 (1964).

Construing any hypothetical ambiguity in favor of the alien means construing § 1252(a)(2)(B)(ii) to permit judicial review, which protects the alien's ability to justifiably seek reopening. Without such review, aliens may be subject to deportation even though the agency's decision to deny reopening is demonstrably erroneous.

III. The Consequences Of The Seventh Circuit's Interpretation Of § 1252(a)(2)(B)(ii) Would Be Harmful.

A. Appellate Review Of Motions To Reopen Immigration Decisions Is Essential To Prevent Injustice.

This Court has explained that motions to reopen are an "important safeguard" designed to "ensure a proper and lawful disposition" of an alien's case. *Dada*, 128 S. Ct. at 2318. It has analogized reopening motions to motions brought pursuant to Federal Rule of Civil Procedure 60(b), which provides for relief from a final judgment in situations involving mistake, fraud, newly discovered evidence, or similar circumstances. *See Stone*, 514 U.S. at 401. That kind of relief is particularly critical in cases where the outcome was the result of procedural default. *See Gonzalez v. Crosby*, 545 U.S. 524, 534 (2005) (describing the "legitimate" function of Rule

60(b) motions “to relieve parties from the effect of a default judgment mistakenly entered against them”).

The extremely high stakes in the immigration context significantly increase the importance of such a safeguard, and of appellate review to ensure that reopening is afforded to aliens in a fair and consistent manner. The consequences of a judgment in an immigration proceeding can be extraordinarily severe. *See Jordan v. DeGeorge*, 341 U.S. 223, 231 (1951) (“[D]eportation is a drastic measure and at times the equivalent of banishment or exile” (internal quotation marks omitted)); *Bridges v. Wixon*, 326 U.S. 135, 154 (1945) (“Though deportation is not technically a criminal proceeding, it visits a great hardship on the individual and deprives him of the right to stay and live and work in this land of freedom. That deportation is a penalty – at times a most serious one – cannot be doubted. Meticulous care must be exercised lest the procedure by which he is deprived of that liberty not met the essential standards of fairness.”).

It is against the backdrop of these consequences that the Seventh Circuit’s interpretation of § 1252(a)(2)(B)(ii) must be viewed. That interpretation would bar review of decisions denying motions to reopen in a manner that would force petitioners to bear certain unjust consequences of immigration judgments. For example, a change in the political climate of a petitioner’s home country may render a previous adverse judgment unjust, something Congress expressly recognizes in providing for reopening on this basis. *See* 8 U.S.C.

§ 1229a(c)(7). If the BIA abuses its discretion in denying such a motion, the Seventh Circuit's interpretation of § 1252(a)(2)(B)(ii) would nonetheless foreclose appellate review. The stakes in those situations are often life and death, which is precisely why Congress narrowly circumscribed that provision's limits on appellate review and why this Court construes statutes against limitations on judicial review and in favor of the alien. *See Dada*, 128 S. Ct. at 2318; *Reno*, 509 U.S. at 63-64.

The consequences of eliminating appellate review of immigration decisions are magnified given the high rate at which the courts of appeals reverse the BIA for abuse of discretion. *See Benslimane v. Gonzales*, 430 F.3d 828, 829-30 (7th Cir. 2005); *Zuh v. Mukasey*, 547 F.3d 504, 513-14 (4th Cir. 2008). The Seventh Circuit, in particular, has noted that in one recent year it reversed almost 40% of the BIA judgments that came before it. *Benslimane*, 430 F.3d at 829-30. Denials of motions to reopen or reconsider are among the most heavily criticized decisions. *See, e.g., Dawoud v. Gonzales*, 424 F.3d 608, 611 (7th Cir. 2005); *Fiadjoe v. Att'y Gen.*, 411 F.3d 135, 155 (3d Cir. 2005); *Ssali v. Gonzales*, 424 F.3d 556, 563-64 (7th Cir. 2005). In reviewing those decisions, courts have uncovered problems as serious as an agency decisionmaker's complete lack of familiarity with the facts of the case and with its own precedent, *Ssali*, 424 F.3d at 563-64, and "extraordinarily abusive" treatment of petitioners, *Fiadjoe*, 411 F.3d at 154. Yet where the BIA's abuse of discretion does not give rise to a constitutional

claim or question of law, the Seventh Circuit's interpretation would entirely preclude appellate review.

In light of the pervasive problems with BIA adjudication, as well as the nature of the errors corrected by judicial review of denials of motions to reopen, this Court should be extremely reluctant to find that Congress intended to strip courts of jurisdiction over a substantial and important subset of immigration decisions.

B. The Seventh Circuit's Interpretation Would Allow The Executive Branch To Insulate Its Decisions From Judicial Review.

The Seventh Circuit's interpretation of 8 U.S.C. § 1252(a)(2)(B)(ii) gives "the executive branch the authority to insulate its decisions from judicial review where there is no clear indication in the statute that Congress intended to strip [courts] of [their] jurisdiction." Pet. App. 16a (Cudahy, J., dissenting). According to the Seventh Circuit's view, where there is even the slightest suggestion of an implicit authority to act under a statute, the Attorney General or Secretary of Homeland Security could avoid judicial review of issues of fact and equity simply by promulgating regulations that define a particular action as "discretionary." There is no indication that Congress intended to grant such broad authority to the executive branch to shield itself from judicial review. Indeed, it is "axiomatic" that federal agencies do not have the authority to determine federal court jurisdiction. *Carlyle Towers Condo. Ass'n v. FDIC*, 170 F.3d 301, 310 (2d Cir.

1999); *see also Miller v. FCC*, 66 F.3d 1140, 1144 (11th Cir. 1995).

The consequences of the Seventh Circuit's interpretation are unacceptably far-reaching. A large number of Attorney General actions are already classified as discretionary solely by regulation. For instance, pursuant to regulation an *in absentia* removal order "may be rescinded" on a showing that the alien did not receive proper notice, or was in state or federal custody at the time the order issued. *See* 8 C.F.R. § 1003.23(b)(4)(ii). Under the Seventh Circuit's view, even a clearly erroneous agency finding that an individual received notice, constituting an abuse of the agency's discretion, would be beyond the jurisdiction of the federal courts.

Moreover, the Seventh Circuit's interpretation gives the executive branch a strong incentive to attempt to escape judicial review by reclassifying other decisions and actions as discretionary. For instance, current regulations provide that an immigration attorney "shall be subject to disciplinary sanctions" if found to knowingly take actions that "lack an arguable basis in . . . fact." *Id.* § 1003.102(j)(1). Current regulations also provide that an immigration judge who determines that an asylum officer was wrong in finding the absence of a credible fear of persecution shall vacate the asylum officer's removal order. *See id.* § 1003.42. If the regulations were changed to make these decisions discretionary, the Seventh Circuit would deem them unreviewable, despite the gravity of the

consequences. This Court should not countenance that extraordinary result.

CONCLUSION

For all of the foregoing reasons, this Court should reverse the decision of the Seventh Circuit, hold that the courts of appeals retain jurisdiction to review decisions of the BIA denying motions to reopen, and remand this case for further proceedings.

Respectfully submitted,

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APPENDIX

8 U.S.C. § 1229a

§ 1229a. Removal proceedings

(a) Proceeding

(1) In general

An immigration judge shall conduct proceedings for deciding the inadmissibility or deportability of an alien.

(2) Charges

An alien placed in proceedings under this section may be charged with any applicable ground of inadmissibility under section 1182(a) of this title or any applicable ground of deportability under section 1227(a) of this title.

(3) Exclusive procedures

Unless otherwise specified in this chapter, a proceeding under this section shall be the sole and exclusive procedure for determining whether an alien may be admitted to the United States or, if the alien has been so admitted, removed from the United States. Nothing in this section shall affect proceedings conducted pursuant to section 1228 of this title.

(b) Conduct of proceeding

(1) Authority of immigration judge

The immigration judge shall administer oaths, receive evidence, and interrogate, examine, and cross-examine the alien and any witnesses. The immigration judge may issue subpoenas for the attendance of witnesses and presentation of

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evidence. The immigration judge shall have authority (under regulations prescribed by the Attorney General) to sanction by civil money penalty any action (or inaction) in contempt of the judge's proper exercise of authority under this chapter.

(2) Form of proceeding

(A) In general

The proceeding may take place—

- (i) in person,
- (ii) where agreed to by the parties, in the absence of the alien,
- (iii) through video conference, or
- (iv) subject to subparagraph (B), through telephone conference.

(B) Consent required in certain cases

An evidentiary hearing on the merits may only be conducted through a telephone conference with the consent of the alien involved after the alien has been advised of the right to proceed in person or through video conference.

(3) Presence of alien

If it is impracticable by reason of an alien's mental incompetency for the alien to be present at the proceeding, the Attorney General shall prescribe safeguards to protect the rights and privileges of the alien.

(4) Alien's rights in proceeding

In proceedings under this section, under regulations of the Attorney General—

(A) the alien shall have the privilege of being represented, at no expense to the Government, by counsel of the alien's choosing who is authorized to practice in such proceedings,

(B) the alien shall have a reasonable opportunity to examine the evidence against the alien, to present evidence on the alien's own behalf, and to cross-examine witnesses presented by the Government but these rights shall not entitle the alien to examine such national security information as the Government may proffer in opposition to the alien's admission to the United States or to an application by the alien for discretionary relief under this chapter, and

(C) a complete record shall be kept of all testimony and evidence produced at the proceeding.

(5) Consequences of failure to appear

(A) In general

Any alien who, after written notice required under paragraph (1) or (2) of section 1229(a) of this title has been provided to the alien or the alien's counsel of record, does not attend a proceeding under this section, shall be ordered removed in absentia if the Service establishes by clear, unequivocal, and convincing evidence that the written notice was so provided and that the alien is removable (as defined in

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subsection (e)(2) of this section). The written notice by the Attorney General shall be considered sufficient for purposes of this subparagraph if provided at the most recent address provided under section 1229(a)(1)(F) of this title.

(B) No notice if failure to provide address information

No written notice shall be required under subparagraph (A) if the alien has failed to provide the address required under section 1229(a)(1)(F) of this title.

(C) Rescission of order

Such an order may be rescinded only—

(i) upon a motion to reopen filed within 180 days after the date of the order of removal if the alien demonstrates that the failure to appear was because of exceptional circumstances (as defined in subsection (e)(1) of this section), or

(ii) upon a motion to reopen filed at any time if the alien demonstrates that the alien did not receive notice in accordance with paragraph (1) or (2) of section 1229(a) of this title or the alien demonstrates that the alien was in Federal or State custody and the failure to appear was through no fault of the alien.

The filing of the motion to reopen described in clause (i) or (ii) shall stay the removal of the

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alien pending disposition of the motion by the immigration judge.

(D) Effect on judicial review

Any petition for review under section 1252 of this title of an order entered in absentia under this paragraph shall (except in cases described in section 1252(b)(5) of this title) be confined to (i) the validity of the notice provided to the alien, (ii) the reasons for the alien's not attending the proceeding, and (iii) whether or not the alien is removable.

(E) Additional application to certain aliens in contiguous territory

The preceding provisions of this paragraph shall apply to all aliens placed in proceedings under this section, including any alien who remains in a contiguous foreign territory pursuant to section 1225(b)(2)(C) of this title.

(6) Treatment of frivolous behavior

The Attorney General shall, by regulation—

(A) define in a proceeding before an immigration judge or before an appellate administrative body under this subchapter, frivolous behavior for which attorneys may be sanctioned,

(B) specify the circumstances under which an administrative appeal of a decision or ruling will be considered frivolous and will be summarily dismissed, and

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(C) impose appropriate sanctions (which may include suspension and disbarment) in the case of frivolous behavior.

Nothing in this paragraph shall be construed as limiting the authority of the Attorney General to take actions with respect to inappropriate behavior.

(7) Limitation on discretionary relief for failure to appear

Any alien against whom a final order of removal is entered in absentia under this subsection and who, at the time of the notice described in paragraph (1) or (2) of section 1229(a) of this title, was provided oral notice, either in the alien's native language or in another language the alien understands, of the time and place of the proceedings and of the consequences under this paragraph of failing, other than because of exceptional circumstances (as defined in subsection (e)(1) of this section) to attend a proceeding under this section, shall not be eligible for relief under section 1229b, 1229c, 1255, 1258, or 1259 of this title for a period of 10 years after the date of the entry of the final order of removal.

(c) Decision and burden of proof

(1) Decision

(A) In general

At the conclusion of the proceeding the immigration judge shall decide whether an alien is removable from the United States. The determination of the immigration judge shall be

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based only on the evidence produced at the hearing.

(B) Certain medical decisions

If a medical officer or civil surgeon or board of medical officers has certified under section 1222(b) of this title that an alien has a disease, illness, or addiction which would make the alien inadmissible under paragraph (1) of section 1182(a) of this title, the decision of the immigration judge shall be based solely upon such certification.

(2) Burden on alien

In the proceeding the alien has the burden of establishing—

(A) if the alien is an applicant for admission, that the alien is clearly and beyond doubt entitled to be admitted and is not inadmissible under section 1182 of this title; or

(B) by clear and convincing evidence, that the alien is lawfully present in the United States pursuant to a prior admission.

In meeting the burden of proof under subparagraph (B), the alien shall have access to the alien's visa or other entry document, if any, and any other records and documents, not considered by the Attorney General to be confidential, pertaining to the alien's admission or presence in the United States.

(3) Burden on service in cases of deportable aliens

(A) In general

In the proceeding the Service has the burden of establishing by clear and convincing evidence that, in the case of an alien who has been admitted to the United States, the alien is deportable. No decision on deportability shall be valid unless it is based upon reasonable, substantial, and probative evidence.

(B) Proof of convictions

In any proceeding under this chapter, any of the following documents or records (or a certified copy of such an official document or record) shall constitute proof of a criminal conviction:

- (i) An official record of judgment and conviction.
- (ii) An official record of plea, verdict, and sentence.
- (iii) A docket entry from court records that indicates the existence of the conviction.
- (iv) Official minutes of a court proceeding or a transcript of a court hearing in which the court takes notice of the existence of the conviction.
- (v) An abstract of a record of conviction prepared by the court in which the conviction was entered, or by a State official associated with the State's repository of criminal justice records, that indicates the charge or section of law violated, the disposition of the case, the existence and date of conviction, and the sentence.

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(vi) Any document or record prepared by, or under the direction of, the court in which the conviction was entered that indicates the existence of a conviction.

(vii) Any document or record attesting to the conviction that is maintained by an official of a State or Federal penal institution, which is the basis for that institution's authority to assume custody of the individual named in the record.

(C) Electronic records

In any proceeding under this chapter, any record of conviction or abstract that has been submitted by electronic means to the Service from a State or court shall be admissible as evidence to prove a criminal conviction if it is—

(i) certified by a State official associated with the State's repository of criminal justice records as an official record from its repository or by a court official from the court in which the conviction was entered as an official record from its repository, and

(ii) certified in writing by a Service official as having been received electronically from the State's record repository or the court's record repository.

A certification under clause (i) may be by means of a computer-generated signature and statement of authenticity.

(4) Applications for relief from removal

(A) In general

An alien applying for relief or protection from removal has the burden of proof to establish that the alien—

- (i) satisfies the applicable eligibility requirements; and
- (ii) with respect to any form of relief that is granted in the exercise of discretion, that the alien merits a favorable exercise of discretion.

(B) Sustaining burden

The applicant must comply with the applicable requirements to submit information or documentation in support of the applicant's application for relief or protection as provided by law or by regulation or in the instructions for the application form. In evaluating the testimony of the applicant or other witness in support of the application, the immigration judge will determine whether or not the testimony is credible, is persuasive, and refers to specific facts sufficient to demonstrate that the applicant has satisfied the applicant's burden of proof. In determining whether the applicant has met such burden, the immigration judge shall weigh the credible testimony along with other evidence of record. Where the immigration judge determines that the applicant should provide evidence which corroborates otherwise credible testimony, such evidence must be provided unless the applicant demonstrates that the applicant does not have

the evidence and cannot reasonably obtain the evidence.

(C) Credibility determination

Considering the totality of the circumstances, and all relevant factors, the immigration judge may base a credibility determination on the demeanor, candor, or responsiveness of the applicant or witness, the inherent plausibility of the applicant's or witness's account, the consistency between the applicant's or witness's written and oral statements (whenever made and whether or not under oath, and considering the circumstances under which the statements were made), the internal consistency of each such statement, the consistency of such statements with other evidence of record (including the reports of the Department of State on country conditions), and any inaccuracies or falsehoods in such statements, without regard to whether an inconsistency, inaccuracy, or falsehood goes to the heart of the applicant's claim, or any other relevant factor. There is no presumption of credibility, however, if no adverse credibility determination is explicitly made, the applicant or witness shall have a rebuttable presumption of credibility on appeal.

(5) Notice

If the immigration judge decides that the alien is removable and orders the alien to be removed, the judge shall inform the alien of the right to appeal that decision and of the consequences for failure to

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depart under the order of removal, including civil and criminal penalties.

(6) Motions to reconsider

(A) In general

The alien may file one motion to reconsider a decision that the alien is removable from the United States.

(B) Deadline

The motion must be filed within 30 days of the date of entry of a final administrative order of removal.

(C) Contents

The motion shall specify the errors of law or fact in the previous order and shall be supported by pertinent authority.

(7) Motions to reopen

(A) In general

An alien may file one motion to reopen proceedings under this section, except that this limitation shall not apply so as to prevent the filing of one motion to reopen described in subparagraph (C)(iv).

(B) Contents

The motion to reopen 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.

(C) Deadline

(i) In general

Except as provided in this subparagraph, the motion to reopen shall be filed within 90 days of the date of entry of a final administrative order of removal.

(ii) Asylum

There is no time limit on the filing of a motion to reopen if the basis of the motion is to apply for relief under sections 1158 or 1231(b)(3) of this title and is based on changed country conditions arising in the country of nationality or the country to which removal has been ordered, if such evidence is material and was not available and would not have been discovered or presented at the previous proceeding.

(iii) Failure to appear

The filing of a motion to reopen an order entered pursuant to subsection (b)(5) of this section is subject to the deadline specified in subparagraph (C) of such subsection.

(iv) Special rule for battered spouses, children, and parents

Any limitation under this section on the deadlines for filing such motions shall not apply—

(I) if the basis for the motion is to apply for relief under clause (iii) or (iv) of section 1154(a)(1)(A) of this title, clause (ii) or (iii)

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of section 1154(a)(1)(B) of this title, section 1229b(b) of this title, or section 1254(a)(3) of this title (as in effect on March 31, 1997);

(II) if the motion is accompanied by a cancellation of removal application to be filed with the Attorney General or by a copy of the self-petition that has been or will be filed with the Immigration and Naturalization Service upon the granting of the motion to reopen;

(III) if the motion to reopen is filed within 1 year of the entry of the final order of removal, except that the Attorney General may, in the Attorney General's discretion, waive this time limitation in the case of an alien who demonstrates extraordinary circumstances or extreme hardship to the alien's child; and

(IV) if the alien is physically present in the United States at the time of filing the motion.

The filing of a motion to reopen under this clause shall only stay the removal of a qualified alien (as defined in section 1641(c)(1)(B) of this title pending the final disposition of the motion, including exhaustion of all appeals if the motion establishes that the alien is a qualified alien.

(d) Stipulated removal

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The Attorney General shall provide by regulation for the entry by an immigration judge of an order of removal stipulated to by the alien (or the alien's representative) and the Service. A stipulated order shall constitute a conclusive determination of the alien's removability from the United States.

(e) Definitions

In this section and section 1229b of this title:

(1) Exceptional circumstances

The term "exceptional circumstances" refers to exceptional circumstances (such as battery or extreme cruelty to the alien or any child or parent of the alien, serious illness of the alien, or serious illness or death of the spouse, child, or parent of the alien, but not including less compelling circumstances) beyond the control of the alien.

(2) Removable

The term "removable" means—

(A) in the case of an alien not admitted to the United States, that the alien is inadmissible under section 1182 of this title, or

(B) in the case of an alien admitted to the United States, that the alien is deportable under section 1227 of this title.

8 U.S.C. § 1252

§ 1252. Judicial review of orders of removal

(a) Applicable provisions

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* * * *

(2) Matters not subject to judicial review

* * * *

(D) Judicial review of certain legal claims

Nothing in subparagraph (B) or (C), or in any other provision of this chapter (other than this section) which limits or eliminates judicial review, shall be construed as precluding review of constitutional claims or questions of law raised upon a petition for review filed with an appropriate court of appeals in accordance with this section.

* * * *

(b) Requirements for review of orders of removal

With respect to review of an order of removal under subsection (a)(1) of this section, the following requirements apply:

* * * *

(6) Consolidation with review of motions to reopen or reconsider

When a petitioner seeks review of an order under this section, any review sought of a motion to reopen or reconsider the order shall be consolidated with the review of the order.

* * * *