No. 08-911

IN THE
Supreme Court of the United States

AGRON KUCANA,

Petitioner,

v.

ERIC H. HOLDER, JR.,
ATTORNEY GENERAL OF THE UNITED STATES,

Respondent.

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

BRIEF FOR LAW PROFESSORS AS AMICI CURIAE IN SUPPORT OF PETITIONER

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INTEREST OF AMICI CURIAE[1]

Amici curiae listed in the Appendix to this Brief are law professors who teach and write about statutory interpretation and the relationship between the federal courts and administrative agencies. Amici come together in this case because of their shared concern that the decision below is inconsistent with fundamental separation of powers values and risks setting a dangerous precedent with regard to agency control over judicial review of administrative action. Amici all agree that, for the reasons set forth in this brief, the decision below should be reversed.

SUMMARY OF ARGUMENT

The availability of judicial review derives from both a long common law tradition and the structure of our Constitution. Thus, under longstanding principles of statutory interpretation and the strong presumption in favor of judicial reviewability, courts should not construe statutes to eliminate or restrict judicial review absent a clear statement of congressional intent to do so. Like numerous other clear statement requirements, this approach reflects respect for the separation of powers by ensuring that Congress acts in a deliberate and politically accountable manner before limiting courts' jurisdiction or otherwise altering the traditional

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[1] The parties have consented to the filing of this brief. Pursuant to Rule 37.3(a), letters consenting to the filing of this brief are on file with the Clerk of the Court. No counsel for a party authored this brief in whole or in part, and no person, other than amici or their counsel, made a monetary contribution to the preparation or submission of this brief.

roles and powers of the separate branches of government.

Reading the jurisdiction-stripping provision in 8 U.S.C. § 1252(a)(2)(B)(ii) to preclude review over decisions of the Board of Immigration Appeals (BIA) denying motions to reopen is fundamentally inconsistent with these bedrock principles. Congress provided no clear statement that it intended to cut off judicial review of those decisions. To the contrary, Congress took care to provide that judicial review would be foreclosed only when Congress itself "specified" the agency's unreviewable discretion in designated immigration statutes. By overlooking the absence of any clear statement regarding motions to reopen, the decision below eliminated judicial review where Congress expressed no intent to do so, and thus undermined the institutional values that clear statement requirements are intended to preserve.

That the BIA's own implementing regulations declare its decisions on motions to reopen to be within the agency's discretion cannot supply the clear statement that is missing in the statute. It is Congress's intent that must be clear, not the agency's. By reading the statute to bar judicial review where the agency's discretion is "specified" only in its own regulations, and not in the statute itself, the court of appeals effectively delegated to the agency the authority—which the Constitution vests only in Congress—to decide the scope of the federal courts' jurisdiction. That approach undermines the same separation of powers principles that warrant the application of a clear statement requirement in the first place. This Court should therefore reverse the court of appeals' decision and reaffirm the importance of the presumption of reviewability and the need for a clear statement of congressional intent be-

fore assuming that Congress has precluded judicial review of agency action.

ARGUMENT

I. COURTS SHOULD NOT CONSTRUE STATUTES TO ELIMINATE OR RESTRICT JUDICIAL REVIEW UNLESS CONGRESS HAS CLEARLY STATED AN INTENT TO DO SO

A. Clear Statement Requirements Promote Important Separation Of Powers Values And Ensure That Congress Acts Deliberately And Openly When Redefining The Traditional Roles Of The Branches Of Government

It is a well-established practice of statutory construction that courts do not interpret legislation to redefine the traditional roles of or balance of power among the branches of government unless Congress has clearly stated that it intended to do so. That approach ensures that it is Congress, not the courts, that alters the traditional balance. Even where Congress's constitutional authority to act is not in doubt, such that canons of constitutional avoidance are not implicated, courts apply clear statement requirements out of respect for the separation of powers to ensure that Congress did not effect a significant change to the structure of government lightly, through inadvertence, or without transparency.

Courts and commentators have recognized the important institutional values that clear statement requirements serve. For example, when important structural principles are at stake, clear statements indicate that Congress has thought carefully about the effects of its actions. *See Gregory* v. *Ashcroft*, 501 U.S. 452, 461 (1991) ("'In traditionally sensitive areas, … the re-

quirement of clear statement assures that the legislature has in fact faced, and intended to bring into issue, the critical matters involved in the judicial decision.'" (citations omitted)); *see also* William N. Eskridge, Jr. & Philip P. Frickey, *Quasi-Constitutional Law: Clear Statement Rules as Constitutional Lawmaking*, 45 Vand. L. Rev. 593, 631 (1992) (interpretive presumptions and clear statement requirements "can protect important constitutional values against accidental or undeliberated infringement"); Cass R. Sunstein, *After the Rights Revolution: Reconceiving the Regulatory State* 154 (1990) (arguing that interpretive canons encourage deliberate and accountable lawmaking).

Furthermore, requiring a clear statement of legislative intent assures that when Congress tips the balance of power, it does so in a transparent way, so that legislators may be held accountable to voters for their actions. *See* Henry M. Hart, Jr., *The Power of Congress to Limit the Jurisdiction of Federal Courts: An Exercise in Dialectic*, 66 Harv. L. Rev. 1362, 1399 (1953) ("The primary check on Congress is the political check—the votes of the people. If Congress wants to frustrate the judicial check, our constitutional tradition requires that it be made to say so unmistakably, so that the people will understand and the political check can operate."); *see also* Herbert Wechsler, *The Political Safeguards of Federalism: The Role of the States in the Composition and Selection of the National Government*, 54 Colum. L. Rev. 543, 546-547, 558-560 (1954).

Clear statement requirements also preserve the separation of powers by ensuring that it is Congress—not the judiciary—that makes the decision to disrupt the status quo. *See* Stuart Minor Benjamin & Ernest A. Young, *Tennis With the Net Down: Administrative Federalism Without Congress*, 57 Duke L.J. 2111, 2149

(2008) ("[T]he Court's employment of clear statement rules in a variety of contexts reflects the traditional—and in our view plainly correct—notion that *Congress* must make the critical decisions." (emphasis added)); Eskridge & Frickey, 45 Vand. L. Rev. at 631 (presumptions and clear statement rules "are necessary to assure that *the political branches* make the most important policy choices in our democracy" (emphasis added)).

Reflecting these purposes, this Court has looked for clear expressions of legislative intent in a wide variety of contexts to ensure that Congress has acted deliberately and transparently when disturbing traditional institutional roles. For example, the Court has cautioned that Congress cannot alter courts' longstanding prerogatives by "displac[ing] courts' traditional equitable authority absent the 'clearest command.'" *Miller* v. *French*, 530 U.S. 327, 340 (2000) (citation omitted). Similarly, "[o]ut of respect for the separation of powers and the unique constitutional position of the President," the Court has held that "textual silence is not enough to subject the President to the provisions of the [Administrative Procedure Act]," and instead required "an express statement by Congress before assuming it intended the President's performance of his statutory duties to be reviewed for abuse of discretion." *Franklin* v. *Massachusetts*, 505 U.S. 788, 800-801 (1992).[2]

The same caution has marked the Court's approach when the balance of power between the federal and

[2] *See also Nixon* v. *Fitzgerald*, 457 U.S. 731, 748 & n.27 (1982) (declining to find Congress has created a civil action for damages against the President absent a clear statement).

state governments is at stake. *See Gregory*, 501 U.S. at 460 (requiring Congress to speak clearly if it intends to "upset the usual constitutional balance of federal and state powers" by prescribing qualifications for state office; "'it is incumbent upon the federal courts to be certain of Congress' intent before finding that federal law overrides this balance'" (citation omitted)); *Atascadero State Hosp.* v. *Scanlon*, 473 U.S. 234, 238-239, 242-243 (1985) (because abrogation of States' Eleventh Amendment immunity disrupts the "'constitutionally mandated balance of power,'" courts should be "certain of Congress' intent," and "[t]he requirement that Congress unequivocally express this intention in the statutory language ensures such certainty" (citation omitted)); *cf. EEOC* v. *Arabian Am. Oil Co.*, 499 U.S. 244, 248 (1991) (requiring clear expression of congressional intent before applying U.S. law extraterritorially). These cases thus illustrate that clear statement requirements are imposed not to prevent Congress from acting, but rather to ensure that important structural changes do not occur through inadvertence or stealth. *See, e.g.*, *Ex Parte Yerger*, 75 U.S. (8 Wall.) 85, 103 (1869) (declining to "giv[e] to doubtful words the effect of withholding or abridging" the Court's appellate habeas corpus jurisdiction).

B. A Clear Statement Is Similarly Required When Congress Alters Courts' Traditional Role By Eliminating Or Restricting Judicial Review Of Agency Action

The institutional values underlying courts' application of clear statement requirements when other aspects of the separation of powers are at stake apply with equal force when Congress eliminates or restricts judicial review of agency action. There is a long historical tradition of such reviewability. Courts are thus

loathe to assume that Congress intended to disturb that tradition by precluding judicial review without a clear indication of intent to do so.

Courts' power of judicial review of administrative action is rooted in Anglo-American legal history, dating back at least to the seventeenth century. *See* Louis L. Jaffe, *Judicial Control of Administrative Action* 329-334 (1965). The King's judges in England, for example, had authority to issue the prerogative writs to inferior officers, "order[ing] the officer to demonstrate the legality of his order or determination." *Id.* at 153. Reception of this tradition into American law is illustrated by *American School of Magnetic Healing* v. *McAnnulty*, 187 U.S. 94 (1902). There, the Postmaster General barred the plaintiff from conducting business through the mail on the ground that the plaintiff's advertisements were fraudulent. *Id.* at 98-99. The Postmaster General argued that his decision was "administrative" and therefore unreviewable by the court. *See id.* at 108-110. The Court rejected that argument and held that the delegation of authority to the Postmaster General "does not necessarily and always oust the courts of jurisdiction to grant relief to a party aggrieved." *Id.* at 108. Rather, "[t]he acts of all … officers must be justified by some law, and in case an official violates the law … *the courts generally have jurisdiction* to grant relief." *Id.* (emphasis added).

McAnnulty is the foundation in a line of cases that solidified what has become a bedrock principle: judicial review is presumed, unless Congress clearly says otherwise. *See Gegiow* v. *Uhl*, 239 U.S. 3, 8-10 (1915) (holding that immigration commissioner's decision reflected a misinterpretation of the law and noting that "[t]he courts are not forbidden *by the statute* to consider whether the reasons, when they are given, agree with

the requirements of the act" (emphasis added)); *Dismuke* v. *United States*, 297 U.S. 167, 172 (1936) (interpreting the Civil Service Retirement Act and holding that "*in the absence of compelling language*, resort to the courts to assert a right which the statute creates will be deemed to be curtailed only so far as authority to decide is given to the administrative officer" (emphasis added)). *See generally* Jaffe 339 (discussing *McAnnulty*).

From this common law tradition emerged a presumption of judicial review that has become a critical element of the modern administrative state. Thus, it is now well settled that there is a "strong presumption that Congress intends judicial review of administrative action." *Bowen* v. *Michigan Acad. of Family Physicians*, 476 U.S. 667, 670 (1986). By virtue of that presumption, judicial review is available unless there is "'clear and convincing evidence' of a contrary legislative intent." *Abbott Labs.* v. *Gardner*, 387 U.S. 136, 141 (1967) (quoting *Rusk* v. *Cort*, 369 U.S. 367, 379-380 (1962)); *see also Gutierrez de Martinez* v. *Lamagno*, 515 U.S. 417, 424 (1995) ("[W]e have stated time and again that judicial review of executive action will not be cut off unless there is persuasive reason to believe that such was the purpose of Congress." (internal quotation marks omitted)).[3]

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[3] *See also Citizens to Preserve Overton Park, Inc.* v. *Volpe*, 401 U.S. 402, 410 (1971) (petitioners were entitled to judicial review where "there [was] no indication that Congress sought to prohibit judicial review and there [was] most certainly no 'showing of "clear and convincing evidence" of a … legislative intent' to restrict access to judicial review" (citations omitted)). Consistent with the presumption, the Court has interpreted the Administrative Procedure Act's exception to reviewability for agency action

This tradition of judicial review is reflected in the constitutional structure, as well. *See Marbury* v. *Madison*, 5 U.S. (1 Cranch) 137, 173-180 (1803). While the presumption of reviewability is often invoked to avoid due process or other concerns that might arise if individual litigants were denied any judicial review of constitutional claims, courts' reluctance to find that Congress has eliminated or restricted judicial review absent a clear indication of intent also stems from and reinforces the constitutional separation of powers.[4] The Constitution's text reflects the separation of powers concerns that inhere in questions concerning the availability of judicial review in the federal courts. The Constitution preserves judicial independence by placing the original jurisdiction of the Supreme Court outside of Congress's control, U.S. Const. art. III, § 2, cl. 2, by providing federal judges with life tenure and protection against salary diminution, *id.* § 1, and by limiting Congress's power to suspend the writ of habeas corpus, *id.* art. I, § 9, cl. 2, while simultaneously giving power otherwise to shape courts' jurisdiction to the most politically accountable branch, *see id.* art. I, § 8, cl. 9; *id.* art. III, §§ 1, 2.

Thus, in the face of the developing administrative state, the presumption played an important role in preserving the institutional prerogatives of the courts and

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"committed to agency discretion" to be a "very narrow exception." *Id.* (discussing 5 U.S.C. § 701) (internal quotation marks omitted).

[4] The presumption of reviewability thus evolved without discussion of constitutional avoidance concepts and, indeed, long predated Justice Brandeis's classic statement of that canon in *Ashwander* v. *TVA*, 297 U.S. 288, 345-348 (1936) (Brandeis, J., concurring); *see also infra* p. 22.

maintaining agencies' legitimacy. *See Stark* v. *Wickard*, 321 U.S. 288, 310 (1944) ("The responsibility of determining the limits of statutory grants of authority … is a judicial function[.]"); *see also Nixon* v. *Fitzgerald*, 457 U.S. 731, 761 (1982) (Burger, C.J., concurring) ("Even prior to the adoption of our Constitution, as well as after, judicial review of legislative action was recognized in some instances as necessary to maintain the proper checks and balances."); Stephen I. Vladeck, Boumediene*'s Quiet Theory: Access to Courts and the Separation of Powers*, 84 Notre Dame L. Rev. 2107, 2128 (forthcoming 2009) (courts' concern in developing the presumption of reviewability "was *not* motivated by a perceived need to protect an individual litigant's right to have an Article III court provide a definitive answer to a question … but by the possibility that the burgeoning administrative state would frustrate the courts' power to have the *final* say").[5]

The presumption of reviewability has become so ingrained in our governmental system that Congress is assumed to account for it in legislating. *See McNary* v. *Haitian Refugee Ctr. Inc.*, 498 U.S. 479, 496 (1991) ("It is presumable that Congress legislates with knowledge of our … well-settled presumption favoring interpretations of statutes that allow judicial review of administrative action[.]"); Daniel J. Meltzer, *Congress, Courts*,

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[5] *See also* Sunstein 143 ("This basic principle [of judicial review] assumes special importance in light of the awkward constitutional position of the administrative agency. Broad delegations of power to regulatory agencies, questionable in light of the grant of legislative power to Congress in Article I of the Constitution, have been allowed largely on the assumption that courts would be available to ensure agency fidelity to whatever statutory directives have been issued.").

and Constitutional Remedies, 86 Geo. L.J. 2537, 2586 (1998) ("[I]f the legislature has been told that judicial review will not be precluded absent the clearest statement, the absence of that clear statement is inextricably part of 'conventional' statutory meaning."). Thus, when a statute is "reasonably susceptible to divergent interpretation, [courts] adopt the reading that accords with traditional understandings and basic principles: that executive determinations generally are subject to judicial review." *Gutierrez de Martinez*, 515 U.S. at 434.

Accordingly, even assuming that Congress may constitutionally foreclose judicial review of agency action in certain circumstances, to maintain the separation of powers, courts should not construe statutes to have that effect unless it is clear that Congress has addressed the issue in an open and deliberate way. *See* Ernest A. Young, *Constitutional Avoidance, Resistance Norms, and the Preservation of Judicial Review*, 78 Tex. L. Rev. 1549, 1611 (2000) ("Requiring a clear statement of Congress's intent to restrict federal jurisdiction effectively flags those provisions of a legislative proposal that implicate Article III values, thereby increasing the likelihood that the political process will actually focus on the structural principles at stake."); *see also id.* at 1605-1613; Erwin Chemerinsky, *A Framework for Analyzing the Constitutionality of Restrictions on Federal Court Jurisdiction in Immigration Cases*, 29 U. Mem. L. Rev. 295, 316 (1999) ("The ability of Congress to restrict federal court jurisdiction raises basic constitutional issues in terms of separation of powers[.]"); Richard H. Fallon, Jr., *Of Legislative Courts, Administrative Agencies, and Article III*, 101 Harv. L. Rev. 915, 939 (1988) (describing separation of powers interests served by ensuring appellate review

by an Article III court of decisions of non-Article III tribunals). Applying that rule here, the Court should not interpret the Immigration and Nationality Act (INA) to foreclose judicial review of BIA decisions unless the statute reflects Congress's clear intent to so provide.[6]

II. THE SEVENTH CIRCUIT'S DECISION CONTRAVENED THESE CLEAR STATEMENT REQUIREMENTS AND UNDERMINED THE INSTITUTIONAL VALUES THOSE REQUIREMENTS ARE INTENDED TO PRESERVE

A. There Is No Clear Statement In The Statute That Congress Intended To Preclude Judicial Review Of Decisions Denying Reopening

By interpreting the INA to preclude judicial review of BIA denials of motions to reopen, the Seventh Circuit abrogated judicial review where there was no clear statement that Congress meant to bring about that result. The text and legislative history of 8 U.S.C. § 1252(a)(2)(B)(ii) demonstrate that Congress intended "[d]enials of discretionary relief" by the Attorney General or the Secretary of Homeland Security to be insulated from judicial review only where Congress itself has conferred discretion in the statute. The statute thus provides no clear statement of intent to bar judicial review in cases where, as here, the BIA's action is taken pursuant to discretion conferred only by the agency's own regulations. By holding that the statute nonetheless precluded judicial review, the decision below failed to give effect to the institutional values that

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[6] *See* Pet. App. 15a (Ripple, J., concurring *dubitante*) ("[H]ad Congress intended to deprive [the] court of jurisdiction of specific substantive decisions, it would have done so explicitly.").

underlie the clear statement requirement and instead opened the door to the restriction or elimination of judicial review where Congress has not squarely faced the issue. *Cf. Gregory*, 501 U.S. at 461.

"[T]he starting point" in interpreting § 1252(a)(2)(B)(ii) is its text: where "the words of the statute are unambiguous, the judicial inquiry is complete." *Desert Palace, Inc.* v. *Costa*, 539 U.S. 90, 98 (2003) (internal quotation marks omitted); *see also Barnhart* v. *Sigmon Coal Co.*, 534 U.S. 438, 450 (2002). Here, the plain language of the statute indicates that Congress intended to foreclose judicial review over discretionary determinations only when the Board's discretion is "specified" in the statute. 8 U.S.C. § 1252(a)(2)(B)(ii).[7] To "[s]pecify" means "[t]o mention specifically; to state in full and explicit terms; … to tell

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[7] The provision states:

> (B) Denials of discretionary relief
>
> Notwithstanding any other provision of law (statutory or nonstatutory), … 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.

8 U.S.C. § 1252(a)(2).

or state precisely." *Black's Law Dictionary* 1399 (6th ed. 1990). Congress did not address BIA discretion over motions to reopen at all, much less "specif[y]" it in the statute. Rather, the BIA's discretion with respect to motions to reopen is established only in its implementing regulations. *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 statutory provision concerning the Board's authority to reopen proceedings, 8 U.S.C. § 1229a(c)(7), does not refer to or confer discretion on the Attorney General in connection with motions to reopen, nor does the statute discuss the agency's role in any way. It merely imposes certain procedural limitations on an immigrant's ability to seek reopening. *See id.* (discussing timing and content requirements for motions to reopen).[8] If such broad lan-

[8] The provision states:

> (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.

guage were sufficient to "specif[y]" the Board's discretion and thus bar judicial review, then "the effects of that jurisdictional bar would be sweeping indeed." *Soltane* v. *DOJ*, 381 F.3d 143, 147-148 (3d Cir. 2004) (Alito, J.) (construing 8 U.S.C. § 1153(b)(4)). That result would thus render the phrase "specified in this subchapter" superfluous and would be fundamentally inconsistent with the separation of powers principles underlying the clear statement requirement. *See, e.g.*, *Zhao* v. *Gonzales*, 404 F.3d 295, 303 (5th Cir. 2005).

The legislative history of § 1252(a)(2)(B)(ii) also fails to supply the requisite clear indication of congressional intent that is missing in the statutory text. The

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(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—[under specified conditions].

8 U.S.C. § 1229a(c) (footnote omitted).

legislative history provides no indication that Congress intended to foreclose judicial review when agency discretion is conferred only by regulation. The conference report accompanying the bill that was ultimately enacted as § 1252(a)(2)(B) contains no explanatory remarks about its meaning; it merely restates the statutory text. H.R. Conf. Rep. No. 104-863, at 621-622 (1996).[9]

Nor does the provision of jurisdiction in § 1252(a)(2)(D) supply the necessary clear statement or cure the problems created by the Seventh Circuit's approach.[10] That section does not govern the scope of § 1252(a)(2)(B)(ii). And while that provision arguably lessens any concern that the jurisdiction-stripping statute is unconstitutional (by allowing judicial review of constitutional claims and questions of law that arise

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[9] The enacted bill incorporated language from another bill, H.R. 2202, which was accompanied by its own separate conference report. H.R. Conf. Rep. No. 104-828 (1996). That report similarly offers no indication that Congress intended to permit the BIA to enact regulations shielding its decisions from judicial review. That report also merely parroted the bill's text. *See id.* at 219 (explaining that § 1252(a)(2)(B)(ii) "bars judicial review … of any decision or action by the Attorney General which is specified to be in the discretion of the Attorney General").

[10] The provision states:

> (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.

8 U.S.C. § 1252(a)(2).

in the context of discretionary agency actions), it does not remove the need for a clear statement of what agency actions Congress intended to cover within the scope of § 1252(a)(2)(B)(ii). The clear statement requirement operates to preserve the separation of powers, the traditional roles of the branches of government, and the institutional values of accountability and deliberation. Even if Congress is not pushing the bounds of its constitutional authority by limiting courts' jurisdiction to review BIA decisions, separation of powers principles still call for a clear statement that Congress meant to exercise its authority to cut off judicial review. *See, e.g.*, *Gutierrez de Martinez*, 515 U.S. at 434; *Atascadero State Hosp.*, 473 U.S. at 242-243.

Thus, there is no clear indication that Congress intended to foreclose judicial review where the agency's discretion is "specified" only in the agency's regulations. Adhering closely to the statutory requirement that agency discretion must be "specified in the subchapter" to preclude judicial review is not only faithful to the statute's plain language, but also reinforces the institutional values underlying the clear statement requirement by ensuring that Congress itself has clearly intended to confer unreviewable discretion and has done so in a deliberate and politically accountable fashion. In holding that the jurisdiction-stripping provision applies even where Congress has not "specified" its intent in the statute, the Seventh Circuit violated the clear statement requirement and its animating principles.

B. The Seventh Circuit's Decision Further Undermined The Separation Of Powers By Looking To The Executive Agency To Provide The Necessary Clear Statement

As demonstrated, the court of appeals' decision to apply the jurisdiction-stripping provision in circumstances where Congress did not clearly intend it to apply was fundamentally inconsistent with important separation of powers principles. Yet the Seventh Circuit did further violence to those principles by looking instead to an administrative agency to supply the requisite clear statement—even where the agency itself did not purport to address the availability of judicial review in an open and deliberate fashion. *See* Pet. App. 4a. In doing so, the court effectively reallocated to the Executive an authority that the Constitution confers only on Congress.

The Constitution vests in Congress, not the Executive, the power to establish and define the jurisdiction of the lower courts. U.S. Const. art III, § 1; *see also id.* art. I, § 8 (giving Congress authority "[t]o constitute tribunals inferior to the Supreme Court," and to "make all Laws which shall be necessary and proper for carrying into Execution the foregoing Powers"). It is unclear whether the Constitution would permit Congress to delegate to the Executive its authority to make rules defining the lower courts' jurisdiction. Even assuming Congress could do so, however, there is no indication here that Congress intended to take such action or provided any principle to guide the agency's exercise of that authority. "[W]hen Congress confers decisionmaking authority upon agencies *Congress* must 'lay down by legislative act an intelligible principle to which the person or body authorized to [act] is directed to conform.'" *Whitman* v. *American Trucking Ass'ns*, 531

U.S. 457, 472 (2001) (quoting *J.W. Hampton, Jr. & Co.* v. *United States*, 276 U.S. 394, 409 (1928)). "The intelligible-principle rule seeks to enforce the understanding that Congress may not delegate the power to make laws and so may delegate no more than the authority to make policies and rules that implement its statutes." *Loving* v. *United States*, 517 U.S. 748, 771 (1996).

Just as there are outer limits on Congress's authority to delegate its lawmaking power, so there are limits on its authority to delegate its power to define courts' jurisdiction. If that authority can properly be delegated to an agency, such a delegation must at least be made by Congress itself and must be appropriately limited. Courts are thus reluctant to find such a delegation or to sanction attempts by agencies to arrogate to themselves the authority to determine courts' jurisdiction—a reluctance that stems from the same institutional and separation of powers values that underlie the use of clear statement requirements. *See, e.g.*, *Nehmer* v. *Department of Veterans Affairs*, 494 F.3d 846, 860-861 (9th Cir. 2007) (agency cannot "remove itself from [a] court's authority and ignore its orders simply by enshrining its interpretation of a consent decree in a regulation"; allowing agency to do so "would raise a most troubling question of separation of powers"); *Carlyle Towers Condo. Ass'n* v. *FDIC*, 170 F.3d 301, 310 (2d Cir. 1999) ("[I]t is 'axiomatic' that agencies can neither grant nor curtail federal court jurisdiction." (quoting *Miller* v. *FCC*, 66 F.3d 1140, 1144 (11th Cir. 1995))); *United States* v. *Mitchell*, 18 F.3d 1355, 1360 n.7 (7th Cir. 1994) (noting that Congress's power to define federal courts jurisdiction is "sensitive and central to our Anglo-American legal tradition" and questioning whether Congress may "delegate such a core legislative

function as its control over federal court jurisdiction to any agency or commission").

Where such a delegation is made, it must at a minimum be carefully circumscribed to ensure that the ultimate jurisdictional scheme is determined by Congress, not the agency or official exercising that delegated authority. *See, e.g.*, *Jones* v. *United States*, 137 U.S. 202 (1890) (federal jurisdiction extended to guano island upon Secretary of State's designation of such island as "appertaining to the United States," but only under specified statutory conditions); *United States* v. *Dryden*, 563 F.3d 1168, 1171 (10th Cir. 2009) (holding there was no unconstitutional delegation to agency of Congress's power to define lower courts' jurisdiction when district court relied on Sentencing Commission policy statement regarding jurisdiction because statement was "merely a paraphrase of Congress's own language," not the agency's opinion); *Owens* v. *Republic of Sudan*, 531 F.3d 884, 888-893 (D.C. Cir. 2008) (rejecting non-delegation challenge to statute predicating federal court jurisdiction on Executive Branch factfinding).[11]

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[11] *Cf. Morrison* v. *Olson*, 487 U.S. 654, 693-696 (1988) (delegation to judicial branch of authority to appoint Independent Counsel did not violate separation of powers in part because the judiciary's appointment power was limited to requests from the Attorney General, and although judicial branch defined scope of Independent Counsel's jurisdiction, jurisdiction was limited to factual circumstances of Attorney General's request); *United States* v. *Nixon*, 418 U.S. 683, 704 (1974) ("[T]he 'judicial Power of the United States' vested in the federal courts by Art. III, § 1, of the Constitution can no more be shared with the Executive Branch than the Chief Executive, for example, can share with the Judiciary the veto power, or the Congress share with the Judiciary the power to override a Presidential veto. Any other conclusion would be contrary to the basic concept of separation of powers and the

Here, there is no indication that Congress meant to delegate to the BIA its authority to decide when BIA decisions would be immune from judicial review. Yet by looking to the Board's regulations to determine whether the jurisdiction-stripping provision should apply, the Seventh Circuit's decision effectively delegated Congress's authority to the agency. In doing so, the Seventh Circuit not only ignored the institutional values that require Congress to speak clearly when it intends to eliminate or restrict judicial review, but also effectively reallocated Congress's control over the lower courts' jurisdiction to the agency. Even where Congress clearly manifests a deliberate intent to vest the constitutional authority of one branch in another, such a reallocation may offend the separation of powers. *Cf. Bowsher* v. *Synar*, 478 U.S. 714, 726-727, 733-734 (1986) (unconstitutional for Congress to reserve sole power to remove Comptroller General because it gave Congress control over execution of laws); *INS* v. *Chadha*, 462 U.S. 919, 956-959 (1983) (unconstitutional for Congress to circumvent bicameralism and presentment requirement and presidential veto power through statute permitting one-house congressional veto of executive action); *Buckley* v. *Valeo*, 424 U.S. 1, 121-124, 129 (1976) (unconstitutional for Congress to vest in itself the power to appoint officers of the United States). The decision below yields an even greater injury to separation of powers concerns because it allows a self-interested agency to increase its own power at the expense of and with no overt sanction by Congress.

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checks and balances that flow from the scheme of a tripartite government." (citing *The Federalist* No. 47, at 313 (James Madison) (S. Mittell ed., 1938))).

Permitting the BIA by regulation to trigger the application of the jurisdiction-stripping provision is particularly problematic because a central purpose of the longstanding presumption of judicial reviewability is precisely to ensure that the Executive does not act with unchecked discretion. Thus, as long ago as *Rooke's Case*, the court held that a property owner could bring a replevin action against the commission of sewers to recover property taken in satisfaction of an assessment for drainage repairs, notwithstanding the commission's power under its royal charter to act according "to their discretions." 77 Eng. Rep. 209, 210 (C.P. 1597) (Coke, J.). As Sir Edward Coke famously noted, the commission's "proceedings ought to be limited and bound with the rule of reason and law … and not … according to their wills and private affections." *Id.*; *see also FCC* v. *Fox Television Stations, Inc.*, 129 S. Ct. 1800, 1830 (2009) (Breyer, J., dissenting) ("American courts have followed a venerable legal tradition, stretching back at least to the days of Sir Edward Coke and the draining of the English fens."). In more recent times, this Court likewise has consistently invoked the presumption to favor judicial review of executive agency actions. *E.g.*, *Gutierrez de Martinez*, 515 U.S. at 424; *Traynor* v. *Turnage*, 485 U.S. 535, 542 (1988); *Bowen*, 476 U.S. at 670; *Abbott Labs.*, 387 U.S. at 140-141.

Moreover, the presumption of review over agency decisions is also intended in part to encourage sound administrative decision-making and to promote agency legitimacy. *See* Jaffe 323 ("From the point of view of an agency, the question of the legitimacy of its action is so secondary to that of the positive solution of a problem. It is for this reason that we, in common with nearly all of the Western countries, have concluded that the

maintenance of legitimacy requires a judicial body independent of the active administration."); Fallon, 101 Harv. L. Rev. at 942 ("Because of agencies' hybrid and problematic status in our constitutional system, Congress frequently provides for judicial review in part to secure an imprimatur of legitimacy for administrative action."); *see also* Sunstein 154. Requiring a clear statement of congressional intent before interpreting a statute to foreclose judicial review of agency action thus not only ensures that difficult decisions are made by politically accountable bodies, but also preserves the agency's status as a constitutionally legitimate actor.

These salutary effects of judicial review of encouraging sound decision-making and promoting agency legitimacy are of particular importance in the context in which this case arose. The BIA's internal deliberative process has been widely criticized as failing to promote the institutional values of accountability, deliberation, and agency legitimacy that the clear statement requirement and presumption of reviewability are intended to serve. *See, e.g.*, *Kadia* v. *Gonzales*, 501 F.3d 817, 821 (7th Cir. 2007) ("Repeated egregious failures of the Immigration Court and the Board to exercise care commensurate with the stakes in an asylum case can be understood, but not excused, as consequences of a crushing workload[.]"); *Benslimane* v. *Gonzales*, 430 F.3d 828, 829-830 (7th Cir. 2005) (collecting statements of "severe" judicial criticism of the BIA; "adjudication of these cases … has fallen below the minimum standards of legal justice").[12] Looking to the agency for a

[12] *See also Wang* v. *Attorney General*, 423 F.3d 260, 267-268 (3d Cir. 2005); *Recinos de Leon* v. *Gonzales*, 400 F.3d 1185, 1193 (9th Cir. 2005). Indeed, some immigration judges have acknowledged that since regulatory changes in 2002 increased the BIA's

statement of intent to preclude judicial review where Congress has supplied none thus violates precisely the separation of powers principles that warrant application of a clear statement requirement in the first place.

The Seventh Circuit's decision is even more problematic from this separation of powers perspective because even if the agency had been delegated authority to restrict judicial review, there is in fact no indication that it meant to exercise such authority here. The BIA's regulation says only that the decision to reopen is within the Board's discretion. 8 C.F.R. § 1003.2(a). It does not address judicial review and thus provides neither notice that judicial review will be affected nor any avenue for political accountability. Indeed, nothing in the rulemaking process indicates that the BIA intended to alter the traditional balance of power between the branches of government by depriving the federal courts of jurisdiction. *See, e.g.*, 61 Fed. Reg. 32,924, 32,924 (June 26, 1996) (describing the purpose of the regulation as centralizing the appeals and motions procedures and establishing time and number limitations on motions, but omitting any mention of judicial review).[13] The Seventh Circuit's decision below thus presents a problem of double inadvertence by finding judicial review to be precluded in the absence not only

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reliance on affirmances without opinion, immigration judges have not had the resources or training needed to fulfill their new responsibility to provide thorough and fully reasoned written opinions. Michele Benedetto, *Crisis on the Immigration Bench*, 73 Brook. L. Rev. 467, 479-480 (2008).

[13] *See also* 67 Fed. Reg. 54,878, 54,904 (Aug. 26, 2002); 64 Fed. Reg. 56,135, 56,142 (Oct. 18, 1999); 62 Fed. Reg. 10,312, 10,330-10,331 (Mar. 6, 1997); 61 Fed. Reg. 18,900, 18,904-18,905 (Apr. 29, 1996).

of a clear statement from Congress, but even from the agency itself.

Nor are the harmful effects of the decision below limited to BIA decisions on motions to reopen. The BIA frequently acts pursuant to discretion that is conferred by its own regulations, not by statute. *See*, *e.g.*, 8 C.F.R. § 1003.2(a) (conferring discretion in deciding motions to reconsider); Pet. App. 14a (Ripple, J., concurring *dubitante*) (discussing the extension of the Seventh Circuit's holding to motions to reconsider); *see also* Pet. Br. 38-39 (discussing other examples). The Seventh Circuit's analysis would treat these regulations as jurisdiction-stripping actions, again without any evidence of intent to exercise such authority by the agency in question.

The institutional values underlying the clear statement rule are thus directly and repeatedly implicated by the Seventh Circuit's decision in this case. That decision should be reversed to avoid a result that disturbs the traditional roles of the separate branches of government without any clear statement that Congress intended such a result. In the absence of evidence of clear intent by Congress to preclude judicial review, it further violates separation of powers principles to look instead to an administrative agency to supply the requisite clear statement. And the agency in any event did not do so in this case, where it never squarely faced the question of judicial review in crafting the regulation on which the Seventh Circuit's analysis hinges. It is thus particularly important to reinforce the institutional values of deliberation and accountability that the clear statement requirement is meant to promote where neither Congress nor the agency in question has evidenced clear intent to pre-

clude judicial review of BIA denials of motions to reopen.

CONCLUSION

For the foregoing reasons, the decision below should be reversed.

Respectfully submitted.

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