No. 08-911

In the Supreme Court of the United States

AGRON KUCANA, PETITIONER

v.

ERIC H. HOLDER, JR., ATTORNEY GENERAL

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

BRIEF FOR THE RESPONDENT SUPPORTING PETITIONER

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QUESTION PRESENTED

Whether the court of appeals erred in holding that under 8 U.S.C. 1252(a)(2)(B)(ii) it lacked jurisdiction to review the Board of Immigration Appeals' denial of petitioner's motion to reopen his immigration proceedings.

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

Cases:

Cases—Continued Page

Cases—Continued Page

Cases—Continued Page

Treaty, statutes, regulations and rules:

Statutes, regulations and rule—Continued Page

Statutes, regulations and rule—Continued Page

Statutes, regulations and rule—Continued Page

Miscellaneous—Continued Page

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-21a) is reported at 533 F.3d 534. The decision of the Board of Immigration Appeals denying petitioner's motion to reopen (Pet. App. 22a-26a) is unreported.

JURISDICTION

The judgment of the court of appeals was entered on July 7, 2008. The petition for a writ of certiorari was filed on October 3, 2008, and was granted on April 27, 2009. The jurisdiction of this Court rests on 28 U.S.C. 1254(1).

STATUTORY PROVISIONS INVOLVED

The relevant statutory provisions are reproduced in an appendix to this brief. App., *infra*, 1a-22a.

STATEMENT

Petitioner is a native and citizen of Albania who was admitted to the United States as a visitor and has remained here well past the time allowed. Petitioner failed to appear for his removal hearing and was ordered removed in absentia. He filed a motion to reopen seeking to excuse his absence and rescind his removal order. That motion was denied. Four years later, petitioner filed a second motion to reopen his removal proceedings, this time contending that changed political conditions in Albania made him eligible for relief from removal. The Board of Immigration Appeals (Board) denied the motion on the ground that petitioner had failed to satisfy his heavy burden of justifying reopening. The court of appeals dismissed petitioner's challenge to that ruling, holding that it lacked jurisdiction to review the denial of a motion to reopen under 8 U.S.C. 1252(a)(2)(B)(ii). It is the position of the government that the court of appeals erred in holding that it was without jurisdiction to review the Board's denial of the motion to reopen. Judicial review of such an order is not precluded, but the order is reviewable only for abuse of discretion.

1. a. In 1996, Congress amended the Immigration and Nationality Act (INA or Act), 8 U.S.C. 1101 *et seq.*, to expedite the removal of criminal and other illegal aliens from the United States. See Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (IIRIRA), Pub. L. No. 104-208, Div. C, 110 Stat. 3009-546. As relevant here, Congress amended the INA to limit judicial review of certain discretionary decisions of the Attorney General and the Secretary of Homeland Security (Secretary). As amended, the relevant section of the INA now provides that no court shall have jurisdiction to review any

> 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)(B)(ii). Section 1158(a) concerns the discretionary granting of asylum. See 8 U.S.C. 1158(a). The phrase "this subchapter" refers to Title 8 of the United States Code, Chapter 12, Subchapter II, which is codified at 8 U.S.C. 1151-1381 and pertains broadly to immigration matters. See *Van Dinh* v. *Reno*, 197 F.3d 427, 433 (10th Cir. 1999).

In 2005, Congress amended the INA to include the following provision:

> 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)(D), as added by the REAL ID Act of 2005, Pub. L. No. 109-13, Div. B, § 106(a)(1)(A)(iii), 119 Stat. 310.[1]

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[1] Section 1252, as enacted by IIRIRA and amended by the REAL ID Act, applies to petitioner's petition for review of the denial of his second motion to reopen. As originally enacted, IIRIRA provided that, in the case of an alien who was in deportation proceedings as of IIRIRA's effective date (April 1, 1997), the amendments made by IIRIRA shall not apply and "the proceedings (including judicial review thereof) shall continue to be conducted without regard to such amendments." IIRIRA § 309(c)(1), 110 Stat. 3009-625. Judicial review of final orders of deportation in such cases thus was to be governed by former Section

b. If an alien fails to appear for his removal proceeding, he "shall be ordered removed in absentia" if the government establishes that he was provided with written notice of the proceeding and that he is removable. 8 U.S.C. 1229a(b)(5)(A). An alien who has been ordered removed in absentia may file a motion to reopen with the immigration judge (IJ) to rescind that order. 8 U.S.C. 1229a(b)(5)(C); 8 C.F.R. 1003.23(b)(4); see *In re Guzman,* 22 I. & N. Dec. 722, 723 (B.I.A. 1999) (Board lacks jurisdiction to review an in absentia removal order unless the alien first files a motion to reopen to rescind the order with the IJ).

To prevail on a motion to reopen to rescind an in absentia removal order, the alien must demonstrate either that he failed to receive adequate notice of his

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106 of the INA, 8 U.S.C. 1105a (1994), subject to certain transitional changes in Section 106 that were enacted in Section 309(c)(4) of IIRIRA, 110 Stat. 3009-626. Petitioner was in deportation proceedings prior to the effective date of IIRIRA, but he did not seek judicial review of the denial of his second motion to reopen until 2007. See p. 11, *infra*. In the REAL ID Act of 2005, Congress provided that all petitions for review filed after that Act's effective date would be governed by Section 1252, even if they were formerly governed by IIRIRA's transitional rules. See REAL ID Act § 106(d), 119 Stat. 311 ("A petition for review filed under former section 106(a) of the Immigration and Nationality Act * * * shall be treated as if it had been filed as a petition for review under section 242 of the Immigration and Nationality Act (8 U.S.C. 1252), as amended by this section," and "such petition for review shall be the sole and exclusive means for judicial review of an order of deportation or exclusion."); see also, *e.g.*, *Onikoyi* v. *Gonzales*, 454 F.3d 1, 3 (1st Cir. 2006) ("[U]nder the REAL ID Act, transitional rules cases are now subject to the jurisdictional rules currently codified in 8 U.S.C. § 1252."). Because petitioner sought judicial review of the Board's denial of his second motion to reopen in 2007, his case is subject to amended Section 1252, which includes the jurisdictional bar at issue here, 8 U.S.C. 1252(a)(2)(B)(ii).

removal hearing or that "exceptional circumstances" justify reopening. 8 U.S.C. 1229a(b)(5)(C); 8 C.F.R. 1003.23(b)(4)(iii)(A). "Exceptional circumstances" are limited to 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," that are "beyond the control of the alien." 8 U.S.C. 1229a(e)(1). If the motion to reopen is based on "exceptional circumstances," it must be filed within 180 days of the removal order. 8 U.S.C. 1229a(b)(5)(C)(i); 8 C.F.R. 1003.23(b)(4)(iii)(A)(*1*).[2]

c. The Act separately addresses motions to reopen removal proceedings for any reason other than to rescind an in absentia removal order. See 8 U.S.C. 1229a(c)(7). Such a motion is to be filed with the IJ or the Board, depending upon which was the last to render a decision in the matter. 8 C.F.R. 1003.2(c) (Board), 1003.23 (IJ). The alien must "state the new facts that will be proven at a hearing to be held if the motion is granted" and must support the motion "by affidavits or other evidentiary material." 8 U.S.C. 1229a(c)(7)(B); 8 C.F.R. 1003.2(c)(1), 1003.23(b)(3). Where the motion to reopen is filed with the Board, it "shall not be granted unless it appears to the Board that evidence sought to be offered is material and was not available and could not have been discovered or pre-

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[2] Section 1229a(b)(5), discussed in the text, was enacted as part of IIRIRA. See IIRIRA § 304(a)(3), 110 Stat. 3009-590 to 3009-591. The INA contained a parallel provision prior to the enactment of IIRIRA. See 8 U.S.C. 1252b(c) (1994).

sented at the former hearing." 8 C.F.R. 1003.2(c)(1); see also 8 C.F.R. 1003.23(b)(3) (IJ).[3]

An alien may file only one such motion to reopen, and it must be filed within 90 days of entry of the final order of removal. 8 U.S.C. 1229a(c)(7)(A) and (C)(i); 8 C.F.R. 1003.2(c)(2), 1003.23(b)(1). Those limitations do not apply, however, if the motion to reopen alleges that asylum or withholding of removal is appropriate based on "changed country conditions arising in the country of nationality or in the country to which removal has been ordered" since the time of the removal order. 8 U.S.C. 1229a(c)(7)(C)(ii); see 8 C.F.R. 1003.2(c)(3)(ii), 1003.23(b)(4).[4]

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[3] IJs and the Board adjudicate motions to reopen pursuant to authority delegated by the Attorney General. See 8 U.S.C. 1103(g)(2); 8 C.F.R. 1003.1.

[4] This case was decided by the court of appeals on the premise that 8 U.S.C. 1229a(c)(7) applied to petitioner's second motion to reopen. See Pet. App. 5a. Petitioner did not challenge that premise in his certiorari petition, see Pet. 9 (relying on Section 1229a(c)(7)), and the government affirmatively proceeded on that premise in its brief in opposition, see Br. in Opp. 2-3, 12. It can be argued that Section 1229a(c)(7) did not apply to petitioner's second motion to reopen, because that provision was added in IIRIRA, see IIRIRA § 304(a)(3), 110 Stat. 3009-593 (enacting 8 U.S.C. 1229a(c)(6) (Supp. II 1996) (current version at 8 U.S.C. 1229a(c)(7)); petitioner was in deportation proceedings as of the effective date of IIRIRA; and IIRIRA provided that its new rules shall not apply to an alien who was in deportation proceedings on its effective date, IIRIRA § 309(c)(1), 110 Stat. 3009-625. See note 1, *supra*. At the same time, there is a reasonable argument that petitioner's second motion to reopen, which was filed in 2006, was covered by Section 1229a(c)(7), on the theory that the filing of a motion to reopen was not part of the same proceedings that culminated in the final order of deportation and therefore was subject to the amendments made by IIRIRA. See IIRIRA § 309(c)(1), 110 Stat. 3009-625 (provid-

Motions to reopen removal proceedings are "disfavored" because "[t]here is a strong public interest in bringing litigation to a close as promptly as is consistent with the interest in giving the adversaries a fair opportunity to develop and present their * * * cases." *INS* v. *Abudu*, 485 U.S. 94, 107 (1988). That interest is especially strong in the immigration context, where "every delay works to the advantage of the deportable alien who wishes merely to remain in the United States." *INS* v. *Doherty*, 502 U.S. 314, 323 (1992). Accordingly, the movant must "meet[] a 'heavy burden' and present[] evidence of such a nature that the Board is satisfied that if proceedings before the immigration judge were reopened, with all the attendant delays, the new evidence offered would likely change the result in the case." *In re Coelho*, 20 I. & N. Dec. 464, 473 (B.I.A. 1992); *Abudu*, 485 U.S. at 110. The Board has broad discretion in adju-

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ing that "the proceedings (including judicial review thereof) shall continue to be conducted without regard to [IIRIRA's] amendments").

If Section 1229a(c)(7) did not apply to petitioner's second motion to reopen, petitioner still would be subject to the procedural requirements discussed in the text, because they were contained in regulations that existed prior to IIRIRA. See 61 Fed. Reg. 18,900, 18,904-18,905 (1996) (8 C.F.R. 3.2(c) (1997) (current version at 8 C.F.R. 1003.2(c)); see also pp. 32-33, *infra*. But if Section 1229a(c)(7) was inapplicable, it would undermine the argument that Section 1252(a)(2)(B)(ii) precludes judicial review of the denial of petitioner's second motion to reopen, because the court of appeals relied on Section 1229a(c)(7) in concluding that the INA itself vests the Attorney General with discretionary authority to decide motions to reopen. See Pet. App. 5a.

Because the court below relied on Section 1229a(c)(7), because petitioner did not challenge the court's decision on that ground, because the government did not raise the issue in its brief in opposition, and because the issue is not one going to the jurisdiction of this Court, we suggest that the Court assume for purposes of its decision that Section 1229a(c)(7) does apply in this case. See Sup. Ct. R. 15.2.

dicating a motion to reopen, and it may "deny a motion to reopen even if the party moving has made out a *prima facie* case for relief." 8 C.F.R. 1003.2(a); see *Doherty*, 502 U.S. at 323; *Abudu*, 485 U.S. at 110; *INS* v. *Phinpathya*, 464 U.S. 183, 188 n.6 (1985).

2. Petitioner is a native and citizen of Albania. Pet. App. 1a. He was admitted to the United States as a nonimmigrant visitor in July 1995 and remained in the United States beyond the time authorized. *Ibid.*; Administrative Record (A.R.) 607.

In May 1996, petitioner filed an application for asylum and withholding of removal with the former Immigration and Naturalization Service (INS),[5] contending that he would be persecuted if he was returned to Albania because he had been a member of the pro-democracy movement in the early 1990s. J.A. 7 n.2; A.R. 543-560. On June 26, 1996, the INS instituted proceedings charging petitioner with being removable as an alien who had overstayed his visa, A.R. 607, 609; see 8 U.S.C. 1251(a)(1)(B) (1994), and it referred his asylum application to an IJ, J.A. 7 n.2.

Petitioner appeared with counsel before the IJ. J.A. 7. He conceded that he was removable and renewed his request for asylum and withholding of removal. J.A. 7, 30. The IJ determined that petitioner was removable and scheduled a hearing to determine petitioner's eligibility for relief from removal. *Ibid.* Petitioner failed to appear for his removal hearing, and the IJ ordered him removed in absentia. Pet. App. 1a; J.A. 33; see 8 U.S.C. 1229a(b)(5).

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[5] On March 1, 2003, the INS ceased to exist as an agency within the Department of Justice and its enforcement functions were transferred to the Department of Homeland Security, pursuant to the Homeland Security Act of 2002, 6 U.S.C. 101 *et seq.*

3. Petitioner filed a motion to reopen his removal proceedings to rescind his in absentia removal order. Pet. App. 1a; see A.R. 259-262. He alleged that he had missed his hearing because he overslept. Pet. App. 1a-2a; A.R. 261.

The IJ denied petitioner's motion to reopen. J.A. 29-32; see Pet. App. 2a. The IJ explained that there was no allegation that petitioner had failed to receive adequate notice of the hearing. J.A. 31. The IJ also concluded that petitioner did not demonstrate that his failure to appear was due to "exceptional circumstances," meaning "circumstances beyond [his] control, such as serious illness of the alien or a death [in] the alien's immediate family." *Id.* at 31-32.

The Board affirmed the IJ's decision without an opinion. Pet. App. 2a; J.A. 28.

4. Over four years later, petitioner filed a second motion with the IJ to reopen his removal proceedings. Pet. App. 2a; J.A. 16-20. He argued that conditions in Albania had changed since the entry of his removal order and that his case should be reopened to allow him to apply for asylum, withholding of removal, and protection under the Convention Against Torture and Other Cruel and Degrading Treatment or Punishment (CAT), *adopted* Dec. 10, 1984, S. Treaty Doc. No. 20, 100th Cong., 2d Sess. (1988), 1465 U.N.T.S. 85. Pet. App. 2a; J.A. 16-18. Petitioner also contended that he was eligible for adjustment of status because his mother, a naturalized United States citizen, had filed a visa petition on his behalf, that petition had been approved, and the visa numbers had become current. Pet. App. 11a; J.A. 19.

The IJ denied the motion. J.A. 6-15. The IJ explained that petitioner had failed to present new evidence that warranted reopening his case, because condi-

tions had improved, rather than worsened, in Albania since the time he was ordered removed. J.A. 12-13. The IJ also determined that the approved visa petition did not justify reopening. J.A. 14-15.

5. The Board dismissed petitioner's appeal. Pet. App. 22a-26a. It first determined that the IJ lacked jurisdiction to consider petitioner's second motion to reopen because the Board "was last to render a decision in this matter." *Id.* at 23a; see 8 C.F.R. 1003.2(a). Treating the motion to reopen as if it had been filed with the Board initially, the Board concluded that petitioner had failed to demonstrate "prima facie eligibility for asylum or withholding of deportation * * * based on material changes that have occurred in Albania" since the time of his removal proceedings. Pet. App. 24a-26a.[6] The Board rejected petitioner's contention that he would be persecuted in Albania because he had been a vocal member of the Democratic Party, explaining that the Democratic Party "participates in the political system and holds seats in Parliament, and the current Prime Minister of Albania is from the Democratic Party." *Id.* at 24a-25a. The Board also observed that the Albanian Constitution "provides citizens with the right to change their government peacefully, and citizens exercised this right in practice"; that there were "no confirmed cases of people being killed or detained strictly for political reasons" and "no major outbreaks of political violence since 1998"; and that "neither the Government nor the major political parties engage in policies of abuse or coercion against their political opponents." *Id.* at 24a-25a & n.1.

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[6] On appeal to the Board, petitioner abandoned his argument that reopening was warranted so that he could pursue adjustment of status. Pet. App. 11a-12a, 25a; A.R. 12-19.

6. The court of appeals dismissed petitioner's petition for review. Pet. App. 1a-21a. The court observed that the Board's denial of reopening would be reviewed for abuse of discretion. *Id.* at 3a (citing 8 C.F.R. 1003.2(a)). The court then stated that, based on the record before it, "[i]t is difficult to perceive an abuse of discretion" here. *Ibid.* Petitioner's argument, the court explained, was that the Board erred in failing to explicitly address one affidavit included with his motion to reopen, but that affidavit "does not document a change in Albanian conditions since 1997; it is instead a historical narrative reaching back to the time when Albania was a totalitarian dictatorship." *Ibid.* The court also noted various ways in which conditions in Albania had improved: Albania had reached a "Stabilization and Association Agreement" with the European Union (EU) in 2006; Albanians have been able to travel throughout the EU since 2007; "Albania is today a democratic nation with international guarantees of human rights"; and "there have been no reported political killings or detentions for years." *Id.* at 2a-3a.

The court noted, however, that the parties' agreement that the abuse of discretion standard of review applied to the case caused it to wonder whether it should consider petitioner's contention at all. Pet. App. 3a. Having thus raised the issue, the court held that it lacked jurisdiction under 8 U.S.C. 1252(a)(2)(B)(ii) to consider petitioner's challenge to the denial of his second motion to reopen. Pet. App. 3a-12a. As noted above, Section 1252(a)(2)(B)(ii) provides that no court shall have jurisdiction to review any action of the Attorney General "the authority for which is specified in [the relevant subchapter of the INA] to be in the discretion of the Attorney General." 8 U.S.C. 1252(a)(2)(B)(ii).

The court acknowledged that a regulation, rather than the INA itself, confers on the Board the discretion to grant or deny a motion to reopen, but the court found this difference immaterial. In the court's view, Section 1252(a)(2)(B)(ii) "applies to discretionary decisions under regulations that are based on and implement the Immigration and Nationality Act," Pet. App. 4a-5a, and the regulation conferring discretion here "draw[s] [its] force from provisions in the [INA] allowing immigration officials to govern their own proceedings," *id.* at 5a (citing 8 U.S.C. 1229a(c)(7)).[7]

The court then noted that, although Section 1252(a)(2)(B)(ii) generally barred review of the denial of reopening, the court did have jurisdiction under 8 U.S.C. 1252(a)(2)(D) over constitutional claims or questions of law. Pet. App. 9a-10a. The court determined, however, that petitioner did not raise such a claim, because his "brief does not phrase his contentions in those terms" and his "entire argument is that the Board abused its discretion." *Ibid.*

Judge Ripple concurred but suggested that 8 U.S.C. 1252(a)(2)(B)(ii) should be limited to "procedural rulings." Pet. App. 12a-15a. Judge Cudahy dissented, *id.* at 15a-20a, contending that the court had jurisdiction because "there is no statutory language suggesting the level of deference to be afforded a denial of a motion to reopen," *id.* at 19a.

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[7] The court also rejected petitioner's argument that reopening was warranted based on his approved visa petition, explaining that petitioner had failed to present that claim to the Board. Pet. App. 11a-12a; see Pet. C.A. Supp. Br. 2 (petitioner's concession that he failed to exhaust that claim); see also 8 U.S.C. 1252(d)(1) (federal courts lack jurisdiction to consider a claim not presented to the Board).

7. In concluding that it lacked jurisdiction under Section 1252(a)(2)(B)(ii), the panel held that the Seventh Circuit's prior decision in *Singh* v. *Gonzales*, 404 F.3d 1024 (2005), which held to the contrary, must be overruled. Pet. App. 7a-10a. For that reason, the panel circulated its opinion to all active Seventh Circuit judges, pursuant to the Circuit's Rule 40(e). *Id.* at 10a. The panel's opinion noted that five judges voted in favor of rehearing en banc. *Ibid.*; see also *id.* at 20a-21a (opinion of Ripple, J., joined by Rovner, Wood, and Williams, JJ., dissenting from denial of rehearing en banc).

SUMMARY OF ARGUMENT

The provision in the INA that limits judicial review of certain discretionary determinations, 8 U.S.C. 1252(a)(2)(B)(ii), does not apply to the Board's denial of motions to reopen.

A. By its plain text, Section 1252(a)(2)(B)(ii) applies only to decisions that the relevant subchapter specifies are within the discretion of the Attorney General or the Secretary of Homeland Security. Although motions to reopen are mentioned in the statutory subchapter, only a regulation, and not the statute itself, specifies that the Board has wide discretion in adjudicating them. If Congress had intended in Section 1252(a)(2)(B)(ii) to reach decisions for which discretionary authority is conferred by regulation, Congress easily could have said so. It did not, and denials of motions to reopen therefore are not reviewable under the unambiguous language of Section 1252(a)(2)(B)(ii).

B. The broader statutory context supports the view that Section 1252(a)(2)(B)(ii) does not preclude judicial review of denials of motions to reopen. In each of the several jurisdictional bars surrounding that provision,

Congress referred to and relied upon other statutes (as opposed to regulations) to constrict the scope of judicial review of removal orders, thereby evidencing its desire to retain control over the courts' review of such orders. Moreover, a separate provision of the INA's judicial review section confirms that denials of motions to reopen are judicially reviewable, because that section provides for consolidation of a petition for review challenging the denial of a motion to reopen with any separate petition challenging the denial of the underlying final order of removal.

C. The history of the immigration laws confirms that denials of motions to reopen are reviewable. Although aliens long have been permitted to file motions to reopen, Congress did not codify a provision permitting such filings until 1996. In the same legislation, Congress enacted Section 1252(a)(2)(B)(ii), yet made no suggestion that that provision applied to motions to reopen. Moreover, the federal courts long have reviewed denials of motions to reopen, and Congress did not indicate any intention to change that practice when it enacted Section 1252(a)(2)(B)(ii).

The court of appeals therefore erred in holding that it lacked jurisdiction over petitions for review of denials of motions to reopen under Section 1252(a)(2)(B)(ii). The court of appeals also observed that, even if it had jurisdiction, it would be difficult to conclude that the Board abused its discretion in denying petitioner's second motion to reopen. Although that conclusion is correct, this Court need not consider the fact-bound question whether the Board abused its discretion. The case therefore should be remanded to the court of appeals for further proceedings.

ARGUMENT

SECTION 1252(a)(2)(B)(ii) DOES NOT BAR JUDICIAL REVIEW OF THE BOARD'S DENIAL OF A MOTION TO REOPEN

The INA includes several provisions that limit judicial review of certain decisions of the Attorney General and the Secretary of Homeland Security in immigration proceedings. This case concerns 8 U.S.C. 1252(a)(2)(B)(ii), which provides that "no court shall have jurisdiction to review" any 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 [relevant official's] discretion." The question in this case is whether the denial of a motion to reopen is such a decision or action. The answer is no, because a regulation, rather than a provision in the relevant subchapter of the INA, specifies that the Board has discretion to decide such a motion.

A. The Text Of Section 1252(a)(2)(B)(ii) Does Not Bar Judicial Review Of Denials Of Motions To Reopen

"As in any case of statutory construction, [this Court's] analysis begins with the language of the statute." *Hughes Aircraft Co.* v. *Jacobson*, 525 U.S. 432, 438 (1999) (internal quotation marks omitted). Section 1252(a)(2)(B)(ii), by its plain terms, does not preclude judicial review of denials of motions to reopen.

1. At issue here is 8 U.S.C. 1252(a)(2)(B)(ii), which provides:

> 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 * * * 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)(B)(ii).

By its terms, the statutory text precludes judicial review of certain discretionary decisions rendered by the Attorney General or the Secretary of Homeland Security. The jurisdictional bar applies to "any" decision or action statutorily specified to be within the Attorney General's or the Secretary's discretion, regardless of whether the decision was made or action was taken in removal proceedings. See *Ali* v. *Federal Bureau of Prisons*, 128 S. Ct. 831, 835-836 (2008) ("any" has an "expansive meaning" (internal quotation marks omitted)). And the bar applies without regard to any other provision addressing judicial review, with the sole exception of 8 U.S.C. 1252(a)(2)(D), a provision under which Congress restored jurisdiction for constitutional and legal claims.

But the jurisdictional limitation in Section 1252(a)(2)(B)(ii) does not apply to every decision—or even every discretionary decision—made by the Attorney General or the Secretary. It applies only to those the "authority" for which is "specified under this subchapter to be in the [relevant official's] discretion." 8 U.S.C. 1252(a)(2)(B)(ii). The requirement that Congress have "specified" that the Attorney General or the

Secretary has discretionary authority over the decision means that the Act itself must contain language that renders the decision discretionary. *Webster's Third New International Dictionary of the English Language* 2187 (1993) ("specify" is "to mention or name in a specific or explicit manner: tell or state precisely or in detail"). And indeed, that statement must appear in a certain part of the Act—Title 8 of the United States Code, Chapter 12, Subchapter II, which is codified at 8 U.S.C. 1151 through 1381. See *Van Dinh* v. *Reno*, 197 F.3d 427, 433 (10th Cir. 1999). Finally, there is one kind of decision identified in Section 1252(a)(2)(B)(ii) for which judicial review is permitted—"the granting of [asylum] relief under section 1158(a)." 8 U.S.C. 1252(a)(2)(B)(ii).[8] The class of decisions reached by Section 1252(a)(2)(B)(ii), then, "is both very clear and limited." *Singh* v. *Mukasey*, 536 F.3d 149, 153 (2d Cir. 2008).

2. In this case, petitioner seeks judicial review of the Board's denial of his second motion to reopen. The denial of a motion to reopen is a "decision * * * of the Attorney General," because the Board acted on behalf of the Attorney General in adjudicating the motion. See 8 U.S.C. 1103(g)(2); 8 C.F.R. 1003.1. The critical question is whether the "authority" to grant or deny a motion to reopen is specified to be in the Attorney General's discretion under a provision in 8 U.S.C. 1151-1381.[9]

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[8] The decision at issue in this case does not concern "the granting of relief under section 1158(a)," because the Board did not decide whether to grant petitioner asylum in the exercise of its discretion. Instead, the Board considered only whether petitioner demonstrated changed country conditions establishing prima facie eligibility for asylum, withholding of removal, or CAT protection.

[9] Petitioner limited the question presented in this case to the scope of 8 U.S.C. 1252(a)(2)(B)(ii) and whether it "removes jurisdiction from

The Board's authority to act on a motion to reopen is set forth in a longstanding regulation—8 C.F.R. 1003.2(a)—not in a provision in the relevant statutory subchapter. The regulation provides that "[t]he Board may at any time reopen * * * any case in which it has rendered a decision" and that the Board's "decision to grant or deny a motion to reopen * * * is within the discretion of the Board," such that the Board may "deny a motion to reopen even if the party moving has made out a *prima facie* case for relief." *Ibid.*; see also 8 C.F.R. 1003.23(b)(3) (IJ's discretion to decide a motion to reopen). In light of this regulation governing reopening, it is well-settled that whether to grant a motion to reopen is entrusted to the Board's discretion. See, *e.g.*, *INS* v. *Doherty*, 502 U.S. 314, 323 (1992); *INS* v. *Jong Ha Wang*, 450 U.S. 139, 143 n.5 (1981) (per curiam).

By virtue of the enactment of IIRIRA in 1996, the relevant subchapter of the INA now also mentions motions to reopen—in 8 U.S.C. 1229a(c)(7). But that provision addresses only the procedures for filing such a motion; it is silent with respect to the authority of the Attorney General, through the Board or an IJ, to rule on such a motion, and thus does not speak to whether that

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federal courts to review rulings on motions to reopen by the Board of Immigration Appeals." Pet. 1. Petitioner did not seek review of the court of appeals' further ruling that 8 U.S.C. 1252(a)(2)(D), which restored jurisdiction in the courts to review "constitutional claims or questions of law" in petitions for review, was inapplicable in this case because petitioner did not raise any such claim or question in the court of appeals. See Pet. App. 10a. Indeed, petitioner did not cite Section 1252(a)(2)(D) in his certiorari petition or his reply brief at the petition stage. Although the government cited Section 1252(a)(2)(D) in the question presented in its brief in opposition, it likewise did not address the issue in the body of that brief. Accordingly, no question concerning the scope of Section 1252(a)(2)(D) is before the Court.

authority is discretionary in nature. Section 1229a(c)(7) provides that "[a]n alien may file one motion to reopen," 8 U.S.C. 1229a(c)(7)(A); specifies 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," 8 U.S.C. 1229a(c)(7)(B); and provides a deadline for the filing of such a motion, along with an exception to that deadline for certain cases in which the alien seeks asylum or withholding of removal, 8 U.S.C. 1229a(c)(7)(C).[10] Section 1229a(c)(7)(C) also provides special procedural rules for motions to reopen filed by battered spouses, children, and parents. See 8 U.S.C. 1229a(c)(7)(C)(iv).

Thus, while Section 1229a(c)(7)(C) obviously contemplates that the Attorney General, through the Board and the IJs, will rule on motions to reopen, it does not actually address the Attorney General's authority to do so or the manner in which that authority is to be exercised. Since the enactment of IIRIRA, as before, those matters are instead governed by regulations of the Attorney General that confer discretionary authority on the Board and the IJs. The omission of any such conferral of authority in the INA itself is especially glaring because there are "myriad Congressionally-defined, discretionary *statutory* powers of the Attorney General articulated within" the relevant subchapter. *Zafar* v. *United States Att'y Gen.*, 461 F.3d 1357, 1361 (11th Cir. 2006). Indeed, there are over thirty provisions in the relevant subchapter of the INA that explicitly grant the Attorney General or the Secretary "discretion" to make

[10] These requirements are also contained and supplemented in the relevant regulations. See 8 C.F.R. 1003.2(a) and (c)-(g), 1003.23(b).

a certain decision.[11] And, as the courts of appeals have recognized, several more provisions commit decisions to the Attorney General's or the Secretary's discretion using words that are functionally equivalent to "discretion."[12] By contrast, Section 1229a(c)(7) does not contain *any* language stating or even suggesting that the Attorney General has discretionary authority to decide motions to reopen. Section 1229a(c)(7) therefore does not "specif[y]" that motions to reopen may be granted "in the discretion of the Attorney General"—a necessary condition to trigger the jurisdictional bar in Section 1252(a)(2)(B)(ii).

The only discretionary authority expressly referred to in Section 1229a(c)(7)'s authorization of motions to reopen involves the Attorney General's ability to waive the filing deadline for motions to reopen for certain

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[11] See, *e.g.*, 8 U.S.C. 1157(c)(1); 8 U.S.C. 1159(b); 8 U.S.C. 1181(b); 8 U.S.C. 1182(a)(3)(D)(iv); 8 U.S.C. 1182(a)(9)(B)(v); 8 U.S.C. 1182(d)(1); 8 U.S.C. 1182(d)(3)(A); 8 U.S.C. 1182(d)(5)(A); 8 U.S.C. 1182(d)(11); 8 U.S.C. 1182(d)(12); 8 U.S.C. 1182(g)(1); 8 U.S.C. 1182(g)(3); 8 U.S.C. 1183; 8 U.S.C. 1184(c)(6)(F); 8 U.S.C. 1184(d)(1); 8 U.S.C. 1186a(c)(4); 8 U.S.C. 1186a(d)(3); 8 U.S.C. 1203(b); 8 U.S.C. 1225(a)(4); 8 U.S.C. 1225(b)(1)(A)(iii)(I); 8 U.S.C. 1227(a)(1)(E)(iii); 8 U.S.C. 1227(a)(1)(H); 8 U.S.C. 1227(a)(7)(B); 8 U.S.C. 1259; 8 U.S.C. 1281(a); 8 U.S.C. 1281(c); 8 U.S.C. 1286; 8 U.S.C. 1302(c); 8 U.S.C. 1305(b); 8 U.S.C. 1321(a); 8 U.S.C. 1330(a); 8 U.S.C. 1353.

[12] See, *e.g.*, *Zhu* v. *Gonzales*, 411 F.3d 292, 294-295 (D.C. Cir. 2005) (decision whether to grant national interest waiver under 8 U.S.C. 1153(b)(2)(B)(i) so alien may obtain a work visa); *Jean* v. *Gonzales*, 452 F.3d 392, 396 (5th Cir. 2006) (decision whether to grant waiver under 8 U.S.C. 1159(c) so alien may obtain adjustment of status); *Blake* v. *Carbone*, 489 F.3d 88, 98 n.7 (2d Cir. 2007) (decision whether to grant waiver of inadmissibility under former Section 212(c) of the INA, 8 U.S.C. 1182(c) (1994) (repealed 1996)); *CDI Info. Servs., Inc.* v. *Reno*, 278 F.3d 616, 619 (6th Cir. 2002) (decision whether to grant visa extension under 8 U.S.C. 1184(a)(1)).

battered spouses, children, and parents if such a person "demonstrates extraordinary circumstances or extreme hardship to [his or her] child." 8 U.S.C. 1229a(c)(7)(C)(iv)(III). By its terms, that grant of discretionary authority is limited to the waiver of the statutory filing deadline; it does not address the scope of the Attorney General's authority with respect to the merits of such a motion.

The judicial review provision of the INA also mentions motions to reopen, providing for consolidating judicial review of motions to reopen with review of underlying removal orders. See 8 U.S.C. 1252(b)(6). But that provision likewise does not address the scope of the Attorney General's authority to grant or deny such a motion, and indeed it contemplates that judicial review of the denial of a motion to reopen is available, rather than barred by Section 1252(a)(2)(B)(ii). See pp. 30-31, *infra*.[13] There is, therefore, "nothing in the subchapter specifying that motions to reopen are 'in the discretion of the Attorney General.'" *Singh*, 536 F.3d at 154.

That conclusion is confirmed by a consideration of the consequence of the fact that the conferral of discretionary authority on the Board is set forth only in the Attorney General's regulation. Suppose that, instead of promulgating a regulation specifying that the Board has discretion to deny a motion to reopen, see 8 C.F.R. 1003.2(a), the Attorney General promulgated a regula-

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[13] There is also a provision—separate from Section 1229a(c)(7), which governs motions to reopen generally—that governs the special situation of a motion to reopen to rescind an in absentia removal order. See 8 U.S.C. 1229a(b)(5)(C). That provision likewise does not address the scope of the Attorney General's authority to rule on such a motion, and, in any event, it does not apply in this case, because petitioner does not challenge the denial of his first motion to reopen.

tion stating that, if certain criteria are met, the Board "shall grant a motion to reopen." The result of such a regulation would be that the Board no longer had discretionary authority to decide motions to reopen; instead, the Board would be required to grant motions to reopen under certain circumstances. There is no question that the Attorney General would have the authority to issue such a regulation, see 8 U.S.C. 1103(g), and such a regulation would be a permissible interpretation of the INA because the INA does not specify any standards for granting a motion to reopen. The fact that the Attorney General could revise his regulations to make granting motions to reopen mandatory under certain circumstances makes plain that the INA itself does not specify that the authority to decide such motions is in the Attorney General's discretion.[14]

3. Because nothing in the relevant subchapter of the INA specifies that the Attorney General has discretionary authority to adjudicate motions to reopen, Section 1252(a)(2)(B)(ii) does not bar review of the denial of such a motion. The only provision of law that contains the requisite specification is a regulation, 8 C.F.R. 1003.2. But the text of Section 1252(a)(2)(B)(ii) says nothing about the conferral of discretion by regulation, and Congress's express requirement that discretionary authority be "specified" in "this subchapter" makes clear that

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[14] Where the INA itself does specify that a particular decision is within the discretion of the Attorney General, a regulation directing the Board to grant or deny relief in specified circumstances would not remove the Board's decision from the scope of the jurisdictional bar in Section 1252(a)(2)(B)(ii). As far as the INA is concerned, the decision would remain discretionary with the Attorney General, and such a regulation would be an implementation of that discretion by instructing the Board how to exercise the discretionary authority on his behalf.

a conferral of discretion in a regulation does not qualify. See, *e.g.*, *Bates* v. *United States*, 522 U.S. 23, 29 (1997) (this Court "ordinarily resist[s] reading words or elements into a statute that do not appear on its face"). That is especially true because, as a "jurisdictional statute," Section 1252(a)(2)(B)(ii) "must be construed both with precision and with fidelity to the terms by which Congress has expressed its wishes." *Cheng Fan Kwok* v. *INS*, 392 U.S. 206, 212 (1968).

Not surprisingly, all of the courts of appeals that have considered the question—with the exception of the court below—have agreed that the plain language of Section 1252(a)(2)(B)(ii) does not preclude them from reviewing a denial of a motion to reopen. See, *e.g.*, *Singh*, 536 F.3d at 153-154; *Miah* v. *Mukasey*, 519 F.3d 784, 789 n.1 (8th Cir. 2008); *Jahjaga* v. *Attorney Gen. of the United States*, 512 F.3d 80, 82 (3d Cir. 2008); *Zhao* v. *Gonzales*, 404 F.3d 295, 302-303 (5th Cir. 2005); *Infanzon* v. *Ashcroft*, 386 F.3d 1359, 1361-1362 (10th Cir. 2004); *Medina-Morales* v. *Ashcroft*, 371 F.3d 520, 528-529 (9th Cir. 2004). And even the Seventh Circuit—in an opinion that was overruled in the decision below—previously had "conclude[d] that [it] ha[s] jurisdiction to review the Board's denial of [an alien's] motion to reopen" despite Section 1252(a)(2)(B)(ii). *Singh* v. *Gonzales*, 404 F.3d 1024, 1026-1027 (2005), overruled by *Kucana* v. *Mukasey*, 533 F.3d 534, 537-538 (2008) (Pet. App. 7a-10a), cert. granted, No. 08-911 (Apr. 27, 2009).[15]

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[15] Although Section 1252(a)(2)(B)(ii) does not preclude judicial review of denials of motions to reopen, there are certain circumstances in which such decisions would not be reviewable. If, for example, a court of appeals lacked jurisdiction to review the denial of the alien's underlying claim for relief, then it would also lack jurisdiction to review the denial of a motion to reopen that sought to revisit the denial of the

4. In the decision below, the court of appeals held that it lacked jurisdiction to review the denial of petitioner's motion to reopen because Section 1252(a)(2)(B)(ii) "applies to discretionary decisions under regulations that are based on and implement the Immigration and Nationality Act." Pet. App. 4a. The court of appeals acknowledged that a regulation—not a statute—"specifi[es]" that the Board has discretion to grant or deny a motion to reopen, but the court pointed out that the regulation "draw[s] [its] force from [a] provision in the [INA] allowing immigration officials to govern their own proceedings"—namely, 8 U.S.C. 1229a(c)(7), which provides for the filing of motions to

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underlying claim, because a contrary rule would permit an end-run around an applicable jurisdictional bar. That principle has been applied to determinations that are made unreviewable under 8 U.S.C. 1252(a)(2)(B)(i), see, *e.g.*, *Martinez-Maldonado* v. *Gonzales*, 437 F.3d 679, 683 (7th Cir. 2006) (hardship waiver under 8 U.S.C. 1229b); *Mariuta* v. *Gonzales*, 411 F.3d 361, 365 (2d Cir. 2005) (adjustment of status under 8 U.S.C. 1255); determinations that are entrusted to the Attorney General's discretion by statute and are unreviewable under 8 U.S.C. 1252(a)(2)(B)(ii), see, *e.g.*, *Assaad* v. *Ashcroft*, 378 F.3d 471, 473-474 (5th Cir. 2004) (waiver of removability based on good-faith marriage under 8 U.S.C. 1186a(c)(4)(B)); and determinations that an alien is removable because he committed a certain crime, which are unreviewable under 8 U.S.C. 1252(a)(2)(C), see, *e.g.*, *Cruz* v. *Attorney Gen. of the United States*, 452 F.3d 240, 246 (3d Cir. 2006); *Dave* v. *Ashcroft*, 363 F.3d 649, 652 (7th Cir. 2004); *Patel* v. *United States Att'y Gen.*, 334 F.3d 1259, 1261-1262 (11th Cir. 2003).

The courts of appeals also would be precluded from reviewing the denial of a motion to reopen when an alien seeks *sua sponte* reopening from the Board. The unanimous view of the courts of appeals is that such a claim is unreviewable because *sua sponte* reopening is committed to agency discretion by law, see 5 U.S.C. 701(a)(2), and there are no judicially manageable standards for reviewing such a decision, see, *e.g.*, *Tamenut* v. *Mukasey*, 521 F.3d 1000, 1003-1004 (8th Cir. 2008) (en banc) (per curiam) (agreeing with ten other courts of appeals).

reopen. Pet. App. 5a. Because the Board's authority to adjudicate motions to reopen derives from the relevant subchapter of the INA, the court continued, Section 1252(a)(2)(B)(ii) applies to motions to reopen. *Ibid*.

The court of appeals is mistaken. In Section 1252(a)(2)(B)(ii), Congress required more than that the Attorney General's discretionary authority for making the decision at issue ultimately derives from a provision in the relevant statutory subchapter. Congress provided instead that the discretionary authority must be "*specified* under this subchapter." 8 U.S.C. 1252(a)(2)(B)(ii) (emphasis added). Although 8 U.S.C. 1229a(c)(7) obviously assumes that the Attorney General has the authority to adjudicate motions to reopen, the provision does not address that authority or the manner in which it is exercised. As the Fifth Circuit has explained: "The statutory language is uncharacteristically pellucid on this score: it does not allude generally to 'discretionary authority' or to 'discretionary authority exercised *under this statute*,' but specifically to 'authority for which is *specified under this subchapter* to be in the discretion of the Attorney General.'" *Zhao*, 404 F.3d at 303 (quoting 8 U.S.C. 1252(a)(2)(B)(ii)).

In deciding that Section 1252(a)(2)(B)(ii) applies to motions to reopen, the court of appeals overruled its prior decision in *Singh* v. *Gonzales*. Pet. App. 7a-10a. In *Singh*, the court observed that the statute "only describes the contents of motions to reopen and the filing deadlines" and does not contain "any specific language entrusting the decision on a motion to reopen to 'the discretion of the Attorney General.'" 404 F.3d at 1026-1027 (quoting 8 U.S.C. 1252(a)(2)(B)(ii)). That reasoning was correct, and there was no reason to revisit it. The court of appeals suggested that what it termed the

"narrow reading" of Section 1252(a)(2)(B)(ii) in *Singh* was no longer required in light of the REAL ID Act's allowance of jurisdiction to review "constitutional claims" and "questions of law," which ensured the availability of judicial review in some circumstances even if Section 1252(a)(2)(B)(ii) generally barred review. Pet. App. 8a-10a (quoting 8 U.S.C. 1252(a)(2)(D)). But the addition of Section 1252(a)(2)(D) in 2005 did not change the operative language of Section 1252(a)(2)(B)(ii) as enacted in 1996, and it therefore provides no basis for ignoring the plain meaning of that language. See *Jahjaga*, 512 F.3d at 82 ("The operative phrase here is 'specified under this subchapter.'"). The court of appeals therefore erred in applying Section 1252(a)(2)(B)(ii) to motions to reopen.

B. The Statutory Context Confirms That Section 1252(a)(2)(B)(ii) Does Not Apply To Denials of Motions To Reopen

"It is a fundamental canon of statutory construction that the words of a statute must be read in their context and with a view to their place in the overall statutory scheme." *National Ass'n of Home Builders* v. *Defenders of Wildlife*, 127 S. Ct. 2518, 2534 (2007) (internal quotation marks omitted). Here, the context of the jurisdictional bar at issue confirms that it does not apply to decisions entrusted to the Attorney General's discretion by regulation, such as motions to reopen.

1. The provision at issue appears in Section 1252, the part of the INA that provides a complete set of procedures and standards for judicial review. Section 1252(a)(2), titled "Matters not subject to judicial review," lists a variety of agency determinations that are not reviewable by the federal courts. Those determina-

tions are broken into three categories: immigration officers' determinations of whether aliens applying for admission are admissible, 8 U.S.C. 1252(a)(2)(A); denials of discretionary relief, 8 U.S.C. 1252(a)(2)(B)(i) and (ii); and final orders of removal entered against criminal aliens, 8 U.S.C. 1252(a)(2)(C). The statute then provides that, notwithstanding the jurisdictional bars listed in Sections 1252(a)(2)(A)-(C), a court of appeals may still review "constitutional claims or questions of law." 8 U.S.C. 1252(a)(2)(D).

This statutory context underscores that Section 1252(a)(2)(B)(ii) does not apply to decisions in which a regulation (rather than a statute) provides the Attorney General with discretionary authority to make the decision. First, within Section 1252(a)(2)(B), clause (ii), at issue here, is immediately preceded by clause (i), which provides that the federal courts do not have jurisdiction to review "any judgment regarding the granting of relief under section 1182(h), 1182(i), 1229b, 1229c, or 1255." Each of the sections referenced addresses a different form of discretionary relief from removal: waivers of inadmissibility based on certain criminal offenses, 8 U.S.C. 1182(h); waivers of inadmissibility based on fraud or misrepresentation, 8 U.S.C. 1182(i); cancellation of removal, 8 U.S.C. 1229b; voluntary departure, 8 U.S.C. 1229c; and adjustment of status, 8 U.S.C. 1255. And each of those sections contains language specifying that the decision is entrusted to the Attorney General's discretion.[16] All of the decisions made unreviewable by

[16] See 8 U.S.C. 1182(h) ("The Attorney General may, in his discretion, waive the application of [various inadmissibility grounds based on criminal offenses]."); 8 U.S.C. 1182(i)(1) ("The Attorney General may, in the discretion of the Attorney General, waive the application of [inadmissibility based on fraud or misrepresentation]."); 8 U.S.C. 1229b(a),

Section 1252(a)(2)(B)(i), then, are decisions of the Attorney General, the discretionary nature of which is explicitly provided by statute.

Like clause (i), clause (ii) precludes judicial review of discretionary decisions made by the Attorney General. And like clause (i), clause (ii) limits its reach to decisions for which the Attorney General's authority is provided in Subchapter II of Chapter 12 of Title 8 of the United States Code. Compare 8 U.S.C. 1252(a)(2)(B)(i) (referring to administrative "judgment[s]" under five sections in Subchapter II), with 8 U.S.C. 1252(a)(2)(B)(ii) (applying to any other decision or action the "authority" for which is "specified under this subchapter"). The key difference between the two provisions is that in the former, Congress specifically enumerated the administrative judgments that would be insulated from judicial review, while in the latter, Congress included a catch-all provision for "any other decision or action" of the same nature. Read together, the two provisions make clear that Congress intended to limit judicial review of discretionary decisions only where Congress itself set out the Attorney General's decisionmaking authority in the statute.

2. The same is true with respect to the other parts of Section 1252(a)(2) that limit judicial review. Like Section 1252(a)(2)(B), both Section 1252(a)(2)(A) and Section 1252(a)(2)(C) rely on statutes, rather than regula-

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(b)(1)-(2) ("The Attorney General may cancel removal [of certain aliens]."); 8 U.S.C. 1229c(a)(1) ("The Attorney General may permit an alien voluntarily to depart the United States at the alien's own expense."); 8 U.S.C. 1255(a) ("[T]he status of an alien * * * may be adjusted by the Attorney General, in his discretion and under such regulations as he may prescribe, to that of an alien lawfully admitted for permanent residence.").

tions, to define their scope. Section 1252(a)(2)(A), for example, precludes judicial review of certain decisions by immigration officers regarding admissibility by reference to another statutory provision, 8 U.S.C. 1225(b)(1). In particular, Section 1252(a)(2)(A) states that "no court shall have jurisdiction to review" "any individual determination" or "cause or claim arising from or relating to the implementation or operation of" a removal order entered under Section 1225(b)(1), 8 U.S.C. 1252(a)(2)(A)(i); "a decision by the Attorney General to invoke the provisions of such section," 8 U.S.C. 1252(a)(2)(A)(ii); "the application of such section to individual aliens," including a "determination [regarding asylum eligibility] made under 1225(b)(1)(B)," 8 U.S.C. 1252(a)(2)(A)(iii); and "procedures and policies adopted by the Attorney General to implement" Section 1225(b)(1), 8 U.S.C. 1252(a)(2)(A)(iv).[17] All of those jurisdictional limitations depend on statutory provisions; none depends on a regulation.

Similarly, Section 1252(a)(2)(C) refers to various other statutory provisions in barring judicial review of removal orders entered against certain criminal aliens. It provides that "no court shall have jurisdiction to review" any final order of removal "against an alien who is removable" because he committed a criminal offense covered in 8 U.S.C. 1182(a)(2); an offense covered by 8 U.S.C. 1227(a)(2)(A)(iii), (B), (C) or (D); or certain offenses covered by 8 U.S.C. 1227(a)(2)(A)(i). 8 U.S.C. 1252(a)(2)(C). Again, nothing in the criminal alien bar

[17] The first, third, and fourth of those jurisdictional limitations are subject to the exceptions noted in 8 U.S.C. 1252(e). See 8 U.S.C. 1252(a)(2)(A)(i), (iii) and (iv).

makes the federal courts' jurisdiction depend upon a regulation.

By defining the various jurisdictional bars by reference to other provisions in the INA itself, Congress ensured that it, and only it, would limit the federal courts' jurisdiction over immigration matters. To read Section 1252(a)(2)(B)(ii) to apply to matters where discretion is conferred on the Board and the IJs by regulation, rather than on the Attorney General by statute, would ignore that congressional design.

3. Finally, and significantly, one other provision in Section 1252 confirms that Section 1252(a)(2)(B)(ii) does not bar judicial review of motions to reopen. Section 1252(b) sets out various procedural requirements for judicial review of removal orders, including the requirement that, "[w]hen a petitioner seeks review of a[] [removal] order," "any review sought of a motion to reopen or reconsider the order shall be consolidated with the review of the order." 8 U.S.C. 1252(b)(6).

Section 1252(b)(6) reflects Congress's understanding that the courts of appeals generally have jurisdiction to review challenges to denials of motions to reopen. See *Stone* v. *INS*, 514 U.S. 386, 394 (1995) (predecessor to Section 1252(b)(6) "contemplates two petitions for review and directs the courts to consolidate the matters"). After all, the consolidation provision would have neither purpose nor function if denials of motions to reopen were not reviewable in the first instance. See *Singh*, 404 F.3d at 1027; *Infanzon*, 386 F.3d at 1362. Section 1252(b)(6)'s predecessor was enacted six years prior to IIRIRA, see Immigration Act of 1990 (IMMACT), Pub. L. No. 101-649, § 545(b)(3), 104 Stat. 5065 (8 U.S.C. 1105(a)(6) (1994)), and Congress presumably would have eliminated such a provision if it intended to bar review

of motions to reopen when it comprehensively revised the judicial review provisions of the INA in 1996 and added Section 1252(a)(2)(B)(ii). See, *e.g.*, *Hawaii* v. *Office of Hawaiian Affairs*, 129 S. Ct. 1436, 1445 (2009). Instead, Congress included Section 1252(b)(6) along with Section 1252(a)(2)(B)(ii).

The court of appeals incorrectly minimized the importance of Section 1252(b)(6). In its view, Section 1252(b)(6) has meaning even if Section 1252(a)(2)(B)(ii) applies to motions to reopen, because denials of such motions may be reviewed (and so, petitions for review may be consolidated) if they raise constitutional claims or questions of law under Section 1252(a)(2)(D). Pet. App. 9a. This rationale is mistaken. The court of appeals' interpretation would have rendered Section 1252(b)(6) a nullity with respect to motions to reopen from the time that Section 1252(a)(2)(B)(ii) was enacted in 1996 to the time that Section 1252(a)(2)(D) was added to the INA in 2005. There is no reason to suppose that Congress left such a nine-year gap.

C. The History Of The Immigration Laws Confirms That Congress Did Not Intend Section 1252(a)(2)(B)(ii) To Preclude Judicial Review Of Denials Of Motions To Reopen

Motions to reopen have a long pedigree, and the federal courts historically have exercised jurisdiction to review them. When Congress enacted Section 1252(a)(2)(B)(ii) in 1996, it made no effort to change that practice, even though it easily could have done so by codifying the pre-existing regulation specifying that motions to reopen are entrusted to the Attorney General's broad discretion. That history confirms that Con-

gress did not intend Section 1252(a)(2)(B)(ii) to preclude judicial review of denials of motions to reopen.

1. Motions to reopen have long been a part of our Nation's immigration laws. See *Dada* v. *Mukasey*, 128 S. Ct. 2307, 2315 (2008) (citing *Ex parte Chan Shee*, 236 F. 579 (N.D. Cal. 1916), and *Chew Hoy Quong* v. *White*, 244 F. 749, 750 (9th Cir. 1917)). The federal courts historically could review the denial of reopening, although they did not second-guess the agency's decisionmaking so long as the agency afforded the alien a fair process. *Ibid*. ("The reopening of a case by the immigration authorities for the introduction of further evidence" was "a matter for the exercise of their discretion." (internal quotation marks omitted)); see *Giova* v. *Rosenberg*, 379 U.S. 18 (1964) (per curiam) (denial of a motion to reopen or reconsider is reviewable on petition for review in court of appeals); see also *INS* v. *Chadha*, 462 U.S. 919, 937-938 (1983) (noting that judicial review extends to "determinations made incident to a motion to reopen such proceedings" (internal quotation marks omitted)); *Cheng Fan Kwok*, 392 U.S. at 211, 216 (discussing *Giova* v. *Rosenberg*).

The Executive Branch's immigration authority was centralized in the Attorney General in 1940, see *BIA Celebrates 50th Anniversary*, 67 Interpreter Releases 1221 (1990), and soon thereafter he issued regulations addressing motions to reopen, see 6 Fed. Reg. 68, 71-72 (1941). In 1958, the Attorney General promulgated a new set of rules for reopening that are substantially the same as those in operation today. 23 Fed. Reg. 9115, 9118-9119; see *Dada*, 128 S. Ct. at 2315. They authorized the Board to reopen "any case in which it has rendered a decision," either *sua sponte* or upon written motion of the government or the alien, and provided vari-

ous procedural requirements for filing a motion to reopen, including the requirement that the motion must "state the new facts to be proved at the reopened hearing" and be "supported by affidavits or other evidentiary material." 23 Fed. Reg. at 9118 (codified at 8 C.F.R. 3.2, 3.8(a) (1965)).

In 1990, Congress became concerned that aliens illegally present in the United States were using motions to reopen to prolong their stay. See *Dada*, 128 S. Ct. at 2315. Congress therefore directed the Attorney General to issue regulations to limit the number of motions to reopen an alien may file and to specify the time period for the filing of such motions. IMMACT § 545(d), 104 Stat. 5066. The Attorney General promulgated the final regulations in 1996; in addition to including time and numerical limits, 61 Fed. Reg. 18,900, 18,905 (8 C.F.R. 3.2(c)(2) (1997) (current version at 8 C.F.R. 1003.2(c)), they provided that the decision whether to grant or deny a motion to reopen is committed to the discretion of the Board, *id.* at 18,904 (amending 8 C.F.R. 3.2(a) (1997) (current version at 8 C.F.R. 1003.2(a)).

Although Congress's legislation in 1990 was intended to expedite petitions for review and the removal process generally, see *Stone*, 514 U.S. at 400-401, Congress refrained from any steps to preclude judicial review of motions to reopen altogether in order to accomplish that goal. Congress merely attempted to streamline the judicial review process, by enacting the directive that whenever an alien seeks judicial review of a final order of deportation, a subsequent petition for review of a denial of reopening must be consolidated with the earlier petition. See IMMACT § 545(b)(3), 104 Stat. 5065.

2. The first statutory provisions allowing an alien to file a motion to reopen were added to the INA in 1996 as

part of IIRIRA. See *Dada*, 128 S. Ct. at 2316 (IIRIRA "transform[ed] the motion to reopen from a regulatory procedure to a statutory form of relief available to the alien"). Congress provided that each alien may file one motion to reopen, and it codified several of the Attorney General's limitations on motions to reopen, including the numerical and time limits specified by regulation. See IIRIRA § 304(a)(3), 110 Stat. 3009-593 (enacting 8 U.S.C. 1229a(c)(6) (Supp. II 1996) (current version at 8 U.S.C. 1229a(c)(7)). Notably, however, Congress did not enact into law the regulation that provided that the decision to grant or deny a motion to reopen lies within the Board's discretion. See *Zhao*, 404 F.3d at 302-303; *Medina-Morales*, 371 F.3d at 528.

In the same legislation, Congress sought once more and yet more aggressively to expedite the removal of illegal aliens from the United States. See *Reno* v. *American-Arab Anti-Discrimination Comm.*, 525 U.S. 471, 475 (1999). To that end, Congress amended the INA to limit judicial review of certain decisions of the Attorney General and the Secretary. See IIRIRA § 306(a)(2), 110 Stat. 3009-607. One of those limitations is the bar on judicial review at issue here, which precludes review of decisions of the Attorney General or the Secretary that are specified in the relevant subchapter as within their discretion. *Ibid.* (8 U.S.C. 1252(a)(2)(B)(ii)). As previously noted, however, Congress did not specify anywhere in the relevant subchapter that decisions whether to grant motions to reopen are within the discretion of the Attorney General. As a result, both before and after IIRIRA, the Attorney General's discretion to decide motions to reopen "still 'derives solely from *regulations* promulgated by the Attorney General' rather than from a statute."

Medina-Morales, 371 F.3d at 528 (quoting *Doherty*, 502 U.S. at 322).

Thus, Congress simultaneously codified a process for the filing of motions to reopen and acted to limit judicial review of certain decisions regarding removal, yet did not take any steps to insulate denials of motions to reopen from judicial review. Congress easily could have done so, simply by codifying the regulation providing the Board with broad discretion to grant or deny motions to reopen. That Congress did not do so confirms that it did not intend to preclude judicial review of denials of motions to reopen in enacting IIRIRA. See *Medina-Morales*, 371 F.3d at 528-529 ("We cannot ignore that Congress, in enacting IIRIRA, expressly referred to 'authority . . . specified under this subchapter to be in the discretion of the Attorney General' at the same time it enacted a first-time provision addressing motions to reopen (§ 1229a(c)), but said nothing about the Attorney General's discretionary authority over such motions.").

Congress's intent becomes especially clear when viewed against the backdrop of the federal courts' long history of reviewing denials of motions to reopen. This Court has reviewed such decisions on numerous occasions, under the deferential abuse-of-discretion standard, see, *e.g.*, *Doherty*, 502 U.S. at 322-324; *INS* v. *Abudu*, 485 U.S. 94, 104-111 (1998); *INS* v. *Rios-Pineda*, 471 U.S. 444, 449-452 (1985); *Jong Ha Wang*, 450 U.S. at 141-146, and federal-court review dates back to at least 1916, see *Dada*, 128 S. Ct. at 2315 (citing cases).[18] In

[18] The courts of appeals likewise have reviewed denials of motions to reopen under the highly deferential abuse of discretion standard, generally upholding the Board's decision "so long as it is not capricious, racially invidious, utterly without foundation in the evidence, or otherwise so irrational that it is arbitrary rather than the result of any perceptible

light of that "long-standing practice," *Miah*, 519 F.3d at 789 n.1, as well as the general presumption in favor of judicial review of agency actions, see *INS* v. *St. Cyr*, 533 U.S. 289, 298 (2001), Congress surely would have spoken clearly in 1996 if it intended to limit judicial review of decisions on motions to reopen. But Congress made no such statement. To the contrary, Congress reenacted the provision, first enacted by IMMACT in 1990, for consolidation of a petition for review of the denial of a motion to reopen with a petition for review of the final removal order, thereby confirming that both kinds of review would remain available.[19]

* * * * *

The court of appeals' holding that it lacked jurisdiction to review the denial of a motion to reopen under

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rational approach." *Zhao*, 404 F.3d at 304 (internal quotation marks omitted); see, *e.g.*, *Larngar* v. *Holder*, 562 F.3d 71, 74 (1st Cir. 2009); *Bi Feng Liu* v. *Holder*, 560 F.3d 485, 489-490 (6th Cir. 2009); *Ahmed* v. *Mukasey*, 548 F.3d 768, 770 (9th Cir. 2008); *Zine* v. *Mukasey*, 517 F.3d 535, 542 (8th Cir. 2008); *Montano Cisneros* v. *United States Att'y Gen.*, 514 F.3d 1224, 1226 (11th Cir. 2008); *Thongphilack* v. *Gonzales*, 506 F.3d 1207, 1209 (10th Cir. 2007); *Barry* v. *Gonzales*, 445 F.3d 741, 744-745 (4th Cir. 2006), cert. denied, 549 U.S. 1182 (2007); *Kaur* v. *Board of Immigration Appeals*, 413 F.3d 232, 233-234 (2d Cir. 2005) (per curiam); *Infanzon*, 386 F.3d at 1362; *Guo* v. *Ashcroft*, 386 F.3d 556, 561-562 (3d Cir. 2004).

[19] In light of the clarity of Section 1252(a)(2)(B)(ii)'s text, the strong support from the provision's context and history, and the general presumption in favor of judicial review, this is not an appropriate case in which to resort to the proposition that ambiguities should be construed in favor of the alien. See, *e.g.*, *Ruiz-Almanzar* v. *Ridge*, 485 F.3d 193, 198 (2d Cir. 2007) (court must use every interpretative tool at its disposal before considering whether remaining ambiguities should be resolved in favor of the alien). Indeed, petitioner did not argue below that any ambiguities in 8 U.S.C. 1252(a)(2)(B)(ii) should be resolved in his favor.

8 U.S.C. 1252(a)(2)(B)(ii) was error. The court also observed, however, that the denial of petitioner's second motion to reopen would be reviewed for abuse of discretion and that "[i]t is difficult to perceive an abuse of discretion" here. Pet. App. 3a. That conclusion was correct, essentially for the reasons the court of appeals suggested. See *ibid.*; see also p. 11, *supra*. But this Court need not itself consider that fact-bound question. The Court should reverse the court of appeals' dismissal for lack of jurisdiction and return the case to the court of appeals for further proceedings.

CONCLUSION

The judgment of the court of appeals dismissing the petition for review for lack of jurisdiction should be reversed and the case remanded for further proceedings.

Respectfully submitted.

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APPENDIX

1. 8 U.S.C. 1229a provides, in pertinent part:

Removal proceedings

* * * * *

(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 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 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.

* * * * *

(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[1] 1158 or 1231(b)(3) of this title and is based on changed country condi-

[1] So in original.

tions 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) of section 1154(a)(1)(B) of this title,[2] section 1229b(b)(2) 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

[2] So in original.

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[3] pending the final disposition of the motion, including exhaustion of all appeals if the motion establishes that the alien is a qualified alien.

* * * * *

(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.

* * * * *

[3] So in original. A closing parenthesis probably should appear.

2. 8 U.S.C. 1252 provides, in pertinent part:

Judicial review of orders of removal

(a) Applicable provisions

(1) General orders of removal

Judicial review of a final order of removal (other than an order of removal without a hearing pursuant to section 1225(b)(1) of this title) is governed only by chapter 158 of title 28, except as provided in subsection (b) of this section and except that the court may not order the taking of additional evidence under section 2347(c) of such title.

(2) Matters not subject to judicial review

(A) Review relating to section 1225(b)(1)

Notwithstanding any other provision of law (statutory or nonstatutory), including Section 2241 or title 28, or any other habeas corpus provision, and Sections 1361 and 1651 of such title, no court shall have jurisdiction to review—

(i) except as provided in subjection (e) of this section, any individual determination or to entertain any other cause or claim arising from or relating to the implementation or operation of an order of removal pursuant to section 1225(b)(1) of this title,

(ii) except as provided in subsection (e) of this section, a decision by the Attorney General to invoke the provisions of such section,

(iii) the application of such section to individual aliens, including the determination

made under section 1225(b)(1)(B) of this title, or

(iv) except as provided in subsection (e) of this section, procedures and policies adopted by the Attorney General to implement the provisions of section 1225(b)(1) of this title.

(B) Denials of discretionary relief

Nothwithstanding any other provision of law (statutory or nonstatutory), including Section 2241 of title 28, or any other habeas corpus provision, and Section 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 of the Secretary of Homeland Security, other than the granting of relief under section 1158(a) of this title.

(C) Orders against criminal aliens

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 by law, no court shall have jurisdiction to review any final order of removal against an alien who is removable by reason of having committed a criminal offense covered in section 1182(a)(2) or 1227(a)(2)(A)(iii), (B), (C), or (D) of this title, or any offense covered by section 1227(a)(2)(A)(ii) of this title for which both predicate offenses are, without regard to their date of commission, otherwise covered by section 1227(a)(2)(A)(i) of this title.

(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.

* * * * *

3. 8 C.F.R. 1003.2 provides, in pertinent part:

Reopening or reconsideration before the Board of Immigration Appeals.

(a) *General.* The Board may at any time reopen or reconsider on its own motion any case in which it has rendered a decision. A request to reopen or reconsider any case in which a decision has been made by the Board, which request is made by the Service, or by the party affected by the decision, must be in the form of a written motion to the Board. The decision to grant or deny a motion to reopen or reconsider is within the discretion of the Board, subject to the restrictions of this section. The Board has discretion to deny a motion to reopen even if the party moving has made out a *prima facie* case for relief.

* * * * *

(c) *Motion to reopen.*

(1) A motion to reopen proceedings 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. A motion to reopen proceedings for the purpose of submitting an application for relief must be accompanied by the appropriate application for relief and all supporting documentation. A motion to reopen proceedings shall not be granted unless it appears to the Board

that evidence sought to be offered is material and was not available and could not have been discovered or presented at the former hearing; nor shall any motion to reopen for the purpose of affording the alien an opportunity to apply for any form of discretionary relief be granted if it appears that the alien's right to apply for such relief was fully explained to him or her and an opportunity to apply therefore was afforded at the former hearing, unless the relief is sought on the basis of circumstances that have arisen subsequent to the hearing. Subject to the other requirements and restrictions of this section, and notwithstanding the provisions in § 1001.1(p) of this chapter, a motion to reopen proceedings for consideration or further consideration of an application for relief under section 212(c) of the Act (8 U.S.C. 1182(c)) may be granted if the alien demonstrates that he or she was statutorily eligible for such relief prior to the entry of the administratively final order of deportation.

(2) Except as provided in paragraph (c)(3) of this section, a party may file only one motion to reopen deportation or exclusion proceedings (whether before the Board or the Immigration Judge) and that motion must be filed no later than 90 days after the date on which the final administrative decision was rendered in the proceeding sought to be reopened, or on or before September 30, 1996, whichever is later. Except as provided in paragraph (c)(3) of this section, an alien may file only one motion to reopen removal proceedings (whether before the Board or the Immigration Judge) and that motion must be filed no later than 90 days after the date on which the final

administrative decision was rendered in the proceeding sought to be reopened.

(3) In removal proceedings pursuant to section 240 of the Act, the time limitation set forth in paragraph (c)(2) of this section shall not apply to a motion to reopen filed pursuant to the provisions of § 1003.23(b)(4)(ii). The time and numerical limitation set forth in paragraph (c)(2) of this section shall not apply to a motion to reopen proceedings:

(i) Filed pursuant to the provision of § 1003.23(b)(4)(iii)(A)(*1*) or § 1003.23 (b)(4)(iii)(A)(*2*);

(ii) To apply or reapply for asylum or withholding of deportation based on changed circumstances arising in the country of nationality or in the country to which deportation has been ordered, if such evidence is material and was not available and could not have been discovered or presented at the previous hearing;

(iii) Agreed upon by all parties and jointly filed. Notwithstanding such agreement, the parties may contest the issues in a reopened proceeding; or

(iv) Filed by the Service in exclusion or deportation proceedings when the basis of the motion is fraud in the original proceeding or a crime that would support termination of asylum in accordance with § 1208.22(f) of this chapter.

(4) A motion to reopen a decision rendered by an Immigration Judge or Service officer that is pending when an appeal is filed, or that is filed while an appeal is pending before the Board, may be deemed a

motion to remand for further proceedings before the Immigration Judge or the Service officer from whose decision the appeal was taken. Such motion may be consolidated with, and considered by the Board in connection with, the appeal to the Board.

(d) *Departure, deportation, or removal.* A motion to reopen or a motion to reconsider shall not be made by or on behalf of a person who is the subject of exclusion, deportation, or removal proceedings subsequent to his or her departure from the United States. Any departure from the United States, including the deportation or removal of a person who is the subject of exclusion, deportation, or removal proceedings, occurring after the filing of a motion to reopen or a motion to reconsider, shall constitute a withdrawal of such motion.

(e) *Judicial proceedings.* Motions to reopen or reconsider shall state whether the validity of the exclusion, deportation, or removal order has been or is the subject of any judicial proceeding and, if so, the nature and date thereof, the court in which such proceeding took place or is pending, and its result or status. In any case in which an exclusion, deportation, or removal order is in effect, any motion to reopen or reconsider such order shall include a statement by or on behalf of the moving party declaring whether the subject of the order is also the subject of any pending criminal proceeding under the Act, and, if so, the current status of that proceeding. If a motion to reopen or reconsider seeks discretionary relief, the motion shall include a statement by or on behalf of the moving party declaring whether the alien for whose relief the motion is being filed is subject to any pending criminal prosecution and, if so, the nature and current status of that prosecution.

(f) *Stay of deportation.* Except where a motion is filed pursuant to the provisions of §§ 1003.23(b)(4)(ii) and 1003.23(b)(4)(iii)(A), the filing of a motion to reopen or a motion to reconsider shall not stay the execution of any decision made in the case. Execution of such decision shall proceed unless a stay of execution is specifically granted by the Board, the Immigration Judge, or an authorized officer of the Service.

(g) *Filing procedures—*

(1) *English language, entry of appearance, and proof of service requirements.* A motion and any submission made in conjunction with a motion must be in English or accompanied by a certified English translation. If the moving party, other than the Service, is represented, Form EOIR-27, Notice of Entry of Appearance as Attorney or Representative Before the Board, must be filed with the motion. In all cases, the motion shall include proof of service on the opposing party of the motion and all attachments. If the moving party is not the Service, service of the motion shall be made upon the Office of the District Counsel for the district in which the case was completed before the Immigration Judge.

(2) *Distribution of motion papers.*

(i) A motion to reopen or motion to reconsider a decision of the Board pertaining to proceedings before an Immigration Judge shall be filed directly with the Board. Such motion must be accompanied by a check, money order, or fee waiver request in satisfaction of the fee requirements of § 1003.8. The record of proceeding pertaining to such a mo-

tion shall be forwarded to the Board upon the request or order of the Board.

(ii) A motion to reopen or a motion to reconsider a decision of the Board pertaining to a matter initially adjudicated by an officer of the Service shall be filed with the officer of the Service having administrative control over the record of proceeding.

(iii) If the motion is made by the Service in proceedings in which the Service has administrative control over the record of proceedings, the record of proceedings in the case and the motion shall be filed directly with the Board. If such motion is filed directly with an office of the Service, the entire record of proceeding shall be forwarded to the Board by the Service officer promptly upon receipt of the briefs of the parties, or upon expiration of the time allowed for the submission of such briefs.

(3) *Briefs and response.* The moving party may file a brief if it is included with the motion. If the motion is filed directly with the Board pursuant to paragraph (g)(2)(i) of this section, the opposing party shall have 13 days from the date of service of the motion to file a brief in opposition to the motion directly with the Board. If the motion is filed with an office of the Service pursuant to paragraph (g)(2)(ii) of this section, the opposing party shall have 13 days from the date of filing of the motion to file a brief in opposition to the motion directly with the office of the Service. In all cases, briefs and any other filings made in conjunction with a motion shall include proof of service on the opposing party. The Board, in its discretion, may extend the time within which such brief is to be submitted and may authorize the filing

of a brief directly with the Board. A motion shall be deemed unopposed unless a timely response is made. The Board may, in its discretion, consider a brief filed out of time.

(h) *Oral argument.* A request for oral argument, if desired, shall be incorporated in the motion to reopen or reconsider. The Board, in its discretion, may grant or deny requests for oral argument.

(i) *Ruling on motion.* Rulings upon motions to reopen or motions to reconsider shall be by written order. Any motion for reconsideration or reopening of a decision issued by a single Board member will be referred to the screening panel for disposition by a single Board member, unless the screening panel member determines, in the exercise of judgment, that the motion for reconsideration or reopening should be assigned to a three-member panel under the standards of § 1003.1(e)(6). If the order directs a reopening and further proceedings are necessary, the record shall be returned to the Immigration Court or the officer of the Service having administrative control over the place where the reopened proceedings are to be conducted. If the motion to reconsider is granted, the decision upon such reconsideration shall affirm, modify, or reverse the original decision made in the case.

4. 8 C.F.R. 1003.23 provides, in pertinent part:

Reopening or reconsideration before the Immigration Court.

(a) *Pre-decision motions.* Unless otherwise permitted by the Immigration Judge, motions submitted prior

to the final order of an Immigration Judge shall be in writing and shall state, with particularity the grounds therefore, the relief sought, and the jurisdiction. The Immigration Judge may set and extend time limits for the making of motions and replies thereto. A motion shall be deemed unopposed unless timely response is made.

(b) *Before the Immigration Court—*

(1) *In general.* An Immigration Judge may upon his or her own motion at any time, or upon motion of the Service or the alien, reopen or reconsider any case in which he or she has made a decision, unless jurisdiction is vested with the Board of Immigration Appeals. Subject to the exceptions in this paragraph and paragraph (b)(4), a party may file only one motion to reconsider and one motion to reopen proceedings. A motion to reconsider must be filed within 30 days of the date of entry of a final administrative order of removal, deportation, or exclusion, or on or before July 31, 1996, whichever is later. A motion to reopen must be filed within 90 days of the date of entry of a final administrative order of removal, deportation, or exclusion, or on or before September 30, 1996, whichever is later. A motion to reopen or to reconsider shall not be made by or on behalf of a person who is the subject of removal, deportation, or exclusion proceedings subsequent to his or her departure from the United States. Any departure from the United States, including the deportation or removal of a person who is the subject of exclusion, deportation, or removal proceedings, occurring after the filing of a motion to reopen or a motion to reconsider shall constitute a withdrawal of such motion.

The time and numerical limitations set forth in this paragraph do not apply to motions by the Service in removal proceedings pursuant to section 240 of the Act. Nor shall such limitations apply to motions by the Service in exclusion or deportation proceedings, when the basis of the motion is fraud in the original proceeding or a crime that would support termination of asylum in accordance with § 1208.22(e) of this chapter.

(i) *Form and contents of the motion.* The motion shall be in writing and signed by the affected party or the attorney or representative of record, if any. The motion and any submission made in conjunction with it must be in English or accompanied by a certified English translation. Motions to reopen or reconsider shall state whether the validity of the exclusion, deportation, or removal order has been or is the subject of any judicial proceeding and, if so, the nature and date thereof, the court in which such proceeding took place or is pending, and its result or status. In any case in which an exclusion, deportation, or removal order is in effect, any motion to reopen or reconsider such order shall include a statement by or on behalf of the moving party declaring whether the subject of the order is also the subject of any pending criminal proceeding under the Act, and, if so, the current status of that proceeding.

(ii) *Filing*. Motions to reopen or reconsider a decision of an Immigration Judge must be filed with the Immigration Court having administrative control over the Record of Proceeding. A motion to reopen or a motion to reconsider shall include a

certificate showing service on the opposing party of the motion and all attachments. If the moving party is not the Service, service of the motion shall be made upon the Office of the District Counsel for the district in which the case was completed. If the moving party, other than the Service, is represented, a Form EOIR-28, Notice of Appearance as Attorney or Representative Before an Immigration Judge must be filed with the motion. The motion must be filed in duplicate with the Immigration Court, accompanied by a fee receipt.

(iii) *Assignment to an Immigration Judge.* If the Immigration Judge is unavailable or unable to adjudicate the motion to reopen or reconsider, the Chief Immigration Judge or his or her delegate shall reassign such motion to another Immigration Judge.

(iv) *Replies to motions; decision.* The Immigration Judge may set and extend time limits for replies to motions to reopen or reconsider. A motion shall be deemed unopposed unless timely response is made. The decision to grant or deny a motion to reopen or a motion to reconsider is within the discretion of the Immigration Judge.

(v) *Stays.* Except in cases involving in absentia orders, the filing of a motion to reopen or a motion to reconsider shall not stay the execution of any decision made in the case. Execution of such decision shall proceed unless a stay of execution is specifically granted by the Immigration Judge, the Board, or an authorized officer of the Service.

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(3) *Motion to reopen.* A motion to reopen proceedings 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 and other evidentiary material. Any motion to reopen for the purpose of acting on an application for relief must be accompanied by the appropriate application for relief and all supporting documents. A motion to reopen will not be granted unless the Immigration Judge is satisfied that evidence sought to be offered is material and was not available and could have not been discovered or presented at the former hearing. A motion to reopen for the purpose of providing the alien an opportunity to apply for any form of discretionary relief will not be granted if it appears that the alien's right to apply for such relief was fully explained to him or her by the Immigration Judge and an opportunity to apply thereof was afforded at the hearing, unless the relief is sought on the basis of circumstances that have arisen subsequent to the hearing. Pursuant to section 240A(d)(1) of the Act, a motion to reopen proceedings for consideration or further consideration of an application for relief under section 240A(a) (cancellation of removal for certain permanent residents) or 240A(b) (cancellation of removal and adjustment of status for certain nonpermanent residents) may be granted only if the alien demonstrates that he or she was statutorily eligible for such relief prior to the service of a notice to appear, or prior to the commission of an offense referred to in section 212(a)(2) of the Act that renders the alien inadmissible or removable under sections 237(a)(2) of the Act, or (a)(4), whichever is earliest. The Immigration Judge has discretion to deny a motion to reopen even if the moving party has established a prima facie case for relief.

(4) *Exceptions to filing deadlines—*

(i) *Asylum and withholding of removal.* The time and numerical limitations set forth in paragraph (b)(1) of this section shall not apply if the basis of the motion is to apply for asylum under section 208 of the Act or withholding of removal under section 241(b)(3) of the Act or withholding of removal under the Convention Against Torture, 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 could not have been discovered or presented at the previous proceeding. The filing of a motion to reopen under this section shall not automatically stay the removal of the alien. However, the alien may request a stay and, if granted by the Immigration Judge, the alien shall not be removed pending disposition of the motion by the Immigration Judge. If the original asylum application was denied based upon a finding that it was frivolous, then the alien is ineligible to file either a motion to reopen or reconsider, or for a stay of removal.

(ii) *Order entered in absentia or removal proceedings.* An order of removal entered in absentia or in removal proceedings pursuant to section 240(b)(5) of the Act may be rescinded only 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 section 240(e)(1) of the Act. An order entered in absentia pursuant to section 240(b)(5) may be rescinded upon a motion to reopen filed at any time if the alien demonstrates that he or she did not

receive notice in accordance with sections 239(a)(1) or (2) of the Act, or the alien demonstrates that he or she was in Federal or state custody and the failure to appear was through no fault of the alien. However, in accordance with section 240(b)(5)(B) of the Act, no written notice of a change in time or place of proceeding shall be required if the alien has failed to provide the address required under section 239(a)(1)(F) of the Act. The filing of a motion under this paragraph shall stay the removal of the alien pending disposition of the motion by the Immigration Judge. An alien may file only one motion pursuant to this paragraph.

(iii) *Order entered in absentia in deportation or exclusion proceedings.*

(A) An order entered in absentia in deportation proceedings may be rescinded only upon a motion to reopen filed:

(*1*) Within 180 days after the date of the order of deportation if the alien demonstrates that the failure to appear was because of exceptional circumstances beyond the control of the alien (e.g., serious illness of the alien or serious illness or death of an immediate relative of the alien, but not including less compelling circumstances); or

(*2*) At any time if the alien demonstrates that he or she did not receive notice or if the alien demonstrates that he or she was in federal or state custody and the failure to appear was through no fault of the alien.

(B) A motion to reopen exclusion hearings on the basis that the Immigration Judge improperly entered an order of exclusion in absentia must be supported by evidence that the alien had reasonable cause for his failure to appear.

(C) The filing of a motion to reopen under paragraph (b)(4)(iii)(A) of this section shall stay the deportation of the alien pending decision on the motion and the adjudication of any properly filed administrative appeal.

(D) The time and numerical limitations set forth in paragraph (b)(1) of this section shall not apply to a motion to reopen filed pursuant to the provisions of paragraph (b)(4)(iii)(A) of this section.

(iv) *Jointly filed motions.* The time and numerical limitations set forth in paragraph (b)(1) of this section shall not apply to a motion to reopen agreed upon by all parties and jointly filed.