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 OF COURT-APPOINTED AMICUS CURIAE IN SUPPORT OF THE JUDGMENT BELOW

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QUESTION PRESENTED

Whether the phrase "decision . . . specified [as discretionary] under this subchapter" in 8 U.S.C. 1252(a)(2)(B)(ii) extends to decisions clearly "specified" as discretionary in regulations duly promulgated "under" the relevant subchapter of the United States Code.

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INTRODUCTION

This case presents a straightforward question of statutory construction. A provision of the Immigration and Nationality Act, 8 U.S.C. 1252(a)(2)(B)(ii), precludes judicial review of "any" decision of the Attorney General or the Secretary of Homeland Security that is "specified" as discretionary "under" the Act, as long as that decision does not involve a constitutional claim or question of law. A regulation, 8 C.F.R. 1003.2, was amended "under" the Act just months before the enactment of 8 U.S.C. 1252(a)(2)(B)(ii). As so amended, the regulation "specifie[s]" that an agent of the Attorney General, the Board of Immigration Appeals, has discretion to grant or deny motions to reopen immigration proceedings.

Petitioner filed a motion to reopen his immigration proceeding, raising only issues of fact. The Board of Immigration Appeals denied that motion. Petitioner appealed, and the Seventh Circuit, reading the plain language of 8 U.S.C. 1252(a)(2)(B)(ii) and 8 C.F.R. 1003.2, held that the statutory provision stripped the court of jurisdiction to consider Petitioner's appeal. The question here is whether the Seventh Circuit was correct to find that the phrase "decision . . . specified [as discretionary] under this subchapter" in 8 U.S.C. 1252(a)(2)(B)(ii) includes decisions "specified" as discretionary in a regulation duly promulgated under the relevant subchapter of the United States Code.

STATEMENT

Section 1252(a)(2)(B)(ii): Congress enacted Section 1252(a)(2)(B)(ii) of the Immigration and Nationality Act (INA), 8 U.S.C. 1101 *et seq*., in September 1996, as part of a sweeping reform designed to alleviate a major burden on the Nation's courts. As the United States explains, Congress included the section in the Illegal Immigration Reform and Immigrant Responsibility Act of 1996, (IIRIRA), Pub. L. No. 104-208, Div. C, 110 Stat. 3009, 3009-546 to 3009-724, a set of amendments to the INA intended "to expedite the removal of criminal and other illegal aliens from the United States." Resp. Br. 2.

IIRIRA was designed to combat aliens' opportunistic (and understandable) practice of using judicial review as a means of delaying deportation. For years before 1996, this Court had recognized that immigration law creates a unique set of incentives to add to the burdens of the federal courts. "[A]s a general matter," the Court explained, "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). "One illegally present in the United States who wishes to remain . . . has a substantial incentive to prolong litigation in order to delay physical deportation for as long as possible." *INS*. v. *Rios-Pineda*, 471 U.S. 444, 450 (1985). The Court expressed concern—often in the context of reviewing motions to reopen—about two consequences of these incentives: (1) "endless delay[s] of deportation by aliens creative and fertile enough to continuously produce new and material facts," *INS* v. *Jong Ha Wang*, 450 U.S. 139, 144, n.5 (1981) (per curiam) (internal quotation marks omitted); and (2)

"substantial" additional "burdens on the courts," *United States* v. *Ortiz*, 422 U.S. 891, 915 (1975) (White, J., concurring).

Driven by the "strong public interest in bringing [immigration] litigation to a close as promptly as is consistent with the interest in giving the adversaries a fair opportunity to develop and present their respective cases," *INS* v. *Abudu*, 485 U.S. 94, 107 (1988), Congress decided to act. Noting what he termed "an overuse of due process," the floor manager of the Senate bill that became IIRIRA explained that a primary purpose of the bill was to "greatly reduce the ability of aliens to unlawfully enter this country and then remain here for years through use, or misuse, of various administrative and judicial proceedings and appeals." 142 Cong. Rec. 9766 (1996) (statement of Sen. Simpson).

With IIRIRA, Congress employed strong and far-reaching means to achieve this end: it "substantially limited the availability of judicial review." *Nken* v. *Holder*, 129 S. Ct. 1749, 1755 (2009). "*[M]any* provisions of IIRIRA [were] aimed at protecting the Executive's discretion from the courts—indeed, that can fairly be said to be the theme of the legislation." *Reno* v. *Am.-Arab Anti-Discrimination Comm.*, 525 U.S. 471, 486 (1999) (emphasis in original). To implement this theme, Congress "repealed the old judicial-review scheme . . . and instituted a new (and significantly more restrictive) one."[1] *Id.* at 475.

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[1] This new judicial review scheme has not solved the problem of court overload. For example, Board of Immigration Appeals statistics indicate that the courts of appeals entertained more than 1,290 immigration cases in 2005, 1,791 in 2006, 2,157

Section 1252(a)(2)(B)(ii) is central to IIRIRA's new "and significantly more restrictive" judicial review scheme. The section imposes strict limits on federal courts' jurisdiction to review most discretionary decisions of immigration officials. Specifically, as subsequently amended by the REAL ID Act of 2005 (REAL ID Act), Pub. L. No. 109-13, Div. B, 119 Stat. 231, 302-323,[2] Section 1252(a)(2)(B)(ii) 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.

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in 2007, and 1,463 in 2008. Executive Office for Immigration Review, *FY 2008 Statistical Year Book* T2 (2009) (Table 2), *available at* http://www.usdoj.gov/eoir/statspub/fy08syb.pdf. The table indicates only how many immigration cases the courts *remanded* to the Board in the given year. Assuming the Board occasionally wins on appeal, the number of immigration cases the courts *heard* in each of these years must be still higher.

[2] As the United States explains, the version of Section 1252(a)(2)(B)(ii) that applies here is that "enacted by IIRIRA and amended by the REAL ID Act," because Petitioner "did not seek judicial review of the denial of his second motion to reopen until 2007." Resp. Br. 3-4 n.1.

8 U.S.C. 1252(a)(2)(B)(ii) (2006).

Most of the clauses in the quoted, overlong sentence are irrelevant here.[3] Stripped to its essentials, the relevant part of Section 1252(a)(2)(B)(ii) provides: "Notwithstanding any other provision of law," "no court" may review "any" decision of the Attorney General or Secretary of Homeland Security (Secretary) that is "specified" as discretionary "under" Title 8, Chapter 12, Subchapter II of the United States Code (that is, under 8 U.S.C. 1151-1381). 8 U.S.C. 1252(a)(2)(B)(ii). The question in this case is whether this jurisdictional limitation extends to the Board of Immigration Appeals' decision to deny Petitioner's motion to reopen—a decision by an agent of the Attorney General that is clearly "specified" as discretionary in a regulation promulgated "under" the relevant subchapter.

Regulation 1003.2: The regulation that does the "specif[ying]" here is 8 C.F.R. 1003.2 (Regulation 1003.2). Originally promulgated in 1958,[4] 23 Fed.

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[3] No party in this case has invoked "Section 2241 of title 28," nor "any other habeas corpus provision," nor "sections 1361 and 1651 of [Title 28]." "[S]ubparagraph (D)" refers to 8 U.S.C. 1252(a)(2)(D) (Section 1252(a)(2)(D)), which was added to the INA in 2005 in response to this Court's decision in *INS* v. *St. Cyr*, 533 U.S. 289 (2001). REAL ID Act § 106(a)(1)(A)(iii), 119 Stat. 310. That section restores court jurisdiction over "constitutional claims or questions of law," 8 U.S.C. 1252(a)(2)(D)—but no such issues are present in this case, see Resp. Br. 17-18 n.9. Finally, "section 1158(a) of [Title 8]" refers to 8 U.S.C. 1158(a), which governs applications for asylum—also not at issue here, Resp. Br. 17 n.8.

[4] This regulation was originally promulgated as 8 C.F.R. 3.2. 23 Fed. Reg. 9115, 9118 (1958). In 2003, it was redesignated 8

Reg. 9115, 9118 (1958),[5] Regulation 1003.2 addresses those motions to reopen removal proceedings that are filed first with the Board of Immigration Appeals (Board or BIA).[6] As detailed below, *infra* pp. 45-45, the regulation supplies various details, absent from the text of the INA, about the format, content, and timing of motions to reopen and motions to reconsider, and the standard of review applicable to those motions.[7]

C.F.R. 1003.2. 68 Fed. Reg. 9824, 9830 (2003). For simplicity, the remainder of this brief refers to the regulation by its current designation: 8 C.F.R. 1003.2 or Regulation 1003.2.

[5] The regulation was amended, 27 Fed. Reg. 96, 96-97 (1962) (amending what was then 8 C.F.R. 3.2), before it was finally codified in 1964, 8 C.F.R. 3.2 (Cum. Supp. 1964) (first codification of same).

[6] As the United States explains, aliens may file motions to reopen removal proceedings in two situations: (1) after they are ordered "removed in absentia" for failing to appear at a removal hearing, 8 U.S.C. 1229a(b)(5)(A), or (2) whenever they have "new facts" they wish to "prove[] at a hearing to be held if the motion is granted," 8 U.S.C. 1229a(c)(7)(B). Resp. Br. 4-5. The relevant regulations instruct aliens to file motions to reopen with either an Immigration Judge or the Board, whichever was the last to render an opinion in the alien's case. 8 C.F.R. 1003.2 (Board); 8 C.F.R. 1003.23 (Immigration Judge).

[7] From the United States' opening brief, it may appear that two regulations are relevant here, Regulation 1003.2 and 8 C.F.R. 1003.23 (Regulation 1003.23). As the United States explains, Resp. Br. 4-6, Regulation 1003.2 concerns motions to reopen filed initially with the Board, while Regulation 1003.23 concerns those motions filed first with an immigration judge. Petitioner filed the motion to reopen at issue here with an immigration judge under Regulation 1003.23. On appeal, however, the Board determined that Petitioner should have filed with the Board, J.A. 23a, and it treated his motion as if he had done so. Thus, only Regulation 1003.2 governs the subsequent

The critical language for this case is in the first paragraph of the regulation:

> 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.

8 C.F.R. 1003.2(a) (emphasis added). Attorney General Reno added this language specifying that the Board has discretion over the disposition of motions to reopen in April 1996, in a regulatory amendment designed "to implement section 545 of the Immigration Act of 1990, Public Law 101-649, which require[d] both time and number limitations on motions to reopen and reconsider and changes in the substantive and procedural aspects of motion and appeal practice." 60 Fed. Reg. 24,573, 24,573 (1995) (proposing amendments to what is now 8 C.F.R. 1003.2); see also 61 Fed. Reg. 18,900, 18,904 (1996) (final rule). As explained below and in the United States' brief, *infra* p. 34; Resp. Br. 32, this new specification of discretion accorded with courts' almost century-long practice of recognizing Attorney General discretion over motions to reopen.

The new specification of discretion in Regulation 1003.2 entered into effect on July 1, 1996. 61 Fed. Reg. at 18,900. Thus, when Congress passed and the

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disposition of Petitioner's motion to reopen. Moreover, Petitioner's Question Presented in this case is limited to whether Section 1252(a)(2)(B)(ii) "strips jurisdiction from federal courts to review *rulings on motions to reopen by the Board*"—that is, rulings on motions filed under Regulation 1003.2. Pet'r Br. i (emphasis added).

President signed IIRIRA on September 30, 1996, see 110 Stat. 3009-749, there was in place brand new regulatory language that made clear that the decision whether to grant or deny a motion to reopen is within the discretion of the Attorney General.

Petitioner: Finally, although this case presents a narrow issue of law, Petitioner's story provides important context. Petitioner is an Albanian citizen who overstayed his visitor visa more than 13 years ago. J.A. 6-7. He filed an application for asylum in spring 1996. *Id.* at 7 n.2, 30. The Immigration and Naturalization Service (INS) referred Petitioner's asylum application to an immigration judge and placed Petitioner "in deportation proceedings through the issuance of an Order to Show Cause." *Id.* at 7 & n.2, 30. Petitioner appeared with counsel at the show cause hearing, "admitted each of the factual allegations" against him, and "conceded deportability." *Id.* at 7, 30. The immigration judge then scheduled a hearing on the merits of Petitioner's asylum petition, but Petitioner failed to appear. *Id.* Accordingly, on October 9, 1997, the judge ordered Petitioner "removed in absentia" under 8 U.S.C. 1229a(b)(5)(A). *Id.* at 7, 33.

Petitioner filed a motion to reopen, explaining that he missed the hearing because he overslept, and requesting that the immigration judge rescind the order. *Id.* at 8, 30. The judge denied the motion, concluding that Petitioner's explanation for his absence did not meet the INA's "exceptional circumstances" standard. J.A. at 8, 31-32; see also 8 U.S.C. 1229a(b)(5)(C)(i) (invoking the "exceptional circumstances" standard of 8 U.S.C. 1229a(e)(1)). The Board affirmed the denial without opinion in May 2002. J.A. 28.

This first motion to reopen is not, however, the motion at the center of this case. Almost nine years after an immigration judge first ordered Petitioner removed, Petitioner filed a second motion to reopen his removal proceedings. *Id.* at 16-19. This second motion principally claimed that conditions in Petitioner's home country had changed for the worse. *Id.* at 18-19; see also Pet. App. 11a-12a (noting that although Petitioner offered "a second argument in support of reopening"—namely, his mother's application, filed on his behalf, for a relative visa—he did not press this second argument in his appeal to the Board).

The immigration judge gave this second motion full consideration but denied it, noting, among other things, that although Petitioner "asserted fear of persecution on account of his involvement with the pro-democracy movement in Albania prior to his arrival in the United States," his motion to reopen "conveniently neglect[ed] to mention that the Democratic Party," which Petitioner had supported, "won Albania's most recent elections." J.A. 12-13.

On appeal from this denial, the Board concluded that the motion had never properly been before the immigration judge: because the "Board was last to render a decision" in Petitioner's case, "[j]urisdiction . . . remained with the Board to consider" Petitioner's second motion to reopen. Pet. App. 23a. Turning to the merits, the Board, too, noted that "the current Prime Minister of Albania is from the Democratic Party." *Id.* at 24a. From this and a few other details of conditions in that country, the Board concluded that Petitioner had not "established his prima facie eligibility for asylum or withholding of deportation in the United States based on material changes that

have occurred in Albania since his failure to appear before the immigration Judge in October 1997." *Id.* at 25a-26a.

Petitioner then sought review in the Seventh Circuit. That court briefly explained that it did not believe the Board had abused its discretion. *Id.* at 3a. Ultimately, however, the court did not affirm the Board's decision but instead dismissed the petition for review on the ground that the jurisdiction-stripping effect of Section 1252(a)(2)(B)(ii) extends to decisions of the Attorney General that are made discretionary by a regulation issued "under" the INA, and thus that the section precludes federal court review of the Board's discretionary denial of Petitioner's motion to reopen. *Id.* at 4a-12a.

SUMMARY OF ARGUMENT

Section 1252(a)(2)(B)(ii) strips courts of appellate jurisdiction in those cases, including Petitioner's, in which the Board denies a motion to reopen for reasons that are purely fact-based.

Section 1252(a)(2)(B)(ii) provides that "no court" may review "any" decision of the Attorney General or the Secretary that is "specified" as discretionary "under this subchapter" (that is, under Title 8, Chapter 12, Subchapter II of the United States Code). "Under" is Congress's and this Court's word of choice to describe the relationship between regulations and the statutes "under" which they are promulgated. Congress's decision to use the word "under" in Section 1252(a)(2)(B)(ii) unambiguously extends the section's reach beyond decisions that are "specified" as discretionary "in" the Act itself to decisions "specified" as discretionary in regulations

adopted "under" the Act. Other expansive words in Section 1252(a)(2)(B)(ii), including the word "any," confirm the section's sweeping reach. Moreover, because the section contains two express exceptions to its otherwise far-reaching jurisdictional limitation, additional exceptions are not to be implied.

The object, purpose, and legislative history of Section 1252(a)(2)(B)(ii) support this reading of the text. The section was the centerpiece of a 1996 congressional effort to adopt a new and far more restrictive judicial review scheme for immigration matters. Recognizing that federal courts were overwhelmed with immigration cases, Congress acted decisively to curtail judicial review in this area. The chief House sponsor of IIRIRA explained that with Section 1252(a)(2)(B)(ii), Congress intended to limit judicial review of all discretionary decisions of immigration officials. Additionally, the only description of Section 1252(a)(2)(B)(ii) provided to Members of Congress before they voted on IIRIRA explained cursorily that the provision stripped courts of jurisdiction to review "any decision . . . specified to be" in the Attorney General's discretion—identifying no limitation on the source of the specification.

Most important, there is a pellucid regulation, 8 C.F.R. 1003.2, that "specifie[s]" that the Board, an agent of the Attorney General, has discretion over motions to reopen filed with it. Attorney General Reno duly adopted the regulatory specification of discretion just a few months *before* Congress enacted IIRIRA and Section 1252(a)(2)(B)(ii). When Congress stripped federal courts of jurisdiction to review the discretionary decisions of the Attorney General, therefore, it had every reason to know that a direct

consequence would be to preclude review of Board denials of fact-based motions to reopen.

Regulation 1003.2 and the 1003.2 Amendments, which added the specification of discretion, were issued "under" the identified subchapter of the United States Code. They are not procedurally or legally defective. And they raise no relevant constitutional concerns, because (1) another provision of the INA, 8 U.S.C. 1252(a)(2)(D), ensures court jurisdiction to review those motions to reopen that raise legal or constitutional claims, and (2) the timeline here—with the 1003.2 Amendments predating Section 1252(a)(2)(B)(ii)—establishes that Congress, not the Attorney General, made the decision to limit court jurisdiction in this circumstance. Regulation 1003.2 is therefore a properly promulgated, lawful agency regulation with the force and effect of law.

Finally, because Section 1252(a)(2)(B)(ii) and Regulation 1003.2 are unambiguous with respect to the issue before this Court, no deference is due to the Attorney General's litigating position that the provisions do not mean what they say. Under Section 1252(a)(2)(B)(ii), the Attorney General may (within limits) identify *whether* decisions are discretionary, but he may not now curtail the jurisdictional effect of his office's pre-IIRIRA decision to place the Board's decisions on motions to reopen in that category.

ARGUMENT

Congress commonly leaves statutory gaps for the relevant agency "to fill . . . in reasonable fashion" with regulations. *Nat'l Cable & Telecomms. Ass'n* v. *Brand X Internet Servs.*, 545 U.S. 967, 980-81 (2005). In ordinary legal parlance, the resulting regulations are described as being "under" the statutes they explicate.

In this case, the Attorney General adopted a regulation under the immigration laws to fill evident gaps in those laws' explication of the procedure and standard of review for motions to reopen removal proceedings. That regulation specifies that an agent of the Attorney General, the Board, has discretion over the disposition of such motions. By its terms, therefore, the later-enacted Section 1252(a)(2)(B)(ii), which strips courts of jurisdiction to review any decision of the Attorney General that is "*specified*" as discretionary "*under*" the immigration laws, 8 U.S.C. 1252(a)(2)(B)(ii) (emphasis added), bars review of the Board's decision to deny Petitioner's motion to reopen his removal proceeding.

I. ON ITS FACE, SECTION 1252(a)(2)(B)(ii) BARS JUDICIAL REVIEW OF DECISIONS AND ACTIONS MADE DISCRETIONARY BY A REGULATION DULY PROMULGATED UNDER TITLE 8, CHAPTER 12, SUBCHAPTER II OF THE UNITED STATES CODE.

"The starting point in statutory interpretation is the language [of the statute] itself," *Ardestani* v. *INS*, 502 U.S. 129, 135 (1991) (alteration in original)

(internal quotation marks omitted), and there is a strong presumption that the statute's plain language expresses congressional intent, see *Rubin* v. *United States*, 449 U.S. 424, 430 (1981). By its terms, the text of 8 U.S.C. 1252(a)(2)(B)(ii) unambiguously precludes judicial review of the Board's denial of a motion to reopen if a regulation duly adopted "under" Title 8, Chapter 12, Subchapter II of the United States Code gives the Board discretion over those motions.

A. The Phrase "Specified Under This Subchapter" Encompasses Both Language In The Subchapter Itself And Language In Regulations Promulgated Under The Subchapter.

The pertinent language of Section 1252(a)(2)(B)(ii) provides: "Notwithstanding any other provision of law (statutory or nonstatutory), . . . no court shall have jurisdiction to review" decisions "the authority for which is specified under this subchapter to be in the discretion of the Attorney General or the Secretary." 8 U.S.C. 1252(a)(2)(B)(ii). On its face, this language bars review in all instances in which the authority for the relevant decision is specified "under this subchapter" to be discretionary. Petitioner and the United States ask this Court to read the statute as if it said "*in* this subchapter" or "*within* this subchapter," but Congress selected the preposition "under," clearly intending to reach not only decisions specified as discretionary *in* the text of the subchapter, but also those specified as discretionary in regulations adopted *under* the subchapter.

"Statutory construction must begin with the language employed by Congress and the assumption that the ordinary meaning of that language accurately expresses the legislative purpose." *Engine Mfrs. Ass'n* v. *S. Coast Air Quality Mgmt. Dist.*, 541 U.S. 246, 252 (2004) (internal quotation marks omitted). In common English, "under" refers to things that are subordinate, in precisely the way that a regulation is subordinate to its authorizing statute. See *Cambridge Dictionary of American English* 951 (2008) ("under" is "a position below or lower than"); *The American Heritage College Dictionary* 1494 (2008) ("beneath or below in position; inferior or subordinate in rank or importance").

In the legal lexicon, the word "under" is the common way to express the relationship of a regulation to its authorizing statute. See Bryan A. Garner, *The Redbook: A Manual on Legal Style* (*Redbook*) 159-60 (2002); see also *Bouvier's Law Dictionary* 3351 (1984) ("under" means "below in position" or "inferior" or "subordinate"). Congress has used the word "under" in this way hundreds of times in the United States Code. See Appendix A (listing 400 examples of statutory references to regulations as "under" their authorizing statutes).

Indeed, in Title 8 itself, Congress repeatedly describes the regulations authorized by the INA as being issued "under" that Act. See, *e.g.*, 8 U.S.C. 1101(a)(9) ("regulations prescribed *under* authority contained in this chapter"); 8 U.S.C. 1103(a)(4), (6), (10) ("regulations issued there*under*"); 8 U.S.C. 1104(a) ("regulations issued there*under*"); 8 U.S.C. 1182(a)(7)(A)(i)(I) ("regulations issued by the Attorney General *under* section 1181(a) of this title"); 8 U.S.C. 1201(a)(1), (g) ("regulations issued

there*under*"); 8 U.S.C. 1204 ("regulations prescribed *under* this chapter"); 8 U.S.C. 1229a(b)(6)(A) ("shall, by regulation . . . define in a proceeding before an immigration judge or before an appellate administrative body *under* this subchapter"); 8 U.S.C. 1323(a)(1) ("regulations issued there*under*") (emphasis added in all). As this Court has explained, "equivalent words have equivalent meaning when repeated in the same statute." *Cohen* v. *de la Cruz*, 523 U.S. 213, 220 (1998); see also *Comm'r* v. *Keystone Consol. Indus., Inc.*, 508 U.S. 152, 159 (1993) (setting forth the textual canon that "identical words used in different parts of the same act are intended to have the same meaning" (internal quotation marks omitted)). When Congress chose to use the word "under" rather than "in" in Section 1252(a)(2)(B)(ii), therefore, it presumably did so deliberately, to reach regulations issued "under" the relevant subchapter.

This Court's use of the word "under" is also relevant, because the Court presumes "that Congress expects its statutes to be read in conformity with this Court's precedents." *Clay* v. *United States*, 537 U.S. 522, 527 (2003) (internal quotation marks omitted). That use is telling here: the Court regularly refers to immigration regulations—including regulations governing motions to reopen—as "under" the INA and its predecessor statutes. See, *e.g.*, *Rios-Pineda*, 471 U.S. at 446 ("the Attorney General has promulgated regulations *under* the [INA]"); *Jong Ha Wang*, 450 U.S. at 140-41 ("The [INA] itself does not expressly provide for a motion to reopen, but regulations promulgated *under* the Act allow such a procedure"); *Cheng Fan Kwok* v. *INS*, 392 U.S. 206, 208 (1968) ("regulations promulgated *under* the [INA's] authority"); *Abel* v. *United States*, 362 U.S.

217, 232 (1960) ("regulations *under* [the INA]"); *Marcello* v. *Bonds*, 349 U.S. 302, 308 (1955) ("The regulations *under* § 242(b) [of the INA]"); *United States ex rel. Polymeris* v. *Trudell*, 284 U.S. 279, 281 (1932) ("By § 13 [of the Immigration Act] and the regulations *under* it") (emphasis added in all). Moreover, the Court has expressly recognized that in a statutory scheme, the word "under" refers to law that is either authorized by the statute or promulgated pursuant to it. See *Fla. Dept. of Revenue* v. *Piccadilly Cafeterias, Inc.*, 128 S. Ct. 2326, 2332 (2008) (agreeing with Florida that "'under' . . . should be read to mean 'with the authorization of' or 'inferior or subordinate' to its referent"); *Ardestani*, 502 U.S. at 135 (indicating that the most natural reading of a statute's applicability to adjudications "under" a section must be "subject to," "governed by," or "by reason of the authority of" that section (internal quotation marks omitted)).

Prominent legal style books, too, agree that "under" is synonymous with "pursuant to," and they instruct that "under" is preferred. See Antonin Scalia & Bryan A. Garner, *Making Your Case: The Art of Persuading Judges* 113 (2008) (advising that "*pursuant to*" "can almost always be replaced with . . . *under*" (italics in original)); Joseph Kimble, *Lifting the Fog of Legalese* 72, 93 (2006); *Redbook* 159–60; *Bouvier's Law Dictionary* 3351. Thus, while "[t]he word 'under' has many dictionary definitions and must draw its meaning from its context," *Ardestani*, 502 U.S. at 135, ordinary usage, common congressional usage, and this Court's usage all indicate that in a phrase like "under this subchapter," "under" extends to regulations issued "pursuant to" the subchapter.

The United States also appears to recognize the significance of Congress's word choice. In numerous places in its opening brief, the Government creatively paraphrases Section 1252(a)(2)(B)(ii), replacing "under" with "in." See Resp. Br. 17 ("statement [of discretion] must appear *in* a certain part of the Act"); *id.* at 22 ("nothing *in* the relevant subchapter of the INA specifies that the Attorney General has discretionary authority"); *id.* ("requirement that discretionary authority be 'specified' *in* 'this subchapter'"); *id.* at 28 ("for which the Attorney General's authority is provided *in* Subchapter II"); *id.* at 34 ("decisions of the Attorney General or the Secretary that are specified *in* the relevant subchapter"); *id.* ("did not specify anywhere *in* the relevant subchapter") (emphasis added in all). In fact, Congress's use of the preposition "under" so undermines the United States' position that in one instance the Government inadvertently omits the word from a direct quotation of the statute. Resp. Br. 11 (misquoting the statutory language as eliminating jurisdiction for review of any decision "'the authority for which is specified *in* [the relevant subchapter] to be in the discretion of the Attorney General'" (substitution in original) (emphasis added)).

Congress certainly could have opted to limit the reach of the jurisdictional bar in Section 1252(a)(2)(B)(ii) to decisions and actions specified as discretionary "*in* this subchapter."[8] Indeed, Congress

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[8] Even if the reach of Section 1252(a)(2)(B)(ii) were limited in this way, the section arguably still would strip courts of jurisdiction to review Board denials of motions to reopen. This brief focuses on the specification of discretion contained in

has used this phrasing thousands of times in the United States Code, presumably to require "inclusion, location, or position within [the] limits" of the statute itself. *Merriam-Webster's Collegiate Dictionary* 627 (2004) (defining "in"). For example,

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Regulation 1003.2, but the language of the INA provision governing Petitioner's motion to reopen, 8 U.S.C. 1229a(c)(7)(B), itself suggests that the decision whether to grant such a motion is discretionary.

Many of the statutory provisions that Petitioner and the United States characterize as committing issues to the Attorney General's discretion say merely "the Attorney General may . . .," or otherwise imply discretion, without ever using the word "discretion." See Pet'r Br. 2-3 & n.2; Resp. Br. 20 & n.12 (noting that "several more provisions commit decisions" to the Attorney General's discretion "using words that are functionally equivalent to 'discretion'"); 8 U.S.C. 1153(b)(2)(B)(i) ("[T]he Attorney General may, when the Attorney General deems it to be in the national interest, waive the requirements of subparagraph (A)."); see also *Alaka* v. *Att'y Gen.*, 456 F.3d 88, 96-98 (discussing Congress's use of the verb "may" to confer discretion). Indeed, Section 1252(a)(2)(B)(ii) itself identifies such a provision. That section extends to discretionary decisions "other than the granting of relief under section 1158(a) of this title." 8 U.S.C. 1252(a)(2)(B)(ii). But Section 1158(a), which concerns asylum applications, nowhere explicitly states that the decision to grant asylum is discretionary. In fact, that section does not even say that an agent of the Attorney General "may" grant the application. Rather, that provision says only, "[a]ny alien who is physically present in the United States or who arrives in the United States . . . may apply for asylum." 8 U.S.C. 1158(a). The reader must deduce from the context that review of the application is discretionary. Likewise, the statutory language governing motions to reopen anticipates an exercise of Attorney General discretion when it states, "[t]he motion to reopen shall state the new facts that will be proven at a hearing to be held *if the motion is granted*." 8 U.S.C. 1229a(c)(7)(B) (emphasis added). The implication is that the Attorney General *may* grant the motion, just as he *may* grant asylum.

Title 8 itself repeatedly uses the phrases "*in* this chapter" or "*in* this subchapter" to refer to material actually located within the statutory text. See, *e.g.*, 8 U.S.C. 1102 ("provided *in* this chapter"); 8 U.S.C. 1159(a)(2) ("notwithstanding any numerical limitation specified *in* this chapter"); 8 U.S.C. 1160(d)(3)(A) ("otherwise provided *in* this chapter"); 8 U.S.C. 1229a(a)(3) ("Unless otherwise specified *in* this chapter"); 8 U.S.C. 1533(d) ("except as they are specifically referenced *in* this subchapter") (emphasis added in all). Had Congress wished similarly to limit the reach of Section 1252(a)(2)(B)(ii)'s jurisdictional bar, it knew how to do so. *Russello* v. *United States*, 464 U.S. 16, 23 (1983) ("Where Congress includes particular language in one section of a statute but omits it in another section of the same Act, it is generally presumed that Congress acts intentionally and purposely in the disparate inclusion or exclusion." (internal quotation marks and alteration omitted)).

In fact, if Congress had intended to limit Section 1252(a)(2)(B)(ii)'s jurisdictional bar to those cases in which the statutory text itself specifies a decision as discretionary, many easier phrasings were available. Congress could have said, for example, "any other decision or action specified in this subchapter to be in the discretion of the Attorney General or the Secretary," or "any other decision or action that Congress specifies is in the discretion of the Attorney General or the Secretary." Instead, the drafters used the passive voice—"which is specified under this subchapter to be"—to avoid identifying the entity doing the specifying. The resulting awkward text is a linguistically inefficient way to impose a jurisdictional bar that reaches only decisions

specified as discretionary *in* the subchapter, but it is the easiest way to convey that Section 1252(a)(2)(B)(ii) extends to decisions specified as discretionary in the subchapter *or in regulations issued thereunder*.

In sum, Congress did not limit the reach of Section 1252(a)(2)(B)(ii) to decisions made discretionary *in* the subchapter. That section extends to decisions made discretionary in the subchapter or in regulations promulgated *under* the subchapter, and neither Petitioner nor the United States nor this Court may read the relevant preposition—"under"—out of the phrase Congress drafted. The parties and the Court must "respect[ ] the words of Congress," *Lamie* v. *U.S. Trustee*, 540 U.S. 526, 536 (2004), by honoring its choice to include within its jurisdictional bar every decision for which the Attorney General or Secretary's discretion is set forth "*under* this subchapter."

B. Other Textual Cues In Section 1252(a)(2)(B)(ii) Confirm That It Is To Be Read Broadly.

In addition to this evidence that Congress used the word "under" in Section 1252(a)(2)(B)(ii) in its ordinary way—to refer to language in the statute and to regulations promulgated under the statute—other textual signals in the section confirm Congress's intent to impose a far-reaching jurisdictional bar.

(i) The section includes several expansive words and phrases.

The language at issue in this case is prefaced by a catch-all provision in which Congress emphasized

that the jurisdictional bar applies to "any" decision or action specified to be discretionary. 8 U.S.C. 1252(a)(2)(B)(ii). "Read naturally, the word 'any' has an expansive meaning," *United States* v. *Gonzales*, 520 U.S. 1, 5 (1997), and this Court has long respected Congress's use of "any" to convey a "broad meaning," *Ali* v. *Fed. Bureau of Prisons*, 128 S. Ct. 831, 835-36 (2008). Particularly when it is placed at the beginning of an otherwise unlimited catch-all phrase, the word "any" is susceptible to only one, "expansive" meaning: "'one or some indiscriminately *of whatever kind*.'" *Ali,* 128 S. Ct. at 836 (quoting *Gonzales,* 520 U.S. at 5 (quoting *Webster's Third New International Dictionary* 97 (1976) (emphasis added))).

In statutory interpretation cases involving the term "any," the Court has flatly rejected litigants' efforts to narrow a catch-all statutory category (here, *any* decision specified *under* the subchapter to be discretionary) to a single subcategory (here, that subset of decisions specified *in* the subchapter to be discretionary). See *Ali*, 128 S. Ct. at 836 (holding that a Bureau of Prison warden is "any other law enforcement officer," under a provision of the Federal Tort Claims Act excepting such officers from waiver of sovereign immunity, despite some evidence that Congress intended the provision to cover only a smaller subset of officers); *Gonzales*, 520 U.S. at 5 (holding that a statutory sentence enhancement requiring the sentence not to run concurrently with "any other term of imprisonment" applies to state as well as federal sentences, notwithstanding the subsection's initial reference to federal drug trafficking crimes); *Collector* v. *Hubbard*, 79 U.S. (12 Wall.) 1, 15 (1871) (concluding "it is quite clear" that

a statute prohibiting the filing of suit "in any court" "includes the State courts as well as the Federal courts," despite some reasons to limit the prohibition). The Court is now being asked to determine whether "any . . . decision . . . specified under this subchapter to be" discretionary, 8 U.S.C. 1252(a)(2)(B)(ii), "means what it says, or . . . should be limited to some subset" of the referenced discretionary decisions. *Maine* v. *Thiboutot*, 448 U.S. 1, 4 (1980). As in these cases, the use of the expansive modifier "any" leaves "no basis in the text for limiting" the provision's coverage. *Gonzales*, 520 U.S. at 5. Because "Congress could not have chosen a more all-encompassing phrase than 'any other [decision or action]' to express [its] intent," *Ali*, 128 S. Ct. at 837, the analysis of these cases "applies equally to the expansive language Congress employed in [Section 1252(a)(2)(B)(ii)]," *id.* at 836.

Furthermore, "any" is not the only expansive term in Section 1252(a)(2)(B)(ii). In language modified by the REAL ID Act of 2005, Congress emphasized that the jurisdictional bar should be observed "[n]otwithstanding any other provision of law (statutory *or nonstatutory*)." REAL ID Act § 106(a)(1)(A)(ii), 119 Stat. 310 (adding the phrase "(statutory or nonstatutory)"); 8 U.S.C. 1252(a)(2)(B) (emphasis added). In so doing, Congress both confirmed its recognition of the role that *regulatory* provisions play in the immigration context and expressed its desire that the jurisdictional bar of Section 1252(a)(2)(B)(ii) be read broadly. *United States* v. *Clintwood Elkorn Mining Co.*, 128 S. Ct. 1511, 1518 (2008) (holding that an argument for a narrow reading will be "unavailing" where there is "explicit and expansive statutory language"). Another

2005 addition to the section further emphasizes the latter point: Section 1252(a)(2)(B) now applies "regardless of whether the . . . action [for which review is sought was taken] in removal proceedings," REAL ID Act § 101(f)(2), 119 Stat. 305, thereby conveying Congress's intent that no exceptions be read into the rule.

(ii) Where Congress wanted to limit the section's reach, it did so explicitly.

Moreover, this Court has noted that "[w]here Congress explicitly enumerates certain exceptions to a general prohibition, additional exceptions are not to be implied, in the absence of evidence of a contrary legislative intent." *TRW Inc.* v. *Andrews*, 534 U.S. 19, 28 (2001) (internal quotation marks omitted). Congress clearly carved out two exceptions to the jurisdictional bar of Section 1252(a)(2)(B)(ii): the section excepts issues referenced "in subparagraph (D)," 8 U.S.C. 1252(a)(2)(B), as well as "the granting of relief under section 1158(a) of this title," 8 U.S.C. 1252(a)(2)(B)(ii). "Subparagraph (D)" refers to Section 1252(a)(2)(D), which restores appellate court jurisdiction to review constitutional and legal claims. "[T]he granting of relief under section 1158(a)" refers to the granting of asylum petitions under 8 U.S.C. 1158(a). See *supra* p. 5 n.3. By specifying these two exceptions to the reach of Section 1252(a)(2)(B)(ii), Congress precluded any other exceptions to its otherwise broad command that "no court shall have jurisdiction to review . . . any" decision specified "under this subchapter" to be discretionary.

Thus, both the text and the context of the phrase at issue in this case—"under this subchapter"—

reveal a straightforward statutory command to bar judicial review of a decision or action made discretionary by a regulation duly promulgated "under this subchapter." Because Congress "says in a statute what it means and means in a statute what it says there," *Conn. Nat'l Bank* v. *Germain*, 503 U.S. 249, 254 (1992), the Court should take Congress at its word.

C. The Court Need Not Rely On Tiebreaking Canons To Interpret This Unambiguous Statute.

Petitioner invokes the so-called "immigration rule of lenity"[9] and the canon that favors interpreting statutes to allow for judicial review of administrative action, Pet'r Br. 26-27, 33-34, but there is no ambiguity in Section 1252(a)(2)(B)(ii) that requires resort to either canon. *Barnhart* v. *Sigmon Coal Co.*, 534 U.S. 438, 461-62 (2002) ("When the words of a statute are unambiguous, . . . this first canon is also the last: judicial inquiry is complete." (internal quotation marks omitted)). Congress plainly wanted to impose broad restrictions on judicial review to bring the kind of gamesmanship visible in this case to an end, and Section 1252(a)(2)(B)(ii) uses clear and expansive language to accomplish that end.

As Petitioner acknowledges, Pet'r Br. 33, the Court has "repeatedly emphasized that the touchstone of the rule of lenity is statutory

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[9] As the United States notes, Petitioner "did not argue below that any ambiguities in 8 U.S.C. 1252(a)(2)(B)(ii) should be resolved in his favor." Resp. Br. 36 n.19.

ambiguity," and that the rule therefore is reserved "for those situations in which a reasonable doubt persists about a statute's intended scope even *after* resort to the language and structure, legislative history, and motivating policies of the statute." *Moskal* v. *United States,* 498 U.S. 103, 107-108 (1990) (internal quotation marks omitted). A statute is not ambiguous for purposes of lenity merely because there exists "a division of judicial authority" over its proper construction. *Id.* at 108. Absent ambiguity, there is "no occasion to invoke the rule of lenity." *Deal* v. *United States*, 508 U.S. 129, 135-36 (1993); see also *Fernandez-Vargas* v. *Gonzales*, 548 U.S. 30, 40, 42 (2006) (declining to apply the "principle of construing any lingering ambiguities in deportation statutes in favor of the alien" in light of the countervailing "facial reading" of the statute and other clear evidence of intent (internal quotation marks omitted)).

Likewise, "[t]he presumption favoring judicial review of administrative action is just that—a presumption. This presumption, like all presumptions used in interpreting statutes, may be overcome by specific language or specific legislative history that is a reliable indicator of congressional intent." *Block* v. *Cmty. Nutrition Inst.*, 467 U.S. 340, 349 (1984). Here, there is both specific language and, as discussed further below, specific legislative history. "The words, structure and history of the . . . amendments to the [INA] clearly reveal," *NLRB* v. *United Food & Commercial Workers Union*, 484 U.S. 112, 124 (1987), that Congress intended Section 1252(a)(2)(B)(ii)'s jurisdictional bar to be far-reaching. The section uses expansive terms like "notwithstanding," "any," "regardless," and most

importantly "under." Construing the section "both with precision and with fidelity to the terms by which Congress . . . expressed its wishes," *Cheng Fan Kwok*, 392 U.S. at 212, leaves no room for operation of the cited presumptions. Because "the congressional intent to preclude judicial review is fairly discernible" in this case, any presumption favoring judicial review is "overcome by specific language," *Block*, 467 U.S. at 349, 351 (internal quotation marks omitted), as well as by "inferences of intent drawn from the statutory scheme as a whole," *United States* v. *Fausto,* 484 U.S. 439, 452 (1988) (internal quotation marks omitted).

Petitioner argues that "[t]he consequences" of precluding review here would be "unacceptably far-reaching," Pet'r Br. 38, but this Court has made clear that it "will not alter the text in order to satisfy the policy preferences of [a party]," for "[t]hese are battles that should be fought among the political branches," and the parties should not "seek to amend the statute by appeal to the Judicial Branch." *Barnhart*, 534 U.S. at 462. See also *Dodd* v. *United States*, 545 U.S. 353, 359-60 (2005) ("Although we recognize the potential for harsh results in some cases, we are not free to rewrite the statute that Congress has enacted. . . . The disposition required by the text here, though strict, is not absurd. It is for Congress, not this Court, to amend the statute if it believes that the [result of the decision is] unduly restrict[ive]."). The policy preferences expressed by Petitioner and his Amici are just that: policy preferences for consideration by policymakers. The language of Section 1252(a)(2)(B)(ii) is unambiguous and far-reaching, and its import is clear. The section strips courts of jurisdiction to review "any" decision of the Attorney General that is specified as

discretionary in the INA or in regulations implementing the Act. Even if this Court "disagree[s]" with Congress's decision to impose such a far-reaching jurisdictional limit, the Court does "not have license to question the decision on policy grounds." *Tyler* v. *Cain*, 533 U.S. 656, 663 n.5 (2001).

II. THE OBJECT, PURPOSE, AND LEGISLATIVE HISTORY CONFIRM THAT CONGRESS INTENDED SECTION 1252(a)(2)(B)(ii) TO BAR JUDICIAL REVIEW OF DECISIONS SPECIFIED AS DISCRETIONARY IN A DULY ADOPTED REGULATION.

"The strong presumption that the plain language of the statute expresses congressional intent is rebutted only in rare and exceptional circumstances, when a contrary legislative intent is clearly expressed." *Ardestani*, 502 U.S. at 135-136 (internal quotation marks and citations omitted). In this case, far from rebutting that presumption, all other indicia of congressional intent—including the overarching purpose of the legislative reform that brought about this provision, the congressional dialogue that preceded the passage of Section 1252(a)(2)(B), and the legal background against which Congress acted—support the plain-text reading of the statute.

A. The Object And Purpose Of IIRIRA Confirm Congress's Intent To Enact A Sweeping Jurisdictional Bar.

"Whether and to what extent a particular statute precludes judicial review is determined not only from its express language" and "the structure of the statutory scheme," but also from the statute's

"objectives," and "its legislative history." *Block*, 467 U.S. at 345; see also *Fausto,* 484 U.S. at 444-46 (giving weight to the "leading purpose" of the Act in question and the criticisms of the prior system of review in finding that Congress intended to strip the courts of jurisdiction). The story of IIRIRA confirms that the enacting Congress contemplated that Section 1252(a)(2)(B)(ii) would bar judicial review of those decisions of the Attorney General or Secretary that are specified as discretionary either in statutory language or in a duly promulgated regulation.

IIRIRA was not Congress's first effort to streamline the deportation process and prevent aliens from abusing the court system. In fact, IIRIRA came six years after 1990 reform legislation that had taken some first steps toward eliminating the perverse incentives created by the promise of procedural delay. See Immigration Act of 1990, Pub. L. No. 101-649, 104 Stat. 4978. The earlier, significantly milder reform effort had set strict deadlines for petitions for review, permitted aliens fewer bites at the apple of judicial review, and attempted to expedite the removal process in other ways. See *Stone v. INS*, 514 U.S. 386, 400-01 (1995). In particular, the 1990 Act demanded that "whenever a petitioner seeks review of an order under this section, any review sought with respect to a motion to reopen or reconsider such an order shall be consolidated with the review of the order."[10]

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[10] Petitioner and the United States make much of this consolidation provision, 8 U.S.C. 1252(b)(6), arguing that Congress would not have required the consolidation of review of the denial of a motion to reopen with review of the underlying

Immigration Act of 1990 § 545(b)(3), 104 Stat. 5065 (codified with technical amendments at 8 U.S.C. 1252(b)(6)).

By 1996, it was clear that this milder reform had not been sufficient to reduce the immigration caseload, and Congress "sought, once more and yet more aggressively[,] to expedite the removal of illegal aliens from the United States." Resp. Br. 34. Therefore, in IIRIRA, Congress took more drastic measures. See *supra* pp. 2-5.

Given the escalating burden that immigration cases placed on the judiciary, and the breadth of IIRIRA's proposed solution, Congress could not have

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removal order if legislators had not intended to permit judicial review of the former. Petr. Br. 29; Resp. Br. 30-31. The explanation may be simple oversight, but there are two more satisfying explanations. First, decisions on motions to reopen are reviewable if they present constitutional claims or questions of law, 8 U.S.C. 1252(a)(2)(D); the existence of the consolidation provision is thus consistent with the fact that in some, purely factual cases—including Petitioner's—there is no review at all. Second, Congress may have intended (1) to strip courts of jurisdiction to review decisions specified as discretionary in regulations (including decisions on motions to reopen); and yet also (2) to leave room for the Attorney General to amend the relevant regulations and disclaim unreviewable discretion over those decisions (a change that would restore federal court jurisdiction, and thus would raise no constitutional concerns). One consequence of delegating a decision like what-terms-to-specify-as-discretionary is that the delegator, Congress, cannot be sure how the delegate, the Attorney General, will choose to exercise the authority. Congress had to provide for either eventuality—that is, for the Attorney General to continue to specify motions to reopen as discretionary and thus unreviewable, or for him instead to remove the "discretion" language from the relevant regulation.

intended for Section 1252(a)(2)(B)(ii), the Act's central jurisdiction-stripping measure, to have exclusions of the scale that Petitioner suggests. It would frustrate the drafters' manifest purpose—and turn a blind eye to the "object and policy" of the law, *Gozlon-Peretz* v. *United States*, 498 U.S. 395, 407 (1991)—to read that section as if it imposed very modest limits on judicial review of aliens' claims,[11] when Congress plainly intended to leave *all* discretionary immigration matters in the hands of executive decisionmakers, and thereby to eliminate aliens' ability to benefit themselves by overloading the federal courts.

B. The Legislative History Of IIRIRA Confirms Congress's Intent To Enact A Sweeping Jurisdictional Bar.

Representative Lamar Smith, the chief House sponsor of IIRIRA, explained soon after the Act's passage that curtailing federal courts' jurisdiction to hear immigration appeals was a critical feature of

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[11] This case cannot be resolved by distinguishing between substantive and procedural decisions, as Judge Ripple suggests in concurrence below. Pet. App. 14a (Ripple, J., concurring). Even if Section 1252(a)(2)(B)(ii) extended only to actions and decisions that the INA itself specifies as discretionary, the section would still operates to deny aliens review of some substantive decisions of the Board, because the Act specifies certain substantive decisions as discretionary. See, *e.g.*, 8 U.S.C. 1182(h) (specifying that the Attorney General "may, in his discretion" waive an alien's inadmissibility for certain criminal offenses); see also Resp. Br. 27 & n.16 (discussing similar provisions).

Congress's effort to limit aliens' ability to forestall their removal from the country. Representative Lamar Smith & Edward R. Grant, *Immigration Reform: Seeking the Right Reasons*, 28 St. Mary's L. J. 883, 918-19 (1997). Specifically, Representative Smith indicated that Congress opted to preclude judicial review of *all* "issues pertaining to purely discretionary relief," which the drafters believed "should remain within the sole discretion of the Attorney General and, thus, . . . no longer [be] appealable to the federal courts." *Id.* at 919.

The legislative history of Section 1252(a)(2)(B)(ii) supports this account and makes clear that the Members of Congress who voted on IIRIRA understood that section to have the broad contours later outlined by Representative Smith. The portion of IIRIRA that became Section 1252(a)(2)(B)(ii) did not appear in any form in any of the pre-conference versions of the bill. The section was added in conference and addressed for the first time in the conference report. H.R. Rep. No. 104-828, at 63, 219 (1996) (Conf. Rep.).[12] The IIRIRA Conference Report

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[12] Given the last-minute timing and Members' heavy reliance on conference reports, such reports are "the most reliable evidence in legislative history of congressional intent." *Auburn Hous. Auth. v. Martinez*, 277 F.3d 138, 147 (2d Cir. 2002); see also *Disabled in Action of Metro. N.Y. v. Hammons*, 202 F.3d 110, 124 (2d Cir. 2000) ("Because a conference report represents the final statement of terms agreed to by both houses, next to the statute itself it is the most persuasive evidence of congressional intent." (internal quotation marks omitted)); *Nw. Forest Res. Council v. Glickman*, 82 F.3d 825, 835 (9th Cir. 1996) ("a congressional conference report is recognized as the most reliable evidence of congressional intent.").

was issued less than twenty-four hours before the House voted, 142 Cong. Rec. 24,801-02 (Sept. 25, 1996), and less than six days before the Senate voted and the President signed IIRIRA into law, 142 Cong. Rec. 26,735-36 (Sept. 30, 1996) (voice vote on The Department of Defense Appropriations Act of 1997, H.R. 3610, 104th Cong. Div. C (1996)); Statement on Signing the Omnibus Consolidated Appropriations Act, 1997, 2 Pub. Papers 1729-732 (Sept. 30, 1996).

In the report, the conferees gave their colleagues a single statement on the operation of Section 1252(a)(2)(B), the revised bill's new jurisdiction-stripping provision:

> This subsection also bars judicial review (1) of any judgment whether to grant relief under section 212 (h) or (i), 240A, 240B, or 245, (2) *of any decision or action of the Attorney General which is specified to be in the discretion of the Attorney General* (except a discretionary judgment whether to grant asylum as described in section 242(b)).

H.R. Rep. No. 104-828, at 219 (emphasis added).

Thus, the key report offered to those who voted on IIRIRA did not include any limits on the phrase "specified to be in the discretion of the Attorney General." Rather, the report announced only that the bill would strip courts of jurisdiction to review *any* decision specified as discretionary, making no mention of the *source* of that specification—statutory, regulatory, or otherwise. In light of this language, it appears that the enacting Congress intended that Section 1252(a)(2)(B)(ii)'s sweeping jurisdictional bar would include *every* Attorney General decision specified to be discretionary, regardless of the location of the specification. Failure to adhere to this reading would contravene the plain language of the

section and frustrate the intent of the enacting Congress.

C. The History Of Motions To Reopen Further Supports Reading Section 1252(a)(2)(B)(ii) To Reach Those Motions.

Finally, by the time Congress enacted IIRIRA in September 1996, motions to reopen had been left to the Attorney General's discretion for almost a century. And just a few months earlier, the Attorney General had promulgated a regulation explicitly confirming that discretion. There is therefore every reason to presume that when Congress enacted Section 1252(a)(2)(B)(ii), it expected exactly the result the Seventh Circuit reached in this case.

Common law history: As this Court recently noted, "[t]he reopening of a case by the immigration authorities for the introduction of further evidence was treated [in 1916], as it is now, as a matter for the exercise of their discretion; where the alien was given a full opportunity to testify and to present all witnesses and documentary evidence at the original hearing, judicial interference was deemed unwarranted." *Dada* v. *Mukasey*, 128 S. Ct. 2307, 2315 (2008) (internal quotation marks omitted); see also, *e.g.*, *Wong Shong Been* v. *Proctor*, 79 F.2d 881, 883 (9th Cir. 1935) (emphasizing that "[t]he reopening of a case by the immigration authorities for the introduction of further evidence" was "a matter for the exercise of their discretion," and holding that judicial interference was unwarranted); *Chew Hoy Quong* v. *White*, 244 F. 749 (9th Cir. 1917); *Ex parte Chan Shee*, 236 F. 579 (N.D. Cal. 1916); Resp. Br. 32 (recognizing this lengthy history).

More recent cases not only recognize the Attorney General's discretion in this area, but emphasize that his discretion is quite broad. See *Doherty*, 502 U.S. at 323 (noting that a regulatory provision promulgated in 1987 "requires that under certain circumstances a motion to reopen be denied, but does not specify the conditions under which it shall be granted," and finding that "[t]he granting of a motion to reopen is thus discretionary and the Attorney General has broad discretion to grant or deny such motions" (internal citation and quotation marks omitted)); see also *Abudu*, 485 U.S. at 96, 110 (confirming "the BIA's broad discretion in considering motions to reopen" and noting that "the reasons for giving deference to agency decisions on petitions for reopening . . . in other administrative contexts apply with even greater force in the INS context"); *INS* v. *Phinpathya*, 464 U.S. 183, 188 n.6 (1984) (noting that the granting of the motion to reopen is "entirely within BIA's discretion").

Regulatory history: The regulatory history of motions to reopen accords with this common law history and confirms that the Congress that passed IIRIRA should have been well aware of the Attorney General's discretion over those motions. The Attorney General issued regulations governing motions to reopen as early as 1941, see 6 Fed. Reg. 68, 71-72 (1941), and by the late 1950s he had set forth the discretionary scheme that the United States acknowledges existed with "substantially the same" contours from that time forward. Resp. Br. 32; 23 Fed. Reg. at 9118-19 (promulgating original version of what is now Regulation 1003.2). Moreover, just months before Congress enacted IIRIRA, the Attorney General had refined this scheme to specify

even more plainly what had long been clear to all concerned: a motion to reopen filed with the Board is "within the [Board's] discretion." 61 Fed. Reg. at 18,904. When Congress voted on IIRIRA, therefore, it was abundantly clear that motions to reopen are subject to the broad discretion of the Attorney General and his agents.

In determining the meaning of statutory text, this Court has "endorsed the presumption that Congress was thoroughly familiar with contemporary law when it enacted" the provision in question. *Cent. Va. Cmty. Coll.* v. *Katz*, 546 U.S. 356, 362 n.3 (2006) (internal quotation marks omitted). Specifically, the Court presumes that when Congress returns to a statutory scheme like the INA, legislators are aware of the administrative precedent interpreting that scheme and are familiar with the ways key words and phrases have been used. See *Lorillard* v. *Pons*, 434 U.S. 575, 580 (1978) (recognizing Congress is aware of pre-existing regulations and their interpretations); see also *Beck* v. *Prupis*, 529 U.S. 494, 501, 504 (2000) (noting that when Congress uses widely accepted terms, "it mean[s] to adopt" the "well-established" principles related to those terms); *Bragdon* v. *Abbott*, 524 U.S. 624, 631 (1998) (Congress's repetition of a well-established term implies it is using the term with awareness of pre-existing uses).

Thus, when Congress came to the table to devise a plan for "more aggressively . . . expedit[ing] the removal of illegal aliens from the United States," Resp. Br. 34, it was presumably aware of the existing regulations governing motions to reopen removal proceedings, and of the almost century-long judicial practice of recognizing the Attorney General's discretion over those motions. Likewise, when the

drafters of Section 1252(a)(2)(B)(ii) chose to preclude review of "any" decision made subject to the Attorney General's discretion, they were presumably aware of the long-held regulatory understanding—recently made explicit by the addition of new regulatory language—that "whether to grant a motion to reopen is entrusted to the Board's discretion." Resp. Br. 18. And when the conferees reported, in the document on which we presume their voting colleagues relied, that the proposed jurisdictional bar would apply to "any decision or action of the Attorney General which is specified to be in the discretion of the Attorney General," H.R. Rep. No. 104-828, at 219, the Members of Congress presumably knew that this description extended to the disposition of motions to reopen.

All told, reading "under this subchapter" to include decisions and actions made discretionary by a regulation promulgated under the subchapter is not only "most in accord with context and ordinary usage, and thus most likely to have been understood by the *whole* Congress which voted on the words of the statute (not to mention the citizens subject to it)," but also "most compatible with the surrounding body of law into which the provision must be integrated—a compatibility which . . . we assume Congress always has in mind." *Green* v. *Bock Laundry Mach. Co.*, 490 U.S. 504, 528 (1989) (Scalia, J., concurring).

III. REGULATION 1003.2 SPECIFIES ATTORNEY GENERAL DISCRETION OVER THE DISPOSITION OF MOTIONS TO REOPEN REMOVAL PROCEEDINGS AND, AS SUCH, TRIGGERS SECTION 1252(a)(2)(B)(ii).

This interpretation of Section 1252(a)(2)(B)(ii)'s text, purpose, and history raises three subsidiary questions for the Court: (1) whether Regulation 1003.2, which clearly specifies that discretion over the disposition of motions to reopen lies with the Attorney General, was promulgated "under" Title 8, Chapter 12, Subchapter II of the United States Code; (2) if so, whether the regulation's specification of discretion is not binding on the courts because it is constitutionally suspect, "procedurally defective, arbitrary or capricious in substance, or manifestly contrary to the [INA]," *United States* v. *Mead Corp.*, 533 U.S. 218, 227 & n.6 (2001); and finally, (3) if the regulatory specification is procedurally and legally sound, whether there is any reason for this Court nevertheless to defer to the Attorney General's recently adopted litigating position that the specification fails to accomplish its stated purpose of committing motions to reopen to his discretion.

The answers to these questions are quite straightforward: (1) the 1003.2 Amendments, which added the discretionary language to Regulation 1003.2, were promulgated under the relevant subchapter; (2) the amendments were "properly promulgated, substantive agency regulations," and they present no constitutional difficulty, and thus Regulation 1003.2's specification of discretion "ha[s] the force and effect of law," *Chrysler Corp.* v. *Brown*, 441 U.S. 281, 295 (1979) (internal quotation marks

omitted); and finally, (3) no deference is due to the Attorney General's litigating position that the amended version of Regulation 1003.2 does not mean what it plainly says. If the Attorney General wishes to repudiate the jurisdictional consequences of his office's regulation, his avenues of recourse are to amend the regulation or to encourage Congress to amend Section 1252(a)(2)(B)(ii).

A. Regulation 1003.2 Unambiguously Specifies That The Disposition of Motions to Reopen Is Discretionary, And It Was Adopted "Under This Subchapter."

Regulation 1003.2 specifies that the Board has broad discretion over motions to reopen filed with it. Both the regulation itself and the later-added specification of discretion were duly promulgated "under" the relevant subchapter of the INA. On its face, therefore, Regulation 1003.2 triggers Section 1252(a)(2)(B)(ii).

i. Regulation 1003.2 specifies that the Attorney General has discretion over motions to reopen.

"In interpreting an administrative regulation, as in interpreting a statute, we must begin by examining the language of the provision at issue." *Am. Fed'n of State, County & Mun. Employees* v. *Am. Int'l Group, Inc.*, 462 F.3d 121, 125 (2d Cir. 2006) (internal quotation marks omitted)); see also *Engine Mfrs. Ass'n*, 541 U.S. at 252 (discussing statutory interpretation). Regulation 1003.2, which governs "[r]eopening or reconsideration before the Board of Immigration Appeals," 8 C.F.R. 1003.2, includes

language expressly confirming the long understanding, see Resp. Br. 32, that the Board has discretion to grant or deny motions to reopen: "The decision to grant or deny a motion to reopen or reconsider is within the discretion of the Board." 8 C.F.R. 1003.2(a).

This clearly specifies that an agent of the Attorney General—the Board—has discretion over the disposition of motions to reopen. See 8 U.S.C. 1103(g)(2) (permitting the Attorney General to delegate his authority to an agent); 8 C.F.R. 1003.1 (delegating authority to the Board). Indeed, the specification of discretion in Regulation 1003.2 ("within the discretion of," 8 C.F.R. 1003.2(a)) uses language all but identical to the language Congress later used in drafting Section 1252(a)(2)(B)(ii) ("in the discretion of," 8 U.S.C. 1252(a)(2)(B)(ii)). If, as argued above, the phrase "under this subchapter" in Section 1252(a)(2)(B)(ii) incorporates regulations, then the language of Regulation 1003.2 is plainly adequate to "specif[y]" that the disposition of motions to reopen is discretionary, and thus to trigger the section's jurisdiction-stripping effect. 8 U.S.C. 1252(a)(2)(B)(ii).

ii. Regulation 1003.2 was issued "under this subchapter."

The regulatory specification of discretion in Regulation 1003.2 also meets the other requirement of Section 1252(a)(2)(B)(ii): it was issued "under this subchapter"—that is, under Title 8, Chapter 12, Subchapter II of the United States Code.

The Attorney General added the language specifying discretion to Regulation 1003.2 on April

29, 1996, 61 Fed. Reg. at 18,904, and the addition took effect on July 1, 1996, *id.* at 18,900. In the version of the INA in effect on both of these dates, Congress had delegated to the Attorney General the authority to "establish such regulations . . . as he deems necessary for carrying out his authority under the provisions of this chapter"—that is, under Title 8, Chapter 12. 8 U.S.C. 1103(a) (1994).[13] This authorizing language itself appears in Subchapter I of Chapter 12, but by its terms, the authorization extends to rules that the Attorney General deems necessary for carrying out his authority under both Subchapters I and II. And the title page of the 1003.2 Amendments indicates that Attorney General Reno intended the amendments to carry out her authority under then-Section 1252b of the INA, which was located in Subchapter II. 61 Fed. Reg. at 18,904 (indicating "Authority").

Section 1252b, which IIRIRA repealed, IIRIRA § 308(b)(6), 110 Stat. at 3009-615, pertained to "Deportation procedures," and included powers currently found in Section 1229a, including the power to issue orders of deportation "in absentia," and to rescind such orders "*upon a [qualifying] motion to reopen*." 8 U.S.C. 1252b(c)(1), (c)(3) (1994) (emphasis added); 8 U.S.C. 1229a(b)(5)(C)(ii) (emphasis added). Section 1252b mentioned only motions to reopen *in absentia* orders (not other removal orders), but the section's brief allusion to motions to reopen clearly presupposed that the Attorney General had in place a

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[13] In the current version of the authorizing provision, the Attorney General's powers are detailed in Section 1103(g)(2). 8 U.S.C. 1103(g)(2).

more general procedure for reviewing all motions to reopen removal proceedings.

In sum, then, Attorney General Reno asserted the Board's discretion over motions to reopen in regulatory language that she adopted pursuant to her delegated authority to "establish such regulations . . . as . . . necessary for carrying out," 8 U.S.C. 1103(a) (1994), the powers delegated in Section 1252b of Subchapter II. That is, she asserted discretion in language promulgated "under" Subchapter II.

B. Regulation 1003.2 Is Binding On The Courts.

Because Regulation 1003.2, on its face, triggers the jurisdiction-stripping effect of Section 1252(a)(2)(B)(ii), the next task is to ascertain whether the regulation is binding on the courts.

As this Court has explained:

> When Congress has "explicitly left a gap for an agency to fill, there is an express delegation of authority to the agency to elucidate a specific provision of the statute by regulation," *Chevron* [*U.S.A. Inc.* v. *Natural Res. Def. Council, Inc.*, 467 U.S. 837, 843-44 (1984)], and any ensuing regulation is binding in the courts unless procedurally defective, arbitrary or capricious in substance, or manifestly contrary to the statute[,] . . . [a]ssuming . . ., of course, that the agency's exercise of authority is constitutional.

Mead, 533 U.S. at 227 & n.6. To evaluate the binding nature of the specification of discretion in Regulation 1003.2, therefore, the Court must assess (1) whether that specification fills a statutory gap that Congress left for the Attorney General to fill; (2) whether the

Attorney General's effort to fill that gap raises any constitutional concerns; and finally, (3) whether the same effort is "procedurally defective," unreasonable, or "manifestly contrary to the [INA]."

i. Regulation 1003.2 and its specification of discretion fill a statutory gap that Congress left for the Attorney General to fill.

The above discussion of Congress's delegation of regulatory authority in 8 U.S.C. 1103, *supra* p. 41, serves not only to prove that the discretionary language in Regulation 1003.2 was adopted "under this subchapter" for purposes of Section 1252(a)(2)(B)(ii), but also to establish that the same language was adopted pursuant to an "express delegation of authority to the agency to elucidate a specific provision of the [INA] by regulation," *Chevron*, 467 U.S. at 843-44. As of 1996, 8 U.S.C. 1103 delegated to the Attorney General the authority to "establish such regulations . . . as he deems necessary for carrying out his authority under the provisions of this chapter." 8 U.S.C. 1103(a) (1994). Interpreting a virtually identical provision of the Communications Act in *Global Crossing Telecommunications, Inc.* v. *Metrophones Telecommunications, Inc.*, this Court held that the relevant language broadly "delegate[s] to the agency authority to 'fill' a 'gap,' i.e., to apply [the statutory provisions in question] through regulations and orders with the force of law." 550 U.S. 45, 58 (2007) (quoting *Brand X*, 545 U.S. at 980-81).

In fact, that version of Section 1103 seemingly accomplished a broader delegation of power than the provision at issue in *Global Crossing*. The

Communications Act authorizes the Federal Communications Commission to "prescribe such rules and regulations as may be necessary *in the public interest* to carry out the provisions of this chapter." 47 U.S.C. 201(b) (emphasis added). In contrast, in 1996, Section 1103 authorized the Attorney General to adopt any regulations "he deems necessary for carrying out his authority," 8 U.S.C. 1103(a) (1994)—there was no suggestion that "the public interest" or any other limitation constrained the Attorney General in this task.

Not only does Section 1103 constitute a broad delegation of authority, but Regulation 1003.2 and its specification of discretion also fill evident gaps in the INA. Specifically, prior to IIRIRA, "no statutory provision" governed reopening of ordinary removal proceedings; "the authority for such motions derive[d] solely from regulations promulgated by the Attorney General." *Doherty*, 502 U.S. at 322. Meanwhile, also prior to IIRIRA, Section 1252b anticipated the possibility that an alien ordered removed in absentia could file a motion to reopen his removal proceeding, but that section omitted essential details, including the procedure for filing and review of such a motion. 8 U.S.C. 1252b (1994). Section 1252b did not, for example, specify the form a motion to reopen should take, the information it should include, or the standard under which it would be reviewed. 8 U.S.C. 1252b(c)(3) (1994). Finally, although the INA now expressly provides for the filing of motions to reopen in absentia and ordinary removal proceedings, the relevant sections still say nothing about the form and content of those motions, nor about the standard under which immigration officials will review them. See 8 U.S.C. 1229a(b)(5)(C) (motions to reopen in

absentia removal orders); 8 U.S.C. 1229a(c)(7) (all other motions to reopen).

Regulation 1003.2 fills in all of the necessary specifics for motions to reopen filed with the Board, explaining, among other things, that such motions must be in writing, 8 C.F.R. 1003.2(a); that they must "state the new facts that will be proven at a hearing to be held if the motion is granted," 8 C.F.R. 1003.2(c)(1); that they must be "supported by affidavits or other evidentiary material," 8 C.F.R. 1003.2(c)(1); and that the Board has discretion to review the motions, including the discretion "to deny a motion . . . even if the party moving has made out a *prima facie* case for relief," 8 C.F.R. 1003.2(a). Accordingly, Regulation 1003.2 and its specification of discretion pass the first test of binding effect—they represent an exercise of the Attorney General's statutorily delegated authority to fill gaps in the INA.

ii. Regulation 1003.2 raises no relevant constitutional concerns.

Two possible constitutional objections to Regulation 1003.2 and its specification of discretion might be raised, but neither is relevant here. First, if the regulation triggered Section 1252(a)(2)(B)(ii) in a way that stripped the federal courts of jurisdiction over constitutional claims raised in motions to reopen, that result could itself raise constitutional questions. See *INS* v. *St. Cyr*, 533 U.S. 289, 300 (2001) (discussing the jurisdiction-stripping provisions of IIRIRA). But the regulation cannot have that effect: Section 1252(a)(2)(D) limits the reach of Section 1252(a)(2)(B)(ii), providing that "[n]othing . . . in any . . . provision of [the INA] 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." 8 U.S.C. 1252(a)(2)(D).

Moreover, if the Board were to ignore a "potentially dispositive issue" in its review of a motion to reopen, the reviewing court potentially could, as the Seventh Circuit suggests, treat that mistake as an "error of law that would allow review under [Section] 1252(a)(2)(D)." Pet. App. 11a. Under that interpretation, Section 1252(a)(2)(B)(ii) would operate to strip courts of jurisdiction in only that narrow set of cases (including this case) in which the Board denies a motion to reopen for purely fact-based and at least cursorily explicated reasons. Here, the Court of Appeals ruled that Petitioner did not "advance[] any 'constitutional claims or questions of law,'" *id.* at 10a, and as the United States points out, Petitioner "did not seek review of [that] ruling," so "no question concerning the scope of Section 1252(a)(2)(D) is before the Court," Resp. Br. 17-18 n.9.

Second, it might be suggested that the Attorney General may not constitutionally claim unreviewable discretion over the disposition of motions to reopen.[14]

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[14] Notably, neither Petitioner nor any of his Amici claims, and the facts do not suggest, that depriving Petitioner of judicial review here would violate his rights under the Due Process Clause. More generally, Congress itself plainly could curtail court jurisdiction over fact-based petitions to reopen without raising due process concerns. The only possible question here, therefore, is whether Congress may delegate to the Attorney General the authority to define which issues are "discretionary" when that definition implicates court jurisdiction.

Congress plainly has authority to circumscribe federal courts' jurisdiction to review the discretionary, fact-based decisions of executive officials. See generally, *e.g.*, 5 U.S.C. 701(a)(2) (proscribing review of "agency action . . . committed to agency discretion by law"); *Heckler* v. *Chaney*, 470 U.S. 821, 834-35 (1985) (construing 5 U.S.C. 701(a)(2)); see also *Dalton* v. *Specter*, 511 U.S. 462, 477 (1994) ("The judicial power of the United States conferred by Article III of the Constitution is upheld just as surely by withholding judicial relief where Congress has permissibly foreclosed it, as it is by granting such relief where authorized by the Constitution or by statute."). But it might be argued here that Congress may not circumscribe courts' authority to review discretionary agency decisions and then delegate to agency officials the corresponding line-drawing exercise of determining which decisions are in the "discretionary" category. Judge Cudahy adverted to this issue in dissent below, when he argued that the majority's opinion would "giv[e] the executive branch the authority to insulate its decisions from judicial review where there is no clear indication in the statute that Congress intended to strip us of our jurisdiction." Pet. App. 16a (Cudahy, J., dissenting).[15]

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[15] A recent decision of this Court in the very different context of prison reform litigation suggests that this is not a concern. See *Woodford* v. *Ngo*, 548 U.S. 81, 87, 93 (2006) (holding that an inmate in the California state prison system was barred from litigating his § 1983 claims in federal court because he missed a fifteen-day prison grievance deadline—and thus, impliedly, that prison officials may constitutionally issue procedural rules with jurisdictional consequences); Giovanna

In this case, however, Congress did not abdicate its authority to determine the limits of court jurisdiction, and the Attorney General did not overreach. Consider the timing: when Congress enacted Section 1252(a)(2)(B)(ii) in September 1996, it did so against the backdrop of an almost century-long understanding that the Attorney General has discretion over motions to reopen. See *supra* p. 34; Resp. Br. 32. Moreover, only a few months earlier, in April 1996, the Attorney General had added an express specification of discretion to Regulation 1003.2. See *supra* p. 7. Thus, *Congress* did the work of circumscribing court jurisdiction; the Attorney General merely specified as discretionary a class of decisions long understood to be so. *Cf. Cuomo* v. *Clearing House Ass'n*, 129 S. Ct. 2710, 2721 (2009) (noting that the term "visitorial powers" in the National Bank Act "define[s] and thereby limit[s] the category of action reserved to the Federal Government and forbidden to the States," and therefore, when the Office of the Comptroller of the Currency later interprets the term, the Office "necessarily declares the pre-emptive scope of the [Act]" (internal quotation marks omitted)).

Petitioner has given the Court no reason to believe that the Attorney General will, in the future, claim discretion over a broader or inappropriate range of functions. In this case, therefore, the question is not whether Congress may constitutionally delegate its authority to determine

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Shay & Johanna Kalb, *More Stories of Jurisdiction Stripping and Executive Power: Interpreting the Prison Litigation Reform Act (PLRA)*, 29 Cardozo L. Rev. 291, 302-08 (2007) (discussing *Ngo*).

federal court jurisdiction. Here, the Court need only determine whether *Congress*, by legislating in light of an existing regulatory understanding that the Attorney General has discretion over the disposition of motions to reopen, both had the constitutional authority to limit, and did in fact limit, court authority to review the denial of such motions. The answer to the first question is indisputably yes; the answer to the second is the issue of the day.

iii. Regulation 1003.2 is not procedurally defective, nor unreasonable, nor manifestly contrary to the INA.

Neither Petitioner nor his Amici have argued that Regulation 1003.2 itself or the 1003.2 Amendments that added the specification of discretion are procedurally defective, arbitrary and capricious, or contrary to law. Moreover, the six-year "catch-all" statute of limitations has run for challenges to either the rule or the amendments. 28 U.S.C. 2401(a); see also *Sai Kwan Wong* v. *Doar*, 571 F.3d 247, 263 (2d Cir. 2009) (concluding that "[i]n the case of a claimed procedural error . . . the [catch-all] statute of limitations begins to run . . . upon issuance of the regulation"); *Nagahi* v. *INS*, 219 F.3d 1166, 1171 (10th Cir. 2000) (noting, in a challenge to a regulation limiting the time for appealing the denial of a naturalization application, that "[i]n the absence of a specific statutory limitations period, a civil action against the United States under the [Administrative Procedure Act] is subject to the six year limitations period found in 28 U.S.C. § 2401(a)");

In any event, perusal of the rulemaking record for the 1003.2 Amendments suggests no cause for

concern. With respect to procedure, the amendments progressed in orderly fashion through the notice, comment, and concise general statement requirements of the Administrative Procedure Act (APA), 5 U.S.C. 553. Specifically, the rulemaking progressed from a proposed rule issued in June 1994, 59 Fed. Reg. 29,386 (1994), through a second proposed rule issued in May 1995, 60 Fed. Reg. 24,573 (1995), to a final rule issued in April 1996, 61 Fed. Reg. 18,900 (1996). The first proposal ushered in a sixty-day comment period, 59 Fed. Reg. at 29,386, and the second a thirty-day comment period, 60 Fed. Reg. at 24,573—sufficient, alone or in combination, to permit interested parties to submit their views. *Cf. Riverbend Farms, Inc.* v. *Madigan*, 958 F.2d 1479, 1484 (9th Cir. 1992) ("Although the APA mandates no minimum comment period, some window of time, usually thirty days or more, is . . . allowed for . . . comment."). Further, the proposals and the final rule included the same discretionary language—"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"—so there can be no suggestion that the proposals failed to give interested parties notice of the possibility that the Attorney General would expressly specify his discretion over motions to reopen filed with the Board. 59 Fed. Reg. at 29,387; 60 Fed. Reg. at 24,575; 61 Fed. Reg. at 18,904. Finally, the Amendments' drafters devoted four Federal Register pages to a concise general statement that explained the provisions of the six-page rule and responded to the seventy-one comments received during the two comment periods. 61 Fed. Reg. at 18,900-04.

With respect to content, too, the specification of discretion in the 1003.2 Amendments appears unexceptionable. The specification served merely to confirm the "well-settled" understanding that "whether to grant a motion to reopen is entrusted to the Board's discretion." Resp. Br. 18. There was therefore no occasion for the final rule to provide the sort of lengthy explanation that might be necessary to support a reversal of policy. See, *e.g.*, *Brand X*, 545 U.S. at 981 (recognizing that "[u]nexplained inconsistency [may be] a reason for holding an interpretation to be an arbitrary and capricious change from agency practice under the Administrative Procedure Act").

Finally, far from contravening the INA, the 1003.2 Amendments were promulgated "to implement the directives of section 545 of the Immigration Act of 1990," which established "[b]oth time and number limitations on motions to reopen." 59 Fed. Reg. at 29,386. The Amendments specified procedures for the filing of such motions, providing only limited exceptions to the time and number limitations, in accordance with "the intent of Congress to streamline the deportation proceedings of aliens in the United States." *Id.*

In summary, both Regulation 1003.2 and the 1003.2 Amendments fill gaps in the governing statute; they were issued pursuant to properly delegated rulemaking authority; they raise no relevant constitutional concerns; and the time for challenges to their procedural history and content has long passed. Moreover, neither the amendments' procedural history nor their content is manifestly unlawful. Accordingly, Regulation 1003.2 as amended is binding on this Court. *Mead*, 533 U.S. at 227.

C. The Court Need Not Defer To The Attorney General's Contrary Litigating Position.

The final issue before the Court is how much weight, if any, to give to the Attorney General's current assertion that Regulation 1003.2 does *not* trigger the jurisdiction-stripping effect of Section 1252(a)(2)(B)(ii). The Court regularly defers to an agency's interpretation of the statute it is charged with administering, *Chevron*, 467 U.S. at 843-44, and also to the agency's reading of its own regulations, *Nat'l Ass'n of Home Builders* v. *Defenders of Wildlife*, 551 U.S. 644, 672 (2007). Such deference is not appropriate here, however, for two reasons. First, the agency's assertion is a litigating position "wholly unsupported by regulations, rulings, or administrative practice." *Bowen* v. *Georgetown Univ. Hosp.*, 488 U.S. 204, 212 (1988). Second, with respect to the question before the Court, the statute and regulation are unambiguous.

On the first point, the Attorney General's present view of the interplay between Section 1252(a)(2)(B)(ii) and Regulation 1003.2 is quite new. In cases before 2008, the United States repeatedly read the relevant statutory and regulatory language as the Seventh Circuit did, to strip courts of jurisdiction to review Board denials of motions to reopen. See, *e.g.*, Brief for Respondent at 8, in *Onyinkwa* v. *Ashcroft*, 376 F.3d 797 (8th Cir. 2004) ("Where a regulation that implements a statute in subchapter II confers discretion, section 1252(a)(2)(B)(ii) strips a court of appeals of jurisdiction over the discretionary decision governed by the regulation."); Brief for Respondent at 10, in

Yerkovich v. *Ashcroft*, 381 F.3d 990 (10th Cir. 2004) ("Where the regulation that implements a statute in subchapter II confers discretion, Section 1252(a)(2)(B)(ii) acts to strip the court of appeals of jurisdiction over the discretionary decision governed by the regulation." (citing *CDI Info. Servs.* v. *Reno*, 278 F.3d 616, 619 (6th Cir. 2002))).

In fact, it is possible to determine approximately when the Attorney General's view changed: the initial Brief for Respondent in *Jahjaga* v. *Attorney General* argued *against* court jurisdiction to review a motion to reopen, but when the court sought supplemental briefing on the issue, the Government changed its mind. 512 F.3d 80, 83 n.1 (3rd Cir. 2008) ("Prior to argument of these two appeals, we had asked counsel for the Government and the parties to address the question[] of jurisdiction . . . . [T]he Government withdrew its earlier argument that we could not review the BIA's decision because of its discretionary nature [and] conceded that we possess jurisdiction to review the issues on these appeals."). This switch-in-time may not itself be dispositive of the deference question, see *Long Island Care at Home, Ltd.* v. *Coke*, 551 U.S. 158, 171 (2007), but in the absence of a duly promulgated rule or other "articulated" agency "interpretation" of Section 1252(a)(2)(B)(ii) and Regulation 1003.2, this Court owes no deference to the United States' shifting litigating position, *Bowen*, 488 U.S. at 212; see also *INS* v. *Cardoza-Fonseca*, 480 U.S. 421, 446 n.30 (1987) ("An agency interpretation of a relevant provision which conflicts with the agency's earlier interpretation is entitled to considerably less deference than a consistently held agency view." (internal quotation marks omitted)).

Moreover, no deference is owed here because the text of Section 1252(a)(2)(B)(ii) and Regulation 1003.2 admits of only one interpretation on the issue before the Court. As discussed above, *supra* pp. 14-21, Section 1252(a)(2)(B)(ii) unambiguously extends to decisions and actions "specified" by the INA *or* by regulation issued thereunder "to be in the discretion of the Attorney General." 8 U.S.C. 1252(a)(2)(B)(ii). Thus, with respect to the section's reach, "the intent of Congress is clear, [and] that is the end of the matter; for the court, as well as the agency, must give effect to the unambiguously expressed intent of Congress." *Chevron*, 467 U.S. at 842-43. The INA leaves room for the Attorney General to identify *whether* certain issues are discretionary, but it leaves no room for him to curtail the jurisdictional effect of designating an issue as discretionary. *Cf. Negusie v. Holder*, 129 S. Ct. 1159, 1171 (2009) (Stevens, J., concurring in part and dissenting in part) ("The fact that Congress has left a gap for the agency to fill means that courts should defer to the agency's reasonable gap-filling decisions, not that courts should cease to mark the bounds of delegated agency choice.").

Regulation 1003.2 is similarly clear—it specifies in so many words that the decision whether to grant or deny a motion to reopen is "within the discretion" of the Attorney General. 8 C.F.R. 1003.2(a). There is simply no way to interpret that language as stopping short of triggering Section 1252(a)(2)(B)(ii)'s jurisdictional bar. The bar extends to decisions specified to be in the Attorney General's discretion; Regulation 1003.2 so specifies with respect to the disposition of motions to reopen filed with the Board. To the extent that the Attorney General's present

contrary view of the regulation's import is based on a different understanding of the regulatory text, that understanding is "inconsistent with the regulation" and merits no deference. *Auer* v. *Robbins*, 519 U.S. 452, 461 (1997) (internal quotation marks omitted).

The Attorney General may now regret the jurisdictional consequences of the clear specification of discretion that his office added to Regulation 1003.2 in 1996. There may be policy arguments for allowing courts to review the Board's denial of motions to reopen. But it is a well-settled—and jurisprudentially sound—principle of administrative law that an agency must "abide by the regulations it promulgates." *Sameena Inc.* v. *U.S. Air Force*, 147 F.3d 1148, 1153 (9th Cir. 1998) (citing *Vitarelli* v. *Seaton*, 359 U.S. 535, 545 (1959); *Service* v. *Dulles*, 354 U.S. 363, 372 (1957); *United States ex rel. Accardi* v. *Shaughnessy*, 347 U.S. 260, 266-67 (1954)). That principle has its most salutary effect in situations in which an agency has been generous in granting parties procedural safeguards that go beyond those mandated by statute. In that situation, "[a]n agency's failure to follow its own regulations tends to cause unjust discrimination and deny adequate notice." *Sameena*, 147 F.3d at 1153 (internal quotation marks omitted). Here too, though, the failure to enforce the plain language of Regulation 1003.2 would have adverse consequences for some parties before the Board. In concert with Section 1252(a)(2)(B)(ii), Regulation 1003.2's specification of discretion and its other limits on the filing of dilatory or repetitious motions to reopen serve not only to expedite the removal of some aliens, in accordance with Congress's intent in the Immigration Act of 1990, see *supra* pp. 7, 51, but also

to ensure that the Board's limited resources are focused not on defending denials of motions to reopen, but on reaching the right result in removal proceedings from the outset.

CONCLUSION

For the foregoing reasons, this Court should affirm the Seventh Circuit's determination that 8 U.S.C. 1252(a)(2)(B)(ii) bars courts from reviewing the Board's discretionary denial of Petitioner's motion to reopen his removal proceeding.

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