No. 08-911

IN THE
Supreme Court of the United States

AGRON KUCANA,
Petitioner,
v.

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

On Writ of Certiorari to the U.S. Court of Appeals for the Seventh Circuit

BRIEF OF WASHINGTON LEGAL FOUNDATION AND ALLIED EDUCATIONAL FOUNDATION AS *AMICI CURIAE* IN SUPPORT OF THE JUDGMENT BELOW

Daniel J. Popeo
Richard A. Samp
(Counsel of Record)
Washington Legal Foundation
2009 Massachusetts Ave., NW
Washington, DC 20036
(202) 588-0302

Date: October 5, 2009

QUESTION PRESENTED

Do the federal courts of appeals have jurisdiction to review a Board of Immigration Appeals decision to deny a second motion to reopen immigration proceedings, filed by an alien subject to a final order of removal, seeking to reapply for asylum or withholding of deportation based on changed circumstances?

TABLE OF CONTENTS

Page

Page

TABLE OF AUTHORITIES

Page(s)

Cases:

Page(s)

Statutes:

Page(s)

Regulations:

Miscellaneous:

BRIEF OF WASHINGTON LEGAL FOUNDATION AND ALLIED EDUCATIONAL FOUNDATION AS *AMICI CURIAE* IN SUPPORT OF THE JUDGMENT BELOW

INTERESTS OF *AMICI CURIAE*

The Washington Legal Foundation (WLF) is a public interest law and policy center with supporters in all 50 States.[1] WLF devotes a substantial portion of its resources to promoting America's security. To that end, WLF has appeared before this Court and other federal courts to support the prompt deportation of aliens who enter or remain in the United States in violation of our law, thereby ensuring that those aliens do not take immigration opportunities that might otherwise be extended to others. *See, e.g., Nken v. Holder*, 129 S. Ct. 1749 (2009). WLF has also opposed efforts by federal courts to exercise jurisdiction over immigration matters that are properly the prerogative of the elected branches of government. *See, e.g., Clark v. Martinez,* 543 U.S. 371 (2005); *Demore v. Kim*, 538 U.S. 510 (2003); *INS v. St. Cyr,* 533 U.S. 289 (2001); *Reno v. American-Arab Anti-Discrimination Comm.* ("*AAADC*"), 525 U.S. 471 (1999).

The Allied Educational Foundation (AEF) is a non-profit charitable foundation based in Englewood,

---

[1] Pursuant to Supreme Court Rule 37.6, *amici* states that no counsel for a party authored this brief in whole or in part; and that no person or entity, other than *amici* and their counsel, made a monetary contribution intended to fund the preparation and submission of this brief. All parties (as well as counsel appointed by the Court to support the judgment below) have consented to the filing of this brief; letters of consent have been lodged with the clerk.

New Jersey. Founded in 1964, AEF is dedicated to promoting education in diverse areas of study, such as law and public policy, and has appeared as *amicus curiae* in this Court on a number of occasions.

Particularly in light of the significant national security concerns raised by immigration matters, *amici* believe that the courts should abide by Congress's determination that the courts have an extremely limited role to play in overseeing whether final orders of removal should be reopened. Congress has decreed that it is largely up to the political branches of government to decide whether those aliens who are determined (following completion of all judicial review) to be present in this country without authorization should be permitted further opportunities to challenge that determination. *Amici* are concerned that courts are undermining the effectiveness of immigration enforcement efforts when they permit aliens to seek judicial review of denials of motions to reopen, and then routinely block removal while they undertake that review. As evidenced by this case, the ready availability of such delays frequently permits savvy attorneys to postpone indefinitely the deportation of their alien clients. *Amici* do not support removing aliens who qualify for asylum to countries where their lives will be endangered. *Amici* nonetheless believe that there are sufficient checks built into the system that such removals are highly unlikely even if courts abide by Congress's limitations on their jurisdiction.

STATEMENT OF THE CASE

Petitioner Agron Kucana, a citizen of Albania,

entered the United States in July 1995 on a 90-day non-immigrant business visitor visa. The visa required him to leave by October 11, 1995. Nonetheless, he remains in the U.S. to this day, 14 years after he was required to leave, despite repeated efforts by the federal government to remove him.

In May 1996, Kucana filed with the INS an application for asylum and withholding of removal, alleging that he would be persecuted based on his political opinions if he returned to Albania. The INS charged him with being a removable alien, and his application was referred to an immigration judge (IJ). When he failed to appear for a hearing to determine his eligibility for asylum – a 1997 hearing date he acknowledges being aware of – the IJ ordered his removal *in absentia*.

Kucana did not seek judicial review of that order. Instead, he moved to reopen his removal proceedings, claiming that his failure to appear at the 1997 hearing was excusable. The IJ denied the motion to reopen in February 1998. The IJ found that Kucana had failed to satisfy either of the two statutory criteria for obtaining relief from an *in absentia* removal order: (1) a showing that he did not receive notice of the hearing; or (2) a showing that his failure to appear was due to "exceptional circumstances." 8 U.S.C. § 1252b(c)(3)(B) & (A) (1996). His appeal from that decision was denied by the Board of Immigration Appeals (BIA) in May 2002. He did not seek judicial review of the BIA's decision.

More than four years later, Kucana filed a second

motion to reopen his final order of removal. He argued that social and political changes in Albania since his case was last heard strengthened his asylum claim and thereby warranted reopening removal proceedings. The IJ denied the motion in July 2006, and Kucana appealed to the BIA.

The BIA's December 2006 ruling rejected Kucana's claims. Pet. App. 22a-26a. The BIA initially ruled that the second motion to reopen should have been filed with the BIA rather than the IJ because, at the time of the filing, the BIA was the last body to have issued a decision. *Id.* at 23a. The BIA nonetheless considered and rejected the second motion to reopen on its merits. It concluded that Kucana had failed to make out a *prima facie* case that he was eligible for asylum or withholding of deportation "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 (citing 8 C.F.R. § 1003.2(c)(3)(ii)). In the absence of such a showing, the BIA concluded that Kucana's motion to reopen was properly denied. *Id.* at 26a.

Kucana then sought review in the U.S. Court of Appeals for the Seventh Circuit. The appeals court dismissed the petition for review for lack of jurisdiction. *Id.* at 1a-21a. Relying on its prior decision in *Ali v. Gonzales*, 502 F.3d 659 (7th Cir. 2007), the court held that 8 U.S.C. § 1252(a)(2)(B)(ii) bars appeals from denials of motions to reopen final orders of removal because the immigration laws make clear that grant or denial of a motion to reopen rests within the discretion of the Attorney General. *Id.* at 4a-10a. The court said

that it had jurisdiction to hear any "constitutional claims or questions of law" raised by Kucana but that he had not raised any such claims. *Id.* at 10a-12a. Four judges on the Seventh Circuit signed an opinion dissenting from denial of rehearing *en banc*. *Id.* at 20a-21a.

SUMMARY OF ARGUMENT

Amici agree with the Seventh Circuit's conclusion that 8 U.S.C. § 1252(a)(2)(B)(ii) bars judicial review of the denial of Kucana's motion to reopen his immigration proceedings. *Amici* write separately to point out that there is a more fundamental reason why judicial review is barred: 8 U.S.C. § 1229a(c)(7)(A) provides that an alien may file only "one motion to reopen proceedings" under § 1229a. Kucana's latest motion is his second motion to reopen (his first was filed in October 1997). As such, the BIA was prohibited from reopening the proceedings by § 1229a(c)(7)'s numerical limitation. Accordingly, an appeal is jurisdictionally barred because, as the United States acknowledges in its brief, the courts lack jurisdiction to hear appeals from denial of relief that the BIA is not authorized to grant.

Section 1229a(c)(7) provides for one exception from its numerical limitation, but that exception is inapplicable here. The exception, set forth in § 1229a(c)(7)(C)(iv), waives the numerical limitation for certain "battered spouses, children, and parents." In contrast, the provision that directly addresses asylum claims, § 1229a(c)(7)(C)(ii), waives the *time limitation* for asylum claims but not the *numerical limitation*. Section 1229a(c)(7) makes plain that the BIA lacked any

authority to grant Kucana's motion.

Regulations adopted by the Department of Justice prior to the adoption of § 1229a(c)(7) in 1996 purport to authorize the BIA – notwithstanding the numerical limitation – to reopen immigration proceedings when an alien seeks to "reapply for asylum or withholding of deportation based on changed circumstances" in the country to which deportation has been ordered. *See* 8 C.F.R. § 1003.2(c)(3)(ii). That regulation is invalid because it is not a reasonable interpretation of Congress's limited authorization for the reopening of immigration proceedings.

Alternatively, the judgment below ought to be affirmed because the Seventh Circuit correctly interpreted § 1252(a)(2)(B)(ii)'s limitation on judicial review of discretionary decisions of the Attorney General (and his designated surrogate, the BIA). Kucana asks the Court to read § 1252(a)(2)(B)(ii) as though it stated that its application is limited to situations in which "a provision in this subchapter explicitly states that the Attorney General has discretion to grant or deny relief." *Amici* submit that when the statute is considered as a whole and in the context of its adoption, § 1252(a)(2)(B)(ii) can more plausibly be read to bar judicial review whenever "the immigration laws make clear that the decision to grant or deny relief rests in the discretion of the Attorney General." Because this Court has repeatedly recognized that immigration law does not set forth criteria that, if satisfied, require the reopening of immigration proceedings but rather in all instances grants the Attorney General discretion to deny a motion to reopen,

§ 1252(a)(2)(B)(ii) bars judicial review of denial of a motion to reopen.

ARGUMENT

I. KUCANA MAY NOT SEEK JUDICIAL REVIEW OF DENIAL OF HIS SECOND MOTION TO REOPEN BECAUSE HIS MOTION WAS CATEGORICALLY BARRED BY THE NUMERICAL LIMITATION ON MOTIONS TO REOPEN

A. Under § 1229a(c)(7)(A), Aliens May Not File More Than One Motion to Reopen to Reopen Immigration Proceedings

Kucana's current motion to reopen his immigration proceedings is not the first such motion he has filed following the issuance of a final order of deportation/removal in 1997. He also filed a motion to reopen in October 1997, arguing that his failure to appear at his hearing before the IJ was excusable. Section 1229a(c)(7)(A) provides that aliens are limited to filing "one motion to reopen proceedings" under § 1229a. Because the current motion exceeds the numerical limitation imposed by § 1229a(c)(7)(A), the motion was improper and the BIA lacked statutory authority to grant it.

Section 1229a(c)(7) creates a single exception from its numerical limitation, but that exception is inapplicable here. The exception waives the numerical limitation for certain "battered spouses, children, and

parents." *See* 8 U.S.C. § 1229a(c)(7)(C)(iv) (setting forth a "special rule for battered spouses, children, and parents" and providing that "[a]ny limitation" set forth in § 1229a "shall not apply" to the filing of motions to reopen by such individuals); § 1229a(c)(7)(A) (providing that the numerical limitation on motions to reopen "does not apply so as to prevent the filing of one motion to reopen described in subparagraph (C)(iv)"). Kucana's second motion to reopen is not one to which § 1229a(c)(7)(C)(iv) applies.

In contrast, the provision that directly addresses motions to reopen based on claims for asylum and withholding of removal waives the *time limitation* but not the *numerical limitation*. It states, "There is no time limit on the filing of a motion to reopen if the basis for the motion is to apply for" asylum or withholding of removal, § 1229a(c)(7)(C)(ii), but the statute makes no mention of waiver of the numerical limitation. The inclusion of an express waiver of the numerical limitation in (C)(iv) but the omission of such a waiver in (C)(ii) makes plain that Congress intended to bar second motions to reopen when based on a claim for asylum or withholding of removal.

The analysis is unchanged by the fact that Kucana's first motion sought to reopen for the purpose of rescinding an *in absentia* removal order. Motions to reopen for that purpose are subject to special restrictions set forth in 8 U.S.C. § 1229a(b)(5)(C).[2] But

---

[2] In general, motions to reopen under § 1229a(b)(5)(C) will be granted only upon a showing that the alien's failure to appear at his hearing "was because of exceptional circumstances," or because

nothing in § 1229a suggests that a motion to reopen for the purpose of rescinding an *in absentia* removal order should not count as a first motion to reopen for purposes of § 1229a(c)(7)(A). To the contrary, § 1229a(c)(7)(A) explicitly limits aliens to one motion to reopen "under this section," and a motion to reopen for the purpose of rescinding an *in absentia* removal order is undeniably a motion "under this section" (*i.e.*, § 1229a).[3]

Indeed, in a recent decision regarding the filing of motions to reopen immigration proceedings, this Court explicitly recognized that Congress, through its enactment of the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 ("IIRIRA"), Pub. L. No. 104-208, 110 Stat. 3009-546, imposed "significant" limits on the filing of motions to reopen, including limits on the number of motions an alien may file. *Dada v. Mukasey*, 128 S. Ct. 2307, 2315-16 (2006).

---

he never received notice of the hearing.

[3] Section 1229a(c)(7)(C)(iii) provides further evidence that Congress intended motions to reopen for the purpose of rescinding an *in absentia* removal order to be treated like all other motions to reopen when counting the total number of motions to reopen previously filed. (C)(iii) provides that the filing of a motion to reopen an *in absentia* removal order entered pursuant to § 1229a(b)(5) for failure to appear at an IJ hearing is subject to the 180-day filing deadline imposed by (b)(5)(C)(i) rather than the 90-day filing deadline imposed by (c)(7)(C)(i). The fact that Congress would see the need to spell out that the filing deadline set forth in § 1229a(c)(7)(C)(i) did not apply to motions to reopen for the purpose of rescinding an *in absentia* removal order strongly suggests that Congress believed that such motions were a normal part of the broader category of motions to reopen immigration proceedings.

The Court noted that regulations adopted by the Department of Justice and a provision of IIRIRA (codified at 8 U.S.C. § 1229a(c)(7)(A)) both limited an alien facing removal to only "one motion to reopen." *Id.*

In sum, the numerical limitation imposed by § 1229a(c)(7)(A) means that under no circumstances would Kucana have been entitled to a reopening of his immigration proceedings, even if he could have demonstrated a *prima facie* case of changed country conditions in Albania.

B. Department of Justice Regulations Purporting to Waive the Numerical Limitation in Asylum Cases Are Invalid

Despite the clear language of § 1229a(c)(7)(A), the United States asserts, on the basis of Department of Justice regulations, that the numerical limitation on motions to reopen does not apply to this case. That regulation, 8 C.F.R. § 1003.2(c)(3)(ii), states that the numerical limitation on motions to reopen "shall not apply" to a motion to reopen proceedings to "reapply for asylum or withholding of deportation based on changed circumstances arising in the country of origin or in the country to which deportation has been ordered." Because (as demonstrated above) 8 U.S.C. § 1229a(c)(7)(A) expressly provides that the numerical limitation *does* apply to such motions, the regulation is invalid because it is not a reasonable interpretation of Congress's limited authorization for the reopening of immigration proceedings.

The history surrounding adoption of the statute and regulation dispels any doubt that the two are in direct conflict. Prior to adoption of IIRIRA in 1996, no federal statute so much as mentioned motions to reopen immigration proceedings following the entry of a final order of deportation. Nonetheless, since 1958 the Department of Justice has had in place regulations that provided for reopening of immigration under some circumstances. *Dada,* 128 S. Ct. at 2315. Until 1996, those regulations contained neither time nor numerical limitations on the filing of motions to reopen. *Id.*

In 1990, Congress adopted legislation expressing its concern that deportation proceedings were being unnecessarily prolonged by aliens who were abusing their right to file motions to reopen. The Immigration Act of 1990, Pub. L. No. 101-649, 104 Stat. 4978 (1990), directed the Justice Department to address its concerns:

> [T]he Attorney General shall issue regulations with respect to . . . the period of time in which motions to reopen and to reconsider may be offered in deportation proceedings, which regulations shall include a limitation on the number of motions that may be filed and a maximum time period for the filing of such motions.

Immigration Act of 1990 at § 545(d), 104 Stat. at 5066. In explaining the intent of § 545(d), the Joint Explanatory Statement of the Committee of Conference, H.R. Conf. Rep. No. 955, 101st Cong., 2d Sess., stated:

> Unless the Attorney General finds reasonable

> evidence to the contrary, the regulations should state that such motions be made within 20 days of the date of the final determination in the proceeding and that such motions be limited to one motion to reopen and one motion to reconsider.

H.R. Conf. Rep. No. 955 at 133.[4]

The Department of Justice responded by adopting regulations that for the first time imposed limitations on the number and timing of motions to reopen. Those regulations, which became final in April 1996, have undergone very few changes in the ensuing 13 years; the current version of the regulation imposing limitations on the number and timing of motions to reopen, 8 C.F.R. § 1003.2(c)(2) & (c)(3), is substantially similar to the version adopted in 1996. *See* 61 Fed. Reg. 18900 (Apr. 29, 1996). In particular, the 1996 regulations and the current regulations are identical in providing that: (1) a party may file only one motion to reopen; (2) that motion must be filed within 90 days of the final administrative action in the proceeding sought to be reopened; and (3) the time and numerical limitations do not apply to motions to reopen proceedings for the purpose of reapplying for asylum or withholding of deportation. *See* 8 C.F.R. § 3.2(c)(2) & (c)(3) (1996).

---

[4] This Court has explicitly recognized that "a principal purpose" of the Immigration Act of 1990 was "to expedite petitions for review and to redress the related problem of successive and frivolous administrative appeals and motions." *Stone v. INS*, 514 U.S. 386, 400 (1995). The Court noted that the Act "directed the Attorney General to promulgate regulations limiting the number of reconsideration and reopening motions that an alien could file." *Id.*

Congress responded five months later by adopting IIRIRA. That legislation for the first time codified the practice of granting motions to reopen immigration proceedings following issuance of a final order of removal. 8 U.S.C. § 1229a(c)(7). IIRIRA accepted the general rule adopted by the DOJ regulations with respect to time and numerical limitations: one motion to reopen, which must be filed within 90 days. 8 U.S.C. § 1229a(c)(7)(A) & (C)(i). However, Congress rejected the regulations' waiver rule with respect to motions to reopen for the purpose of seeking to reapply for asylum or withholding of removal. While the regulations had provided in April 1996 for both types of waiver with respect to such motions, IIRIRA provided for waiver only of the time limitation. 8 U.S.C. § 1229a(c)(7)(C)(ii).

In light of the timing (final regulations adopted in April 1996, followed by IIRIRA's enactment in September 1996), the legislation can only be viewed as an explicit rejection of the Department of Justice rule permitting waiver of the one-motion-to-reopen rule with respect to claims for asylum and withholding of removal. Congress intended thereby to prohibit the filing and granting of such motions to reopen when it is not the first motion to reopen filed by the alien. Yet despite that rejection, the Department of Justice has neither changed its regulations to conform to the statute, nor sought to explain how the two can be harmonized. Accordingly, the BIA lacks the authority to grant Kucana's motion to reopen; the regulation that the United States relies on to support its claim that the BIA possesses discretionary to grant the motion is invalid because it conflicts with 8 U.S.C. § 1229a(c)(7)(A).

C. Kucana May Not Seek Judicial Review of the Denial of His Motion When the BIA Lacks Discretionary Authority to Grant the Motion

Congress has decreed that aliens who are subject to a final order of removal and who have filed a previous motion to reopen, may not file a second motion to reopen for the purpose of applying or reapplying for a discretionary grant of asylum or withholding of deportation. 8 U.S.C. § 1229a(c)(7)(A). Kucana filed just such a second motion, and (not surprisingly, given the plain language of the statute) it was denied by the BIA. He appeals from that denial, but he raises no constitutional challenge to the numerical limitation. Under those circumstances, he is not entitled to judicial review of a claim that amounts to nothing more than a plea for the BIA to exercise its own authority to reopen.

As explained above, a principal motivating factor in Congress's decision to impose the numerical limitation was a desire to streamline administrative and judicial review procedures. *See, e.g., AADC,* 525 U.S. at 486 ("[*M*]*any* provisions of IIRIRA are aimed at protecting the Executive's discretion from the courts – indeed, that can fairly be said to be the theme of the legislation"). But these measures can accomplish few of Congress's streamlining purposes if aliens remain free to seek judicial review of denials of administrative relief for which Congress has decreed them categorically ineligible. Permitting judicial review under those circumstances is as an end run around the limitations imposed by Congress; it serves only to delay proceedings, and "as a general matter, 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).

Although § 1229a(c)(7)(A) provides that the BIA may not grant Kucana's motion to reopen his immigration proceedings because it is barred by the numerical limitation, the BIA nonetheless could choose to reopen the proceedings on its own authority. Indeed, Department of Justice regulations provide that the BIA "may at any time reopen or reconsider on its own motion any case in which it has rendered a decision." 8 C.F.R. § 1003.2(a). But as the United States notes, the federal appeals courts unanimously agree that an alien is not entitled to judicial review of the BIA's denial of the alien's request that the BIA reopen proceedings on its own authority:

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

U.S. Br. 24 n.15.

Kucana does not assert that the BIA violated his constitutional rights or made an error of law. He asserts only that the BIA abused its discretion in denying his motion to reopen. But § 1229a(c)(7) makes

clear that the BIA does not possess any discretion to grant his motion. Under those circumstances, Kucana should not be permitted to obtain judicial review. Alternatively, the Court should rule that the BIA did not abuse its discretion by denying relief (reopening the immigration proceedings) that it was not authorized to grant.

II. SECTION 1252(A)(2)(b)(ii) BARS JUDICIAL REVIEW OF DENIAL OF A MOTION TO REOPEN IMMIGRATION PROCEEDINGS

8 U.S.C. § 1252(A)(2)(b)(ii) provides that "no court shall have jurisdiction to review" a decision of the Attorney General "the authority for which is specified under this subchapter to be in the discretion of the Attorney General." It is undisputed that no provision of the immigration laws states *explicitly* that the grant or denial of a motion to reopen immigration proceedings is committed to the discretion of the Attorney General. *Amici* nonetheless submit that § 1252(A)(2)(b)(ii) – when read in the context of the entire body of federal immigration statutes and of the circumstances surrounding its adoption – is fairly read to bar judicial review of denial of motions to reopen immigration proceedings.

1. Kucana proceeds on the assumption that the word "specified" is synonymous with the words "explicitly stated." To the contrary, while the word "specify" connotes some degree of clarity in congressional intent, it cannot fairly be understood as requiring that the discretionary nature of a decision be

stated explicitly in a statute. Synonyms for "specify" include "detail, indicate, enumerate, stipulate." *See*, e.g., Dictionary.com, "specify," in Dictionary.com Unabridged, Random House, Inc., http://dictionary.reference.com/browse/specify. The discretionary nature of grants or denials of motions to reopen should be deemed to be "specified" under the immigration code because that discretionary nature is clearly indicated by the code even though it is not explicitly stated in any one provision of the code.

2. We note initially that Kucana does not seriously contest that a decision to grant or deny a motion to reopen is a discretionary decision of the Attorney General. As the Court recently noted, "the reopening of a case by the immigration authorities for the introduction of new evidence" is, and was historically, treated "as 'a matter for the exercise of their discretion.'" *Dada,* 128 S. Ct at 2315 (quoting *Wong Shong Been v. Proctor*, 79 F.2d 881, 883 (9th Cir. 1935)). Long before there was any statutory authorization for reopening immigration proceedings, the Justice Department beginning in 1958 issued regulations authorizing the filing of motions to reopen but making clear at all times that the decision to grant or deny such motions was a matter committed to the Attorney General's discretion. *Id.* The current DOJ regulation governing motions to reopen, which has been in place for many years, provides:

> 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).

3. As the United States notes in its brief, federal courts for many years have entertained appeals from denial of motions to reopen, and have reviewed those decisions under an abuse of discretion standard. U.S. Br. 22-23. But it was Congress's belief that aliens were taking advantage of overly lax appeal procedures to unnecessarily delay the completion of immigration proceedings, and for that reason it adopted – as part of IIRIRA – both § 1252(a)(2)(B)(ii) as well as other provisions limiting judicial review of immigration proceedings. *See, e.g.,* §§ 1252(a)(2)(A), 1252(a)(2)(C), 1252(b)(4), 1252(b)(9), 1252(g). Indeed, the Court has recognized that "*many* provisions of IIRIRA are aimed at protecting the Executive's discretion from the courts – indeed, that can fairly be said to be the theme of the legislation." *AADC*, 525 U.S. at 486 (emphasis in original). Section 1252(b)(9), for example, provides that review of "all questions of law and fact" arising in connection with "any action taken or proceeding brought to remove an alien from the United States under this subchapter" is available *only* in connection with the judicial review of a "final order" of removal provided for under § 1252(b). This so-called "zipper clause" has the effect of significantly limiting the occasions on which an alien facing removal may seek judicial assistance to avoid removal.

4. In light of Congress's awareness in 1996 that motions to reopen, while not statutorily authorized,

were routinely accepted and made subject to the BIA's discretion, it seems overwhelmingly clear that such motions were among the ones contemplated by Congress as falling within the restrictions imposed by § 1252(a)(2)(B(ii). For one thing, although *amici* have been unable to obtain from the U.S. any statistics that break down the number of times in which aliens have sought judicial review of denials of motions to reopen, anecdotal evidence suggests that a significant percentage of all lawsuits alleging that the BIA abused its discretion were appeals from denials of motions to reopen. It is inconceivable that a Congress concerned with perceived excesses by aliens in seeking judicial review of discretionary decisions would choose to make the IIRIRA provision that was intended to address such excesses – § 1252(a)(2)(B(ii) – inapplicable to appeals from denial of motions to reopen, the likely #1 source of abuse.

5. The United States points to numerous examples of instances in which the immigration statutes explicitly name immigration-related decisions that are delegated to the discretion of the Attorney General; the United States suggests that Congress would similarly have mentioned motions to reopen by name if it had intended those motions to be covered by § 1252(a)(2)(B(ii). But there is no reason to ascribe such a motivation to Congress given that, until 1996, motions to reopen were not even mentioned in the immigration laws. The more pertinent fact is that it was universally understood in 1996 that the grant or denial of motions to reopen was, indeed, entrusted to the discretion of the Attorney General. Given that understanding, and the entire tenor of IIRIRA, it is

inconceivable that Congress would not have understood that denials of motions to reopen were covered by § 1252(a)(2)(B)(ii).

6. The United States argues that its position is supported by § 1252(b)(6), which was also adopted as part of IIRIRA. That clause provides, "When a petitioner seeks review of an order under this section, any review sought of a motion to reopen or reconsider the order shall be consolidated with the review of that order." The United States argues that § 1252(b)(6) indicates that Congress contemplated that courts would continue to have jurisdiction to hear motions to reopen.

The United States reads far too much into this provision. IIRIRA is chock full of provisions that overlap one another. *Compare, e.g.,* §§ 1252(b)(9) and 1252(g). Congress's evident intent was to express in as many different ways as possible that it was seeking to cut down on what it viewed as excessive judicial review of immigration proceedings. One method for doing so was to prevent judicial review of discretionary decisions, such as decisions denying motions to reopen – § 1252(a)(2)(B)(ii). Another method was to make sure that if a court, notwithstanding § 1252(a)(2)(B)(ii), insisted that it had the authority to review the denial of a motion to reopen, the number of judicial proceedings would be minimized by insisting on the consolidation of the appeal from the denial with any appeal from a final order of removal – § 1252(b)(6).

Congress proved prescient in its insertion of somewhat redundant review-restricting provisions in IIRIRA. On several occasions, this Court has adopted

extremely expansive interpretations of IIRIRA provisions regarding judicial review, in order to avoid potential constitutional problems that might arise if the provisions were given narrower readings. *See, e.g., INS v. St. Cyr,* 533 U.S. 289 (2001); *Clark v. Martinez,* 543 U.S. 371 (2005); *Zadvydas v. Davis*, 533 U.S. 678 (2001). The existence of overlapping review-restricting provisions has allowed Congress to keep a lid on abusive appeals by aliens seeking to delay their removal, even as this Court and other federal courts have cut back on portions of IIRIRA's jurisdiction-stripping provisions.

7. As noted above, a principal concern that motivated adoption of IIRIRA was an intent to streamline the immigration appeals process and thereby cut down on the number of immigration-related appeals. It is an understatement to suggest that that goal has not been fully achieved. To the contrary, the number of immigration-related cases in the federal appeals courts has skyrocketed over the past decade since the adoption of IIRIRA. *See*, e.g., Margaret Lee, *Immigration Litigation Reform,* Congressional Research Service (May 6, 2006); Michael B. Mushlin, *The Surge in Immigration Appeals and Its Impact on the Second Circuit Court of Appeals*, Pace University Law School, Vol. 60 No. 1 (2005), available at http://digitalcommons.pace.edu/lawfaculty/536 (immigration appeals rose 294% in the federal appeals courts from 2001 to 2002, and increased from 175 in the Second Circuit in 2001 to 2,224 in 2003).

While there are undoubtedly numerous causes for the surge in immigration appeals, anecdotal evidence suggests that one significant factor has been the

continued availability of appeals from denial of motions to reopen, despite the existence of § 1252(a)(2)(B)(ii). Among the circuit courts, only the Seventh Circuit has interpreted that provision as barring judicial review of denials of motions to reopen. The ability of the two appeals courts with the largest immigration-related dockets – the Second and Ninth Circuits – to function on a timely basis has been significantly impaired by the crush of immigration cases. Mushlin, *supra,* at 246-47. *Amici* respectfully suggest that ascribing to § 1252(a)(2)(B)(ii) an intent to bar appeals from denials of motions to reopen – a meaning that best comports with its language and the background surrounding adoption of IIRIRA – would be a significant step toward achieving the reduction of the immigration case law intended by Congress.

CONCLUSION

Amici curiae request that the Court affirm the decision of the court of appeals.

Respectfully submitted,

Daniel J. Popeo
Richard A. Samp
(Counsel of Record)
Washington Legal
Foundation
2009 Mass. Ave, NW
Washington, DC 20036
(202) 588-0302

Dated: Oct. 5, 2009

Counsel wish to thank Ryan Ward, a student at Texas Tech University Law School, for his assistance in the preparation of this brief.