

No. 08-911

---

---

IN THE  
*Supreme Court of the United States*

---

AGRON KUCANA,  
*Petitioner,*

v.

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

---

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

---

**REPLY BRIEF**

---

ELAINE J. GOLDENBERG  
LINDSAY C. HARRISON  
JENNER & BLOCK LLP  
1099 New York Avenue, NW  
Suite 900  
Washington, DC 20001  
(202) 639-6000

RICK M. SCHOENFIELD  
*Counsel of Record*  
DIVINCENZO SCHOENFIELD  
SWARTZMAN  
33 N. LaSalle, 29th Floor  
Chicago, IL 60602  
(312) 334-4800

MICHAEL R. LANG  
MICHAEL R. LANG &  
ASSOCIATES  
33 N. LaSalle, 29th Floor  
Chicago, IL 60602  
(312) 236-5599

*Counsel for Petitioner*

---

---

## TABLE OF CONTENTS

TABLE OF AUTHORITIES.....	ii
INTRODUCTION.....	1
ARGUMENT .....	2
I. THE ATTORNEY GENERAL'S AUTHORITY TO DENY A MOTION TO REOPEN IS NOT SPECIFIED TO BE DISCRETIONARY "UNDER" THE RELEVANT SUBCHAPTER.....	2
A. The Language Of The Statute Requires That The Specification Of Discretionary Authority Appear In The Statute, Not In A Regulation.....	2
B. Nothing In The Legislative History Supports Amicus's Position.....	10
C. Amicus's Interpretation Is Implausible Because It Has Extraordinary Consequences.....	13
D. Even Assuming Any Ambiguity In The Statute, Amicus's Position Must Be Rejected.....	16
II. IN ANY EVENT, THE REGULATION ON WHICH AMICUS RELIES WAS NOT ISSUED PURSUANT TO THE RELEVANT SUBCHAPTER.....	18
CONCLUSION .....	20

## TABLE OF AUTHORITIES

## CASES

<i>Ardestani v. INS</i> , 502 U.S. 129 (1991) .....	2
<i>Board of Governors of Federal Reserve System v. Investment Co. Institute</i> , 450 U.S. 46 (1981).....	12
<i>Bridges v. Wixon</i> , 326 U.S. 135 (1945).....	15
<i>Corley v. United States</i> , 129 S. Ct. 1558 (2009).....	3
<i>Director, Office of Worker’s Compensation Programs v. Newport News Shipbuilding &amp; Dry Dock Co.</i> , 514 U.S. 122 (1995).....	10-11
<i>Florida Department of Revenue v. Piccadilly Cafeterias, Inc.</i> , 128 S. Ct. 2326 (2008) .....	1
<i>Izumi Seimitsu Kogyo Kabushiki Kaisha v. U.S. Phillips Corp.</i> , 510 U.S. 27 (1993).....	16
<i>McNary v. Haitian Refugee Center, Inc.</i> , 498 U.S. 479 (1991).....	17
<i>Medina-Morales v. Ashcroft</i> , 371 F.3d 520 (9th Cir. 2004).....	7
<i>Morales v. Trans World Airlines, Inc.</i> , 504 U.S. 374 (1992).....	12
<i>Nken v. Holder</i> , 129 S. Ct. 1749 (2009).....	15
<i>Rapanos v. United States</i> , 547 U.S. 715 (2006).....	11
<i>Reno v. Catholic Social Services, Inc.</i> , 509 U.S. 43 (1993).....	17

*Shao v. Attorney General*, No. 09-10259,  
2009 WL 3104017 (11th Cir. Sept. 30,  
2009)..... 16

*Soltane v. United States Department of  
Justice*, 381 F.3d 143 (3d Cir. 2004) ..... 2, 5

**STATUTES AND REGULATIONS**

6 U.S.C. § 1138(c)(2)(A)-(G) ..... 4  
 6 U.S.C. § 1138(g)..... 3  
 8 U.S.C. § 1103(a)..... 6, 18  
 8 U.S.C. § 1158..... 5  
 8 U.S.C. § 1158(a)(2)(C) ..... 16  
 8 U.S.C. § 1158(a)(2)(D) ..... 16  
 8 U.S.C. § 1229a(b)(5)(A) ..... 7  
 8 U.S.C. § 1229a(c)(7)..... 5  
 8 U.S.C. § 1229a(c)(7)(A)..... 16  
 8 U.S.C. § 1252(a)(2)(A) ..... 11  
 8 U.S.C. § 1252(a)(2)(B)(i)..... 4, 11  
 8 U.S.C. § 1252(a)(2)(B)(ii)..... *passim*  
 8 U.S.C. § 1252(a)(2)(C) ..... 11  
 8 U.S.C. § 1252(a)(2)(D) ..... 7  
 8 U.S.C. § 1252(b)(6) ..... 7  
 11 U.S.C. § 522(b)(2) ..... 3  
 11 U.S.C. § 522(d) ..... 3  
 50 U.S.C. § 1706(b)..... 4  
 8 C.F.R. § 1003.2 ..... 18, 20

8 C.F.R. § 1003.2(c)(3)(ii) ..... 16

**LEGISLATIVE MATERIALS**

H.R. Rep. No. 104-828 (1996) (Conf. Rep.) ..... 12

**OTHER AUTHORITIES**

*American Heritage College Dictionary* (4th Ed. 2000) ..... 2

*Black’s Law Dictionary* (Rev. 4th ed. 1968) ..... 2

*Compact Oxford English Dictionary* (2d ed. 1991) ..... 2

Executive Office for Immigration Review:  
Motions and Appeals in Immigration Proceedings, 61 Fed. Reg. 18,900 (Apr. 29, 1996) ..... 8

S. Ct. R. 14.1(a) ..... 16

Lamar Smith & Edward R. Grant,  
*Immigration Reform: Seeking the Right Reasons*, 28 St. Mary’s L.J. 883 (1997) ..... 13

*Webster’s Third New International Dictionary* (1993) ..... 2

## INTRODUCTION

Amicus contends that the word “under” in § 1252(a)(2)(B)(ii) – which deprives courts of jurisdiction to review decisions or actions of the Attorney General “the authority for which is specified” to be discretionary “under this subchapter” – must be read as meaning “subordinate” or “pursuant to,” rather than “according to” or “within.” That argument is wrong. The only “natural” reading of § 1252(a)(2)(B)(ii), *Florida Department of Revenue v. Piccadilly Cafeterias, Inc.*, 128 S. Ct. 2326, 2332-33 (2008), is one that requires the “authority . . . specified under this subchapter” to actually appear somewhere in the referenced portion of the statute. That reading is required by the language of § 1252 itself, as well as by the language of other relevant statutory provisions, and it is wholly consistent with the legislative history. It is also the only reading that does not give rise to extraordinary consequences that Congress is very unlikely to have intended. Moreover, even were § 1252(a)(2)(B)(ii) thought to be ambiguous (which it is not), Petitioner’s reading is dictated by multiple applicable canons of construction – including the canon against jurisdiction-stripping, which requires a clear statement by Congress before insulating agency action from judicial review. Finally, even were Amicus’s interpretation of the statute correct, her argument fails for an independently sufficient reason: the regulation that she identifies as the requisite specification of discretionary authority was not issued “under” the correct subchapter of the statute.

## ARGUMENT

**I. The Attorney General’s Authority To Deny A Motion To Reopen Is Not Specified To Be Discretionary “Under” The Relevant Subchapter.****A. The Language Of The Statute Requires That The Specification Of Discretionary Authority Appear In The Statute, Not In A Regulation.**

1. As Amicus recognizes, there are many definitions of the word “under.” *See Ardestani v. INS*, 502 U.S. 129, 135 (1991). Those definitions include “according to,” *Black’s Law Dictionary* 1695 (Rev. 4th ed. 1968), “within,” *American Heritage College Dictionary* 1874 (4th ed. 2000); *see also Webster’s Third New International Dictionary* 2487 (1993) (“within the grouping or designation”), and “[d]enoting occurrence in a particular section or article of a . . . work,” *Compact Oxford English Dictionary* 2158 (2d ed. 1991) – all definitions that accord with the interpretation of the statute set forth by Petitioner and the United States and adopted by every court of appeals to address the question except the court below. *See, e.g., Soltane v. U.S. Dep’t of Justice*, 381 F.3d 143, 146 (3d Cir. 2004) (interpreting § 1252(a)(2)(B)(ii) and stating that “the language of the statute in question must provide the discretionary authority before the bar can have any effect” (internal quotation marks omitted)).

To be sure, given the different dictionary definitions of the word “under,” it “must draw its meaning from its context.” *Ardestani*, 502 U.S. at 135. But Amicus’s own examples definitively demonstrate why the “context” of § 1252(a)(2)(B)(ii)

does not in any way suggest that the word “under” refers to a subordinate relationship like the relationship of a regulation to its authorizing statute. Amicus lists hundreds of statutory provisions in which regulations are described as being issued “under” a statute. *See* Amicus Br. Appendix A. In *every single one* of those examples, Congress *expressly* used the word “regulations.” Amicus has not come forward with a single instance in which Congress used the word “under” unaccompanied by the word “regulations” to refer to a regulatory scheme. It would have been easy for Congress to write § 1252(a)(2)(B)(ii) to mirror the provisions in Amicus’s appendix and cover decisions or actions the authority for which is specified to be discretionary in regulations promulgated under the subchapter, but “Congress did not write the statute that way.” *Corley v. United States*, 129 S. Ct. 1558, 1567 (2009) (internal quotation marks omitted).

Congress has, however, supplied many examples of statutory provisions that refer to things “specified under” certain statutory provisions where “under” can be read only to mean “within.” *See, e.g.*, 11 U.S.C. § 522(b)(2) (providing that a debtor in bankruptcy proceedings may exempt from property of the estate “property that is specified under subsection (d)”); *id.* § 522(d) (providing a list of twelve specific types of property, such as real property, motor vehicles, and life insurance contracts); 6 U.S.C. § 1138(g) (grantee of terrorism prevention research grants must return funds if Secretary determines they were used “for a purpose other than the allowable uses specified under



subsection (c) of this section”); *id.* § 1138(c)(2)(A)-(G) (list of seven types of research for which grant money “may be used”). There is nothing mysterious about Congress’s use of the passive voice in these provisions; Congress does not refer to itself in a statute except in unusual situations in which future legislative action is expressly contemplated. *See, e.g.*, 50 U.S.C. § 1706(b).

2. Congress also gave various “textual cues,” Amicus Br. 21, showing that “under” in § 1252(a)(2)(B)(ii) cannot be read the way that Amicus asks this Court to read it – cues that Amicus misinterprets or ignores when discussing the operative statutory language. First, § 1252(a)(2)(B)(ii) refers not to “any” decision or action “the authority for which is specified under this subchapter to be in the discretion of the Attorney General,” but rather to “any *other*” such decision or action. 8 U.S.C. § 1252(a)(2)(B)(ii) (emphasis added); *compare* Amicus Br. 5, 22. In other words, § 1252(a)(2)(B)(ii) refers to the same kind of specification of discretionary authority encompassed by § 1252(a)(2)(B)(i), the immediately preceding subsection. Each and every one of the provisions listed in § 1252(a)(2)(B)(i) is a *statutory* provision that grants the Attorney General discretion, and each provision is one “under” which relief can be granted. Accordingly, it is clear that when Congress referred to “any other” specification “under the

subchapter” it likewise had statutory provisions in mind.<sup>1</sup>

Of course, even if the statute simply read “any,” that would not advance Amicus’s argument. Including everything that is within a specifically described category does not enlarge the category or render it limitless. The question in this case is the scope of the category described in § 1252(a)(2)(B)(ii) – identifying *which* authority for decisions or actions is specified to be discretionary “under th[e] subchapter.” The phrase “any other” is instructive on that question, but the word “any” is not.

Second, Amicus omits virtually any mention of the fact that § 1252(a)(2)(B)(ii) speaks of decisions or actions “*the authority for which*” is made discretionary “under this subchapter.” 8 U.S.C. § 1252(a)(2)(B)(ii) (emphasis added). The reference to the Attorney General’s “authority” makes clear that the source of the specification must be a statute and not a regulation – after all, Congress is the body

---

<sup>1</sup> Similarly, an exception to the jurisdictional bar of § 1252(a)(2)(B)(ii) is the “granting of relief under” a *statutory* provision that gives the Attorney General discretion over asylum decisions. Amicus suggests that this provision, 8 U.S.C. § 1158, does not actually grant discretion, *see* Amicus Br. 19 n.8, but § 1158(b) states that the Attorney General “may” grant asylum, *see* Pet’r Br. 18 & n.7. Relatedly, Amicus argues that the statutory provision governing motions to reopen, § 1229a(c)(7), can be thought to confer discretion simply by virtue of stating that such a motion might conceivably be granted. *See* Amicus Br. 19 n.8. But, of course, whether a motion might or might not be granted says nothing about the existence of discretion on the part of the decisionmaker. *See, e.g., Soltane*, 381 F.3d at 148 n.3.

that confers “authority” on the executive, and the Attorney General can hardly be said to give himself “authority” to act. This point is underscored by the provision of Title 8 that Amicus identifies as authorizing the Attorney General to issue the regulation at issue in this case, which states that the Attorney General is empowered to act to “carry[] out his authority under the provisions of this chapter,” 8 U.S.C. § 1103(a)(3) – that is, the authority that Congress has granted him. Because only Congress can define the bounds of the Attorney General’s authority, it is only Congress that can act “under this subchapter” within the meaning of § 1252(a)(2)(B)(ii).

Third, Amicus’s reliance on the phrase “statutory or nonstatutory,” added by a 2005 amendment to the portion of the statute that introduces § 1252(a)(2)(B)(i) and (ii), is misplaced. Congress made clear its intent that § 1252(a)(2)(B)(ii) apply “[n]otwithstanding any other provision of law,” whether “statutory or nonstatutory.” But again, that phrase says nothing about the scope of § 1252(a)(2)(B)(ii) itself. And a Congress that was newly attentive to “the role that regulatory provisions play in the immigration context,” Amicus Br. 23, and that shared Amicus’s reading of the language of § 1252(a)(2)(B)(ii), could have been expected to make its intentions clear by adding a reference to “nonstatutory” provisions to the portion of clause (ii) that discusses where the Attorney General’s discretion must be specified. That is particularly so in light of the fact that at the time of the 2005 amendment courts had already ruled that review of motions to reopen was not barred pursuant

to § 1252(a)(2)(B)(ii) by the existence of the regulation on which Amicus places her reliance. *See, e.g., Medina-Morales v. Ashcroft*, 371 F.3d 520, 528 (9th Cir. 2004).

3. In addition to the “textual cues” in § 1252 itself, there are a number of other strong indications in the statutory scheme that Amicus’s interpretation of the provision at issue cannot be correct. First, under Amicus’s view of the statute at least two different provisions would have been wholly superfluous at the time of enactment: 8 U.S.C. § 1252(b)(6), governing consolidation of judicial review of motions to reopen with other matters, and 8 U.S.C. § 1229a(b)(5)(A), addressing judicial review of *in absentia* removal orders. *See* Pet’r Br. 29-30. Amicus grapples with this issue only in a footnote, suggesting that § 1252(b)(6) was no longer superfluous after the 2005 enactment of § 1252(a)(2)(D). *See* Amicus Br. 29-30 n.10. But Amicus does not explain how that later enactment sheds any light on the intent of the Congress that passed the 1996 statute containing the language at issue in this case, or why Congress would have wanted a useless consolidation provision in place for nine full years. Amicus also suggests that Congress was simply preparing for the possibility that the Attorney General would change the regulations so as to make motions to reopen reviewable. But this would be a strange and inefficient way for Congress to proceed – and, indeed, accepting Amicus’s argument would vitiate the canon counseling in favor of giving effect to all statutory provisions, since it can always be argued that a superfluous provision is

simply being held in reserve lest there be a later change in the law.

Second, it is notable that in enacting IIRIRA in 1996, in which Congress substantively addressed motions to reopen for the first time, Congress borrowed many things from the existing regulation governing such motions – the very regulation that Amicus makes much of – but chose not to codify in the statute the regulatory language making reopening decisions discretionary. For instance, the procedural requirements for motions to reopen found in § 1229a(c)(7) are drawn from the reopening regulation that predated the statute’s enactment. *See* Executive Office for Immigration Review; Motions and Appeals in Immigration Proceedings, 61 Fed. Reg. 18,900, 18,904-05 (Apr. 29, 1996) (containing the regulatory language added just before the statute was passed and eventually codified as 8 C.F.R. § 1003.2). That regulation gave Congress a template, should it have wished to use it, for stating that decisions on motions to reopen were within the Attorney General’s discretion. Yet even while inserting throughout subchapter II more than thirty references to the Attorney General’s discretionary authority on various matters, *see* Pet’r Br. 19, in drafting the provision on motions to reopen Congress did not include any such reference. This suggests that Congress made a deliberate decision not to trigger § 1252(a)(2)(B)(ii) – and that Amicus’s interpretation would amount to an end-run around Congress’s intentional exclusion.

Finally, Amicus’s approach does not give force under § 1252(a)(2)(B)(ii) to the many provisions in

the relevant subchapter in which Congress did expressly discuss the Attorney General's discretion. Although Amicus asserts that her interpretation of § 1252(a)(2)(B)(ii) covers specifications of discretion in the statute as well as in the regulations, it is not clear how her definition of "under" could possibly cover the statutory provisions, since she asserts that under means "a position below or lower than" and "inferior or subordinate in rank or importance." Amicus Br. 15 (internal quotation marks omitted). Provisions in subchapter II of the statute itself are not specifications that are "below" or "inferior" to the subchapter. Thus, Amicus's reading of the statute appears to have the perverse result of depriving courts of jurisdiction to review decisions made discretionary by regulation, *but not* decisions made discretionary only by statute – even though Congress took the trouble to list many such decisions. That reading cannot be reconciled with Congress's carefully constructed scheme.

For all of these reasons, it is not possible to select Amicus's definition of the word "under" from dictionaries and style manuals and treat that definition as controlling in this case. In every conceivable respect, the language of *this* statute demonstrates that § 1252(a)(2)(B)(ii) uses the word "under" to mean "according to" or "within," so that a specification of discretionary authority has force only if it appears in the statute itself.

**B. Nothing In The Legislative History Supports Amicus's Position.**

The legislative history of § 1252(a)(2)(B)(ii) is exceedingly thin. This is not surprising, since, as Amicus points out, the provision was a last-minute addition to the 1996 immigration statute (and, therefore, can hardly be said to be central to carrying out that statute's purposes). Amicus Br. 33. But Amicus makes sweeping statements about Congress's intent, and then seizes on a single phrase from a conference report, and on a single sentence from a law review article written by a statutory sponsor, in order to declare that "specific" legislative history supports her view of the meaning of the word "under." Amicus Br. 26, 28. In fact, nothing in these insubstantial snippets – or in any other part of the history of the statute – supports Amicus's position.

As an initial matter, Amicus's argument that the general intent of IIRIRA was to "streamline the deportation process and prevent aliens from abusing the court system," Amicus Br. 29, sheds no light on the meaning of § 1252(a)(2)(B)(ii). While reducing the jurisdiction of the courts can be said to streamline the process of hearing immigrants' claims, eliminating all judicial review would streamline the process even more. But that is not what Congress chose to do. The question at issue in this case is the precise degree to which Congress chose to restrict judicial review, and an argument about Congress's general purposes – the "last redoubt of losing causes" – cannot possibly supply an answer to that question. *Director, Office of Worker's Comp. Programs v. Newport News Shipbuilding &*

*Dry Dock Co.*, 514 U.S. 122, 135 (1995). After all, “[e]very statute proposes, not only to achieve certain ends, but also to achieve them by particular means – and there is often a considerable legislative battle over what those means ought to be. The withholding of agency authority is as significant as the granting of it, and we have no right to play favorites between the two.” *Id.* at 136; *see also, e.g., Rapanos v. United States*, 547 U.S. 715, 752 (2006) (“[N]o law pursues its purpose at all costs, and . . . the textual limitations upon a law’s scope are no less a part of its ‘purpose’ than its substantive authorizations.”).

That principle is particularly germane in this case. For one thing, placing weight on the general purposes of IIRIRA is inconsistent with the long-standing rule that in order to deprive the courts of jurisdiction over agency action Congress must make a clear textual statement of its intent. *See* Pet’r Br. 26-28. For another, § 1252(a)(2)(B)(ii) is not the only portion of IIRIRA in which Congress accomplished its purpose of restricting the jurisdiction of the courts – and so it does not make sense to single out § 1252(a)(2)(B)(ii) and give it a broad interpretation in an attempt to effectuate that purpose. *See* 8 U.S.C. § 1252(a)(2)(A) (stripping review over matters relating to 8 U.S.C. § 1225(b)(1)); *id.* § 1252(a)(2)(B)(i) (stripping review over particular, identified discretionary decisions); *id.* § 1252(a)(2)(C) (stripping review over certain orders against criminal aliens).

Amicus fares no better in relying on the conference report or the law review article. With respect to the conference report, Amicus points to a



statement that describes § 1252(a)(2)(B)(ii) as barring judicial review “of 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 (1996) (Conf. Rep.). Of course, a conference report cannot override express statutory language through a less than complete summary. *See Bd. of Governors of Fed. Reserve Sys. v. Inv. Co. Inst.*, 450 U.S. 46, 73 n.54 (1981); *see also, e.g., Morales v. Trans World Airlines, Inc.*, 504 U.S. 374, 386 n.2 (1992) (“[L]egislative history need not confirm the details of changes in the law effected by statutory language before we will interpret that language according to its natural meaning.”). But, in any event, nothing about the conference report suggests that regulations are a permissible source of the specification of discretionary authority required by the statute. To the contrary, the most likely interpretation of the conference report as read by legislators in the midst of enacting a new statute, which included many specific provisions giving the Attorney General discretionary authority, *see* Pet’r Br. 19, is that it was they themselves who were busy doing the specifying.

As for the law review article, it is not legislative history in any sense, because it expresses the views of a single legislator that were not communicated to the legislative body at the time it was deliberating on the passage of the statute. Moreover, it seems to articulate a view that Amicus does not espouse – that it is only *purely discretionary* decisions by the Attorney General, and not decisions that involve any questions of fact or law, that are unreviewable by the

federal courts. *See* Lamar Smith & Edward R. Grant, *Immigration Reform: Seeking the Right Reasons*, 28 St. Mary's L.J. 883, 918-19 (1997) (stating that “issues pertaining to purely discretionary relief” mentioned in § 1252(a)(2)(B)(i), which is not at issue in this case, “should remain within the sole discretion of the Attorney General,” but that appeals should remain available where there is “a likelihood of a contested issue of law or fact,” and that “asylum, which is not purely a discretionary form of relief, remains appealable”). It is not surprising that Amicus does not take this position, since Petitioner would indisputably prevail under that view of the statute. *See* Pet'r Br. 33 n.15.

**C. Amicus's Interpretation Is Implausible Because It Has Extraordinary Consequences.**

Amicus dismisses Petitioner's discussion of the consequences of different interpretations of § 1252(a)(2)(B)(ii) as an expression of “policy preferences” appropriate only for consideration by “policymakers.” Amicus Br. 27. To the contrary, however, an examination of such consequences is an interpretive tool – and, in this case, it demonstrates that Amicus's interpretation has extraordinary consequences that are very unlikely to reflect the intent of the enacting Congress.

If Amicus is correct about what § 1252(a)(2)(B)(ii) means, then Congress has given the executive *carte blanche* to insulate its own decisions from appellate review, merely by issuing a regulation dubbing those decisions “discretionary.” This kind of delegation of authority is unheard of – not surprisingly, because

its validity is highly suspect. *See* Pet'r Br. 37-39; Law Professors Br. 18-26. Amicus has not supplied any example of any other statutory provision that functions in this unlikely way – presumably because there is none.

Apparently uneasy about the implications of this argument, Amicus protests that Congress itself made the decision about the scope of the courts' jurisdiction over decisions on motions to reopen, because Congress was aware that just a few months earlier the Attorney General had issued a regulation making such decisions discretionary. *See* Amicus Br. 48. This argument does nothing to rationalize the scheme that would exist if Amicus's interpretation of the statute were correct. Under that interpretation, there is nothing stopping the Attorney General from removing the discretion language from the motion-to-reopen regulation tomorrow, which – in Amicus's view of the world – would suddenly restore jurisdiction over a broad category of cases so as to contravene Congress's original intent in enacting § 1252(a)(2)(B)(ii). There is also nothing stopping the Attorney General from making a wide variety of other immigration decisions discretionary by regulation, thereby ensuring that the courts can never correct even the most abusive and unreasonable executive decisions unless there is a legal or constitutional error. Moreover, under Amicus's interpretation of the statute, it would actually become *impossible* for the Attorney General to make a decision discretionary so as to ensure abuse of discretion review by the courts – because every time the Attorney General mentioned

discretion in one of its regulations, the courts would automatically lose the power to undertake such review. It beggars belief that Congress intended the statute to function in this extraordinary fashion.

That is particularly true given how arbitrary executive immigration decisions often are, and how serious the hardship is for the hapless immigrant whose claims are not given a reasonable hearing – matters of which Congress was also presumably aware when it acted. *See Bridges v. Wixon*, 326 U.S. 135, 154 (1945); Pet’r Br. 34-36; National Immigrant Justice Ctr. Br. 13-21. Amicus does not dispute that courts have found immigration decisions to be infected with disturbing errors at an alarming rate. Indeed, Amicus cites statistics showing the high rate at which federal courts remand cases to the BIA because the BIA’s decision is erroneous. *See* Amicus Br. 3 n.1. Under such circumstances, the presumption against jurisdiction-stripping, *see* Pet’r Br. 26-27, is surely at its height.

At the same time, Amicus’s restrictive interpretation of § 1252(a)(2)(B)(ii) has no countervailing benefit. The Washington Legal Foundation’s brief asserts that frivolous motions to reopen delay resolution of cases and give immigrants a vehicle for extending their stay in this country. *See* WLF Br. 2. But that is not so. Motions to reopen do not stay removal automatically (except, per express statutory command, in the context of a motion to reopen an *in absentia* removal order), and the standard for obtaining a stay is a strict one. *See Nken v. Holder*, 129 S. Ct. 1749, 1760-62 (2009). In addition, motions to reopen provide the government

with the movant's address – hardly the best way for someone under threat of removal from the country to evade the authorities. Forbidding judicial review of decisions on motions to reopen is therefore in no way necessary to curb any abuse of the system.<sup>2</sup>

**D. Even Assuming Any Ambiguity In The Statute, Amicus's Position Must Be Rejected.**

All of the arguments set forth above demonstrate that the unambiguous meaning of the statutory text requires a specification of discretionary authority in the statute itself, and not in a regulation. But even if this Court disagrees, it is impossible to say that

---

<sup>2</sup> The Washington Legal Foundation also argues that Petitioner's motion to reopen should have been denied solely on the ground that it was his second such motion. *See* WLF Br. 8-16. This issue, which court-appointed Amicus does not press and which requires consideration of the validity of a regulation specifically permitting Petitioner's second motion because it argued changed country conditions, *see* 8 C.F.R. § 1003.2(c)(3)(ii), is outside the scope of the question presented, is not jurisdictional, and is not properly decided here, *see, e.g., Izumi Seimitsu Kogyo Kabushiki Kaisha v. U.S. Phillips Corp.*, 510 U.S. 27, 31-34 (1993); S. Ct. R. 14.1(a). Petitioner notes, however, that (1) 8 U.S.C. § 1229a(c)(7)(A) states a minimum, not a maximum, number of motions to reopen; (2) the relevant regulation is authorized by 8 U.S.C. § 1158(a)(2)(C) and (D); (3) the regulation creates a safety valve that is necessary to deal with life-threatening risks due to changed conditions that did not exist earlier in the immigration proceedings, such as a coup in a movant's home country that puts the movant at risk of wrongful imprisonment, torture, or death; and (4) the courts of appeals have accepted that a motion to reopen based on changed country conditions is not subject to a numerical bar, *see, e.g., Shao v. Att'y Gen.*, No. 09-10259, 2009 WL 3104017, at \*1 (11th Cir. Sept. 30, 2009).

Amicus has done anything more than make an argument about why the text is ambiguous, on the ground that Congress could have made its meaning still clearer by using the word “in” instead of the word “under.” Amicus’s protestations that it is her reading that is unambiguously correct, *see, e.g.*, Amicus Br. 25-27, are impossible to credit, since the word “under” admittedly has the meaning “in,” Congress has used it that way in other statutory provisions, virtually every Court of Appeals judge to have interpreted the provision has rejected Amicus’s approach, and the “textual cues” on which Amicus relies simply beg the question of what the disputed language of § 1252(a)(2)(B)(ii) actually means.

If the statute is ambiguous, then Petitioner must prevail. Other than insisting that there is no ambiguity at all here, Amicus makes no effort to argue that the various canons of construction that Petitioner has invoked – the presumption against stripping review of administrative action without “clear and convincing evidence” that Congress so intended, *Reno v. Catholic Social Servs., Inc.*, 509 U.S. 43, 63-64 (1993), the canon that a statute should be construed to give effect to all of its provisions, and the immigration rule of lenity – are inapplicable. These canons do not express “policy preferences,” Amicus Br. 27 – they are basic tools of statutory construction, which Congress is presumed to “legislate[] with knowledge of,” *McNary v. Haitian Refugee Center, Inc.*, 498 U.S. 479, 496 (1991); *see also* Law Professors Br. 3-11. Because Congress has not by any stretch of the imagination made a clear statement that courts lack jurisdiction to review

agency decisions on motions to reopen, the Seventh Circuit's decision to deprive Petitioner of a hearing cannot stand.

## **II. In Any Event, The Regulation On Which Amicus Relies Was Not Issued Pursuant To The Relevant Subchapter.**

Even assuming that there were any merit to Amicus's strained reading of the statutory language (which there is not), Amicus's argument nevertheless founders on a critical point: the sole regulation on which Amicus relies was issued pursuant to subchapter I of Title 8, Chapter 12 of the U.S. Code, and not, as § 1252(a)(2)(B)(ii) plainly requires, pursuant to subchapter II ("this subchapter").

Amicus agrees that, if it is proper to look in a regulation for the "specific[ation]" of discretion that § 1252(a)(2)(B)(ii) describes, that regulation must be issued pursuant to "Title 8, Chapter 12, Subchapter II of the United States Code" – the subchapter in which § 1252 itself appears. Amicus Br. 40. Amicus identifies the relevant regulation as 8 C.F.R. § 1003.2, and states that the Attorney General's power to issue that regulation stems from 8 U.S.C. § 1103(a), which permits the Attorney General to "establish such regulations . . . as he deems necessary for carrying out his authority under the provisions of this chapter." Amicus also correctly notes that § 1103(a) is found in Subchapter I, and not in Subchapter II. Under Amicus's own view that the word "under" refers to "the way that a regulation is subordinate to its authorizing statute," that is the end of the matter – the regulation is authorized by

the wrong subchapter, and the requirements of § 1252(a)(2)(B)(ii) are not met. Amicus Br. 15, 17.

Amicus struggles to overcome this problem, constructing a complex multi-step argument whereby the regulation in question can somehow be linked up with a statutory provision in subchapter II that addresses motions to reopen – even though that statutory provision *did not even exist* at the time the regulation was promulgated. Amicus points out that the regulation referred to a now-repealed section of the INA that briefly mentioned a kind of motion to reopen that is not at issue in the instant case – a motion to reopen a removal order entered *in absentia*. And while Amicus also readily admits that “prior to IIRIRA, no statutory provision governed” reopening of the kind that Petitioner sought, Amicus Br. 44 (internal quotation marks omitted), Amicus also appears to find it sufficient that – after the regulation was put into place – the 1996 statute mentioned both kinds of motions to reopen, and did so in Subchapter II.

This reasoning cannot carry the day. A mere mention of a particular subject in subchapter II is not enough to make any regulation that also touches on that subject a regulation “under” that subchapter – and Amicus’s own proffered definitions of the word “under” are not capacious enough to encompass such an approach. And Congress could not have intended for courts to have to trace the subject of a regulation through various repealed and newly enacted statutes in order to come to a conclusion about whether the regulation was “under” the proper part of the statute. These problems with Amicus’s argument



strongly indicate that “under” does not have the meaning that Amicus suggests. But if “specified under this subchapter” can sweep in regulations at all, the inquiry surely must be confined to identifying which statutory provision actually authorizes the executive to issue the pertinent regulation. Amicus has identified no authorization for 8 C.F.R. § 1003.2 in Subchapter II. Accordingly, the Seventh Circuit would have jurisdiction to hear Petitioner’s appeal even if this Court accepts Amicus’s interpretation of § 1252(a)(2)(B)(ii).

### CONCLUSION

For all of the foregoing reasons, this Court should reverse the decision of the Seventh Circuit.

Respectfully submitted,

ELAINE J. GOLDENBERG  
LINDSAY C. HARRISON  
JENNER & BLOCK LLP  
1099 New York Avenue, NW  
Suite 900  
Washington, DC 20001  
(202) 639-6000

RICK M. SCHOENFIELD  
*Counsel of Record*  
DIVINCENZO SCHOENFIELD  
SWARTZMAN  
33 N. LaSalle, 29th Floor  
Chicago, IL 60602  
(312) 334-4800

MICHAEL R. LANG  
MICHAEL R. LANG &  
ASSOCIATES  
33 N. LaSalle, 29th Floor  
Chicago, IL 60602  
(312) 236-5599

*Counsel for Petitioner*