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

REPLY BRIEF FOR THE RESPONDENT SUPPORTING PETITIONER

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The provision of the Immigration and Nationality Act (INA) at issue, 8 U.S.C. 1252(a)(2)(B)(ii), provides that "no court shall have jurisdiction to review" any decision "the authority for which is specified under this subchapter to be in the discretion of the Attorney General or the Secretary of Homeland Security." That provision precludes jurisdiction only when Congress itself has specified discretionary authority in the text of the relevant subchapter of the INA.

The court-appointed amicus (amicus) contends that the single word "under" in the statutory text unambiguously evidences a congressional intent to preclude jurisdiction when discretionary authority is specified only in a regulation, as well as when it is specified in the statute. That is wrong. The word "under" has multiple meanings, and in the context of Section 1252(a)(2)(B)(ii),

it means "in" or "by," so that the requisite discretionary authority must be contained within Subchapter II of Chapter 12 of Title 8 of the United States Code. Interpreting "under this subchapter" to include "in regulations adopted under this subchapter" would strain the statutory text, conflict with the way Congress ordinarily refers to regulations, and create a number of superfluities and anomalies.

Section 1252(a)(2)(B)(ii)'s context confirms that it ousts the courts of jurisdiction only when discretionary authority is specified in the text of the relevant subchapter. Section 1252 comprehensively regulates judicial review of removal, and paragraphs (A) through (C) of Section 1252(a)(2) list three categories of determinations that courts have no jurisdiction to review. Each of those categories relies upon other statutory provisions to define its scope; none relies upon regulations. Moreover, clause (i) of Section 1252(a)(2)(B) lists a variety of decisions that are specified as discretionary under particular identified sections of the relevant subchapter, and clause (ii) follows with a catch-all for "any other" decision for which discretionary authority is specified under the subchapter. Clause (ii), like clause (i), therefore applies only when discretionary authority has been specified by statute. Amicus entirely ignores this statutory context.

Amicus's view also cannot be squared with the drafting history of the statutory provision at issue and the federal courts' long history of reviewing denials of motions to reopen. At the time Congress enacted Section 1252(a)(2)(B)(ii), it also codified procedures and requirements for motions to reopen, borrowing from the Attorney General's reopening regulations. Yet Congress did not enact the portion of the regulations specifying that

reopening is discretionary, and it did not mention motions to reopen or regulations concerning these motions (or indeed regulations at all) in describing matters exempt from judicial review. The legislative record thus indicates that Congress intended to continue the federal courts' longstanding practice of reviewing denials of motions to reopen. Amicus suggests to the contrary based on Congress's general purpose to expedite removal of illegal aliens. But Congress furthered that purpose by enacting certain filing requirements for motions to reopen, not by altering the courts' jurisdiction over them.

Section 1252(a)(2)(B)(ii) therefore only precludes jurisdiction when Congress itself has committed a matter to the Attorney General's or the Secretary's discretion. Because motions to reopen are committed to the Board's discretion by regulation, rather than by statute, Section 1252(a)(2)(B)(ii) does not apply to them.

A. The Text Of Section 1252(a)(2)(B)(ii) Bars Jurisdiction Only When Discretionary Authority Is Conferred By Statute, Not When It Is Conferred By Regulation

1. Amicus contends that, by using the word "under," Congress "unambiguously" extended Section 1252(a)(2)(B)(ii) to include regulations that specify a decision as discretionary. Amicus Br. 10, 14, 54. She is mistaken. The text says nothing about regulations; it points to "this subchapter" as the place that discretionary authority must be specified. Most naturally read, the phrase "the authority for which is specified under this subchapter" refers only to instances in which the requisite authority has been specified in the text of the subchapter.

As this Court has recognized, "[t]he word 'under' has many dictionary definitions and must draw its meaning from its context." *Ardestani* v. *INS*, 502 U.S. 129, 135 (1991). Amicus acknowledges as much. See Amicus Br. 17 (quoting *Ardestani*). In Section 1252(a)(2)(B)(ii), "specified under" means "specified in" or "specified by," so that courts lack jurisdiction only when discretionary authority for a certain decision or action is contained in the text of the relevant subchapter. Many dictionaries include such a definition of "under." For example, *Webster's Third New International Dictionary of the English Language* (1993) defines "under" as, *inter alia*, "within the grouping or designation of" or "in the section designated as," giving as an example "matters that come [under] this head[ing]," *id.* at 2487 (defs. 11a and b). It also defines "under" to mean "required by," "in accordance with," or "bound by," giving as an example "rights [under] the law." *Ibid.* (def. 8a). The *Oxford English Dictionary* likewise states that one meaning of "under" is "that one thing is covered by, or included in, another," such as when "under" "[d]enot[es] inclusion in a group [or] category" or "[d]enot[es] occurrence in a particular section or article of a literary work." 18 *Oxford English Dictionary* 950 (2d ed. 1989) (defs. 17a and b). Other dictionaries, including those relied upon by amicus, include similar definitions of "under."[1]

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[1] See, *e.g.*, *American Heritage College Dictionary* 1494 (4th ed. 2007) ("under" means "[w]ithin the group or classification of: *listed under biology*"); *Cambridge Dictionary of American English* 951 (2d ed. 2008) ("according to"; "*Under current law*"; "'*Where can I find books on swimming?*' '*Look under sports* (=within the subject of sports).'"); *New Oxford American Dictionary* 1830 (2d ed. 2005) ("under" is "used to express grouping or classification: *file it under 'lost'*"); *Random House Webster's Unabridged Dictionary* 2059 (2d ed. 2001) ("under"

The word "under" is commonly used in this manner. For example, if one spoke of rights "created under" the Constitution, that phrase naturally would be understood to refer only to rights provided in or by the Constitution, and not also to rights Congress has created by statute, even though the Constitution grants Congress the authority to enact statutes that confer rights. Similarly, if a tenant or landlord referred to rights or obligations "under the lease," that term naturally would signify only those obligations set forth in the lease. See also, *e.g.*, Bryan A. Garner, *A Dictionary of Modern Legal Usage* 896 (2d ed. 1995) (Garner) (giving as an example "*Under* Rule 32(a)(2), the deposition testimony may be used by an adverse party for any purpose at trial.").

Similarly to these examples, Section 1252(a)(2)(B)(ii) speaks of the specification of something (discretionary authority) "under" (meaning in or by) a particular legal text or document ("this subchapter"). "Under" that phrase, only the discretionary authority specified in the subchapter itself, not any discretionary authority specified in regulations, precludes judicial review.

2. Amicus offers two different definitions of "under" in support of her contention that Section 1252(a)(2)(B)(ii) applies to regulatory specifications of discretionary authority. She first suggests that "under" means "subordinate to," and Section 1252(a)(2)(B)(ii) therefore refers to regulations because "a regulation is subordinate to a statute." Br. 15 (citing 3 Francis Rawle, *Bouvier's Law Dictionary and Concise Encyclopedia* 3351 (reprint 8th ed. 1984 (1914)). But that defini-

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means "beneath the heading or within the category of: *Classify the books under 'Fiction' and 'General'* ").

tion does not make sense in the context of Section 1252(a)(2)(B)(ii), because the text does not compare the relative strength or authority of two things. See *Webster's Third New International Dictionary of the English Language* 2277 (defining "subordinate" as "placed in a lower order, class, or rank" or "holding a lower or inferior position"). Instead, it speaks of where a specification of discretionary authority is found. If the term "subordinate to" is substituted for the word "under," the statute would read: a "decision or action * * * the authority for which is specified *subordinate to* this subchapter." The nonsense of that formulation indicates the fallacy of amicus's definition.

Amicus relatedly contends (Br. 17) that "under" means "pursuant to," and that "specified under this subchapter" therefore means specified in the statute or in regulations promulgated pursuant to it. But defining "under" as "pursuant to" does not solve amicus's problem. Substituting "pursuant to" for "under" would result in the formulation "the authority for which is specified pursuant to this subchapter." That awkward formulation is not unambiguous, because "pursuant to" has multiple meanings, see, *e.g.*, Garner 721, and the provision still mentions only one place—"this subchapter"—to look for a specification of discretionary authority. But if amicus were correct that "under" means "pursuant to," and "pursuant to" means "under the authority of" (see Amicus Br. 17), a fatal anomaly would arise: Section 1252(a)(2)(B)(ii) would apply only to regulations promulgated "under the authority of" the relevant subchapter, and not to specifications of discretion in the subchapter itself. That result would make Section 1252(a)(2)(B)(ii) inapplicable to the dozens of provisions in the relevant subchapter that specify dis-

cretionary authority. Gov't Br. 20 nn.11-12. And that result is difficult to reconcile with the provision's reference to the "authority" of the Attorney General, because although statutes typically would be thought to confer such authority, regulations that the Attorney General himself issues would not.

Amicus contends (Br. 15) that "'under' is the common way to express the relationship of a regulation to its authorizing statute." That is true, but also beside the point, because Section 1252(a)(2)(B)(ii) does not use the word "under" to "describe the relationship between regulations and the statutes under which they are promulgated," Amicus Br. 10 (internal quotation marks omitted), but rather to locate the specifications of discretionary authority that operate to preclude judicial review. Because the meaning of "under" depends on its context, *Ardestani*, 502 U.S. at 135, amicus's proffering of another meaning of the word in another context has no bearing on the definitional question presented here.

3. Congress's use of the word "under" in contexts similar to this one reinforces the most natural reading of the word in Section 1252(a)(2)(B)(ii). Congress often employs the word "under" to mean "within," "in," or "by" a certain statutory heading or subdivision. Congress for example has spoken of items specified "under"

a certain chapter,[2] subchapter,[3] section,[4] subsection,[5] paragraph,[6] subparagraph,[7] clause,[8] subclause,[9] and sentence.[10] Interpreting the unadorned word "under" to require the reader to look beyond the place Congress has specified in each of those provisions would create significant uncertainty about their reach and would run contrary to their plain import.[11]

4. As amicus's own examples demonstrate (Br. 15-16), when Congress means to refer to items specified

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[2] *E.g.*, 7 U.S.C. 1926(a)(18) ("the Secretary may not condition approval of such loans or grants upon any requirement, condition or certification other than those specified under this chapter").

[3] *E.g.*, 42 U.S.C. 1395w-2(a) ("conditions of participation or for coverage specified under this subchapter").

[4] *E.g.*, 6 U.S.C. 202(3) ("functions specified under section 251 of this title").

[5] *E.g.*, 2 U.S.C. 472(c) ("authorities specified under subsection (d) of this section").

[6] *E.g.*, 8 U.S.C. 1227(a)(1)(H)(i)(II) ("except for those grounds of inadmissibility specified under paragraphs (5)(A) and (7)(A) of section 1182(a) of this title").

[7] *E.g.*, 8 U.S.C. 1255a(g)(2)(C) ("waiver * * * of the periods specified under subparagraph (A)").

[8] *E.g.*, 5 U.S.C. 1214(b)(2)(A)(ii) ("the 240-day period specified under clause (i)").

[9] *E.g.*, 42 U.S.C. 1395ww(h)(7)(A)(ii)(III) ("the reference resident level specified under subclause (I) or (II)").

[10] *E.g.*, 8 U.S.C. 1153(b)(5)(C)(i) ("the dollar amount specified under the previous sentence").

[11] Congress also refers to matters specified "under" regulations when it means "in" or "by" regulations. See, *e.g.*, 8 U.S.C. 1101(a)(9) ("designated under regulations"); 8 U.S.C. 1182(a)(7)(A)(i)(I) ("if such document is required under the regulations issued by the Attorney General under section 1181(a) of this title").

under a regulation, it does so expressly.[12] Significantly, every one of the examples amicus cites in her lengthy statutory appendix, from both the INA and other statutes, expressly mentions a "regulation" or "regulations" along with "under." See Amicus Br. App. A1-A26. By contrast, amicus has not identified any instance in which the word "under" itself has been taken to refer to regulations that are not specified in the statutory provision.

If amicus were correct that all Congress need do to signal the inclusion of regulations is to use the word "under," then much of the language in her statutory appendix would be superfluous. See, *e.g.*, *TRW Inc.* v. *Andrews*, 534 U.S. 19, 31 (2001). For example, Congress would not have had to say "designated under regulations prescribed under authority contained in this chapter" in 8 U.S.C. 1101(a)(9); it could have just said "des-

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[12] See, *e.g.*, 8 U.S.C. 1101(a)(9) ("designated under *regulations* prescribed under authority contained in this chapter") (emphasis added); 8 U.S.C. 1103(a)(4), (6) and (10) ("powers, privileges, or duties conferred or imposed by this chapter or *regulations* issued thereunder") (emphasis added); 8 U.S.C. 1104(a) ("powers, functions, or duties conferred or imposed by this chapter or *regulations* issued thereunder") (emphasis added); 8 U.S.C. 1182(a)(7)(A)(i)(I) ("if such document is required under the *regulations* issued by the Attorney General under section 1181(a) of this title") (emphasis added); 8 U.S.C. 1201(a)(1) ("limitations prescribed in this chapter or *regulations* issued thereunder") (emphasis added); 8 U.S.C. 1201(g) ("provisions of this chapter, or the *regulations* issued thereunder") (emphasis added); 8 U.S.C. 1204 ("issue an immigrant visa * * * under *regulations* prescribed under this chapter") (emphasis added); 8 U.S.C. 1229a(b)(6)(A) ("[t]he Attorney General shall, by *regulation* * * * define in a proceeding before an immigration judge or before an appellate administrative body under this subchapter, frivolous behavior for which attorneys may be sanctioned") (emphasis added); 8 U.S.C. 1323(a)(1) ("if a visa was required under this chapter or *regulations* issued thereunder") (emphasis added).

ignated under authority contained in this chapter." See Amicus Br. App. A1-A26; see also, *e.g.*, 42 U.S.C. 1396t(e)(2)(A) ("specified under regulations under section 1396d(a)(23) of this title"); 42 U.S.C. 7411(g)(1) ("specify in regulations under subsection (f)(1) of this section").

Neither would Congress have written as it did a slew of statutory provisions that refer to a matter "under" or "specified under" a statutory section or subdivision and then refer separately to regulations involving that matter. For example, 8 U.S.C. 1153(b)(5)(C)(i) provides that "[t]he Attorney General * * * may from time to time prescribe regulations increasing the dollar amount specified under the previous sentence." If "under" necessarily referred to regulations, then "the dollar amount specified under the previous sentence" would include any dollar amount specified under regulations, and Congress would not have needed to give the Attorney General the authority to "prescribe regulations increasing the dollar amount" from that listed in the statute. Similar examples appear throughout the United States Code.[13]

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[13] See, *e.g.*, 8 U.S.C. 1229c(e) ("[t]he Attorney General may by regulation limit eligibility for voluntary departure under this section for any class or classes of aliens"); 26 U.S.C. 38(c)(5)(B) ("the $25,000 amount specified under subparagraph (B) of paragraph (1) shall be reduced for each component member of such group by apportioning $25,000 among the component members of such group in such manner as the Secretary shall by regulations prescribe"); 33 U.S.C. 1314(e) ("[t]he Administrator * * * may publish regulations, supplemental to any effluent limitations specified under subsections (b) and (c) of this section"); 42 U.S.C. 7509a(a)(1) ("the attainment date specified under the applicable provision of this chapter, or in a regulation promulgated under such provision").

As all these statutory provisions indicate, if Congress had intended to make the availability of judicial review turn on regulations, it would have said that the courts lack jurisdiction to review any decision or action the discretionary authority for which is "specified under this subchapter or under regulations issued thereunder." Such a formulation in the alternative is common in the United States Code.[14] Yet Congress chose different language that does not mention regulations at all. "The statutory language is uncharacteristically pellucid on this score: it does not allude generally to 'discretionary authority.'" *Zhao* v. *Gonzales*, 404 F.3d 295, 303 (5th Cir. 2005) (quoting 8 U.S.C. 1252(a)(2)(B)(ii)). It instead alludes specifically to authority "'*specified under this subchapter* to be in the discretion of the Attorney General.'" *Ibid.* (quoting 8 U.S.C. 1252(a)(2)(B)(ii)).[15]

5. Amicus erroneously suggests that various words other than "under" indicate that Section

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[14] See, *e.g.*, 8 U.S.C. 1103(a)(4), (6) and (10), 1104(a), 1201(a)(1) and (g), and 1323(a)(1) (text provided in note 12, *supra*); see also, *e.g.*, 2 U.S.C. 476(e)(1) ("the provisions of subchapter 1 of chapter 57 and section 5731 of Title 5, and regulations promulgated thereunder"); 12 U.S.C. 1426(a)(4)(A) ("this chapter and the regulations issued hereunder"); 17 U.S.C. 701(e) ("section 706(b) and the regulations issued thereunder").

[15] Although Section 1252(a)(2)(B)(ii) does not oust the courts of appeals of *jurisdiction* to review matters that are made discretionary by regulation, some decisions rendered under regulations that confer no private rights or are otherwise properly regarded as entirely discretionary would be judicially unreviewable because they are committed to agency discretion by law. See 5 U.S.C. 701(a)(2). That is true of the regulations providing for *sua sponte* reopening. See Gov't Br. 24 n.15. Nothing in Section 1252 displaces that general principle limiting judicial review of agency action.

1252(a)(2)(B)(ii) applies to regulations. First, contrary to amicus's contention (Br. 21-22), use of the word "any" in Section 1252(a)(2)(B)(ii) does not mean that the provision precludes judicial review of every discretionary decision of the Attorney General or the Secretary. That is because the remaining language in Section 1252(a)(2)(B)(ii) restricts the provision's scope to a subset of discretionary determinations—those for which authority "is specified under this subchapter." See *Ali* v. *Federal Bureau of Prisons*, 128 S. Ct. 831, 836 n.4 (2008) ("other circumstances may counteract the effect of [the] expansive modifier[] ['any']"). Indeed, the logic of amicus's argument would preclude judicial review of *every* decision of the Attorney General or Secretary, discretionary or not. That is because the reference to "discretion," no less than the reference to "this subchapter," appears in the restrictive language following the phrase "any other decision or action." If amicus reads "any" essentially to negate that restrictive language, the result is to render non-reviewable all decisions of the Attorney General and the Secretary.

Second, amicus mistakenly contends (Br. 23) that Section 1252(a)(2)(B)(ii) covers discretion conferred by regulations because the jurisdictional bar applies "[n]otwithstanding any other provision of law (statutory or nonstatutory)." But that introductory clause does not define the scope of the jurisdictional bar; it states that, once the scope of the bar has been ascertained, jurisdiction is precluded regardless of what any other provision or source of law might say. This clause was added by the REAL ID Act of 2005, Pub. L. No. 109-13, Div. B, § 106(a)(1)(A)(ii), 119 Stat. 310, to effect Congress's intention to "eliminate habeas review" of removal orders and instead permit "all aliens who are ordered removed

by an immigration judge" to "raise constitutional and legal challenges in the courts of appeals." H.R. Conf. Rep. No. 72, 109th Cong., 1st Sess. 174-175 (2005). The "notwithstanding" clause codifies Congress's determination that no other provision of law, including habeas corpus, shall trump the jurisdictional bar; it says nothing about whether the bar encompasses decisions for which discretion is conferred by regulation.

Amicus also contends (Br. 23-24) that Section 1252(a)(2)(B)(ii)'s directive that the jurisdictional bar apply "regardless of whether the judgment, decision, or action is made in removal proceedings" means that actions made discretionary by regulation are covered. But again, the quoted language does not define the scope of the jurisdictional bar. It simply makes clear that a specified discretionary decision falls within the jurisdictional bar whether it is made by the Attorney General (in removal proceedings) or the Secretary (in petitions and applications for benefits outside such proceedings). The language (like the "notwithstanding" clause, discussed above) was added to Section 1252(a)(2)(B)(ii) by the REAL ID Act, see § 101(f)(2), 119 Stat. 305, in order to resolve disagreement in the circuits regarding whether Section 1252(a)(2)(B) applies to decisions made outside removal proceedings in contexts such as visa revocations, see, *e.g.*, *ANA Int'l Inc.* v. *Way*, 393 F.3d 886, 891 n.3 (9th Cir. 2004) (noting disagreement in circuits prior to the REAL ID Act). The language has nothing to do with the reach of the words "specified under this subchapter."

Finally, amicus suggests (Br. 20) that Congress intentionally "used the passive voice" in Section 1252(a)(2)(B)(ii) "to avoid identifying the entity doing the specifying." There is no reason to believe that is so.

Congress identified the entity that would be "doing the specifying"—itself—in a perfectly common way: by identifying the vehicle—"this subchapter"—through which the specification would be made. Both in the text of Section 1252(a)(2)(B)(ii) and in its surrounding context, in which all of the prohibitions on judicial review are defined by reference to statutes (Gov't Br. 26-30), Congress clearly identified the relevant lawmaking body.

6. Although Congress provided procedures and filing requirements for motions to reopen in 8 U.S.C. 1229a, it did not specify anywhere in the text of the relevant subchapter that the Attorney General's authority to adjudicate motions to reopen is discretionary in nature. Gov't Br. 18-21; see Pet. App. 7a. Amicus suggests in a footnote (Br. 18 n.8) that Section 1229a(c)(7)(B)'s statement that "[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" confers discretionary authority by implying that the motion to reopen could be denied. That suggestion is without merit. Section 1229a(c)(7)(B) does not address conditions under which a motion to reopen may be granted; it instead lists the required contents of a motion to reopen. Although the statutory text implies that a motion to reopen may or may not be granted (a proposition that is hardly surprising), the provision does not state (or indeed even suggest) that the Attorney General's reopening authority is discretionary in nature.[16] Indeed, the

[16] Amicus mistakenly suggests (Br. 19 n.8) as support for her interpretation of 8 U.S.C. 1229a(c)(7)(B) that Section 1252(a)(2)(B)(ii) itself identifies a provision that provides discretionary authority without using words connoting discretion. Section 1252(a)(2)(B)(ii), on her argument, exempts from its reach "the granting of relief under section

text of Section 1229a(c)(7)(B) stands in stark contrast to the many provisions within the relevant subchapter that specify discretionary authority by using the word "discretion" or functionally equivalent words. See Gov't Br. 19-20 & nn.11-12.

7. In sum, amicus's view would expand the scope of Section 1252(a)(2)(B)(ii) beyond Congress's precise specification of the decisions it wished to remove from the courts' jurisdiction to review. Although the relevant text applies only where discretionary authority has been "specified under this subchapter," amicus's extension of this language to regulations would oust the courts of

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1158(a) of this title," and 8 U.S.C. 1158(a) "nowhere explicitly states that the decision to grant asylum is discretionary." Amicus Br. 19 n.8. Section 1158(a) provides that an alien "may apply" for asylum, and Section 1158(b) sets out the conditions under which asylum may be granted. The permissive text of Section 1158(b) makes clear that the decision whether to grant relief is entrusted to the Attorney General's or Secretary's discretion. See 8 U.S.C. 1158(b)(1)(A) ("The Secretary of Homeland Security or the Attorney General *may* grant asylum to an alien who has applied for asylum * * * if the Secretary of Homeland Security or the Attorney General determines that such alien is a refugee within the meaning of [8 U.S.C.] 1101(a)(42)(A).") (emphasis added). The reference in Section 1252(a)(2)(B)(ii) to subsection (a) of Section 1158—as opposed to subsection (b)—may be imprecise, but its import is clear. Prior to the enactment of the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (IIRIRA), Pub. L. No. 104-208, Div. C, 110 Stat. 3009-546, Section 1158(a) provided that eligible aliens "may be granted asylum in the discretion of the Attorney General." 8 U.S.C. 1158(a) (1994). In IIRIRA, Congress divided former Section 1158(a) into several new subsections, see IIRIRA § 604(a), 110 Stat. 3009-690, but apparently failed to take account of that change when it referred to Section 1158(a) in Section 1252(a)(2)(B)(ii). In any event, comparing Section 1229a to Section 1158 makes clear that asylum and motions to reopen should not be treated the same, because asylum decisions are specified as discretionary "under this subchapter" (*i.e.*, in Section 1158(b)), and decisions on motions to reopen are not.

jurisdiction with respect to a potentially much broader class of discretionary decisions. That is exactly the wrong approach. A jurisdictional statute such as Section 1252(a)(2)(B)(ii) "must be construed both with precision and with fidelity to the terms by which Congress has expressed its wishes." *Cheng Fan Kwok* v. *INS*, 392 U.S. 206, 212 (1968). Amicus's reading fails to do so.

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

1. Amicus ignores the context in which the provision at issue here appears. As the government has explained (Br. 26-30), Section 1252 comprehensively regulates judicial review of removal orders. Section 1252(a)(1) states that an alien may seek review of a final order of removal by filing a petition for review in the appropriate court of appeals. 8 U.S.C. 1252(a)(1). Section 1252(a)(2), entitled "Matters not subject to judicial review," then lists three categories of agency determinations over which the courts do not have jurisdiction: determinations regarding admissibility of aliens, see 8 U.S.C. 1252(a)(2)(A); denials of certain forms of discretionary relief, 8 U.S.C. 1252(a)(2)(B); and final removal orders of criminal aliens, 8 U.S.C. 1252(a)(2)(C).

Within each of those categories, Congress has defined the scope of the jurisdictional bar solely by reference to other statutory provisions. Section 1252(a)(2)(A), for example, defines its scope by reference to provisions in 8 U.S.C. 1225 that identify various determinations made by immigration officers in inspecting aliens for admission. Similarly, Section 1252(a)(2)(C) limits judicial review by reference to other portions of the INA that make aliens who have commit-

ted certain criminal offenses removable. Neither of those jurisdictional bars suggests that the availability of judicial review hinges in any way on regulations.

Section 1252(a)(2)(B) is triggered in the same manner. It contains two clauses, each of which bars review of decisions of the Attorney General or Secretary that are specified as discretionary in Subchapter II of Chapter 12 of Title 8. Clause (i) accomplishes this purpose by explicitly listing a number of decisions entrusted to the Attorney General's or Secretary's discretion by statute: "judgment[s] regarding the granting of relief under section 1182(h), 1182(i), 1229b, 1229c, or 1255." 8 U.S.C. 1252(a)(2)(B)(i). Clause (ii), which is at issue here, then provides a catch-all provision for "any other decision or action" of the Attorney General or Secretary "the authority for which is specified under this subchapter to be in [their] discretion." 8 U.S.C. 1252(a)(2)(B)(ii). Read in tandem, the two provisions make clear that Congress intended to limit judicial review only where Congress itself has provided that the Attorney General's or the Secretary's authority is discretionary. See Gov't Br. 27-28. Indeed, both refer to matters "under" the relevant subchapter or specified section within it, and the word "other" in clause (ii) reinforces the conclusion that both clauses pertain to the same kinds of specifications of discretionary authority—specifications in the text of the relevant subchapter. The provisions immediately surrounding the text at issue therefore strongly support its limitation to discretionary authority specified in the relevant subchapter.

2. Another provision in Section 1252, Section 1252(b)(6), confirms that denials of motions to reopen are judicially reviewable. Section 1252(b)(6) requires a court of appeals to consolidate a petition for review of

a denial of reopening with a petition for review of the underlying removal order. 8 U.S.C. 1252(b)(6). There would have been no need to provide for consolidation if the denial of a motion to reopen were not reviewable at all. Indeed, a predecessor to Section 1252(b)(6) was enacted six years prior to the enactment of IIRIRA in 1996. See *Stone* v. *INS*, 514 U.S. 386, 394 (1995); Gov't Br. 30. But rather than deleting that provision when it revised the INA's judicial review section and enacted Section 1252(a)(2)(B)(ii) as part of IIRIRA, as would have been appropriate to conform to amicus's view, Congress reenacted the consolidation provision in Section 1252(b)(6).

Amicus suggests (Br. 29 n.10) two ways to reconcile Section 1252(b)(6) with her view of Section 1252(a)(2)(B)(ii), but neither survives scrutiny. First, amicus argues that although Section 1252(a)(2)(B)(ii) generally would bar review of denials of motions to reopen, Section 1252(a)(2)(D) would permit review of constitutional claims and questions of law. But Section 1252(a)(2)(D) was not enacted until 2005, which means that under amicus's view Section 1252(b)(6) would have had no purpose or effect between 1996 and 2005. See Gov't Br. 31. Second, amicus hypothesizes that Congress wanted to "leave room for the Attorney General to amend the relevant regulations and disclaim unreviewable discretion." Amicus Br. 30 n.10. That assertion has no support in the statutory text or the legislative record, and it is contrary to the purpose amicus elsewhere has ascribed to Congress, which is to preclude judicial review of denials of reopening in order to speed removal of aliens.

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

1. The federal courts have long reviewed denials of motions to reopen. That unbroken practice dates back to the beginning of the last century[17] and was recognized in this Court's recent decision in *Dada* v. *Mukasey*, 128 S. Ct. 2307, 2315 (2008). In light of that long history of judicial review, Congress would have spoken clearly if it had intended to strip the courts of appeals of their jurisdiction to review denials of motions to reopen. It did not do so.

Amicus contends (Br. 34) that the history supports her view because it shows that reopening has long been entrusted to the Board's discretion. Here, amicus conflates the standard of review with the availability of review. That denials of reopening have long been subject to highly deferential review (Gov't Br. 35 n.18) does not mean that Congress in 1996 intended to cut off judicial review of those decisions entirely. Indeed, it tends to suggest the opposite: Congress knew about this long-

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[17] See, *e.g.*, *INS* v. *Doherty*, 502 U.S. 314 (1992); *INS* v. *Abudu*, 485 U.S. 94 (1988); *INS* v. *Rios-Pineda*, 471 U.S. 444 (1985); *INS* v. *Jong Ha Wang*, 450 U.S. 139 (1981); *Al-Karagholi* v. *INS*, 409 U.S. 1086 (1972) (Douglas, J., dissenting from denial of certiorari); *Giova* v. *Rosenberg*, 379 U.S. 18 (1964); *Groza* v. *INS*, 30 F.3d 814 (7th Cir. 1994); *Gomez-Gomez* v. *INS*, 681 F.2d 1347 (11th Cir. 1982); *Ghosh* v. *Attorney Gen.*, 629 F.2d 987 (4th Cir. 1980); *Au Yi Lau* v. *United States INS*, 555 F.2d 1036 (D.C. Cir. 1977); *Vergel* v. *INS*, 536 F.2d 755 (8th Cir. 1976); *Bufalino* v. *INS*, 473 F.2d 728 (3d Cir. 1973); *Gena* v. *INS*, 424 F.2d 227 (5th Cir. 1970); *La Franca* v. *INS*, 413 F.2d 686 (2d Cir. 1969); *Williams* v. *Sahli*, 271 F.2d 228 (6th Cir. 1959); *Chew Hoy Quong* v. *White*, 244 F. 749 (9th Cir. 1917); *Ex parte Chan Shee*, 236 F. 579 (N.D. Cal. 1916).

standing practice, including the narrow review allowed, and decided not to change it.

2. The statute's drafting history confirms that conclusion. The Attorney General long has provided for reopening by regulation. See Gov't Br. 32-33. In 1990, Congress instructed the Attorney General to revise the regulations to place time and numerical limitations upon motions to reopen. See Immigration Act of 1990 (IMMACT), Pub. L. No. 101-649, § 545(d), 104 Stat. 5066. The Attorney General amended the regulations to add those limitations and also added a provision stating that motions to reopen are committed to the Board's discretion. See 61 Fed. Reg. 18,904-18,905 (1996) (8 C.F.R. 3.2 (1997)) (current version at 8 C.F.R. 1003.2). Congress enacted IIRIRA against that backdrop. In doing so, Congress for the first time expressly provided that aliens may file a motion to reopen and borrowed several provisions from the Attorney General's regulations to govern such filings. But Congress made no effort to preclude review of denials of reopening. Congress could have done so in a number of ways: by mentioning denials of reopening in Section 1252(a)(2)(B); by making Section 1252(a)(2)(B)(ii) turn on regulatory, as well as statutory, specifications of discretion; or by enacting in the INA the language in the Attorney General's preexisting regulations committing reopening to the Board's discretion. See Gov't Br. 34-35. Congress did not take any of these steps.

3. Amicus contends (Br. 28-31) that Congress wished to expedite the removal of aliens not only by placing time and numerical limitations on motions to reopen but also by precluding all judicial review of reopening.

IIRIRA's general purpose was undoubtedly to expedite the removal of illegal aliens from the United States. See, *e.g.*, *Reno* v. *American-Arab Anti-Discrimination Comm.*, 525 U.S. 471, 475 (1999). The relevant inquiry, however, is not whether amicus's view would "serve the general purposes of" IIRIRA, but "how far Congress meant to go when it enacted" Section 1252(a)(2)(B)(ii). *BP Am. Prod. Co.* v. *Burton*, 549 U.S. 84, 100 (2006). There is no evidence that Congress sought to accomplish its general purpose by removing all jurisdiction to review denials of motions to reopen. To the contrary, the legislative record in both 1990 and 1996 reveals that Congress's concern was that aliens were filing too many motions to reopen too long after their original removal orders, not that aliens were too often obtaining judicial review of the denials of such motions. See IMMACT § 545(d), 104 Stat. 5066; 61 Fed. Reg. at 18,901; IIRIRA § 304(a)(3); 110 Stat. 3009-593; H.R. Conf. Rep. No. 828, 104th Cong., 2d Sess. 212 (1996) (*Conference Report*). And Congress's reenactment of Section 1252(b)(6) belies amicus's suggestion that IIRIRA was designed to expedite removal at all costs.

Amicus cites two items (Br. 31-33) in support of her view. The first is the statement in a conference report that Section 1252(a) "bars judicial review * * * 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))." *Conference Report* 219. That statement simply summarizes the statutory text at a general level, and does not purport to answer the question whether decisions made discretionary by regulation are judicially reviewable.

Amicus's second source is a snippet in a law review article published after IIRIRA's passage, which states that "issues pertaining to purely discretionary relief, including cancellation of removal and voluntary departure, * * * are within the sole discretion of the Attorney General and, thus, are no longer appealable to the federal courts." Lamar Smith & Edward R. Grant, *Immigration Reform: Seeking the Right Reasons*, 28 St. Mary's L.J. 883, 918-919 (1997). A statement in a law review article published after a statute was enacted does not reflect a shared understanding of the Members of Congress who deliberated on the statute. See, *e.g.*, *CSPC* v. *GTE Sylvania, Inc.*, 447 U.S. 102, 117 (1980). In any event, the cited language does not address whether Section 1252(a)(2)(B)(ii) extends to regulations; it appears to concern only Section 1252(a)(2)(B)(i), because it uses the language of that provision (discretionary "relief") and refers to two statutory examples contained in that provision (cancellation of removal and voluntary departure). Amicus therefore has not identified any basis in the legislative record sufficient to override the clear statutory text, context, and history.

4. The text of the judicial review bars reveals Congress's true design. In subparagraphs (A), (B), and (C) of Section 1252, Congress carefully delineated the decisions that it wished to insulate from judicial review. In defining the bars to judicial review in Section 1252(a)(2) by reference to other provisions in the INA, Congress ensured that it, and only it, would limit the federal courts' jurisdiction to review removal orders. That decision accords with Congress's traditional role in shaping the federal courts' jurisdiction, see, *e.g.*, *Kline* v. *Burke Constr. Co.*, 260 U.S. 226, 234 (1922), and it leaves untouched the federal courts' longstanding practice of re-

viewing denials of motions to reopen under a highly deferential standard, see, *e.g.*, *Dada*, 128 S. Ct. at 2315. Under those circumstances, there is no reason to strain the statutory text to preclude jurisdiction to review denials of motions to reopen.[18]

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[18] Amici Washington Legal Foundation et al. suggest (Br. 7-16) that the judgment should be affirmed because petitioner's second motion to reopen was barred by 8 U.S.C. 1229a(c)(7)(A). That argument was not presented to or passed on by the court of appeals, and it has not been advanced by any party or by the court-appointed amicus. This Court therefore should decline to consider it. See, *e.g.*, *Ohio Forestry Ass'n* v. *Sierra Club*, 523 U.S. 726, 738-739 (1998); *Robertson* v. *Seattle Audubon Soc'y*, 503 U.S. 429, 441 (1992).

In any event, amici are mistaken. Although Section 1229a(c)(7)(A) states that "[a]n alien may file one motion to reopen proceedings under this section," the Attorney General long has interpreted that provision to permit a second motion to reopen to seek asylum or withholding of removal based on changed conditions in the country of removal. See 8 C.F.R. 1003.2(c)(3)(ii). That regulation reasonably interprets the statutory text. The statutory assurance that an alien "may file one motion to reopen" does not foreclose the Attorney General from interpreting Section 1229a to permit a further motion in certain special circumstances. See *Dada*, 128 S. Ct. at 2316 ("the statutory text * * * guarantees to each alien the right to file 'one motion to reopen proceedings'"). And other provisions of the INA suggest that a further motion to reopen should be permitted in the circumstances allowed by the regulation. See 8 U.S.C. 1158(a)(2)(D) (authorizing an exception for changed circumstances to the prohibition against filing successive asylum applications); 8 U.S.C. 1229a(c)(7)(C)(ii) (waiver of the time limitations for a motion to reopen based on changed circumstances material to an asylum claim). Finally, given that the relevant regulations existed prior to Section 1229a's enactment, see 61 Fed. Reg. at 18,904, Congress's failure to restrict the Attorney General's discretion to allow an additional motion to reopen based on changed country conditions is telling. There is no basis to overturn the Attorney General's regulation.

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For the foregoing reasons and those stated in our opening brief, the judgment of the court of appeals should be reversed.

Respectfully submitted.

ELENA KAGAN
Solicitor General

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