No. 06-1346

IN THE

Supreme Court of the United States

AHMED ALI,

Petitioner,

—v.—

DEBORAH ACHIM, MICHAEL CHERTOFF, SECRETARY OF THE DEPARTMENT OF HOMELAND SECURITY, AND MICHAEL MUKASEY, UNITED STATES ATTORNEY GENERAL,

Respondents.

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

BRIEF *AMICUS CURIAE* OF THE AMERICAN CIVIL LIBERTIES UNION, AMERICAN IMMIGRATION LAW FOUNDATION, AND AMERICAN IMMIGRATION LAWYERS ASSOCIATION IN SUPPORT OF PETITIONER

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STATEMENT OF INTEREST[1]

The Court granted review in this case on both merits and jurisdictional issues. On the merits, *amici* agree with petitioner that a non-aggravated felony offense cannot be classified as a "particularly serious crime" for purposes of withholding of removal. This brief does not address that issue, and is limited solely to the jurisdictional question. *Amici* have substantial experience litigating jurisdictional issues in the immigration area and have regularly appeared before this Court and the courts of appeals on these issues.

The American Civil Liberties Union ("ACLU") is a nationwide, nonprofit, nonpartisan organization with more than 500,000 members dedicated to protecting the fundamental rights guaranteed by the Constitution and the laws of the United States. Of particular note, the ACLU was counsel in *INS v. St. Cyr*, 533 U.S. 289 (2001). More generally, the Immigrants' Rights Project of the ACLU engages in a nationwide program of litigation and advocacy to enforce and protect the constitutional and civil rights of immigrants.

The American Immigration Law Foundation ("AILF") is a nonprofit organization founded in 1987

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[1] Pursuant to Rule 37.3, letters of consent to the filing of this brief have been submitted to the Clerk of the Court. Pursuant to Rule 37.6, counsel for *amici* states that no counsel for a party authored this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than *amici curiae,* their members or their counsel made a monetary contribution to its preparation or submission.

to increase public understanding of immigration law and policy, to promote public service and professional excellence in the immigration law field, and to advance fundamental fairness, due process, and basic constitutional and human rights in immigration law and administration. The AILF Legal Action Center is a nonprofit litigation and legal services program whose purpose is to assure the fair and just administration of immigration laws and policies.

The American Immigration Lawyers Association ("AILA") is a nonprofit association of immigration and nationality lawyers and law school professors. Founded in 1946, AILA is an affiliated organization of the American Bar Association. It now has more than 11,000 members organized in 36 chapters across the United States, in Canada, and in Europe. AILA members regularly appear before federal courts throughout the United States. AILA's members' clients will be directly affected by the decision of the Court in this matter.

INTRODUCTION

The first question on which the Court granted review is a merits issue: whether the Attorney General has statutory authority to classify a non-aggravated felony as a "particularly serious crime" ("PSC") under the provision governing withholding of removal. *See* Pet. Cert. at i. The Seventh Circuit assumed that it had petition-for-review jurisdiction over that statutory claim in light of 8 U.S.C. 1252(a)(2)(D), and the government agrees with that

jurisdictional holding. *Amici* likewise agree with that jurisdictional ruling and will not further address the merits question presented in this case.

The second question presented is a jurisdictional issue: whether the Seventh Circuit erred in refusing to review "arguments that the agency applied an *incorrect legal standard*." Pet. Cert. at i. (Question II) (emphasis added).

As explained in the Brief of Petitioner, Ali contends that the incorrect "legal standard" applied by the Board of Immigration Appeals ("BIA" or "Board") was its failure to consider the specific circumstances of his offense and any mitigating factors. Specifically, he contends that the relevant statutory provisions governing withholding and asylum require the BIA to look at individualized mitigating factors in determining whether a crime is a PSC, and prohibit the BIA from basing its PSC determination solely on the elements of the offense. *See, e.g.*, Pet. Br. at 35 n.21, 37 n.23, 50-51.

While the government appears to disagree with this reading of the relevant asylum and withholding provisions, *see* BIO at 18, petitioner has clearly asserted a legal question regarding the proper construction of the asylum and withholding provisions. *Cf. INS v. Aguirre-Aguirre*, 526 U.S. 415, 425-26, 430 (1999) (treating similar claim regarding the "serious nonpolitical crime" exception to withholding of removal as a *statutory* question).

Because petitioner is exclusively seeking review by this Court of a *legal* question involving the proper construction of the withholding and asylum

statutes, the jurisdictional question in this case is straightforward.[2] The Immigration and Nationality Act ("INA") plainly does not bar review of petitioner's statutory claim, nor could it do so without raising "substantial constitutional questions" under the Suspension Clause. *See INS v. St. Cyr*, 533 U.S. 289, 300 (2001). As the Court observed at length in *St. Cyr*, 533 U.S. at 301, the classic function of habeas was to review *executive* detention where there had been no prior judicial review. The Court thus emphasized that any restrictions on habeas review in this context would raise far-reaching constitutional concerns. *Id*. at 300, 304-05, 314.

Amici first address why there is (and constitutionally must be) jurisdiction over petitioner's statutory claim in light of 8 U.S.C. 1252(a)(2)(D), which vests the courts of appeals with review over "questions of law" and does so notwithstanding other jurisdictional bars in the INA. The bulk of *amici*'s brief, however, is not devoted to that comparatively straightforward jurisdictional issue. Rather, *amici* focus on why the Court should expressly reserve other, complex jurisdictional issues that are not necessary for resolution of the claim presented here. This case is not an appropriate vehicle for resolving other issues about the proper construction and scope of the INA's complex jurisdictional provisions that raise numerous constitutionally-sensitive issues. Thus, the Court

[2] In fact, as noted earlier, the Seventh Circuit found jurisdiction to review the merits claim presented in Question 1 precisely because it was a legal claim involving the interpretation of the INA. *Ali v. Achim,* 468 F.3d 462, 465 (7th Cir. 2006)

need not and should not seek to resolve questions regarding (1) the extent to which 8 U.S.C. 1252(a)(2)(B)(ii) – a provision restricting review of certain discretionary decisions – would permit review of petitioner's *statutory* claim even if new § 1252(a)(2)(D) did not plainly confer jurisdiction; (2) whether the ultimate PSC determination is a non-reviewable discretionary decision within the meaning of 8 U.S.C. 1252(a)(2)(B)(ii); and (3) the full scope of § 1252(a)(2)(D)'s reference to reviewable "questions of law."

These questions – which are explicitly or implicitly raised by petitioner's jurisdictional analysis – are unnecessary to resolution of the instant case. Some may present potentially difficult issues of statutory construction and constitutional interpretation, and raise issues of significant practical importance given the sheer number of cases they affect. *Amici* respectfully urge the Court to reserve these questions until they arise in concrete controversies where the jurisdictional issues can be fully presented and are necessary to the outcome.

STATEMENT OF CASE

Petitioner was found removable on the basis of a criminal conviction and applied for three forms of relief: asylum under 8 U.S.C. 1158; withholding of removal under 8 U.S.C. 1231(b)(3)(A); and relief under the Convention Against Torture ("CAT").[3] The

[3] *See* Foreign Affairs Reform and Restructuring Act, Pub. L. No. 105-277, 112 Stat. 2681-822 (implementing Article 3 of the United Nations Convention Against Torture and Other Forms

BIA denied all three forms of relief and petitioner filed a petition for review with the Seventh Circuit.

The Seventh Circuit reversed the BIA's CAT ruling and remanded that claim to the Board for further proceedings. The court of appeals, however, rejected petitioner's asylum and withholding challenges. First, the court held that the Attorney General (and his designee, the BIA) were not statutorily precluded from classifying a non-aggravated felony as a PSC for purposes of asylum and withholding. The court further held that it lacked jurisdiction to decide whether the BIA properly concluded that petitioner's individual crime was a PSC.

Petitioner's Petition in this Court raised two questions. The first was whether the Attorney General was statutorily precluded from classifying a non-aggravated felony as a PSC for purposes of withholding. Petitioner's second question challenged the court of appeals' jurisdictional holding as to both withholding and asylum.[4]

SUMMARY OF ARGUMENT

1. The critical jurisdictional factor in this case is that petitioner is exclusively raising a legal claim

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of Cruel, Inhuman or Degrading Treatment or Punishment) (codified as Note to 8 U.S.C. 1231).

[4] If the Court agrees with petitioner on the merits of Question 1, the only jurisdictional question remaining is whether the court of appeals may review petitioner's statutory challenge to the BIA's PSC determination for purposes of *asylum*.

regarding the proper construction of the withholding and asylum statutes. Because petitioner is raising only a statutory claim, the INA plainly does not bar review, nor could it constitutionally do so. *See INS v. St Cyr*, 533 U.S. 289, 300-08 (2001).

2. The Seventh Circuit cited two provisions of the INA in holding that it lacked jurisdiction. One of those provisions—8 U.S.C. 1252(a)(2)(C)— is plainly inapplicable here because it applies only to cases where the alien is removable on the basis of one of the listed criminal offenses. Petitioner's non-aggravated felony offense is clearly not one of the listed offenses (a point the government does not dispute).

The other provision cited by the court of appeals was 8 U.S.C. 1252(a)(2)(B)(ii), which bars review of certain *discretionary* decisions. That provision likewise does not apply to petitioner's statutory claim for several reasons, as discussed below. It is unnecessary for the Court to resolve that issue in this case, however. Even assuming that § 1252(a)(2)(B)(ii) could apply to petitioner's statutory challenge, it is clear that petitioner's statutory claim would nonetheless be reviewable in light of new 8 U.S.C. 1252(a)(2)(D). Section 1252(a)(2)(D) was added to the INA in 2005 and vests the courts of appeals with petition-for-review jurisdiction over "constitutional claims" and "questions of law," and does so notwithstanding the jurisdictional bar in § 1252(a)(2)(B). Thus, under § 1252(a)(2)(D), it is plain that the court of appeals has jurisdiction to review petitioner's statutory claim. *See* Section I.

3. Because petitioner is seeking review over a legal claim regarding the proper construction of the withholding and asylum statutes, the Court need not, and should not, reach three issues that may appear to be presented by petitioner's jurisdictional analysis:

a. The first is whether a *statutory* claim falls within the scope of 8 U.S.C. 1252(a)(2)(B)(ii)'s bar on review of *discretionary* decisions or actions. In this case, that question has no significance because petitioner is raising a *question of law* and is therefore entitled to review under new § 1252(a)(2)(D), even assuming that § 1252(a)(2)(B)(ii) might otherwise bar petitioner's claim. But, in other cases, where aliens may be raising factual rather than legal claims, the issue may be dispositive. That is so because such claims may not be encompassed within the jurisdiction-conferring provisions of § 1252(a)(2)(D) but would nonetheless not be barred unless they fit within the jurisdiction-*stripping* provisions of § 1252(a)(2)(B)(ii). That issue should be addressed only where it is dispositive. In such cases, *amici*'s position is that § 1252(a)(2)(B)(ii) applies only to the *discretionary aspect* of a decision, and not to all claims that may relate to that discretionary decision. *See Zadvydas v. Davis*, 533 U.S. 678, 688 (2001). Thus, even if the ultimate PSC determination were discretionary within the meaning of § 1252(a)(2)(B)(ii), that provision would not preclude review of *non*-discretionary claims related to a PSC determination. *See* Section II.A.

b. The second issue that should be reserved is whether the ultimate PSC determination is in fact

discretionary within the meaning of § 1252(a)(2)(B)(ii). Because petitioner's brief in this Court challenges only the legal analysis employed by the Board to reach its conclusion, it is unnecessary to decide in this case whether the ultimate PSC determination is a decision or action "the authority for which is specified under this subchapter to be in the discretion of the Attorney General or the Secretary of Homeland Security." 8 U.S.C. 1252(a)(2)(B)(ii). Nor should the Court seek to do so given the inherent complexity of drawing lines between discretionary and non-discretionary decisions absent a full development in the specific circumstances of the claim. While *amici* agree with petitioner that a PSC determination for purposes of both asylum and withholding of removal is not a discretionary determination within the meaning of § 1252(a)(2)(B)(ii), there is no need for the Court to use this case to address that issue. *See* Section II.B.

c. Finally, the Court should reserve the question of the scope of § 1252(a)(2)(D)'s reference to "questions of law." That is a matter with profound constitutional implications for the scope of review mandated by the Suspension Clause of the Constitution. *See St. Cyr,* 533 U.S. at 301. For example, *amici* submit that "questions of law" must encompass *all* legal claims, including regulatory claims and those involving the application of law to fact, consistent with congressional intent and to satisfy the historic scope of habeas corpus review. *See, e.g.*, *Chen v. U.S. Dep't of Justice*, 471 F.3d 315 (2d Cir. 2006). It cannot be limited to an artificial subset of "pure" legal claims as the government has sometimes contended. In this case, the petitioner is

exclusively raising a question of statutory construction that indisputably falls under § 1252(a)(2)(D). The Court thus need not, and should not, address broader issues concerning other claims in a constitutionally-sensitive area. *See* Section II.C.

ARGUMENT

I. PETITIONER'S STATUTORY CLAIM IS REVIEWABLE UNDER THE INA AND THE SUSPENSION CLAUSE.

Petitioner is raising a legal claim regarding the proper construction of the withholding and asylum statutes. Specifically, he contends that the relevant statutory provisions required the BIA to look at individualized mitigating factors in determining whether his crime was a PSC for purposes of withholding and asylum. Nothing in the INA bars review of that statutory claim, nor could the INA do so without raising "substantial constitutional questions" under the Suspension Clause. *See INS v. St. Cyr*, 533 U.S. 289, 301 (2001).

Indeed, as the Court made clear in *St. Cyr*, there has never been a time in the history of the United States when habeas review was not available for a legal claim brought by a noncitizen facing removal. *See id.* at 305-06. As the Court observed, this unbroken tradition of review over removal decisions is part of the larger tradition in this country and in England of habeas review over executive detention generally.

1. In *St. Cyr*, the Court exhaustively traced the history of judicial review in the immigration area. 533 U.S. at 301-08. Prior to 1996, aliens facing

deportation were generally entitled to broad Administrative Procedure Act-type review in the courts of appeals by means of a petition for review, and thus could raise all claims (factual, discretionary, legal and constitutional) challenging their removal. In 1996, Congress enacted the Anti-Terrorism and Effective Death Penalty Act of 1996 ("AEDPA"), Pub. L. No. 104-132, 110 Stat. 1214, and the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 ("IIRIRA"), Pub. L. No. 104-208, Div. C., 110 Stat. 3009-546. Those two statutes enacted significant restrictions on judicial review over removal orders, including a broad jurisdictional bar on review for aliens facing removal on the basis of certain listed criminal offenses, *see* 8 U.S.C. 1252(a)(2)(C), and a bar on review of certain discretionary decisions raised by any alien, *see* 8 U.S.C. 1252(a)(2)(B).

In *St. Cyr*, the Court addressed the reach of the broadest of the 1996 restrictions and concluded that they would raise substantial constitutional concerns under the Suspension Clause if they precluded an alien facing removal from raising legal or constitutional claims. *See* 533 U.S. at 300, 304-05, 314. To avoid those constitutional concerns, the Court construed the provisions as barring only direct petitions for review in the courts of appeals, but *not* a traditional district court habeas action under 28 U.S.C. 2241. *See id.* at 314. The Court made clear, however, that the Suspension Clause protected the substance of habeas review, and not the form of review, and that Congress was therefore free to place review back in the courts of appeals by petition for review *as long as* it provided for review that was

commensurate with the scope and availability of review previously available in a habeas action. *See id.* at 314 n.38.

The practical result of the Court's *St. Cyr* decision was that some aliens had to seek review of their removal orders by means of a district court habeas action, while others remained eligible to seek review directly in the courts of appeals. Congress responded to this bifurcated system in 2005 by passing the REAL ID Act. *See* REAL ID Act of 2005, Pub. L. No. 109-13, Div. B, § 106(a)(1)(A)(iii), 119 Stat. 310. The REAL ID Act generally eliminated district court review of final removal orders and placed commensurate review in the courts of appeals by petition for review. *See, e.g.*, 8 U.S.C. 1252(a)(5); *Chen v. U.S. Dep't of Justice*, 471 F.3d 315, 324 & n.3 (2d Cir. 2006); *Ramadan v. Gonzales*, 479 F.3d 646, 653 (9th Cir. 2007) (per curiam). Thus, there is no longer any substantial question regarding the proper *forum* for challenging a final removal order -- such review must ordinarily be sought by means of a petition for review in the court of appeals on the understanding that such review will generally be an adequate substitute for habeas corpus.[5]

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[5] Importantly, although the REAL ID Act generally repealed habeas review over challenges to final removal orders, it made clear that it did not eliminate habeas review over all immigration decisions. Consistent with Act's text and history (and the government's understanding of the Act), the courts of appeals have held that habeas remains available to review challenges to detention. *See, e.g.*, *Hernandez v. Gonzales*, 424 F.3d 42, 42 (1st Cir. 2005). *See also* H.R. Rep. No. 109-72, at 175 (2005) (Conf. Rep.) (noting that Act "would not preclude habeas review over challenges to detention that are

Congress also recognized, however, that in light of *St. Cyr*, it could not eliminate habeas without providing the courts of appeals with review commensurate to the scope of review that previously existed in habeas. But rather than repeal all of the 1996 jurisdictional bars, Congress enacted new 8 U.S.C. 1252(a)(2)(D). *See* REAL ID Act of 2005, Pub. L. No. 109-13, Div. B, § 106(a)(1)(A)(iii), 119 Stat. 310 (enacting § 1252(a)(2)(D)). That provision provides in full:

> (D) Judicial review of certain legal claims: Nothing in subparagraph (B) [8 U.S.C. 1252(a)(2)(B)] or (C), or in any other provision of this chapter (other than this section) which limits or eliminates judicial review, shall be construed as precluding review of constitutional claims or questions of law raised upon a petition for review filed with an appropriate court of appeals in accordance with this section. [6]

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independent of challenges to removal orders"). Likewise, habeas review must remain available in cases where the petition for review does not constitute an adequate and effective substitute for habeas corpus. That question should be considered and resolved in the specific context of a particular type of claim, for example, where an alien cannot feasibly seek review by a petition for review because the challenged action actually occurs after the 30-day petition for review deadline has elapsed. No question of this nature is presented in this case.

[6] *Amici* note that the text of § 1252(a)(2)(D) quoted above, which appears in the U.S. Code, refers to "this chapter." In contrast, the final bill passed by Congress referred to this "Act" (*i.e.*, the INA). REAL ID Act of 2005, Pub. L. No. 109-13, Div. B, § 106(a)(1)(A)(iii), 119 Stat. 310. The reference to "chapter"

Section 1252(a)(2)(D) is thus a jurisdictional trump card to ensure that the courts of appeals will now have review over all "constitutional claims" and "questions of law" and will have such review notwithstanding virtually all of the INA's jurisdictional bars (including specifically the criminal bar in § 1252(a)(2)(C) and the discretionary bar in § 1252(a)(2)(B)).

2. Under the INA, as amended by the REAL ID Act, there are now two basic jurisdictional inquiries that must be undertaken by the courts of appeals on petitions for review of removal orders. One is whether § 1252(a)(2)(D) confers petition-for-review jurisdiction over the claim at issue. In cases where, as here, aliens are clearly raising "constitutional claims" or "questions of law" within the meaning of § 1252(a)(2)(D), the question of jurisdiction is resolved and the court must adjudicate the claim. If it is not clear, however, that the alien is raising a constitutional or legal claim under § 1252(a)(2)(D), then the courts must determine if any of the jurisdictional bars enacted in 1996 (such as § 1252(a)(2)(C) or § 1252(a)(2)(B)) are applicable. If the alien's case is not subject to one of those bars, then the alien may obtain review of his or her claims under the INA's general grant of petition-for-review jurisdiction in 8 U.S.C. 1252(a). Because both inquiries are jurisdictional, the courts can and should engage in these two inquiries in whichever order permits the narrowest and most straightforward resolution of the issue.

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should thus properly be understood as referring to the entire INA, because all of the INA appears at Chapter 12 of Title 8.

In this case, the Seventh Circuit skipped over the first of these inquiries regarding the applicability of § 1252(a)(2)(D), and proceeded directly to the question of whether any of the 1996 jurisdictional bars precluded review of petitioner's claim. Specifically, the court of appeals cited two of the 1996 provisions in its jurisdictional analysis, 8 U.S.C. 1252(a)(2)(C) and 1252(a)(2)(B)(ii). *See Ali,* 468 F.3d at 465.

The first of these provisions, § 1252(a)(2)(C), generally bars review in cases involving aliens removable on the basis of certain criminal offenses. That provision is inapplicable here because petitioner's non-aggravated felony offense indisputably does not fall within one of the categories listed in the provision (and the government does not contend otherwise).

The second provision on which the court of appeals relied, § 1252(a)(2)(B)(ii), governs review of certain *discretionary* decisions. Section 1252(a)(2)(B) states in full:

> Denials of discretionary relief
>
> Notwithstanding any other provision of law (statutory or nonstatutory), including section 2241 of Title 28, or any other habeas corpus provision, and sections 1361 and 1651 of such title, and except as provided in subparagraph (D), and regardless of whether the judgment, decision, or action is made in removal proceedings, no court shall have jurisdiction to review

> (i) any judgment regarding the granting of relief under section 1182(h), 1182(i), 1229b, 1229c, or 1255 of this title, or
>
> (ii) any other decision or action of the Attorney General or the Secretary of Homeland Security the authority for which is specified under this subchapter to be in the discretion of the Attorney General or the Secretary of Homeland Security, other than the granting of [asylum] relief under section 1158(a) of this title.

By its terms, subsection (i) clearly does not apply here because withholding and asylum, which appear respectively in the INA at 8 U.S.C. 1231(b)(3)(A) and 8 U.S.C. 1158, are not among the five listed types of relief. Thus, the only arguably applicable provision is subsection (ii).

Petitioner's contention is that subsection (ii) also does not encompass review of his PSC challenge. Among other things, he argues that asylum decisions are exempted altogether from § 1252(a)(2)(B)(ii)'s bar, withholding is a mandatory form of relief, and generally, PSC determinations in both the asylum and withholding contexts are not discretionary decisions within the meaning of the statute. Alternatively, petitioner argues that his statutory claim is reviewable *even if* it falls within § 1252(a)(2)(B)(ii)'s jurisdictional bar because of the passage of new 8 U.S.C. 1252(a)(2)(D).

Amici agree that petitioner's challenge to the BIA's PSC determination does not fall within any of the 1996 jurisdictional bars, including §

1252(a)(2)(B)(ii). But, as noted, the Court need not, and should not, address that issue in light of new § 1252(a)(2)(D). Even if § 1252(a)(2)(B)(ii) covered petitioner's claim, it is plain that new § 1252(a)(2)(D) would provide review.

Section 1252(a)(2)(D) explicitly refers to § 1252(a)(2)(B) and makes clear that § 1252(a)(2)(B) does not bar review where aliens are raising "questions of law." And petitioner is clearly raising a question of law here. Moreover, although resort to § 1252(a)(2)(D)'s legislative history is unnecessary in this case, that history unambiguously demonstrates that petitioner's statutory claim is reviewable. As the Joint House-Senate Conference Report shows, § 1252(a)(2)(D) was enacted specifically in response to the Court's decision in *St. Cyr*. And as noted above, *St. Cyr* made clear that that the elimination of all review over a *legal* claim would raise "substantial constitutional questions" because habeas review in the immigration area has historically encompassed review of both constitutional and non-constitutional *questions of law*. *See St. Cyr*, 533 U.S. at 300; H.R. Rep. No. 109-72, at 175 (2005) (Conf. Rep.) (citing *St. Cyr*).

Indeed, the legislative history shows that Congress took pains to comply with the Court's *St. Cyr* decision and to avoid creating constitutional concerns. The Joint Conference Report thus stated that although the REAL ID Act generally eliminated habeas review over challenges to removal orders, § 1252(a)(2)(D) would now "permit judicial review over those issues that were historically reviewable on habeas" by means of a petition for review in the

courts of appeals (thereby ensuring that the *substance* of habeas review was preserved). H.R. Rep. No. 109-72, at 175 (citing *St. Cyr*).

In short, the addition to the INA of § 1252(a)(2)(D) leaves no doubt that review of petitioner's legal claim is not barred, even if that claim were to fall within the scope of § 1252(a)(2)(B)(ii). And, as Congress itself recognized and as this Court's decision in *St. Cyr* made clear, the INA would raise serious constitutional concerns if it were construed to preclude all review of legal claims in any court by any means. *See also infra* at Part II.C. (discussing the meaning of the term "questions of law" in § 1252(a)(2)(D)).

II. THIS CASE DOES NOT REQUIRE THE COURT TO DETERMINE THE PRECISE SCOPE OF SECTIONS 1252(a)(2)(B)(ii) OR 1252(a)(2)(D).

As set forth above, the jurisdictional issue in this case should be resolved on the narrow ground that 8 U.S.C. 1252(a)(2)(D) plainly confers petition-for-review jurisdiction because petitioner is exclusively raising claims of statutory construction. *Amici* respectfully submit, therefore, that this is not the proper case for addressing other conceivable and constitutionally-significant jurisdictional issues that are not presented or necessary for resolving this case. Those issues should be reserved for a case in which they are fully developed and dispositive.

First, the Court need not address the question whether petitioner's *statutory* claim falls within § 1252(a)(2)(B)(ii)'s jurisdictional bar regarding

discretionary decisions. Although the issue is of no particular significance in this case (because petitioner is raising a question of law reviewable under § 1252(a)(2)(D)), it may be significant in other cases where aliens are not raising "constitutional claims" or "questions of law" (and thus cannot rely on § 1252(a)(2)(D)). In those cases, the critical question will be what claims § 1252(a)(2)(B) permits and which it prohibits without the "jurisdictional trump" of § 1252(a)(2)(D). Those questions should be decided where the question of jurisdiction is squarely and unavoidably presented

Second, the Court should not address the numerous arguments advanced by petitioner in support of his position that the ultimate PSC determination falls outside of the jurisdictional bar in § 1252(a)(2)(B)(ii). Here, petitioner is challenging only the *legal* analysis adopted by the BIA in making that determination. Accordingly, the issue of judicial review over the ultimate PSC decision need not be decided. *See infra* Section II.B.

Third, and most importantly, the Court need not decide the precise scope of the term "questions of law" in § 1252(a)(2)(D), since there can be no dispute that petitioner's claim of statutory construction raises a question of law. In particular, the Court need not address whether the term "questions of law" should be construed to preclude regulatory claims or those involving the application of law to fact, or is limited to some artificial subset of so-called "pure" legal claims. *See infra* Section II.C.

A. The Court Need Not Decide Whether Petitioner's Nondiscretionary Statutory Claims Fall Within The Jurisdictional Bar In Section 1252(a)(2)(B)(ii).

Because petitioner is raising a question of law, § 1252(a)(2)(D) ensures review *regardless* of how § 1252(a)(2)(B)(ii) is construed. In other cases, however, § 1252(a)(2)(D) will be inapplicable because the petitioner is not raising a legal or constitutional claim encompassed by that provision. In such cases, the proper construction of § 1252(a)(2)(B)(ii) may be critical to determining whether the courts have jurisdiction over the claim.

For instance, in some cases, a petitioner (who is not removable by reason of a criminal offense covered in § 1252(a)(2)(C) and therefore not subject to that preclusion statute) may be challenging a factual determination made by the BIA in the course of adjudicating an application for discretionary relief. The petitioner in those cases will not be seeking review of the BIA's exercise of discretion but, rather, asking the court to correct the factual error (under the substantial evidence test) and to remand the case to the BIA so the Board can re-exercise its discretion based on a proper understanding of the record. Where the petitioner is raising a factual claim, the only relevant jurisdictional provision may be § 1252(a)(2)(B)(ii), and § 1252(a)(2)(D) would not be applicable. Hence, the proper scope of the jurisdictional bar in § 1252(a)(2)(B)(ii) may be outcome-determinative. When that question actually arises, it should be addressed in light of

congressional intent, the presumption of review of administrative decisions and any constitutional concerns that may arise by precluding review. This is not that case.

As a general matter, however, *amici* believe that the jurisdictional bar in § 1252(a)(2)(B)(ii) encompasses only the actual *discretionary decision*, and not every claim related to that discretionary decision. Thus, in the above example, the *non*-discretionary factual error, though *related* to the adjudication of the discretionary relief application, would not be barred from review by § 1252(a)(2)(B)(ii). Likewise, the *non*-discretionary statutory question raised by petitioner in this case would fall outside of § 1252(a)(2)(B)(ii), even assuming that the ultimate PSC determination were deemed discretionary within the meaning of § 1252(a)(2)(B)(ii).

Indeed, this Court has already made clear that the proper focus under § 1252(a)(2)(B)(ii) is on the particular claim asserted by the petitioner. In *Zadvydas v. Davis*, 533 U.S. 678 (2001), the Court held that § 1252(a)(2)(B)(ii) did not bar jurisdiction over a statutory claim related to the Attorney General's discretionary detention authority. In concluding that § 1252(a)(2)(B)(ii) was inapplicable to petitioner's *statutory* challenge, the Court explained that the aliens in that case did not

> seek review of the Attorney General's exercise of discretion; rather, they challenge the extent of the Attorney General's authority under the post-removal-period detention statute. And

> the extent of that authority is not a matter of discretion.

Zadvydas, 533 U.S. at 688.

The courts of appeals have likewise focused on the particular claim presented, rejecting the notion that § 1252(a)(2)(B)(ii) precludes review of non-discretionary claims simply because they may relate to an issue that is ultimately discretionary. Every circuit to address the issue has concluded that § 1252(a)(2)(B)(ii) does not bar review of non-discretionary challenges. *See Cho v. Gonzales*, 404 F.3d 96, 98-102 (1st Cir. 2005) (finding jurisdiction over statutory eligibility for a discretionary waiver of the conditional basis of permanent residency); *Firstland Int'l, Inc. v. U.S. INS*, 377 F.3d 127, 131 (2d Cir. 2004) (finding jurisdiction to review claim that a statutory notice was a mandated prerequisite for a discretionary visa revocation); *Soltane v. U.S. DOJ*, 381 F.3d 143, 147-48 (3d Cir. 2004) (Alito, J.) (holding that visa preference determination was reviewable because non-discretionary); *Shokeh v. Thompson*, 369 F.3d 865, 868 (5th Cir. 2004) (reviewing bond determination because it was non-discretionary), *vacated on other grounds by* 375 F.3d 351 (5th Cir. 2004); *Singh v. Gonzales*, 451 F.3d 400, 410-11 (6th Cir. 2006) (finding jurisdiction over statutory eligibility issues for 8 USC 1227(a)(1)(H) waiver); *San Pedro v. Ashcroft*, 395 F.3d 1156, 1157-58 (9th Cir. 2005) (finding jurisdiction over statutory eligibility elements of a 8 U.S.C. 1227(a)(1)(H) waiver); *Sierra v. INS*, 258 F.3d 1213, 1217 (10th

Cir. 2001) (finding jurisdiction over constitutional challenge to discretionary parole proceeding).[7]

Focusing on the specific claim raised by the petitioner is also consistent with the approach taken under analogous jurisdictional provisions, such as 5 U.S.C. 701(a)(2) of the Administrative Procedure Act. That provision bars review where "agency action is committed to agency discretion by law." 5 U.S.C. 701(a)(2). This Court and the lower courts have nonetheless found jurisdiction where the precise claim asserted is non-discretionary, even if it relates to an otherwise unreviewable discretionary action. *See*, *e.g.*, *Webster v. Doe*, 486 U.S. 592, 603-04 (1988) (finding jurisdiction to review constitutional claim

[7] *Amici* note that § 1252(a)(2)(D)'s reference to § 1252(a)(2)(B) does not indicate that § 1252(a)(2)(B) previously covered non-discretionary claims. Rather, the reference was likely intended to *clarify* that § 1252(a)(2)(B) was never intended to apply to non-discretionary decisions. That clarification may have been viewed as necessary given the (erroneous) position taken by the government with respect to subsection (i) of § 1252(a)(2)(B), which, unlike subsection (ii), bars review of "judgments" related to any of the five listed forms of discretionary relief. According to the government, subsection (i) barred review of all determinations *related* to those five forms of discretionary relief, and not simply the ultimate discretionary decision. Although that position resulted in litigation (and thus uncertainty), it has been rejected by the courts of appeals. *See, e.g., Sepulveda v. Gonzales*, 407 F.3d 59, 62 (2d Cir. 2005) (rejecting government's contention "that under § 1252(a)(2)(B), we may not review any order granting or denying §§ 1229b or 1255 relief, regardless of whether relief was denied as a matter of discretion or because a nondiscretionary factor was found to preclude eligibility for relief"); *see also, e.g.*, *Prado v. Reno*, 198 F.3d 286, 290 (1st Cir. 1999); *Paunescu v. INS*, 76 F. Supp. 2d 896, 900 (N.D. Ill. 1999).

notwithstanding conclusion that the CIA Director's ultimate decision to discharge the employee was discretionary and unreviewable under § 701(a)(2)); *Ward v. Skinner*, 943 F.2d 157, 159-60 (1st Cir. 1991) (Breyer, J.) (finding jurisdiction over statutory challenge to an otherwise discretionary denial of request to waive certain transportation safety rules).

In short, focusing on the particular *claim* raised by the petitioner, and not on whether the claim relates in some manner to a discretionary decision or action, is supported by the text of the statute (with its emphasis on *discretion*), this Court's repeated admonition that jurisdictional statutes should be construed narrowly, and the well-established presumption in favor of judicial review. *See, e.g.*, *St Cyr*, 533 U.S. at 298-99 (discussing "strong presumption in favor of judicial review of administrative action").

B. The Court Should Reserve the Question of Whether the Ultimate PSC Determination For Asylum and Withholding Is Discretionary Within the Meaning of Section 1252(a)(2)(B)(ii).

Amici agree with petitioner that the ultimate PSC determination is not discretionary within the meaning of § 1252(a)(2)(B)(ii). But that issue need not be addressed here because petitioner presents a threshold statutory claim regarding the BIA's legal analysis in making that ultimate determination.

Any analytical framework the Court adopts to distinguish between discretionary and non-

discretionary decisions would likely have significant implications for a number of other statutory issues not presently before the Court that may raise distinct questions. Among the issues percolating in the lower courts are: whether a noncitizen has met the "good faith" marriage requirement necessary for a hardship waiver for purposes of a petition for the removal of conditional residence status;[8] whether a noncitizen has suffered "extreme cruelty" for purposes of cancellation of removal or suspension of deportation for battered spouses;[9] whether a noncitizen has made a showing of "changed" or "extraordinary" circumstances to justify the filing of an asylum application after the one-year deadline;[10] revocation of a visa;[11] and denial of a continuance.[12]

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[8] *See, e.g.*, *Cho v. Gonzales*, 404 F.3d 96, 99-102 (1st Cir. 2005); *Oropeza-Wong v. Gonzales*, 406 F.3d 1135, 1143 (9th Cir. 2005); *Urena-Tavarez v. Ashcroft*, 367 F.3d 154, 159-61 (3d Cir. 2004).

[9] *See, e.g.*, *Hernandez v. Ashcroft*, 345 F.3d 824, 833-35 (9th Cir. 2003); *Wilmore v. Gonzales,* 455 F.3d 524, 526-28 (5th Cir. 2006); *Perales-Cumpean v. Gonzales*, 429 F.3d 977, 982-83 (10th Cir. 2005).

[10] *See, e.g.*, *Ferry v. Gonzales*, 457 F.3d 1117, 1130 (10th Cir. 2006); *Ramadan v. Gonzales*, 479 F.3d 646, 654-56 (9th Cir. 2007).

[11] *See, e.g.*, *ANA Int'l, Inc. v. Way*, 393 F.3d 886 (9th Cir. 2004); *Jilin Pharm. USA, Inc, v. Gonzales,* 447 F.3d 196, 205 (3d Cir. 2006).

[12] *See, e.g.*, *Alsamhouri v. Gonzales,* 484 F.3d 117, 122 (1st Cir. 2007); *Sanusi v. Gonzales,* 445 F.3d 193, 198 (2d Cir. 2006); *Zafar v. U.S. Attorney Gen.,* 461 F.3d 1357, 1360-62 (11th Cir. 2006); *Grass v. Gonzales*, 418 F.3d 876, 877-78 (8th Cir. 2005); *Yerkovich v. Ashcroft*, 381 F.3d 990, 992-95 (10th Cir. 2004).

Because each of these issues raises complex questions of jurisdiction under the INA (and does so against the United States' unbroken tradition of habeas review over executive detention), and because the Court's analysis of what constitutes an unreviewable discretionary decision would potentially have significant implications in these and other categories of cases, *amici* respectfully urge the Court to reserve judgment on this issue.

In each of these contexts, it is necessary to conduct an analysis of the manner in which the issue arises, the precise claims presented and the relation to final removal orders. An unnecessary adjudication of whether § 1252(a)(2)(B)(ii) applies to the PSC claim presented here, where § 1252(a)(2)(D) plainly provides review of petitioner's claim, may incorrectly carry over to other contexts. If the Court were nonetheless to address whether the ultimate PSC determination is discretionary within the meaning of § 1252(a)(2)(B)(ii), *amici* agree with petitioner that it does not fall within that jurisdictional bar, and will not repeat those arguments here. *See* Pet. Br. at 37-50 (discussing at length why a PSC determination does not fall within § 1252(a)(2)(B)(ii)).[13]

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[13] In addition to the arguments made by petitioner, *amici* also note that the PSC determination is not the kind of determination that is inherently discretionary. As the Court has noted, "if the word 'discretion' means anything in a statutory or administrative grant of power, it means that the recipient must exercise his authority according to his own understanding and conscience." *United States ex rel. Accardi v. Shaughnessy*, 347 U.S. 260, 266-67 (1954). *See also, e.g.*, *INS v.*

In sum, *amici* agree with petitioner that the ultimate PSC determination falls outside of the jurisdictional bar in § 1252(a)(2)(B)(ii). But, given the complexity of drawing coherent lines between discretionary and non-discretionary determinations, *amici* respectfully urge the Court to refrain from addressing whether the ultimate PSC determination is reviewable under § 1252(a)(2)(B)(ii). The issue should be left for a future case where it is outcome-determinative.

C. The Court Should Not Address the Precise Scope of the Term "Questions of Law" in § 1252(a)(2)(D).

There has been some confusion in the courts of appeals regarding the precise scope of the term "questions of law" in 8 U.S.C. 1252(a)(2)(D). In particular, some courts initially adopted the position that § 1252(a)(2)(D) applied only to "pure" questions of law regarding statutory construction, implying that it may not have covered regulatory issues or

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St. Cyr, 533 U.S. 289, 307-08 (2001) (describing discretionary decisions as "a matter of grace") (quoting *Jay v. Boyd*, 351 U.S. 345, 353-54 (1956)); *Reno v. American-Arab Anti-Discrimination Comm.*, 525 U.S. 471, 483-84 (1999) (explaining that where the INS had discretion over certain matters, it exercised "that discretion for humanitarian reasons or simply for its own conscience"); *cf. Franklin v. Massachusetts*, 505 U.S. 788, 817 (1992) (Stevens, J., concurring) (concluding that the Secretary of Commerce's conduct of the census is not committed to agency discretion within the meaning of the APA because "[t]here is no indication that Congress intended the Secretary's own mental processes, rather than other more objective factors, to provide the standard").

claims involving the application of law to fact. That position is incorrect.

In this case, the Court need not, and should not, address the precise scope of § 1252(a)(2)(D) because petitioner is indisputably raising a question of law regarding the proper interpretation of the withholding and asylum statutes. *Amici* nonetheless briefly set forth why § 1252(a)(2)(D) cannot be understood to cover only an artificial subset of legal issues.

1. In *St. Cyr*, the Court engaged in a lengthy historical analysis and, based on the unbroken tradition of habeas review in the immigration area, concluded that the Suspension Clause "required some judicial intervention in deportation cases." 533 U.S. at 300 (internal punctuation omitted). In particular, the Court emphasized that serious constitutional problems would arise if the immigration statutes were interpreted to preclude all review over the types of claims that were historically reviewable in habeas, including in the context of the discretionary relief claim raised in that case. *See id.* at 300 ("A construction of the amendments at issue that would entirely preclude review . . . by any court would give rise to substantial constitutional questions"); *see also id.* at 300-01 (noting that "at the absolute minimum," the Suspension Clause protects judicial review of those issues that were historically reviewable on habeas).

Of critical significance here, the Court in *St. Cyr* emphasized that habeas review in the executive detention context had not been limited to constitutional claims, but included non-

constitutional claims as well. *See id.* at 302-03. The Court further concluded that habeas review encompassed not only claims regarding the proper "interpretation" of statutes, but also claims regarding the "application" of statutes. *Id.* at 302. The Court's analysis also left no doubt that habeas review covered questions concerning *regulations*. Indeed, one of the habeas cases on which the Court relied most heavily – *United States ex rel. Accardi v. Shaughnessy*, 347 U.S. 260 (1954) – involved a claim under a regulation, not a statute. *St. Cyr*, 533 U.S. at 307 (citing *Accardi*).

Thus, a substantial constitutional question would arise if the INA were construed to preclude review over questions involving (1) the application of statutes or (2) the interpretation and application of regulations. *See* Gerald L. Neuman, *On the Adequacy of Direct Review After the REAL ID Act of 2005*, 51 N.Y.L. Sch. L. Rev. 133, 139-41 (2006) (citing cases and arguing that to avoid constitutional concerns, the REAL ID Act should be construed to preserve review over "application" questions and those involving "regulations"). Consequently, unless the REAL ID Act *compels* such a construction, § 1252(a)(2)(D) should be construed to preserve review over such claims. But nothing in the text or legislative history of § 1252(a)(2)(D) remotely compels such a narrow construction.

2. The text and history of § 1252(a)(2)(D) indicate that the term "questions of law" in § 1252(a)(2)(D) is not limited to so-called "pure" questions of law. The statutory term "questions of law" is unqualified. It does not state that only

statutory questions are reviewable, thereby excluding claims involving regulations. Nor does it refer only to questions of statutory construction, thereby excluding questions involving the *application* of statutes or regulations. Nothing in the text of § 1252(a)(2)(D) therefore warrants the conclusion that the statute applies only to a subset of legal claims. *See e.g., Chen v. U.S. Dep't of Justice*, 471 F.3d 315, 327-28 (2d Cir. 2006) (revising prior decision and concluding that "questions of law" in 1252(a)(2)(D) "are not limited solely to matters of 'statutory construction'").

Legislative history also supports *amici*'s reading. As discussed above, *supra* Section I, the Conference Report shows that Congress was well aware of its constitutional obligation to preserve review over any claim that was previously cognizable in a traditional district court habeas action. Indeed, the Conference Report notes that the purpose of new § 1252(a)(2)(D) was precisely to ensure judicial review over those issues that were historically reviewable on habeas. H.R. Rep. No. 109-72, at 175 (2005) (Conf. Rep.); *see also ibid* (stating that the new scheme "would provide an 'adequate and effective' alternative to habeas corpus") (citing *St. Cyr*). *See also, e.g.*, *Chen*, 471 F.3d at 326-27 ("We construe . . . the REAL ID Act . . . to encompass the same types of issues that courts traditionally exercised in habeas review"); *Kamara v. Attorney Gen.*, 420 F.3d 202, 211, 213-15 (3d Cir. 2005) (finding that the scope of review under REAL ID Act "mirrors" the scope of habeas review and exercising jurisdiction over BIA's application of regulatory standard to facts).

The Conference Report thus makes absolutely clear that Congress' goal was to streamline review into the courts of appeals, and *not* to eliminate any review that was previously available in habeas – much less to embroil the courts in Suspension Clause issues:

> Significantly, this section does not eliminate judicial review, but simply restores such review to its former settled forum prior to 1996. Under section 106 [of the REAL ID Act], all aliens . . . will be able to . . . raise constitutional and legal challenges in the courts of appeals. . . .

H.R. Rep. No. 109-72, at 174. And, as explained above, *St. Cyr* made clear that those "issues that were historically reviewable on habeas" (H.R. Rep. No. 109-72, at 175) included claims concerning (1) regulations and (2) the application of law to fact.

The Conference Report also specifically recognizes that a "mixed question of law and fact" remains reviewable and that only the *factual* elements of such questions will be unreviewable and not the "legal element." *Ibid.* That discussion directly follows from and explains the observation that the qualifier "pure" was deleted from the final bill because it was viewed as "superfluous." *Ibid* (noting that earlier version of the bill provided for review of constitutional claims and "pure questions of law"). The drafters thus apparently assumed that a question was or was not "legal" for jurisdictional purposes, and that there were not subsets of legal questions. Consequently, even in the "mixed

question" context, the legal element of the question is reviewable. What constitutes a "legal element" is thus left for the courts to determine as the question arises in particular cases, using the body of historic habeas law and the contours of constitutionally-mandated review of executive detention as the touchstone.[14]

In short, § 1252(a)(2)(D) provides review over *all legal* claims, and not an artificial subset of so-

[14] The Joint House-Senate Conference Report also states that the "purpose of [§ 1252(a)(2)(D)] . . . is to permit judicial review over those issues that were historically reviewable on habeas – constitutional and statutory-construction questions, not discretionary or factual questions." H.R. Rep. No. 109-72, at 175. Some courts initially cited this language as support for the view that only *pure* questions of *statutory* construction were reviewable. *See Chen v. U.S. Dep't of Justice*, 434 F.3d 144, 153 (2d Cir. 2006), *opinion vacated after rehearing*, 471 F.3d 315 (2d Cir. 2006); *Ramadan v. Gonzales*, 427 F.3d 1218, 1222 (9th Cir. 2005), *opinion withdrawn after rehearing*, 479 F.3d 646 (9th Cir. 2007) (per curiam). But this passage could not plausibly have been intended to set forth an exhaustive list of *all* legal claims that were reviewable in habeas. In context, the Report is merely seeking to distinguish legal claims from "factual" and "discretionary" claims. In this regard, the passage echoes the overall theme of the legislation – that Congress was trying to streamline review to the circuits while avoiding Suspension Clause concerns by preserving review over any claim previously cognizable in habeas. Indeed, if this passage were taken literally, then the REAL ID Act would not only preclude review over questions concerning the application of law to fact, but also over pure questions of law regarding the proper interpretation of *regulations*. As noted, that is an implausible interpretation of the statute and one that would surely render the statute unconstitutional. *See supra* at Part II.C.1.; *St. Cyr*, 533 U.S. at 307 (discussing *United States ex rel. Accardi v. Shaughnessy*, 347 U.S. 260 (1954)).

called pure questions of statutory construction. That reading is supported by the statute's text and history, the Suspension Clause, and by the long and unbroken tradition of habeas corpus review of executive detention in the United States and England.

3. Although *amici* believe that § 1252(a)(2)(D) must encompass all legal issues, this is not the case in which that question is presented or should be decided. Here, petitioner is raising a question of statutory law. Thus, the broader questions are not present in this case, and petitioner does not address the issue.

The scope of review over removal orders has significant implications in numerous statutory contexts not presently before the Court. Indeed, the courts of appeals are currently grappling with that issue in a variety of contexts. *See, e.g.*, *Jean-Pierre v. Attorney Gen.*, 500 F.3d 1315, 1322 (11th Cir. 2007) (finding jurisdiction under § 1252(a)(2)(D) to review alien's claim "insofar as he challenges the application of an undisputed fact pattern to a legal standard"); *Jean v. Gonzales*, 435 F.3d 475, 482 (4th Cir. 2006) (same); *Ramadan*, 479 F.3d at 652 (same); *Chen*, 471 F.3d at 326 (same); *Toussaint v. Attorney Gen.*, 455 F.3d 409 (3d Cir. 2006) (same); *but see Hamid v. Gonzales*, 417 F.3d 642, 647 (7th Cir. 2005). Especially in light of this ongoing litigation in the courts of appeals, the Court should not address the issue until it is presented with a case in which the issue is outcome-determinative.

Moreover, and fundamentally, the precise scope of legal claims that must be reviewable for non-

citizens subject to executive detention raises constitutional questions that may have profound implications for the Suspension Clause and for habeas corpus more broadly. These issues should not be undertaken unless it is essential to do so and the actual questions are fully presented.

* * * *

The most straightforward means of resolving this case is under 8 U.S.C. 1252(a)(2)(D) because petitioner is indisputably raising a question of law. Accordingly, the question of whether petitioner's statutory claim falls within the scope of § 1252(a)(2)(B)(ii), and any issues regarding the precise meaning of the term "questions of law" in § 1252(a)(2)(D), should be addressed only when they are squarely presented and necessary for resolution of the case.

CONCLUSION

For the reasons stated above, the Court should reverse the judgment below and find that petitioner's statutory claim is reviewable.

Respectfully submitted,

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November 28, 2007