No. 08-911

IN THE

Supreme Court of the United States

AGRON KUCANA,

Petitioner,

—v.—

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

Respondent.

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

BRIEF *AMICUS CURIAE* OF THE AMERICAN CIVIL LIBERTIES UNION IN SUPPORT OF PETITIONER

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STATEMENT OF INTEREST[1]

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. The ACLU was counsel in *INS v. St. Cyr*, 533 U.S. 289 (2001), and has substantial experience litigating jurisdictional issues in the immigration area, regularly appearing before this Court and the courts of appeals on these issues. 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.

INTRODUCTION AND SUMMARY OF ARGUMENT

The Seventh Circuit held that it lacked jurisdiction to review Kucana's motion to reopen on the basis of three conclusions. First, it held that 8 U.S.C. 1252(a)(2)(B)(ii) divested it of jurisdiction to review motions to reopen, notwithstanding the fact that the discretion-conferring language governing

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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 *amicus* 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 *amicus curiae,* its members or its counsel made a monetary contribution to this brief's preparation or submission.

reopening motions is specified solely in regulations, rather than in the Immigration and Nationality Act (INA).[2] Second, it held that Section 1252(a)(2)(B)(ii) barred review of petitioner's particular claims despite the fact that the Board of Immigration Appeals (BIA or Board) denied Kucana's motion on non-discretionary grounds (*i.e.*, that Kucana had not made out a *prima facie* case for reopening his asylum application). Finally, it held that 8 U.S.C. 1252(a)(2)(D) did not restore its jurisdiction because Kucana was not raising "constitutional claims" or

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[2] Section 1252(a)(2)(B) is entitled "Denials of discretionary relief" and provides in full:

> 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 relief under section 1158(a) of this title.

"questions of law." *See Kucana v. Mukasey*, 533 F.3d 534, 536-38 (7th Cir. 2008).

Amicus urges the Court to reverse the Seventh Circuit's erroneous ruling – and to do so narrowly, without addressing more significant jurisdictional questions that have not been raised by either petitioner or the government and are not squarely presented here. Indeed, both petitioner and the government press only a single ground for reversal – that motions to reopen are not covered by Section 1252(a)(2)(B)(ii) because the Attorney General's discretion is specified solely in the regulations, and not in the relevant "subchapter" of the INA. That argument is plainly correct, especially in light of Section 1252(a)(2)(B)(ii)'s unambiguous language and the fact that the Seventh Circuit's interpretation of Section 1252(a)(2)(B)(ii) would mean that the agency could insulate many of its decisions simply by enacting discretion-conferring regulations.

If the Court reverses the Seventh Circuit on this ground, as it can and should, it need not reach three additional issues:

1) First, the Court need not address the more far-reaching question of *what type* of language would fall within the scope of Section 1252(a)(2)(B)(ii) were it contained in the statute rather than the regulations. The INA contains provisions that expressly vest the Attorney General with "discretion" to make a decision and those provisions indisputably fall within Section 1252(a)(2)(B)(ii). But, as the government notes (Govt. Br. 20 & n.12), the Act also

contains provisions that contain less explicit language. As to these less explicit provisions, the courts of appeals are divided on whether the language is sufficient to vest the Attorney General with unreviewable discretion under Section 1252(a)(2)(B)(ii).

In this case, however, the Court need not resolve the issue because the relevant statutory provisions governing reopening motions contain no discretion-conferring language whatsoever, as the government correctly notes (Govt. Br. 20), and as even the Seventh Circuit acknowledged, 533 F.3d at 536. Instead, the Court should reserve the issue for a case where the relevant statutory provision contains language that at least arguably confers discretion and there is an actual controversy (and full briefing) on the issue.

Indeed, even if the Court were to accept the Seventh Circuit's position that Section 1252(a)(2)(B)(ii) applies where the discretion-conferring language appears solely in regulations, the Court would still not need to address what type of language is sufficient to confer unreviewable discretion on the Attorney General. Here, the relevant regulations explicitly grant the agency "discretion" to grant or deny a motion to reopen. As a result, there is no reason to address this issue, even if the Court holds that Section 1252(a)(2)(B)(ii) applies to motions to reopen.

2) Second, the Court need not decide whether Section 1252(a)(2)(B)(ii) bars review only where the

Attorney General's decision is actually based on an exercise of discretion, or instead, precludes review of *all* claims (factual, legal and discretionary) that in any way relate to a discretionary decision. The government implicitly assumes that Section 1252(a)(2)(B)(ii) bars review of all claims, and thus, if applicable to motions to reopen, would insulate such motions from all judicial scrutiny, including to correct factual and legal errors. *See* Govt. Br. at 30-31 (assuming that provisions generally providing for review of motions to reopen would have lacked any "purpose" if Section 1252(a)(2)(B)(ii) covered such motions); *see also* Pet. Br. at 28-33 and n.15. That is wrong.

Section 1252(a)(2)(B)(ii) bars review only where the Attorney General rules on discretionary grounds and the petitioner seeks review of that discretionary ruling. *See Zadvydas v. Davis*, 533 U.S. 678, 688 (2001) (holding that Section 1252(a)(2)(B)(ii) did not bar review of a legal claim challenging a discretionary detention decision). Thus, even if Section 1252(a)(2)(B)(ii) did generally cover motions to reopen (which it does not because the discretion is conferred solely by regulation), Kucana's particular motion was reviewable because it was denied on non-discretionary grounds.

In any event, because neither petitioner nor the government advances this argument as an alternative ground for reversal, the Court need not directly address the precise scope of the jurisdiction-stripping language in Section 1252(a)(2)(B)(ii). The

Court should also refrain from resting its decision on arguments that *implicitly* assume that Section 1252(a)(2)(B)(ii) bars review over all claims, and not just actual discretionary determinations.

In particular, the Court should not, and need not, adopt the position that the 1996 provisions spelling out the procedure for obtaining judicial review of motions to reopen (such as the consolidation provision) would be rendered superfluous if Section 1252(a)(2)(B)(ii) applied to motions to reopen. As petitioner acknowledges, Pet. Br. at 33 n.15, those provisions would only be rendered meaningless if Section 1252(a)(2)(B)(ii) bars review of all types of claims, rather than narrowing the scope of review to non-discretionary (factual and legal) claims. If, however, Section 1252(a)(2)(B)(ii) permits review of non-discretionary claims, then the provisions would have meaning: they would set forth the procedure for filing a petition for review from the denial of a motion to reopen and Section 1252(a)(2)(B)(ii) would then dictate the scope of that review.

There are ample indications that Congress did not intend for Section 1252(a)(2)(B)(ii) to apply to motions to reopen – including most importantly the unambiguous language of Section 1252(a)(2)(B)(ii) itself. Thus, the Court can hold that motions to reopen are not covered by Section 1252(a)(2)(B)(ii), without addressing, directly or indirectly, the scope of Section 1252(a)(2)(B)(ii)'s preclusion language or adopting the "superfluous" argument.

3) Finally, the Court need not address whether 8 U.S.C. 1252(a)(2)(D) provided the court of appeals with jurisdiction, since petitioner apparently did not argue below that he was raising "constitutional claims" or "questions of law" within the meaning of Section 1252(a)(2)(D), and neither petitioner nor the government argues in this Court that review of Kucana's motion to reopen is available under Section 1252(a)(2)(D). *See* Govt. Br. at 17-18 n.9 (noting that scope of Section 1252(a)(2)(D) is not presented here).

The scope of Section 1252(a)(2)(D)'s jurisdiction-restoring language – and in particular the meaning of the term "questions of law" – is the subject of extensive litigation and has given rise to several circuit splits. Among other questions, the courts of appeals have sharply differed on how to differentiate between an unreviewable factual claim and a reviewable mixed question of law and fact. Given the circuit conflicts, and the fact that no party is raising the issue, the Court should not address the scope of Section 1252(a)(2)(D). Nor should the Court characterize petitioner's claim as either factual or legal, since nothing turns on that characterization in this case.

ARGUMENT

I. SECTION 1252(a)(2)(B)(ii) DOES NOT APPLY TO MOTIONS TO REOPEN BECAUSE DISCRETION IS SPECIFIED SOLELY IN THE REGULATIONS.

As petitioner and the government have briefed at greater length, the jurisdictional bar in Section 1252(a)(2)(B)(ii) applies only where discretion is conferred by statute, rather than by regulations. The plain language of the jurisdiction-stripping provision makes clear that the agency's discretionary rulings are unreviewable only where the discretionary authority is "specified" in the relevant "subchapter" of the INA. The relevant "subchapter" is subchapter II of Chapter 12, 8 U.S.C. 1151-1381. Subchapter II, at 8 U.S.C. 1229a(c)(7), creates a statutory right to reopen and lays out the general rules governing such motions. It does not, however, specify that decisions on motions to reopen are in the discretion of the Attorney General.

The statutory silence is significant, since Sections 1151-1381 clearly specify many other discretionary powers of the Attorney General. *See, e.g.*, 8 U.S.C. 1157(c)(1) ("the Attorney General may, *in the Attorney General's discretion* and pursuant to such regulations as the Attorney General may prescribe, admit any refugee who is not firmly resettled in any foreign country") (emphasis added).

Notably, although the Seventh Circuit reached a contrary conclusion, it did not identify any language in the statute that confers discretion on the Attorney General. Instead, it looked to the language of the regulations governing motions to reopen, which provide that "[t]he decision to grant or deny a motion to reopen or reconsider is within the discretion of the Board." 8 C.F.R. 1003.2(a). But,

under the plain language of Section 1252(a)(2)(B)(ii), the discretion must be specified in the statute.

Moreover, the Seventh Circuit's decision is not only inconsistent with Section 1252(a)(2)(B)(ii)'s plain language, but has the effect of permitting the agency charged with enforcing the immigration laws to determine which of its actions will be reviewable and which will not. Indeed, the jurisdiction of the courts of appeals would no longer be controlled by the statutory regime created by Congress, but rather by the agency whose actions are being reviewed. This result is inconsistent with the statute, longstanding practice, and the "strong presumption in favor of judicial review of administrative action." *See INS v. St. Cyr*, 533 U.S. 289, 298 (2001).

Thus, as every other circuit to address the issue has concluded, motions to reopen are not covered by Section 1252(a)(2)(B)(ii).[3] To resolve this case, the Court need go no further than to hold that Section 1252(a)(2)(B)(ii) applies only where the

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[3] *See Tandayu v. Mukasey*, 521 F.3d 97, 100 (1st Cir. 2008); *Kaur v. BIA*, 413 F.3d 232, 233 (2d Cir. 2005) (per curiam); *Shardar v. Atty. Gen. of U.S.*, 503 F.3d 308, 311 (3d Cir. 2007); *Barry v. Gonzales*, 445 F.3d 741, 744 (4th Cir. 2006); *Zhao v. Gonzales*, 404 F.3d 295, 303 (5th Cir. 2005); *Fang Huang v. Mukasey*, 523 F.3d 640, 654 (6th Cir. 2008); *Miah v. Mukasey*, 519 F.3d 784, 789 n.1 (8th Cir. 2008); *Medina-Morales v. Ashcroft*, 371 F.3d 520, 529 (9th Cir. 2004); *Infanzon v. Ashcroft*, 386 F.3d 1359, 1361-62 (10th Cir. 2004); *Montano Cisneros v. U.S. Atty. Gen.*, 514 F.3d 1224, 1226 (11th Cir. 2008).

Attorney General's discretionary authority is specified by statute.

II. THE COURT SHOULD NOT ADDRESS THREE JURISDICTIONAL ISSUES THAT HAVE NOT BEEN BRIEFED AND ARE NOT SQUARELY PRESENTED HERE.

A. The Court Need Not Decide What Type of Statutory Language is Necessary to Confer Discretion Within The Meaning of Section 1252(a)(2)(B)(ii).

The Seventh Circuit recognized that the relevant statutory provisions governing motions to reopen contain *no* discretion-conferring language whatsoever. 533 F.3d at 536. *See* Govt. Br. at 20 (noting that the statute does not contain "any" discretion-conferring language). That is plainly correct. Thus, this case does not raise the question of what words – short of actually mentioning the term "discretion" – are sufficient to specify that a decision is discretionary within the meaning of Section 1252(a)(2)(B)(ii). Wherever the line is drawn, the statutory provisions governing motions to reopen would be insufficient.

Moreover, there is no question that the regulations *do* explicitly confer discretion: "[t]he decision to grant or deny a motion to reopen or reconsider is within the discretion of the Board." 8 C.F.R. 1003.2(a). Thus, even if the Court were to

accept the Seventh Circuit's view that Section 1252(a)(2)(B)(ii) applies where the discretion-conferring language is contained solely in regulations, there would be no need to address whether language that does not explicitly mention the term "discretion" is sufficient to trigger Section 1252(a)(2)(B)(ii).

Reserving the issue is especially appropriate because the courts of appeals are divided on the question. For example, the courts are divided on whether they are precluded from reviewing the "particularly serious crime" determination governing eligibility for asylum and withholding of removal. *Compare, e.g.*, *Matsuk v. INS*, 247 F.3d 999, 1002 (9th Cir. 2001) (holding that the "particularly serious crime" determination is discretionary and thus unreviewable under Section 1252(a)(2)(B)(ii), notwithstanding the fact that the statute does not explicitly mention the Attorney General's *discretion*), *with Alaka v. Atty. Gen.*, 456 F.3d 88, 100-02 (3d Cir. 2006) (holding that the "particularly serious crime" determination is not discretionary and can be reviewed); *Nethagani v. Mukasey*, 532 F.3d 150, 154-55 (2d Cir. 2008) (same).

Similarly, the courts of appeals are divided on whether the phrase "extreme cruelty" in 8 U.S.C. 1229b(b)(2) is unreviewable notwithstanding the fact that the statute nowhere expressly refers to the Attorney General's "discretion." *Compare, e.g.*, *Stepanovic v. Filip*, 554 F.3d 673, 680 (7th Cir. 2009) (holding that the phrase "extreme cruelty" is

inherently discretionary and unreviewable because it requires "a judgment call"); *Perales-Cumpean v. Gonzales*, 429 F.3d 977, 982 (10th Cir. 2005) (same), *with Hernandez v. Ashcroft*, 345 F.3d 824, 833-34 (9th Cir. 2003) (holding that extreme cruelty is not discretionary but instead involves "application of law to factual determinations").

The disagreement over what type of language confers discretion within the meaning of Section 1252(a)(2)(B)(ii) is also at issue in many other contexts, including whether an alien has met the "good faith" marriage requirement necessary for a hardship waiver,[4] and the decision to revoke a visa.[5] Because the Court's analysis of what language is sufficient to confer discretion for purposes of Section

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[4] *Compare Cho v. Gonzales*, 404 F.3d 96, 100-02 (1st Cir. 2005) (holding that the "good faith marriage" determination for a hardship waiver under Section 1186a(c)(4) is reviewable); *Ibrahimi v. Holder*, 566 F.3d 758, 763 (8th Cir. 2009) (same), *with Urena-Tavarez v. Ashcroft*, 367 F.3d 154, 159-61 (3d Cir. 2004) (holding "good faith marriage" is discretionary and unreviewable); *Assaad v. Ashcroft*, 378 F.3d 471, 475 (5th Cir. 2004) (same).

[5] *Compare ANA Intern., Inc. v. Way*, 393 F.3d 886, 893-94 (9th Cir. 2004) (holding that the decision to revoke a visa is reviewable because there are non-discretionary standards for the courts to apply), *with Jilin Pharmaceutical USA, Inc. v. Chertoff*, 447 F.3d 196, 203-04 (3d Cir. 2006) (holding that because the statute states that the Attorney General "may" revoke a visa "at any time" the decision is specified as discretionary in the statute and falls within Section 1252(a)(2)(B)(ii)); *El-Khader v. Monica*, 366 F.3d 562, 567 (7th Cir. 2004) (same).

1252(a)(2)(B)(ii) has potentially significant implications for these and other categories of cases, *amicus* urges the Court not to address the issue until it is squarely presented in an actual controversy and the parties have fully briefed the issue.

B. The Court Need Not Address Whether Section 1252(a)(2)(B)(ii) Permits Review Over Non-Discretionary Claims.

After concluding (incorrectly) that Section 1252(a)(2)(B)(ii) applies to motions to reopen, the Seventh Circuit then held that Section 1252(a)(2)(B)(ii) divested it of jurisdiction over both discretionary and non-discretionary claims. Accordingly, it held that Section 1252(a)(2)(B)(ii) precluded review over Kucana's particular claims, which it acknowledged were non-discretionary. 533 F.3d at 537. That broad interpretation of Section 1252(a)(2)(B)(ii) is erroneous. However, the Court need not in this case address whether Section 1252(a)(2)(B)(ii) precludes review over non-discretionary claims because neither petitioner nor the government makes the argument that the Seventh Circuit could have reviewed Kucana's particular claims even if Section 1252(a)(2)(B)(ii) generally applied to motions to reopen. Furthermore, and importantly, the Court should not adopt the position that certain statutory provisions would be rendered superfluous if Section 1252(a)(2)(B)(ii) applied to reopening motions, because that argument implicitly assumes that

Section 1252(a)(2)(B)(ii) precludes review of *all* claims, factual, legal and discretionary.

1. Section 1252(a)(2)(B)(ii) applies only to *discretionary* determinations made by the agency, and not every claim related to a discretionary decision. Thus, even where a particular type of agency decision generally falls under Section 1252(a)(2)(B)(ii) (because the statute confers clear discretionary authority), the courts of appeals are not divested of jurisdiction in particular cases if the actual basis of the agency's decision is non-discretionary.

Here, the BIA did not deny Kucana's motion to reopen in the exercise of its discretion. Instead, it made a non-discretionary determination that Kucana had failed to demonstrate the requisite changed circumstances for reopening:

> Based on the evidence submitted, we are unable to find that the respondent established his prima facie eligibility for asylum or withholding of deportation based on material changes that have occurred in Albania since his failure to appear.

Pet. App. 25a. Nowhere in its decision did the BIA indicate that it was denying Kucana's motion to reopen as a matter of discretion. Thus, even if Section 1252(a)(2)(B)(ii) applies to motions to reopen, the Seventh Circuit erred in holding that it did not have jurisdiction over Kucana's claims.

The government's brief, however, implicitly assumes that Section 1252(a)(2)(B)(ii) applies to all claims related to a discretionary decision. The government notes that Congress in 1996 not only codified the right to file a motion to reopen, but also expressly provided procedures for obtaining judicial review of reopening motions. *See* Govt. Br. at 30-31 (citing 8 U.S.C. 1252(b)(6)). The government thus argues that Congress would have had no reason to spell out a procedure for judicial review of motions to reopen if Section 1252(a)(2)(B)(ii) was intended to cover such motions, since Section 1252(a)(2)(B)(ii) would have divested the courts of appeals of all review over reopening motions. *See* Govt. Br. at 31; *see also* Pet. Br. at 28-33 (making same argument); *but see id.* at 33 n.15.

But that is only true if (as petitioner notes, Pet. Br. at 33 n.15) Section 1252(a)(2)(B)(ii) divested the courts of appeals of all review over motions to reopen, regardless of the basis for the denial of the motion. The provisions would not be rendered superfluous if (as *amicus* contends) Section 1252(a)(2)(B)(ii) covers only those denials that are actually based on the exercise of discretion, since that would leave the courts with jurisdiction to review motions to reopen that were denied on the basis of legal or factual determinations (as in this case).[6]

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[6] Petitioner makes the same superfluous argument, Pet. Br. at 28-33, but acknowledges that the superfluous argument only has force if Section 1252(a)(2)(B)(ii) precludes review of all

Notably, the position taken by the government in this Court is directly at odds with the position it took in the Seventh Circuit. There, the government advanced two arguments. It argued, as it does here, that motions to reopen are generally not covered by Section 1252(a)(2)(B)(ii) because the discretion-conferring language is contained solely in regulations. But, significantly, it also argued that Kucana's motion would have been reviewable in any event, because it was denied on non-discretionary grounds. Indeed, as the Seventh Circuit noted, the latter argument was the government's principal contention in the court of appeals. 533 F.3d at 537. Yet now the government appears to be suggesting that Section 1252(a)(2)(B)(ii), where applicable, bars review over all types of claims.

The government's position in the Seventh Circuit was the correct one. In *Zadvydas v. Davis*, 533 U.S. 678 (2001), the Court held that Section 1252(a)(2)(B)(ii) does not bar jurisdiction over a statutory claim related to the Attorney General's discretionary detention authority. The Court explained that the aliens in *Zadvydas* do not

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claims, discretionary or non-discretionary. *See id.* at 33 n.15; *see also id.* (acknowledging authority contrary to the position that Section 1252(a)(2)(B)(ii) precludes review of all claims, discretionary and non-discretionary); *see infra* at 16-17 and n.7 (discussing that courts of appeals have overwhelmingly held that Section 1252(a)(2)(B)(ii) precludes review only of discretionary determinations).

> 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.

533 U.S. at 688. This Court thus made clear that the proper focus under Section 1252(a)(2)(B)(ii) is on the particular claim asserted by the petitioner, not whether the claim is related to a decision that is ultimately in the discretion of the Attorney General. *See also St. Cyr*, 533 U.S. at 307-08.

The courts of appeals have also overwhelmingly held that Section 1252(a)(2)(B) bars review only where the alien is challenging a discretionary determination, and does not bar review of factual or legal claims. *See, e.g.*, *Singh v. Gonzales*, 413 F.3d 156, 160 n.4 (1st Cir. 2005) (reviewing a non-discretionary determination related to a discretionary decision covered by 1252(a)(2)(B)); *Sepulveda v. Gonzales*, 407 F.3d 59, 62-63 (2d Cir. 2005) (same); *Rodriguez v. Gonzales*, 451 F.3d 60, 62 (2d Cir. 2006) (same); *Mireles-Valdez v. Ashcroft*, 349 F.3d 213, 215-16 (5th Cir. 2003) (same); *Garcia-Melendez v. Ashcroft*, 351 F.3d 657, 661 (5th Cir. 2003) (same); *Santana-Albarran v. Ashcroft,* 393 F.3d 699, 703 (6th Cir. 2005) (same); *Aburto-Rocha v. Mukasey*, 535 F.3d 500, 502-03 (6th Cir. 2008) (same); *Ortiz-Cornejo v. Gonzales*, 400 F.3d 610, 612 (8th Cir. 2005) (same); *Gutierrez v. Mukasey*, 521

F.3d 1114, 1116 (9th Cir. 2008) (same); *Montero-Martinez v. Ashcroft*, 277 F.3d 1137, 1140-41 (9th Cir. 2002) (same); *San Pedro v. Ashcroft*, 395 F.3d 1156, 1157-58 (9th Cir. 2005) (same); *Sabido Valdivia v. Gonzales*, 423 F.3d 1144, 1147-49 (10th Cir. 2005) (same).[7]

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[7] With the exception of the Seventh Circuit, *amicus* is not aware of any case, before or after the 2005 enactment of 8 U.S.C. 1252(a)(2)(D), holding that non-discretionary legal claims are barred by Section 1252(a)(2)(B). Equally as significant, *amicus* is also not aware of any decision issued before the enactment of Section 1252(a)(2)(D), outside the Seventh Circuit, that held that Section 1252(a)(2)(B) barred review of non-discretionary factual claims. Insofar as there are a handful of post-2005 cases suggesting that non-discretionary factual claims are barred by Section 1252(a)(2)(B), those cases are almost all dicta, devoid of any analysis, and frequently inconsistent with precedent within the same circuit.

Among other things, the cases do not even attempt to explain the textual basis in Section 1252(a)(2)(B) for distinguishing between legal claims, on the one hand, and factual and discretionary claims, on the other (as opposed to drawing a line between discretionary and non-discretionary claims). Indeed, these cases simply assume that with the enactment of Section 1252(a)(2)(D), they can no longer review non-discretionary factual claims. *See, e.g.*, *Andrada v. Gonzales*, 459 F.3d 538, 542 (5th Cir. 2006) (stating without analysis that the courts of appeals "continue" not to have jurisdiction over factual claims, citing Section 1252(a)(2)(D), and not acknowledging its own pre-2005 case law finding review under Section 1252(a)(2)(B) of non-discretionary factual claims, such as *Garcia-Melendez*, 351 F.3d at 651); *Arambula-Medina v. Holder*, --- F.3d ---, No. 08-9589, 2009 WL 1978726 at *2 (10th Cir. July 10, 2009) (stating that it may not review factual claims under Section 1252(a)(2)(B), but erroneously relying on a prior decision involving a complete jurisdictional

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 notwithstanding conclusion that the CIA Director's ultimate decision to discharge the employee was discretionary and unreviewable under APA Section 701(a)(2)); *Ward v. Skinner*, 943 F.2d 157, 159-60 (1st Cir. 1991) (Breyer, C.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

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bar precluding "review [of] any determination"). *Cf. Suvorov v. Gonzales*, 441 F.3d 618, 622 (8th Cir. 2006) (finding no review of factual claims in a case involving both Section 1252(a)(2)(B) and a separate jurisdictional bar specifically governing factual claims). But that position wrongly assumes that Section 1252(a)(2)(D) narrowed the scope of review under Section 1252(a)(2)(B). It is indisputable, however, that Section 1252(a)(2)(D) was not intended to narrow review, but to ensure that legal and constitutional claims would be reviewable if they were otherwise unreviewable under the 1996 jurisdiction-stripping provisions.

claim relates in some manner to a discretionary decision or action, is supported by the text of Section 1252(a)(2)(B)(ii) (with its emphasis on *discretion*), this Court's repeated admonition that jurisdiction-stripping 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"). Thus, as the government argued in the court of appeals, Section 1252(a)(2)(B)(ii) does not apply where the BIA's decision is based on non-discretionary grounds.

2. In this case, however, neither petitioner nor the government has urged this alternative ground for reversal; rather, each has argued solely that motions to reopen are not covered by Section 1252(a)(2)(B)(ii) because there is no discretion-conferring language in the reopening statute. Thus, given that the issue has not been fully briefed or squarely presented, *amicus* urges the Court not to address the issue directly or indirectly, thereby foreclosing its resolution in a future case (assuming it is still an open issue in light of the Court's decision in *Zadvydas*).

In particular, the Court should not adopt the position that the procedures enacted in 1996 for obtaining judicial review of reopening motions would be rendered meaningless if Section 1252(a)(2)(B)(ii) applied to motions to reopen. As noted, that argument assumes that Section 1252(a)(2)(B)(ii) would have eliminated all review, even over factual

and legal claims relating to the denial of a reopening motion.

The fact that these provisions would not be rendered superfluous in no way detracts from the force of the government's and petitioner's submission. Even without this argument, it is clear that Section 1252(a)(2)(B)(ii) does not apply to motions to reopen, given the plain language of the statute, the history of judicial review over such motions, and the strong presumption in favor of judicial review. There is thus no reason for the Court to adopt arguments that would unnecessarily foreclose later resolution of the issue.

Nor does the 2005 passage of 8 U.S.C. 1252(a)(2)(D) render the question academic. As discussed more fully below, Section 1252(a)(2)(D) ensures review over constitutional claims and questions of law and does so notwithstanding the INA's jurisdictional bars, including Section 1252(a)(2)(B)(ii). But Section 1252(a)(2)(D) does not restore review of *factual* claims. As a result, there is enormous practical importance hinging on whether Section 1252(a)(2)(B)(ii) precludes review of all claims or just those that challenge the actual exercise of discretion. In short, *amicus* urges the Court to refrain from commenting, directly or indirectly, on whether Section 1252(a)(2)(B)(ii), where applicable, bars review of all claims or just discretionary determinations.

C. The Court Need Not Address Section 1252(a)(2)(D) or Determine

Whether Kucana's Claims Were Factual or Legal.

1. Section 1252(a)(2)(D) was added to the INA in 2005 and, as noted, ensures review over constitutional claims and "questions of law" and does so notwithstanding the INA's myriad jurisdictional bars (with exceptions not material here).[8] In this case, however, petitioner does not contend that he was raising a question of law, and thus does not argue that even if Section 1252(a)(2)(B)(ii) barred review of his motion to reopen, the court of appeals would have had jurisdiction to review his claims under Section 1252(a)(2)(D).

Instead, petitioner appears to concede that his claim does not fall within Section 1252(a)(2)(D). Pet. Br. at 33 n.15. Moreover, the Seventh Circuit specifically noted that petitioner did not argue below that he was raising a legal claim. 533 F.3d at 538. And the government agrees that Section 1252(a)(2)(D) is not at issue here because petitioner does not assert that he is raising a legal claim. Govt. Br. at 17-18 n.9 (noting that the question presented does not include Section 1252(a)(2)(D)). Given the

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[8] Section 1252(a)(2)(D) provides:

> Nothing in subparagraph (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.

parties' positions, the Court need not and should not address the scope of Section 1252(a)(2)(D), and should instead await an actual controversy implicating Section 1252(a)(2)(D).

Nor is there any need for the Court to characterize petitioner's claim as either factual or legal, since that distinction is relevant only with respect to Section 1252(a)(2)(D), and not to any of the arguments advanced by petitioner or the government. As already discussed, both petitioner and the government make only one argument – that Section 1252(a)(2)(B)(ii) is inapplicable to motions to reopen because the discretion-conferring language appears solely in regulations. Neither party makes the alternative argument that even if Section 1252(a)(2)(B)(ii) generally applied to motions to reopen, it would not have barred review in this particular case because Kucana's motion was not denied in the exercise of discretion. *But see* Pet. Br. at 33 n.15.

But even if petitioner or the government had made that alternative argument, there would still be no need for this Court to characterize petitioner's claim as either factual or legal. All that would be necessary would be to decide if Kucana had raised a *non*-discretionary claim, factual or legal. And there is no dispute that he did so. *See* Govt. Br. at 14; Pet. Br. at 33 n.15; 533 F.3d at 537.

In fact, Section 1252(a)(2)(D) is significant only in cases where there is a complete jurisdictional bar that precludes review not just of discretionary

determinations, but of *all* determinations – factual, legal, constitutional and discretionary. *See*, *e.g.*, *Kamara v. Atty. Gen.*, 420 F.3d 202, 210-11 (3d Cir. 2005) (interpreting complete bar on reviewing claims raised by aliens removable on the basis of a criminal conviction); *Ramadan v. Gonzales*, 479 F.3d 646, 650 (9th Cir. 2007) (per curiam) (interpreting complete bar on all claims related to the asylum-filing deadlines). *See infra* at 25-26 (discussing additional cases).

In these cases, petitioners can only obtain review if they are able to raise legal or constitutional claims, since a full bar precludes review of factual and discretionary claims and Section 1252(a)(2)(D) restores review only over "constitutional claims" or "questions of law." Thus, it is critical in these types of cases that the courts of appeals not only determine whether a claim is discretionary or non-discretionary *but also* whether the claim is factual or legal. In contrast, where the only jurisdictional bar at issue is Section 1252(a)(2)(B)(ii), then the court need only decide whether a claim is discretionary or non-discretionary, since 1252(a)(2)(B)(ii) is a limited bar precluding review only where there is an actual exercise of discretion, as *amicus* explained above.

2. Reserving any issues regarding Section 1252(a)(2)(D) is especially appropriate because the courts of appeals are sharply divided over the meaning of the term "questions of law" in that provision. In particular, the courts are divided over two basic questions. The first is whether the term

"questions of law" is limited to pure questions of law or, instead, covers both pure legal claims as well as those involving the application of law to fact (*i.e.*, mixed questions of law and fact). The second issue concerns how to identify a reviewable mixed question of law and fact (assuming such claims fall within the term "questions of law" in the first place).

The impetus for Section 1252(a)(2)(D) was this Court's decision in *St. Cyr*, 533 U.S. 289, which interpreted the 1996 jurisdictional bar applicable to aliens with criminal convictions. The Court held that although the bar eliminated the court of appeals' petition-for-review jurisdiction over St. Cyr's legal claim, it did not eliminate district court habeas review (because it did not specifically mention the repeal of habeas corpus pursuant to 28 U.S.C. 2241). *Id.* at 308-09. And because the bar did not eliminate habeas corpus as a jurisdictional safety valve, it did not trigger the "substantial constitutional questions" that would have resulted from the complete elimination of review in any court by any means over legal claims. *Id*. at 300. But the Court in *St. Cyr* also made clear that Congress remained free to enact a substitute for habeas *provided* it was "neither inadequate nor ineffective" in scope. *Id.* at 314 n.38 (internal quotation marks and citation omitted).

Congress took up the Court's invitation in 2005 and eliminated district court habeas review over removal orders, *see*, *e.g.*, 8 U.S.C. 1252(a)(5), but simultaneously enacted Section 1252(a)(2)(D) to ensure the courts of appeals' petition-for-review

jurisdiction over constitutional claims and questions of law. By enacting Section 1252(a)(2)(D), Congress thus avoided the constitutional problems that would have been raised by the absence of any forum to raise legal claims. *See* H.R. Rep. No. 109-72, 173-75 (2005) (Joint House-Senate Conf. Rep.) (expressly referencing *St. Cyr* and acknowledging on several occasions Congress' understanding that it cannot eliminate all review in any forum over legal claims).[9]

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[9] Section 1252(a)(2)(D) is applicable to all INA provisions that eliminate or limit judicial review but specifically references Sections 1252(a)(2)(B) and (C). 8 U.S.C. 1252(a)(2)(D). Given that 1252(a)(2)(D) is a catch-all provision, Congress likely did not specifically determine which provisions within the INA did or did not eliminate review of legal and constitutional claims, including whether 1252(a)(2)(B) eliminated review over non-discretionary claims. But, insofar as the 2005 Congress gave the issue any attention, it may have wanted to take precautions because the government had been arguing prior to 2005 that subsection (i) of Section 1252(a)(2)(B) barred review of all determinations *related* to the five forms of discretionary relief enumerated within that subsection, and not simply the ultimate discretionary decision. *See, e.g., Sepulveda v. Gonzales*, 407 F.3d 59, 62 (2d Cir. 2005) (rejecting government's contention that Section 1252(a)(2)(B)(i) barred review "regardless of whether relief was denied as a matter of discretion"); *Prado v. Reno*, 198 F.3d 286, 290 (1st Cir. 1999) (same). The fact that Congress did not also enact a separate provision in addition to Section 1252(a)(2)(D) to clarify any possible confusion about whether provisions such as Section 1252(a)(2)(B) precluded review of factual claims is not surprising given that the 2005 Congress was specifically responding to this Court's decision in *St. Cyr* and its understanding that it was constitutionally obligated to provide review over legal and constitutional claims.

In light of Section 1252(a)(2)(D)'s passage, the courts of appeals uniformly agree that they may now review constitutional claims and questions of law and may do so notwithstanding the INA's jurisdictional bars. But they disagree on whether the term "questions of law" is limited to pure legal claims or, instead, encompasses the application of law to fact as well. *Compare, e.g.*, *Xiao Ji Chen v. U.S. Dep't of Justice*, 471 F.3d 315, 331 (2d Cir. 2006) ("the term 'questions of law' undeniably can encompass claims of 'erroneous *application* or interpretation of statutes'") (emphasis added by Second Circuit) (quoting *St. Cyr*, 533 U.S. at 302); *Singh v. Gonzales*, 432 F.3d 533, 541 (3d Cir. 2006) ("We have . . . held that [jurisdiction under Section 1252(a)(2)(D)] includes review of the BIA's application of law to undisputed fact"); *Jean v. Gonzales*, 435 F.3d 475, 482 (4th Cir. 2006) (finding that "a legal determination involving the application of law to factual findings . . . presents a reviewable decision" under Section 1252(a)(2)(D)); *Nguyen v. Mukasey*, 522 F.3d 853, 854-55 (8th Cir. 2008) (per curiam) (concluding that "whether the IJ properly applied the law to the facts" is a reviewable "legal question"); *Ramadan*, 479 F.3d at 650 (holding that the term "questions of law" in Section 1252(a)(2)(D) "extends to questions involving the application of statutes or regulations to undisputed facts"); *Jean-Pierre v. Atty. Gen.*, 500 F.3d 1315, 1322 (11th Cir. 2007) (concluding that it could review "the application of an undisputed fact pattern to a legal standard"), *with Almuhtaseb v. Gonzales*, 453 F.3d

743, 748 (6th Cir. 2006) (holding that jurisdiction under Section 1252(a)(2)(D) is limited to "review of constitutional claims or matters of statutory construction"); *Viracacha v. Mukasey*, 518 F.3d 511, 515 (7th Cir.) ("the proviso in § 1252(a)(2)(D) is limited to 'pure' questions of law"), *cert. denied*, 129 S.Ct. 451 (2008); *Diallo v. Gonzales*, 447 F.3d 1274, 1282 (10th Cir. 2006) ("in addition to constitutional claims, the REAL ID Act grants us jurisdiction to review 'a narrow category of issues regarding statutory construction'") (citation omitted).

In addition, even among those circuits that hold that mixed questions are reviewable under Section 1252(a)(2)(D), there is sharp disagreement over how to identify a mixed question. Among other things, the courts are divided, in result and analysis, on how to differentiate between a reviewable mixed question of law and fact and a pure, underlying fact – what this Court has termed a "basic," "primary" or "historical" fact. *Townsend v. Sain*, 372 U.S. 293, 309 n.6 (1963), *overruled on other grounds by Keeney v. Tamayo-Reyes*, 504 U.S. 1 (1992).

As this Court has stated, a mixed question of law and fact is one where:

> the historical facts are admitted or established, the rule of law is undisputed, and the issue is whether the facts satisfy the statutory standard, or to put it another way, whether the rule of law as applied to the established facts is or is not violated.

Pullman-Standard v. Swint, 456 U.S. 273, 289 n.19 (1982). *See also Ornelas v. United States*, 517 U.S. 690, 696 (1996) (describing the determination of "whether [the] historical facts . . . amount to reasonable suspicion or to probable cause" as "a mixed question of law and fact"); *Thompson v. Keohane*, 516 U.S. 99, 112-13 (1995) ("application of the controlling legal standard to the historical facts . . . presents a 'mixed question of law and fact'"); *Townsend*, 372 U.S. at 309 n.6 (distinguishing issues of fact, which "refer to what are termed basic, primary, or historical facts: facts in the sense of a recital of external events and the credibility of their narrators," from "mixed questions of fact and law, which require the application of a legal standard to the historical-fact determinations") (citation and internal quotation marks omitted).

Yet, notwithstanding this Court's general guidance on the issue, the courts of appeals are divided in the immigration context on how to distinguish between mixed questions and unreviewable pure facts. For example, the courts have disagreed about whether Section 1252(a)(2)(D) permits them to review the BIA's determination that the underlying facts of a case failed to satisfy the standard for relief under the Convention Against Torture (CAT). *Compare, e.g.*, *Toussaint v. Atty. Gen.*, 455 F.3d 409, 412 n.3 (3d Cir. 2006) (holding that application of the CAT standard is a legal question because it involves "not disputed facts but whether the facts, even when accepted as true, sufficiently demonstrate that it is more likely than

not that she will be subject to persecution or torture"), *with Hamid v. Gonzales*, 417 F.3d 642, 647 (7th Cir. 2005) (holding that application of the CAT standard is not a question of law because it comes down to "whether the IJ correctly considered, interpreted, and weighed the evidence presented"); *Saintha v. Mukasey*, 516 F.3d 243, 249-50 (4th Cir.), *cert. denied*, 129 S.Ct. 595 (2008) (application of the CAT standard is an unreviewable factual claim because it would normally be reviewed for substantial evidence).

Similarly, the courts of appeals have disagreed about whether the "extraordinary" or "changed" circumstances exceptions to the one-year asylum-filing deadline are unreviewable factual determinations or, instead, reviewable mixed questions under Section 1252(a)(2)(D). *Compare, e.g.*, *Ramadan*, 479 F.3d at 654, 656 (holding that "changed circumstances" is a "mixed question of law and fact" that is reviewable because "'questions of law' includes review of the application of statutes and regulations to undisputed historical facts"), *with Khan v. Filip*, 554 F.3d 681, 689 n.3 (7th Cir. 2009) (holding that petitioner's argument that the IJ "required him to provide more evidence . . . than is called for by the regulations" is factual because it "is an argument about the sufficiency of the evidence, not the interpretation of the regulation"); *Mehilli v. Gonzales*, 433 F.3d 86, 93 (1st Cir. 2005) ("BIA findings as to timeliness and changed circumstances are usually factual determinations").

3. *Amicus*' position is that Section 1252(a)(2)(D) applies to both pure legal claims and mixed questions of law and fact, and that the complete preclusion of review over the application of law to fact would raise serious Suspension Clause concerns. *See St. Cyr*, 533 U.S. at 301-02 (stating that "[a]t its historical core" the writ of habeas corpus encompassed "errors of law, including the erroneous application or interpretation of statutes"); *Boumediene v. Bush*, 128 S.Ct. 2229, 2266 (2008) ("the privilege of habeas corpus entitles the prisoner to a meaningful opportunity to demonstrate that he is being held pursuant to 'the erroneous application or interpretation' of relevant law") (quoting *St. Cyr*, 533 U.S. at 302); *Kamara*, 420 F.3d at 211 & n.5 (noting that "if the REAL ID Act imposed a narrower standard of review than that previously offered under a petition for habeas corpus, a significant Suspension Clause issue would arise" and thus concluding that Section 1252(a)(2)(D) covers "issues of application of law to fact") (internal quotation marks omitted); *Chen*, 471 F.3d at 326-27 (construing the REAL ID Act "to encompass the same types of issues that courts traditionally exercised in habeas review," including application or interpretation of statutes, in order to provide the constitutional protection required by the Suspension Clause and *St. Cyr*); *Ramadan*, 479 F.3d at 653 ("preclusion of judicial review over mixed questions of law and fact would raise serious constitutional questions under *St. Cyr*").

Thus, in this case, *if* petitioner had been arguing that the historical facts of his case satisfied some statutory or regulatory legal standard (such as the changed circumstances standard), he would have been raising a reviewable mixed question of law and fact under Section 1252(a)(2)(D). It is unclear what petitioner is precisely arguing but, in any event, neither the government nor petitioner has relied on Section 1252(a)(2)(D). Accordingly, the Court need not characterize the claim as factual or legal, or determine the precise contours of Section 1252(a)(2)(D).

* * * *

The narrow issue in this case should be decided on the ground that Section 1252(a)(2)(B)(ii) does not apply to motions to reopen because the discretion-conferring language appears solely in regulations. The Court should not reach any of the broader jurisdictional issues discussed above, which have not been briefed by the parties and are not squarely presented.

CONCLUSION

The judgment of the court of appeals should be reversed.

Respectfully submitted,

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July 20, 2009