No. _____

In the Supreme Court of the United States

AHMED ALI,

Petitioner,

v.

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

Respondents.

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

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether the Seventh Circuit erred in concluding – in direct conflict with the Third Circuit – that an offense need not be an aggravated felony to be classified as a "particularly serious crime" that bars eligibility for withholding of removal under 8 U.S.C. § 1231(b)(3)(B).

2. Whether the Seventh Circuit erred in narrowly construing the scope of its jurisdiction to review particularly serious crime determinations of the Board of Immigration Appeals under 8 U.S.C. §§ 1252(a)(2)(B)(ii) and (a)(2)(D), by treating non-discretionary denials of asylum and withholding of removal as discretionary in nature, and by refusing to consider arguments that the agency applied an incorrect legal standard, in direct conflict with the construction of those statutes by the Third, Ninth, and Tenth Circuits.

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PETITION FOR WRIT OF CERTIORARI

This petition seeks a writ of certiorari to review a court of appeals decision of three consolidated appeals: a petition for review of a final removal order of the Board of Immigration Appeals ("Board"), a petition for review of the Board's denial of a motion for reconsideration of its final removal order, and an appeal of the denial of a petition for a writ of habeas corpus in the federal district court. The questions presented implicate only the court of appeals' disposition of the issues raised in the removal order. The denial of the habeas petition is no longer at issue in this case.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Seventh Circuit is published at 468 F.3d 462 and is reproduced at App. 1a-20a. The decision of the district court denying the petition for habeas corpus is unpublished and is reproduced at App. 21a-30a. The order of the district court denying relief under Fed. R. Civ. P. 59(e) is unpublished and is reproduced at App. 31a-34a. The Board's order denying a motion to reconsider the Board's final removal order is unpublished and is reproduced at App. 35a. The Board's final removal order is unpublished and is reproduced at App. 36a-42a. The decision of the Immigration Judge ("IJ") that gave rise to the Board decision from which the petition for review was taken is unpublished and is reproduced at App. 43a-53a. A prior relevant order of the Board in this case is unpublished and is reproduced at App. 54a-59a. A prior relevant order of the IJ in this case is unpublished and is reproduced at App. 60a-69a. The Seventh Circuit's order denying the petition for rehearing with suggestion of rehearing en banc is unpublished and is reproduced at App. 70a-71a.

JURISDICTION

The judgment of the court of appeals was entered on November 6, 2006. A petition for rehearing with suggestion

of rehearing en banc was denied on January 5, 2007. Jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1). Jurisdiction over the habeas petition was proper in the district court under 28 U.S.C. § 2241. Jurisdiction before the Immigration Judge was proper under 8 U.S.C. § 1229a. The Board had jurisdiction to review the Immigration Judge's decision pursuant to 8 C.F.R. § 1003.1(b). Jurisdiction in the court of appeals was proper under 8 U.S.C. § 1252(a)(1) and 28 U.S.C. §§ 1291, 1294, and 2253.

RELEVANT STATUTORY PROVISIONS

The relevant statutory provisions are cited below and reproduced in Petitioner's Appendix (72a-81a).

8 U.S.C. § 1158(b)(2)

8 U.S.C. § 1231(b)(3)(B)

8 U.S.C. § 1252(a)(2)

STATEMENT

1. **Ali's Background in Somalia.** Petitioner Ahmed Ali ("Ali") was born on January 1, 1980, in Baidoa, Somalia, and is a member of the Rahanweyn clan. AR 929.[1] When Somalia descended into inter-clan warfare, two of Ali's brothers were killed (AR 929), Ali was shot at and threatened on several occasions (AR 929-930), and in 1996, soldiers from an opposing clan's army raided Ali's house and forced Ali to witness the brutal attempted rape and actual murder of his sister, Sophia (AR 929). After that incident, Ali and his remaining family fled, eventually arriving in Kenya where they lived as refugees under the auspices of the United Nations High Commissioner for Refugees.

Ali has been diagnosed as suffering from Post Traumatic Stress Disorder ("PTSD"). AR 1069. He experiences depression and guilt for surviving the warfare and witnessing the deaths of so many around him. In particular, according to Ali's attending psychiatric physician, Ali's witnessing (at age

[1] Citations to "AR" are to the Administrative Record.

16) of the assault on and murder of Sophia was "an event beyond the range of usual and customary events that most people experience during their lives," which triggered Ali's PTSD. AR 830-831. Manifestations of Ali's PTSD include hyper-vigilance, insomnia, and flashbacks of the traumatic episodes in Somalia, particularly the assault on and murder of his sister. AR 1069.

2. **Ali's Admission to the United States and His Conviction.** Ali was admitted to the United States as a refugee on August 30, 1999, at age 19, along with his mother and ten siblings. AR 929-930. Ali lived with a sister in Madison, Wisconsin. There, he worked at various retail stores and the Department of Housing at the University of Madison. AR 930. He also attended classes at Madison Area Technical College. *Id.*

After moving to Madison, Ali had three run-ins with a small group of individuals. In the first incident, Ali was threatened with a gun and then beaten up, requiring stitches as a result of blows to the face, AR 930-931; Ali filed a police report, but the assailants were never apprehended. In a second incident, Ali and one of the men from the April incident began fighting; both were cited for disorderly conduct. AR 931. The third occasion was more serious; the aggressor and Ali engaged in a physical fight involving a box cutter that Ali used for work. Both men required multiple stitches. AR 490, 930.

Ali was prosecuted for the June 30, 2000, incident. He pled guilty to the offense of Substantial Battery under Wisconsin law on April 12, 2001. AR 1354. Ali was sentenced to 11 months' imprisonment, AR 931, but was placed on "Huber Status" for most that period, which allowed him to leave jail during the day to continue his employment and attend medical appointments at the Dane County Mental Health Center. AR 931-932. It was after his June 2000 arrest that Ali was diagnosed for the first time with PTSD. Ali began treatment for his PTSD in September 2000 and contin-

ued treatment throughout the time he served at the Dane County Correctional Center.

3. **Removal Proceedings in the Agency**. On June 7, 2002, the government began removal proceedings against Ali, charging him with being removable because of his battery conviction. AR 1389-1391. Ali conceded removability, but requested that the IJ grant a refugee waiver to allow him to become a legal permanent resident. Ali also requested relief from removal in the forms of asylum, withholding of removal, and protection under the Convention Against Torture ("CAT"). AR 624. The IJ issued an oral decision on October 10, 2002, finding that Ali had suffered past persecution in Somalia and faced a clear probability of future persecution if returned there. While the IJ denied Ali's request for a waiver and for asylum, he granted withholding of removal. App., *infra*, 68a.

On November 12, 2002, the Government appealed the IJ's grant of withholding of removal to the Board and Ali cross-appealed the IJ's denial of asylum and a criminal waiver. AR 609-620. On November 14, 2003, the Board reversed the IJ's grant of withholding of removal, finding that Ali's battery conviction was a *per se* "particularly serious crime" ("PSC"), without regard to the mitigating facts and circumstances surrounding the offense. App., *infra*, 56a-59a. He was thus found ineligible for both Withholding of Removal and Asylum. *Id.* The Board remanded the case to the IJ for consideration of Ali's eligibility for relief under the CAT. AR 503. *Id.* at 59a.

The IJ conducted a second individual merits hearing on February 10, 2004, and issued an oral decision concluding that Ali faced a clear probability of torture upon return to Somalia. App., *infra*, 52a. As such, he granted Ali deferral of removal under CAT. *Id.* The Government again appealed the IJ's grant of relief from removal and Ali cross-appealed to preserve appellate review of all issues in his case. On

March 15, 2005, the Board issued an order overruling the IJ's grant deferring removal under the CAT. App., *infra*, 42a.

4. **Proceedings in the Court of Appeals.** Ali filed a timely petition for review in the Seventh Circuit on April 15, 2005. AR 9. The Seventh Circuit panel heard oral argument on January 9, 2006, and issued its decision on November 6, 2006, granting in part and denying in part the petition. The court agreed with Ali that the Board's rejection of his CAT claim was unreasoned and ignored several key pieces of evidence. App., *infra*, 15a-19a. It therefore remanded that portion of the case to the Board. However, the court rejected Ali's arguments that the standard applied to relief in the form of a refugee waiver under Section 1159(c) was erroneous (*id.* at 6a-10a) and that only aggravated felonies can be "particularly serious" so as to bar eligibility for both asylum and withholding of removal (*id.* at 10a-15a).[2] The court also held (*id.* at 15a) that it lacked jurisdiction under 8 U.S.C. § 1252(a)(2)(B) to consider Ali's argument that the Board misapplied the law in finding Ali's offense to be a "particularly serious crime."

On December 21, 2006, Ali timely filed a petition for rehearing with suggestion of rehearing en banc. On January 5, 2007, the Seventh Circuit issued an order denying the petition. App., *infra*, 70a.

REASONS FOR GRANTING THE PETITION

In this petition, Ali presents two questions that are worthy of this Court's attention. The first question raises an issue of exceptional importance as to which the Seventh Cir-

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[2] Although the immigration code employs the term "particularly serious crime" for both asylum and withholding of removal, the term is defined differently in the two contexts. Compare 8 U.S.C. § 1158(b)(2)(A) with 8 U.S.C. § 1231(b)(3)(B). In the asylum context, the term sweeps more broadly, such that some criminal offenses may be particularly serious for asylum, but not for withholding.

cuit's decision squarely conflicts with a recent decision of the Third Circuit with respect to eligibility for withholding of removal under 8 U.S.C. § 1231(b)(3)(B). The second question raises several closely related issues of statutory construction as to which the Seventh Circuit's decision directly conflicts with decisions of the Third, Ninth, and Tenth Circuits concerning the scope of the courts of appeals' jurisdiction under 8 U.S.C. §§ 1252(a)(2)(B)(ii) and (a)(2)(D) to review certain determinations of the Board of Immigration Appeals. Both questions thus implicate matters of great importance to the uniform development of the country's immigration laws as to which the courts of appeals are deeply and seemingly irrevocably divided.

I. The Circuits Are Split Concerning The Construction Of An Important Federal Statute – 8 U.S.C. § 1231(b)(3)(B) – That Governs Eligibility For Withholding Of Removal.

A. After the Seventh Circuit panel heard oral argument, but before decision in this case, the Third Circuit issued its decision in *Alaka v. Attorney General*, 456 F.3d 88 (3d Cir. 2006).[3] In *Alaka*, the Third Circuit held that the "plain language and structure" of 8 U.S.C. § 1231(b)(3)(B) "indicate that an offense must be an aggravated felony to be sufficiently 'serious'" for classification as a "particularly serious crime" (or "PSC") that bars eligibility for withholding of removal. *Id.* at 104-105. Ali therefore immediately brought the Third Circuit's decision to the Seventh Circuit's attention. Without addressing *Alaka*, the Seventh Circuit reached precisely the opposite conclusion as its sister circuit on the same issue, rejecting Ali's argument that "only aggravated felonies count as particularly serious crimes for purposes of withholding of removal." App., *infra*, 13a-14a. The panel then upheld the Board's determination that Ali is not eligible

[3] Ali submitted the *Alaka* case in a July 19, 2006 letter to the Seventh Circuit pursuant to Fed. R. App. P. 28(j).

for withholding of removal, notwithstanding the parties' agreement that Ali's offense was not an aggravated felony as that term is defined at 8 U.S.C. § 1101(a)(43). *Id.* at 12a n.3, 14a-15a.

B. The Third Circuit's construction of Section 1231(b)(3)(B) turned on the court's reading of the language, structure, and design of the statute. See *Alaka*, 456 F.3d at 104-105. This Court consistently has stressed that "statutory language cannot be construed in a vacuum," and that "the words of a statute must be read in their context and with a view to their place in the overall statutory scheme." *Davis v. Michigan Dep't of Treasury*, 489 U.S. 803, 809 (1989). Accord, *e.g.*, *Alexander v. Sandoval*, 532 U.S. 275, 288 n.7 (2001) ("interpretive inquiry begins with the text and structure of the statute").

Here, for purposes of withholding of removal, the statute reads as follows:

> [A]n alien who has been convicted of an aggravated felony (or felonies) for which the alien has been sentenced to an aggregate term of imprisonment of at least 5 years shall be considered to have committed a particularly serious crime. The previous sentence shall not preclude the Attorney General from determining that, *notwithstanding the length of sentence imposed*, an alien has been convicted of a particularly serious crime.

8 U.S.C. § 1231(b)(3)(B)(iv) (emphasis added). The term "particularly serious crime" is not defined in the statute. However, as the Third Circuit correctly concluded, the structure of the provision makes clear Congress' intent to tie the two critical sentences together in ascertaining when a crime is "particularly serious." *Alaka*, 456 F.3d at 104-105. The first sentence provides that crimes are *per se* particularly serious where (1) the offense or offenses are aggravated felonies and (2) a term of at least five years imprisonment is im-

posed. The second sentence provides that the first sentence does not preclude the Attorney General from finding offenses to be PSCs "'notwithstanding the length of sentence,'" but makes no reference to aggravated felonies. And because the second sentence "is clearly tied to the first," and in fact "explicitly refers back to the 'previous sentence,'" the Third Circuit read the language together to limit a PSC to one that is an aggravated felony. *Id.*

The same result obtains through application of the *expressio unius est exclusio alterius* canon of statutory interpretation. It is highly informative that Congress clearly stated that crimes can be "particularly serious" notwithstanding the absence of a five-year prison term, but did not manifest any intent to classify crimes as "particularly serious" if they are not aggravated felonies. See, *e.g.*, *Chevron U.S.A. Inc. v. Echazabal*, 536 U.S. 73, 81 (2002) *(expressio unius est exclusio alterius* canon applies where considering "a series of two or more terms or things that should be understood to go hand in hand, which is abridged in circumstances supporting a sensible inference that the term left out must have been meant to be excluded"); *Leatherman v. Tarrant County Narcotics Intelligence & Coordination Unit*, 507 U.S. 163, 168 (1993) (applying *expressio unius est exclusio alterius* canon).

C. The Seventh Circuit's reliance on the absence of a provision expressly providing that only aggravated felonies could be PSCs (App., *infra*, 14a) overlooks the sensible structural and contextual reading of the statutory text that relies on what Congress did say, rather than what it did not say. The Seventh Circuit's construction also guts the *expressio unius* principle; if that principle applied only where Congress had been specific, it would be of no use to courts in interpreting the law. It is precisely where Congress has expressly excluded one item and not expressly excluded another that courts reasonably infer Congressional intent not to exclude the other.

The Third Circuit's reading also better comports with the overall "structure" of the Immigration and Nationality Act ("INA"). See *Alexander*, 532 U.S. at 288 n.7. Under the INA, the standard of proof for withholding "is more demanding than that required for asylum, but an alien who makes the required showing is entitled to relief unless he falls within one of the statutory bars." *Groza v. INS*, 30 F.3d 814, 822 (7th Cir. 1994); *cf. INS v. Stevic*, 467 U.S. 407, 429-430 (1984) (withholding requires "more likely than not" showing); *INS v. Cardoza-Fonseca*, 480 U.S. 421, 449 (1987) ("'well-founded fear'" sufficient for asylum eligibility). Moreover, asylum generally leads to a permanent legal status and thus to citizenship (see 8 U.S.C. § 1159 (providing for adjustment to permanent resident status)), whereas withholding does not. Thus, Congress has enacted greater limitations on eligibility for asylum than for withholding. One is barred from asylum eligibility for failing to seek asylum within one year, 8 U.S.C. § 1158(a)(2)(B); for having been firmly resettled in another country before arriving in the United States, *id.* § 1158(b)(2)(A)(vi); for having unlawfully reentered the United States after being removed, *id.* § 1231(a)(5), 8 C.F.R. § 208.31; or in situations where the alien may be removed to a safe third country, 8 U.S.C. § 1158(a)(2)(A). None of those provisions applies to eligibility for withholding.

Congress' use of different rules for the term "particularly serious crime" in the contexts of eligibility for asylum and withholding thus makes sense in the overall statutory scheme and should be given effect. The Third Circuit's approach resonates with the Congressional desire evinced in the INA that eligibility for withholding of removal be significantly broader than for asylum, just as eligibility for protection under CAT is broader than eligibility for withholding of removal. See App., *infra*, 16a-19a. Congress has specified that for purposes of asylum, any aggravated felony will be considered to constitute a PSC, and will thus bar asylum eligibility. 8 U.S.C. § 1158(b)(2)(B)(i). For withholding of

removal, however, only aggravated felonies with a five-year jail sentence are *per se* considered particularly serious. 8 U.S.C. § 1231(b)(3)(B). And under that scheme, individuals who have committed "serious" – but not "particularly serious" – crimes are permitted to remain in the United States, but may not obtain permanent status or citizenship.

II. The Circuits Are Deeply Divided As To The Scope Of Review Permitted Over Particularly Serious Crime Determinations.

A. The Seventh Circuit's decision below deepens the already complex divisions in the circuits regarding the federal courts' jurisdiction to review PSC determinations of the Board of Immigration Appeals. Pursuant to 8 U.S.C. § 1231(b)(3)(B), withholding of removal may not be granted "if the Attorney General *decides that* * * * (ii) the alien, having been convicted by a final judgment of a particularly serious crime is a danger to the community of the United States." 8 U.S.C. § 1231(b)(3)(B)(ii) (emphasis added). Congress has precluded the federal courts of appeals from reviewing any 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, other than the granting of relief under section 1158(a) of this title." 8 U.S.C. § 1252(a)(2)(B)(ii). However, in 8 U.S.C. § 1252(a)(2)(D),[4] Congress recently expanded the court of appeals' jurisdiction over certain legal claims, notwithstanding 8 U.S.C. § 1252(a)(2)(B), § 1252(a)(2)(C), and other jurisdiction-stripping provisions in the INA. Section 1252(a)(2)(D) provides that "[n]othing 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." 8 U.S.C. § 1252(a)(2)(D).

[4] Congress enacted Section 1252(a)(2)(D) in the Real ID Act of 2005, Pub. L. No. 109-13, Div. B, 119 Stat. 231, 302, 310.

Thus, even in cases where the provisions of Section 1252(a)(2)(B)(ii) apply, Section 1252(a)(2)(D) now permits review of the subset of claims that are properly classified as "questions of law."

The courts of appeals are divided on two important and related questions concerning these statutes. First, they differ as to whether review of a PSC determination is affected at all by the bar on review of discretionary decisions established in 8 U.S.C. § 1252(a)(2)(B)(ii). The Seventh Circuit holds that, in light of Section 1252(a)(2)(B)(ii), a PSC determination generally is not reviewable; the Third Circuit holds that such a determination is reviewable; the Ninth Circuit has agreed generally with the Seventh Circuit's construction. Second, the courts are at odds over the intersection of Section 1252(a)(2)(B)(ii) and Section 1252(a)(2)(D). In the decision below, the Seventh Circuit narrowly construed Section 1252(a)(2)(D) to preclude review of errors in the agency's legal analysis, including of its own prior precedents. By contrast, the Ninth and Tenth Circuits would permit such review.

1. In this and other cases, the Seventh Circuit has held that PSC determinations are discretionary decisions which lie within the bar imposed by Section 1252(a)(2)(B)(ii). See App., *infra*, 10a; *Tunis v. Gonzales*, 447 F.3d 547, 549 (7th Cir. 2006) (Posner, J.). The Seventh Circuit has read Section 1231(b)(3)(B)(ii) as giving "the Attorney General * * * discretion to rule that the alien's 'aggravated felony' is not a 'particularly serious crime' and hence does not bar * * * relief." *Tunis*, 447 F.3d at 549. And from that conclusion, the court has deduced that Section 1252(a)(2)(B)(ii) precludes judicial review, except over questions of law: "[t]he courts have (with an immaterial exception) no jurisdiction to review discretionary determinations by the Attorney General concerning immigration, 8 U.S.C. § 1252(a)(2)(B)(ii), including determinations under 8 U.S.C. § 1231(b)(3)(B)(ii)." *Id.*

Like the Seventh Circuit, the Ninth Circuit has held that the PSC determination is discretionary for purposes of 8

U.S.C. § 1252(a)(2)(B)(ii). *Matsuk v. INS*, 247 F.3d 999, 1002 (9th Cir. 2001) ("The decision to deny withholding to Matsuk was based upon the Attorney General's discretion. * * * Thus, Section 1252(a)(2)(B)(ii) divests this court of jurisdiction to review this issue."). The only authority cited by the Ninth Circuit for that proposition was a Board of Immigration Appeals case, *In re S-S-*, 22 I. & N. Dec. 458, 464 (BIA 1999) ("[t]he Attorney General has discretionary authority to determine whether an aggravated felony conviction resulting in a sentence of less than 5 years is a particularly serious crime"). The *Matsuk* Court held that the PSC determination was within the Attorney General's discretion; it neither asked nor purported to answer the question of whether that discretion had been expressly conferred by Congress.

In contrast to the Seventh and Ninth Circuits, the Third Circuit has held that review of PSC determinations is not barred by Section 1252(a)(2)(B)(ii). *Alaka v. Att'y Gen.*, 456 F.3d 88 (3d Cir. 2006); see also *Lavira v. Att'y Gen.*, 478 F.3d 158 (3d Cir. 2007). The basis for the Third Circuit's approach is the text of Section 1252(a)(2)(B)(ii), which precludes review only over decisions "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." 8 U.S.C. § 1252(a)(2)(B)(ii) (emphasis added). As the Third Circuit has observed, "Congress knows how to 'specify' discretion and has done so repeatedly in other provisions of the INA," noting thirty-two areas in which discretion has expressly been given to the immigration agencies. *Alaka*, 456 F.3d at 98 & n.17. Moreover, the court found that unlike provisions that employ the term "may" – which connotes discretion – the text of Section 1231(b)(3)(B)(ii) only uses the term "decides." *Id.* at 100. The court further noted that withholding of removal is a mandatory, not discretionary, form of relief, and reasoned that "[a]ny evaluation of the 'discretionary' nature of the 'particularly serious crime' de-

termination should be conducted in light of the mandatory character of withholding." *Id.* Given the statutory text and context, the Third Circuit concluded that the jurisdiction-stripping mandate of Section 1252(a)(2)(B)(ii) simply does not apply to PSC determinations.

The courts of appeals thus plainly are divided on the construction of Section 1252(a)(2)(B)(ii). Ali respectfully requests that this Court intervene to resolve that conflict and suggests that in so doing, this Court should adopt the Third Circuit's approach and reject the erroneous rationale and result reached by the Seventh and Ninth Circuits. The Seventh Circuit's and Ninth Circuit's focus on whether a decision is discretionary by its nature ignores the language of Section 1252(a)(2)(B)(ii) – and, in particular, the limit on the scope of the jurisdiction bar to agency authority that is "specified under this subchapter." Moreover, because Section 1252(a)(2)(B)(ii) undoubtedly is a jurisdiction-stripping provision, this Court's precedents establish a presumption that such a provision is to read narrowly. See *INS v. St. Cyr*, 533 U.S. 289, 298-299 (2001); *McNary v. Haitian Refugee Center, Inc.*, 498 U.S. 479, 498 (1991); *Johnson v. Robison*, 415 U.S. 361, 373-374 (1974). The Seventh and Ninth Circuits have applied exactly the opposite presumption. Finally, neither the Seventh nor the Ninth Circuit appears to have taken into account the fact that it has relied on a section entitled "Denials of *discretionary* relief" (8 U.S.C. § 1252(a)(2)(B) (emphasis added)) in reaching a decision to bar review of determinations affecting the availability of withholding of removal, which is a *mandatory, non-discretionary* form of relief.

2. The Seventh Circuit decision below also is in conflict with the decisions of other circuits on the question of whether Section 1252(a)(2)(B)(ii) bars review over a PSC determination in the asylum context. The Seventh Circuit held that "[t]he BIA * * * did not apply an incorrect legal standard when it determined that Ali committed a 'particularly seri-

ous' crime for purposes of ineligibility for asylum and withholding of removal. We lack jurisdiction to review the BIA's exercise of discretion when the agency operates under the proper legal standard. 8 U.S.C. § 1252(a)(2)(B) and (C). We therefore do not address Ali's argument that the BIA misapplied its own precedent." App., *infra*, 14a. That conclusion overlooked the plain language of Section 1252(a)(2)(B)(ii), which expressly exempts discretionary asylum decisions from the reach of that provision. That section only prohibits review over "any other decision or action * * * specified under this subchapter to be in the discretion of the Attorney General * * *, *other than the granting of relief under section 1158(a) of this title.*" 8 U.S.C. § 1252(a)(2)(B)(ii) (emphasis added). Section 1158(a) is part of the asylum statute.[5]

Not surprisingly, another circuit recently reached the precisely opposite conclusion, holding that in an asylum case, a PSC finding *is* "reviewable because [discretionary asylum decisions are] specifically exempted from § 1252(a)(2)(B)(ii)'s jurisdiction-stripping provisions." *Morales v. Gonzales*, 478 F.3d 972, 980 (9th Cir. 2007).

3. The courts of appeals also are deeply divided over the scope of review granted by 8 U.S.C. § 1252(a)(2)(D), which confers jurisdiction over a subset of cases that present "con-

[5] It may also be noted that the PSC provisions of 8 U.S.C. § 1158(b)(2)(A) are no more discretionary than those in Section 1231(b)(3)(B). The provisions in Section 1158(b)(2)(A) state that the asylum protections "shall not apply to an alien if the Attorney General determines that – * * * (ii) the alien, having been convicted by a final judgment of a particularly serious crime, constitutes a danger to the community of the United States." 8 U.S.C. § 1158(b)(2)(A)(ii). The phraseology is mandatory, using the word "shall"; the only vaguely discretionary aspect of this provision is the word "determines." Unless any determination is by its nature discretionary (in which case, Section 1252(a)(2)(B)(ii) bars relief far outside its apparent scope), this provision is simply not a discretionary provision.

stitutional claims or questions of law." The Seventh Circuit concluded that its jurisdiction under Section 1252(a)(2)(D) did not encompass the question of whether "the BIA misapplied its own precedent in its analysis of Ali's offense of conviction." App., *infra*, 14a-15a (citation and footnote omitted). As the court explained, "[r]eviewing the BIA's determination in this regard would require an improper assertion of jurisdiction over the BIA's exercise of its statutorily conferred discretion." *Id.* at 15a.

As the Seventh Circuit acknowledged, its interpretation of Section 1252(a)(2)(D) is in conflict with the approach taken by other circuits. App., *infra*, 15a. In fact, both the Ninth and the Tenth Circuits have concluded that Section 1252(a)(2)(D) permits the courts of appeals to review whether the agency employed a correct legal analysis. *Morales*, 478 F.3d at 980 ("Morales raises a legal question pertaining to what an IJ may refer to in deciding whether a prior offense is a particularly serious crime"); *Afridi v. Gonzales*, 442 F.3d 1212, 1218-1221 (9th Cir. 2006); *Brue v. Gonzales*, 464 F.3d 1227, 1231 (10th Cir. 2006).[6]

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[6] Outside the context of PSCs, the First and Second Circuits have addressed the "questions of law" language of Section 1252(a)(2)(D), and have adopted a broad approach similar to the Ninth and Tenth Circuits in this context. For example, in *Chen v. United States Department of Justice*, 471 F.3d 315 (2d Cir. 2006), the Second Circuit concluded that Section 1252(a)(2)(D) transferred to the courts of appeals at least that level of review constitutionally required in district court habeas jurisdiction; and found that erroneous application of law, lack of rationality, and failure to exercise discretion were within the scope of that review. *Id.* at 327-328 (quoting *INS v. St. Cyr*, 533 U.S. 289, 302 (2001) for the proposition that habeas review had "encompassed detentions based on errors of law, including the erroneous application or interpretation of statutes" and citing *United States ex rel. Hintopoulos v. Shaughnessy*, 353 U.S. 72, 78-79 (1957) (considering argument that Board abused its discretion "applied an improper standard in

In *Morales*, for example, the Ninth Circuit considered whether the agency had erred in considering evidence alleged in an indictment, but not found beyond a reasonable doubt. 478 F.3d at 981-983. In *Afridi,* the court held that the agency had failed to correctly apply the *Frentescu* factors. 442 F.3d at 1221. Accord *Yousefi v. U.S. INS*, 260 F.3d 318, 329 (4th Cir. 2001) (remanding after noting that of the four *Frentescu* factors, "[i]n Yousefi's case the immigration judge and the Board considered only the first two factors"). And in *Brue*, the Tenth Circuit held that it had jurisdiction under Section 1252(a)(2)(D) to consider whether "the agency failed to consider the appropriate factors." *Brue*, 464 F.3d at 1231. As that court explained, "the agency's determination that petitioner committed a particularly serious crime * * * does not present, as respondents argue, a completely unreviewable discretionary decision. * * * '[W]e can determine [under the REAL ID Act] whether the BIA applied the correct legal standard in making its determination.'"). *Id.* at 1232.[7]

As this case demonstrates, the Ninth and Tenth Circuits' construction of the statutes at issue better comports with the language and intent of Congress. Here, petitioner argued that the Board erred in applying its holding in *Matter of Garcia-*

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exercising its discretion") and *United States ex rel. Accardi v. Shaughnessy*, 347 U.S. 260 (1954) (reviewing agency failure to exercise discretion, and interpreting a regulation, not a statute)). The Second Circuit thus concluded that Section 1252(a)(2)(D) review "[is] not limited solely to matters of 'statutory construction.'" 471 F.3d at 326. See also *Berhe v. Gonzales*, 464 F.3d 74, 87 (1st Cir. 2006) (Board's insufficient analysis of the case was "error of law").

[7] In *Brue*, the Tenth Circuit did not hold that review of the PSC designation was barred by Section 1252(a)(2)(B)(ii). Rather, the decision turned on the fact that Brue had committed a crime listed in 8 U.S.C. § 1252(a)(2)(C); thus, the *Brue* Court found jurisdiction stripped except where Section 1252(a)(2)(D) applies. *Brue*, 464 F.3d at 1231.

Garrocho, 19 I. & N. Dec. 423 (BIA 1986), to find that some crimes are *per se* PSCs, even though those crimes do not fall within the statutory category of *per se* PSCs. *Matter of Garcia-Garrocho* was decided long before Congress specified the crimes that it wished to classify as *per se* particularly serious. *Cf.* Immigration Act of 1990, Pub. L. No. 101-649, 104 Stat. 4978, 5053 (classifying all aggravated felonies as PSCs); Antiterrorism and Effective Death Penalty Act of 1996, § 413(f), Pub. L. No. 104-132, 110 Stat. 1214, 1269 (giving Attorney General discretionary authority to override the categorical bar to withholding of removal for aggravated felons); Illegal Immigration Reform and Immigrant Responsibility Act of 1996, Pub. L. No. 104-208, 110 Stat. 3009-546, 3009-602 (currently codified at 8 U.S.C. § 1231(b)(3)(B)(ii)). Ali's contention that these three intervening statutory amendments call into doubt the agency's continued reliance on case law that predated the amendments plainly presents a "question of law." That question lies within the courts of appeals' express jurisdiction under the REAL ID Act, and the Seventh Circuit erred in concluding otherwise on the basis of its overly restrictive statutory construction and its overly deferential approach to the Board's prior precedents.

B. As the foregoing analysis shows, there is considerable division and confusion among the courts of appeals with respect to the scope of judicial review over agency PSC determinations. The Third Circuit holds that review of PSC determinations is not barred by Section 1252(a)(2)(B)(ii). The Ninth Circuit joins the Third Circuit as to PSC determinations in the asylum context, but not as to withholding of removal. The Ninth and Tenth Circuits hold that even where the jurisdictional bars of Section 1252 are implicated, Section 1252(a)(2)(D) nonetheless permits review of PSC determinations at least as to questions of law, including whether the agency properly applied its own prior legal analysis to the facts at issue. By contrast, the Seventh Circuit narrowly con-

strues all of the pertinent statutes, holding that Section 1252(a)(2)(B)(ii) bars review of all PSC determinations and that Section 1252(a)(2)(D) does not revive judicial review in cases where the petitioner contents that the agency committed legal error by misinterpreting or misapplying its prior decisions.

1. The approaches of these circuits have hardened into an enduring circuit split that seems very unlikely to abate absent this Court's intervention. In addition to this case, the Seventh Circuit's approach has now been confirmed in *Tunis v. Gonzales*, 447 F.3d 547, 549 (7th Cir. 2006), and *Petrov v. Gonzales*, 464 F.3d 800, 801-802 (7th Cir. 2006). The Ninth Circuit's holding in *Matsuk v. INS*, 247 F.3d 999, 1002 (9th Cir. 2001), that PSC determinations fall within Section 1252(a)(2)(B)(ii) has been reaffirmed in *Unuakhaulu v. Gonzales*, 416 F.3d 931, 937 (9th Cir. 2005), *Afridi v. Gonzales*, 442 F.3d 1212, 1218 (9th Cir. 2006), and *Morales v. Gonzales*, 478 F.3d 972, 979-980 (9th Cir. 2007). The Ninth Circuit's understanding of Section 1252(a)(2)(D), previously articulated in *Afridi*, has been followed in *Morales*, and more generally in *Ramadan v. Gonzales*, 2007 WL 528715, at *1-*6 (9th Cir. Feb. 22, 2007). The Third Circuit's holding in *Alaka v. Attorney General*, 456 F.3d 88, 104-105 (3d Cir. 2006), that Section 1252(a)(2)(B)(ii) is not implicated by PSC determinations has been followed in *Lavira v. Attorney General*, 478 F.3d 158, 161 (3d Cir. 2007). In short, there is a persistent and serious circuit split, which only this Court can resolve.

2. This case presents an ideal vehicle for resolving this three-way circuit split. Many petitioners who are found by the agency to have committed PSCs have also committed aggravated felonies or other crimes which trigger the provisions of 8 U.S.C. § 1252(a)(2)(C). This case does not implicate Section 1252(a)(2)(C), because Ali was removable only for committing a single crime of moral turpitude. 8 U.S.C. § 1227(a)(2)(A)(i). That subset of removable offenses is not

listed among the criminal bars to jurisdiction found at 8 U.S.C. § 1252(a)(2)(C). Thus, this case affords the Court a clear opportunity to address the discretionary questions presented by Section 1252(a)(2)(B)(ii) and Section 1252(a)(2)(D), unencumbered by the further complexity of Section 1252(a)(2)(C).[8]

3. Finally, the questions presented here arise frequently, thus providing greater urgency to the need for this Court to render a unifying construction of the jurisdictional provisions at issue. Although the PSC issue is discrete, the jurisdictional provisions at issue in this context apply broadly to a wide range of immigration matters. According to a Westlaw search by counsel, there have been more than 500 courts of appeals decisions (published and unpublished) interpreting 8 U.S.C. § 1252(a)(2)(D), which has been in effect for less than two years. And nearly 200 decisions have addressed Section 1252(a)(2)(B)(ii). Together, the two provisions undergird an enormous swath of all immigration litigation, which itself is a rapidly expanding field of law. Ongoing fundamental disputes at such a basic level inhibit the rational development of immigration law jurisprudence and require this Court's intervention.

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[8] The courts of appeals are in conflict over what or in what manner this would trigger Section 1252(a)(2)(C) (barring review over individuals with criminal-based removal orders). *Cf. Unuakhaulu*, 416 F.3d at 937 ("the IJ's decision * * * did not predicate * * * denial of relief on Unuakhaulu's aggravated felony conviction. * * * We accordingly reject the government's invitation to extend the jurisdiction-stripping provisions to circumstances where they do not apply."); *Petrov*, 464 F.3d at 802 ("when the crime is an 'aggravated felony,' § 1252(a)(2)(C) blocks judicial review of the removal order. * * * Subsection (C) covers the removal order as a whole").

CONCLUSION

The petition for writ of certiorari should be granted.

Respectfully submitted.

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