No. 07-____

IN THE

Supreme Court of the United States

SYED IQBAL ALI,

Petitioner,

v.

MICHAEL B. MUKASEY, UNITED STATES ATTORNEY GENERAL,

Respondent.

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

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

A panel of the United States Court of Appeals for the Seventh Circuit held that the jurisdiction-stripping provision of § 242(a)(2)(B)(ii) of the Immigration and Nationality Act, 8 U.S.C. § 1252(a)(2)(B)(ii), precludes judicial review of continuance decisions of immigration judges in removal proceedings. Section 1252(a)(2)(B)(ii) provides (with an exception for the granting of asylum that is not relevant here) that "no court shall have jurisdiction to review . . . any other decision or action of the Attorney General . . . the authority for which is specified under this subchapter to be in the discretion of the Attorney General." An immigration judge's authority to grant or deny continuances is specified only in a regulation, *see* 8 C.F.R. § 1003.29, and is not mentioned in the relevant statutory subchapter. Thus, even the Attorney General acknowledged below that the court had jurisdiction to review the continuance decision.

The question presented is:

Whether the Seventh Circuit correctly held, in direct conflict with the United States Courts of Appeals for the First, Second, Third, Fourth, Fifth, Sixth, and Eleventh Circuits, that courts do not have jurisdiction to review a decision of an immigration judge denying a motion for a continuance.

PARTIES TO THE PROCEEDING

The parties before the court below were Syed Iqbal Ali and then-Attorney General Alberto R. Gonzales. The parties before this Court are contained in the caption of the case.

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PETITION FOR A WRIT OF CERTIORARI

Syed Iqbal Ali respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Seventh Circuit.

OPINIONS BELOW

The decision of the Immigration Judge ("IJ") (Pet. App. 25a-29a) and the orders of the Board of Immigration Appeals ("BIA") (Pet. App. 16a-18a; 19a-25a) are unreported.

The opinion of the United States Court of Appeals for the Seventh Circuit is reported at 502 F.3d 659 (Pet. App. 1a-15a).

JURISDICTION

The Seventh Circuit's opinion was issued on September 14, 2007. Pet. App. 1a-15a. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

STATUTORY AND REGULATORY PROVISIONS INVOLVED

The principal statutory provision involved is 8 U.S.C. § 1252; the principal regulation involved is 8 C.F.R. § 1003.29, both of which are set out in the Appendix to this petition. Pet. App. 30a-46a; 47a.

STATEMENT OF THE CASE

In several provisions of the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 ("IIRIRA"), Pub. L. No. 104-208, 110 Stat. 3009 (amended by the REAL ID Act of 2005 ("REAL ID Act"), Pub. L. No. 109-13, 119 Stat. 302), Congress amended the Immigration and Nationality Act ("INA"), 8 U.S.C. §§ 1101-1537, to reduce or eliminate the jurisdiction of the courts of appeals to review

certain decisions of IJs and the BIA. Specifically, § 306(a)(2) of IIRIRA, codified at 8 U.S.C. § 1252(a)(2)(B)(ii), removed the courts' jurisdiction to review any "decision or action of the Attorney General . . . the authority for which is specified under this subchapter to be in the discretion of the Attorney General . . . , other than the granting of" asylum.

Before the Seventh Circuit's decision in this case, seven courts of appeals had held in published opinions (and one court of appeals in an unpublished, nonprecedential disposition) that § 1252(a)(2)(B)(ii) did not strip courts of jurisdiction to review an IJ's denial of a motion for a continuance of removal proceedings, because such a decision is not "specified under" the relevant "subchapter to be in the discretion of the Attorney General." In contrast, two courts of appeals had held that § 1252(a)(2)(B)(ii) stripped courts of jurisdiction, because an IJ's general authority to "conduct proceedings for deciding the admissibility or deportability of an alien," 8 U.S.C. § 1229a(a)(1), is within the "subchapter" covered by the provision, and a regulation implementing that subchapter, 8 C.F.R. § 1003.29, provides that an "Immigration Judge may grant a motion for continuance for good cause shown."

Importantly, in briefing before the Seventh Circuit in this case, Pet. App. 48a-56a, the First Circuit in *Alsamhouri v. Gonzales*, 484 F.3d 117, 121 (1st Cir. 2007), the Fourth Circuit in *Lendo v. Gonzales*, 493 F.3d 439, 441 n.1 (4th Cir. 2007), and the Eighth Circuit in *Ikenokwalu-White v. Gonzales*, 495 F.3d 919, 924 n.2 (8th Cir. 2007), the Attorney General interpreted § 1252(a)(2)(B)(ii) like the majority of the

courts of appeals to have addressed the issue, arguing that this jurisdiction-stripping provision does not bar review of an IJ's continuance decision. According to the Attorney General, the "Solicitor General has concurred in that position." Pet. App. 55a.

Rejecting not only the majority position, but also the view of the Attorney General, the Seventh Circuit deepened a circuit split by holding that the jurisdictional bar of § 1252(a)(2)(B)(ii) applies to continuance decisions.

A. Statutory Background

The INA allows a court of appeals considering a final order of removal pursuant to 8 U.S.C. § 1252 to review "all questions of law and fact, including interpretation and application of constitutional and statutory provisions, arising from any action taken or proceeding brought to remove an alien." *Id.* § 1252(b)(9). In IIRIRA, however, Congress amended the INA to preclude judicial review of any "decision or action of the Attorney General . . . the authority for which is specified under this subchapter to be in the discretion of the Attorney General . . . , other than the granting of" asylum. *Id.* § 1252(a)(2)(B)(ii). The phrase "this subchapter" refers to subchapter II of Chapter 12 of Title 8 of the United States Code, which includes §§ 1151-1381.

In the "subchapter" referred to—specifically, 8 U.S.C. § 1229a(a)(1)—Congress, among other things, vested IJs with the general authority to "conduct proceedings for deciding the inadmissibility or deportability of an alien." Notwithstanding this language, an IJ's express authority to grant or deny a

continuance is not found in the particular subchapter where § 1252(a)(2)(B)(ii) is contained. *See generally* 8 U.S.C. ch. 12 (entitled "Immigration and Nationality"). Instead, the authority is derived solely from regulations promulgated by the Department of Justice. *See* 8 C.F.R. § 1003.29 (stating that "[t]he Immigration Judge may grant a motion for continuance for good cause shown").

B. Immigration Proceedings Below

Syed Iqbal Ali, a citizen of Pakistan, entered the United States in 1996 on a six-month visitor's visa. Pet. App. 25a. Mr. Ali overstayed his visa, and, in March 2003, the INS charged him with removability under 8 U.S.C. § 1227(a)(1)(B), for remaining in the United States longer than authorized, and 8 U.S.C. § 1227(a)(1)(C)(i), for failing to maintain the nonimmigrant status by which he was admitted. Pet. App. 25a-26a.

At a preliminary hearing in April 2003, Mr. Ali requested and was granted a continuance so that he could seek to adjust his status to that of a lawful permanent resident under 8 U.S.C. § 1255(a). Pet. App. 26a. At Mr. Ali's next hearing in November 2003, he conceded removability but stated that he would soon become eligible for adjustment of status because his son Zeeshan had a pending application for citizenship and, once Zeeshan was naturalized, Zeeshan would file a family-based visa petition (I-130) on Mr. Ali's behalf. Pet. App. 4a; 61a.

At a subsequent hearing in February 2005, Mr. Ali again requested a continuance because Zeeshan was still in the process of naturalizing his status in the United States. Pet. App. 67a-69a. The IJ denied Mr.

Ali's request for a continuance. Pet. App. 28a. In the view of the IJ, Mr. Ali had not shown "good cause" for the continuance as required by 8 C.F.R. § 1003.29, because (1) Mr. Ali had nearly two years to work on getting a visa, (2) he was not immediately eligible for a visa, (3) his prospects for having a visa available to him were "unclear and at least possibly months to years away," and (4) he could return to Pakistan and await a visa through the consular process. Pet. App. 28a. The IJ granted Mr. Ali's request for voluntary departure. Pet. App. 28a-29a.

Mr. Ali appealed the IJ's decision to the BIA. Mr. Ali argued that the IJ's denial of a continuance was erroneous under both BIA and Seventh Circuit precedent. Pet. App. 20a-22a. The BIA rejected Mr. Ali's arguments and concluded that the IJ had given adequate reasons for denying the continuance based on the evidence. Pet. App. 21a. The BIA thus affirmed the IJ's decision and granted Mr. Ali sixty days to depart the country voluntarily. Pet. App. 23a. Mr. Ali moved for reconsideration, but the BIA denied the motion. Pet. App. 16a-18a.

Mr. Ali filed a timely petition for review in the United States Court of Appeals for the Seventh Circuit.

C. The Court of Appeals' Decision

On appeal, the Seventh Circuit held that 8 U.S.C. § 1252(a)(2)(B)(ii) deprived the court of jurisdiction to review the IJ's decision denying Mr. Ali's motion for a continuance. The court rejected the position of both Mr. Ali and the Attorney General that because continuances are not mentioned in the immigration statutes, and are only referenced in the immigration

regulations, the discretionary authority to grant or deny a continuance is not "specified under" the relevant subchapter of the INA. Pet. App. 9a. Instead, the court reasoned that, even though the INA is silent on the issue of continuances, an IJ's "*authority* to grant or deny a continuance derives not from the regulation but from the statute." *Id.* (emphasis in original). The court found an IJ's authority to grant or deny a continuance implicit in § 1229a(a)(1), which provides, in full, that "[a]n immigration judge shall conduct proceedings for deciding the inadmissibility or deportability of an alien," and § 1229a(b)(1), which provides IJs with the power to administer oaths, to receive evidence, to examine the alien and witnesses, to issue subpoenas, and to levy contempt sanctions. *Id.* The court thus concluded that "[t]he regulation pertaining to continuances implements these statutes, but the immigration judge's *authority* to conduct and control the course of removal proceedings is 'specified in' subchapter II of the INA, and this necessarily encompasses the discretion to continue the proceedings, whether on the motion of a party or sua sponte. The jurisdictional bar therefore applies to continuance decisions." Pet. App. 9a-10a (emphasis in original). In so holding, the court explicitly recognized that this issue is the subject of a circuit split and "that we are aligning ourselves with the minority view." Pet. App. 10a.

In reaching this conclusion, the court also relied on its prior decision in *Leguizamo-Medina v. Gonzales*, 493 F.3d 772, 775 (7th Cir. 2007) (holding that because an IJ's decision on cancellation of removal is unreviewable under § 1252(a)(2)(B)(i) the

choices leading to that decision, including the denial of a continuance, are likewise unreviewable). The court below reasoned by analogy that because the denial of a petition to adjust status is unreviewable under § 1252(a)(2)(B)(ii), the IJ's denial of Mr. Ali's continuance motion was unreviewable, too, because it was a "procedural step along the way to an unreviewable final decision." Pet. App. 11a-12a.

Additionally, the court held that Mr. Ali was not entitled to relief under its prior decision in *Subhan v. Ashcroft*, 383 F.3d 591 (7th Cir. 2004). In *Subhan*, the court observed that § 1252(a)(2)(B)(ii) generally bars judicial review of continuance decisions. *Id.* at 595. Nevertheless, the court in that case granted a petition for review of an IJ's denial of a continuance in an adjustment of status proceeding. *See id.* The court reasoned that because, in denying the continuance, the IJ did not provide a reason consistent with the permissible reasons for denying adjustment of status under 8 U.S.C. § 1255(i), the denial of the continuance nullified the petitioner's opportunity to adjust status under § 1255(i). The court below found that *Subhan* did not apply to Mr. Ali's case because the BIA affirmed the IJ's denial of a continuance based on evidence indicating that Zeeshan's citizenship application had been denied—"a reason consistent with the adjustment [of status] statute, not merely a 'statement of the obvious.'" Pet. App. 12a.

Finally, the court refused to consider Mr. Ali's argument that the National Security Entry-Exit Registration System, which caused Mr. Ali to come to the attention of the INS, unconstitutionally targeted him for registration and removal based on

his ethnicity. Pet. App. 14a. The court reasoned that it lacked jurisdiction to hear such a claim by an alien challenging the Attorney General's decision to commence removal proceedings. Pet. App. 14a (citing 8 U.S.C. § 1252(g); *Reno v. Am.-Arab Anti-Discrimination Comm.*, 525 U.S. 471, 491 (1999)).

Judges Ripple, Rovner, Wood, and Williams voted to rehear the case *en banc*, but this was less than the required majority of active judges. Pet. App. 3a n.1. Mr. Ali now petitions this Court for a writ of certiorari.

REASONS FOR GRANTING THE PETITION

The Court should grant the petition for three reasons:

First, the courts of appeals are deeply split 7-3 on whether the jurisdictional bar of 8 U.S.C. § 1252(a)(2)(B)(ii) prohibits judicial review of an immigration judge's decision denying a motion for a continuance, with the majority and, recently, even the Attorney General, agreeing that the jurisdictional bar does not apply.

Second, this case raises an important and recurring question of immigration law, an area where, as this Court has repeatedly noted, there is a particular need for national uniformity. The precise question in this case is of exceptional national importance—whether aliens will be treated uniformly with regard to their right to judicial review of continuance decisions, or whether those aliens within the jurisdiction of three courts of appeals will be treated more harshly.

Third, the erroneous decision below is inconsistent with the text of the relevant statutory provisions and

conflicts this Court's instruction in *INS v. St. Cyr*, 533 U.S. 289, 298 (2001), that there is a strong presumption in favor of judicial review of administrative action, particularly when it involves aliens.

I. THE COURTS OF APPEALS ARE DEEPLY SPLIT ON WHETHER COURTS HAVE JURISDICTION TO REVIEW AN IMMIGRATION JUDGE'S DENIAL OF A MOTION FOR A CONTINUANCE

This case presents this Court with a well-developed 7-3 conflict between the courts of appeals, which are now deeply split on whether courts have jurisdiction to review an IJ's denial of a motion for a continuance. In well-reasoned and thorough opinions, seven courts of appeals, the First, Second, Third, Fourth, Fifth, Sixth, and Eleventh Circuits, have held that courts have jurisdiction to review continuance decisions. *See Alsamhouri v. Gonzales*, 484 F.3d 117 (1st Cir. 2007); *Sansui v. Gonzales*, 445 F.3d 193 (2d Cir. 2006) (per curiam); *Khan v. U.S. Attorney Gen.*, 448 F.3d 226 (3d Cir. 2006); *Lendo v. Gonzales*, 493 F.3d 439 (4th Cir. 2007); *Ahmed v. Gonzales*, 447 F.3d 433 (5th Cir. 2006); *Abu-Khaliel v. Gonzales*, 436 F.3d 627 (6th Cir. 2006); *Zafar v. U.S. Attorney Gen.*, 461 F.3d 1357 (11th Cir. 2006); *see also Martinez v. Gonzales*, 166 F. App'x 300, 300 (9th Cir. 2006) (holding the same in an unpublished, nonprecedential disposition). In contrast, the Seventh Circuit in this case, as well as the Eighth and Tenth Circuits, have held that courts do not have jurisdiction to review continuance decisions. *See* Pet. App. 10a; *Yerkovich v. Ashcroft*, 381 F.3d 990 (10th Cir. 2004); *Onyinkwa v. Ashcroft*, 376 F.3d 797 (8th

Cir. 2004). This 7-3 conflict is squarely presented in this case and ripe for this Court's immediate resolution. A brief review of the circuit opinions conflicting with the decision below plainly establishes the breadth and scope of this conflict.

In *Zafar*, 461 F.3d 1357, the Eleventh Circuit examined the jurisdiction-stripping provision and noted that "Congress has precisely carved-out the statutorily-provided discretionary powers of the Attorney General within [subchapter II], and, in turn, has expressly prohibited 'any court' from reviewing them." *Id.* at 1361. The court further observed that "[t]he express authority of an IJ to grant or deny a motion to continue a hearing is *not* found" in the text of subchapter II. *Id.* at 1360 (emphasis in original). Rather, "the authority of an IJ to grant a motion for continuance is derived solely from regulations." *Id.* (citing 8 C.F.R. § 1003.29). The court thus concluded that because "only the particular discretionary authorities of the Attorney General expressly 'specified' in [subchapter II] are barred from our review . . . and the discretionary authority to grant or deny a continuance in removal proceedings is not expressly contained within [subchapter II], we have jurisdiction to review those discretionary decisions." *Id.* at 1361. To support its interpretation that the discretion to grant continuances is not "specified under" subchapter II, the court noted that "[t]here are myriad Congressionally-defined discretionary *statutory* powers of the Attorney General" specifically articulated in subchapter II. *Id.* (emphasis in original). The court found it significant that the power to continue immigration proceedings is not

among them. *See id.* Finally, the court noted that its decision was in accord with this Court's instruction in *St. Cyr*, 533 U.S. at 298, that there is a strong presumption in favor of judicial review of administrative action involving aliens. *Zafar*, 461 F.3d at 1361-62.

In *Sansui*, 445 F.3d 193, the Second Circuit stated its agreement with the Eleventh Circuit's holding in *Zafar* "that the decision by an IJ or the BIA to grant or to deny a continuance . . . is not a decision 'specified under [the relevant] subchapter.'" *Id.* at 198. The Second Circuit recognized but rejected the argument that because an IJ's general authority to conduct removal proceedings is provided in 8 U.S.C. § 1229a(a)(1), a provision in subchapter II, an IJ's authority to grant or deny a continuance is "specified under" subchapter II to be in the Attorney General's discretion. *See id.* at 198-99. The court reasoned that "[a]lthough the presiding officer at a hearing traditionally has discretion to grant or to deny continuances requested by the parties appearing before him, we cannot conclude that the decision to grant or to deny a continuance in immigration proceedings is 'specified under [the relevant] subchapter to be in the discretion of the Attorney General,'" because "continuances are not even mentioned in the subchapter." *Id.* at 199 (alteration in original). The court also noted that the conferral of discretion in 8 C.F.R. § 1003.29 to grant continuances "suggests that such authority is not 'specified' under the 'subchapter' of the INA pursuant to which the regulation was promulgated." *Id.* at 199 n.8. Finally, like the Eleventh Circuit in *Zafar*, the court observed that this Court has adopted a strong

presumption in favor of judicial review of administrative action involving aliens, which compelled the exercise of jurisdiction over the petition. *See id.* at 199 (citing *St. Cyr*, 553 U.S. at 298).

The Seventh Circuit's decision also conflicts with the Fifth Circuit's decision in *Ahmed*, 447 F.3d 433. There, the court held that it had jurisdiction to review an IJ's continuance decision, relying on its prior opinion in *Zhao v. Gonzales*, 404 F.3d 295, 303 (5th Cir. 2005), in which the court held that § 1252(a)(2)(B)(ii) did not strip it of jurisdiction to review an IJ's discretionary denial of a motion for reconsideration. In discussing the scope of the statute, the court in *Ahmed* noted that "[o]ne might mistakenly read § 1252(a)(2)(B)(ii) as stripping us of the authority to review any discretionary immigration decision." 447 F.3d at 436 (internal quotation marks omitted). The court found that reading incorrect, however, "because § 1252(a)(2)(B)(ii) strips us only of jurisdiction to review the discretionary authority that is *specified in the statute*." *Id.* (internal quotation marks omitted; emphasis in original). The court continued: "[T]he language of § 1252(a)(2)(B)(ii) is thoroughly pellucid on this score; it does not allude generally to 'discretionary authority' or to 'discretionary authority exercised *under this statute*,' but specifically to 'authority for which is *specified under this subchapter* to be in the discretion of the Attorney General.'" *Id.* (internal quotation marks omitted; emphasis in original). The court thus held that, because an IJ's discretion to act on a motion for a continuance is derived solely from regulations

promulgated by the Department of Justice, and not from subchapter II of the INA, the jurisdictional bar of § 1252(a)(2)(B)(ii) did not apply. *Id.* at 436-37; *see also Zhao*, 404 F.3d at 303 (concluding that construing § 1252(a)(2)(B)(ii) to apply to the grant of discretion in a regulation "would belie Congress's conspicuous selection of the phrase 'specified under this subchapter'").

The Third Circuit's decision in *Khan*, 448 F.3d 226 reached the same result, quoting at length from the Fifth Circuit's opinions in *Ahmed* and *Zhao*, the Second Circuit's opinion in *Sansui*, and the Eleventh Circuit's opinion in *Zafar*, and held that the court had jurisdiction to review the denial of a continuance motion. *See id.* at 231-32. Similarly, the Fourth Circuit's opinion in *Lendo*, 493 F.3d 439, "agree[d] with the majority of circuits that have considered the issue that § 1252(a)(2)(B)(ii) does not bar judicial review of an IJ's denial of a motion to continue removal proceedings." *Id.* at 441 n.1.

In the First Circuit case of *Alsamhouri*, 484 F.3d 117, the Attorney General argued that § 1252(a)(2)(B)(ii) did *not* bar judicial review of an IJ's decision to grant or deny a continuance, just as he did before the Seventh Circuit in this case. Unlike the Seventh Circuit, the court in *Alsamhouri* accepted the Attorney General's interpretation of § 1252(a)(2)(B)(ii) and held that it had jurisdiction. *See id.* at 121-22. The court observed that subchapter II does not even mention continuances, let alone specify that the granting or denial of continuances by an IJ is "in the discretion of the Attorney General." *Id.* at 122 (internal quotation marks omitted). The court reasoned that the plain

language of § 1252(a)(2)(B)(ii) does not limit jurisdiction when an IJ exercises discretion "not specified anywhere in the statutory subchapter, but rather derives entirely from regulations promulgated by the Attorney General." *Id.*

In *Abu-Khaliel*, 436 F.3d 627, the Sixth Circuit concluded that § 1252(a)(2)(B)(ii) did not strip it of jurisdiction to review an IJ's denial of a continuance, but it reached that conclusion through different reasoning than that used in the opinions discussed above. Disagreeing with the reasoning of the Eleventh Circuit in *Zafar*, the court stated that the authority of IJs to grant continuances is "specified under" § 1229a(a)(1), the section of subchapter II that generally empowers IJs to conduct removal proceedings. *Abu-Khaliel*, 436 F.3d at 634. It concluded, however, that § 1252(a)(2)(B)(ii) only withdrew courts' jurisdiction to review discretionary decisions of the *Attorney General*, not those of IJ's. *Id.* The court thus held that the jurisdictional bar did not apply to an IJ's discretionary decision to deny a continuance. *Id.*[1]

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[1] In addition to these decisions, the Ninth Circuit has held in an unpublished, nonprecedential disposition that it has jurisdiction to review the continuance decisions of IJs. *See Martinez*, 166 F. App'x at 300. Moreover, as the Attorney General noted in its supplemental briefing before the Seventh Circuit, Pet. App. 53a n.4, the Ninth Circuit, in *Medina-Morales v. Ashcroft*, determined that it had jurisdiction to review a discretionary denial of a motion to reopen, holding that § 1252(a)(2)(B)(ii) "applies only to acts over which a *statute* gives the Attorney General pure discretion unguided by legal standards or statutory guidelines." 371 F.3d 520, 528 (9th Cir. 2004)

The Seventh Circuit's decision is, however, consistent with the Eighth Circuit's opinion in *Onyinkwa*, 376 F.3d 797, in which the court held that it did not have jurisdiction to review an IJ's denial of a motion for continuance. The court stated broadly that "[w]henever a regulation implementing a subchapter II statute confers discretion upon an IJ, IIRIRA generally divests courts of jurisdiction to review the exercise of that discretion." *Id.* at 799. The court noted that 8 U.S.C. § 1229a(a)(1) authorizes IJs to conduct removal proceedings and that 8 C.F.R. § 1003.29 "has long been held to confer discretion upon an IJ to grant or deny a continuance." *Id.* The court thus concluded that because 8 C.F.R. § 1003.29, a regulation implementing subchapter II, vests IJs with discretion to decide continuance motions, under § 1252(a)(2)(B)(ii), it had no jurisdiction to review exercises of that discretion. *Id.*[2]

Similarly, the Tenth Circuit in *Yerkovich*, 381 F.3d 990, held that it had no authority to review a denial of a continuance. The court observed that although subchapter II does not specifically confer discretion on IJs to grant or deny continuances, 8 C.F.R.

(emphasis added). This holding forecloses any argument that § 1252(a)(2)(B)(ii) bars review of a denial of a continuance in the Ninth Circuit.

[2] A subsequent panel of the Eighth Circuit stated its disagreement with *Onyinkwa* and urged that "it may be appropriate for our court to revisit this issue *en banc*." *Ikenokwalu-White*, 495 F.3d at 924 n.2. However, the court has not taken any steps toward reconsidering the issue. *See id.* (noting "the present case is [not] the most appropriate vehicle for" *en banc* rehearing).

§ 1003.29 does. *Yerkovich*, 381 F.3d at 993. The court also relied on what it viewed to be the "theme" of IIRIRA—to protect executive discretion from judicial review. *Id.*

In light of these cases, the conflict on this question is well-developed: Courts of appeals on both sides of the issue have examined the relevant statutory provision, and have engaged a variety of interpretive tools to ascertain the correct rule. They have also scrutinized and responded to the reasoning of the courts and judges on the other side of the split. As academic commentary has noted, the Court should therefore review the split now because nothing would be gained from further percolation in the lower courts. *See* Tarik Naber, Comment, *Judicial Review Under 8 U.S.C. § 1252(a)(2)(B)(ii): How a Minority of Federal Circuit Courts are Keeping Non-Citizens Out of Court*, 40 U.C. DAVIS L. REV. 1515, 1541-42 (2007) ("The issue is appropriate for Supreme Court review because seven circuits [now ten] have addressed the issue and remain almost evenly divided. Also, the courts of appeals have all decided their cases within the past three years . . . . This means that the split is very much active and ripe for review." (footnote omitted)).

Finally, further percolation would be particularly unwarranted here because the Attorney General and Solicitor General now concede that the jurisdictional bar does *not* apply to continuance decisions.[3] There

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[3] *See* Pet. App. 8a (noting "that the Department of Justice now takes the position that the jurisdiction-stripping provision, § 1252(a)(2)(B)(ii), does not apply to continuance decisions");

will therefore be no adversarial disagreement in front of any court to aid in developing whatever new insights or variations on this issue could possibly be developed at this juncture. Review now would also terminate the extraordinarily anomalous situation in which the Attorney General concedes that his decisions are reviewable under a statute he enforces but courts, without the benefit of adversarial briefing, eschew the proffered invitation to review. Certainly further "percolation" in this unusual situation can neither ameliorate the split nor aid this Court in resolving the question presented. Thus, the time to act is now.

II. THE QUESTION PRESENTED IS OF GREAT NATIONAL IMPORTANCE, AFFECTING THE UNIFORM ADMINISTRATION OF THE NATION'S IMMIGRATION LAWS AND AFFECTING A SUBSTANTIAL NUMBER OF CASES

The question presented involves an issue of great national importance and affects a substantial number

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Ikenokwalu-White, 495 F.3d at 924 n.2 (noting that "the Attorney General in the present case sent our court a letter withdrawing arguments against jurisdiction . . . and conceding this issue"); *Lendo*, 493 F.3d at 441 n.1 (noting that the government withdrew the argument that the court was barred by § 1252(a)(2)(B)(ii) from reviewing a continuance decision); *Alsamhouri*, 484 F.3d at 121 (noting that the government conceded "that section 1252(a)(2)(B)(ii) poses no jurisdictional bar to judicial review of a decision by an IJ, pursuant to 8 C.F.R. § 1003.29, to grant or deny a continuance" (footnote omitted)). And, as noted, the "Solicitor General has concurred in that position." Pet. App. 55a.

of immigration cases. The fact that eleven courts of appeals have addressed this question within four years of the first decision establishes the question's present-day importance and recurrence. Indeed, the question continues to arise frequently in the courts of appeals.[4] Accordingly, this Court's intervention is now necessary to resolve the split and to ensure that the immigration laws are uniformly administered throughout the United States.

A. Uniformity Is Imperative In Administering The Immigration Laws

This Court has made clear that the immigration laws governing access into the country as a whole should be uniformly interpreted and administered because of "the Nation's need to speak with one voice in immigration matters." *Zadvydas v. Davis*, 533 U.S. 678, 700 (2001) (internal quotation marks

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[4] *See, e.g.*, *Ilic-Lee v. Mukasey*, ___ F.3d ___, 2007 WL 4063893, at *1 (6th Cir. Nov. 19, 2007) (following *Abu-Khaliel*); *Tariq v. Keisler*, 505 F.3d 650, 658 (7th Cir. 2007) (following *Ali*); *Feliz v. Gonzales*, 487 F.3d 71, 72 (1st Cir. 2007) (following *Alsamhouri*); *Morgan v. Gonzales*, 445 F.3d 549, 551 (2d Cir. 2006) (following *Sansui*); *Garza-Moreno v. Gonzales*, 489 F.3d 239, 242 (6th Cir. 2007) (following *Abu-Khaleil*); *Ikenokwalu-White*, 495 F.3d at 924 n.2 (suggesting that the Eighth Circuit should reconsider *en banc* the holding of *Onyinkwa*); *Grass v. Gonzales*, 418 F.3d 876, 879 (8th Cir. 2005) (holding that the REAL ID Act did not abrogate *Onyinkwa*), *cert. denied*, 547 U.S. 1079 (2006); *Sidikhouya v. Gonzales*, 407 F.3d 950, 952 (8th Cir. 2005) (per curiam) (following *Onyinkwa*); *Rivas v. Gonzales*, 220 F. App'x 892, 895 (10th Cir. 2007) (following *Yerkovich*); *Haswanee v. U.S. Attorney Gen.*, 471 F.3d 1212, 1214 (11th Cir. 2006) (per curiam) (following *Zafar*).

omitted). This Court's "one voice" requirement recognizes that immigration policy affects our relations with other nations and thus it must, like other aspects of foreign policy, be exercised uniformly by the federal government. *Compare Am. Ins. Ass'n v. Garamendi*, 539 U.S. 396, 413-14 (2003) (noting "the concern for *uniformity* in this nation's dealings with foreign nations that animated the Constitution's allocation of the foreign relations power to the National Government in the first place" (emphasis added; internal quotation marks omitted)), *with* U.S. CONST. art. I, § 8, cl. 4 ("The Congress shall have the power . . . to establish an *uniform* Rule of Naturalization." (emphasis added)). As such, the federal courts of appeals have recognized that avoiding circuit splits is particularly critical in this area of the law given that "[n]ational uniformity in the immigration and naturalization laws is paramount." *Rosendo-Ramirez v. INS*, 32 F.3d 1085, 1091 (7th Cir. 1994); *see also id.* (noting that "rarely is the vision of a unitary nation so pronounced as in the laws that determine who may cross our national borders and who may become a citizen"); *Jaramillo v. INS*, 1 F.3d 1149, 1155 (11th Cir. 1993) (en banc) (avoiding a circuit split on an immigration issue and noting that "[n]ot only does our conclusion today help heal an intercircuit split, it also will help achieve nationwide uniformity in an area of the law where uniformity is particularly important").

Uniformity is especially important here given that this circuit split potentially affects a significant percentage of all cases before the courts of appeals. Over the past several years, "the U.S. Courts of Appeals have seen a dramatic increase in

immigration cases. . . . [T]he courts of appeals are receiving about five times as many petitions for review today as they did before 2002." John R.B. Palmer, *et al.*, *Why Are So Many People Challenging Board of Immigration Appeals Decisions in Federal Court? An Empirical Analysis of the Recent Surge in Petitions for Review*, 20 GEO. IMMIGR. L.J. 1, 3-4 (2005). Examining a longer period of time, another study concluded that, in the ten-year period between 1997 and 2006, there was a 970% increase in the number of cases seeking judicial review of immigration orders. Lenni B. Benson, *Making Paper Dolls: How Restrictions on Judicial Review and the Administrative Process Increase Immigration Cases in the Federal Courts*, 51 N.Y. L. SCH. L. REV. 37, 39 (2007).[5]

Moreover, immigration cases are also increasing in *relative* terms; they comprise a growing proportion of the dockets of federal appellate courts. In 2001, immigration appeals accounted for only 3 percent of

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[5] Data made available by the Administrative Office of the United States Courts confirms these scholars' observations. In 2001, 1760 petitions for review of immigration decisions were filed with the federal courts of appeal. *See* Administrative Office of the United States Courts, *Judicial Business of the United States Courts* 98 (2001) (hereinafter *Judicial Business 2001*), *available at* http://www.uscourts.gov/judbus2001/appendices/b03sep01.pdf (last visited Dec. 11, 2007). By 2006, that number had increased nearly seven-fold to 11,911. *See* Administrative Office of the United States Courts, *Judicial Business of the United States Courts* 115 (2006) (hereinafter *Judicial Business 2006*), *available at* http://www.uscourts.gov/judbus2006/completejudicialbusiness.pdf (last visited Dec. 11, 2007).

the caseload of the federal courts of appeals.[6] In 2006, of the 66,618 cases filed in the federal courts of appeals, 11,911 were petitions for review of BIA decisions, which made these cases almost 20 percent of the entire caseload of the federal courts of appeals.[7]

Academic commentary has attributed this dramatic increase in part to jurisdictional disputes fostered by jurisdiction-stripping provisions like 8 U.S.C. § 1252(a)(2)(B)(ii). *See* Benson, *supra*, at 42 (noting that, after IIRIRA, courts have "had to spend time exercising jurisdiction in order to determine whether they had jurisdiction"). This case presents this Court with an opportunity to provide clear guidance to the courts of appeals regarding the scope of their jurisdiction.

B. The Jurisdictional Question Presented Is Outcome-Determinative In Immigration Proceedings

A judicial refusal to review a continuance decision has a profound impact on an alien's substantive rights because in the immigration context, unlike most situations, improper denial of a continuance does not merely affect when adjudication will occur, but will usually have an outcome-determinative effect on whether an alien is removed from the country.

Aliens often seek continuances to gain the time needed for the government to make a determination about the alien or his family that will greatly affect

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[6] *See Judicial Business 2001*, at 98.

[7] *See Judicial Business 2006*, at 115.

his status—such as acting on a labor certification petition or a relative's visa application. *See, e.g.*, *Zafar*, 461 F.3d at 1359 (alien sought a continuance because he had a pending labor certification request); *Khan*, 448 F.3d at 229 (same); *Ahmed*, 447 F.3d at 435 (same); *Subhan*, 383 F.3d at 593 (same); *Yerkovich*, 381 F.3d at 992 (alien sought a continuance because her daughter recently passed the naturalization examination and her daughter's citizenship would entitle the alien to obtain lawful permanent resident status); *Onyinkwa*, 376 F.3d at 798 (alien sought a continuance while his wife filed a visa application on his behalf); *Abu-Khaliel*, 436 F.3d at 629-30 (same); *see also Sansui*, 445 F.3d at 195 (alien sought a continuance to acquire medical evidence in support of his claim under the Convention Against Torture). But as even the Seventh Circuit has recognized, "the wheels of bureaucracy grind slow," and often, the alien remains waiting, through no fault of his or her own, for the request to be processed. *See Subhan*, 383 F.3d at 593. If the IJ refuses the continuance that the alien needs to adjust status, this effectively denies the statutory right to challenge removal and can result in the removal of an alien who would have been allowed to stay once his government paperwork was processed. Thus, "[a]n IJ's decision to deny a continuance . . . can prove decisive in an alien's case," and result in an alien's removal "solely because of bureaucratic delay." Naber, *supra*, 40 U.C. DAVIS L. REV. at 1539-40.

In addition to bureaucratic inertia, obvious practical problems created by dealing with foreign languages and governments often cause delay in

establishing the alien's entitlement to stay. For example, in *Badwan v. Gonzales*, 494 F.3d 566, 567 (6th Cir. 2007), the alien sought a continuance to obtain a translation of a foreign-language document establishing his divorce from his first wife—a translation Badwan unquestionably needed to establish his eligibility for adjustment of status. *Id.* at 567-68. The IJ denied the continuance and, because Badwan did not have the evidence he needed to prove his eligibility for adjustment of status at that time, denied Badwan's adjustment application and ordered him to depart the country. *Id.* at 569. The Sixth Circuit reversed, observing that, except for lacking the required translation, Badwan would have had "little trouble" establishing his eligibility for adjustment of status, and noted that Badwan had, in fact, obtained the required translation by the time he appealed to the BIA. *Id.*

In short, without judicial review of continuance denials, an IJ can deny continuance requests with impunity and arbitrarily deny aliens any realistic opportunity to secure the documents establishing that they satisfy the relevant criteria.

Furthermore, the disuniform access that individual litigants have to judicial review is very significant. That aliens in some circuits receive judicial review of continuance decisions, while aliens in other circuits do not, is antithetical to the overriding goal of having courts speak with "one voice" on immigration laws. *See Zadvydas*, 533 U.S. at 700. This Court's review is necessary to establish uniformity in immigration laws throughout the United States and to ensure that immigrants in the Seventh, Eighth, and Tenth

Circuits enjoy the same rights as immigrants in the rest of the country.

Finally, there are no concerns about this case as a vehicle for resolving the split. As noted, the Seventh Circuit below squarely and unequivocally held that the "jurisdictional bar . . . applies to continuance decisions," thus "aligning [them]selves with the minority view," both because it disagreed with the majority's interpretation of the statute as an original matter and because the "majority position . . . cannot be reconciled with [the Seventh Circuit's] recent opinion in *Leguizamo-Medina*." Pet. App. 10a.[8]

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[8] In the Seventh Circuit's prior opinion in *Subhan*, the court "sidestepped . . . the question" of whether § 1252(a)(2)(B)(ii) precluded jurisdiction because it found that the denial of a continuance violated *§ 1255(i)*. Pet. App. 7a; *see Subhan*, 383 F.3d at 595 (holding that the IJ "violated § 1255(i) when he denied Subhan a continuance without giving a reason consistent with the statute"). But *Subhan*'s creation of an exception to the ban on reviewing continuance decisions under *§ 1255(i)* (which applies only to a narrow class of aliens) does not affect the bar against reviewing such decisions under § 1252(a)(2)(B)(ii). Indeed, *Leguizamo-Medina forecloses* use of the "*Subhan* exception," *i.e.*, allowing review of a continuance denial on the grounds that the denial affected the alien's potential adjustment of status. *Cf. Subhan*, 383 F.3d at 595 (permitting judicial review of continuance denials that nullify the opportunity to adjust status). Rather, under the reasoning of *Leguizamo-Medina* (which the decision below erroneously applied here, *see infra* at pp. 29-30), a continuance decision *cannot* be reviewed if it affects adjustment of status precisely because that adjustment of status decision is itself unreviewable and, consequently, there purportedly can be no judicial review of the "'propriety of the steps that led to that decision.'" Pet. App. 11a (quoting *Leguizamo-Medina*, 493 F.3d at 775).

III. THE SEVENTH CIRCUIT'S DECISION CONFLICTS WITH THE PLAIN LANGUAGE OF THE RELEVANT STATUTE AND IS OTHERWISE ERRONEOUS

Under basic principles of statutory construction, the interpretation of the majority of the federal appellate courts is correct and that of the decision below is erroneous.

First, the relevant statutory language makes plain that subchapter II itself must specifically provide the Attorney General with discretionary authority in order for § 1252(a)(2)(B)(ii) to bar judicial review: "[N]o court shall have jurisdiction to review . . . any . . . decision or action of the Attorney General . . . the authority for which is *specified under this subchapter* to be in the discretion of the Attorney General." 8 U.S.C. § 1252(a)(2)(B)(ii) (emphasis added). On its face, § 1252(a)(2)(B)(ii) precludes judicial review only if "the authority" for the "decision or action" at issue is "specified under this subchapter," subchapter II, "to be in the discretion of the Attorney General." Subchapter II specifies neither that the Attorney General has authority to grant a continuance nor that the decision to grant or deny a continuance is in the Attorney General's discretion. Instead, the discretionary authority to grant or deny a continuance is vested in IJs by a regulation promulgated by the Department of Justice, 8 C.F.R. § 1003.29. Thus, under its plain language, § 1252(a)(2)(B)(ii) does not reach discretionary authority that derives from immigration regulations, but is not specified in Subchapter II.

The Seventh Circuit reached a contrary result by asserting that an IJ's authority to grant or deny a continuance does not derive from 8 C.F.R. § 1003.29, but from subchapter II, specifically 8 U.S.C. § 1229a(a)(1) and (b)(1). The Seventh Circuit reasoned that these two provisions "specify" an IJ's general authority to conduct removal proceedings "and this necessarily encompasses the discretion to continue the proceedings." Pet. App. 9a.

While an IJ's general power to conduct proceedings might well *imply* a power to continue proceedings, the jurisdictional bar applies only to authority "*specified*" in subchapter II, not those powers which can be inferred from a general grant. There is a clear distinction between discretionary authority that lies in IJs by default and the authority that subchapter II explicitly specifies to be in the Attorney General's discretion. As the Ninth Circuit has observed in a similar context, "[b]ecause 8 U.S.C. § 1229a(c) [permitting aliens to file motions to reopen] neither grants nor limits the Attorney General's discretion to deny motions to reopen, IIRIRA can perhaps be said to have left such authority to the Attorney General by default. But default authority does not constitute the *specification* required by § 1252(a)(2)(B)(ii)." *Medina-Morales*, 371 F.3d at 528 (emphasis in original).

Second, the Seventh Circuit's interpretation renders superfluous the word "specified" in § 1252(a)(2)(B)(ii). Because that interpretation invokes the jurisdictional bar for all relevant authority "*derive[d]*" from Subchapter II, the decision below would have reached the same result if the word "specified" was excised from the statute (or changed to "derived" or "stemming from"). This runs afoul of

the bedrock principle that "[s]tatutes must be interpreted, if possible, to give each word some operative effect." *Walters v. Metro. Educ. Enters., Inc.*, 519 U.S. 202, 209 (1997); *see also McNary v. Haitian Refugee Ctr., Inc.*, 498 U.S. 479, 494 (1991) (holding that a provision of the INA limiting judicial review of certain adjustment of status decisions did not bar a federal court action, noting that "had Congress intended the limited review provisions . . . to encompass challenges to INS procedures and practices, it could easily have used broader statutory language").

Third, in many provisions of subchapter II, Congress explicitly vested the Attorney General with discretionary authority over certain decisions or actions. *See, e.g.*, 8 U.S.C. §§ 1154(a)(1)(J), 1157(c)(1), 1158(b)(2)(A)(v), 1159(b), 1182-83, 1184(q)(3), 1186b(d)(3), 1203(b), 1225(a)(4), 1225(b)(1)(A)(iii)(I), 1226a(a)(7), 1227(a)(1)(E)(iii), 1227(a)(1)(H), 1229a(c)(7)(C)(iv)(III), 1229b(b)(2)(D), 1229c(a)(2)(B), 1254a(b)(3)(C), 1255(a), 1255(j)(2), 1255a(b)(1)(D)(ii), 1255a(c)(5)(C), 1255a(g)(2)(C), 1255b(b), 1259, 1281(a), 1281(c), 1285, 1286, 1302(c), 1305(b), 1321(a), 1330(a), 1365a(f)(2), 1367(b). That Congress has explicitly specified in subchapter II so many decisions or actions to be in the Attorney General's discretion demonstrates that Congress knows how to place a decision within § 1252(a)(2)(B)(ii)'s insulation from judicial review. Congress' decision not to mention continuances in subchapter II is, therefore, a clear indication that it never intended continuance decisions made under the authority of an immigration regulation to be shielded from judicial review.

Fourth, even if the Seventh Circuit's reading of § 1252(a)(2)(B)(ii) is *plausible*, it is certainly not sufficiently compelling to overcome the "strong presumption in favor of judicial review of administrative action," especially in cases involving aliens. *St. Cyr*, 533 U.S. at 298. "From the beginning," this Court wrote in *Bowen v. Michigan Academy of Family Physicians*, "'our cases [have established] that judicial review of a final agency action by an aggrieved person will not be cut off unless there is persuasive reason to believe that such was the purpose of Congress.'" 476 U.S. 667, 670 (1986) (alteration in original) (quoting *Abbott Labs. v. Gardner*, 387 U.S. 136, 140 (1967)). In addition, this Court has frequently construed jurisdiction-stripping statutes, like § 1252(a)(2)(B)(ii), narrowly. *See, e.g.*, *Am.-Arab Anti-Discrimination Comm.*, 525 U.S. at 486 (adopting a "narrow reading" of 8 U.S.C. § 1252(g), another jurisdiction-stripping provision of IIRIRA).

Furthermore, even with respect to statutory provisions that do not strip jurisdiction, ambiguities in immigration statutes must be resolved "in favor of [an alien] because deportation is a drastic measure and at times the equivalent of banishment or exile." *Tan v. Phelan*, 333 U.S. 6, 10 (1948) (citation omitted); *see also St. Cyr*, 533 U.S. at 320 (noting that it is a "'longstanding principle of statutory construction [that] any lingering ambiguities in deportation statutes [should be construed] in favor of the alien." (quoting *INS v. Cardoza-Fonseca*, 480 U.S. 421, 449 (1987))).

In this case, the narrowest and most favorable reading of the statutory language is to permit aliens to seek judicial review of continuance decisions.

Fifth, the contrary justifications of the Seventh Circuit below and the Eighth and Tenth Circuits are unpersuasive. In declining to exercise jurisdiction over Mr. Ali's petition for review, the Seventh Circuit below relied in part on its holding in *Leguizamo-Medina* that "[w]hen a decision is unreviewable, any opinion one way or the other on the propriety of the steps that led to that decision would be an advisory opinion." Pet. App. 11a (internal quotation marks omitted). The court reasoned that because it would not have had jurisdiction to review a denial of adjustment of status, it had no jurisdiction to review the continuance decision under *Leguizamo-Medina*. Pet. App. 11a-12a. Thus, the Seventh Circuit, under the reasoning adopted below, would not review the denial of a continuance—even if § 1252(a)(2)(B)(ii) did not exist—because the continuance denial would purportedly be a procedural step on the way to an unreviewable adjustment of status determination.

However, the order under review here, as in all continuance-denial challenges, is the final order of *removal*, which is plainly reviewable under 8 U.S.C. § 1252(a)(1). As the decision below itself acknowledged, "we are not reviewing a final decision denying adjustment of status (the case never got that far)." Pet. App. 11a. Rather, the final agency action being challenged is the reviewable order of removal, on the grounds that a properly conducted hearing would have afforded the alien time to alter his status in a way that may defeat removal. Thus, the alien is

challenging "a step to" a *reviewable* decision, not any unreviewable refusal to adjust status.

Moreover, the Eighth Circuit's conclusion that jurisdiction is barred "[w]henever a *regulation* implementing a subchapter II statute confers discretion upon an IJ," *Onyinkwa*, 376 F.3d at 799 (emphasis added), cannot be reconciled with the plain language of § 1252(a)(2)(B)(ii) which, as noted, divests the courts of jurisdiction only when discretionary authority "is specified under" subchapter II.

The Tenth Circuit similarly renders the "specified under" limitation meaningless and, indeed, directly excises it from the statute. In *Van Dinh v. Reno*, the Tenth Circuit stated that "'§ 1252(a)(2)(B)(ii) provides that no court has jurisdiction to review *any* decision or action the Attorney General has discretion to make 'under this subchapter,'" except for asylum decisions. 197 F.3d 427, 433 (10th Cir. 1999) (quoted in *Yerkovich*, 381 F.3d at 993). As the Fifth Circuit rightly noted in *Zhao*, however, this paraphrase "misstat[es] the statutory text, omitting the phrase 'the authority for which is specified' before 'under this subchapter.'" 404 F.3d at 303 n.6. "By selectively (or inadvertently) omitting this language, the *Yerkovich* and *Van Dinh* courts analyze statutory language that Congress did not adopt." *Id.* Also, in *Yerkovich*, the Tenth Circuit refused to exercise jurisdiction based on what it viewed as the "theme" of IIRIRA—protecting Executive discretion from judicial review. 381 F.3d at 994. But statutory "themes" (whatever they may be) cannot trump plain statutory language. *See FCC v. NextWave Personal Commc'ns Inc.*, 537 U.S. 293, 305 (2003).

In sum, this Court's immediate intervention is necessary to restore national uniformity to the administration of the immigration laws and this case is an ideal vehicle for doing so.

CONCLUSION

The petition should be granted.

Respectfully submitted,

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