No. 06-1346

In the Supreme Court of the United States

AHMED ALI,

Petitioner,

v.

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

Respondents.

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

BRIEF FOR THE PETITIONER

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QUESTIONS PRESENTED

Petitioner was admitted to the United States as a refugee from Somalia based on his legitimate fear of persecution in that country. Sometime thereafter, he was convicted of substantial battery under Wisconsin law and was sentenced to 11 months imprisonment, but was placed on "Huber Status" for most of that period, which allowed him to leave jail during the day to continue his employment and to attend medical appointments. The government commenced removal proceedings and asserted that petitioner's crime was a "particularly serious crime" as defined in the Immigration and Nationality Act, thus precluding him from eligibility for either withholding of removal or asylum—despite the uncontested finding that petitioner's crime is not an "aggravated felony" as defined in the statute. The questions presented are:

1. Whether a criminal offense must be an "aggravated felony," as defined in 8 U.S.C. § 1101(a)(43), to be classified as a "particularly serious crime" that bars eligibility for withholding of removal under 8 U.S.C. § 1231(b)(3).

2. Whether 8 U.S.C. § 1252(a)(2)(B)(ii) precludes the courts of appeals from reviewing aspects of a decision by the Board of Immigration Appeals to deny asylum or withholding of removal on the ground that the petitioner has committed a "particularly serious crime," and if so whether 8 U.S.C. § 1252(a)(2)(D) confers jurisdiction to decide whether the Board's determination whether a specific crime constitutes a particularly serious crime is consistent with the statutory definitions of that term.

TABLE OF CONTENTS

TABLE OF CONTENTS—continued

Page

TABLE OF CONTENTS—continued

Page

TABLE OF AUTHORITIES

Page(s)

CASES

TABLE OF AUTHORITIES—continued

Page(s)

TABLE OF AUTHORITIES—continued

Page(s)

TABLE OF AUTHORITIES—continued

Page(s)

TABLE OF AUTHORITIES—continued

Page(s)

AGENCY DECISIONS

CURRENT U.S. CODE PROVISIONS

TABLE OF AUTHORITIES—continued

Page(s)

TABLE OF AUTHORITIES—continued

Page(s)

TABLE OF AUTHORITIES—continued

Page(s)

TABLE OF AUTHORITIES—continued

Page(s)

TABLE OF AUTHORITIES—continued

Page(s)

TABLE OF AUTHORITIES—continued

Page(s)

TREATIES

TABLE OF AUTHORITIES—continued

Page(s)

FEDERAL REGULATIONS

STATE STATUTES

LEGISLATIVE HISTORY AND BILLS

TABLE OF AUTHORITIES—continued

Page(s)

MISCELLANEOUS

BRIEF FOR THE PETITIONER

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a–20a) is published at 468 F.3d 462. The court's order denying the petition for rehearing with suggestion of rehearing en banc is unpublished and is reproduced at Pet. App. 70a–71a. The final removal order of the Board of Immigration Appeals ("Board") (*id.* at 36a–42a) is unpublished, as are its order denying a motion to reconsider (*id.* at 35a) and a prior relevant order in this case (*id.* at 54a–59a). The decision of the Immigration Judge that gave rise to the Board decision from which the petition for review was taken (*id.* at 43a–53a) is unpublished, as is a prior relevant order in this case (*id.* at 60a–69a).

JURISDICTION

The judgment of the court of appeals was entered on November 6, 2006. The petition for rehearing with suggestion of rehearing en banc was denied on January 5, 2007. The petition for a writ of certiorari was timely filed on April 5, 2007, and was granted on September 25, 2007. This Court has jurisdiction under 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

The relevant statutory provisions are cited below and are reproduced in the addendum to this brief at 1a–15a.

8 U.S.C. § 1101(a)(43)

8 U.S.C. § 1158(b)(1), (2)

8 U.S.C. § 1231(b)(3)

8 U.S.C. § 1252(a)(2), (b)(4)(D)

STATEMENT

A. Legal Framework

1. The Immigration and Nationality Act ("INA"), 8 U.S.C. § 1101 *et seq.*, provides several remedies for aliens who face persecution in their countries of origin. These include asylum, withholding of removal, and deferral of removal under the Convention Against Torture ("CAT"). The first two of these remedies are at issue here.[1]

Asylum is a discretionary remedy that protects refugees who can demonstrate past persecution on account of race, religion, nationality, membership in a particular social group, or political opinion. 8 U.S.C. §§ 1158, 1101(a)(42)(A). A grant of asylum "permits an alien to remain in the United States and to apply for permanent residency after one year." *INS* v. *Aguirre-Aguirre*, 526 U.S. 415, 419 (1999).

Withholding of removal provides temporary protection to aliens who can demonstrate that their "life or freedom would be threatened" on account of their race, religion, nationality, membership in a particular social group, or political opinion. 8 U.S.C. § 1231(b)(3)(A). An alien seeking withholding must satisfy a higher burden than an asylum-seeker, dem-

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[1] The petitioner in this case sought all three of these forms of relief below, and the Seventh Circuit has ordered the Board to reconsider its order denying petitioner deferral of removal under the CAT, see Pet. App. 15a–19a, but nothing related to petitioner's effort to obtain CAT relief is before the Court at this time. The questions presented by the petition for certiorari relate only to asylum and withholding of removal, each of which is a broader form of relief for an alien who faces persecution in his or her country of origin than deferral of removal under the CAT. See 8 C.F.R. § 1208.17(a), (b).

onstrating that future persecution is "more likely than not." *INS* v. *Stevic*, 467 U.S. 407, 424 (1984). Once an alien demonstrates that he or she qualifies for withholding of removal, that relief is mandatory. See *Aguirre-Aguirre*, 526 U.S. at 419–420; *Stevic*, 467 U.S. at 421 n.15. An alien in withholding status, however, remains eligible for removal to any country in which the alien would not be persecuted. *Aguirre-Aguirre*, 526 U.S. at 419.

2. The modern withholding provision was introduced as part of the Refugee Act of 1980, Pub. L. No. 96-212, § 203(e), 94 Stat. 102, 107, to satisfy the obligation of "non-refoulement" created by the United Nations Protocol relating to the Status of Refugees ("Refugee Protocol"), Jan. 31, 1967, 19 U.S.T. 6223, 606 U.N.T.S. 267, to which the United States acceded in 1968.[2] See *INS* v. *Cardoza-Fonseca*, 480 U.S. 421, 424 (1987); H.R. CONF. REP. NO. 96-781, at 20 (1980), *reprinted in* 1980 U.S.C.C.A.N. 160, 161.

The Refugee Convention provides that "[n]o Contracting State shall expel or return ('refouler') a refugee in any manner whatsoever to the frontiers of ter-

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[2] The Refugee Protocol incorporates the substantive provisions of Articles 1(C)–(F) and 2 through 34 of the United Nations Convention Relating to the Status of Refugees ("Refugee Convention"), July 28, 1951, 189 U.N.T.S. 150. See *Aguirre-Aguirre*, 526 U.S. at 427. The principal difference between the Refugee Convention and the Refugee Protocol is that the definition of "refugee" in the Convention was limited to those fleeing "[a]s a result of events occurring before 1 January 1951," Refugee Convention art. 1(A)(2), whereas the Refugee Protocol is not so limited, see Refugee Protocol art. 1(2). All references to the Refugee Convention in this brief are to provisions that were incorporated in the Refugee Protocol, and thus to which the United States has acceded.

ritories where his life or freedom would be threatened on account of his race, religion, nationality, membership of a particular social group or political opinion." *Id.* art. 33(1).

The Refugee Convention contains two limitations on this "non-refoulement" principle. First, "[t]he benefit of [non-refoulement] may not * * * be claimed by a refugee whom there are reasonable grounds for regarding as a danger to the security of the country in which he is." *Id.* art. 33(2). Similarly, non-refoulement may not be claimed "by a refugee * * * who, having been convicted by a final judgment of a particularly serious crime, constitutes a danger to the community of that country." *Ibid.*[3]

Congress incorporated these limitations into the Refugee Act, in particular disqualifying an alien from withholding of removal "if the Attorney General determines that * * * the alien, having been convicted of a particularly serious crime, constitutes a danger to the community of the United States." Refugee Act § 203(e), 94 Stat. at 107, formerly codified at 8 U.S.C. § 1253(h)(2)(B) (1982).

3. In the years since the enactment of the Refugee Act in 1980, Congress has refined the limitations on withholding but has always retained both the general non-refoulement principle and the exception to that principle for refugees who have been convicted of a particularly serious crime ("PSC").

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[3] The Refugee Convention also excludes entirely from the definition of "refugee" individuals who have committed serious non-political crimes prior to arrival, war crimes, and acts contrary to the purposes and principles of the United Nations. See *id.* art. 1(F).

Congress introduced the concept of "aggravated felony" to the INA in the Anti-Drug Abuse Act of 1988, Pub. L. No. 100-690, § 7342, 102 Stat. 4181, 4469–4470. Conviction of an aggravated felony triggers expedited removal procedures and ineligibility for various forms of relief. See *id.* §§ 7343(b), 7347, 7349, 102 Stat. at 4470–4473. Aggravated felonies initially consisted of murder, drug trafficking, and illicit trafficking in firearms or destructive devices. (After amendments in 1990, 1994, 1996, and 2003, the list of aggravated felonies now includes twenty-one categories of offenses, encompassing a host of specific crimes. See 8 U.S.C. § 1101(a)(43)(A)–(U).)

The statutory terms "aggravated felony" and PSC were first associated in the Immigration Act of 1990, in which Congress provided that "an alien who has been convicted of an aggravated felony shall be considered to have committed a particularly serious crime" for purposes of withholding. Pub. L. No. 101-649, § 515(a)(2), 104 Stat. 4978, 5053, formerly codified at 8 U.S.C. § 1253(h)(2) (1994). The 1990 Act also specified that "[a]n alien who has been convicted of an aggravated felony * * * may not apply for or be granted asylum." *Id.* § 515(a)(1), 104 Stat. at 5053, codified at 8 U.S.C. § 1158(d) (1994).

The current limitations on withholding and asylum were enacted in 1996. In April of that year, while Congress considered expanding the definition of aggravated felony for purposes of withholding of removal, concern that this action would conflict with treaty obligations prompted Congress to provide that the PSC bar would not apply to aggravated felons if the Attorney General determined that withholding of removal was "necessary to ensure compliance with the [Refugee Protocol]." Antiterrorism and Effective

Death Penalty Act of 1996 ("AEDPA"), Pub. L. No. 104-132, § 413(f), 110 Stat. 1214, 1269, codified at 8 U.S.C. § 1253(h)(3) (enacted April 24, 1996; repealed Sept. 1996). See *In re Q-T-M-T-*, 21 I. & N. Dec. 639, 648 n.4 (B.I.A. 1996) (discussing legislative history).

In September 1996, Congress passed the Illegal Immigration Reform and Immigrant Responsibility Act ("IIRIRA"), Pub. L. No. 104-208, Div. C, 110 Stat. 3009-546. In addition to expanding the definition of aggravated felonies as earlier proposed, see *id.* § 321, 110 Stat. at 3009-627–3009-628, Congress dropped the explicit reference to the Refugee Protocol and amended the PSC bar to withholding of removal. That provision now provides:

> For purposes of [eligibility for withholding of removal], an 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.

IIRIRA § 305(a)(3), 110 Stat. at 3009-598, codified at 8 U.S.C. § 1231(b)(3).

Congress also created for the first time a PSC bar to asylum. The statute defines what constitutes a PSC for purposes of asylum somewhat differently than the term is defined for purposes of withholding of removal. For asylum, a disqualifying PSC is defined as follows:

> (i) Conviction of aggravated felony. For purposes of [eligibility for asylum], an alien who has been convicted of an aggravated felony shall be considered to have been convicted of a particularly serious crime.
>
> (ii) Offenses. The Attorney General may designate by regulation offenses that will be considered to be a [PSC].

IIRIRA § 604(a), 110 Stat. at 3009-692, codified at 8 U.S.C. § 1158(b)(2)(B).

4. An alien who is removable may apply for relief from removal under various provisions of the INA, including asylum and withholding. The initial determination of eligibility for asylum or withholding is made by an Immigration Judge ("IJ"), see 8 C.F.R. § 1240.1(a), whose determination may be appealed to the Board, see *id.* § 1003.1(b). The Board's decision may be appealed to a federal court of appeals, but the statute places significant limitations on judicial review in such appeals. Specifically, Congress has generally barred judicial review of discretionary immigration determinations (other than the grant of asylum) by the Attorney General or his designee. Under 8 U.S.C. § 1252(a)(2)(B):

> [N]o court shall have jurisdiction to review—
>
> (i) any judgment regarding the granting of relief under section 1182(h), 1182(i), 1229b, 1229c, or 1255 of this title, or
>
> (ii) any other decision or action of the Attorney General * * * the authority for which is specified under [8 U.S.C. subchapter

> 12(II)[4]] to be in the discretion of the Attorney General * * *, other than the granting of relief under section 1158(a) of this title.

Ibid.[5]

In response to this Court's holding in *INS* v. *St. Cyr* that § 1252(a)(2)(C) did not repeal habeas corpus jurisdiction under 28 U.S.C. § 2241 and that preclusion of the claim presented in that case concerning legal eligibility for discretionary relief "would give rise to substantial constitutional questions," 533 U.S. 289, 300 (2001), Congress enacted the REAL ID Act of 2005. In particular, in order to provide an "'adequate and effective' substitute for habeas corpus," H.R. CONF. REP. NO. 109-72, at 175, *reprinted in* 2005 U.S.C.C.A.N. 240, 300 (quoting *Swain* v. *Pressley*, 430 U.S. 372, 381 (1977)), Congress enacted 8 U.S.C. § 1252(a)(2)(D), which limits the jurisdiction-stripping provisions of § 1252(a)(2)(B) and (C):

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[4] Chapter 12 of Title 8 is the INA; Subchapter 12(II), the "subchapter" to which 8 U.S.C. § 1252(a)(2)(B) refers, governs immigration. See 8 U.S.C. §§ 1151–1381; *Alaka* v. *Att'y Gen.*, 456 F.3d 88, 95 (3d Cir. 2006).

[5] When Congress restructured the immigration system to place administration and enforcement of the INA in a new Bureau of Citizenship and Immigration Services within the Department of Homeland Security, it vested in the Secretary of Homeland Security authority that previously was exercised by the Attorney General. See Homeland Security Act of 2002, Pub. L. No. 107-296, 116 Stat. 2135. In the REAL ID Act of 2005, Pub. L. No. 109-13, Div. B, 119 Stat. 302, Congress clarified § 1252(a)(2)(B)(ii) by specifying that courts lack jurisdiction to review decisions or actions "of the Attorney General *or the Secretary of Homeland Security* the authority for which is specified under [8 U.S.C. subchapter 12(II)] to be in the discretion of the Attorney General *or the Secretary of Homeland Security*." REAL ID Act § 101(f), 119 Stat. at 305 (emphasis added).

> Nothing in [§ 1252(a)(2)(B)] * * * which limits or eliminates judicial review, shall be construed as precluding review of *constitutional claims* or *questions of law* raised upon a petition for review filed with an appropriate court of appeals.

REAL ID Act § 106(a)(1)(A)(iii), 119 Stat. at 310 (emphasis added).

B. Factual Background

1. Petitioner Ahmed Ali ("Ali") was born on January 1, 1980, in Baidoa, Somalia, and is a member of the Rahanweyn clan. Pet. App. 62a–63a. When Somalia descended into inter-clan warfare, two of Ali's brothers were killed, Ali was shot at and threatened on several occasions, *id.* at 3a, 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, *id.* at 63a. 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"). *Ibid.* 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 psychiatrist, witnessing (at age 16) 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.[6] Manifestations of Ali's PTSD include hyper-

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

vigilance, insomnia, and flashbacks to the traumatic episodes in Somalia, particularly to the assault and murder of his sister. *Id.* at 1069.

2. Ali was admitted to the United States as a refugee on August 30, 1999, at age 19, along with his mother and ten siblings. Pet. App. 62a–63a. Ali lived with a sister in Madison, Wisconsin. There, he worked while attending classes at Madison Area Technical College. *Id*. at 4a.

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, *Ibid.*, see also AR 930–931; Ali filed a police report, AR 703, 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. Pet. App. 4a. The third occasion, on June 30, 2000, was more serious; the two men engaged in a physical fight involving a box cutter that Ali used for work. Both men required multiple stitches. AR 490, 931.

Ali was prosecuted for the third incident. He pled guilty to the offense of Substantial Battery under Wisconsin law on April 12, 2001. Pet. App. 55a. He was sentenced to 11 months' imprisonment, 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 first diagnosed with PTSD. Ali began treatment for his PTSD in September 2000 and continued treatment throughout the time he served at the Dane County Correctional Center.

C. Proceedings Below

On June 7, 2002, the government began removal proceedings against Ali, charging him with being removable because of his battery conviction. Pet. App. 62a. 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 CAT. *Ibid.* 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. *Id.* at 68a.

Ali appealed the IJ's denial of the waiver and asylum to the Board and the government cross-appealed the grant of withholding of removal. *Id.* at 54a. On November 14, 2003, the Board reversed the IJ's grant of withholding of removal, finding that despite the government's concession that Ali's battery conviction was not an aggravated felony as that term is defined in the INA,[7] that conviction was nonetheless a *per se* PSC, based solely on the elements of the offense (and without regard to the mitigating facts and circumstances surrounding the offense). *Id.* at 56a–59a. He was thus found ineligible for both withholding of removal and asylum. *Ibid.* The Board remanded the case to the IJ for consideration of Ali's eligibility for relief under the CAT. *Id.* at 59a.

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[7] The parties agree that Ali has not committed an aggravated felony. Pet. App. 12a n.3. Substantial battery would be an aggravated felony only if the "term of imprisonment [were] at least one year." 8 U.S.C. § 1101(a)(43)(F).

The IJ conducted a second hearing on February 10, 2004, and issued an oral decision concluding that Ali faced a clear probability of torture upon return to Somalia. *Id.* at 52a. As such, he granted Ali deferral of removal under the CAT. *Ibid*. The government again appealed the IJ's grant of relief from removal; Ali cross-appealed to preserve appellate review of all issues. On March 15, 2005, the Board issued an order overruling the IJ's grant of relief under the CAT. *Id.* at 42a.

Ali filed a timely petition for review in the Seventh Circuit on April 15, 2005. AR 9. The court of appeals granted in part and denied 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. Pet. App. 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. The court also held that 8 U.S.C. § 1252(a)(2)(B)(ii) deprived it of jurisdiction to review Ali's claim that the purportedly "discretionary" determination that his crime was a PSC resulted from applying the wrong legal standard. Pet. App. 15a.

Ali petitioned for certiorari, arguing that (1) the statute precludes a crime from being a PSC for purposes of withholding if that crime is not an aggravated felony, and (2) the court of appeals erred in refusing to reach petitioner's claim that the Board used an improper legal standard in determining that he committed a PSC, for purposes of both asylum and

withholding. The petition was granted on September 25, 2007.

SUMMARY OF ARGUMENT

1. Only an "aggravated felony," as defined in the INA by 8 U.S.C. § 1101(a)(43), can rise to the level of a PSC that renders an alien ineligible for withholding of removal to a country where the alien will face persecution on account of his race, religion, nationality, membership in a particular social group, or political opinion.

The PSC bar to withholding of removal, 8 U.S.C. § 1231(b)(3), first provides that where a crime (1) is an aggravated felony; and (2) results in a sentence of five years or longer, the crime is *per se* a PSC. The Attorney General is authorized to modify *one* of these two requirements and to determine that a specific crime is a PSC "notwithstanding the length of sentence imposed." *Ibid.* But the statute does not authorize the Attorney General to determine that an offense is a PSC notwithstanding the fact that it is not an aggravated felony. By a plain reading of the statute, and through the interpretive canon *expressio unius est exclusio alterius*, this omission means that Congress intended to exclude the possibility that non-aggravated felonies could be PSCs. The government's contrary reading renders meaningless the statutory provision authorizing the Attorney General to determine that an aggravated felony resulting in a sentence of less than five years is a PSC, and would read out of the statute the clear difference between how PSCs are defined for purposes of withholding versus for purposes of asylum, where the Attorney General *is* authorized to designate a non-aggravated felony to be a PSC.

The legislative history confirms that only an aggravated felony can be a PSC for purposes of withholding of removal. The latest amendment to the PSC bar was enacted as part of a conference committee compromise during which it was clear that Congress did not intend to violate the United States' obligations under the Refugee Protocol. But the Refugee Protocol tolerates deportation to persecution only for an alien who has committed a capital or very grave offense; Congress thus cannot have intended to expel refugees for minor offenses that do not even constitute aggravated felonies.

Even if the PSC bar were not unambiguous, it would still have to be construed in favor of petitioner. Not only would the canon that any ambiguity be resolved in favor of an alien facing deportation control, but in any event the Board has not issued an interpretation of that bar that is entitled to deference under *Chevron U.S.A., Inc.* v. *Natural Resources Defense Council, Inc.*, 467 U.S. 837, 842 (1984). The ruling in Ali's case was designated non-precedential and therefore does not carry the force of law, as *United States* v. *Mead Corp.*, 533 U.S. 218, 226–227 (2001), requires for *Chevron* deference to apply. And the Board's October 24, 2007 decision in *In re N-A-M-*, 24 I. & N. Dec. 336, 338 (B.I.A. 2007) would not be entitled to deference even if the statute were ambiguous because the Board did not purport to exercise its discretion to interpret an ambiguous statute and instead asserted that its reading of the statute was compelled as a matter of law. In any event, the Board's interpretation is unreasonable as a matter of law because it failed to consider the operation of the canons of statutory interpretation and Congress's intent to comply with the Refugee Protocol, and has

failed to construe ambiguities to the benefit of the alien.

2. The court of appeals also erred in holding that it lacked jurisdiction to consider Ali's legal claims as to why the Board erred in finding that his conviction could constitute a disqualifying PSC under the asylum and withholding statutes. The jurisdictional bar in 8 U.S.C. § 1252(a)(2)(B)(ii) precludes review only of discretionary determinations. But asylum determinations are specifically exempted from this jurisdictional bar and withholding of removal is a mandatory, not discretionary, form of relief. Thus, the court of appeals had jurisdiction over petitioners' arguments.

Furthermore, the determination whether a crime is a PSC is itself not specified to be within the discretion of the Attorney General, and involves no exercise of discretion.

Finally, even if § 1252(a)(2)(B)(ii) were applicable to some PSC determinations with respect to claims for asylum or withholding, 8 U.S.C. § 1252(a)(2)(D), which affirmatively provides the courts of appeals jurisdiction to review "questions of law," would confer jurisdiction to adjudicate challenges such as petitioner's claim that the Board established an improper legal standard for adjudicating PSC disputes.

ARGUMENT

I. Only An "Aggravated Felony" Can Constitute A "Particularly Serious Crime" That Disqualifies An Alien From Withholding Of Removal.

Congress has specified only narrow conditions under which an alien may be removed to a country where his "life or freedom would be threatened." 8

U.S.C. § 1231(b)(3). The IJ has already determined that petitioner's life or freedom will be threatened if he is removed to Somalia. Pet. App. 56a. The question that remains is whether his conviction for battery with an accompanying sentence of eleven months' imprisonment—much of it spent on work release—despite not constituting an "aggravated felony" under 8 U.S.C. § 1101(a)(43), nonetheless constitutes a PSC the dangerousness of which makes him ineligible for protection.

Under the terms of the governing statute, the answer to that question is plainly no: Using the ordinary tools of statutory construction, it is clear that a crime that does not qualify as an aggravated felony cannot qualify as a PSC for purposes of the withholding of removal statute. See Part I.A, *infra.* But even were there any ambiguity in the statute, the government's interpretation of that statute is not entitled to *Chevron* deference and should be rejected. See Part I.B, *infra.*

A. Using ordinary rules of statutory interpretation, it is clear that only aggravated felonies may constitute "particularly serious crime[s]" under 8 U.S.C. § 1231(b)(3)(B).

1. The proper interpretation of § 1231(b)(3)(B) must give effect to its plain meaning in context.

When Congress speaks clearly through a statute, the plain meaning of that statute governs. See, *e.g.*, *Robinson* v. *Shell Oil Co.*, 519 U.S. 337, 340 (1997). The text and structure of 8 U.S.C. § 1231(b)(3)(B) demonstrate that an offense can be a PSC so as to bar withholding of removal only if that offense first

constitutes an "aggravated felony" as defined by Congress, see *id.* § 1101(a)(43).

The statute provides, for purposes of withholding of removal:

> [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.

Id. § 1231(b)(3)(B) (emphasis added).

Under this provision, Congress in essence partitioned offenses into three categories: (1) aggravated felonies for which a sentence of five years or more has been imposed, which under the first sentence of this paragraph of § 1231(b)(3)(B) are *per se* PSCs; (2) other aggravated felonies, which under the second sentence the Attorney General may determine to be PSCs "notwithstanding the length of sentence imposed"; and (3) offenses that do not constitute aggravated felonies, which the Attorney General is "precludе[d]" from "determining" to be PSCs.

As the Third Circuit has explained, this tripartite division of offenses is the necessary implication of the structure of § 1231(b)(3)(B). Because the second sentence "is clearly tied to the first," and in fact "explicitly refers back to the 'previous sentence,'" the language of the two sentences must be read together and provides that the Attorney General's authority to designate a crime that is not a *per se* PSC to none-

theless be a PSC "is limited to aggravated felonies." *Alaka*, 456 F.3d at 104–105.

The same result obtains through the interpretive canon *expressio unius est exclusio alterius*, which provides that "expressing one item of [an] associated group or series excludes another left unmentioned," *United States* v. *Vonn*, 535 U.S. 55, 65 (2002). In the first sentence of the provision, Congress supplied two criteria that jointly make a crime *per se* particularly serious—(1) that it is an aggravated felony; and (2) that it results in a five-year term of imprisonment. In the next sentence, Congress vested decisional authority in the Attorney General to waive the second criterion but not to waive the first criterion. This "omission bespeaks a negative implication," *Chevron U.S.A. Inc.* v. *Echazabal*, 536 U.S. 73, 81 (2002), that only an aggravated felony may rise to the level of PSC. See also *Leatherman* v. *Tarrant County Narcotics Intelligence & Coordination Unit*, 507 U.S. 163, 168 (1993) (applying canon).

The expression-exclusion canon operates from the assumption that when Congress omits an element of an associated group, it does so intentionally. See 2A Singer & Singer, STATUTES AND STATUTORY CONSTRUCTION § 47:23 (7th ed. 2007). This inference must be strongest where, as here, an associated group is defined in one sentence and limited in the very next. Nonetheless, the Seventh Circuit rejected application of the maxim here because Congress "[did] not state" that non-aggravated felonies could *not* be PSCs. See Pet. App. 14a. This reasoning renders the expression-exclusion canon meaningless: If a negative inference could be drawn from an omission only when Congress was explicit, then the canon would be of no use in statutory construction.

Moreover, the Seventh Circuit's interpretation of the statute renders the second sentence superfluous. A non-aggravated felony could constitute a PSC only if the statute authorizes the Attorney General to designate *any* crime to be particularly serious. But if that is the case, the second sentence of the provision operates only to confer authority that already exists. Such an interpretation runs afoul of this Court's "caution[] against reading a text in a way that makes part of it redundant." *Nat'l Ass'n of Home Builders* v. *Defenders of Wildlife*, 127 S. Ct. 2518, 2536 (2007).

The *expressio unius* inference is further supported by reading § 1231(b)(3)(B) in the context of the entire statute. See *King* v. *St. Vincent's Hosp.*, 502 U.S. 215, 221 (1991) (reciting "the cardinal rule that a statute is to be read as a whole"); *Davis* v. *Mich. Dep't of Treasury*, 489 U.S. 803, 809 (1989) ("It is a fundamental canon of statutory construction that the words of a statute must be read in their context and with a view to their place in the overall statutory scheme."). In the withholding statute, Congress made no explicit provision for crimes that are not aggravated felonies to be treated as PSCs. By contrast, in the asylum statute, Congress *explicitly* permitted the Attorney General to designate a non-aggravated felony to be a PSC and thus to disqualify an alien from that remedy. In the context of asylum, all aggravated felonies are *per se* PSCs and the Attorney General "may designate by regulation [other] offenses that will be considered to be" a PSC for pur-

poses of asylum. 8 U.S.C. § 1158(b)(2)(B); page 6, *supra*.[8]

The asylum provision and the withholding provision were amended simultaneously, see IIRIRA §§ 305(a)(3), 604(a), 110 Stat. at 3009-598, 3009-692. Because "it is generally presumed that Congress acts intentionally and purposely when it includes particular language in one section of a statute but omits it in another," *City of Chicago* v. *Envtl. Def. Fund*, 511 U.S. 328, 338 (1994) (internal quotation marks omitted), it follows that the omission in § 1231(b)(3)(B) of a similar provision authorizing the Attorney General to specify that non-aggravated felonies could qualify as PSCs for purposes of the withholding bar was intentional. See also *Envtl. Def.* v. *Duke Energy Corp.*, 127 S. Ct. 1423, 1432 (2007); *Atl. Cleaners & Dyers, Inc.* v. *United States*, 286 U.S. 427, 433–434 (1932).[9]

2. The legislative history of § 1231(b)(3)(B) confirms the provision's plain meaning.

The legislative history of § 1231(b)(3)(B) confirms that Congress intended to preclude convictions for

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[8] The Attorney General has not designated "substantial battery" to be a particularly serious crime for any purpose, including for purposes of rendering an alien ineligible to seek asylum.

[9] The narrower PSC bar for withholding is also consistent with the statute's general approach, wherein Congress has enacted greater limitations on eligibility for asylum than for withholding. For example, an alien is ineligible for asylum but not for withholding if he or she fails to seek relief within one year of entry, 8 U.S.C. § 1158(a)(2)(B); was firmly resettled in another country before arriving in the United States, *id.* § 1158(b)(2)(A)(vi); unlawfully reentered the United States after being removed, *id.* § 1231(a)(5); 8 C.F.R. § 208.31; or could be removed to a safe third country, 8 U.S.C. § 1158(a)(2)(A).

non-aggravated felonies from qualifying as PSCs for purposes of the withholding bar.

The PSC bar language that became part of IIRIRA resulted from a conference committee compromise. The House passed a bill providing that aggravated felonies resulting in a sentence of five years or more would qualify as "particularly serious" for purposes of the withholding bar. See H.R. 2202, 104th Cong. § 305(a)(3) (as passed by House, Mar. 21, 1996). The Senate passed a different immigration reform bill that would have designated a larger subset of aggravated felonies to be particularly serious,[10] except where, in a particular case, deportation would violate the Refugee Protocol. See H.R. 2202, 104th Cong. § 161(c) (as passed by Senate, May 2, 1996); 142 CONG. REC. S4609–S4611 (May 2, 1996). A bipartisan conference committee eventually emerged with a compromise bill that made all aggravated felonies that led to a sentence of five years or more PSCs (per the House version) but that added the possibility that other aggravated felonies could be particularly serious upon the determination of the Attorney General (per the Senate version). See H.R. CONF. REP. NO. 104-828, at 215 (1996).

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[10] Certain offenses, like murder, are aggravated felonies regardless of the punishment imposed. Other offenses are aggravated felonies only if a certain amount of money is involved (as in the case of money laundering, see 8 U.S.C. § 1101(a)(43)(D)) or a certain term of imprisonment is imposed (as in the case of crimes of violence, see *id.* § 1101(a)(43)(F)). Prior to 1996, the thresholds were $100,000 (for offenses delimited by funds involved) and five years' imprisonment (for offenses delimited by length of imprisonment). S. 1664 would have reduced the thresholds to $10,000 and one year's imprisonment for certain categories of offenses. That idea was in fact adopted later that year, in IIRIRA. *Id.* § 321(a), 110 Stat. at 3009-627–3009-628.

The existence of this compromise makes clear that Congress acted consciously when incorporating the provision authorizing non-five-year aggravated felonies to be PSCs for withholding purposes and, therefore, did not intend for the provision to be meaningless. Cf. *Chickasaw Nation* v. *United States*, 534 U.S. 84, 94 (2001). The content of the compromise provides further evidence that both chambers gave serious and sustained consideration to the relationship between the aggravated felony definition and the PSC bars in light of the nation's treaty obligations.

Throughout the history of the withholding provision, Congress has taken great care to acknowledge and to adhere to its treaty obligations under the Refugee Protocol, which generally prohibits returning a refugee to likely persecution. Because of the serious consequences that would result, the obligation of non-refoulement created by Article 33(1) of the Refugee Convention provides only narrow exceptions. For the PSC exception, at issue here, the relevant United Nations Handbook[11] explains that a *serious* non-political crime[12] "must be a capital crime or a very grave punishable act" and that "[m]inor offences punishable by moderate sentences are not grounds for exclusion." *Handbook on Procedures and Criteria*

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[11] The Handbook "provides significant guidance in construing the [Refugee] Protocol, to which Congress sought to conform," *Cardoza-Fonseca*, 480 U.S. at 439 n.22.

[12] As we noted above, see note 3, *supra*, the Refugee Convention provides no protection—and thus the non-refoulement principle does not apply—to any person who "has committed a *serious non-political crime* outside the country of refuge prior to his admission to that country as a refugee." Refugee Convention art. 1(F) (emphasis added).

for Determining Refugee Status, ¶ 155, U.N. Doc. HCR/IP/4/Eng/REV.1 (Jan. 1992). As the Board has acknowledged, "it should be clear that a 'particularly serious crime' * * * is more serious than a 'serious nonpolitical crime.'" *Matter of Frentescu*, 18 I. & N. Dec. 244, 247 (B.I.A. 1982).[13]

The Refugee Act of 1980, which established the basic contours of the withholding statute, reflected Congress's manifest intent to bring the United States into compliance with the Refugee Protocol. See *Cardoza-Fonseca*, 480 U.S. at 424; H.R. CONF. REP. NO. 96-781, at 20, *reprinted in* 1980 U.S.C.C.A.N. at 161.

Even while enacting harsher immigration laws to respond to perceived problems with alien criminality, Congress has reiterated its intent to comply with the Refugee Protocol. For example, in April 1996, amid discussion of expanding the definition of aggravated felony to include crimes punished with only one year's imprisonment instead of five, see note 10, *supra*, Congress acknowledged the potential conflict with the Refugee Protocol and required the Attorney General to ensure continued compliance. See AEDPA § 413(f), 110 Stat. at 1269, codified at 8 U.S.C. § 1253(h)(3) (enacted April 24, 1996; repealed Sept. 1996).[14]

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[13] A learned commentator on the Refugee Convention explained that a PSC is one that "demonstrates a complete or near complete lack of social and moral inhibitions, e.g. the blowing up of a passenger airplane in order to collect life insurance, or wanton killing in a public place." Grahl-Madsen, *Commentary on the Refugee Convention, 1951*, art. 33 cmt. 10 (1963) (United Nations High Comm'r for Refugees 1997).

[14] In introducing the amendment to the Senate Committee on the Judiciary on March 20, 1996, Senator Kennedy explained that although the PSC bar "has not been in conflict with our

When Congress enacted IIRIRA five months later, it made three changes relevant to the PSC withholding bar. First, Congress expanded the definition of aggravated felony by, among other things, lowering the minimum sentence required for certain crimes to qualify as aggravated felonies from five years to one year, carrying out one of the definitional changes that had prompted Congress to introduce 8 U.S.C. § 1253(h)(3) as part of AEDPA. Second, Congress altered the relationship between aggravated felonies and PSCs, mandating that only aggravated felonies with sentences of five years or more—essentially, aggravated felonies under the previous, narrower definition of that term—would constitute *per se* PSCs. Third, Congress reversed the prior rule—under which aggravated felonies with sentences of less than five years were presumptively PSCs—by repealing the provision granting the Attorney General the power to determine that the Refugee Protocol precluded certain aggravated felonies from being treated as PSCs, and instead granting the Attorney General the authority to determine that particular aggravated felonies *are* PSCs even if the sentence imposed is less than five years. None of this legislative activity indicates that Congress dismissed its previous concern that designating all aggravated felonies to be PSCs for purposes of the

treaty obligations," the Committee's vote "to declare an aggravated felon anyone convicted of an offense involving imprisonment of one year, * * * means that people with fairly minor offenses would be ineligible to seek withholding of deportation, [which] in many instances may violate the Refugee Convention." *Immigration Control and Financial Responsibility Act of 1996: Mark-up on S. 1664 before the Senate Committee on the Judiciary*, 104th Cong., 2d Sess. 61 (1996) (relevant portions attached in the addendum to this brief at 16a–28a). See also *Q-T-M-T-*, 21 I. & N. Dec. at 649 n.4 (discussing mark-up).

withholding statute might violate the Refugee Protocol, let alone that Congress in fact sought to authorize the attorney general to designate even *non*-aggravated felonies as PSCs.

Thus, the uninterrupted history of the withholding provision demonstrates Congress's intent to comply with the Refugee Protocol.[15] Construing § 1231(b)(3)(B) to authorize the expulsion of Ali is flatly inconsistent with that aim. Congress could not simultaneously have sought to comply with the Refugee Protocol and have adopted the expansive exclusion from withholding relief propounded by the government.

* * * * *

Under the INA, only crimes designated as "aggravated felonies" that lead to a sentence of five years or more are *per se* "particularly serious crime[s]" for purposes of withholding. Although the statute permits the Attorney General or his designee to determine that other aggravated felonies—with sentences of less than five years—are PSCs, no crime that fails even to meet the statutory minimum for an aggravated felony may qualify as a PSC.

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[15] Because Congress has repeatedly expressed its intent to comply with the Refugee Protocol, the statute must be construed consistent with the nation's treaty obligations to effectuate that intent. The same result obtains from the *Charming Betsy* canon of statutory interpretation, which provides that "an act of Congress ought never to be construed to violate the law of nations if any other possible construction remains." *Murray* v. *Schooner Charming Betsy*, 6 U.S. (2 Cranch) 64, 118 (1804).

B. Even if there were ambiguity as to the meaning of § 1231(b)(3)(B), that provision should be interpreted to exclude non-aggravated felonies from the scope of particularly serious crimes.

1. Any ambiguity in § 1231(b)(3)(B) must be construed to the benefit of the alien.

If, despite the foregoing analysis, the Court concludes that the meaning of the PSC bar language remains unclear, that ambiguity should be resolved in favor of Ali. This Court has recognized a "longstanding principle of construing any lingering ambiguities in deportation statutes in favor of the alien." *Cardoza-Fonseca*, 480 U.S. at 449; accord, *e.g.*, *INS* v. *Errico*, 385 U.S. 214, 225 (1966) ("Even if there were some doubt as to the correct construction of the statute, the doubt should be resolved in favor of the alien."). This principle acknowledges that "deportation is a drastic measure." *Fong Haw Tan* v. *Phelan*, 333 U.S. 6, 10 (1948). Here, the consequences of deportation, and the persecution and possible murder of Ali that would ensue, lend even greater force to this Court's practice of employing "the narrowest of several possible meanings of the words used." *Id.* Neither the Board nor the Seventh Circuit acknowledged this important, and humane, principle of statutory interpretation, which must be applied before considering an agency's claim to interpretive deference. Cf. *Nat'l Cable & Telecomms. Ass'n* v. *Brand X Internet Servs.*, 545 U.S. 967, 985 (2005).

2. The decision of the Board of Immigration Appeals in this case is not entitled to Chevron *deference.*

Rather than employing the standard tools of statutory construction to this statute, the Seventh Circuit determined that it must defer to the Board's interpretation of § 1231(b)(3)(B) under *Chevron*. See Pet. App. 10a. That deference was inappropriate. Under this Court's settled precedent, *Chevron* deference is not warranted where, as here, an agency issues an unpublished order that lacks the force of law under the agency's own rules.

An agency interpretation is entitled to *Chevron* deference only "when it appears that Congress delegated authority to the agency generally to make rules carrying the force of law, and that the agency interpretation claiming deference was *promulgated in the exercise of that authority*." *Mead*, 533 U.S. at 226–227 (emphasis added). Here, the Board's ruling below was not promulgated in the exercise of the Attorney General's authority to adopt an interpretation of the statute carrying the force of law.

Under Board regulations, rulings can be made in the form of "precedent decisions" or "unpublished decisions." Precedent decisions "provide clear and uniform guidance to the [former Immigration and Naturalization] Service, the immigration judges, and the general public on the proper interpretation and administration of the [INA] and its implementing regulations," and "serve as precedents in all proceedings involving the same issue or issues." 8 C.F.R. § 1003.1(g). By contrast, "[u]npublished decisions are binding on the parties to the decision but are not considered precedent for unrelated cases." *Board of Immigration Appeals Practice Manual* § 1.4(d)(ii)

(2004), *available at* http://www.usdoj.gov/eoir/bia/qapracmanual/apptmtn4.htm.

The Board did not designate its decision in this case as precedential, nor did it rely upon any precedent decisions construing the current language of § 1231(b)(3)(B).[16] In circumstances such as this, where an agency issues an interpretation that does not carry the force of law, this Court has found that the agency's decision is "entitled to respect" only to the extent it has the "power to persuade," *Christensen* v. *Harris County*, 529 U.S. 576, 587 (2000) (quoting *Skidmore* v. *Swift & Co.*, 323 U.S. 134, 140 (1944)), but that it is "beyond the *Chevron* pale," *Mead*, 533 U.S. at 234. See also *Rotimi* v. *Gonzales*, 473 F.3d 55, 57 (2d Cir. 2007) (per curiam) (refusing to defer to an unpublished Board disposition); *Garcia-Quintero* v. *Gonzales*, 455 F.3d 1006, 1014 (9th Cir. 2006) (same).

Of course, even if *Chevron* deference were to apply to Board decisions designated as non-precedential, the Board's interpretation of the statute still must be reasonable. By relying only upon precedents that have been abrogated many times over and by failing even to *acknowledge* the statutory changes, let alone to assess the consequences of those

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[16] The Board did cite three precedent opinions in its discussion of Ali's withholding claim: *Matter of Garcia-Garrocho*, 19 I. & N. Dec. 423 (B.I.A. 1986); *Matter of Carballe*, 19 I. & N. Dec. 357 (B.I.A. 1986); and *Frentescu*, 18 I. & N. Dec. 244. See Pet. App. 57a–58a. However, because each of these decisions predates the concept of "aggravated felony," which was introduced to the INA in 1988, see page 5, *supra*, not to mention the statutory amendments to the PSC bar in 1990 and twice in 1996 (in AEDPA and IIRIRA), the Board's interpretation of the current statutory text cannot obtain *Chevron* deference on this basis.

emendations, the Board's opinion should fail review for reasonableness.

The Seventh Circuit thus erred thrice in concluding that the Board's disposition of Ali's withholding claim was due deference. First, the statute is unambiguous. See Part I.A, *supra*. Second, the Seventh Circuit credited a ruling that was not authoritative. Finally, to the extent that the Seventh Circuit credited a Board interpretation of a statute, the Board either was interpreting the wrong, outdated statute or was interpreting the statute without acknowledging that the statute's text had changed. In any event, the Board decision regarding Ali was entitled to no deference.

3. The decision of the Board of Immigration Appeals in N-A-M- *is not entitled to* Chevron *deference.*

As discussed above, when the Board issued its unpublished decision in this case, there was no Board precedent interpreting the current PSC bar. Nor was there relevant precedent when the Seventh Circuit wrongly deferred to the Board's unpublished ruling. However, on October 24, 2007, more than a decade after the current PSC bar language was enacted—but just twenty-nine days after certiorari was granted in this case—the Board issued a "precedent decision" addressing whether non-aggravated felonies may constitute PSCs. *N-A-M-*, 24 I. & N. Dec. at 338. The Board acknowledged the split between the Third and Seventh Circuits and the pendency of this case and issued an opinion concluding that "a plain reading of the Act indicates that the statute does not require an offense to be an aggravated felony in order for it to be considered a particularly serious crime." *Ibid*. Taking its new principle to the extreme,

the Board proceeded to find that a crime resulting in *no jail time whatsoever* was a PSC.

While this Court generally grants *Chevron* deference to published decisions of the Board that resolve statutory ambiguities, *Aguirre-Aguirre*, 526 U.S. at 424, no deference is warranted here. As an initial matter, the opinion in *N-A-M-* indicates that the Board considered itself to be bound by "[a] plain reading of the Act." 24 I. & N. Dec. at 338. Because the Board did not believe there to be a gap in the statute, it did not exercise the legislative discretion that ordinarily entitles an agency's construction of an ambiguous statute to deference. See *Peter Pan Bus Lines, Inc.* v. *Fed. Motor Carrier Safety Admin.*, 471 F.3d 1350, 1354 (D.C. Cir. 2006) ("[D]eference to an agency's interpretation of a statute is not appropriate when the agency wrongly believes that interpretation is compelled by Congress." (internal quotation marks omitted)); see also *SEC* v. *Chenery Corp.*, 318 U.S. 80, 88 (1943) ("If an order is valid only as a determination of policy or judgment which the agency alone is authorized to make and which it has not made, a judicial judgment cannot be made to do service for an administrative judgment."). Accordingly, the deference afforded to an agency when that agency is intentionally interpreting an ambiguous statute is unavailable to support the Board's interpretation here.[17]

Moreover, the Board's thirteenth-hour interpretation of § 1231(b)(3)(B) is plainly unreasonable. Un-

[17] Indeed, this Court would not reach "step two" of *Chevron* unless it found the statute to be ambiguous. But in that case, the Board's interpretation of the provision would *a fortiori* be incorrect.

der *Chevron*, deference is appropriate only where an agency fills a statutory gap with an authoritative interpretation "based on a permissible construction of the statute," 467 U.S. at 843, such that the agency "fills a gap or defines a term in a way that is reasonable in light of the legislature's revealed design." *NationsBank of N.C., N.A.* v. *Variable Annuity Life Ins. Co.*, 513 U.S. 251, 257 (1995). The Board has failed to engage in the analysis required to further Congress's design.

The canons of statutory interpretation "have been the bedrock of Anglo-American interpretation for centuries." Eskridge & Frickey, CASES AND MATERIALS ON LEGISLATION 633 (2d ed. 1995). Congress is presumed to draft statutes with knowledge of these canons. See *Muniz* v. *Hoffman*, 422 U.S. 454, 474 (1975); *Lockhart* v. *United States*, 546 U.S. 142, 149 (2005) (Scalia, J., concurring). Thus, an agency charged with legal interpretation cannot reasonably carry out the legislature's revealed design without employing those interpretive canons. See *Bell* v. *Reno*, 218 F.3d 86, 94 (2d Cir. 2000) ("An agency's interpretation of a statutory provision is not reasonable when it ignores an established rule of statutory construction set forth by the Supreme Court.").

In *N-A-M-*, despite the Board's awareness of the grant of certiorari in this case, the Board made no attempt to employ the *expressio unius* canon, ignored the *Charming Betsy* principle and Congress's manifest intent to comply with the Refugee Protocol, failed to resolve ambiguities to the benefit of the alien notwithstanding this Court's contrary instruction, and adopted an interpretation that renders Congress's carefully negotiated qualification utterly nugatory. No attempt to decipher Congress's intent

that skips these fundamental steps can be reasonable.[18]

Rather than adopt a "permissible construction" of Congress's statute, the Board demonstrated just how far its concept of PSC has diverged from Congress's explicit goal of complying with the Refugee Protocol and thus of expelling aliens facing persecution only for "a capital crime or a very grave punishable act." *Handbook on Procedures and Criteria for Determining Refugee Status*, *supra*, ¶ 155. In *N-A-M-*, The Board ruled that an alien convicted of felony menacing under Colorado law[19] had committed a PSC and was ineligible for withholding of removal. The petitioner in *N-A-M-* received *no* term of imprisonment but instead was given a four-year period of deferred judgment, which, under Colorado law, "is akin to a

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[18] The Board placed much emphasis on its practice "for more than a quarter of a century" of permitting non-aggravated felonies to be PSCs. *N-A-M-*, 24 I. & N. Dec. at 341. But the current statutory provision on PSCs has only been in effect for ten years, and the same statute that amended the definition of PSCs also greatly expanded the categories of crimes designated aggravated felonies; bureaucratic consistency in the face of major, carefully negotiated, statutory changes can provide no great confidence in the Board's analysis.

[19] The relevant statute provides that "[a] person commits the crime of menacing if, by any threat or physical action, he or she knowingly places or attempts to place another person in fear of imminent serious bodily injury." COLO. REV. STAT. § 18-3-206(1).The offense is a felony if committed:

> (a) By the use of a deadly weapon or any article used or fashioned in a manner to cause a person to reasonably believe that the article is a deadly weapon; or
>
> (b) By the person representing verbally or otherwise that he or she is armed with a deadly weapon.

Ibid.

sentence of probation," *People* v. *Rivera-Bottzeck*, 119 P.3d 546, 549 (Colo. Ct. App. 2004), except that, upon successful completion of the probationary period, "the plea of guilty previously entered shall be withdrawn and the charge upon which the judgment and sentence of the court was deferred shall be dismissed with prejudice." COLO. REV. STAT. § 18-1.3-102(2).[20]

Thus, *N-A-M-* reflects the Board's apparent belief that a crime can be so serious as to require expelling an alien to a country where the alien faces persecution and possible torture, but not so heinous that it merits sullying the alien's permanent record—let alone imprisoning the alien for even a day. A result so out of tune with Congress's expectations is entitled to no deference whatsoever. See, *e.g.*, *Whitman* v. *Am. Trucking Ass'ns*, 531 U.S. 457, 484–486 (2001).

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Accordingly, even if 8 U.S.C. § 1231(b)(3)(B) were ambiguous—which it is not, see Part I.A, *supra*—the Board's interpretation of that statute is unreasonable and warrants no deference. Rather, in light of the provision's text and history, the nation's treaty obligations and Congress's avowed intent to abide by those obligations, and the rule of lenity, the better

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[20] Indeed, in *N-A-M-* the Board refused categorically to consider "offender characteristics" relevant to sentencing in determining whether a crime is particularly serious. 24 I. & N. Dec. at 343, Taken together with the Board's prior holding in *Carballe*, 19 I. & N. Dec. at 360, that the PSC bar requires no separate dangerousness inquiry, the Board has entirely excluded any consideration of the best predictors of recidivism and future dangerousness, despite the statutory requirement that it consider whether a given alien will be a "danger to the community." 8 U.S.C. § 1231(b)(3)(B)(ii).

reading is that a non-aggravated felony may never be a PSC. See Part I.A & I.B.1, *supra*. Thus, regardless of whether the Court finds any ambiguity as to the meaning of § 1231(b)(3)(B), the Court should reverse the decision of the court of appeals and hold that a crime that does not qualify as an aggravated felony under 8 U.S.C. § 1101(a)(43) cannot qualify as a PSC for purposes of 8 U.S.C. § 1231(b)(3)(B)—and thus that Ali is not statutorily precluded from seeking withholding of removal.

II. The Seventh Circuit Erred In Holding That It Lacked Jurisdiction Under 8 U.S.C. § 1252(a)(2)(B)(ii) To Review The Board's Denial Of Asylum And Withholding Of Removal.

Regardless of whether this Court agrees with our first argument—that only aggravated felonies can be "particularly serious crime[s]" so as to preclude withholding of removal under 8 U.S.C. § 1231(b)(3)(B)—this Court must also address the jurisdiction of the courts of appeals to review whether the Board erred as a matter of law in making the particular PSC determinations at issue here.

Before the court of appeals we argued that, even if the Board were permitted to conclude that petitioner's non-aggravated felony conviction could constitute a PSC for purposes of withholding or asylum, the Board erred in its analysis of whether this *particular* crime was a PSC. In particular, we argued that the Board adopted a legally erroneous test under which petitioner's crime was deemed a *per se* PSC based only on the Board's analysis of the legal

elements of that crime, without considering the *specific details* of Ali's offense.[21]

The Seventh Circuit held that 8 U.S.C. § 1252(a)(2)(B)(ii), which deprives the courts of appeals of jurisdiction to review "any * * * decision or action of the Attorney General or the Secretary of Homeland Security the authority for which is specified under [8 U.S.C. subchapter 12(II)] to be in the discretion of the Attorney General or the Secretary of Homeland Security," precluded it from considering these arguments. See Pet. App. 5a–6a, 14a–15a.[22]

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[21] More specifically, we argued (1) that the determination that Ali's crime was *per se* particularly serious, rather than particularly serious based on an analysis of the facts surrounding his offense, is legally impermissible and logically inconsistent with the INA's provisions specifying the limited crimes that are *per se* particularly serious for purposes of withholding and asylum, see 7th Cir. Pet. Br. 18, 21; contra *N-A-M-*, 24 I. & N. Dec. at 338, and (2) that the Board's approach precludes the consideration of factors relevant to future dangerousness or recidivism, effectively reading the dangerousness provisions out of the statute. See 7th Cir. Pet. Br. at 19, 22; 8 U.S.C. § 1208(b)(2)(A)(ii) (barring applicant from asylum if he or she "constitutes a danger to the community of the United States"); 8 U.S.C. § 1231(b)(3)(B)(ii) (providing that withholding of removal is unavailable to an alien who "is a danger to the community of the United States"). Cf. *Alaka*, 456 F.3d at 95 n.11 (noting that most courts have agreed with the Board on this issue but not reaching the question).

[22] The Seventh Circuit also intimated that it was without jurisdiction to review Ali's arguments by operation of 8 U.S.C. § 1252(a)(2)(C), which bars judicial review of cases brought by individuals removable under specified grounds. See Pet. App. 14a. The government never advanced this plainly erroneous argument—for good reason, as the applicable ground of removability, 8 U.S.C. § 1227(a)(1)(A)(i), is not among the grounds triggering the § 1252(a)(2)(C) bar.

That ruling is plainly wrong and is contrary to the plain words of the jurisdictional provision. It is, moreover, well established that provisions stripping the federal courts of authority to review agency action must be interpreted narrowly. See, *e.g.*, *St. Cyr*, 533 U.S. at 298–299; *McNary* v. *Haitian Refugee Center, Inc.*, 498 U.S. 479, 498 (1991); *Johnson* v. *Robison*, 415 U.S. 361, 373–374 (1974). In particular "clear and convincing" evidence is required before Congress is understood to preclude judicial review of an administrative decision, *Bd. of Governors of the Fed. Reserve Sys.* v. *MCorp Fin., Inc.*, 502 U.S. 32, 44 (1991). Given the language of § 1252(a)(2)(B) and this framework, there are at least three independent reasons why the Seventh Circuit erred in holding that it lacked jurisdiction over petitioner's arguments.

First, § 1252(a)(2)(B)(ii) is textually inapplicable to both forms of relief at issue here because the statute expressly exempts discretionary asylum determinations from its reach and because withholding determinations are non-discretionary.

Second, the Board's determination whether petitioner's crime was a PSC did not involve any exercise of discretion—and certainly is not a determination that the INA "specifie[s]" to be within the discretion of the Attorney General or the Secretary of DHS—and thus § 1252(a)(2)(B)(ii) does not deprive the court of appeals of jurisdiction to review that determination.

Finally, even if § 1252(a)(2)(B)(ii) were deemed applicable to the determination whether a crime is a PSC, the arguments petitioner raised below all involved the claim that the Board erred as a matter of law in adopting the test by which it concluded that

his specific crime was a PSC. Thus, 8 U.S.C. § 1252(a)(2)(D), which provides that "[n]othing in [8 U.S.C. § 1252(a)(2))(B)] which limits or eliminates judicial review, shall be construed as precluding review of * * * questions of law," restores the court of appeals' jurisdiction to review those legal claims.[23]

A. Section 1252(a)(2)(B)(ii) does not apply to either asylum or withholding of removal.

Congress enacted 8 U.S.C. § 1252(a)(2)(B) in 1996. See IIRIRA § 306, 110 Stat. at 3009-607. Under the subheading "Denials of Discretionary Relief," Congress created two related bars to judicial review of decisions by the Attorney General or his designee.

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[23] A ruling for Ali on the first question presented would narrow the jurisdictional questions presented here by leaving unanswered only the question whether the lower court had jurisdiction to review the Board's denial of Ali's application for *asylum* on the basis of his conviction of a purported PSC, not the denial of his application for *withholding of removal*.

In the lower court, we argued that the Board was statutorily prohibited from determining that Ali's crime was a PSC both with respect to withholding of removal (under 8 U.S.C. § 1231(b)(3)(B)) and to asylum (under 8 U.S.C. § 1158(b)(2)). We did not petition for certiorari from the Seventh Circuit's determination that the Board was not statutorily precluded from determining that Ali's conviction satisfied the PSC provision for purposes of asylum (there being no circuit split on that question). See Pet. 5–6; BIO 9 n.3, 13. Contrary to the implicit suggestion in the government's brief in opposition, however, see BIO I (redefining second question presented to address only withholding); *id.* at 25 n.10, we *did* seek certiorari from the court of appeals' decision that it lacked jurisdiction to review whether the Board's separate determination that Ali's specific crime *actually qualified* as a PSC was consistent with the governing statute. See Pet. 10–19.

The first specifically bars judicial review over "any judgment regarding the granting of" the most common forms of discretionary relief (other than asylum): cancellation of removal, adjustment of status, voluntary departure, and various waivers of inadmissibility. 8 U.S.C. § 1252(a)(2)(B)(i). The second prong, § 1252(a)(2)(B)(ii), precludes judicial review over any other "decision or action * * * the authority for which is specified under [8 U.S.C. subchapter 12(II)] to be in the discretion of the Attorney General * * *, other than the granting of relief under section 1158(a)."[24]

Nothing in § 1252(a)(2)(B) deprives the courts of appeals of jurisdiction over petitions for asylum or for withholding of removal—two types of relief available to protect an alien who might otherwise be removed to a country in which he or she might be persecuted or tortured. Neither is included in the detailed list of specific types of relief from removal over which jurisdiction is barred under § 1252(a)(2)(B)(i). And neither falls within the more general bar contained in § 1252(a)(2)(B)(ii). Congress expressly exempted asylum determinations from that jurisdictional bar, and because the that bar applies only to judicial review of *discretionary* relief, the courts of appeals have jurisdiction to review determinations as to withholding of removal, which is a nondiscretionary form of relief.

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[24] The only change to the language of § 1252(a)(2)(B)(ii) since its enactment has been the inclusion of discretionary decisions of the Secretary of Homeland Security. See REAL ID Act § 101(f)(1), 119 Stat. at 305; see also note 5, *supra*.

1. Asylum is expressly exempted from § 1252(a)(2)(B)(ii).

Under the express terms of § 1252(a)(2)(B)(ii), Congress has not barred the courts of appeals from reviewing Board decisions with respect to petitions for asylum. As we noted above, the jurisdictional ban applies to discretionary decisions "*other than the granting of relief under section 1158(a)*." 8 U.S.C. § 1252(a)(2)(B)(ii) (emphasis added). But Section 1158 of the INA is the asylum provision, and thus the courts of appeals have jurisdiction to review asylum determinations. The Seventh Circuit did not even acknowledge the fact that § 1252(a)(2)(B)(ii) explicitly excludes asylum determinations. Cf. *Morales* v. *Gonzales*, 478 F.3d 972, 980 (9th Cir. 2007) (discretionary asylum decisions are "specifically exempted from § 1252(a)(2)(B)(ii)'s jurisdiction-stripping provisions.").[25]

Accordingly, § 1252(a)(2)(B)(ii) leaves intact the jurisdiction of the courts of appeals to review even discretionary decisions by the Board denying asylum (under the standard of review delineated in 8 U.S.C. § 1252(b)(4)). Because the Seventh Circuit believed

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[25] The cross reference in § 1252(a)(2)(B)(ii) refers to § 1158(a), which entitles "any alien" physically present in the United States to apply for asylum, the necessary predicate to the application being granted under § 1158(b). When Congress was considering enacting § 1252(a)(2)(B), § 1158(a) provided both the authority to apply and the Attorney General's discretion to grant asylum. See 8 U.S.C. § 1158(a) (1994). By its terms the cross-reference still must be interpreted to apply to the "granting of" asylum, however; any other interpretation would not only be difficult to parse but would also render several other portions of the statute—including 8 U.S.C. § 1158(b)(2)(D) & (b)(4)—meaningless.

that it lacked that jurisdiction, this Court should remand the case to the court of appeals and instruct it to engage in the necessary inquiry.[26]

2. Withholding of removal is a non-discretionary remedy and thus outside the scope of the jurisdictional bar.

As we have noted, the jurisdictional bar contained in § 1252(a)(2)(B)(ii) applies only to "decision[s] or action[s] specified under [8 U.S.C. subchapter 12(II)] to be in the discretion of the Attorney General." 8 U.S.C. § 1252(a)(2)(B)(ii). In particular, as the title to that section clarifies, it applies to the specified "[d]enials of discretionary relief." *Ibid.* Because withholding of removal is not a form of discretionary relief from removal (nor discretionary in any other sense), the jurisdictional bar does not apply to it, and the court of appeals therefore had jurisdiction to review all of Ali's challenges to the Board's denial of his application for withholding (rather than just the one challenge that it admitted fell outside the scope of the jurisdictional bar).

Unlike the many places where Congress has expressly granted the Attorney General or his designee discretion in denying relief under the INA,[27] the plain text of the withholding statute makes that relief *mandatory* whenever the alien is eligible for it.[28] Although the withholding determination involves an

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[26] A remand by the Court on this ground and agreement with our submission under Part I would obviate the need for the need to address the remainder of the issues we discuss in this brief.

[27] See page 45 and note 33, *infra*.

[28] See 8 U.S.C. § 1231(b)(3)(A) ("the Attorney General *may not* remove an alien * * *") (emphasis added).

inquiry into whether the alien's life or freedom would be threatened on the specified grounds, it does not involve the exercise of discretion.[29]

Thus, it is unsurprising that this Court has specifically held that withholding is not a discretionary form of relief.[30] The Seventh Circuit has also acknowledged this. See Pet. App. 10a n.2; *Lhanzom* v. *Gonzales*, 430 F.3d 833, 842 (7th Cir. 2005).

The Seventh Circuit nonetheless held that it lacked jurisdiction over Ali's claims because even though "[w]ithholding of removal is a mandatory form of relief to which eligible applicants are entitled," Pet. App. 10a n.2 (citing 8 U.S.C. § 1231(b)(3)(A)), "the Attorney General has discretion to determine *who is eligible*" for that relief. *Ibid.* (citing 8 U.S.C. § 1231(b)(3)(B) (emphasis added)). That assertion is not only illogical—if the Attorney General has discretion to decide who is ineligible for withholding of removal, that relief is, in essence, not mandatory but discretionary—but also plainly incorrect as a matter of law. Section 1231(b)(3)(B) provides that withholding is unavailable "if the Attorney General decides that" one of four disqualifying conditions (including conviction of a PSC) exists. As we explain below, this provision requires the Attorney General to *consider* the question whether an alien is

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[29] That withholding of removal is not a form of discretionary relief follows also from the history of that remedy. See *Stevic*, 467 U.S. at 417; *INS* v. *Doherty*, 502 U.S. 314, 331–332 (1992).

[30] See *Aguirre-Aguirre*, 526 U.S. at 419–420 ("[a]s a general rule, withholding is mandatory if an alien 'establishes that it is more likely than not that he would be subject to persecution on one of the specified grounds'") (quoting *Stevic*, 467 U.S. at 429–430) (alterations omitted).

statutorily barred from seeking withholding; it does not afford the Attorney General *discretion* in conducting that analysis. See Part II.B, *infra*. Furthermore, that same analysis must occur with regard to every determination of withholding eligibility, and the courts of appeals regularly exercise jurisdiction over such determinations.

Thus, the court of appeals plainly erred in reading § 1252(a)(2)(B)(ii) as preventing an exercise of jurisdiction over petitioner's arguments. The Seventh Circuit's unexplained conclusion to the contrary cannot stand.

B. Section 1252(a)(2)(B)(ii) does not apply to the determination whether an offense is a "particularly serious crime" for purposes of the asylum or withholding of removal statutes.

Even if § 1252(a)(2)(B)(ii) were applicable to *any* aspect of a petition seeking review of withholding or asylum (which it is not, see Part II.A, *supra*), the court of appeals nonetheless erred in refusing to review the particular claims that petitioner raises here, which address whether the Board employed the proper legal analysis in determining whether petitioner's crime qualifies as a PSC under 8 U.S.C. §§ 1158(b)(2)(A) and 1231(b)(3)(B). The determination whether a specific crime qualifies as a PSC is not specified to be a discretionary decision, and thus the courts of appeals have jurisdiction to review the Board's determinations as to that matter.

1. Section 1252(a)(2)(B)(ii) deprives the courts of appeals of jurisdiction to review "any * * * decision or action of the Attorney General * * * the authority for which is specified under [8 U.S.C. subchapter 12(II)]

to be in the discretion of the Attorney General." But that provision by its terms has no bearing on judicial review of decisions that do *not* involve the exercise of discretion.

Contrary to the court of appeals' unexplained assumption to the contrary, see Pet. App. 6a, there is nothing discretionary about the determination whether a specific crime qualifies as a PSC. As we have noted, the statutory definitions for what qualifies as a PSC differ between the asylum statute and the withholding statute; neither, however, involves a grant of discretionary authority.

In particular, the PSC bar for purposes of asylum states that the Attorney General's statutory authorization to grant asylum "shall not apply to an alien if the Attorney General *determines* that * * * the alien, having been convicted of a particularly serious crime, constitutes a danger to the community of the United States." 8 U.S.C. § 1158(b)(2)(A) (emphasis added). The PSC bar to withholding is phrased slightly differently; it specifies that withholding of removal is not available "to an alien * * * if the Attorney General *decides* that * * * 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).

The PSC bar in each of these provisions is plainly mandatory in the sense that the Attorney General has no discretion to waive that bar (and therefore to grant asylum or withholding of removal) if the bar would otherwise apply in a case. Nor do these provisions suggest that the Attorney General is engaging in an exercise of discretion in determining whether a specific crime is a PSC. Neither provision uses the

term "discretion" or any variant thereof, and neither even contains permissive language, such as the word "may."[31]

The only possible basis for arguing that these provisions afford the Attorney General discretion is that the provisions specify that the Attorney General is to "determine[]" or "decide[]" whether a specific crime qualifies as a PSC. But although these terms delineate who is statutorily assigned the *task* of resolving whether a specific crime qualifies as a PSC, nothing about the use of these words suggests that this analysis involves an exercise of discretion.

Although one might imagine hypothetical situations in which the words "decide" and "determine" are deployed to connote an exercise of discretion, in context it is plain that these words are merely delineating who—the Attorney General—is assigned the statutory task of analyzing whether a specific crime qualifies as a PSC. *Someone* must do this for the PSC bar to have any significance, and the statute provides that the "someone" is the Attorney General or his designee. Judges "decide" cases and "determine" what the law is regularly (as this Court will decide this matter by determining the meaning of several provisions of the INA); there is nothing discretionary about such decisions.

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[31] As the Third Circuit noted in *Alaka*, "'if "discretion" under § 1252(a)(2)(B)(ii) means nothing more than the application of facts to principles, then it is hard to imagine any action by the Attorney General under the relevant title that would not be deemed discretionary.'" *Alaka*, 456 F.3d at 96 (quoting *Soltane* v. *U.S. Dep't of Justice*, 381 F.3d 143, 148 n.3 (3d Cir. 2004)) (alterations omitted).

That these terms do not here connote an exercise of discretion is further demonstrated by the fact that there are numerous other places within the INA where these precise terms are used in a fashion that plainly does not connote an exercise of discretion. For instance, both terms are used in setting forth the IJ's responsibility to determine whether a permanent resident alien is removable from the United States,[32] a quintessentially non-discretionary legal determination. See, *e.g.*, *Sanusi* v. *Gonzales*, 474 F.3d 341, 345 (6th Cir. 2007) ("The question whether an alien's conviction renders him removable is a non-discretionary, purely legal question; the Courts of Appeal ordinarily must review such questions *de novo*.") (internal quotation marks and alterations omitted); see also *Alaka*, 456 F.3d at 96–97 (listing other instances in which courts of appeals have jurisdiction to review issues that the Attorney General "determines" or "decides").

By contrast, there are at least 47 distinct places within Subchapter II of the INA where the Attorney General is *explicitly* afforded "discretion" in making a decision.[33] The omission of an explicit reference to

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[32] See, *e.g.*, 8 U.S.C. § 1229a(a)(1) (specifying that immigration judges must conduct proceedings "for *deciding*" inadmissibility or deportability); § 1229a(a)(3) (providing that a removal proceeding is the sole procedure "for *determining* whether an alien may be admitted to the United States, or, if the alien has been so admitted, removed from the United States"); § 1229a(c)(4) (specifying that "[i]f the immigration judge *decides* that the alien is removable," the judge must inform the alien of the right to appeal); § 1229a(d) (specifying that "[a] stipulated order [of removal] shall constitute a conclusive *determination* of the alien's removability") (all emphases added).

[33] The Third Circuit listed 32 instances of discretion being specified by the statute, see *Alaka*, 456 F.3d at 97 nn.16, 17, but

discretion in 8 U.S.C. §§ 1158(b)(2)(A) and 1231(b)(3)(B) would appear, by comparison, to be significant. Moreover, in another 82 locations within Subchapter II Congress used explicitly permissive language (such as "may") in assigning authority to the Secretary or Attorney General.[34] The PSC bar contains no similar permissive language. The omission of such explicitly permissive or discretionary terminology in 8 U.S.C. §§ 1158(b)(2)(A) and 1231(b)(3)(B) must be given meaning.

Finally, an interpretation of these statutory provisions that affords the Attorney General discretion

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the first provision that court listed in fact falls into Subchapter I of the INA and thus is not relevant to § 1152(a)(2)(B)(ii). The Third Circuit's list, however, excludes 16 other instances in Subchapter II where power is statutorily made "discretionary." See 8 U.S.C. §§ 1182(d)(13)(B), 1182(d)(14), 1182(k), 1184(d)(1), 1184(d)(2)(B), 1184(q)(3), 1226(e), 1226a(a)(7), 1229a(c)(7)(C)(iv)(III), 1255a(b)(1)(D)(ii), 1255a(c)(5)(C), 1255a(g)(2)(C), 1255b(b), 1282(a), 1282(b), 1285.

[34] See 8 U.S.C. §§ 1153(b)(2)(B)(i), 1153(b)(5)(C)(i), 1154(a)(1)(K)(ii), 1154(f)(2), 1154(f)(4)(B), 1155, 1157(c)(3), 1157(c)(4), 1159(c), 1160(a)(2)(A), 1160(a)(3)(B), 1160(b)(2)(B), 1160(c)(2)(B), 1160(d)(3)(A), 1182(a)(9)(C)(iii), 1182(e), 1182(f), 1182(n)(5)(D)(ii), 1182(n)(5)(E)(i), 1182(t)(2), 1183a(f)(6)(B), 1184(c)(4)(B)(iii)(II), 1184(c)(14)(A)(i), (ii), 1184(c)(14)(B), 1184(g)(8)(C), 1184(*l*)(2)(a), 1184(j)(2), 1186a(d)(2)(B), 1186a(d)(2)(C), 1186b(d)(2)(B), 1186b(d)(2)(C), 1187(a), 1187(c)(1), 1187(c)(5)(B)(iii), 1187(c)(5)(B)(iv)(I), 1187(c)(8)(B), 1187(d), 1187(e)(2), 1187(h)(3)(C)(i), 1221(f), 1221(g), 1221(h), 1221(j), 1224, 1225(a)(5), 1225(b)(2)(C), 1225(c)(2)(B), 1226a(a)(3), 1227(a)(1)(E)(iii), 1227(a)(3)(C)(ii), 1227(a)(7)(A), 1229a(c)(4)(C), 1231(a)(6), 1231(b)(2)(C), 1231(b)(2)(F), 1231(c)(2)(A), 1231(c)(2)(C), 1254a(a)(1), 1254a(b)(1), 1254a(c)(1)(B), 1254a(c)(2)(A)(ii), 1254a(d)(2), 1254a(f), 1255a(d)(2)(B)(i), 1255a(g)(3), 1258(a), 1260, 1281(d), 1283, 1284(a), 1284(c), 1285, 1286, 1287, 1321(c)(2)(A), 1322(b), 1323(b), 1323(e), 1324a(b)(1)(E), 1324c(d)(7), 1356(j), 1367(b).

in determining whether a specific crime qualifies as a PSC would suggest that Congress had authorized the Attorney General to violate the United States' binding treaty obligations under the Refugee Protocol. Just as withholding of removal is a mandatory form of relief precisely because the Refugee Convention and Refugee Protocol require that it be afforded to any refugee who qualifies for it, see pages 3–4, 40, *supra*, Article 33(2) of the Convention is the source of the PSC exception. Notably, the Convention does not suggest that the PSC determination is discretionary; if a refugee who is otherwise eligible for protection has not committed a PSC, then that protection is mandatory.

Of course, the United States could withdraw from the Refugee Protocol, see RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW § 339 (1987), *United States* v. *Curtiss-Wright Export Corp.*, 299 U.S. 304, 320 (1936), but it has not done so—and as this Court has noted, the 1980 Refugee Act was in fact specifically designed to bring the United States into conformance with its treaty obligations. See *Stevic*, 467 U.S. at 421. Thus, because allowing the Attorney General to exercise discretion in determining whether a crime qualifies as a PSC would be inconsistent with the Refugee Convention, this Court should interpret 8 U.S.C. §§ 1158(b)(2)(A) and 1231(b)(3)(B) not to afford the Attorney General discretion in making that determination. See also *Charming Betsy*, 6 U.S. (2 Cranch) at 118.

2. Even if one could characterize the Attorney General's determination that a specific crime is a PSC to involve an exercise in discretion, that determination would still not fall within the jurisdictional bar contained in § 1252(a)(2)(B)(ii). By its plain

terms, that provision does not bar review of *all* discretionary decisions; rather, it bars review only of "any * * * decision or action of the Attorney General * * * the authority for which is *specified* * * * to be in the discretion of the Attorney General." 8 U.S.C. § 1252(a)(2)(B)(ii) (emphasis added).

As the Fifth Circuit has explained, "One might mistakenly read § 1252(a)(2)(B)(ii) as stripping [courts] of the authority to review *any* discretionary immigration decision." *Zhao* v. *Gonzales*, 404 F.3d 295, 303 (5th Cir. 2005) (emphasis added). But as that court clarified, such a reading would be flawed "because § 1252(a)(2)(B)(ii) strips [courts] only of jurisdiction to review discretionary authority *specified* in the statute." *Ibid.* (emphasis added).

> The statutory language is uncharacteristically 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."

Ibid. (emphasis in original).[35]

Neither 8 U.S.C. § 1158(b)(2)(A) nor 8 U.S.C. § 1231(b)(3)(B) *specifies* that the PSC determination is within the Attorney General's discretion. By con-

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[35] See also, *e.g.*, *Ramadan* v. *Gonzales*, 479 F.3d 646, 655 & n.9 (9th Cir. 2007); *Alsamhouri* v. *Gonzales*, 458 F.3d 15, 16 (1st Cir. 2006), *withdrawn*, 471 F.3d 209, *rev'd*, *Alsamhouri* v. *Gonzales*, 484 F.3d 117 (1st Cir. 2007) (initially finding there to be a lack of jurisdiction to review discretionary determination where neither party pointed out the specification requirement, but revising that decision, on rehearing, to find jurisdiction); *Singh* v. *Gonzales*, 451 F.3d 400, 410–411 (6th Cir. 2006).

trast, there are, as we have noted, at least 47 places within the relevant subchapter of the INA where Congress has expressly afforded the Attorney General discretion in making a decision. See page 45 and note 33, *supra*. Given the frequency with which Congress has explicitly noted that the authority for a particular decision or action "is specified * * * to be in the discretion of the Attorney General," 8 U.S.C. § 1252(a)(2)(B)(ii), the most obvious reading of this provision is that the courts of appeals retain jurisdiction over any determination that is not "specified" to be discretionary in this manner—and thus retain jurisdiction to review PSC determinations.

In concluding that it had jurisdiction to review a PSC determination in *Alaka*, the Third Circuit noted three circumstances in which a statute might not *explicitly* state that a decision by the Attorney General was discretionary, but that might nonetheless be interpreted to specify that a decision is discretionary. See *Alaka*, 456 F.3d at 98–100.[36] Given the well-established principle that provisions stripping the federal courts of authority to review agency action must be interpreted narrowly and in particular the rule that "clear and convincing evidence" is required before Congress is understood to preclude judicial

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[36] In particular, the Third Circuit thought that a decision might be "specified" to be in the discretion of the Attorney General, even absent the use of a variant of the word "discretion," (a) if the statute uses the permissive "may" instead of the mandatory "shall" in its text; (b) if the statute as a whole suggests that the decision is discretionary; and (c) if the statutory text contains "amplifying language" that "serves to elevate the decision—out of the broader class of determinations the Attorney General is entitled to make—into the narrower category of decisions where discretion has been 'specified.'" *Alaka*, 456 F.3d at 100.

review of an administrative decision, see *MCorp*, 502 U.S. at 44; page 36, *supra*, we question how any statutory provision that does not expressly use a form of the word "discretion" or clearly permissive language (such as "may") could ever qualify for purposes of § 1252(a)(2)(B)(ii).

But, as the Third Circuit noted, the "deci[sion]" or "determin[ation]" whether a specific crime is a PSC plainly does not fall within any of these categories, see *Alaka*, 456 F.3d at 99–100, and thus this Court need not decide whether only those provisions that do use the words "discretion" or "may" fall within the jurisdictional bar. In either instance, it is evident that the PSC determination has not been specified to be discretionary, and thus that the courts of appeals have jurisdiction to review such determinations. The lower court erred by failing to do so.

C. 8 U.S.C. § 1252(a)(2)(D) would provide the court of appeals with jurisdiction to review petitioner's arguments even if § 1252(a)(2)(B)(ii) applied here.

Even if § 1252(a)(2)(B)(ii) were applicable to some determinations regarding whether a crime is a PSC, but see Parts II.A & B, *supra*, the court of appeals would nonetheless have erred in refusing to address petitioner's specific challenges to the erroneous legal analysis used by the Board in making the determination that petitioner's crime was a PSC.

1. Under 8 U.S.C. § 1252(a)(2)(D), "[n]othing in [8 U.S.C. § 1252(a)(2)(B)] * * * which limits or eliminates judicial review, shall be construed as precluding review of * * * *questions of law*." § 1252(a)(2)(D) (emphasis added). Petitioner argued below that the analytic method by which the Board determined that

his crime was a PSC violated the statute as a matter of law. In particular, petitioner argued that the Board (1) erred by adopting an improper legal test under which crimes such as petitioner's, which fall outside the scope of the statutory *per se* test for PSCs, can nonetheless be determined to be PSCs without considering the details of the offense and sentence, and (2) was required by statute to analyze specifically whether he posed a risk of future dangerousness, which requires consideration of factors the Board ignored such as petitioner's now-diagnosed and now-treated PTSD. See note 21, *supra*. Both of these issues pose a question of law, and thus the court of appeals had jurisdiction to review them under § 1252(a)(2)(D).

2. The Seventh Circuit acknowledged that § 1252(a)(2)(D) limits the scope of the jurisdictional bar contained in § 1252(a)(2)(B)(ii), see Pet. App. 6a, and in fact relied on § 1252(a)(2)(D) in holding that it had jurisdiction to address the issue addressed in Part I, *supra*. See Pet. App. 10a. But the court of appeals refused to consider the alternative arguments, which it characterized as "Ali's argument that the BIA misapplied its own precedent—*Matter of Frentescu*, 18 I. & N. Dec. 244 (1982)." Pet. App. 14a–15a.[37]

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[37] In *Frentescu* the Board had itself analyzed the statute in a fashion similar to that which we argued was required by statute. See 18 I. & N. Dec. at 246–247. In making our arguments in the court of appeals, we relied in part on the fact that the Board ignored its own precedent in *Frentescu*. See 7th Cir. Pet. Br. 18–22. Although the argument that the Board should have applied its own prior binding precedent is now moot in light of the Board's subsequent precedential decision in *N-A-M-*, the

But both of these claims are quintessentially "questions of law." Neither addresses a factual matter about Ali's crime, or even a judgment of the seriousness of that specific crime. Each instead challenges only the Board's interpretation *of the INA*, and in particular what factors must be considered as a matter of law in determining whether an alien is subject to the PSC bar. An interpretation of the INA by the Board is a question of law. Cf., *e.g.*, *Civil Aeronautics Bd.* v. *Delta Air Lines*, *Inc.*, 367 U.S. 316, 322 (1961) ("the determinative question is not what the Board thinks it should do but what Congress has said it can do"). Thus, § 1252(a)(2)(B)(ii) cannot strip the court of appeals of jurisdiction to review these arguments—and, in fact, several other courts of appeals have held that they have jurisdiction to decide whether the Board improperly demarcated what factors are relevant to a PSC determination. See, *e.g.*, *Afridi* v. *Gonzales*, 442 F.3d 1212, 1217–1220 (9th Cir. 2006); *Brue* v. *Gonzales*, 464 F.3d 1227, 1234–1235 (10th Cir. 2006) (denying a petition for review only after determining that the Board had considered each of the relevant factors).

3. To the extent there were any question that § 1252(a)(2)(D) affords the courts of appeals jurisdiction over claims such as these, the legislative history demonstrates that this provision is intended to allow for judicial review of such claims.

Section 1252(a)(2)(D) was enacted as part of the REAL ID Act, § 106(a)(1)(A)(iii), 119 Stat. at 310. The REAL ID Act purported to consolidate all review of removal orders in the courts of appeals, see *id.* § 106(a)(1)(A)(i)–(ii), in terms that would comply

more general argument—that the test the Board used is precluded by the statute—is in no way affected by *N-A-M-*.

with this Court's mandate in *St. Cyr* and *Calcano-Martinez* v. *INS*, 533 U.S. 348 (2001).[38]

In those cases, this Court "agree[d] * * * that leaving aliens without a forum for adjudicating [legal] claims * * * would raise serious constitutional questions," *Calcano-Martinez*, 533 U.S. at 351, but clarified that "it might be [constitutionally] permissible" for Congress to limit habeas review of some orders of removal, "[i]f it were clear that the question of law could be answered in another judicial forum." *St. Cyr*, 533 U.S. at 314. Thus, in the REAL ID Act, Congress enacted § 1252(a)(2)(D), which was designed to "provide a scheme [of judicial review of immigration decisions] which is an 'adequate and effective' substitute for habeas corpus." See H.R. CONF. REP. NO. 109-72, at 175, *reprinted in* 2005 U.S.C.C.A.N. at 300 (quoting *Swain*, 430 U.S. at 381). Section 1252(a)(2)(D) thus "permit[s] judicial review over those issues that were historically reviewable on habeas—constitutional and statutory-construction questions," *ibid.*, by providing that "all aliens who are ordered removed by an immigration judge will be able to appeal to the [Board] and then raise constitutional and legal challenges in the court of appeals." *Ibid.*

Petitioner plainly could have raised his arguments in habeas before the REAL ID Act. As this Court noted in *St. Cyr*, traditional habeas review

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[38] Congress intended to "address the anomalies created by *St. Cyr* and its progeny" by restricting the availability of habeas relief, which Congress saw as giving "criminal aliens * * * more judicial review than non-criminals," H.R. CONF. REP. NO. 109-72, at 174, *reprinted in* 2005 U.S.C.C.A.N. at 299, and by "eliminat[ing] the problems of bifurcated and piecemeal litigation." *Ibid.*

"encompassed detentions based on errors of law, including the erroneous application or interpretation of statutes"; challenges to "[e]xecutive interpretations of the immigration laws"; and determinations regarding an alien's "statutory eligibility for discretionary relief." *St. Cyr*, 533 U.S. at 302, 307, 314 n.38.[39]

Thus, both the plain text and the legislative history of § 1252(a)(2)(D) demonstrate that this section affords the courts of appeals jurisdiction to review arguments such as those that the Seventh Circuit refused to hear.

CONCLUSION

The judgment of the court of appeals should be reversed.

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[39] Cases in which this Court has reviewed erroneous executive interpretations of law in habeas include, *e.g.*, *United States ex rel. Hintopoulos* v. *Shaughnessy*, 353 U.S. 72, 78 (1957); *Delgadillo* v. *Carmichael*, 332 U.S. 388, 391 (1947); *Bridges* v. *Wixon*, 326 U.S. 135, 149 (1945); *Kessler* v. *Strecker*, 307 U.S. 22, 35 (1939); *Hansen* v. *Haff*, 291 U.S. 559, 563 (1934); and *Gegiow* v. *Uhl*, 239 U.S. 3, 9 (1915). See also Neuman, *Jurisdiction and the Rule of Law after the 1996 Immigration Act*, 113 HARV. L. REV. 1963, 1965–1969 (2000).

Respectfully submitted.

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NOVEMBER 2007

ADDENDUM

1. 8 U.S.C. § 1101(a)(43) provides:

DEFINITIONS.

As used in this chapter—

* * *

(43) The term "aggravated felony" means—

(A) murder, rape, or sexual abuse of a minor;

(B) illicit trafficking in a controlled substance (as defined in section 802 of Title 21), including a drug trafficking crime (as defined in section 924(c) of Title 18);

(C) illicit trafficking in firearms or destructive devices (as defined in section 921 of Title 18) or in explosive materials (as defined in section 841(c) of that title);

(D) an offense described in section 1956 of Title 18 (relating to laundering of monetary instruments) or section 1957 of that title (relating to engaging in monetary transactions in property derived from specific unlawful activity) if the amount of the funds exceeded $10,000;

(E) an offense described in—

(i) section 842(h) or (i) of Title 18, or section 844(d), (e), (f), (g), (h), or (i) of that title (relating to explosive materials offenses);

(ii) section 922(g)(1), (2), (3), (4), or (5), (j), (n), (o), (p), or (r) or 924(b) or (h) of Title 18 (relating to firearms offenses); or

(iii) section 5861 of Title 26 (relating to firearms offenses);

(F) a crime of violence (as defined in section 16 of Title 18, but not including a purely political offense) for which the term of imprisonment [is] at least one year;

(G) a theft offense (including receipt of stolen property) or burglary offense for which the term of imprisonment [is] at least one year;

(H) an offense described in section 875, 876, 877, or 1202 of Title 18 (relating to the demand for or receipt of ransom);

(I) an offense described in section 2251, 2251A, or 2252 of Title 18 (relating to child pornography);

(J) an offense described in section 1962 of Title 18 (relating to racketeer influenced corrupt organizations), or an offense described in section 1084 (if it is a second or subsequent offense) or 1955 of that title (relating to gambling offenses), for which a sentence of one year imprisonment or more may be imposed;

(K) an offense that—

> **(i)** relates to the owning, controlling, managing, or supervising of a prostitution business;
>
> **(ii)** is described in section 2421, 2422, or 2423 of Title 18 (relating to transportation for the purpose of prostitution) if committed for commercial advantage; or
>
> **(iii)** is described in any of sections 1581-1585 or 1588-1591 of Title 18 (relating to peonage, slavery, involuntary servitude, and trafficking in persons);

(L) an offense described in—

(i) section 793 (relating to gathering or transmitting national defense information), 798 (relating to disclosure of classified information), 2153 (relating to sabotage) or 2381 or 2382 (relating to treason) of Title 18;

(ii) section 421 of Title 50 (relating to protecting the identity of undercover intelligence agents); or

(iii) section 421 of Title 50 (relating to protecting the identity of undercover agents);

(M) an offense that—

(i) involves fraud or deceit in which the loss to the victim or victims exceeds $10,000; or

(ii) is described in section 7201 of Title 26 (relating to tax evasion) in which the revenue loss to the Government exceeds $10,000;

(N) an offense described in paragraph (1)(A) or (2) of section 1324(a) of this title (relating to alien smuggling), except in the case of a first offense for which the alien has affirmatively shown that the alien committed the offense for the purpose of assisting, abetting, or aiding only the alien's spouse, child, or parent (and no other individual) to violate a provision of this chapter[;]

(O) an offense described in section 1325(a) or 1326 of this title committed by an alien who was previously deported on the basis of a conviction for an offense described in another subparagraph of this paragraph;

(P) an offense

(i) which either is falsely making, forging, counterfeiting, mutilating, or altering a

passport or instrument in violation of section 1543 of Title 18 or is described in section 1546(a) of such title (relating to document fraud) and

(ii) for which the term of imprisonment is at least 12 months, except in the case of a first offense for which the alien has affirmatively shown that the alien committed the offense for the purpose of assisting, abetting, or aiding only the alien's spouse, child, or parent (and no other individual) to violate a provision of this chapter;

(Q) an offense relating to a failure to appear by a defendant for service of sentence if the underlying offense is punishable by imprisonment for a term of 5 years or more;

(R) an offense relating to commercial bribery, counterfeiting, forgery, or trafficking in vehicles the identification numbers of which have been altered for which the term of imprisonment is at least one year;

(S) an offense relating to obstruction of justice, perjury or subornation of perjury, or bribery of a witness, for which the term of imprisonment is at least one year;

(T) an offense relating to a failure to appear before a court pursuant to a court order to answer to or dispose of a charge of a felony for which a sentence of 2 years' imprisonment or more may be imposed; and

(U) an attempt or conspiracy to commit an offense described in this paragraph.

The term applies to an offense described in this paragraph whether in violation of Federal or State law and applies to such an offense in violation of the law of a foreign country for which the term of imprisonment was completed within the previous 15 years. Notwithstanding any other provision of law (including any effective date), the term applies regardless of whether the conviction was entered before, on, or after September 30, 1996.

2. 8 U.S.C. § 1158(b)(1), (2) provide:

(b) Conditions for granting asylum.

(1) In general

(A) Eligibility

The Secretary of Homeland Security or the Attorney General may grant asylum to an alien who has applied for asylum in accordance with the requirements and procedures established by the Secretary of Homeland Security or the Attorney General under this section if the Secretary of Homeland Security or the Attorney General determines that such alien is a refugee within the meaning of section 1101(a)(42)(A) of this title.

(B) Burden of proof

(i) In general. The burden of proof is on the applicant to establish that the applicant is a refugee, within the meaning of section 1101(a)(42)(A) of this title. To establish that the applicant is a refugee within the meaning of such section, the applicant must establish that race, religion, nationality, membership in a particular social group, or political opinion was or will be at least one central reason for persecuting the applicant.

(ii) Sustaining burden. The testimony of the applicant may be sufficient to sustain the applicant's burden without corroboration, but only if the applicant satisfies the trier of fact that the applicant's testimony is credible, is persuasive, and

refers to specific facts sufficient to demonstrate that the applicant is a refugee. In determining whether the applicant has met the applicant's burden, the trier of fact may weigh the credible testimony along with other evidence of record. Where the trier of fact determines that the applicant should provide evidence that corroborates otherwise credible testimony, such evidence must be provided unless the applicant does not have the evidence and cannot reasonably obtain the evidence.

(iii) Credibility determination. Considering the totality of the circumstances, and all relevant factors, a trier of fact may base a credibility determination on the demeanor, candor, or responsiveness of the applicant or witness, the inherent plausibility of the applicant's or witness's account, the consistency between the applicant's or witness's written and oral statements (whenever made and whether or not under oath, and considering the circumstances under which the statements were made), the internal consistency of each such statement, the consistency of such statements with other evidence of record (including the reports of the Department of State on country conditions), and any inaccuracies or falsehoods in such statements, without regard to whether an inconsistency, inaccuracy, or falsehood goes to the heart of the applicant's claim, or any other relevant factor. There is no presumption of credibil-

ity, however, if no adverse credibility determination is explicitly made, the applicant or witness shall have a rebuttable presumption of credibility on appeal.

(2) Exceptions

(A) In general

Paragraph (1) shall not apply to an alien if the Attorney General determines that—

(i) the alien ordered, incited, assisted, or otherwise participated in the persecution of any person on account of race, religion, nationality, membership in a particular social group, or political opinion;

(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;

(iii) there are serious reasons for believing that the alien has committed a serious nonpolitical crime outside the United States prior to the arrival of the alien in the United States;

(iv) there are reasonable grounds for regarding the alien as a danger to the security of the United States;

(v) the alien is described in subclause (I), (II), (III), (IV), or (VI) of section 1181(a)(3)(B)(i) of this title or section 1227(a)(4)(B) of this title (relating to terrorist activity), unless, in the case only of an alien described in subclause (IV) of section 1182(a)(3)(B)(i) of this title, the Attorney General determines, in the At-

torney General's discretion, that there are not reasonable grounds for regarding the alien as a danger to the security of the United States; or

(vi) the alien was firmly resettled in another country prior to arriving in the United States.

(B) Special rules

(i) Conviction of aggravated felony. For purposes of clause (ii) of subparagraph (A), an alien who has been convicted of an aggravated felony shall be considered to have been convicted of a particularly serious crime.

(ii) Offenses. The Attorney General may designate by regulation offenses that will be considered to be a crime described in clause (ii) or (iii) of subparagraph (A).

(C) Additional limitations

The Attorney General may by regulation establish additional limitations and conditions, consistent with this section, under which an alien shall be ineligible for asylum under paragraph (1).

(D) No judicial review

There shall be no judicial review of a determination of the Attorney General under subparagraph (A)(v).

3. 8 U.S.C. § 1231(b)(3) provides:

(b) Countries to which aliens may be removed.

* * *

(3) Restriction on removal to a country where alien's life or freedom would be threatened

(A) In general

Notwithstanding paragraphs (1) and (2), the Attorney General may not remove an alien to a country if the Attorney General decides that the alien's life or freedom would be threatened in that country because of the alien's race, religion, nationality, membership in a particular social group, or political opinion.

(B) Exception

Subparagraph (A) does not apply to an alien deportable under section 1227(a)(4)(D) of this title or if the Attorney General decides that—

(i) the alien ordered, incited, assisted, or otherwise participated in the persecution of an individual because of the individual's race, religion, nationality, membership in a particular social group, or political opinion;

(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;

(iii) there are serious reasons to believe that the alien committed a serious nonpolitical crime outside the United States before the alien arrived in the United States; or

(iv) there are reasonable grounds to believe that the alien is a danger to the security of the United States.

For purposes of clause (ii), an 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. For purposes of clause (iv), an alien who is described in section 1227(a)(4)(B) of this title shall be considered to be an alien with respect to whom there are reasonable grounds for regarding as a danger to the security of the United States.

(C) Sustaining burden of proof; credibility determinations

In determining whether an alien has demonstrated that the alien's life or freedom would be threatened for a reason described in subparagraph (A), the trier of fact shall determine whether the alien has sustained the alien's burden of proof, and shall make credibility determinations, in the manner de-

scribed in clauses (ii) and (iii) of section 1158(b)(1)(B) of this title.

4. 8 U.S.C. § 1252(a)(2), (b)(4)(D) provide:

(a) Applicable provisions

* * *

(2) Matters not subject to judicial review.

(A) Review relating to section 1225(b)(1) of this title

Notwithstanding any other provision of law (statutory or nonstatutory), including section 2241 of Title 28, or any other habeas corpus provision, and sections 1361 and 1651 of such title, no court shall have jurisdiction to review—

(i) except as provided in subsection (e) of this section, any individual determination or to entertain any other cause or claim arising from or relating to the implementation or operation of an order of removal pursuant to section 1225(b)(1) of this title,

(ii) except as provided in subsection (e) of this section, a decision by the Attorney General to invoke the provisions of such section,

(iii) the application of such section to individual aliens, including the determination made under section 1225(b)(1) of this title, or

(iv) except as provided in subsection (e) of this section, procedures and policies adopted by the Attorney General to im-

plement the provisions of section 1225(b)(1) of this title.

(B) Denials of discretionary relief

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

(i) any judgment regarding the granting of relief under section 1182(h), 1182(i), 1229b, 1229c, or 1255 of this title, or

(ii) any other decision or action of the Attorney General or the Secretary of Homeland Security the authority for which is specified under this subchapter to be in the discretion of the Attorney General or the Secretary of Homeland Security, other than the granting of relief under section 1158(a) of this title.

(C) Orders against criminal aliens

Notwithstanding any other provision of law (statutory or nonstatutory), including section 2241 of Title 28, or any other habeas corpus provision, and sections 1361 and 1651 of such title, and except as provided in subparagraph (D), no court shall have jurisdiction to review any final order of removal against an alien who is removable by reason of having committed a criminal offense covered in section 1182(a)(2) or 1227(a)(2)(A)(iii), (B), (C), or (D)

of this title, or any offense covered by section 1227(a)(2)(A)(ii) of this title for which both predicate offenses are, without regard to their date of commission, otherwise covered by section 1227(a)(2)(A)(i) of this title.

(D) Judicial review of certain legal claims

Nothing in subparagraph (B) or (C), or in any other provision of this chapter (other than this section) which limits or eliminates judicial review, shall be construed as precluding review of constitutional claims or questions of law raised upon a petition for review filed with an appropriate court of appeals in accordance with this section.

* * *

(b) Requirements for review of orders of removal.

With respect to review of an order of removal under subsection (a)(1) of this section, the following requirements apply:

* * *

(4) Scope and standard for review

Except as provided in paragraph 5(b)—

* * *

(D) the Attorney General's discretionary judgment whether to grant relief under section 1158(a) of this title shall be conclusive unless manifestly contrary to the law and an abuse of discretion.

4. Excerpts from the Immigration Control and Financial Responsibility Act of 1996: Mark-up on S. 1664 before the Senate Committee on the Judiciary, 104th Cong., 2d Sess. (1996):*

Transcript of Proceedings

United States Senate
Committee on the Judiciary
Committee Business

Washington, D.C.
March 20, 1996
Miller Reporting Company, Inc.
507 C Street, N.E.
Washington, D.C. 20002
(202) 546-6666

S. 269 and S. 1394, as merged into one single bill by the Subcommittee on Immigration for Committee consideration, The Immigration Reform Act of 1995

*1

COMMITTEE BUSINESS
WEDNESDAY, MARCH 20, 1996
UNITED STATES SENATE
COMMITTEE ON THE JUDICIARY
WASHINGTON, D.C.

The committee met, pursuant to notice, at 4:25 p.m., in Room SH-216, Hart Senate Office Building,

* We include this verbatim transcript because we understand that it is available only in the library of the Senate Judiciary Committee. Because the library does not allow photocopying, the duplication included in this addendum was prepared by manually retyping the original on November 13, 2007.

Hon. Orrin G. Hatch, chairman of the committee, presiding.

Present: Senators Hatch, Simpson, Grassley, Brown, Thompson, Kyl, DeWine, Abraham, Kennedy, Simon, Feinstein, and Feingold.

The Chairman. We have ten here. Senator Abraham is in the back room, and Senator Kennedy as well. But we can start moving here.

We are going to resume our consideration of the immigration legislation. We have spent 4 days on it so far, and we still have over a dozen amendments left just on Title I. These amendments, along with virtually all of the amendments on subsequent titles, have been available for some time. Accordingly, it is my strong expectation that we can get through them more quickly than we have gone through some of the earlier amendments.

* * *

**59*

The Chairman. * * * Senator Kennedy, your amendment No. 2, I believe. We will turn to you. Kennedy 4, excuse me. I am sorry. Your amendment No. 4.

* * *

**60*

* * *

Senator Kennedy. Thank you, Mr. Chairman. This amendment gives the Attorney General the discretion to withhold the deportation of someone who is otherwise deportable if, in this case, she determines that such deportation would be in conflict with

our obligation to the 1967 Protocol relating to the Status of Refugees.

In our immigration laws, there are two provisions which allow refugees to remain: one, the refugee status under the Refugee Act of 1980, which is for people who meet our refugee definition, which is patterned on the U.N. Refugee Convention; and, two, withholding of deportation, the authority of the Attorney General to withhold deportation for persons otherwise deportable, but whose life or freedom would be threatened on account of race, religion, nationality, membership in a particular social group, or political opinion. This is a higher standard than the normal refugee definition contained in the Refugee Act.

When considering our obligation under the Refugee Convention, the Supreme Court has held that withholding of **61* deportation is the minimum action which allows us to meet our treaty obligations. And under the immigration laws, aggravated felons are ineligible for withholding of deportation. This provision has not been in conflict with our treaty obligations because the Refugee Convention allows the deportation of refugees when very serious crimes are involved. Therefore, if you have a refugee, as here, and they commit the aggravated felony, the fact that they have other kinds of concerns that might have qualified them to remain here and resist deportation do not apply under the international protocol. They can be deported.

Last week, however, the committee voted to declare an aggravated felon anyone convicted of an offense involving imprisonment of one year, and this means that people with fairly minor offenses would be ineligible to seek withholding of deportation, in

many instances may violate the Refugee Convention. The administration has recommended, and I agree, that an additional safeguard is necessary as more stringent penalties are adopted. U.N. High Commission on Refugees expressed similar concerns written in a letter to all members of the committee.

My amendment would just give the Attorney General the authority to withhold the deportation when it is necessary to ensure compliance with a treaty obligation. This amendment would not eliminate the exceptions for deportation **62* of refugees who have committed serious crimes but enables the Attorney General to withhold deportation that would be in conflict with our international obligations. If we do not take the protection of refugees seriously, we cannot expect other governments to, either.

This is really in response to the circumstances—and we have had some discussion about this—where, for example, if you carry a weapon from Texas, where it is legitimate to hold on to it, into the District of Columbia, where it is not, and you are apprehended, under the earlier amendments which were accepted here, that, under a strict definition, could be enough to deport you. A fraudulent check overdrawn on bank accounts in some States is considered sufficient to trigger this. All I am interested in is maintaining the fact that we are going to permit the deportation when we have the serious crimes as defined, which we have lived under, and in the circumstances of lesser crimes, the misdemeanors, that we are going to be consistent with the various international protocols of which we are signed.

[The amendment follows:][**]

63* **The Chairman. Any discussion? Senator Abraham?

Senator Abraham. It is really more a question, I think. I think the committee knows my concern as expressed in the amendments, including the one that Senator Kennedy has just referenced, is that we should have an expeditious process for deporting criminal aliens and that we define those who are deportable, in terms of those who get on a fast track for deportation, a little more tightly than we have before.

But let me just ask the Senator, it is my understanding that the decisions the Attorney General would make in this are unreviewable. And I would like to know is: Does that only apply to the decision to protect the alien and not deport them? That is really where, I guess, my—I am a little bit confused.

Senator Kennedy. The Senator would be correct. It wouldn't be reviewable. I hadn't even thought about having it either way subject to review. If the Senator had some way that would be satisfactory to me for the Attorney General to make it, whether it is going to--whoever the Attorney General is. But if there was some other desire to have it reviewed—

Senator Abraham. No, actually, to the contrary. I guess what I am concerned about is I wouldn't want to trigger a whole new review process—

64* **Senator Kennedy. No. The Senator is—

Senator Abraham.—in the event the Attorney General decides that the United Nations—

[**] Brackets and omission in original.

Senator Kennedy. My point is that you ultimately have to have someone that is going to be able to define what our treaty obligations would be. That would be the Attorney General. Therefore, I would leave it with the Attorney General in understanding what our international treaty obligations would be.

Senator Abraham. I would not object if we modified it so that either decision the Attorney General might make is unreviewable, because what I am concerned about, as I said last week when we had another amendment on it, is triggering an appeal process based on some argument that the Attorney General made the wrong decision. If we could work together to just rough out that language, I think we would be—

Senator Kennedy. No, it is not my intention to do so.

The Chairman. With that understanding, is there any—

Senator Kyl. Mr. Chairman, might I ask two questions of Senator Kennedy?

The Chairman. Yes.

Senator Kyl. This refers to paragraph (1). I am trying to find paragraph (1) here. Is paragraph (1) a deportation of felons requirement?

Senator Kennedy. It is Section 243(h)(1), paragraph **65* (1), and it says "shall not deport or return an alien other than described in Section 241(a)(4)(d) to a country if the Attorney General determines such alien's life or freedom would be threatened in such a country on account of race, religion, national membership in a particular social group." I imagine that that is the operative language.

Senator Kyl. Excuse me, but I think that is the language that you would be replacing. I am assuming that back in here there is a paragraph (1) that relates to deportation of felons. Is that not what we are dealing with here?

Senator Kennedy. The definition, the way it has been defined in the last amendment about how aggravated felons and the definition of aggravated felons, which is a different kind of a—which would permit the deportation with the serious crimes that has been recognized and which we have recognized under international treaty, but would not catch those particular crimes which do not fall in that category as a serious felon.

Senator Kyl. So paragraph (1) is a definition of crime—

Senator Kennedy. As I understand from staff, it would have to be an additional paragraph. There is the additional paragraph that says "Notwithstanding any provision of law, paragraph (1) shall apply to any alien if *66 the Attorney General determines, in the Attorney General's unreviewable discretion, that a) such alien's life or freedom would be threatened, in the country to which such alien would be deported or returned, account of race, religion, nationality...political opinion, and b) the application of paragraph (1) to such alien is necessary to ensure compliance with the 1967 United Nations Protocol relating to the status of Refugees."

Senator Kyl. That is the language of your amendment that was just read, as I understand it.

Senator Feinstein. Mr. Chairman?

Senator Kennedy. Yes, and in that is the basic series of crimes which would be—which I understand

in terms of the treaty obligations they would be deportable. This is only saying that in those circumstances where there might be others that would fall under the definition of aggravated assault but which have not been recognized as treaty obligations, that the Attorney General in those circumstances would have the discretion, which would be non-reviewable.

Senator Kyl. What I am trying to understand, if I could just continue for a moment—unless you want to elucidate this point. I don't understand what crimes this necessarily refers to. Is it just bad checks or is it something else? And I haven't found the part of the statute **67* to which this applies. If someone could enlighten me as to what kinds of crimes this would apply to--in other words, just hypothetical speaking, does this mean that if somebody were convicted of murder in the United States—

Senator Kennedy. No, no.

Senator Kyl. Okay. That is what I am—can we put a frame around it?

Senator Kennedy. This could be in some States, since we have incorporated all State laws—we have incorporated all State laws besides the Federal Government, that anything that would fall within the definition of a year, which in some States is bad checks.

Senator Kyl. A year penalty?

Senator Kennedy. Yes. So it would be—or carrying a weapon, for example, in the District of Columbia, you are subject to a year in jail, and so this could be a circumstance where the person unknowingly violated the law and carried a weapon in the District of Columbia and would not--in those circumstances, the Attorney General would be able to re-

view those circumstances which are in this, still defined under the Abraham amendment as aggravated assault and would be able to make a judgment that it didn't comply or was not included in the treaty obligation.

Senator Thompson. But didn't we—excuse me. Are you finished?

68* **Senator Kyl. I am not finished, but go ahead.

Senator Thompson. In the Abraham amendment, though, I thought we had this discussion. I thought it required the sentencing of a year.

Senator Feinstein. That is correct.

Senator Thompson. In other words, the individual has to not be subject to something that might carry a year or less or some crime that he did not know he committed or a technicality. It is someone who has actually received one year. Nowadays, that is more than frivolous with the crowding of the jails and so forth that we have. So I just want to make sure that we understand that we are dealing here with crimes that some judge, anyway, determined was of such an import that they received a year in jail. Is that not correct?

Senator Kennedy. Well, it could be suspended sentence triggers this as well. You could have a suspended sentence.

Senator Thompson. Is that correct, Senator Abraham? I didn't recall one way or the other on that.

Senator Abraham. Well, yes, but they would have to have been sentenced to a year to trigger this. Now if somehow at some point you determine to sus-

pend the sentence, that could happen. But what we are trying to do, I think, is--let me just clarify. I don't believe the intent of this amendment is to change any of that part of what we have *69 already accomplished. My understanding is the objective is to try to address an exception for the Attorney General to not move forward with the deportation if there are treaty violations. Now, that is a separate issue.

Senator Thompson. But the treaty, as I understand it, just speaks in terms of serious crimes.

Senator Abraham. That is right. It does not define—

Senator Thompson. It does not delineate crimes.

Senator Abraham. It in no way suggests—

Senator Thompson. Who determines what is serious?

Senator Abraham.—that the one year would not constitute a serious crime.

Senator Feinstein. Mr. Chairman, I am puzzled by this.

Senator Kennedy. If I could, Senator, it says in the words of Senator Abraham, regardless of any suspension, it would also be included. So you could have a suspended sentence. The point about it is there are enough of these that have been included, the weapons charge, the bad checks charge, the rest of it, which I don't think is really what is being intended to be reached by the Senator. We have the treaty obligations for the serious kinds of crimes. All we are trying to make sure is that you are not going to sweep up unnecessarily, at the discretion of the

Attorney General, those that have committed the minor offenses.

The Chairman. Senator Feinstein?

70* **Senator Feinstein. I am a little puzzled by this. I don't know what countries—and I would like to know—would require us to keep somebody who had been sentenced to a year in prison. And I wonder if we couldn't delay this. I would like to find out.

Senator Kennedy. Well, we would be glad to delay it. This is the Justice Department that believes that it is important to comply with the other treaties, but I am more than glad to bring it up at another time, if you want the additional information as to what countries—

Senator Feinstein. I would like to know, because—

Senator Kennedy. What is it exactly—

The Chairman. Well, would it be possible—

Senator Feinstein. I can't understand how a country would require us to keep somebody who—

Senator Kennedy. It isn't a country. It is just a protocol which has been signed—

Senator Feinstein. Well, a protocol would require.

Senator Kennedy. Which has been defined in such a way as to permit--the protocol permits the deportation in spite of the other circumstances of risk of life or persecution. If they have committed a serious crime, they are out. It is a law enforcement protocol, treaty. All this is saying is if they get caught up in these minor offenses that otherwise have not been recognized under the international protocol, **71*

there will be discretion given to the Attorney General, whether that will waived or not.

The purpose of this was to permit the deportation of individuals who otherwise would be able to say that they have a legitimate right, if they had that, to deport them. But the question is whether it is not recognized in international treaty that those that are involved in these minor crimes, which are included in the Abraham offense, to be so included. And that is all they are trying to do, is make that consistent.

The Chairman. I would like to dispose of the amendment now. We have plenty of time on the floor to resolve it.

Senator Simon. The Attorney General isn't going to be massively excluding people here. I think it is a reasonable amendment.

The Chairman. I do, too.

Senator Kyl. May I ask the second question that I had of Senator Kennedy? I am pleased to get the answer to the first one. The 1967 U.N. Protocol, is that a protocol that says for non-serious crimes you shouldn't deport people if harm could come to them in their home country?

Senator Kennedy. I will ask Michael Myers to respond.

Mr. Myers. If there is a serious crime here, committed here, then we have the right under the protocol to deport the individual. If there is a serious crime there, perhaps **72* the INS general counsel can answer that part, but it is my understanding that that also could be taken into consideration, as long as it is a non-political crime.

The Chairman. Is that your understanding? You can speak very loudly from there.

Mr. Martin. Yes, that is my understanding.

The Chairman. Okay. That is his understanding.

All right. Is there any objection to this amendment? Senator Abraham?

Senator Abraham. No, I am not raising—

The Chairman. If there is no objection to this amendment, then the amendment is adopted.