No. 08-656

In the Supreme Court of the United States

TERESA JEZIERSKI,
Petitioner,
v.
MICHAEL B. MUKASEY,
Attorney General of the United States
Respondent.

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

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Does the jurisdiction-stripping provision of the Immigration and Nationality Act (INA), which bars judicial review of "any * * * decision or action of the Attorney General * * * the authority for which is specified under this subchapter to be in [his] discretion," 8 U.S.C. § 1252(a)(2)(B)(ii), permit the Attorney General himself to preclude judicial review by declaring certain decisions discretionary by administrative regulation?

2. If so, does the INA's jurisdiction-restoring provision, which directs that "[n]othing in [the jurisdiction-stripping provision] shall be construed as precluding [judicial] review of constitutional claims or questions of law, " 8 U.S.C. § 1252(a)(2)(D), allow the courts of appeals to review mixed questions of law and fact or only questions of pure law?

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OPINIONS BELOW

The opinion of the Seventh Circuit (App., *infra*, 1a-10a) is reported at 543 F.3d 886. The opinions of the Board of Immigration Appeals denying petitioner's motion to reopen (App., *infra*, 11a-13a) and denying petitioner's administrative appeal (App., *infra*, 14a-17a) are unreported. The official oral order of the Immigration Judge denying petitioner a hardship waiver (App., *infra*, 18a-30a) and the unofficial written summary of that order (App., *infra*, 31a-35a) are also unreported.

JURISDICTION

The judgment of the court of appeals was entered on September 10, 2008. The jurisdiction of this court is invoked under 28 U.S.C. § 1254(1).

STATUTORY AND REGULATORY PROVISIONS INVOLVED

Section 242(a)(2)(B) of the Immigration and Nationality Act, 8 U.S.C. § 1252(a)(2)(B), provides, in relevant part:

> 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.

Section 242(a)(2)(D) of the Immigration and Nationality Act, 8 U.S.C. § 1252(a)(2)(D), provides, in relevant part:

> 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.

Section 240(c)(7)(A) of the Immigration and Nationality Act, 8 U.S.C. § 1229a(c)(7)(A), provides, in relevant part:

> An alien may file one motion to reopen proceedings under this section, except that this limitation shall not apply so as to prevent the

> filing of one motion to reopen described in subparagraph (C)(iv).

8 C.F.R. § 1003.2(a) provides, in relevant part:

> The decision to grant or deny a motion to reopen or reconsider is within the discretion of the Board.

STATEMENT

This case concerns two issues: (1) whether the "jurisdiction-stripping" provision of the Immigration and Nationality Act, which bars judicial review of "any * * * decision * * * of the Attorney General * * * the authority for which is specified *under this subchapter* to be in [his] discretion," 8 U.S.C. § 1252(a)(2)(B)(ii) (emphasis added), permits the Attorney General himself to preclude judicial review by declaring certain decisions discretionary by administrative regulation; and, if so, (2) whether the accompanying "jurisdiction-restoring" provision, which directs that "[n]othing in [the jurisdiction-stripping provision] shall be construed as precluding review of constitutional claims or questions of law," 8 U.S.C. § 1252(a)(2)(D), allows the courts of appeals to review mixed questions of law and fact or only questions of pure law.

A. Statutory Framework

1. The Immigration and Nationality Act (INA or the Act), 8 U.S.C. §§ 1101 *et seq.*, is the basic body of immigration law in the United States. Enacted in

1952, the INA "represent[ed] the first attempt to bring within one cohesive and comprehensive statute the various laws relating to immigration, naturalization and nationality," H.R. Rep. No. 1365, 82d Cong., 2d Sess. 1677 (1952), replacing a system rife with "[i]nequities, gaps, loopholes, and lax practices," *id.* at 1679, with one that "[s]afeguard[ed] judicial review and provid[ed] for fair administrative practice and procedure," *ibid.*

Under the INA, when the government seeks to remove (*i.e.,* deport) an individual with conditional permanent resident status, it must notify her of the proceedings in writing, allow her to secure counsel, and give her the opportunity to present evidence and cross-examine witnesses in proceedings before an immigration judge (IJ). 8 U.S.C. §§ 1229-1229a. The burden is on the government to prove "by clear and convincing evidence that * * * the alien is deportable." 8 U.S.C. § 1229a(c)(3)(A). If the IJ orders removal, the individual may appeal to the Board of Immigration Appeals (BIA). If the BIA upholds the IJ's decision, Section 242 of the Act provides for review in the courts of appeals. 8 U.S.C. § 1252(a)(5).

In 1996, Congress enacted the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (IIRIRA), Pub. L. No. 104-208, Div. C, 110 Stat. 3009 (1996), to further "clarif[y] and streamlin[e] * * * judicial review of deportation and exclusion orders." S. Rep. No. 249, 104th Cong., 2d Sess. 14 (1996). The IIRIRA contained a "jurisdiction-stripping" provision that precluded judicial review of a series of

enumerated administrative actions, along with "any other decision * * * the authority for which is specified under this subchapter to be in the discretion of the Attorney General." 8 U.S.C. § 1252(a)(2)(B)(ii). In *INS* v. *St. Cyr*, 533 U.S. 289, 314 (2001), however, this Court limited this provision's practical effect. Noting that "some 'judicial intervention in deportation cases' is unquestionably 'required by the Constitution,'" *id.* at 300 (quoting *Heikkila* v. *Barber*, 345 U.S. 229, 235 (1953)), *St. Cyr*, which involved an adjacent subsection, 8 U.S.C. § 1952(a)(2)(C), held that district courts' traditional jurisdiction to review such actions in habeas corpus proceedings was not impaired by IIRIRA.

Congress responded by enacting the REAL ID Act of 2005, Pub. L. No. 109-13, Div. B, 119 Stat. 231 (2005), which eliminated completely district court habeas review, putting in its place a regime in which courts of appeals review administrative removal decisions through petitions for review. 8 U.S.C. § 1252(b)(2).

While the 2005 law left intact IIRIRA's jurisdiction-stripping provision, it added a complementary "jurisdiction-restoring" subsection, which provided that "[n]othing in * * * any * * * provision of this chapter * * * which limits or eliminates judicial review[] shall be construed as precluding review of constitutional claims or questions of law raised upon a petition for review." 8 U.S.C. § 1252(a)(2)(D). The Act thus "give[s] every alien one day in the court of appeals, satisfying constitutional concerns" by "permit[ting] judicial

review over those issues that were historically reviewable on habeas." H.R. Rep. No. 72, 109th Cong., 1st Sess. 175 (2005).

2. Consistent with its concern for fair and efficient process, Congress has also changed the law governing reopening of removal proceedings. Although the Immigration and Naturalization Service (INS) had long recognized that immigrants were entitled to reopen removal proceedings in light of new developments and courts had reviewed such decisions, see *INS* v. *Adubu*, 485 U.S. 94, 104-105 (1988), before 1996 no INA provision specifically addressed reopening. Congress amended the INA to create a time-limited statutory right to petition to reopen. See 8 U.S.C. § 1229a(c)(7). Specifically, Section 240 allows an alien subject to removal to file "one motion to reopen proceedings." *Id.* § 1229a(c)(7)(A); see also *id.* § 1252(b)(6) (providing for judicial review of reopening denials to be consolidated with review of underlying order). Although the provision prescribes time and content guidelines, *id.* § 1229a(c)(7)(B)-(C), it does not specify the standards governing relief, nor does it address the standard or scope of judicial review of such decisions.

The Attorney General has done so, however, through administrative action. In particular, operating alongside longstanding BIA precedent governing when reopening of removal orders is appropriate, see, *e.g.*, *In re C- C-*, 23 I. & N. Dec. 899 (BIA 2006) (reopening for asylum based on change in circumstances and country conditions); *In re Velarde*,

23 I. & N. Dec. 253 (BIA 2002) (reopening for adjustment of status based on marriage entered into after commencement of removal proceedings); *In re Lozada*, 19 I. & N. Dec. 637 (BIA 1988) (reopening based on a claim of ineffective assistance of counsel), which "retain[] precedential force unless and until modified or overruled by the Attorney General," *In re E- L- H-*, 23 I. & N. Dec. 814, 817-818 (BIA 2005), stands a Justice Department regulation declaring that "[t]he decision to grant or deny a motion to reopen * * * is within the discretion of the [BIA]." 8 C.F.R. § 1003.2(a).

B. Proceedings Below

Petitioner Teresa Jezierski (née Gradzka) was born in Poland 50 years ago and lawfully entered the United States in 1993 to visit and care for her ailing uncle, who was then living in Chicago. Through her uncle, she met Zbigniew Jezierski, dated him for about a year, married him in 1994, and together they established a home in Chicago. Mr. Jezierski, a U.S. citizen, later filed an immigration petition on his wife's behalf, and she filed an application for permanent residence. In Fall 1994, the Immigration and Naturalization Service granted Ms. Jezierski conditional lawful permanent residency based on the marriage. App., *infra*, 24a.

In September 1996, Ms. Jezierski filed a Petition to Remove the Conditions of Residence (Form I-751) with the Department of Homeland Security (DHS). In 1997, while DHS was considering the petition, she divorced Mr. Jezierski after he absconded with her

car and money. R. 236, 274-276. Because the marriage, on which her permanent residency was conditioned, had ended, DHS decided she was no longer eligible for permanent residency, denied her petition, and initiated removal proceedings. R. 331-333, 339-340.

Ms. Jezierski hired attorney Daniel Rozenstrauch to represent her. R. 43. Since she had divorced, she could not file the necessary joint petition, see 8 U.S.C. 1186(a)(c)(1), to remove the marriage condition on which her continued residency rested. She could, however, ask to have that requirement waived under Section 216(c)(4), which lifts the joint petitioning requirement for, among others, aliens whose marriages were *bona fide* and those for whom removal would cause "extreme hardship." 8 U.S.C. § 1186(a)(c)(4). Rosenstrauch convinced her that her best chance to maintain lawful permanent resident status was to show that that her marriage had been *bona fide* by renewing her Form I-751 request. R. 33-37. Rozenstrauch failed, however, to advise her of her ability to file a second Form I-751 petition asserting extreme hardship as an alternative ground. Nor did he explain that failing to do so would preclude the IJ from considering that ground. During the hearing, the IJ expressed surprise that the attorney had not argued hardship and stated that Ms. Jezierski might well have fared better under a hardship defense. R. 104-105. The IJ ultimately denied Ms. Jezierski's petition. R. 152-154.

Ms. Jezierksi then retained Rozenstrauch to appeal the IJ's decision to the BIA. R. 33-37.

Rozenstrauch's BIA Notice of Appeal stated that he would file a brief. He never did so, however, and the BIA denied her appeal. App., *infra*, 12a-13a.

On August 9, 2007, Ms. Jezierski filed a Motion to Reopen pursuant to *In re Lozada*, 19 I. & N. Dec. 637 (BIA 1988), contending that Rozenstauch's performance was not minimally adequate and had seriously prejudiced her case. R. 16-27. In September, the BIA denied that motion. The Board accepted, for the sake of decision, that Rozenstauch's performance had been ineffective. App., *infra*, 12a. It concluded, however, that her motion failed on the "prejudice" prong, *i.e.*, that there was not a reasonable probability that the proceedings would have come out differently had she received minimally adequate representation. App., *infra*, 12a-13a.

Ms. Jezierski then filed a petition for review in the United States Court of Appeals for the Seventh Circuit. She argued that the attorney's incompetence had prevented her from effectively presenting her case to the IJ and the BIA, App., *infra*, 2a, thereby rendering the proceedings fundamentally unfair. She also argued that if the proceedings were reopened and she were represented by competent counsel she would be able to show that she indeed qualified for relief from removal because of "extreme hardship." Pet. C.A. Br. 10-11. The Attorney General urged the court of appeals to uphold the BIA's refusal to reopen under the "abuse of discretion" standard. Gov't C.A. Br. 15-16. He never argued that the INA's jurisdiction-stripping provision precluded review.

In an opinion by Judge Posner, however, the court of appeals dismissed the petition for lack of jurisdiction, App., *infra*, 10a, first explaining that

> [o]ur recent decisions in *Zamora-Mallari* v. *Mukasey*, 514 F.3d 679, 694 (7th Cir. 2008), *Kucana* v. *Mukasey* 533 F.3d 534 (7th Cir. 2008), and *Huang* v. *Mukasey*, 534 F3d 618 (7th Cir. 2008) hold (contrary to the view of some of our sister circuits) that there is no power of judicial review of petitions to reopen removal proceedings unless the petition presents a question of law [o]r a constitutional issue.

App., *infra*, 2a (citations from other circuits omitted). This holding turned on interpretation of both the jurisdiction-stripping and jurisdiction-restoring provisions. The first two of the cited decisions had held that the jurisdiction-stripping provision generally precludes review of BIA reopening decisions because "even if the alien demonstrates that he is entitled to relief" the Attorney General had, by administrative regulation, declared such decisions to be discretionary. *Zamora-Mallari*, 514 F.3d 679, 694 (7th Cir. 2008); *Kucana* v. *Mukasey*, 533 F3d 534, 536 (7th Cir. 2008). All three decisions had then held that particular issues presented did not involve either constitutional claims or questions of law, as the jurisdiction-restoring provision requires. *Huang* v. *Mukasey*, 534 F.3d 618, 621-623 (7th Cir. 2008), petition for cert. filed *sub nom. Dung* v. *Mukasey*, 77 U.S.L.W. 3252 (U.S. Oct. 13, 2008) (No. 08-490); *Kucana*, 533 F.3d at 538; *Zamora-Mallari*, 514 F.3d at 694.

The court of appeals then explained its conclusion that Ms. Jezierski's ineffective assistance claim fell outside the jurisdiction-restoring provision. It first acknowledged that the Seventh Circuit's prior "cases had not given consistent answers to the question of our power to review the Board's refusing to reopen a removal proceeding on the basis of ineffective assistance" and noted a "similar tension among [the] circuits." App., *infra*, 3a. Then after observing that "infringement of a constitutional right [wa]s *not* alleged," *id.* at 8a, the court held that the no-prejudice determination Ms. Jezierski sought to challenge was not a "question[] of law," *ibid.*, that would confer jurisdiction under Section 1252(a)(2)(D), but instead "a factual determination," *id.* at 9a. The court repeated that characterization in the opinion's concluding sentences:

> In deciding whether to reopen, the Board asked itself whether the removal proceeding might have come out differently had the alien been represented by competent counsel, and concluded that it would not have. That conclusion was not the answer to a question of law, but a discretionary determination.

Id. at 10a.

REASONS FOR GRANTING THE PETITION

The reading of 8 U.S.C. § 1252 relied upon below restricts judicial review of removal orders far beyond what Congress's plain language provides. Both the Seventh Circuit's broad interpretation of the jurisdiction-stripping provision and its narrow interpretation of the jurisdiction-restoring provision implicate broad and well-developed conflicts among the courts of appeals. Operating in tandem, these holdings bar judicial review of a large category of formerly reviewable administrative decisions, leaving immigrants within the Seventh Circuit no forum in which to seek correction of clear agency errors that courts of appeals elsewhere review (and correct) as a matter of course. This Court should grant review here to restore the scope of judicial review—and the uniformity in immigration law—that Congress sought to establish.

I. The Seventh Circuit's Interpretation Of The INA's Jurisdiction-Stripping Clause Squarely Conflicts With Decisions Of Every Other Court Of Appeals

Section 1252(a)(2)(B)(ii) denies courts jurisdiction to review decisions of the Attorney General "the authority for which is specified under this subchapter to be in [his] discretion," subject to one exception not relevant here. The decision below, following controversial Circuit precedent, see *Kucana*, 533 F.3d. at 536-537, held that this provision barred judicial review of BIA denials of motions to reopen—even though *Congress* did not specify that such decisions

are in the Attorney General's discretion—because regulations promulgated by the Attorney General himself so provide. This aspect of the decision below solidifies the Seventh Circuit's place in the minority on two lopsided Circuit conflicts concerning the meaning of Section 1252(a)(2)(B)(ii)'s specification requirement, and, as explained below, the court's sweeping—and erroneous—interpretation is especially consequential given the court's commitment to a highly restrictive (and also erroneous) construction of the jurisdiction-restoring provision.

A. The Seventh Circuit's Refusal To Review Reopening Denials Conflicts With Decisions Of Ten Other Courts Of Appeals

In 1988, this Court held that administrative denials of motions to reopen were reviewable for abuse of discretion. See *INS* v. *Adubu*, 485 U.S. 94, 104-105 (1988). Notwithstanding Congress's enactment of the jurisdiction-stripping provision in 1996, see Pub. L. 104-208, 110 Stat. 3009, ten courts of appeals continue to review such decisions—and have done so very recently. See *Sunarno* v. *Mukasey*, No. 07-2623, 2008 WL 4348073, at *2 (1st Cir. Sept. 25, 2008); *Zequiraj* v. *Mukasey*, No. 07-5794-ag, 2008 WL 4643892, at *1 (2d Cir. Oct. 21, 2008); *Baig* v. *Attorney General,* No. 08-1073, 2008 WL 4573006, at *1 (3d Cir. Oct. 15, 2008); *Dioubate* v. *Mukasey*, No. 07-2197, 2008 WL 4584860, at *1 (4th Cir. Oct. 15, 2008); *Alvarado-Vallardes* v. *Mukasey*, No. 08-60048, 2008 WL 4649081, at *1 (5th Cir. Oct. 21, 2008); *Zhang* v. *Mukasey*, 543 F.3d 851, 854 (6th Cir. 2008);

Meda-Morales v. *Mukasey*, No. 07-2432, 2008 WL 4307884, at *1 (8th Cir. Sept. 23, 2008); *Soto* v. *Mukasey*, No. 08-72029, 2008 WL 4613593, at *1 (9th Cir. Oct. 17, 2008); *Lopez* v. *Mukasey*, No. 07-9549, 2008 WL 3094052, at *2 (10th Cir. Aug. 7, 2008); *Belle* v. *Attorney General*, No. 08-11146, 2008 WL 4649392, at *1 (11th Cir., Oct. 22, 2008).[1]

Of the ten circuits that currently review motions to reopen, four have explicitly stated their reasons for not applying Section 1252(a)(2)(b)(ii). See *Zhao* v. *Gonzales*, 404 F.3d 295, 303 (5th Cir. 2005); *Miah* v. *Mukasey*, 519 F.3d 784, 789 n.1 (8th Cir. 2008); *Medina-Morales* v. *Ashcroft*, 371 F.3d 520, 528 (9th Cir. 2004); *Infanzon* v. *Ashcroft*, 386 F.3d 1359, 1361-1362 (10th Cir. 2004).

First, these courts have placed great weight on the plain language of the jurisdiction-stripping provision, in particular its direction that only decisions "the authority for which is *specified under this subchapter*" to be in the Attorney General's discretion, are presumptively beyond judicial review. The relevant "subchapter," subchapter II of Chapter 12, 8 U.S.C. §§ 1151-1378 (2006), includes a statutory right to reopen and sets forth general rules governing such motions, see 8 U.S.C. § 1229a(c)(7), these courts have reasoned, but it does not specify that such decisions

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[1] Although many of these very recent cases are unpublished, they all rest on earlier precedential decisions. See, *e.g.*, *Belle*, 2008 WL 4649392, at *1 (relying on authority of *Ali* v. *Attorney General*, 443 F.3d 804, 808 (11th Cir. 2006)); *Alvardo-Vallardes*, 2008 WL 4649081, at *1 (relying on authority of *Panjwani* v. *Gonzales*, 401 F.3d 626, 632 (5th Cir. 2005)).

are in the Attorney General's (or Homeland Security Secretary's) discretion. See *Miah*, 519 F.3d at 789 n.1; *Zhao*, 404 F.3d at 303 (noting that the provisions on reopening "do not furnish us with a level of deference to afford the Attorney General"); *Medina-Morales*, 371 F.3d at 528 ("far from authorizing pure, unguided discretion on the part of the Attorney General, [the provision] specifies guidelines for aliens and makes no mention of discretion"); see also *Infanzon*, 386 F.3d at 1361 (noting that motions to reopen are not a "form of discretionary relief"); *Singh* v. *Gonzales*, 404 F.3d 1024, 1026-1027 (7th Cir. 2005) ("Conspicuously absent [from the provision] is any specific language entrusting the decision on a motion to reopen to 'the discretion of the Attorney General'"), overruled by *Kucana*, 533 F.3d at 538.

As these courts explain, statutory silence is especially telling here because "[t]here are myriad Congressionally-defined, discretionary *statutory* powers of the Attorney General articulated within sections 1151 though 1378." *Zafar* v. *Attorney General*, 461 F.3d 1357, 1361 (11th Cir. 2006); see, *e.g.* 8 U.S.C. § 1157(c)(1) ("[T]he Attorney General may, *in the Attorney General's discretion* and pursuant to such regulations as the Attorney General may prescribe, admit any refugee who is not firmly resettled in any foreign country.") (emphasis added).

And, for Section 1252(a)(2)(B)(ii) purposes, these courts conclude, the *regulatory* declaration in 8 C.F.R. § 1003.2(a) reserving discretion to the BIA is not a substitute for a congressional specification. See *Miah*, 519 F.3d at 789 n.1 (Because "[t]he discretion

to * * * deny motions to reopen * * * is conferred by the Attorney General's regulations, not by statute * * *, we have continued our long-standing practice of reviewing" denials, for "abuse of the BIA's discretion.") (citation omitted); *Medina-Morales*, 371 F.3d at 528 (noting that the statute "can perhaps be said to have left such authority to the Attorney General by default. But default authority does not constitute the *specification* required by § 1252(a)(2)(B)(ii)."); *Zhao*, 404 F.3d at 303 ("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."). Or, as the Third Circuit explained in holding that review of continuances was not barred, "[t]he key to § 125[2](a)(2)(B)(ii) lies in its requirement that the discretion giving rise to the jurisdictional bar must be 'specified' by statute." *Khan* v. *Attorney General*, 448 F.3d 226, 232 (3d Cir. 2006); see also *Zafar*, 461 F.3d at 1361 ("[O]nly the particular discretionary authorities of the Attorney General expressly 'specified' in sections 1151 through 1378 are barred from our review under § 1252(a)(2)B)(ii).").

These decisions have cited a number of additional considerations buttressing their plain language interpretation. Not only is there generally a "strong presumption in favor of judicial review of administrative action," *INS* v. St. *Cyr*, 533 U.S. 289, 298 (2001), these courts have reasoned, see *Medina-Morales*, 371

F.3d at 525 (citing canon), but to conclude that Section 1252(a)(2)(B)(ii) extinguishes judicial review of denials of reopening is especially odd, considering that the statute that introduced the jurisdiction-stripping provision also included (1) the provision creating for the very first time a statutory right to reopen, see *Dada* v. *Mukasey*, 128 S. Ct. 2307, 2315-16 (2008), *and* (2) a provision expressly addressing judicial review of such decisions, see 8 U.S.C. § 1252(b)(6) (requiring consolidation of review of reopening with review of the underlying removal order). See *Infanzon*, 386 F.3d at 1362 ("[T]his section would have been unnecessary if Congress had intended such motions to be among those discretionary decisions not subject to review.").

Rather than join with the ten other courts of appeals, the court below followed its recent decision in *Kucana* v. *Mukasey*, 533 F.3d 534 (7th Cir. 2008). Although all parties in *Kucana* agreed that reopening denials were reviewable for abuse of discretion (and Circuit precedent so held, see *Singh*, 404 F.3d at 1026-1027), Chief Judge Easterbrook's opinion, for himself and Judge Ripple (who concurred "dubitante," *id.* at 539), first "wondered" whether review was proper, *id.* at 536, and ultimately held that Section 1252(a)(2)(B)(ii)'s jurisdictional bar applied, *id.* at 538.

In reaching that result, the *Kucana* court reasoned that Section 1252(a)(2)(B)(ii) "applies to discretionary decisions under regulations that are based on and implement the Immigration and Nationality Act," 533 F.3d at 536, and that the

statutory reopening provision, Section 1229a(c)(7), left the BIA with the power to govern its own proceedings—including authority to follow regulations designating particular decisions as discretionary. Since the Attorney General's regulation had done exactly that, the *Kucana* majority concluded, BIA decisions denying reopening were discretionary "as specified under this subchapter." *Ibid.*

The *Kucana* opinion explicitly considered—and rejected—other courts' decisions refusing to adopt this broad interpretation of the jurisdiction-stripping provision. It explained that considerations that had previously supported a narrow interpretation—(a) the interest in avoiding a constitutionally doubtful preclusion of judicial review and (b) the need to give some independent effect to Section 1252(b)(6)—had had lost force with enactment of the REAL ID Act. That Act, it believed, both addressed the most salient constitutional shortcoming of the prior regime (*i.e.*, that judicial review of "constitutional claims and questions of law" arising from otherwise discretionary administrative decisions would assure that "the agency [cannot] violate statutes and the Constitution at will," 553 F.3d at 538) and assured that Section 1252(b)(6) could have *some* independent effect (*i.e.*, by establishing judicial review procedures for challenges to denials of reopening that fall within Section 1252(a)(2)(D)'s restoration). 533 F.3d at 538.[2]

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[2] In at least four post-*Kucana* decisions involving reopening (including the present one), the Seventh Circuit has adhered to this construction of the jurisdictional bar. See *Adebowale* v. *Mukasey*, No. 07-2201, 2008 WL 4682508, at *2; *Iglesias* v.

B. The Decision Below Implicates A Broader Conflict About Whether The Attorney General May Immunize From Judicial Review *Any* Of His Agency's Immigration Actions By Describing Them As "Discretionary" In His Own Administrative Regulations

Just as the circuits have split over whether the Attorney General may preclude review of motions to reopen by declaring such decisions "discretionary" in administrative regulations, they have divided too over whether he may preclude review of other immigration actions in the same way. Since the jurisdiction-stripping provision applies by its own terms, with one narrow exception, to "*any* * * * decision * * * of the Attorney General * * * the authority for which is specified under this subchapter to be in the discretion of the Attorney General," 8 U.S.C. § 1252(a)(2)(B)(ii) (emphasis added), any power to preclude judicial review through regulation potentially extends across nearly all the agency's immigration activities. Because the jurisdiction-stripping provision also treats the Secretary of Homeland Security in the same way, *ibid.*, any power to preclude through regulation should extend to that agency as well.

Mukasey, 540 F.3d 528, 529 (7th Cir. 2008); *Huang* v. *Mukasey*, 534 F.3d 618, 620 (7th Cir. 2008), petition for cert. filed *sub nom. Dung* v. *Mukasey*, 77 U.S.L.W. 3252 (U.S. Oct. 13, 2008) (No. 08-490).

It is thus no surprise to find the courts of appeals divided over whether such regulatory preclusion extends to other immigration actions, including motions to continue and to reconsider. Congress has never specified, for example, that motions to continue are discretionary or even when they should be granted. The Attorney General has specified through regulation, however, that "[t]he Immigration Judge *may* grant a motion for continuance for good cause shown." 8 C.F.R. § 1003.29 (emphasis added). In addition to the Seventh Circuit, see *Ali* v. *Gonzales*, 502 F.3d 659 (7th Cir. 2007), the Eighth and Tenth Circuits have held that this regulation supplies the specification necessary to preclude review under § 1252(a)(2)(B)(ii). See *Yerkovich* v. *Ashcroft*, 381 F.3d 990, 993-95 (10th Cir.2004); *Onyinkwa* v. *Ashcroft*, 376 F.3d 797, 799 (8th Cir. 2004). At the same time, the First, Second, Third, Fourth, Fifth, and Eleventh Circuits have explicitly rejected this conclusion.[3] See *Alsamhouri* v. *Gonzales*, 484 F.3d 117, 122 (1st Cir. 2007); *Sanusi* v. *Gonzales*, 445 F.3d 193, 198-199 (2d Cir. 2006); *Khan*, 448 F.3d at 232-233 (3d Cir. 2006); *Lendo* v. *Gonzales*, 493 F.3d 439, 441 n.1 (4th Cir. 2007); *Ahmed* v. *Gonzales*, 447 F.3d 433, 436-437 (5th Cir. 2006); *Zafar*, 461 F.3d at 1360-1362 (11th Cir. 2006); see also *Martinez* v. *Gonzales*, 166 F. Appx. 300, 300 (9th Cir. 2006) (holding the same in an unpublished opinion). Each holds that

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[3] Likewise, the Sixth Circuit reviews motions to continue for abuse of discretion, but it has adopted a different jurisdictional rationale. It holds that the statute authorizing motions to continue confers discretion on immigration judges—not on the Attorney General himself—and thus does not fall within the terms of the jurisdiction-stripping provision. See *Abu-Khaliel* v. *Gonzales*, 436 F.3d 627, 633-634 (6th Cir. 2006).

discretion supplied by rule is not "specified under [the statutory] subchapter," 8 U.S.C. § 1252(a)(2)(B)(ii), and thus cannot trigger preclusion.

Confusingly, the two other circuits—the Eighth and Tenth—that hold that discretion supplied by administrative rule precludes review of motions to continue do *not* follow that approach for motions to reopen. Compare *Onyinkwa*, 376 F.3d at 799 ("Whenever a regulation implementing a subchapter II statute confers discretion upon an IJ, IIRIRA generally divests courts of jurisdiction to review the exercise of that discretion.") (8th Cir.) and *Yerkovich*, 381 F.3d at 993-995 ("Although the statutes themselves do not specifically confer discretion on the Attorney General to grant or deny a continuance, the regulations clearly confer such discretion on the IJ.") (10th Cir.) with *Miah* v. *Mukasey*, 519 F.3d 784, 789 n. 1 (8th Cir. 2008) (refusing to apply Section 1252(a)(2)(B)(ii) to motions to reopen or reconsider because "[t]he discretion to grant or deny [such] motions * * * is conferred by the Attorney General's regulations, not by statute") and *Thongphilack* v. *Gonzales*, 506 F.3d 1207, 1209-1210 (10th Cir. 2007) (reviewing motion to reopen for abuse of discretion despite the discretionary language in the regulations governing reopening). The fact that decisions in two circuits interpret the jurisdiction-stripping provision one way for motions to continue and another way for motions to reopen is itself powerful evidence of the need for this Court to give the provision a clear and authoritative interpretation.

A similar conflict has recently developed in cases involving BIA denials of *reconsideration*. As with reopening, a regulation, rather than the statute itself, provides that motions to reconsider are within the agency's discretion. (Indeed, it is the same regulation as the one governing reopening, 8 C.F.R. § 1003.2(a).) Accordingly, ten circuits continue to review motions to reconsider, notwithstanding the jurisdiction-stripping provision. See *Arias-Valencia* v. *Mukasey*, 529 F.3d 428, 430 n.1 (1st Cir. 2008); *Shao* v. *Mukasey*, No. 07-2689-ag, 2008 WL 4531571, at *29 (2d Cir. Oct. 10, 2008); *Borges* v. *Gonzales*, 402 F.3d 398, 404 (3d Cir. 2005); *Jean* v. *Gonzales*, 435 F.3d 475, 481 (4th Cir. 2006); *Singh* v. *Gonzales*, 436 F.3d 484, 486 (5th Cir. 2006); *Sanusi* v. *Gonzales*, 474 F.3d 341, 345 (6th Cir. 2007); *Isse* v. *Mukasey*, 524 F.3d 886, 887 (8th Cir. 2008); *Morales Apolinar* v. *Mukasey*, 514 F.3d 893, 895 (9th Cir. 2008); *Belay-Gebru* v. *INS*. 327 F.3d 998, 1000 n.5 (10th Cir. 2003); *Calle* v. *Attorney General*, 504 F.3d 1324, 1328 (11th Cir. 2007). By contrast, the Seventh Circuit recently ruled that that the jurisdiction-stripping provision bars review of denials of reconsideration, on the ground that it "appl[ies] to discretionary decisions authorized by regulations that are based on and implement the Immigration and Nationality Act," *Johnson* v. *Mukasey*, No. 08-1126, 2008 WL 4414599, at *1 (7th Cir. Oct. 1, 2008).

The split over whether discretion supplied by rule can trigger the INA's jurisdiction-stripping provision now extends from motions to reopen, to continue, and to reconsider and potentially to *any* immigration action the Attorney General (or Secretary of Home-

land Security) declares discretionary. It is no wonder that five Seventh Circuit judges were concerned that *Kucana*'s holding would erode judicial review of immigration decisions generally. See 533 F.3d at 541 (Cudahy, J., dissenting) ("I am reluctant to broaden the immunity from review of an administrative process not necessarily renowned for its reliability."); *id.* at 542 (Ripple, J., dissenting from denial of rehearing en banc) (joined by Rovner, Wood, and Williams, JJ.) (expressing concern about the jurisdiction-stripping provision's "expansion into the realm of outcome determinative decisions"). This expanding confusion in an area of critical importance to many people's lives calls for this Court's immediate intervention.

II. The Seventh Circuit's Interpretation Of The INA's Jurisdiction-*Restoring* Provision Also Conflicts With That Of Other Courts Of Appeals

Having decided that Ms. Jezierski's petition was (by operation of 8 C.F.R. § 1003.2(a)), subject to jurisdiction-stripping under Section 1252(a)(2)(B)(ii), the court below held that the authority conferred by Congress in 2005 did not supply jurisdiction, because the BIA's "no prejudice" conclusion was a "discretionary determination," App., *infra*, 10a, rather than "question[] of law," *ibid.*, for purposes of Section 1252(a)(2)(D).

In so ruling, the Seventh Circuit reaffirmed its place among the minority of courts of appeals that have given Section 1252(a)(2)(D) a narrow con-

struction—as authorizing courts to decide only "pure" questions of law, but not "mixed" ones, such as the prejudice question here, see *Strickland* v. *Washington*, 466 U.S. 668, 698 (1984) (describing prejudice component of Sixth Amendment ineffective assistance claim as a "mixed question of law and fact"); *Fadiga* v. *Attorney General*, 488 F.3d 142, 153 & n.17 (3d Cir. 2007) (applying *de novo* standard in reviewing BIA prejudice determination). Five circuits, however, have rejected that restrictive interpretation.

The Seventh Circuit first staked out this position in *Cevilla* v. *Gonzales*, 446 F.3d 658 (7th Cir. 2006), where the court, referencing the reasoning of the later-withdrawn opinion in *Chen* v. *Department of Justice*, 434 F.3d 144, 153 (2d Cir.) (*Chen I*), on panel reh'g, 471 F.3d 315 (2d Cir. 2006) (*Chen II*), as well as the Ninth Circuit's opinion (also later vacated) in *Ramadan* v. *Gonzales*, 427 F.3d 1218 (9th Cir.2005) (*Ramadan I*), on reh'g, *Ramadan* v. *Gonzales*, 479 F.3d 646 (9th Cir. 2007) (per curiam), dismissed a review petition, explaining that only "statutory-construction questions" qualify as "questions of law," within the meaning of Section 1252(a)(2)(D). See 446 F.3d at 661; accord *Viracacha* v. *Mukasey*, 518 F.3d 511, 515 (7th Cir. 2008) ("[T]he proviso in § 1252(a)(2)(D) is limited to 'pure' questions of law."); *Leguizamo-Medina* v. *Gonzales*, 493 F.3d 772, 774 (7th Cir. 2007) ("[O]nly 'pure' legal questions (as opposed to characterizations or 'mixed' questions) are covered by subsection (D)."); *Johnson*, 2008 WL 4414599, at *2 (same).

Two other circuits have adopted this restrictive interpretation. In *Almuhtaseb* v. *Gonzales*, 453 F.3d 743 (6th Cir. 2006), the Sixth Circuit (also relying on the reasoning of the withdrawn *Chen I* and *Ramadan I* opinions) held that, for judicial review purposes, "a 'question of law' is a question regarding the construction of a statute," *id.* at 748 (internal quotation marks omitted), and in *Diallo* v. *Gonzales*, 447 F.3d 1274 (10th Cir. 2006), the Tenth Circuit (also citing *Chen I* and *Ramadan I*) described the subsection as granting jurisdiction over "a narrow category of issues regarding statutory construction," *id.* at 1282 (internal quotation marks omitted).[4]

In reaching that conclusion, these courts—and the influential *Chen I* and *Ramadan I* opinions—have relied primarily on the legislative history of the REAL ID Act, in which they found indications that Congress did not intend the phrase "questions of law" to have its ordinary meaning and that it was understood by some legislators to incorporate an implicit "pure" questions limitation. See, *e.g.*, *Chen I*, 434 F.3d at 153 (citing committee report indicating that "pure" was deleted from earlier version, because it would have been "'superfluous'") (quoting H.R. Rep. No. 72, 109th Cong., 1st Sess. 175 (2005)).

Five courts of appeals (including the Second Circuit and Ninth Circuits, in their revised opinions

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[4] Decisions of the Fourth and Fifth Circuits suggest a comparably narrow, if not identical, approach. See *Saintha* v. *Mukasey*, 516 F.3d 243, 250 (4th Cir. 2008), petition for cert. filed, 77 U.S.L.W. 3058 (U.S. July 11, 2008) (No. 08-71); *Zhu* v. *Gonzales*, 493 F.3d 588, 596 n.31 (5th Cir. 2007).

in *Chen* and *Ramadan*) have rejected this restrictive interpretation. The Third, Eighth, and Eleventh Circuits have all held that Section 1252(a)(2)(D) jurisdiction includes "mixed" questions of law and fact. See *Nguyen* v. *Mukasey,* 522 F.3d 853, 854-855 (8th Cir. 2008) (per curiam) (provision authorizes courts to decide "whether the IJ properly applied the law to the facts in determining the alien's eligibility for discretionary relief"); *Jean-Pierre* v. *Attorney General,* 500 F.3d 1315, 1322 (11th Cir. 2007) (courts of appeals have "jurisdiction to review * * * challenges [to] the application of an undisputed fact pattern to a legal standard"); *Toussaint* v. *Attorney General,* 455 F.3d 409, 412 n.3 (3d Cir. 2006) ("[W]e have jurisdiction [under section 1252(a)(2)(D)] to review the BIA's application of law to the facts of this case."). And the Ninth Circuit in *Ramadan II* concluded that "jurisdiction over 'questions of law' * * * includes not only 'pure' issues of statutory interpretation, but also application of law to undisputed facts, sometimes referred to as mixed questions of law and fact," 479 F.3d at 648.

These courts have reasoned that, isolated statements in committee reports notwithstanding, the language of the enacted statute does not support a "pure questions" restriction, see *Ramadan*, 479 F.3d at 654; that the legislative history is ambiguous and may be read to support an intention to retain jurisdiction to review mixed questions of law and fact, see *id.* at 653-654; *Jean-Pierre*, 500 F.3d at 1322; *Chen II*, 475 F.3d at 325-327; and that the restrictive interpretation is inconsistent with this Court's decision in *INS* v. *St. Cyr.*, 553 U.S. 406 (2001), which

is widely acknowledged to have spurred Congress to enact the section.

Significantly, the decisions that largely launched the movement toward a restrictive interpretation, the initial panel opinions in *Chen* and *Ramadan*, were withdrawn by the Second and Ninth Circuits, and those courts' opinions on rehearing significantly modified the earlier opinions' gloss on Section 1252(a)(2)(D). See *Chen*, 471 F.3d at 326; *Ramadan*, 479 F.3d at 652. The substituted *Chen* opinion relied on Congress's plain intent to restore the full sweep of jurisdiction "courts traditionally exercised in habeas review of Executive detentions," 471 F.3d at 326-327, and on the fact that "mixed" questions were among the "'issues relating to the legality of the detention,'" *id.* at 327 (quoting *St. Cyr*, 533 U.S. at 301 n.14) (emphasis omitted), that habeas courts historically have addressed.[5]

As the decision below and other recent cases make clear, however, the interpretation put forward in the first *Chen* opinion continues to govern in the Seventh, Sixth, and Tenth Circuits. See *Johnson*, 2008 WL 4414599, at *2 ("[O]nly pure questions of law are reviewable, and not the application of a legal standard to fact, when a discretionary determination

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[5] As the same time, the Second Circuit declined to give "questions of law" its broadest meaning, pronouncing the term ambiguous and citing legislative history as a basis for a somewhat narrow approach. 471 F.3d at 325. Although the revised opinion adhered to its earlier holding, it recognized "the possibility of a case in which the 'application' of a statute actually presents a 'question of law' within the meaning of the REAL ID Act." *Id.* at 331 n.11.

by the Board is challenged in court"); *Adebowale* v. *Mukasey*, No. 07-2201, 2008 WL 4682508, at *2 (7th Cir. Oct. 24, 2008); *Viracacha*, 518 F.3d at 515; *Almuhtaseb* v. *Gonzales*, 453 F.3d at 748 (6th Cir.); *Diallo* v. *Gonzales*, 447 F.3d at 1281 (10th Cir.).

III. The Importance Of The Legal Questions Splitting The Courts Of Appeals And The Magnitude Of The Conflict Warrant This Court's Review

The legal rules applied and the results reached in the decision below place the Seventh Circuit in stark conflict with every other court of appeals. As noted above, no other court has held that Section 1252(a)(2)(B)(ii) operates (in conjunction with 8 C.F.R. § 1003.2(a)) to deprive the courts of appeals of jurisdiction to review denials of reopening. See Part I, *supra*. And no other court has treated BIA ineffective assistance conclusions as unreviewable factual determinations. See *Omar* v. *Mukasey*, 517 F.3d 647, 650 (2d Cir. 2008) (per curiam); *Fadiga* v. *Attorney General*, 488 F.3d 142, 153 (3d Cir. 2007); *Mai* v. *Gonzales*, 473 F.3d 162, 164 (5th Cir. 2006); *Sako* v. *Gonzales*, 434 F.3d 857, 863 (6th Cir. 2006); *Akinwunmi* v. *INS*, 194 F.3d 1340, 1341 n. 2 (10th Cir. 1999).

These specific conflicts are significant enough to warrant review, given recent recognition by Congress and this Court of reopening as an "important safeguard," which helps "ensure a proper and lawful disposition." *Dada* v. *Mukasey*, 128 S. Ct. 2307, 2322-2324 (2008); see also *INS* v. *Doherty*, 502 U.S.

314, 330-331 (1992) (Scalia, J., concurring in part and dissenting in part) (noting that "reopening is the sole means of raising certain [important] issues"). And though ineffective assistance of counsel is only one of several grounds on which reopening has been granted, see pp. 36-37, *supra*, the hardships suffered by aliens who find themselves at the mercy of predatory and unscrupulous members of the immigration bar are both serious and well-documented. See, *e.g.*, Michael S. Vastine, *Is Your Client Prejudiced? Litigating Ineffective-Assistance-of-Counsel Claims in Immigration Matters Arising In The Eleventh Circuit*, 62 U. Miami L. Rev. 1063, 1076 (2008) (noting "ample * * * empirical evidence that a great deal of inadequate, if not illegal, representation is carried out * * * throughout the country.").

The legal rules on which the decision below rests, however, extend far beyond the context of this particular case. Reopening is available in many situations, not just when the removal decision was reached in proceedings where an alien was represented by a malpracticing attorney. And the Seventh Circuit's decision denying review potentially extends to any immigration decision not resting on "pure law" that the Attorney General or Secretary of Homeland Security has specified as "discretionary" through administrative regulation. See Parts I-II, *supra*.

Moreover, although some other courts of appeals have taken either a broad view of the jurisdiction-stripping language of Section 1252(a)(2)(B)(ii) or a narrow view of the jurisdiction-restoring provision's

reference to "questions of law," the Seventh Circuit's embrace of these rules *in tandem* separates the judicial review regime in that circuit from that prevailing elsewhere. Decisions that would be reviewable in any other circuit—including many claims that have led to reversal of BIA decisions on the merits—will not receive a "day in court" if issued within the Seventh Circuit. Compare *Atilano-Garcia* v. *Gonzales*, 159 Fed. Appx. 773 (9th Cir. 2005) (reversing denial of a motion to reopen as an abuse of discretion), *Mirza* v. *Gonzales*, 148 Fed. Appx. 467 (6th Cir. 2005) (same), *Bhasin* v. *Gonzales*, 423 F.3d 977 (9th Cir. 2005) (same), and *Zhao* v. *Gonzales*, 404 F.3d 295 (5th Cir. 2005) (same) with *Adebowale*, 2008 WL, at *2 (refusing review of denial of reopening), *Sharashidze* v. *Mukasey*, No. 07-2611, 2008 WL 4120022 (7th Cir. Sept. 8, 2008) (same), *Mitreva* v. *Mukasey*, No. 07-3058, 2008 WL 4093567 (7th Cir. Sept. 2, 2008) (same), *Yang* v. *Mukasey*, 2008 WL 3852744 (7th Cir. Aug. 19, 2008) (same), and *Huang* v. *Mukasey*, 534 F.3d 618 (7th Cir. 2008) (same), petition for cert. filed *sub nom. Dung* v. *Mukasey*, 77 U.S.L.W. 3252 (U.S. Oct. 13, 2008) (No. 08-490).

This sharp divergence in judicial-review regimes is especially unacceptable because it involves a statute enacted with the specific aim of reducing "piecemeal review, uncertainty, [and] lack of uniformity," H.R. Rep. No. 72, 109th Cong., 1st Sess. 174 (2005), in a field—immigration law—in which the Constitution includes an express commitment to "uniform[ity]," U.S. Const. Art. I, § 8, cl. 4, and where this Court and other federal courts have long strived for nationwide consistency, see *Zadvydas* v. *Davis*,

533 U.S. 678, 711 (2001) (Kennedy, J., dissenting) (stressing the necessity "that the Nation speak with one voice" on immigration matters); *Henderson* v. *Mayor of New York*, 92 U.S. 259, 273 (1875) ("The laws which govern [immigration] ought to be the same in New York, Boston, New Orleans, and San Francisco."); *Ferreira* v. *Ashcroft*, 382 F.3d 1045, 1050 (9th Cir. 2004) (noting that "the need for national uniformity is paramount" in immigration law); *Aguirre* v. *INS*, 79 F.3d 315, 317 (3d Cir. 1996) (concluding that "the interests of nationwide uniformity outweigh our adherence to Circuit precedent in this instance"); *Jaramillo* v. *INS*, 1 F.3d 1149, 1155 (11th Cir. 1993) (changing course, citing the need to "heal an intercircuit split * * * [and] achieve nationwide uniformity").[6]

The practical importance of the Seventh Circuit's restrictive regime is large. In cases like this, judicial review is all that shields individuals, like petitioner, who have entered this country lawfully and abided by its laws, from improper removal to locations far from important family and other responsibilities. As the abuse-of-discretion reversals cited above attest, the "administrative process [at issue is] not necessarily renowned for its reliability," *Kucana*, 533 F.3d at 541

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[6] Rather than apply a thumb on the scale in favor of uniformity, the Seventh Circuit has in recent cases committed itself to an increasingly solitary course, creating circuit conflicts on questions on which there previously had been uniform agreement. See *Kucana*, 533 F.3d at 540 (Cudahy, J., dissenting) (noting the circuit's new "isolated posture" on reviewability of reopening denials); *Johnson*, 2008 WL, at * 1 (opening up a circuit split on the reviewability of motions to reconsider).

(Cudahy, J., dissenting). On the contrary, the serious deficiencies of both the IJ process and the BIA appeals process have been extensively documented. *Banks* v. *Gonzales*, 453 F.3d 449, 452 (7th Cir. 2006) ("Immigration Judge Vinikoor[, the IJ in the present case,] did what this regulation says that an IJ 'shall not' do."); *id.* at 454-455 ("The immigration bureaucracy has much to learn from the experience of other federal agencies * * *."); *Benslimane* v. *Gonzales*, 430 F.3d 828, 829-830 (7th Cir. 2005) (Posner, J.) (noting "staggering 40 percent reversal rate [in petitions] * * * resolved [by Seventh Circuit] on the merits. * * * Our criticisms of the Board and of the immigration judges have frequently been severe. Other circuits have been as critical. This tension between judicial and administrative adjudicators * * * is due to the fact that the adjudication of these cases at the administrative level has fallen below the minimum standards of legal justice.") (citations omitted); *Guchshenkov* v. *Ashcroft*, 366 F.3d 554, 560 (7th Cir. 2004) (noting "systemic failure by the judicial officers of the immigration service to provide reasoned analysis"); see also Evelyn H. Cruz, *Double The Injustice, Twice The Harm: The Impact Of The Board Of Immigration Appeals's Summary Affirmance Procedures*, 16 Stan. L. & Pol'y Rev. 481 (2005).

This Court's intervention is especially warranted because the Seventh Circuit's interpretation of both the jurisdiction-stripping and jurisdiction-restoring provisions rest on significant legal errors. As other courts—and dissenting judges of the Seventh Circuit—have emphasized, the broad construction of

Section 1252(a)(2)(B)(ii) essentially reads the term "specified" out of the statute, with the troubling and almost certainly unintended consequence that the power to preclude judicial review is left to the very agency whose actions would be subject to challenge. This construction gives the provision a different, broader meaning in light of the REAL ID Act, even though that statute left the language of Section 1252(a)(2)(B)(ii) untouched and *extended* judicial review in cases where Congress had previously sought to deny it, see 8 U.S.C. § 1252(a)(2)(D).

The Seventh Circuit's construction of Section 1252(a)(2)(D) rests on equally serious interpretive errors. The statutory language does not hint at a "pure questions" limitation and traditional habeas jurisdiction, which the provision was intended to capture, extended to "questions of law that arose in the context of discretionary relief." *St. Cyr*, 533 U.S. at 307.

IV. This Case Presents An Especially Suitable Vehicle For Settling These Entrenched And Pressing Conflicts

This case presents a particularly appropriate opportunity for this Court to settle these well-developed conflicts. The Seventh Circuit's decision interpreted both provisions, which Congress intended to operate as an integrated, coherent whole. In contrast, decisions that *sustain* jurisdiction on one theory or the other—that is, hold either that jurisdiction-stripping is inoperative or that review has been restored—are unlikely to offer the Court an

opportunity to consider the review regime as a whole. They need not—and typically do not—address the other question. And in the large majority of circuits where less restrictive interpretations of these two provisions have become settled law, jurisdictional matters are seldom extensively explored by the court or the parties.

There is no reason, moreover, to expect that these conflicts will dissipate with time. Over the votes of five Seventh Circuit judges, the Seventh Circuit refused en banc rehearing in *Kucana*, see 533 F.3d at 538; *id.* at 542 (Ripple, J., dissenting) (predicting that the court's rule "will no doubt warrant close scrutiny by the Supreme Court" and citing Sup. Ct. R. 10), just as it has just declined to reconsider *Cevilla*, in light of the Second Circuit's and Ninth Circuit's rehearing decisions in *Chen* and *Ramadan*, see *Viracacha*, 518 F.3d at 515 (reaffirming that Section 1252(a)(2)(D) restores jurisdiction for courts to review only pure questions of law). The extent and practical importance of the divide make further "percolation" especially inappropriate.

V. The Court Below Also Erred In Concluding That Petitioner Did Not Present A Constitutional Claim

Although the alternative ruling below, that review was unavailable under Section 1252(a)(2)(D)'s restoration of jurisdiction for "constitutional claims," does not carry the same broad legal and practical significance as the court's "question[] of law" holding (and might not independently warrant exercise of

this Court's certiorari jurisdiction), that conclusion was also in error.

To the extent the opinion's opaque statement that "infringement of a constitutional right [wa]s *not* alleged," here, App., *infra*, 8a, was meant to describe some sort of forfeiture on Ms. Jezierski's part, the submissions to the appeals court do not support that characterization. Although her brief did not separately address "constitutional claim" jurisdiction—the Government did not contend that jurisdiction had been "stripped" in the first place—petitioner repeatedly invoked her rights to a "fundamentally fair" hearing, an opportunity to be heard, and adequate representation, see, *e.g.*, C.A. Br. at 7-8; C.A. Reply Br. at 4. She argued that her claim was controlled by precedent, including a Seventh Circuit case, that found or suggested a constitutional basis for claims of ineffective assistance in removal proceedings. See C.A. Br. 7-8 (citing *Sanchez* v. *Keisler*, 505 F.3d 641, 647 (7th Cir. 2007)).

To the extent the opinion's observation was meant (as the surrounding discussion suggests) as a statement about the contours of the constitutional protection someone in Ms. Jezierski's position *could* claim, moreover, such a conclusion would entail an *exercise* of jurisdiction and therefore would be inconsistent with the court's jurisdictional dismissal. Even courts that have held there is no due process protection against ineffective assistance in removal proceedings, see p. 36, *infra,* h ave recognized that they were deciding "constitutional claims."

Indeed, while review here is required to resolve the significant conflicts over the meaning of the INA's jurisdiction-stripping and -restoring provisions–and reversal does not depend on the Court's taking up *any* constitutional question, let alone announcing any particular constitutional rule—the Seventh Circuit's understanding of due process adds to widespread disagreement among the courts of appeals as to when and whether harmful legal representation in removal proceedings violates the Constitution.

Most courts have recognized a due process right to effective assistance of counsel. See, *e.g.*, *Hernandez* v. *Reno*, 238 F.3d 50, 55 (1st Cir. 2001); *Omar* v. *Mukasey*, 517 F.3d 647, 650 (2d. Cir. 2008); *Fadiga*, 488 F.3d at 153 (3d Cir.); *Sako* v. *Gonzales*, 434 F.3d 857, 863 (6th Cir. 2006); *Maravilla Maravilla* v. *Ashcroft*, 381 F.3d 855, 857-858 (9th Cir. 2004); *Osei* v. *INS*, 305 F.3d 1205, 1208 (10th Cir. 2002); *Dakane* v. *Attorney General*, 399 F.3d 1269, 1273 (11th Cir. 2004). Others have rejected that conclusion. See *Rafiyev* v. *Mukasey*, 536 F.3d 853, 861 (8th Cir. 2008) ("[T]here is no constitutional right to an attorney, so an alien cannot claim constitutionally ineffective assistance of counsel."); *Afanwi* v. *Mukasey*, 526 F.3d 788, 798 (4th Cir. 2008) (holding "contrary to some of our sister circuits, that retained counsel's ineffectiveness in a removal proceeding cannot deprive an alien of his Fifth Amendment right," because retained attorney was not "engaging in state action"). And still others have spoken ambivalently on the subject. Compare *Goonsuwan* v. *Ashcroft*, 252 F.3d 383, 385 n.2 (5th Cir. 2001) ("[A]liens do * * *

have a constitutionally protected right to procedural due process when deportation proceedings are initiated against them. This right to due process is violated when the representation afforded them was so deficient as to impinge upon the fundamental fairness of the hearing.") (internal quotation marks and citations omitted) with *Mai*, 473 F.3d 162, 165 5th Cir. 2006) (describing "the source and extent of this due process right" as "unclear"). The opinion below appears to stake out a middle position, namely, that an immigrant presents a "constitutional claim" only if ineffective assistance occurs in a removal proceeding characterized by unusually "complex * * * issues" or unspecified "other conditions," App., *infra*, 7a.

Although the constitutional questions need not be taken up in this case—the statutory provisions on which the courts of appeals are divided apply in cases where no constitutional issue is asserted—and there may be reasons why the Court might be disinclined to address them here,[7] the issue *could be* decided were the Court to grant review, and if taken up, would supply an alternative ground for reversing the decision below.

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[7] In addition to the Court's general reluctance to decide constitutional questions in advance of the necessity of doing so, see *Ashwander* v. *TVA*, 297 U.S. 288, 346-347 (1936) (Brandeis, J., concurring), the Attorney General has recently announced that he will review the issue of ineffective assistance in immigration proceedings and his review might yield information relevant to formulating the proper constitutional rule, see Orders No. 2990-2008, 2991-2008, 2992-2008, Office of the Attorney General (Aug. 7, 2008).

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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