1   IN THE SUPREME COURT OF THE UNITED STATES

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3 AGRON KUCANA,   :

4   Petitioner   :

5   v.   : No. 08-911

6 ERIC H. HOLDER, JR.,   :

7 ATTORNEY GENERAL   :

8 - - - - - - - - - - - - - - - - - x

9   Washington, D.C.

10   Tuesday, November 10, 2009

11

12   The above-entitled matter came on for oral

13 argument before the Supreme Court of the United States

14 at 10:04 a.m.

15 APPEARANCES:

16 RICK M. SCHOENFIELD, ESQ., Chicago, Ill.; on behalf of

17   the Petitioner.

18 NICOLE A. SAHARSKY, ESQ., Assistant to the

19   Solicitor General, Department of Justice, Washington,

20   D.C.; on behalf of the Respondent in support of the

21   Petitioner.

22 AMANDA C. LEITER, ESQ., Washington, D.C.; as amicus

23   curiae in support of the judgment below. Invited to

24   brief and argue.

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1   P R O C E E D I N G S

2   (10:04 a.m.)

3   CHIEF JUSTICE ROBERTS: We will hear

4   argument first this morning in Case 08-911,

5   Kucana v. Holder.

6   Mr. Schoenfield.

7   ORAL ARGUMENT OF RICK M. SCHOENFIELD

8   ON BEHALF OF THE PETITIONER

9   MR. SCHOENFIELD: Mr. Chief Justice, and may

10 it please the Court:

11   In enacting section 1252(a)(2)(B), Congress

12 limited its reduction of judicial review to where the

13 authority for the Attorney General's discretion is

14 specified under subchapter 2 of chapter 12 of Title 8.

15   Congress did not express any intent to

16 remove the courts' jurisdiction to review discretionary

17 decisions, the authority for which is specified under

18 any other subchapter or in regulations, nor did Congress

19 express any intent to delegate its constitutional

20 responsibility to determine Federal jurisdiction to the

21 Attorney General --

22   CHIEF JUSTICE ROBERTS: Under what authority

23 were these regulations issued?

24   MR. SCHOENFIELD: The regulation that grants

25 discretion with regard to motions to reopen comes from a

1   section in subchapter 1, not subchapter 2, of the

2   regulations. And that was authorized by section 1103 of

3   Title 8.

4   I should say the authorizing statute for

5   the regulation is in subchapter 1, not subchapter 2.

6   And that's --

7   JUSTICE SCALIA: How does that -- how does

8   that read? I -- I recall the briefs say that, but I

9   don't recall reading it. Is it -- does it appear

10 somewhere?

11   MR. SCHOENFIELD: Section 1103, Your Honor?

12   JUSTICE SCALIA: The -- the provision that

13 -- that you contend provides the authority for the

14 Attorney General's regulation.

15   MR. SCHOENFIELD: Section 1103(g)(2)

16 authorizes the Attorney General to --

17   JUSTICE SCALIA: I know. Where is it, I'm

18 asking? Is it -- is it in the briefs somewhere?

19   You know, it's nice to know what we are

20 talking about. When -- when you are relying on a

21 section, it would be nice to have it in the materials.

22 I mean, I guess I can send for it, but --

23   MR. SCHOENFIELD: Sure. It -- it indicates,

24 on page 18 of the reply brief, that, quote, "Establish

25 such regulations... as he deems necessary for carrying

1   out his authority under the provisions of this chapter."

2   The fact that the statute we are focused on

3   states that authority must be specified in this

4   subchapter -- being subchapter 2 --

5   JUSTICE GINSBURG: Two. The -- the key word

6   that is emphasized in this case is it's "under,"

7   instead of "in."

8   MR. SCHOENFIELD: The word used in the --

9   in the statute is "under," which, of course, has a

10   variety of definitions. We believe that taking the

11   statute in context, that the correct definition to apply

12   is "according to" or "within."

13   JUSTICE GINSBURG: It would be clearer if

14   it had said "in."

15   MR. SCHOENFIELD: Congress could have said

16   "in," but I think Congress made it clear by using the

17   phrase "authority specified under," so we're not -- we

18   don't have a situation where, as Congress usually would

19   do, they would say: a regulation under such and such a

20   statute, where Congress uses the word "regulations."

21   There is the -- the term "regulation" is not used in the

22   statute.

23   CHIEF JUSTICE ROBERTS: If you were to

24   evaluate the validity of the regulation, I suppose,

25   like, an APA case or similar to that, what statutory

1   provision would you look to, to see if the regulation

2   was consistent with that statutory provision?

3   MR. SCHOENFIELD: We would look to section

4   1103 in subchapter 1.

5   JUSTICE SCALIA: So it really doesn't matter

6   what "under" means, right? I mean, even -- even if you

7   accept the other interpretation of "under," to wit, that

8   it includes regulations pursuant to the subchapter, your

9   point is that this regulation is not even pursuant to

10   the subchapter.

11   MR. SCHOENFIELD: That's absolutely correct,

12   Your Honor. Although we don't think regulations are

13   included, even if they were, it's not in the subchapter.

14   JUSTICE SCALIA: I understand. Yes.

15   CHIEF JUSTICE ROBERTS: Yes, but -- is that

16   right? Would -- would subchapter 1 give you much

17   insight into the scope of the regulation and how it was

18   a fair interpretation of the authority under which the

19   Attorney General purported to act?

20   MR. SCHOENFIELD: I think that in terms of

21   looking at the discretion of the Attorney General,

22   historically, on motions to reopen, there have been --

23   there has been discretion.

24   What the regulation did was to codify that

25   historical authority and to be consistent with what the

1   courts had always done, but I think, in interpreting

2   the scope of Congress's intent to reduce judicial

3   review, we need to be very careful about that,

4   obviously. And so, therefore, when it says "as under

5   authority specified in this subchapter," we need to find

6   the authority in the subchapter, which we don't.

7   JUSTICE KENNEDY: The -- the -- subchapter 2

8   does talk about a special rule on reopening for battered

9   spouses, children, and parents. Is that a statute where

10   the discretion is committed to the Attorney General?

11   MR. SCHOENFIELD: No, Your Honor, because

12   subchapter 2 does not say that the Attorney General has

13   discretion to decide motions to reopen. That language

14   is only found in the regulation. The only reference --

15   JUSTICE KENNEDY: So -- so it -- so absent

16   the regulation, you would interpret the statute as

17   saying there is no discretion?

18   MR. SCHOENFIELD: Absent the regulation, I

19   would interpret the statute as being silent as to the

20   matter.

21   JUSTICE KENNEDY: No, that wasn't my

22   question. Let's say there's no regulation. And the

23   statute says, number one, there shall -- so subchapter 2

24   of the statute says, number one, there shall be motions

25   to reopen. And then there is a special rule for

1   battered spouses.

2   Now, you would interpret that statute,

3   absent any regulation, as saying this is not within the

4   discretion of the Attorney General?

5   MR. SCHOENFIELD: I would interpret the

6   statute as not providing for discretion, yes, Your

7   Honor.

8   JUSTICE GINSBURG: What was the --

9   JUSTICE KENNEDY: Well, how does an Attorney

10   General decide without -- without using discretion? He

11   must grant, in any case? Whether a battered spouse

12   waits for 15 years, he must grant?

13   Just under the statute, now.

14   MR. SCHOENFIELD: No.

15   JUSTICE KENNEDY: This is hypothetical.

16   MR. SCHOENFIELD: Yes.

17   No. I'm -- I'm not trying to say that, Your

18   Honor. What I'm trying to say is that --

19   JUSTICE KENNEDY: Well, then there must be a

20   discretionary component implicit.

21   MR. SCHOENFIELD: I would disagree in -- in

22   this way: If the statute is silent as to matters of

23   discretion, the Court can look to -- the Court could

24   look to other sources to determine --

25   JUSTICE GINSBURG: Could you clarify, what

1   is the provision about battered spouses? I thought that

2   that had to do with you could have more than one

3   petition to reopen.

4   MR. SCHOENFIELD: That's correct, Your

5   Honor. But --

6   JUSTICE GINSBURG: But the rule is you may

7   reopen once and that -- that provision on battered

8   spouses says, but if you are in that category, you

9   can reopen again?

10   MR. SCHOENFIELD: I believe that's correct,

11   Your Honor. I believe that the provision on battered

12   spouses creates in a -- allows you to bring more than

13   one motion to reopen. It does -- it does not address

14   the issue of discretion.

15   JUSTICE SCALIA: Why -- why would it -- I

16   don't -- the big obstacle I find with your position is

17   that it doesn't make any sense.

18   Why would Congress want to exclude review

19   for discretionary judgments by the Attorney General that

20   are recited explicitly to be discretionary in the

21   statute, but provide judicial review for judgments that

22   are just as lawfully discretionary because the Attorney

23   General is given the authority to make them

24   discretionary and has done so?

25   I mean, a discretionary judgment is a

1   discretionary judgment. Why -- at least if it's a

2   legitimate one. I can understand why you would say

3   discretion which is given to the Attorney General under

4   the statute, as opposed to discretion which he has

5   wrongfully assumed, but -- but both -- both exercises of

6   discretion are just as lawful, right, under the statute?

7   One is explicit in the statute, and the other is

8   pursuant to the authority of the Attorney General to

9   make it discretionary.

10   Why would Congress want the one to be

11   subject to judicial review and not the other?

12   MR. SCHOENFIELD: Judicial review of motions

13   to reopen has -- has been the traditional normal process

14   for the court to take. I think what Congress was doing

15   here was saying: In certain specified instances, we are

16   going to remove judicial review, but not in all

17   instances.

18   And the question is, where did Congress draw

19   the line? Congress --

20   JUSTICE SCALIA: Yes, and I'm saying why

21   is it a rational line to say -- I think it's a rational

22   line to say, when lawful discretion is being exercised,

23   since it's a discretionary judgment, you're not entitled

24   to it anyway, and therefore, we won't review it. That

25   makes some sense.

1   And I -- but where discretion is lawfully

2   exercised, why would -- why would Congress say, oh, when

3   the discretion is lawfully exercised because the statute

4   says so, we have one approach, but where discretion is

5   lawfully exercised only because the statute allows the

6   Attorney General to prescribe discretion, we will not

7   allow it? I don't understand why -- why it would want

8   to do that.

9   MR. SCHOENFIELD: Well, let me suggest

10   several reasons, Your Honor.

11   JUSTICE SCALIA: Okay.

12   MR. SCHOENFIELD: First, if the Court was to

13   read the statute as allowing a regulation to create

14   discretion and, therefore, to remove judicial review --

15   JUSTICE SCALIA: Well, you -- you don't --

16   you don't contest that the regulation can provide

17   discretion. You -- you don't say the regulation is

18   invalid.

19   MR. SCHOENFIELD: That's correct.

20   JUSTICE SCALIA: So it is a valid exercise

21   of discretion, right?

22   MR. SCHOENFIELD: And courts frequently

23   review decisions for abuse of discretion. And motions

24   to reopen, I would suggest, are particularly important

25   because it creates a safety net for review. It deals

1   with -- like, rule 60(b) of the Federal rules, it deals

2   with potentially new evidence, matters that weren't

3   available to bring initially, and it's important that

4   potential mistakes be reviewed.

5   JUSTICE KENNEDY: I just want to return for

6   a moment to the battered spouse provision. The battered

7   spouse provision specifically says that in the Attorney

8   General's discretion, he may waive the time limit for

9   the 1 year for the battered spouse.

10   Now, that surely is discretion specified --

11   and I think the word "specified" is important here --

12   specified in subchapter 2. So there should be no

13   judicial review as to that.

14   You would have to agree with that, wouldn't

15   you?

16   MR. SCHOENFIELD: Yes, as to the -- as to

17   waiving -- as to waiving the -- on the number of

18   motions, yes. On that point, yes.

19   JUSTICE KENNEDY: All right. So then the

20   thing that Congress cares about most is something the

21   court can't review. That is counterintuitive.

22   MR. SCHOENFIELD: Congress specified some 30

23   instances of discretion to the Attorney General in

24   subchapter 2, and I believe it drew the line there and

25   said, if we did not specify it in subchapter 2, then it

1   is reviewable, just as courts have traditionally

2   reviewed these matters. If there --

3   JUSTICE GINSBURG: The ones that have been

4   codified by statute -- those prior to the codification

5   were by regulation. Is that -- is that so?

6   MR. SCHOENFIELD: The regulation regarding

7   motions to reopen existed before the statute. Congress

8   could readily have made that part of the statutory

9   scheme if it had chosen to do so, but it did not.

10   If there are no further questions, I would

11   like to reserve the rest of my time for rebuttal.

12   CHIEF JUSTICE ROBERTS: Thank you, counsel.

13   MR. SCHOENFIELD: Thank you.

14   CHIEF JUSTICE ROBERTS: Ms. Saharsky.

15   ORAL ARGUMENT OF NICOLE A. SAHARSKY

16   ON BEHALF OF THE RESPONDENT

17   IN SUPPORT OF THE PETITIONER

18   MS. SAHARSKY: Mr. Chief Justice, and may it

19   please the Court:

20   The statute at issue does not bar judicial

21   review of denials of motions to reopen. And I would

22   like to go right to one of the questions that was asked

23   by Justice Scalia, which is: How do you make sense out

24   of this statute, in terms of what Congress is doing in

25   not allowing judicial review of specifications of

1 discretion in regulations, but -- I'm sorry, and

2 allowing judicial review of things that are specified in

3 regulations, but not things that are specified in the

4 subchapter?

5   And I think that the answer to this question

6 comes from the text of the statute, particularly if you

7 compare the two things that are in 1252(a)(2)(B)(i) and

8 (ii), that all of the things that are listed in (i) and

9 that are covered by (ii) are substantive decisions that

10 are made by the Executive in the immigration context as

11 a matter of grace, things that involve whether aliens

12 can stay in the country or not. And those are matters,

13 at the end of the day, that the Executive, in the

14 exercise of its immigration and foreign affairs power,

15 has the authority to decide and that Congress did not

16 want the Federal courts in the business of reviewing.

17   But what the Federal courts have often

18 reviewed are things where discretion is committed by

19 regulation, and these are procedural matters that

20 relates to whether an alien had a fair shot of getting

21 his claim heard by the agency and by the Federal courts.

22 Things like --

23   JUSTICE KENNEDY: What about my question

24 with reference to motions to -- to reopen? That is

25 specified under subchapter 2. That's right there in

1   subchapter 2: There shall be a motion to reopen.

2   Now, if you had no regulation upon it,

3   wouldn't you say that would be within the discretion of

4   the Attorney General?

5   MS. SAHARSKY: I would say that the Attorney

6   General has the discretion to issue regulations with

7   regard to that --

8   JUSTICE KENNEDY: No. No, that's not my

9   question. Hypothetical, not a real case. Just a

10   hypothetical.

11   MS. SAHARSKY: Yes.

12   JUSTICE KENNEDY: Just so we can talk about

13   the statute. The statute says there -- subchapter 2,

14   the one we are most interested in, specifies -- and

15   that's one of the words -- that there shall be a motion

16   to reopen.

17   Now, don't you think that's within the

18   discretion of the Attorney General, absent any

19   regulations?

20   MS. SAHARSKY: Yes, because the statute --

21   JUSTICE KENNEDY: All right. So absent a

22   regulation, there would be jurisdiction stripping under

23   that provision, right?

24   MS. SAHARSKY: No.

25   JUSTICE KENNEDY: Why?

1   MS. SAHARSKY: Because in the case that you

2   are positing, the discretion of the Attorney General is

3   implicit in the statute. It's not specified in the

4   statute. And here, Congress didn't say any time there

5   is a discretionary decision, which is what implicit

6   discretion would go to. It says: When discretionary

7   authority is specified.

8   Under this subchapter, that means that there

9   needs to be something specific, specified, explicit,

10   specifically noted in the text of the statute.

11   JUSTICE KENNEDY: All right. But you would

12   give me, or would you, the concession that -- or

13   agreement that the Attorney General's discretion to

14   waive the time limit for battered spouses is committed

15   to him? And that's non-judiciary reviewable, wouldn't

16   you think?

17   MS. SAHARSKY: That's right. That wouldn't

18   be reviewable. Congress used the language of

19   discretion --

20   JUSTICE KENNEDY: Again, that seems odd,

21   that the thing Congress cares about so much that it

22   makes a specific provision can't be subject to judicial

23   review.

24   MS. SAHARSKY: I think that that is like the

25   -- the various matters that Congress listed as specified

1 as discretionary within the text of the relevant

2 subchapter, that it decided that this was a matter of

3 Executive grace that it did not want the Federal courts

4 involved in.

5   But the Federal courts have long reviewed

6 things like denials of motions to reopen, continuance

7 denials, where you have a situation in which the Federal

8 courts wanted to make sure that aliens were getting a

9 fair chance to have their claims heard.

10   JUSTICE BREYER: So, in fact, if -- if what

11 we have is a motion in the category of grace, except for

12 asylum, saying, of course, the Justice Department makes

13 a decision that can't be reviewed. But then the

14 department, let's imagine, has a regulation, and it

15 says: Anyone can ask the department for a rehearing in

16 such a matter, and we'll decide as a matter of grace

17 whether to give you one.

18   Now, you're saying that would be reviewed?

19   MS. SAHARSKY: No, I'm not saying that.

20   JUSTICE BREYER: Why wouldn't it be

21 reviewed?

22   JUSTICE SCALIA: Sure.

23   JUSTICE BREYER: You just said it was. You

24 said every procedural decision is reviewed, which to me,

25 makes no sense to begin with, because I can't imagine

1   that Congress, while they don't want them to review the

2   substance at all, is perfectly happy to have the courts

3   review every detailed matter of extra time to file a

4   brief, extra time to have an oral argument. All those

5   matters would be reviewable, I guess, in your view.

6   MS. SAHARSKY: Two answers, Your Honor.

7   First, the standard of review here is abuse of

8   discretion. It has long been abuse of discretion. That

9   doesn't mean that the Federal courts are involved in

10 second-guessing the agency --

11   JUSTICE BREYER: Exactly the same is true of

12 the substantive decision. I mean, that has nothing to

13 do with it.

14   I want to know -- look, this is where I'm

15 going. I don't think your -- I can't find a reading of

16 this statute that makes sense, except for one which I am

17 trying on, and I'm sure there's a lot wrong with it,

18 that what Congress meant to do here is to take all the

19 procedural decisions, including reopening ones, and

20 treat them the same way that they are treating the

21 substantive decisions. So that in his case, he wins.

22 Because he gets review of the substance, he should get

23 review of a reopening. It's the same thing. And in

24 some other case, they'd lose, because if you don't get

25 review of the substance, you shouldn't get review of the

1   reopening. Both are the same thing. They are just

2   filed at different times.

3   So that, to me, is the only reading of this

4   statute that I have yet found that made sense. But

5   since no one argues for it, I'm sure I must be making

6   some huge mistake. But that's what you can tell me.

7   (Laughter.)

8   MS. SAHARSKY: I don't think you are, if I

9   am understanding you correctly. We actually have a

10   footnote in our opening brief where --

11   JUSTICE BREYER: Yes, but you are on the

12   wrong side, if you agree with it, because --

13   (Laughter.)

14   JUSTICE BREYER: No, you are on the right

15   side, because he wins. No, you're on the right side.

16   He wins. I take that back. I'm sorry.

17   (Laughter.)

18   MS. SAHARSKY: Well, let me try to explain.

19   There are a number of matters that are committed to the

20   agency's discretion after (i), things like adjustment of

21   status. And if the alien sought review, judicial

22   review, of an adjustment of --

23   JUSTICE BREYER: Yes.

24   MS. SAHARSKY: -- status determination, we

25   would say that's unreviewable under -- under (i).

1   JUSTICE BREYER: Yes.

2   MS. SAHARSKY: Let's say that he then files

3   a motion to reopen --

4   JUSTICE BREYRE: Yes.

5   MS. SAHARSKY: -- where he is essentially

6   trying to relitigate his adjustment of status.

7   JUSTICE BREYER: Oh, but, wait, new things

8   have happened. He doesn't just want to relitigate it.

9   MS. SAHARSKY: Well, what the --

10   JUSTICE BREYER: New things have happened;

11   that's why he wants it reopened.

12   MS. SAHARSKY: What the courts of appeals

13   have said is if what he's challenging is a discretionary

14   determination that the Executive has already made, that

15   that motion to reopen would not be --

16   JUSTICE BREYER: No, he's not, but his

17   motion to reopen is -- it's my hypothetical; I want to

18   deal with it; I accept yours. My hypothetical is,

19   something new came up. That's why he wants it reopened.

20   MS. SAHARSKY: If something new came up --

21   JUSTICE BREYER: Something new came up.

22   That's why he -- I think, isn't it true, often people

23   want it reopened because something new came up?

24   MS. SAHARSKY: Well, certainly that's what

25   the statute requires them to do.

1   JUSTICE BREYER: Okay.

2   MS. SAHARSKY: It's not our experience that

3   every case that's filed is that way.

4   JUSTICE BREYER: No, no.

5   MS. SAHARSKY: But in your hypothetical,

6   when something new comes up, we understand Congress as

7   have wanting that to have been judicially reviewable.

8   JUSTICE BREYER: Oh, I'm asking you, what

9   possible sense could it make?

10   MS. SAHARSKY: Because Congress wants to

11   make sense that the alien is getting -- make sure that

12   the alien is getting a fair shot in terms of the

13   process.

14   JUSTICE BREYER: Look, we're -- two issues.

15   One is grace in respect to -- let's call it fraud, and

16   he loses. Something new comes up, and what does he

17   want? Grace in respect of fraud in light of this new

18   fact.

19   Now, my question would be: What possible

20   sense does it make to say the courts cannot review the

21   first, but they could review the second?

22   MS. SAHARSKY: If what he's seeking is a

23   review of an exercise of discretion, then that is not

24   reviewable, because of the reason that the initial

25   determination is not reviewable.

1   JUSTICE BREYER: Oh, by the way, this

2   reopening is done by regulation, not done by statute.

3   That's where I get to the problem.

4   You are trying to distinguish between

5   whether it's done by regulation or done by statute. And

6   I'm trying to distinguish on a very different context.

7   Treat the motion to reopen the same as you treat the

8   initial motion, whether it's done by regulation or

9   whether it's done by statute.

10   MS. SAHARSKY: Right, and what I'm

11 suggesting is that the difference there is between a

12 substantive determination that's a matter of grace and a

13 procedural determination to make sure that an alien gets

14 a fair shot, and it is --

15   CHIEF JUSTICE ROBERTS: Counsel, I -- I'm

16 sorry, do you want to finish?

17   Okay.

18   I -- I find it curious -- and maybe you can

19 illuminate it for me -- that the Justice Department is

20 before us, arguing that the Justice Department can't be

21 trusted without judicial review.

22   (Laughter.)

23   And I find that doubly curious when the

24 Justice Department won on the opposite position below.

25   I mean, are you suggesting that the statute

1   is so absolutely clear that you could not stand there

2   and say that your colleague down the hall in the Justice

3   Department could be trusted to exercise his discretion,

4   but in fact you are saying: I know we won on that, but

5   we are not going to defend it because we think the

6   Attorney General needs judicial review to help him stay

7   in line?

8   MS. SAHARSKY: In the vast majority of

9   cases, of course we believe that the Board can be

10   trusted, and that's why review is for an abuse of

11   discretion, and it has been for many years. This Court

12   has said in Dada --

13   CHIEF JUSTICE ROBERTS: Yes, but if you take

14   -- if you continued to argue the position you won on

15   before the -- before the Seventh Circuit, it wouldn't be

16   that the standard of review is -- is so deferential that

17   it is okay. It would be there is no review at all.

18   MS. SAHARSKY: That's right, but we did not

19   argue to the Seventh Circuit that there was no

20   jurisdiction here.

21   In fact, it has been our position since 2004

22   that the text of this statute, particularly the text,

23   the context, the history, is so clear that we could not

24   reasonably take the alternate position. It has been --

25   CHIEF JUSTICE ROBERTS: And the position of

1   the Department of Justice was the opposite before 2004,

2   correct?

3   MS. SAHARSKY: There are only a handful of

4   cases, and in those cases, several individual attorneys

5   argued that there was no jurisdiction. And as soon as

6   the leadership of the Office of Immigration Litigation

7   heard of those cases, it sat down with the text of the

8   statute and said: We think that the text here is clear,

9   and we don't think the jurisdiction is taken away. And

10 it directed all of the attorneys in the Office of

11 Immigration Litigation not to be making this

12 jurisdiction-stripping argument anymore.

13   And it has been the United States'

14 consistent position since then, and we urged it to the

15 Seventh Circuit below, that when you look at the text of

16 the statute, you look at authority specified under

17 this subchapter. It's Congress that specifies

18 authority. "Specified under this subchapter" means "in

19 this subchapter." It means "in the text of the

20 subchapter." And we have to answer this question in

21 this case by looking at the text that Congress enacted.

22   I acknowledge that there is not legislative

23 history, for example, to tell us what Congress intended

24 to do here, but we think that the answer comes from the

25 text of the statute. That if you are looking at the

1   substantive determinations that Congress was most

2   concerned about in 1996 when it enacted IIRIRA, those

3   were the things where Executive discretion was

4   exercised it did not want the Federal courts getting

5   involved in. But this --

6   JUSTICE KENNEDY: Can you give me an idea of

7   how many motions to reopen are brought to the courts for

8   review each year?

9   MS. SAHARSKY: Well, there are approximately

10   between 8 and 10,000 motions to reopen filed by the

11   Board of -- before the Board of Immigration Appeals each

12   year, and about between 15 and 20 percent of those are

13   granted.

14   So if you look at the -- the remaining 80 to

15   85 percent that are denied, the general appeal rate for

16   the courts of appeals is about 30 percent from the Board

17   of Immigration Appeals. So if you assume that the

18   appeal rate is about the same for motions to reopen, you

19   could get a number that way. So, you know, we -- there

20   are a substantial number --

21   JUSTICE KENNEDY: So we are talking about 2

22   or 3,000 petitions to the court each year?

23   MS. SAHARSKY: But the -- the point that we

24   are making is that there are these circumstances that

25   Congress has recognized, and this Court recognized it in

1   Dada. The motions to reopen serve several important

2   purposes, and, yes, they are reviewed under a very

3   deferential abuse-of-discretion standard. We do not

4   think in many cases that the Board was doing something

5   wrong and that it needs to be overturned.

6   But, for example, in the -- in a similar

7   context of continuance denials, say there was an

8   immigration judge who did not allow an alien to seek a

9   continuance in order to get an attorney to bring forth

10 his case before the immigration judge. Continuance

11 denials, some circuits, including the Seventh Circuit,

12 have said, are barred under this language.

13   We don't think that judicial review of that

14 is barred. We think that in the rare cases --

15   JUSTICE KENNEDY: Well -- but that would

16 be a question of law which is accepted.

17   MS. SAHARSKY: I -- I am not sure that it

18 would be a question of law in that circumstance.

19   CHIEF JUSTICE ROBERTS: So if you think it's

20 so bad, the Attorney General doesn't have to do it. Why

21 do you need a court to tell you that?

22   MS. SAHARSKY: I think that the courts have

23 long served a very important check on the Board's

24 authority and on the Board's exercise -- you know, the

25 Board has many cases before it. In rare instances --

1   CHIEF JUSTICE ROBERTS: You keep saying "the

2   Board" --

3   MS. SAHARSKY: -- the Federal courts --

4   CHIEF JUSTICE ROBERTS: You keep saying "the

5   Board." Under the statute, it's the Attorney General,

6   correct?

7   MS. SAHARSKY: Yes, that's right, but the

8   statute also -- the Attorney General -- the Board acts

9   on behalf of the Attorney General under the statute,

10   so the Board is --

11   CHIEF JUSTICE ROBERTS: And if he doesn't

12   like what they do, he has the authority to act himself.

13   Whenever somebody delegates authority, they retain

14   authority to act themselves.

15   MS. SAHARSKY: That's right. The Attorney

16   General does police the Board, but the courts of appeals

17   have long done that too, particularly in the context of

18   motions to reopen.

19   This Court, just a couple of years ago in

20   Dada, recognized the important functions that motions to

21   reopen serve and assumed that there would be judicial

22   review of motions to reopen. In fact, it noted that

23   judicial review of motions to reopen, albeit under the

24   abuse-of-discretion standards, goes back to 1916, and we

25   just didn't see anything in 1996 to suggest that

1   Congress wanted to change that. And I think --

2   JUSTICE GINSBURG: Do we know where the

3   motion -- where -- where did it originate? Where did it

4   -- it was -- we now know it's in the regulations. It's

5   in the statute. But how did motions to reopen BIA

6   decisions originate?

7   MS. SAHARSKY: Before the BIA existed, so

8   back in the 1916 context, there were immigration

9   officers, and you could ask them to reconsider or reopen

10   your case. In -- I think it was 1940 or 1941, the Board

11   came into being, and the Attorney General quickly

12   enacted regulations that provided for either sua

13   sponte reopening or for the filing of a motion to

14   reopen. And those regulations existed in substantially

15   the same form until 1996, when they were amended to make

16   discretion explicit in the regulation, and the 1996 is

17   essentially the same form that it's in today. So there

18   has -- there has always been an assumption that there

19   can be such a thing as reopening.

20   And I -- I just want to focus on what

21   Congress was doing in 1996, because I think it's very

22   telling. We know that Congress was focused on enacting

23   bars to judicial review, and we also know that Congress

24   was codifying for the first time an alien's right to

25   file one motion to reopen.

1   But Congress just didn't make any effort to

2   make denials of motions to reopen judicially

3   unreviewable, and that's very telling, because there's

4   any number of ways that Congress could have done that.

5   JUSTICE ALITO: I didn't do the math fast

6   enough in my head when you were answering Justice

7   Kennedy's question, but is he correct that the effect of

8   accepting your argument is about 2,000 additional

9   appeals that -- that the Department of Justice will have

10   to brief and the courts of appeals will have to decide?

11   MS. SAHARSKY: You know, I -- I haven't done

12   the math on that, either, and I think it requires the

13   assumptions that I set out to Justice --

14   JUSTICE ALITO: Yes. On the assumptions

15   that you made, do you know what the -- the result is?

16   MS. SAHARSKY: I -- I don't, because we

17   haven't calculated the number of motions throughout, and

18   we only have total numbers in the courts of appeals.

19   But let me say, if you are concerned about

20   the burden on the courts of appeals, every court but the

21   Seventh Circuit that has considered the issue has found

22   that the provision at issue doesn't bar judicial review.

23   So I don't think that this --

24   JUSTICE KENNEDY: Have any of those courts

25   said that they don't have a workload problem?

1   (Laughter.)

2   MS. SAHARSKY: I think you would know better

3   than I would. We ask the judgment below to be reversed.

4   JUSTICE GINSBURG: May I ask you, before you

5   sit down: Your response to the briefs that suggests

6   that all of this is beside the point because this was

7   a -- a second motion to reopen, and the statute allows

8   only one?

9   MS. SAHARSKY: Well, this is comprehensively

10   addressed in footnote 18 in our reply brief, so I will

11   just address it briefly here -- but if you have follow-

12   up questions -- which is: If you look at the statutory

13   language, it says that an alien may file one motion to

14   reopen. It doesn't limit the Attorney General's

15   authority to allow more than one motion to reopen in

16   certain circumstances. And, in fact, it --

17   CHIEF JUSTICE ROBERTS: Thank you, counsel.

18   Ms. Leiter.

19   ORAL ARGUMENT OF AMANDA C. LEITER

20   AS AMICUS CURIAE SUPPORTING THE JUDGMENT BELOW

21   MS. LEITER: Mr. Chief Justice, and may it

22   please the Court:

23   Congress enacted IIRIRA to reduce the burden

24   that immigration cases imposed, and continue to impose,

25   on the Federal courts. The plain language of the Act

1   strictly limits Federal court jurisdiction to review the

2   discretionary decisions of immigration officials. In

3   fact, as this Court has explained, the theme of the

4   legislation was to protect the Attorney General's

5   discretion from the courts.

6   Section 1252(a)(2)(B)(ii) is central to that

7   theme.

8   Before I discuss the language and meaning of

9   the section, I want to make one point very clear. The

10   section does not preclude judicial review of legal and

11   constitutional claims. Both of those are expressly

12   preserved by section 1252(a)(2)(D).

13   JUSTICE SOTOMAYOR: But that provision came

14   after the original jurisdiction stripping, a number of

15   years after. So why should we look to that to inform

16   what Congress intended at an earlier time with respect

17   to judicial review --

18   MS. LEITER: Well, I have --

19   JUSTICE SOTOMAYOR: -- or the scope of it or

20   --

21   MS. LEITER: I have two answers to that,

22   Your Honor. The first is, to the extent that the Court

23   is concerned now about taking away judicial review of

24   the really sort of important central motions to reopen

25   --

1   JUSTICE SOTOMAYOR: You're talking about --

2   MS. LEITER: -- that is not a problem. With

3   respect --

4   JUSTICE SOTOMAYOR: You're talking about us

5   acting as policymakers. The question is: Why should we

6   be looking to that to define what Congress intended

7   then, when it --

8   MS. LEITER: With respect, Your Honor --

9   JUSTICE SOTOMAYOR: -- stripped jurisdiction

10   earlier or granted it?

11   MS. LEITER: I believe this Court always

12   would have understood and Congress understood that its

13   jurisdiction strip would have had an exception for

14   constitutional claims even as of 1996.

15   In 1988, this Court issued Webster v. Doe,

16   finding that section 701(a)(2), which is quite parallel

17   to this provision, recognizes certain claims as

18   committed to agency discretion by law. Congress --

19   excuse me -- this Court in 1988 recognized that

20   provision as requiring a constitutional exception. And

21   I think Congress, acting in 1996, would have recognized

22   that the same -- very similar language in section

23   1252(a)(2)(B)(ii) would also have a constitutional

24   exception.

25   I agree with you that there would not have

1   been a legal exception but for the enactment of

2   1252(a)(2)(D).

3   JUSTICE SOTOMAYOR: Well, couldn't we look

4   at the fact that when Congress was considering whether

5   to put back into the jurisdiction-stripping statute an

6   exception for constitutional claims, it then knew,

7   because the courts of appeals except for the Seventh,

8   who just recently did it, were routinely taking

9   jurisdiction over motions to reopen?

10   Don't you think that was the time for them

11 to tell us: Hey, you guys got it wrong; we are going to

12 make motions to reopen statutorily discretionary, so if

13 there's any doubt about this, let's clear up what our

14 intent is.

15   MS. LEITER: Well, Justice Sotomayor,

16 certainly had Congress done that, we wouldn't be here.

17 However, it is not true that the courts of appeals as of

18 that date had been uniform in their view that section

19 1252(a)(2)(B)(ii) did not extend to regulations.

20   None had extended it to motions to reopen,

21 but in CDI Services v. Reno in 2002, the Sixth Circuit

22 recognized section 1252(a)(2)(B)(ii) as extending to

23 regulations. That was in the context of a -- a petition

24 for a visa extension. And Onyinkwa v. Ashcroft in 2004,

25 the -- excuse me -- Eighth Circuit similarly recognized

1   that. And then in Yerkovich v. Ashcroft in the same

2   year, the Eighth -- excuse me -- the Tenth Circuit also

3   recognized 1252(a)(2)(B)(ii) as extended to regulations.

4   So the confusion plainly existed as of the

5   date of the REAL ID Act. And I think the burden was on

6   Congress, frankly, in that position, actually to clarify

7   the reverse. If Congress wanted to make clear at that

8   point --

9   JUSTICE SOTOMAYOR: Wait a minute, you're --

10   you're arguing from a real negative, because some courts

11   had said that other statutes were covered by the

12   jurisdictional bar. You're arguing that they knew

13   that no court had held that motions to reopen -- that

14   there was no jurisdiction for motions to reopen, that

15   somehow it should have --

16   MS. LEITER: With respect, Your Honor, it is

17   the same statute at section 1252(a)(2)(B)(ii). And they

18   were holding exactly what the Seventh Circuit held and

19   what we argue here, which is that section

20   1252(a)(2)(B)(ii) extends two things specified as

21   discretionary in regulations issued under the Act.

22   They had not yet considered the issue with

23   respect to motions to reopen, but with respect to other

24   issues specified as discretionary in regulations, they

25   held that the -- that the Act clearly extended to those

1   issues and stripped the courts of jurisdiction.

2   JUSTICE GINSBURG: But on a motion to

3   reopen, there is -- Seventh Circuit stands alone,

4   doesn't it?

5   MS. LEITER: It does, Your Honor. Yes.

6   JUSTICE GINSBURG: And how many circuits are

7   on the other side?

8   MS. LEITER: I believe there are six.

9   JUSTICE GINSBURG: Was there any -- ever a

10   decision in any of those six circuits that went the way

11   the Seventh Circuit went on the motion to reopen?

12   MS. LEITER: No, Your Honor. And that

13   appears to be because the circuits, even the Sixth,

14   Eighth, and Tenth, were persuaded by the existence of

15   the consolidation provision, section 1252(b)(6), but

16   motions to reopen should for some reason be treated

17   differently than other things specified as discretionary

18   in regulations. But their --

19   JUSTICE SCALIA: Have they adhered -- have

20   those other courts that you said originally said that

21   other discretionary judgments made discretionary by

22   regulation were non-reviewable, have they adhered to

23   the -- to that view as to those other --

24   MS. LEITER: They have not repudiated the

25   view, but they have not adhered to it with respect to

1   motions to reopen. They seem to be reading the

2   statute --

3   JUSTICE SCALIA: Oh, I understand. I am

4   asking: Have they treated motions to reopen

5   differently?

6   MS. LEITER: Yes, they seem to treat motions

7   to reopen differently as reviewable, and they have been

8   persuaded to do that by the existence of section

9   1252(b)(6), the consolidation provision.

10   But as I explained earlier --

11   JUSTICE SCALIA: Has any of them, since

12   switching to -- or since holding this with respect to

13   motions to reopen, reaffirmed their view with regard to

14   other discretionary judgments?

15   MS. LEITER: Not that I have found, Your

16   Honor, but nor have they repudiated it. I haven't found

17   a situation in which, after considering motions to

18   reopen, they went back again to consider visa

19   extensions, for example.

20   JUSTICE KENNEDY: But we are talking about

21   what's "specified" under subchapter 2. I think that's

22   an important word, in addition to "under." And motions

23   to reopen are specified, and it doesn't say

24   "discretion." It just says there shall be a motion to

25   reopen.

1   Do you get any mileage from that, or you

2   seem to rest your argument instead on the regulations?

3   And I think that's almost a weaker argument.

4   MS. LEITER: Frankly, Your Honor, I do not

5   think that specification of discretion -- with the

6   exception of the battered spouse's provision that you --

7   that you raised earlier, I do not think the

8   specification of discretion with respect to other

9   aspects of motions to reopen is sufficiently clear in

10   the statute to convey discretion.

11   JUSTICE KENNEDY: So you -- you consider --

12   you -- you think it's plausible to have a regime where

13   motions to reopen are not discretionary at all, absent

14   regulation? That would seem very odd to me.

15   MS. LEITER: No, Your Honor. I think when

16   Congress referred to a specification of discretion in

17   section 1252(a)(2)(B)(ii), they intended, effectively,

18   to provide a notice requirement. There are many things

19   that the Attorney General did under the Immigration Acts

20   prior to the enactment of IIRIRA, after the enactment of

21   IIRIRA, that were understood to be discretionary.

22   What the statute calls for is a different

23   category of discretionary decisions: Those things that

24   are specified as discretionary to be unreviewable; other

25   things that have long been understood to be

1 discretionary remain reviewable.

2   JUSTICE BREYER: Do you want to say anything

3 about, apparently, this idiosyncratic thought that I

4 have had? This is -- it's -- my thought is that both

5 sides are arguing: We just look to see if it's

6 discretion given by statute or given by regulation, and

7 we draw the line on reviewability there.

8   Now, what we're talking about is a big set

9 of cases, including frauds and various things where

10 there is some discretion substantively to let the person

11 stay. Now, on that big set of cases, the statute says

12 if it's fraud, et cetera, we don't want review. But if

13 it's asylum, we want review. Isn't that how it works,

14 basically -- basically?

15   MS. LEITER: Basically.

16   JUSTICE BREYER: Okay. Fine. I'm saying

17 instead of looking to see whether it's a rehearing

18 or procedural or reopening matter, period, you look

19 to see whether it has to do with the basic category.

20 If it's something that Congress doesn't want courts

21 to meddle in, that carries over to reopening, which

22 is the same thing; it carries over to rehearing

23 petitions -- they're all about the same thing. And if

24 it's something that Congress did want courts to meddle

25 in, like asylum, it carries over to reopening, and it

1 carries over to rehearing petitions and other such

2 matters.

3   So Congress has one simple judgment: We

4 want courts to meddle in these affairs substantively or

5 we don't. And our job would be to say, right, if that's

6 what you want, unless it's unconstitutional, that's what

7 we give you.

8   Do you see the way -- I'm just drawing the

9 line vertically instead of horizontally. But I agree,

10 nobody has. Now, to me that makes sense, but apparently

11 to no one else. So I would like to be talked out.

12   (Laughter.)

13   MS. LEITER: With respect, Your Honor, I

14 think that "no one" includes Congress. I think that

15 that -- that that line --

16   JUSTICE BREYER: I didn't leave anyone out.

17 No one is universal.

18   (Laughter.)

19   MS. LEITER: That line might have made sense

20 had Congress drawn it, but Congress --

21   JUSTICE BREYER: How do we know they didn't?

22 I mean, there's such a thing in the law called -- what

23 we think of often -- they often use the word "ancillary"

24 to describe it. And when Congress passes a thing that

25 has to do with X, you often interpret a statute to carry

1   with it the application to ancillary matters, the thing

2   that are bound up in X, even though they don't have a

3   separate sentence because you can't think of everything

4   that describes every matter ancillary to X. That's

5   normal in law.

6   MS. LEITER: The words Congress used here,

7   though, are those decisions specified as discretionary

8   kind or --

9   JUSTICE BREYER: Yes, and we would say those

10   decisions specified includes those decisions that are

11   totally wrapped up in the same thing. So that if a

12   person tries to escape this by simply making his main

13   argument in a rehearing petition, he can't escape it,

14   because it's really the same thing.

15   MS. LEITER: I agree, Your Honor, that that

16   category of things is unreviewable. What I'm struggling

17   with is that the regulation at issue here, regulation

18   1003.2, specifies in no uncertain terms that motions to

19   reopen are discretionary, and therefore, if "specified

20   under" extends to regulations, there is no way in my

21   view not to extend --

22   JUSTICE BREYER: Well, why not? This is not

23   a matter that is the subject of the special provision.

24   A reopening petition is the same kind of thing,

25   identical to the initial petition, and so something that

1 applies to the initial petition applies to the reopening

2 petition because they are the same kind of animal. If

3 you have a -- you know -- I mean, okay. Oh, forget it.

4 I see the point, no point going further.

5   MS. LEITER: With respect, Your Honor, I

6 think the language Congress used was clear here and

7 extends clearly to decisions -- decisions specified as

8 discretionary under the subchapter. Congress could

9 easily have said decisions specified as discretionary in

10 the subchapter, but it did not. And the paragraphs --

11   JUSTICE GINSBURG: Is there any rhyme or

12 reason why some universe of things that could be

13 reviewed in court, Congress put some of the them in the

14 statute and left others out?

15   MS. LEITER: Well, Justice Ginsburg, the

16 description of something as discretionary has

17 consequences for the Attorney General, for the

18 administrative process. It has only the ancillary

19 consequence of stripping the courts of jurisdiction. So

20 court -- excuse me -- the Attorney General needs to

21 determine a rule of evidence for motions before it,

22 needs to determine rules of procedure, needs to

23 determine a rule of decision, and so there are -- there

24 are categories of matters where I could imagine Congress

25 saying to itself: The rule of decision here is really

1   not something with which we need to concern ourselves.

2   It is up to the Attorney General to decide whether this

3   is a discretionary decision or whether this is instead a

4   decision that he or she would like to -- to constrain in

5   some way by having certain specific rules of decision to

6   go by.

7   JUSTICE GINSBURG: Well, it's -- the

8   question isn't whether the Attorney General or the BIA

9   exercises discretion. In all of these, the Attorney

10   General exercises discretion. The question is immunity

11   from court review, and ordinarily that's done by

12   statute. And I do not know of another instance, perhaps

13   you do, where the decision whether a matter that the

14   agency rules on will be exempt from judicial review is

15   made by the agency itself -- the very agency that makes

16   the decision, rather than by the legislature.

17   MS. LEITER: I will answer your question

18   first. I can imagine Congress believing that there are

19   categories of decisions where even the rules of decision

20   are best left to the agency to determine. And in that

21   category, Congress leaves it open to the agency to

22   decide whether to specify those matters as discretionary

23   or instead to specify more constraining rules of

24   decision.

25   With respect to your question about

1   examples --

2   JUSTICE GINSBURG: And -- and I'm not

3   questioning the discretion. The Attorney General can

4   be given discretion to rule on the matter, but the

5   question is: Does that mean that the exercise of

6   discretion will be immune from judicial review?

7   Congress might well say: Agency, you decide what's

8   within your discretion. But not say: And, Agency, we

9   delegate to you, too, the matter whether the court will

10   -- will review your exercise of discretion.

11   MS. LEITER: Right. Two things, Your Honor.

12   First, the jurisdictional consequence of the

13   discretionary specification here attached after the

14   Attorney General applied the label. So here this is not

15   a situation in which the Attorney General was making a

16   determination as to what things should be reviewable.

17   The Attorney General was making a -- a decision as to

18   what rule of decision to apply in motions to reopen, and

19   Congress later attached the jurisdictional significance.

20   JUSTICE GINSBURG: If -- if your

21   interpretation of "under" is right.

22   MS. LEITER: Well, Congress acted later and

23   may, if our interpretation is correct, have attached the

24   jurisdictional significance at that point, yes.

25   With respect to your question about other

1 examples of situations in which an agency is left to

2 make a determination that has jurisdictional

3 consequences, I have a few examples. The first is the

4 Communications Act of 1934. This Court recognized in

5 Global Crossing that the agency there could determine

6 that a -- that conduct under the Act was unreasonable.

7 That is an administrative determination under one

8 section of the Act. It has the consequence under

9 another section of the Act of creating a cause of action

10 for individuals to recover in damages.

11   A second example is actually section

12 701(a)(2) of the Administrative Procedure Act which

13 refers to categories of decisions that are committed to

14 agency discretion by law. Courts have understood that

15 that is not the broad subset of discretionary decisions

16 but instead that subcategory of discretionary decisions

17 for which there is no law to apply, and many courts

18 recognize that the agencies may create the law to apply

19 in those circumstances.

20   So an agency may enact a regulation that

21 binds the agency's own discretion and renders the issue

22 reviewable where it would not otherwise have been. So

23 there --

24   JUSTICE KENNEDY: Do you think absent the

25 special provisions of the -- of the immigration act that

1   we are considering, if it were just under the APA, that

2   a motion to reopen would be committed by law to agency

3   discretion under 702? Because it seems to me that, you

4   know, there are sources we could look to, to see whether

5   or not it's rationally exercised.

6   MS. LEITER: I do not, Your Honor. I

7   believe there is law to apply in this circumstance,

8   particularly after enactment of IIRIRA. Congress now

9   has provided guidelines for when some motions to reopen

10 should be granted, the timeliness of motions to reopen,

11 et cetera. So I do not think this is the broad

12 category of -- or sorry -- the narrow category of things

13 that are committed to agency discretion by law. I was

14 using the example solely to show that there are other

15 circumstances in which an agency action has the

16 consequence of restoring --

17   JUSTICE KENNEDY: Well, I actually think it

18 helps you because -- there is -- there is something to

19 review, the agency does have discretion. But this

20 statute strips it, because it provides for motions to

21 reopen, specifically. But, of course, you --

22   MS. LEITER: Yes, and --

23   JUSTICE KENNEDY: -- you don't take that --

24   JUSTICE SCALIA: Are you going to talk about

25 "under"?

1   (Laughter.)

2   MS. LEITER: I would love to talk about

3   "under," Your Honor.

4   JUSTICE SCALIA: Good.

5   MS. LEITER: And if I may, I would like to

6   start on pages 6a and 7a. I have an illustration

7   here -- excuse me -- of the -- of the government's

8   opening brief. An illustration here of the fact that

9   Congress knows what it is doing when it chooses

10   prepositions. If you look at the section that

11   immediately precedes 1252(a)(2)(B)(ii) -- that is

12   section 1252(a)(2)(A). In (a)(2)(A) --

13   JUSTICE SCALIA: Where is this?

14   JUSTICE KENNEDY: Now, what -- on what page?

15   Look at page 6 --

16   MS. LEITER: I'm sorry. Pages 6a and 7a of

17   the government's opening brief -- so the Respondent's

18   opening brief.

19   JUSTICE SCALIA: Oh, 6a of the government's

20   --

21   MS. LEITER: And pages 6a and 7a in the

22   appendix. This is -- this is provision 1252(a)(2)(A) --

23   and borrowing the term "Romanette" -- Romanette (i),

24   (ii), and (iv) -- refers clearly to things provided in

25   subsection (e) of the statute; whereas, Romanette (iii)

1 refers to the application of such section to individual

2 aliens including the determination made under section

3 1225(b)(1)(B) of this title. That is a determination by

4 immigration officials at the border as to whether an

5 individual who is otherwise inadmissible may have

6 grounds to be detained and allowed to go through asylum

7 proceedings. Clearly there, where Congress recognized

8 that there was an administrative determination to be

9 made, it used the preposition "under" to reach through

10 the statute to the administrative determination.

11   I also have three examples, Your Honor, of

12 situations in chapter 8 in which Congress actually uses

13 the phrase "specified under," the same phrase at issue

14 here, to refer again through the statute to

15 administrative determinations. These are not

16 unfortunately in the briefs.

17   8 U.S.C. 1227 -- excuse me. Let me start

18 with 8 U.S.C. 1375a(a)(4) and (a)(6). This is a

19 provision that calls for the preparation of a pamphlet

20 on the legal rights of immigrant victims of domestic

21 violence. Paragraph 1375a(a)(6) calls for the pamphlet

22 to be distributed and made available, quote, "in the

23 language as specified under paragraph (4)." Turning to

24 paragraph (4) then, it clearly anticipates an

25 administrative determination, because it says the

1   Secretary of Homeland Security in consultation with the

2   Attorney General and the State Department shall

3   determine at least 14 languages into which the pamphlet

4   is translated.

5   So that's an example of Congress using

6   "specified under" to refer, yes, in the first instance

7   to statutory language, as it does in our provision,

8   specified under subchapter 2, but it is a situation in

9   which the statutory language to which "specified under"

10   refers clearly anticipates some exercise of

11   administrative authority.

12   Here, the exercise of administrative

13   authority is the specification of languages.

14   In our example, it is the specification of

15   procedures for motions to reopen.

16   JUSTICE STEVENS: May I ask this question

17   before you finish -- if it is an appropriate time?

18   What is your response to their argument they

19   raise in the reply brief that this was specified under

20   subchapter 1, rather than subchapter 2?

21   MS. LEITER: Your Honor, subchapter 1

22   includes the language that grants authority broadly to

23   the Attorney General to issue regulations implementing

24   the chapter, and the language implemented by the motions

25   to reopen regulations exists in subchapter 2.

1   The motion to reopen regulations very

2   clearly implements Section 1229(a), which is in

3   subchapter 2. And a question asked earlier was where

4   one would look to determine whether Regulation 1003.2 is

5   a valid regulation, a reasonable interpretation of the

6   statute, and for that, I believe one would have to look

7   at the content of section 1229(a), which is in

8   subchapter 2, so although --

9   JUSTICE SCALIA: Except that the text refers

10   not just to the -- the discretion, it refers -- it says

11   the authority for which is specified under this

12   subchapter and the authority to issue that -- the

13   authority to issue the regulation is under subchapter 1.

14   MS. LEITER: Yes, Justice Scalia. I am

15   certainly not --

16   JUSTICE SCALIA: No. You would have to say,

17   no, Justice Scalia, if you want to win this.

18   (Laughter.)

19   MS. LEITER: Yes, the phrase includes the

20   word the authority, Justice Scalia, but I don't think it

21   can bear the weight that Petitioner and the government

22   put on it. I believe that "authority" there references

23   the authority that is clearly granted in section 1103 to

24   implement the entire chapter.

25   But what the section does is to indicate

 1   where the specification of discretion must be located,

 2   and in this case, it must be located in either the

 3   statute or regulations issued under it, and to see

 4   that, I think the easiest illustration is to suppose

 5   that the statute read: No court shall have jurisdiction

 6   to review any decision specified as discretionary --

 7   excuse me -- decision, the authority for which is

 8   specified as discretionary in the subchapter or in

 9   regulations issued thereunder.

10   If Congress had used belts and suspenders in

11   that way and made itself doubly clear, there would be no

12   question here that the word "authority" was somehow

13   superfluous or misplaced.

14   JUSTICE BREYER: Do you have any reason why

15   Congress would have taken great trouble to make certain

16   that courts can review asylum decisions, but Congress

17   would not have wanted a court to review a reopening of

18   an asylum matter, which can be done, after all, only if

19   something new comes up that justifies asylum?

20   For example, a new government comes and

21   takes over a country, and now they are going to

22   murder the person, and that couldn't be considered the

23   first time because the old government was there, and

24   they were just going to torture him, all right? So --

25   so there's something new here.

1   Now, why would any human being say, we want

2   to get courts involved in the first decision, but we

3   want to keep them out of the second decision?

4   MS. LEITER: The -- the best answer I have,

5   Justice Breyer, is that Congress wanted to cut off

6   review at some point, and it was a question of numbers

7   of bites at the apple. I understand your point, that --

8   that the second --

9   JUSTICE BREYER: Reopening is not a bite at

10   the apple. Reopening is a new thing; at least, by and

11   large, and supposed to be -- a change.

12   MS. LEITER: And that may have been part of

13   Congress's concern, that, of course, by and large, it is

14   supposed to be, but it may not always be used in that

15   way, and, at some point, Congress wanted to draw the

16   line. And I note here that Congress did not -- I mean,

17   what Congress did here was to set up a regime under

18   which things that are specified as discretionary are

19   unreviewable.

20   But there is some room here for the Attorney

21   General to remove the specification of discretion if

22   that system is unworkable --

23   JUSTICE SCALIA: And, of course, if your

24   interpretation produces the anomaly that Justice Breyer

25   just described, the government's interpretation produces

1   the opposite anomaly. Right?

2   MS. LEITER: Certainly, Your Honor.

3   JUSTICE BREYER: Exactly, and that's why I

4   ended up with this unusual --

5   (Laughter.)

6   CHIEF JUSTICE ROBERTS: And I suppose it's a

7   large question, if you are talking about, presumably,

8   the unusual cases in which the motion to reopen is -- is

9   justified, that you are talking about 2,000 or

10   3,000 cases, and the question is whether or not those

11   are -- should be reviewed in the executive branch or

12   should be reviewed in the judicial branch.

13   MS. LEITER: Well, the math that we were

14   given earlier, I believe, does come out to about 2,000

15   appeals per year, but I remind the Court that section

16   1252(a)(2)(D) preserves those that raise questions of

17   law or constitutional questions for review.

18   So this is a far narrower -- I assume,

19   although I do not have the numbers, but I assume a far

20   narrower subset of those decisions that would be

21   rendered unreviewable here, only those for which a

22   discretionary factual determination has been made by the

23   agency.

24   CHIEF JUSTICE ROBERTS: So we are looking

25   for needles in -- in a haystack, right?

1   MS. LEITER: I -- I don't have the numbers,

2   Your Honor. I don't know what percent. I am not sure

3   whether it's a fraction of the haystack or a needle

4   within it, but -- but it is certainly a subset of the --

5   of the category of cases.

6   JUSTICE GINSBURG: Do you have other

7   examples where -- "under" is commonly used -- statute

8   and regulations thereunder -- but in the appendix that

9   you have given us, it says, "under regulations."

10   "Under" is always coupled with "regulations," and you

11   want us to transpose that to a statute that

12   conspicuously does not say, "regulations."

13   MS. LEITER: Justice Ginsburg, we included

14   the appendix to illustrate how Congress uses the

15   preposition "under," when it is talking about

16   regulations, so we specifically looked for examples

17   where Congress was talking already about regulations,

18   and the

19   preposition that accompanies that is always "under."

20   I do have two further -- excuse me.

21   JUSTICE SCALIA: You said, earlier, that you

22   had three examples --

23   MS. LEITER: I have two further --

24   JUSTICE SCALIA: -- that were not in your

25   brief. You better spit them out, or we won't know about

1   them.   What are the other two?

2   (Laughter.)

3   MS. LEITER: Thank you, Justice Scalia. The

4   other two are section 1227(a)(1)(H), which refers to

5   1182(a)(5)(A). 1227(a)(1)(H) -- both in Chapter 8 --

6   refers to grounds of inadmissibility -- excuse me --

7   specified under paragraph (5)(A) of section 1182(a).

8   Turning to paragraph (5)(A) of section

9   1182(a), that calls for the Labor Department to

10   determine whether the United States needs immigrant

11   laborers in a particular category.

12   So, again, it's a use of the phrase

13   "specified under" to refer to statutory language, but

14   through the statutory language to what is clearly an

15   anticipated exercise of administrative discretion.

16   JUSTICE SCALIA: 1227(a)(1)(H). What's the

17   third one? And then I am going to ask you what the

18   first one was because I forgot it.

19   MS. LEITER: Okay. The third one is

20   section -- again, chapter 8, section 1537(b)(1) and

21   (b)(2). (B)(1) says that, after judicial review

22   affirming a removal order, the Attorney General, quote,

23   "shall remove the alien to a country specified under

24   paragraph 2."

25   And then, in paragraph 2, the statute says

1   that the alien may choose the country, but that the

2   Attorney General has authority to review the alien's

3   choice of country, and if the alien refuses to choose a

4   country, the Attorney General has authority to

5   specify the country.

6   The first --

7   JUSTICE SCALIA: Yes. What was the first

8   one? Just -- just give me the -- the cite for the first

9   one. I didn't write it down. I should have.

10   MS. LEITER: 1375(a) -- (a)(4) and (a)(6).

11   JUSTICE SCALIA: Thank you.

12   MS. LEITER: If there are no further

13   questions, Your Honor?

14   CHIEF JUSTICE ROBERTS: Thank you, counsel.

15   Mr. Schoenfield, you have 3 minutes

16   remaining.

17   REBUTTAL ARGUMENT OF RICK M. SCHOENFIELD

18   ON BEHALF OF THE PETITIONER

19   MR. SCHOENFIELD: Section 1252(b)(6)

20   mandates that review of the underlying decision should

21   be consolidated with review of a motion to reopen. I

22   think that tells us several things.

23   The first and foremost of which is Congress

24   intended there to be review of motions to reopen -- at

25   least some motions to reopen. To try to go back to

1   Justice Breyer's questions, I think one can extrapolate

2   from the consolidation provision that, if it is

3   impossible to consolidate because there is no review of

4   the underlying decision, you do not get to have a review

5   of those motions to reopen.

6   And that is referenced, I believe, in the

7   government's brief, at footnote 15 -- excuse me -- with

8   some cases cited, where courts have so held.

9   We did not focus on that because that is not

10   Mr. Kucana's issue. As the Court has alluded to,

11   Mr. Kucana's issue is the nature of asylum based upon

12   changed country conditions, and those situations are

13   where it may be a matter of life and death, certainly,

14   also a matter of -- of liberty, to be able to bring

15   forward new evidence, which did not exist before, about

16   changed country conditions, and it is not two bites at

17   the apple. It's the first bite at current conditions,

18   which is essential.

19   With regard to the case of Webster v. Doe,

20   that my colleague cited orally, that was an extremely

21   unusual case in which the Court essentially said that it

22   could not -- it did not have any criteria to evaluate

23   the discretion used by the director of the CIA.

24   That is certainly not the situation we have

25   here, where we are dealing with motions to reopen, which

1   are analogous to rule 60(b) and which are routinely

2   reviewed on abuse-of-discretion standard.

3   Additionally, let me note that, if you were

4   to determine that the statutory language "specified

5   under" is ambiguous that the applicable canons both

6   point us to favoring judicial review -- favoring

7   judicial review and not essentially allowing the

8   Executive to pass a regulation which insulates itself

9   from judicial review.

10   That would be both the clear statement

11   requirement as well as the principle laid down by this

12   Court that, in an ambiguous situation dealing with

13   deportation, ambiguities are to be construed in favor of

14   the alien.

15   If there are no further questions --

16   CHIEF JUSTICE ROBERTS: Thank you, counsel.

17   MR. SCHOENFIELD: Thank you.

18   CHIEF JUSTICE ROBERTS: Ms. Leiter, you have

19   briefed and argued this case in support of the judgment

20   below, at the invitation of the Court, and have ably

21   discharged that responsibility, for which we are

22   grateful.

23   The case is submitted.

24   (Whereupon, at 11:06 a.m., the case in the

25   above-entitled matter was submitted.)

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