

No. _____

IN THE
Supreme Court of the United States

INDU GULATI,

Petitioner,

vs.

MICHAEL B. MUKASEY, Attorney General,

Respondent.

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

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Section 8 U.S.C. 1252(a)(2)(B)(ii) removes judicial review over actions “the authority for which is specified under this subchapter to be in the discretion of the Attorney General” An Immigration Judge’s authority to continue removal proceedings is nowhere mentioned in this statute. The question presented is:

Did the Seventh Circuit err in holding, contrary to the position of eight of its sister circuits and the Attorney General, and in agreement with two other courts of appeals, that § 1252(a)(2)(B)(ii) precludes judicial review of an Immigration Judge’s decision to deny a continuance in a removal proceeding?

PARTIES TO THE PROCEEDING

The parties to the proceeding in the Court of Appeals for the Seventh Circuit were Petitioner Indu Gulati and Respondent Attorney General of the United States.

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INTRODUCTION

The decision below applying Section 1252(a)(B)(ii) of Title 8, U.S.C., to strip the courts of appeals of jurisdiction to review denial of continuances by Immigration Judges (IJ) deepens an eight-to-three split in the circuit courts on an important and recurring issue of immigration law and federal jurisdiction that affects hundreds or thousands of litigants each year. The Attorney General acknowledges this split. Pet App. 59a-61a. The Attorney General also has announced—previously and in this case—a firm position that the majority view is correct and that the position of the court below is wrong. Pet. App. 61a.

In light of this Court's special concern for uniformity in the application of laws in the area of immigration, *Zadvydas v. Davis*, 533 U.S. 678, 700 (2001), review by this Court is clearly warranted. Indeed, under the circumstances, this may be an appropriate case for summary reversal.

OPINIONS BELOW

The slip opinion of the court of appeals, Pet. App. 1a-7a, No. 06-3221, is available at 2007 WL 2988632 (7th Cir. Oct. 15, 2007). The decision of the Board of Immigration Appeals, Pet. App. 8a-10a, is *In re Gulati*, No. A97-331-330 (B.I.A. July 21, 2006). The oral decision of the Immigration Judge, Pet. App. 11a-15a is not reported.

JURISDICTION

The court of appeals issued its decision on October 15, 2007. Pet. App. 1a-8a. On November 23, 2007, Petitioner filed a petition for rehearing and rehearing *en banc*, which was denied on December 27, 2007. Pet. App. 25a-26a. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

STATUTORY PROVISION INVOLVED

Section 242(a)(2)(B)(ii) of the Immigration and Nationality Act, as amended by § 306(a)(2) of the Illegal Immigration Reform and Immigrant Responsibility Act of 1996, provides that:

(B) Denials of discretionary relief

[N]o court shall have jurisdiction to review—

* * *

(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.

8 U.S.C. § 1252(a)(2)(B)(ii).

STATEMENT

Petitioner, Indu Gulati, is a native and citizen of India. She last entered the United States on or about December 8, 1997, as a non-immigrant visitor and stayed in the United States beyond the time allowed by her visa. Petitioner was personally served with a

Notice to Appear by the Department of Homeland Security on August 24, 2004, which charged her with removability on the basis that she stayed in the United States longer than permitted. At a proceeding before an Immigration Judge (“IJ”) on June 16, 2005, Petitioner conceded removability on that basis. *See* Pet. App. 18a.

An alien who has overstayed her visa must ordinarily leave the country before applying for lawful permanent residence. *See* CHARLES GORDON, ET AL., IMMIGRATION LAW AND PROCEDURE § 31.01 (1985 & Supp. 2007). However, Section 245(i) of the Immigration and Nationality Act (“INA”) as amended by the LIFE Act Amendments of 2001, provides that an alien may seek an adjustment of status without leaving the country if, *inter alia*, an employer filed a petition for labor certification on her behalf before April 30, 2001. 8 U.S.C. § 1255(i) (“Section 245(i”).¹

¹ Section 245(i) of the INA, 8 U.S.C. § 1255(i), as amended provides in pertinent part:

- (i) Adjustment of Status of certain aliens physically present in the United States.
 - (1) Notwithstanding the provisions of subsections (a) and (c) of this section, an alien physically present in the United States . . .
 - (B) who is a beneficiary . . . of . . .
 - (ii) an application for a labor certification under section 1182(a)(5)(A) [INA § 212(a)(5)(A)] of this title that was filed pursuant to the regulations of the Secretary of Labor on or before [April 30, 2001]; and
 - (C) . . . is physically present in the United States on December 21, 2000 [date of enactment of the LIFE Act Amendments of 2000]

may apply to the Attorney General for the adjustment of his or her status to that of an alien lawfully admitted for permanent residence.

By regulation, the beneficiary of a labor certification is “grandfathered” or “section 245(i) eligible” if the petition filed on her behalf was “properly filed, meritorious in fact, and non-frivolous.” 8 C.F.R. § 245.10(a)(3); *see also* Interoffice Memorandum, William R. Yates, Acting Associate Director for Operations, United States Citizenship and Immigration Services, *Clarification of Certain Eligibility Requirements Pertaining to an Application to Adjust Status under Section 245(i) of the Immigration and Nationality Act 2*, Mar. 9, 2005, available at <http://www.uscis.gov/files/pressrelease/245iClarification030905.pdf> (laying out the requirements for grandfathering under Section 245(i) and its implementing regulations) [hereinafter Yates Memo].

After conceding removability, Petitioner requested a continuance of the removal proceeding in order to allow a new employer to file a new Alien Labor Certification, pursuant to Section 245(i). This new Certification was necessary because a prior Labor Certification, properly filed under Section 245(i) before April 30, 2001, sat unaddressed by the California Workforce Development Agency until after the original employer went out of business.

The timely filing of the first Labor Certification caused Ms. Gulati to be grandfathered within the terms of Section 245(i), even after the original sponsoring company went out of business: “A visa petition that was properly filed on or before April 30, 2001, and was approvable when filed, but was later withdrawn, denied, or revoked due to circumstances that have arisen after the time of filing, will preserve the alien beneficiary’s grandfathered status”

8 C.F.R. § 245.10(a)(3). Having been thus grandfathered, Ms. Gulati could subsequently adjust status on the basis of a new Labor Certification. “A grandfathered alien is not limited to seeking adjustment of status solely on the basis of the qualifying . . . application for labor certification that initially grandfathered the alien.” Yates Memo, *supra*, at 2.

The IJ denied Petitioner’s request for a continuance on June 16, 2005, stating, “I would deny any request for a continuance in the exercise of discretion, because the respondent simply remained in the United States longer than permitted and still does not wish to depart.” Pet. App. 13a. Further, the IJ, reaching an issue not properly before him, stated that if Ms. Gulati appealed his decision to the Board of Immigration Appeals (“BIA”), “this Court would not grant permanent resident status in the future in the exercise of discretion, solely based on respondent’s delaying her departure from the United States by filing a frivolous appeal.” Pet. App. 15a. Finally, the IJ granted Petitioner voluntary departure pursuant to 8 U.S.C. § 1229(c), in lieu of removal from the United States. Pet. App. 22a-23a.

Petitioner made a timely direct appeal of the IJ’s denial of the continuance to the BIA. On July 21, 2006, the BIA affirmed the IJ’s denial of the continuance, and ordered Petitioner to voluntarily depart within sixty days, on or before September 19, 2006. *See* Pet. App. 9a. In addition, the BIA “specifically disapprove[d] of the Immigration Judge’s prejudgment of an issue not before him,” in his statement that he would deny adjustment of status if

the case should come back to him in the future. But it concluded that this was harmless error. *Id.*

On August 17, 2006, Petitioner timely filed with the Seventh Circuit a Petition for Review, and also, on September 5, 2006, filed a Motion for Stay of Voluntary Departure. The Seventh Circuit granted the Stay Motion on October 2, 2006, *see* Pet. App. 27a-28a, on which date Petitioner had fourteen days remaining in her sixty-day voluntary departure period.²

On October 15, 2007, the Seventh Circuit issued a nonprecedential decision holding that it lacked appellate jurisdiction to review Petitioner's challenge to the denial of the continuance.³ The court held that 8 U.S.C. § 1252(a)(2)(B)(ii), a jurisdiction-stripping provision of the Illegal Immigration Reform and Immigration Responsibility Act of 1996 ("IIRIRA"),⁴

² The BIA granted Petitioner 60 days to voluntarily depart on July 21, 2006. When she filed the stay Motion on September 5, 2006, 46 days had elapsed. When a stay is granted, a court stops the running of the voluntary departure period as of the day the stay was filed. *See Lopez-Chavez v. Ashcroft*, 383 F.3d 650, 654 (7th Cir. 2004); *Falaja v. Gonzales*, 418 F.3d 889, 899-900 (8th Cir. 2005).

³ The Seventh Circuit also denied Petitioner's due process challenge to the IJ's statement that he would deny any future discretionary relief to the Petitioner. Pet. App. 5a.

⁴ Pub. L. No. 104-208, 110 Stat. 3009-1, 3009-546-3009-724. IIRIRA adopted a number of jurisdiction-stripping provisions, in addition to 8 U.S.C. § 1252(a)(2)(B)(ii), the provision at issue in this case. *See* IIRIRA §§ 301(b), 302, 304(a), 306(a), (d), 345(a), 348(a), 349, 371(b)(6), 604(a), 110 Stat. 3009, 3009-576-77, -579, -596-97, -607, -612, -

bars judicial review of denials of continuances, relying on its recent decision in *Ali v. Gonzales*, 502 F.3d 659 (7th Cir. 2007), Pet. App. 29a-42a.

In *Ali v. Gonzales*, the Seventh Circuit gave two bases for its conclusion that it had no jurisdiction to review the denial. *First*, it considered the text of the jurisdiction-stripping provision, which reads, in pertinent part, “no court shall have jurisdiction to review . . . any other decision or action of the Attorney General . . . the authority for which is *specified under this subchapter* to be in the discretion of the Attorney General.” Pet. App. 30a (quoting 8 U.S.C. § 1252(a)(2)(B)(ii))(emphasis added). The court acknowledged that:

[w]hile it is true that continuances are specifically mentioned only in the administrative regulations, *see* 8 C.F.R. § 1003.29, an immigration judge’s authority to grant or deny a continuance is statutory; it derives from 8 U.S.C. § 1229a, which confers upon immigration judges the plenary authority to conduct removal proceedings.

Id. The court reasoned that even though the power to grant or deny continuances is not explicitly specified in the relevant subchapter, it is granted to IJs by a regulation enacted pursuant to IIRIRA and is therefore statutorily conferred and beyond judicial review. Pet. App. 30a-31a.

637-38, -639, -645, 690-91, (codified as amended in scattered sections of 8 U.S.C.).

[A]n immigration judge’s denial of a continuance motion is a discretionary “decision or action” the “authority for which” is committed to the immigration judge by the relevant subchapter . . . and the jurisdictional bar in 8 U.S.C. § 1252(a)(2)(B)(ii) generally precludes judicial review.

Second, the Seventh Circuit reasoned that its earlier decision in *Leguizamo-Medina v. Gonzales*, 493 F.3d 772, 775 (7th Cir. 2007), dictated this result. Interpreting the preceding subsection of the jurisdiction-stripping statute, 8 U.S.C. § 1252(a)(2)(B)(i), the *Leguizamo-Medina* court held that “[w]hen a decision is unreviewable, any opinion one way or the other on the propriety of the steps that led to that decision would be an advisory opinion.” 493 F.3d at 775. The *Ali* court explicitly endorsed this approach, stating that “where § 1252(a)(2)(B)(i) removes jurisdiction to review a final immigration decision . . . , review of continuance denials and other interim orders leading up to the final decision is also precluded.” Pet. App. 31a. Petitioner Ali has also filed a Petition for a Writ of Certiorari to this Court, seeking review of the Seventh Circuit’s conclusion that continuance denials are unreviewable. Petition for Writ of Certiorari at 8, *Ali v. Mukasey*, No. 07-798 (Dec. 12, 2007).

Reasoning from *Ali* and *Leguizamo-Medina*, the Seventh Circuit in *Gulati* concluded that it “therefore lack[ed] jurisdiction to review the IJ’s denial of Gulati’s motion to continue.” Pet. App. 5a.

Petitioner timely filed a petition for rehearing and rehearing en banc before the Seventh Circuit, which was denied on December 27, 2007.

On January 15, 2008, upon Application by Petitioner, Justice Stevens entered an order staying the Petitioner's period of voluntary departure pending the timely filing and disposition of her petition for writ or certiorari.

REASONS FOR GRANTING THE WRIT

In ruling that denials of continuances in removal proceedings are beyond the jurisdiction of the appellate courts, the Seventh Circuit has given the jurisdiction-stripping statute at issue an expansive reading, which is in direct conflict with the decisions of eight other circuits, in substantial tension with decisions of the United States Supreme Court, and contrary to the text of the provision at issue. The circuit courts have acknowledged that they are divided eight-to-three over a question of considerable practical importance. This Court's review is warranted to restore consistency to the nation's immigration laws.

I. THE COURTS OF APPEALS ARE DIVIDED 8-3 ON THE QUESTION WHETHER 8 U.S.C. § 1252(a)(2)(B)(ii) REMOVES JURISDICTION TO REVIEW AN IMMIGRATION JUDGE'S DENIAL OF A CONTINUANCE

As the Attorney General expressly acknowledges, Pet. App. 59a-61a, there is clear split in the courts of appeals over whether 8 U.S.C. § 1252(a)(2)(B)(ii) strips jurisdiction to review an IJ's decision to deny a continuance in removal proceedings. Eight circuit courts have held that § 1252(a)(2)(B)(ii) does not

deprive them of jurisdiction to review a continuance decision. The Eighth and Tenth Circuits, recently joined by the Seventh Circuit, have held directly to the contrary.

The First, Second, Third, Fourth, Fifth, Sixth, Ninth and Eleventh Circuits have all held that that § 1252(a)(2)(B)(ii) does not strip their jurisdiction to review continuance denials. With the exception of the Sixth Circuit, all of these circuits focus on the statute's "requirement that the discretion giving rise to the jurisdictional bar must be 'specified' by statute." *Khan v. Att'y Gen.*, 448 F.3d 226, 232 (3d Cir. 2006) (internal quotation marks omitted). Relying on the clear statement rule, the other seven courts of appeals have held that jurisdiction exists to review a continuance decision because "the language of the statute in question must provide the discretionary authority before the bar can have any effect." *Id.* Here, "the authority of an IJ to grant a motion for continuance is derived solely from regulations." *Zafar v. Att'y Gen.*, 461 F.3d 1357, 1360 (11th Cir. 2006). The Fifth Circuit has observed that the statutory language is "uncharacteristically pellucid" about which decisions are unreviewable and that this language does not include discretionary denials of continuances. *Zhou v. Gonzales*, 404 F.3d 295, 303 (5th Cir. 2005); *Ahmed v. Gonzales*, 436 F.3d 433 (5th Cir. 2006). *Accord Alsamhour v. Gonzales*, 484 F.3d 117, 122 (1st Cir. 2007); *Sanusi v. Gonzales*, 445 F.3d 193, 198 (2d Cir. 2006); *Lendo v. Gonzales*, 493 F.3d 439, 441 n.1 (4th Cir. 2007);

Khan, 448 F.3d at 232 (3d Cir. 2006). *See Martinez v. Gonzales*, 166 F. App'x 300, 300 (9th Cir. 2006).⁵

In contrast, the Seventh, Eighth, and Tenth Circuits have held that “[t]he jurisdictional bar [of 8 U.S.C. § 1252(a)(2)(B)(ii)] . . . applies to continuance decisions.” Pet. App. 37a; *see also* Pet. App. 4a; *Onyinkwa v. Ashcroft*, 376 F.3d 797, 799 (8th Cir. 2004); *Yerkovich v. Ashcroft*, 381 F.3d 990, 993 (10th Cir. 2004). In *Ali v. Gonzales*, which was the basis for the court’s analysis in *Gulati v. Keisler*, the Seventh Circuit reasoned that an immigration judge’s authority to grant or deny a continuance is conferred by 8 U.S.C. § 1229a, giving IJs “plenary authority” over removal proceedings. Pet. App. 30a. The Eighth and Tenth circuits have similarly reasoned that “[w]henever a *regulation implementing* a subchapter II statute confers discretion upon an IJ, IIRIRA generally divests courts of jurisdiction to review the exercise of that discretion.” *Onyinkwa*, 376 F.3d at 799. *See also Yerkovich*, 381 F.3d at 993.

The split in the courts of appeals is well entrenched and will not benefit from further development in the lower courts. In *Ahmed v.*

⁵ The Sixth Circuit concurs in the holding that continuance denials are reviewable notwithstanding the jurisdiction-stripping provisions of IIRIRA but not in the reasoning of the five other circuit courts to so hold. *Abu-Khaliel v. Gonzales*, 436 F.3d 627, 632 (6th Cir. 2006). Instead, the Sixth Circuit has reasoned that “[s]ection 1252(a)(2)(B)(ii) only applies to the portions of subchapter II left to the Attorney General’s discretion, not to the portions of subchapter II that leave discretion with IJs in matters where IJs are merit decision-makers that are subject to our review.” *Id.*

Gonzales, 447 F.3d 433 (5th Cir. 2006), the Fifth Circuit reaffirmed its alignment with the majority of circuits and its interpretation of § 1252(a)(2)(B)(ii) “despite an awareness of caselaw from other circuits to the contrary.” *Id.* at 436 (internal quotation marks omitted). The court observed that the reading advanced by the Eighth and Tenth Circuits “was both contrary to Congress’s language and has clear policy consequences.” *Id.* (citations and internal quotation marks omitted). Other circuit courts holding the majority opinion have openly disagreed with the reasoning of their sister circuits in the minority regarding the scope of § 1252(a)(2)(B)(ii)’s jurisdictional bar. *See, e.g., Sanusi v. Gonzales*, 445 F.3d at 198; *Abu-Khaliel*, 436 F.3d at 632; *Zafar*, 426 F.3d at 1334. Likewise in *Ali*, the Seventh Circuit noted it was joining “the minority position” among courts, and that the court’s earlier decisions compelled that result. Pet. App. 31a.⁶

The sharp circuit split on the question presented in this case is all the more intolerable because it arises in the context of immigration, in which area this Court has recognized a paramount need for “the Nation [] [to] speak with one voice.” *Zadvydas v.*

⁶ In his most recent Memorandum in Opposition to Stay, filed in this Court on January 14, 2008, the Solicitor General suggests that the conflict “may well resolve itself without this Court’s intervention.” Pet. App. 62a. While there is always a chance that the three minority circuits may reconsider their positions in view of the Attorney General’s position on the issue, it is noteworthy that none have done so since the Attorney General asserted his current position more than a year ago. Certainly nothing in the Seventh Circuit’s handling of this case, including its speedy denial of a request for rehearing en banc, suggests that soul-searching about this issue is going on in that circuit. *See* Pet. App. 25a-26a.

Davis, 533 U.S. 678, 700 (2001). The clear, direct, and mutually acknowledged split in the circuits thus demands the attention of this Court.

II. THE SEVENTH CIRCUIT’S INTERPRETATION OF THE JURISDICTION-STRIPPING STATUTE IGNORES RECENT DECISIONS OF THIS COURT, AND IS CONTRARY TO BOTH THE PLAIN TEXT OF THE PROVISION AT ISSUE AND ITS MEANING AS SUGGESTED BY IIRIRA VIEWED AS A WHOLE

A. This Court Has Directed That Courts Should Narrowly Construe Jurisdiction-Stripping Statutes And Especially So In The Immigration Context

In *INS v. St. Cyr*, 533 U.S. 289, 298 (2001), this Court held that despite specific jurisdiction-denying provisions of IIRIRA,⁷ in immigration cases there still exists a “strong presumption in favor of judicial review of administrative action.” In so stating, this Court reaffirmed the principle relied on in *Bowen v. Michigan Academy of Family Physicians*, 476 U.S. 667, 670 (1986), that “Congress intends judicial review of administrative action . . . unless there is persuasive reason to believe that [cutting off judicial review] was the purpose of Congress.” *Id.* (internal citations omitted); *see also McNary v. Haitian Refugee Ctr., Inc.*, 498 U.S. 479, 498 (1991) (recognizing the “strong presumption in favor of judicial review of administrative action”). Applying

⁷ *St. Cyr* concerned 8 U.S.C. §§ 1252(a)(2)(C) and 1252(a)(1), which were enacted as part of IIRIRA, at the same time as § 1252(a)(2)(B)(ii), the provision at issue in the instant case.

this presumption in the context of immigration, this Court’s decision in *St. Cyr* expressly recognized that “[f]or the INS to prevail, it must overcome . . . the strong presumption in favor of judicial review of administrative action” *St. Cyr*, 533 U.S. at 298; *see also Felker v. Turpin*, 518 U.S. 651, 661 (1996) (declining, in the immigration context, to find a repeal of habeas jurisdiction by implication).

In *Bowen*, this Court endorsed a “clear statement” approach to any congressional action purporting to strip judicial review. *Bowen*, 476 U.S. at 671-72. This Court indicated that this approach recognizes that as a default, judicial review exists. *Id.* at 671. This Court, relying on *Abbott Laboratories v. Gardner*, 387 U.S. 136, 141 (1967), noted that “only upon a showing of ‘clear and convincing’ evidence of a contrary legislative intent should the courts restrict access to judicial review.” *Bowen*, 476 U.S. at 671 (quoting *Abbott Labs.*, 387 U.S. at 141 (internal citations omitted)).

As *Bowen* indicates, there is a presumption of judicial review of actions taken during administrative proceedings, including removal proceedings before an IJ. *See Ardestani v. INS*, 502 U.S. 129, 131 (1991) (describing removal proceedings as “administrative”). In *Bowen*, this Court discussed at length the legislative history of the Administrative Procedure Act, 5 U.S.C. §§ 551-559, 701-706 (“APA”), and concluded that it reinforces the presumption of justiciability. *Bowen*, 476 U.S. at 670-73. This Court noted that the Senate Committee on the Judiciary, in discussing the proposed APA, stated: “Very rarely do statutes withhold judicial review. . . . [Without judicial review,] statutes would in effect be blank

checks drawn to the credit of some administrative officer or board.” *Bowen*, 476 U.S. at 671 (quoting S. Rep. No. 79-752, at 26 (1945)). The House Judiciary Committee “agreed that Congress ordinarily intends that there be judicial review, and emphasized the clarity with which a contrary intent must be expressed.” *Id.* The *Bowen* Court noted that the House Committee explained: “To preclude judicial review under [the APA], a statute, if not specific in withholding [judicial] review, must upon its face give clear and convincing evidence of an intent to withhold it.” *Id.* (quoting H.R. Rep. No. 79-1980, at 41 (1946)). This legislative history demonstrates Congress’s intent to retain judicial review of administrative actions absent a clear statement removing such review.

B. The Plain Language of the Statute Makes Clear That § 1252(a)(2)(B)(ii) Does Not Strip Appellate Review of Continuance Denials

1. Decisions Concerning Continuances Are Not “Specified In This Subchapter To Be In The Discretion of the Attorney General”

Given the strong presumption in favor of judicial review, a court can only find that the jurisdiction-stripping provision removes jurisdiction from the federal courts if the language of the statute does so expressly. The provision at issue in this case precludes judicial review of any “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.” 8 U.S.C. § 1252(a)(2)(B)(ii) (emphasis added). The

phrase “this subchapter” refers to Title 8, Chapter 12, Subchapter II of the United States Code, which includes §§ 1151-1378. *See Van Dinh v. Reno*, 197 F.3d 427, 433 (10th Cir. 1999). And “to specify” means “[t]o state explicitly or in detail.” AMERICAN HERITAGE COLLEGE DICTIONARY 1307 (3d ed. 1993).

A number of provisions of the subchapter do “specify” that decisions are to be within the discretion of the Attorney General or the Secretary of the Department of Homeland Security (“DHS”). *See, e.g.*, 8 U.S.C. § 1158(b)(2)(A)(v) (giving the Attorney General discretion to determine whether an alien poses a danger to the security of the United States); 8 U.S.C. § 1181(b) (granting the Attorney General discretion to admit “returning resident immigrants” without a passport or other documentation).

But no provision of the statute or subchapter “specifies” that the decision to deny a continuance in a removal or other proceeding is within the discretion of any official. The statute simply grants authority to “[a]n immigration judge [to] conduct proceedings for deciding the inadmissibility or deportability of an alien.” 8 U.S.C. § 1229a(a)(1). The IJ’s authority to grant a continuance is derived solely from regulations promulgated by the Executive Office for Immigration Review in the Department of Justice. *See* 8 C.F.R. § 1003.29 (stating that “[t]he Immigration Judge may grant a motion for continuance for good cause shown.”). Because authority to grant or deny a continuance is not specified in the relevant subchapter, circuit court jurisdiction to review such decisions remains intact.

The Seventh Circuit accordingly erred when it held that § 1252(a)(2)(B)(ii) strips federal courts of

the authority to review any discretionary immigration decision antecedent to a specified statutory decision, regardless of whether it is “specified under the subchapter.” The jurisdiction-stripping provision is clear: “[I]t 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.” *Zhou v. Gonzales*, 404 F.3d 295, 303 (5th Cir. 2005) (emphasis in original).

2. When Compared to the Language of IIRIRA’s Transitional Rules, 8 U.S.C. § 1252(a)(2)(B)(ii) Must be Read to Create Only a Narrow Exception to Judicial Review

Reading 8 U.S.C. § 1252(a)(2)(B)(ii) with reference to the text of the transitional rules enacted as part of IIRIRA also requires that the jurisdiction-stripping provisions be construed narrowly. IIRIRA’s transitional rules govern judicial review of immigration proceedings where the proceedings began before IIRIRA’s effective date of April 1, 1997, and where no final order was entered by October 30, 1996. *See* IIRIRA § 309(c)(4)(E), Pub. L. No. 104-208, 110 Stat. 3009-1, 3009-625-3009-626 (1997). Only with regard to these transitional cases, Congress withdrew jurisdiction over “any discretionary decision” made pursuant to several enumerated sections of the INA. IIRIRA § 309(c)(4)(E), 110 Stat. at 3009-626 (removing judicial review of discretionary decisions in adjustment of status or removal proceedings made under INA §§ 212(c), 212(h), 212(i), 244, and 245).

In § 1252(a)(2)(B)(ii), Congress used distinctly different language in defining the permanent jurisdiction. Instead of referring to “discretionary decisions,” as did the transitional rules, the new § 1252(a)(2)(B)(ii) denies jurisdiction to review acts “the authority for which is specified to be in the discretion of the Attorney General.” 8 U.S.C. § 1252(a)(2)(B)(ii). It is a well-established canon of statutory interpretation that the use of different terms within a statute demonstrates that Congress intended to convey a different meaning for those terms. *See Sale v. Haitian Ctrs. Council, Inc.*, 509 U.S. 155, 174 (1993) (requiring that each word in a statute be given distinct meaning to best effectuate Congress’s intent); *see also* WILLIAM N. ESKRIDGE, JR., ET AL., *CASES AND MATERIALS ON LEGISLATION: STATUTES AND THE CREATION OF PUBLIC POLICY* 834 (3d ed. 2001). If Congress had intended to withdraw jurisdiction over all “discretionary decisions,” it could have easily used the same language already enacted in the transitional rules.

3. The Attorney General is in Full Agreement with the Majority Interpretation Advocated by Petitioner

For more than a year, the Attorney General has agreed with Petitioner’s position “that because continuances are referenced only in the immigration regulations, not the statutes, the discretionary authority to grant or deny a continuance is ‘not specified under this subchapter’ within the meaning of § 1252(a)(2)(B)(ii), and the jurisdictional bar therefore does not apply.” Pet. App. 36a. At oral argument before the Seventh Circuit in *Ali*, a Department of Justice attorney “informed [the court]

that the Department of Justice now takes the position that the jurisdiction-stripping provision, § 1252(a)(2)(B)(ii), does not apply to continuance decisions.” Pet. App. 35a-36a. On other occasions,⁸ and most recently, in its Memorandum in Opposition to Stay, filed January 14, 2008, the Attorney General has reaffirmed this position in explicit terms. Pet. App. 61a.

Accordingly, this Court should grant certiorari to harmonize the circuits on a critical question of immigration law and to bring their interpretations of IIRIRA’s jurisdiction-stripping provision in line with the words of the statute and this Court’s precedent.

III. THE REVIEWABILITY OF CONTINUANCES IN REMOVAL PROCEEDINGS ARISES FREQUENTLY AND IS OF GREAT CONSEQUENCE IN ACHIEVING THE JUST AND UNIFORM IMPLEMENTATION OF OUR IMMIGRATION LAWS

The issue presented in this case is one that recurs frequently and impacts the rights of hundreds or thousands of litigants each year. Almost three hundred thousand immigrants were subject to removal proceedings in fiscal year 2006. Executive Office for Immigration Review, Office of Planning,

⁸ See *Ikenokwalu-White v. Gonzales*, 495 F.3d 919, 924 n.2 (8th Cir. 2007) (noting that “the Attorney General in the present case sent our court a letter withdrawing arguments against jurisdiction . . . and conceding this issue); *Lendo*, 493 F.3d at 441 n.1 (4th Cir. 2007) (noting that the Government withdrew its argument that § 1252(a)(2)(B)(ii) precluded judicial review of continuance denials); *Alsamhuri*, 484 F.3d at 121 (“The government now concedes . . . that section 1252(a)(2)(B)(ii) poses no jurisdictional bar to judicial review of a decision by an IJ . . . to grant or deny a continuance (internal footnotes omitted).”).

Analysis, & Technology, *FY 2006 Statistical Yearbook*, at C3 (2007), available at <http://www.usdoj.gov/eoir/statspub/fy06syb.pdf>. Many of these immigrants request continuances during their removal proceedings, and continuances are appropriate for numerous reasons, including “to allow the alien time to obtain representation or to file an application for relief.” *Id.* at B1. Many other immigrants request continuances during proceedings to adjust status.⁹

While the ultimate decision whether to grant an adjustment of status may be discretionary, 8 U.S.C. § 1255(a), an immigrant’s opportunity to fully and fairly present her case is nonetheless a matter of significance. Even though a final decision denying the relief sought may not be subject to appellate review, we must assume that the decisionmakers of last resort will be influenced by, and act in good faith based upon, the facts and argument presented to them. Thus, the loss of the ability to make one’s case because an IJ has arbitrarily denied a continuance is a matter of great consequence.

Continuances play an especially important role in removal cases and whenever an adjustment of status may be at issue. The process of adjustment often presents aliens with logistical challenges such as procuring the proper documentation in a timely

⁹ The Department of Homeland Security reports that 121,587 persons were admitted to permanent residence in fiscal year 2006 pursuant to employment-based preferences such as the one under which Ms. Gulati claims eligibility. Dep’t of Homeland Security, Office of Immigration Statistics, *2006 Yearbook of Immigration Statistics* 18 (Table 6) (2006).

fashion, which can impede the smooth processing of their applications to adjust. A willingness to make reasonable allowances by the grant of continuances to allow good faith efforts to provide the required information thus may often be dispositive in carrying out the statute's purposes. This is especially true in the context of section 245(i), where Congress clearly expressed a view that certain individuals should be afforded a special opportunity to make their case for adjustment of status. 8 U.S.C. § 1255(i). Petitioner is eligible to invoke the grandfather status under to section 245(i) and the decision of the Seventh Circuit holding a denial of a continuance unreviewable eviscerates the significance that Congress intended to afford to that status.

CONCLUSION

For the reasons set forth above, the petition for certiorari should be granted.¹⁰

¹⁰ Petitioner further submits, under all the circumstances, that this may be an appropriate case for summary reversal.

In the event that, at the time the Court considers this petition, the Court has already granted certiorari in *Ali v. Mukasey*, No. 07-798, then Petitioner asks that this petition be held pending the resolution of *Ali*.

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