COMMENT

Judicial Review Under 8 U.S.C. § 1252(a)(2)(B)(ii): How a Minority of Federal Circuit Courts Are Keeping Non-Citizens Out of Court

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TABLE OF CONTENTS

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INTRODUCTION

Two non-citizens enter the United States illegally to escape persecution in their native countries.[1] One stays with relatives in Houston while the other locates fellow immigrants in Denver from her country with whom she can stay.[2] Sometime after their arrival, both individuals receive notices to appear before Immigration Judges ("IJs") who order them to depart the United States.[3] The Board of Immigration Appeals ("BIA") reviews and affirms the order of removal in each case.[4] The non-citizens petition their respective federal courts of appeals for review of the BIA decisions.[5] The Fifth Circuit grants review to hear the petition filed by the non-citizen in Houston.[6] The Tenth Circuit, however, refuses to hear the petition brought by the non-citizen in Denver.[7]

One wonders what accounts for these disparate outcomes. Why does one non-citizen receive an opportunity to present his case in federal court while the other must gather her belongings and leave the country? Often, the answer depends upon whether the individual is a member of a protected group for asylum purposes.[8] That is, the answer frequently hinges upon the non-citizen's particular religious or political practices, or the degree and probability of persecution in his

[1] *See* News Release, U.S. Dep't of Justice, Asylum Protection in the United States (Apr. 28, 2005), *available at* http://www.usdoj.gov/eoir/press/05/AsylumProtectionFactsheetQAApr05.htm (explaining that United States offers asylum to those fleeing persecution).

[2] This Comment discusses these two cities because of the federal circuits within which they are located. The relevance of these circuits becomes apparent later in the hypothetical.

[3] *See* News Release, U.S. Dep't of Justice, Immigration Court Process in the United States (Apr. 28, 2005), *available at* http://www.usdoj.gov/eoir/press/05/ImmigrationCourtProcess2005.htm (detailing general immigration court proceedings in United States).

[4] *See id.*

[5] *See id.*

[6] *See, e.g.*, Zhao v. Gonzales, 404 F.3d 295, 302 (5th Cir. 2005) (granting alien's petition for review in Fifth Circuit).

[7] *See, e.g.*, Yerkovich v. Ashcroft, 381 F.3d 990, 991 (10th Cir. 2004) (denying alien's petition for review in Tenth Circuit).

[8] *See* U.S. Dep't of Justice, *supra* note 1 (discussing various criteria for granting asylum).

or her native country.[9] In the hypothetical cases described above, however, the answer is much less intuitive.[10]

In many procedurally identical cases, the answer can be a question of subject matter jurisdiction.[11] The reason for the non-citizens' disparate fates is a difference in the interpretation of a single statutory phrase.[12] The disputed provision, 8 U.S.C. § 1252(a)(2)(B)(ii), limits federal courts' jurisdiction over specific discretionary decisions made in removal proceedings.[13] The courts disagree about whether decisions regarding requests to continue or motions to reopen removal proceedings are among the discretionary decisions beyond federal court jurisdiction.[14] The majority holds that § 1252(a)(2)(B)(ii) does not bar judicial review of discretionary decisions regarding requests to continue or motions to reopen removal proceedings.[15] The minority circuits, however, hold that § 1252(a)(2)(B)(ii) places these

[9] *See id.*

[10] *See infra* notes 11-13 and accompanying text.

[11] *See* Jahic v. Gonzales, No. 04-3726, 2005 WL 1805669, at *128 n.7 (3d Cir. Aug. 2, 2005) (noting circuit split on question of jurisdiction).

[12] *See id.*

[13] 8 U.S.C. § 1252(a)(2)(B)(ii) (2005); *e.g.*, Zhao v. Gonzales, 404 F.3d 295, 302 n.2 (5th Cir. 2005).

[14] *Compare* Zafar v. U.S. Attorney Gen., 426 F.3d 1330 (11th Cir. 2005), *vacated*, 461 F.3d 1357 (11th Cir. 2006) (holding that court of appeals has jurisdiction to review decision to deny continuance of removal proceedings), Zhao v. Gonzales, 404 F.3d 295, 302 (5th Cir. 2005) (holding that § 1252(a)(2)(B)(ii) does not bar judicial review of decision to deny motion to reopen removal proceedings), Subhan v. Ashcroft, 383 F.3d 591, 594 (7th Cir. 2004) (holding that court of appeals can review decision to deny continuance as part of review of final removal order), *and* Medina-Morales v. Ashcroft, 371 F.3d 520, 523 (9th Cir. 2004) (holding that § 1252(a)(2)(B)(ii) does not deprive court of appeals of jurisdiction to review BIA's denial of alien's motion to reopen), *with* Yerkovich v. Ashcroft, 381 F.3d 990, 991 (10th Cir. 2004) (holding that § 1252(a)(2)(B)(ii) precludes judicial review of decision to deny continuance of removal proceedings), Onyinkwa v. Ashcroft, 376 F.3d 797, 799 (8th Cir. 2004) (concluding that court of appeals lacks jurisdiction to review denial of request to continue removal proceedings), *and* Koenig v. INS, 64 F. App'x 996, 998 (6th Cir. 2003) (holding that decision to deny continuance was within IJ's discretion and beyond judicial review).

The term "discretion," as used in a statutory or administrative grant of power, means that the recipient may exercise his authority according to his own understanding and conscience. United States *ex rel.* Accardi v. Shaughnessy, 347 U.S. 260, 266-67 (1954). Congress generally gives administrative agencies broad discretion to exercise their regulatory authority because agencies possess expertise in their areas of specialization. *See* Save Park County v. Bd. of County Comm'rs, 990 P.2d 35, 40-41 (Colo. 1999).

[15] *See Zafar*, 426 F.3d at 1330; *Zhao*, 404 F.3d at 302; *Subhan*, 383 F.3d at 594; *Medina-Morales*, 371 F.3d at 523.

discretionary decisions made in removal proceedings beyond the jurisdiction of the circuit courts.[16]

This Comment argues that the majority's interpretation of § 1252(a)(2)(B)(ii) should prevail.[17] Part I describes the legal background of the Immigration and Nationality Act ("INA") and the 1996 amendments that included § 1252(a)(2)(B)(ii).[18] Part II describes the current state of the law surrounding § 1252(a)(2)(B)(ii).[19] Part III argues that the majority's interpretation complies with the canons of statutory interpretation.[20] Part III argues further that the majority properly refuses to defer to the Attorney General's interpretation of § 1252(a)(2)(B)(ii) and serves important policy objectives.[21] Part IV then provides two possible solutions to resolve the split.[22] The statute, regulations, and cases that this Comment addresses use the term "alien" to describe all individuals who are not citizens or nationals of the United States.[23] While the term is understandably controversial because of its pejorative connotations, the remainder of this Comment uses the term "alien" in place of "non-citizen" for the sake of consistency with the current legal language.[24]

I. BACKGROUND

The Immigration and Nationality Act ("INA"), enacted in 1952, is the foundation of immigration law in the United States.[25] The INA

[16] *See Yerkovich*, 381 F.3d at 991; *Onyinkwa*, 376 F.3d at 799; *Koenig*, 64 F. App'x at 998.

[17] *See infra* Part III.

[18] *See infra* Part I.

[19] *See infra* Part II.

[20] *See infra* Part III.

[21] *See infra* Part III.

[22] *See infra* Part IV.

[23] *See infra* Parts I-IV.

[24] *E.g.*, STEPHEN H. LEGOMSKY, IMMIGRATION AND REFUGEE LAW AND POLICY 1-2 (4th ed. 2005) (declining to use term "alien" altogether in favor of term "non-citizen"); Kevin R. Johnson, *"Aliens" and the U.S. Immigration Laws: The Social and Legal Construction of Nonpersons*, 28 U. MIAMI INTER-AM. L. REV. 263, 264 (1997) (discussing negative legal, social, and political implications of use of term "alien" to describe non-citizens).

[25] *See* Immigration and Nationality Act, ch. 477, 66 Stat. 163 (1952) (codified in scattered sections of 8 U.S.C.); U.S. Citizenship and Immigration Servs., U.S. Dep't of Homeland Sec., Immigration and Nationality Act, http://www.uscis.gov/portal/site/uscis (click on "Laws & Regulations" tab; then follow "Immigration and Nationality Act" hyperlink) (last visited Apr. 2, 2007).

organized and codified the assortment of statutes that previously governed immigration procedures into a single body of law.[26] Congress amended the INA when it enacted the Illegal Immigration Reform and Immigrant Responsibility Act ("IIRIRA") in 1996.[27] The IIRIRA amendments instituted a more restrictive immigration system, increasing criminal penalties, expanding grounds for deportation, and expediting the removal of deportable aliens.[28]

One of IIRIRA's amendments, 8 U.S.C. § 1252(a)(2)(B)(ii), restricts federal courts' jurisdiction over specific categories of decisions made in removal proceedings.[29] The provision states that no court shall have jurisdiction to review any decision specified as discretionary under the INA's immigration subchapter.[30] This limitation applies to

[26] *See* U.S. Citizenship and Immigration Servs., *supra* note 25. Congress has passed many amendments to the INA since its enactment. *Id.*

[27] Illegal Immigration Reform and Immigrant Responsibility Act, Pub. L. No. 104-208, 110 Stat. 3009 (1996).

[28] *See* U.S. Immigration and Naturalization Serv., U.S. Dep't of Justice, Fact Sheet: Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (Mar. 24, 1997), *available at* http://149.101.23.2/graphics/publicaffairs/factsheets/948.htm.

IIRIRA provided for expedited removal, allowing examining immigration officers to order the removal of arriving aliens in many instances without further hearing or review. *Id.* IIRIRA also broadened the definition of certain crimes and added new offenses, while drastically lowering the availability of fines and imprisonment. *Id.* IIRIRA increased criminal penalties for specific immigration-related offenses, such as alien smuggling, document fraud, citizenship fraud, passport fraud, and illegal voting. *Id.* In addition to the amendments affecting deportation, IIRIRA also limited legal aliens' access to public benefits. *Id.* It imposed strict requirements for receipt of Social Security, higher education assistance, housing assistance, and general cash public assistance. *Id.* However, IIRIRA favorably expanded the definition of "refugees" to include those aliens persecuted under coercive population control programs. *Id.* IIRIRA provided that such individuals would be deemed to have a well-founded fear of persecution based on political opinion. *Id.* However, not more than 1,000 refugees could be granted asylum on this basis. *Id.*; *see also* David Johnston, *Government Is Quickly Using Power of New Immigration Law*, N.Y. TIMES, Oct. 22, 1996, at A20 ("[T]he political furor in Congress and the Administration about illegal immigration and criminal aliens has found its way into law."); Mirta Ojito, *Change in Laws Sets Off Big Wave of Deportations*, N.Y. TIMES, Dec. 15, 1998, at A1 (noting that IIRIRA granted INS "wide powers previously afforded only to the courts").

[29] 8 U.S.C. § 1252(a)(2)(B)(ii) (2005); *see also* Zhao v. Gonzales, 404 F.3d 295, 302 n.2 (5th Cir. 2005).

[30] § 1252(a)(2)(B)(ii). Section 1252(a)(2)(B)(ii) provides:

> (B) Denials of discretionary relief
>
> Notwithstanding any other provision of law (statutory or nonstatutory), including section 2241 of Title 28, or any other habeas corpus provision, and sections 1361 and 1651 of such title, and except as provided in subparagraph (D), and regardless of whether the judgment, decision, or

discretionary decisions made by the Attorney General or the Secretary of Homeland Security.[31] The restriction also pertains to discretionary decisions made by IJs and the BIA's review of those decisions.[32] The circuits disagree about the breadth of discretionary decisions that the provision places beyond judicial review.[33]

Specifically, the circuit split concerns whether § 1252(a)(2)(B)(ii) precludes judicial review of an IJ's or BIA decision regarding a continuance or reopening of removal proceedings.[34] An IJ has discretion to grant a deportable alien a continuance for any number of reasons.[35] For example, an IJ can give the alien more time to obtain labor certification or seek adjustment of status.[36] Similarly, the BIA has discretion to reopen removal proceedings.[37] For instance, the BIA may allow an alien to present evidence of changed circumstances in the alien's native country to show fear of persecution.[38] The BIA may

> action is made in removal proceedings, no 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.

Id.

[31] *Id.*

[32] 8 C.F.R. § 1003.10 (2005) ("Immigration Judges, as defined in 8 CFR part 1, shall exercise the powers and duties in this chapter regarding the conduct of exclusion, deportation, removal, and asylum proceedings and such other proceedings which the Attorney General may assign them to conduct.").

[33] *See* Jahic v. Gonzales, No. 04-3726, 2005 WL 1805669, at *128 n.7 (3d Cir. Aug. 2, 2005) (noting circuit split on question of jurisdiction).

[34] *Id.*

[35] 8 C.F.R. § 1003.29 (2005) ("The Immigration Judge may grant a motion for continuance for good cause shown.").

[36] *See, e.g.*, Subhan v. Ashcroft, 383 F.3d 591, 593 (7th Cir. 2004) (stating that 8 U.S.C. § 1255 "authorizes a removable alien to adjust his status to that of a permanent legal resident if he is certified to be entitled to be employed in the United States").

[37] 8 C.F.R. § 1003.2(a) (2005) ("The decision to grant or deny a motion to reopen or reconsider is within the discretion of the Board, subject to the restrictions of this section. The Board has discretion to deny a motion to reopen even if the party moving has made out a prima facie case for relief.").

[38] *Id.* § 1003.2(c)(1) (stating that motion to reopen may be granted on basis of circumstances that have arisen subsequent to removal hearing).

also reopen proceedings to allow an alien to submit an application for relief.[39]

In both situations, whether the decision concerns a continuance or motion to reopen, the discretionary authority to decide these motions comes not from the statute, but from the INA's implementing regulations.[40] All of the circuits agree that § 1252(a)(2)(B)(ii) divests the courts of jurisdiction to review the specific discretionary decisions referred to in the statute.[41] The circuits are split, however, over whether § 1252(a)(2)(B)(ii) also precludes review of decisions described as discretionary in the implementing regulations that accompany the statute but not in the statute itself.[42]

II. CURRENT STATE OF THE LAW

Section 1252(a)(2)(B)(ii) proscribes judicial review of specific discretionary decisions made by the Attorney General (and his designees) or the Secretary of Homeland Security in removal proceedings.[43] The problem faced by the courts is that they must determine exactly which discretionary decisions the statute addresses.[44] The minority of the circuits holds that the courts of appeals lack subject matter jurisdiction to review a denial of a continuance or motion to reopen.[45] The majority of the circuits holds that § 1252(a)(2)(B)(ii) does not preclude judicial review of requests for continuance and motions to reopen.[46] The difference between these two views centers on the courts' conflicting interpretations of the

[39] *Id.*

[40] §§ 1003.2(a), 1003.29.

[41] *See, e.g.*, Zafar v. U.S. Attorney Gen., 426 F.3d 1330, 1332 (11th Cir. 2005), *vacated*, 461 F.3d 1357 (11th Cir. 2006); Zhao v. Gonzales, 404 F.3d 295, 302 (5th Cir. 2005); *Subhan*, 383 F.3d at 595; Yerkovich v. Ashcroft, 381 F.3d 990, 994 (10th Cir. 2004); Onyinkwa v. Ashcroft, 376 F.3d 797, 799 (8th Cir. 2004); Medina-Morales v. Ashcroft, 371 F.3d 520, 525 (9th Cir. 2004); Koenig v. INS, 64 F. App'x 996, 998 (6th Cir. 2003).

[42] *See* Jahic v. Gonzales, No. 04-3726, 2005 WL 1805669, at *128 n.7 (3d Cir. Aug. 02, 2005) (noting circuit split on question of judicial review).

[43] 8 U.S.C. § 1252(a)(2)(B)(ii) (2005). For statute's text, see *supra* note 30.

[44] *E.g.*, *Zhao*, 404 F.3d at 301-02 ("In this circuit, the degree to which 8 U.S.C. § 1252(a)(2)(B)(ii) precludes judicial review of motions to reopen immigration proceedings is an open question.").

[45] The Tenth, Eighth, and Sixth Circuits comprise the minority. *See Yerkovich*, 381 F.3d at 991; *Onyinkwa*, 376 F.3d at 798; *Koenig*, 64 F. App'x at 998.

[46] The Eleventh, Ninth, Seventh, and Fifth Circuits comprise the majority. *See Zafar*, 426 F.3d at 1330; *Zhao*, 404 F.3d at 303; *Subhan*, 383 F.3d at 594; *Medina-Morales*, 371 F.3d at 523.

plain language of § 1252(a)(2)(B)(ii).[47] The two cases discussed below illustrate the minority and majority views.

A. The Minority View — Yerkovich v. Ashcroft

In *Yerkovich v. Ashcroft*, the Tenth Circuit Court of Appeals expressed the minority view, holding that discretionary authority found in the implementing regulations deprived the court of jurisdiction to review a motion to continue removal proceedings.[48] Galina Yerkovich entered the United States from Russia on a visitor's visa in 1996.[49] After Yerkovich's visa expired in 1997, the INS designated her as removable because she remained in the United States longer than permitted.[50] The INS gave Yerkovich notice to appear before an IJ.[51] Yerkovich requested successive continuances in an effort to obtain deferred action, which would allow her to remain in the United States despite her deportable status.[52] The INS, however, ultimately denied her deferred action.[53] Before her final hearing, Yerkovich sought a continuation because she anticipated that her daughter would soon obtain U.S. citizenship.[54] Yerkovich argued that if her daughter became a citizen, she could apply for an adjustment of status based on her relation to her daughter.[55] The IJ denied Yerkovich's request for a further continuance.[56] The IJ reasoned that Yerkovich had already received several continuances and waiting for the daughter's naturalization would take too long.[57] The IJ therefore granted Yerkovich's request for voluntary departure, which permits aliens to depart the United States at their own expense and avoid

[47] *E.g.*, *Zafar*, 426 F.3d at 1332 (stating that petitioners' and respondents' contentions center on language of statute).

[48] *Yerkovich*, 381 F.3d at 991.

[49] *Id.*

[50] *Id.* On March 1, 2003, responsibility for immigration-related services was transferred from the INS to the U.S. Citizenship and Immigration Services. *See* Chelsea Walsh, *Voluntary Departure: Stopping the Clock for Judicial Review*, 73 FORDHAM L. REV. 2857, 2864 (2005). Also, the U.S. Immigration and Customs Enforcement assumed responsibility for the enforcement of the immigration laws from the INS. *See id.* For convenience, this Comment refers to the INS.

[51] *Yerkovich*, 381 F.3d at 991.

[52] *Id.* at 992.

[53] *Id.*

[54] *Id.*

[55] *Id.*

[56] *Id.*

[57] *Id.*

further removal proceedings.[58] Subsequently, the BIA dismissed Yerkovich's appeal and found no abuse of discretion by the IJ.[59]

The Tenth Circuit dismissed Yerkovich's petition for review of the IJ's decision because the court found that it lacked jurisdiction.[60] The Tenth Circuit agreed that § 1252(a)(2)(B)(ii) does not specifically confer discretion upon an IJ to grant or deny a continuance.[61] The court, however, reasoned that while the statute does not specifically grant discretionary authority, an implementing regulation does.[62] Under 8 C.F.R. § 1003.29, an IJ may grant a motion for continuance.[63] The court found that this language confers discretion upon the IJ to grant or deny a motion for continuance.[64] The court held, therefore, that the IJ had discretion to deny Yerkovich's request for a continuance.[65] Because § 1252(a)(2)(B)(ii) bars judicial review of discretionary decisions, the Tenth Circuit concluded that it lacked subject matter jurisdiction to consider Yerkovich's appeal.[66] The Tenth Circuit reasoned further that IIRIRA and § 1252 generally impose a broad restriction on federal court jurisdiction.[67] Thus, the court found that both the statute's plain language and overall purpose deprived the court of subject matter jurisdiction.[68]

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[58] 8 U.S.C. § 1229(c) (2005); *Yerkovich*, 381 F.3d at 992.

[59] *Yerkovich*, 381 F.3d at 992.

[60] *Id.* at 995.

[61] *Id.* at 993.

[62] *Id.*

[63] *See supra* note 35 and accompanying text.

[64] *Yerkovich*, 381 F.3d at 991.

[65] *Id.* at 995.

[66] *Id.*

[67] *Id.* at 993-94.

[68] *Id.* at 994-95. The Tenth Circuit's opinion in *Yerkovich* represents the minority side of the split. The Eighth Circuit's opinion in *Onyinkwa v. Ashcroft* also presents the minority view and is worth discussing here for further illustration. 376 F.3d 797 (8th Cir. 2004). In *Onyinkwa*, the petitioner entered the United States on a student visa in 1987 and married a U.S. citizen in 1995. *Id.* at 798. Subsequently, the INS denied Onyinkwa's visa application because it found that he married his wife solely in order to evade the immigration laws. *Id.* The INS based its finding on certain conflicting information given by Onyinkwa and his wife regarding their relationship and family life. *Id.* at 800. After the INS issued Onyinkwa a notice of removal, Onyinkwa's wife filed a second visa petition and requested that the INS continue removal proceedings pending its adjudication. *Id.* at 798. The INS noticed its intent to deny Onyinkwa's second application, however. *Id.* Thereafter, an IJ denied Onyinkwa's request for continuance of removal proceedings, declining to use her discretion to override the noticed visa denial. *Id.* The BIA affirmed the IJ's decision and gave Onyinkwa 30 days to voluntarily depart the United States. *Id.* On appeal, the Eighth Circuit dismissed Onyinkwa's petition for review, holding that the court

B. The Majority View — Zhao v. Gonzales

In *Zhao v. Gonzales*, the Fifth Circuit Court of Appeals illustrated the majority approach, retaining jurisdiction to review a motion to reopen because the statute does not specifically preclude such review.[69] Yu Zhao posed as an American citizen and tried to enter the United States illegally.[70] After receiving notice to appear before an IJ, Zhao filed an application for asylum and withholding of removal.[71] A deportable alien may be eligible for withholding of removal if the alien will face persecution upon returning to his or her native country.[72] At his hearing, Zhao testified as to his reasons for fleeing China.[73] Zhao stated that police began arresting and persecuting followers of the Falun Gong movement — a spiritual practice to which Zhao subscribed.[74] After hiding in China for several months, Zhao traveled to the United States with a fake passport in order to evade the police.[75] Zhao subsequently learned that the police had tortured to death approximately 200 to 300 Falun Gong practitioners, and exiled or otherwise persecuted 50,000 others.[76] The IJ deemed Zhao a credible witness and accepted his testimony.[77]

lacked jurisdiction to review whether the IJ abused her discretion. *Id.* at 799.

The Eighth Circuit reasoned that the phrase "this subchapter" in 8 U.S.C. § 1252(a)(2)(B)(ii) refers to the immigration subchapter of the INA. *Id.* An IJ's authority to conduct removal proceedings is found within this subchapter (under 8 U.S.C. § 1229a(a)(1)). *Id.* An implementing regulation provides that, pursuant to the IJ's authority over removal proceedings, an IJ may grant a continuance for good cause shown. *Id.* Reading the statute and regulation together, the court concluded that an IJ's discretion to grant or deny a continuance is beyond review under § 1252(a)(2)(B)(ii). *Id.*

[69] 404 F.3d 295, 301 (5th Cir. 2005).

[70] *Id.* at 299.

[71] *Id.* The United States assents to the U.N.'s prohibition on the return of refugees to countries where they would face persecution. *See* Anwen Hughes, *Asylum and Withholding of Removal — A Brief Overview of the Substantive Law*, 1477 P.L.I.: CORP. L. & PRAC. COURSE HANDBOOK 293, 297 (2005). Asylum and withholding of removal are the two main forms of protection that the United States offers to refugees who are physically in the United States. *Id.* Asylum is a discretionary remedy, while withholding of removal is a mandatory form of relief for applicants who qualify. *Id.*

[72] 8 U.S.C. § 1231(b)(3) (2007).

[73] *Zhao*, 404 F.3d at 300.

[74] *Id.*

[75] *Id.*

[76] *Id.*

[77] *Id.*

Despite Zhao's testimony, the IJ denied Zhao's application for asylum and withholding of removal.[78] The IJ held that Zhao failed to establish past persecution or fear of future persecution on account of a protected characteristic.[79] The BIA affirmed the IJ's findings, adding that Zhao never had actual contact with government officials and rarely practiced Falun Gong.[80] The BIA denied Zhao's subsequent motion to reconsider.[81] In his motion, Zhao sought to introduce evidence of worsening conditions in China.[82] He also appealed for the first time the IJ's exclusion of certain unauthenticated documents evincing police efforts to locate him in China.[83]

Zhao petitioned the Fifth Circuit Court of Appeals for review of the BIA's initial decision to affirm the denial of his application for asylum.[84] He also petitioned for review of the BIA's denial of his motion to reopen his case.[85] While neither party raised the question of jurisdiction under § 1252(a)(2)(B)(ii), the Fifth Circuit examined the issue sua sponte.[86] The court noted that its circuit had yet to resolve the question of whether § 1252(a)(2)(B)(ii) bars judicial review of motions to reopen removal proceedings.[87] Ultimately, the court held that it retained jurisdiction because § 1252(a)(2)(B)(ii) only precludes review of those discretionary decisions delineated in the statute itself.[88]

The court rejected the Tenth Circuit's holding in *Yerkovich* and found that the statute did not bar judicial review of all motions to reopen.[89] Contrary to the minority circuits, the Fifth Circuit held that § 1252(a)(2)(B)(ii) prohibits jurisdiction only over discretionary authority specified in the plain language of the statute.[90] The court emphasized that the statute's language does not allude to general

[78] *Id.*

[79] *Id.* at 300-01. An applicant seeking asylum or withholding of removal must first qualify as a refugee. *See* Hughes, *supra* note 71, at 300-04. The term "protected characteristic" refers to the aspect of the applicant's identity that led or will lead to the applicant's persecution. *Id.* These characteristics may include the applicant's ethnicity, religion, or membership in a political party. *Id.*

[80] *Zhao*, 404 F.3d at 301.

[81] *Id.* at 299.

[82] *Id.* at 301.

[83] *Id.*

[84] *Id.*

[85] *Id.*

[86] *Id.* at 302.

[87] *Id.*

[88] *Id.* at 303.

[89] *Id.*

[90] *Id.*

discretionary authority, but rather to that authority specified as discretionary under subchapter II of the statute.[91] The BIA derived its discretionary authority to deny Zhao's motion to reopen from 8 C.F.R. § 1003.23(b)(3).[92] The court held that it had authority to review Zhao's motion because the discretion derived from a federal regulation and not from the statute itself.[93] The court reasoned that Congress included the phrase "specified under this subchapter" for the purpose of identifying which discretionary decisions are beyond judicial review.[94] Thus, the court concluded that including discretionary authority found in an implementing regulation outside the subchapter would contradict the statute's plain language.[95] Unlike the Tenth Circuit in *Yerkovich*, the Fifth Circuit declined to abdicate its jurisdiction based on extra-statutory authority.[96] The analysis below demonstrates why the Fifth Circuit approach should prevail over the minority view.

[91] *Id.*

[92] *Id.*

[93] *Id.*

[94] *Id.*

[95] *Id.* The Fifth Circuit's opinion in *Zhao* represents the majority approach. A more recent case further illustrates the majority view. In *Zafar*, the petitioners entered the United States as non-immigrant visitors. Zafar v. U.S. Attorney Gen., 426 F.3d 1330, 1332-33 (11th Cir. 2005), *vacated*, 461 F.3d 1357 (11th Cir. 2006) (holding same as vacated opinion). Before their authorized stay in the United States expired, the petitioners filed applications for labor certification. *Id.* While the applications were pending, the Department of Homeland Security initiated removal proceedings against the petitioners for staying in the United States longer than authorized. *Id.* The petitioners then requested continuances to await labor certification, which the IJs denied. *Id.* at 1330. The BIA affirmed the IJs' denials of continuances and petitioners sought review. *Id.* The Eleventh Circuit held that it retained jurisdiction under 8 U.S.C. § 1252(a)(2)(B)(ii) to review the denials of petitioners' motions to continue removal proceedings. *Id.* at 1333-35.

In granting review, the Eleventh Circuit reasoned that § 1252(a)(2)(B)(ii) barred review only of those decisions specified as discretionary under the immigration subchapter of the INA. *Id.* The court stated that the subchapter does not contain an IJ's authority to grant or deny continuance. *Id.* Rather, the court found that a federal regulation, 8 C.F.R. § 1003.29, confers such discretion. *Id.* at 1334. Because the discretionary authority over continuances is found in a regulation, and not in the subchapter specified in § 1252(a)(2)(B)(ii), the court held that it retained jurisdiction. *Id.* at 1334-35.

[96] Zhao v. Gonzales, 404 F.3d 295, 303 (5th Cir. 2005).

III. ANALYSIS

Section 1252(a)(2)(B)(ii) should not bar judicial review of IJ or BIA decisions regarding requests for continuance or motions to reopen.[97] Three reasons support the majority approach.[98] First, the majority's interpretation more readily complies with accepted canons of statutory interpretation.[99] Second, the majority approach properly refuses to defer to an executive agency's overreaching statutory interpretation.[100] Third, the majority view has favorable policy implications.[101] For these reasons, the majority approach to § 1252(a)(2)(B)(ii) should prevail.[102]

A. The Majority Approach Complies with Accepted Canons of Statutory Interpretation

Both the majority and minority circuits agree that § 1252(a)(2)(B)(ii) itself does not confer discretion over the decision to grant or deny a continuance or motion to reopen.[103] The circuits also agree that the implementing regulations, 8 C.F.R. §§ 1003.23(b)(3) and 1003.29, do confer such discretion upon an IJ and the BIA.[104] These regulations state that the BIA "has discretion to deny a motion to reopen" and that an IJ "may grant continuance for good cause shown."[105] Section 1252(a)(2)(B)(ii) states that courts cannot review decisions specified as discretionary under the immigration subchapter of the INA.[106] The disagreement between the circuits concerns whether the specified subchapter contains the regulations for purposes

[97] *See infra* Part III.

[98] *See infra* Part III.A-C.

[99] *See infra* Part III.A.

[100] *See infra* Part III.B.

[101] *See infra* Part III.C.

[102] *See infra* Part III.A-C.

[103] *See* Zafar v. U.S. Attorney Gen., 426 F.3d 1330, 1335 (11th Cir. 2005), *vacated*, 461 F.3d 1357 (11th Cir. 2006) (holding same as vacated opinion); Zhao v. Gonzales, 404 F.3d 295, 303 (5th Cir. 2005); Subhan v. Ashcroft, 383 F.3d 591, 595 (7th Cir. 2004); Yerkovich v. Ashcroft, 381 F.3d 990, 993 (10th Cir. 2004); Onyinkwa v. Ashcroft, 376 F.3d 797, 799 (8th Cir. 2004); Medina-Morales v. Ashcroft, 371 F.3d 520, 528 (9th Cir. 2004); Koenig v. INS, 64 F. App'x 996, 998 (6th Cir. 2003).

[104] *See* cases cited *supra* note 103.

[105] 8 C.F.R. § 1003.23(b)(3) (2005) ("The Immigration Judge has discretion to deny a motion to reopen even if the moving party has established a prima facie case for relief."); *id.* § 1003.29 (2005) ("The Immigration Judge may grant a motion for continuance for good cause shown.").

[106] 8 U.S.C. § 1252(a)(2)(B)(ii) (2005). For the statute's text, see *supra* note 30.

of determining if courts have subject matter jurisdiction.[107] If a court finds that the subchapter encompasses the regulations, then § 1252(a)(2)(B)(ii) precludes judicial review of the discretionary decision outlined in the regulations.[108] If a court finds that the regulations are not a part of the subchapter, the court will grant review.[109] The majority's approach adheres to the canons of statutory interpretation and properly recognizes that the regulations are not part of § 1252(a)(2)(B)(ii).[110]

1. The Majority's Interpretation Gives the Statute Its Plain Meaning

A fundamental canon of statutory interpretation is that courts must give the statute's language its plain meaning.[111] In statutory construction cases, the court must first determine whether the disputed language has a plain and unambiguous meaning.[112] When a statute's text sufficiently defines its scope, the court should not inquire further to construe the limits of its application.[113] The majority's interpretation of § 1252(a)(2)(B)(ii) gives the words their plain

[107] *See, e.g.*, *Zhao*, 404 F.3d at 302-03 ("In this circuit, the degree to which 8 U.S.C. § 1252(a)(2)(B)(ii) precludes judicial review of motions to reopen immigration proceedings is an open question."); *Onyinkwa*, 376 F.3d at 799 ("Our court has not yet considered the reviewability of an IJ's refusal to continue removal proceedings under IIRIRA.").

[108] *E.g.*, *Yerkovich*, 381 F.3d at 995 (reading regulation and statute together in finding lack of jurisdiction).

[109] *E.g.*, Medina-Morales v. Ashcroft, 371 F.3d 520, 528 (9th Cir. 2004) (finding that court has jurisdiction because discretion not conferred by statute).

[110] *See infra* Part III.A.1-3.

[111] *See* Desert Palace, Inc. v. Costa, 539 U.S. 90, 98 (2003) (stating that when words of statute are unambiguous, judicial inquiry is complete); Barnhart v. Sigmon Coal Co., 534 U.S. 438, 450 (2002) (stating that Court begins with statute's language in statutory construction cases); Conn. Nat'l Bank v. Germain, 503 U.S. 249, 254 (1992) ("When the words of a statute are unambiguous, then, this first canon is also the last: 'judicial inquiry is complete.'").

[112] *See Barnhart*, 534 U.S. at 450; Robinson v. Shell Oil Co., 519 U.S. 337, 340 (1997); United States v. Ron Pair Enter., 489 U.S. 235, 240 (1989).

[113] *See* Griffin v. Oceanic Contractors, Inc., 458 U.S. 564, 570 (1982) ("Our task is to give effect to the will of Congress, and where its will has been expressed in reasonably plain terms, 'that language must ordinarily be regarded as conclusive.'"); Consumer Prod. Safety Comm'n v. GTE Sylvania, Inc., 447 U.S. 102, 108 (1980); MARGARET Z. JOHNS & REX R. PERSCHBACHER, THE UNITED STATES LEGAL SYSTEM: AN INTRODUCTION 105-07 (2002).

meaning, while the minority inquires further, looking beyond the statute's plain language to consider extra-statutory regulations.[114]

The majority honors the statute's plain meaning by holding that the regulation does not fall within "this subchapter."[115] Standing alone, § 1252(a)(2)(B)(ii) has a reasonable and plain meaning: courts cannot review discretionary decisions specified in the immigration subchapter of the INA.[116] The immigration subchapter does not address an IJ's discretionary authority to grant or deny continuances or motions to reopen.[117] To find that courts cannot review these discretionary decisions, one must supplement the text with the implementing regulations.[118] The statute does not refer to the implementing regulations.[119] Rather, it states that courts cannot review discretionary decisions the authority for which is specified under "this subchapter."[120] This means that one must go outside the statute's text to determine that § 1252(a)(2)(B)(ii) bars judicial review of the discretionary decisions contained in the implementing regulations.[121] Doing so violates the primary canon of statutory interpretation that courts give statutory language, standing alone, its plain and unambiguous meaning.[122]

2. The Majority Approach Gives Effect to All Provisions in the Statute

Another fundamental canon of statutory interpretation with which the majority complies is that courts should give effect to all provisions

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[114] *See supra* note 105 and accompanying text.

[115] *See Desert Palace*, 539 U.S. at 98; *Barnhart*, 534 U.S. at 450.

[116] *See, e.g.*, *Barnhart*, 534 U.S. at 450.

[117] *See* Zafar v. U.S. Attorney Gen., 426 F.3d 1330, 1334 (11th Cir. 2005), *vacated*, 461 F.3d 1357 (11th Cir. 2006) ("The expressed authority of an immigration judge to grant or deny a motion to continue a hearing is *not* found under the particular 'subchapter' where § 1252(a)(2)(B)(ii) is contained . . . ."); Medina-Morales v. Ashcroft, 371 F.3d 520, 528 (9th Cir. 2004) ("Denials of motions to reopen are not acts over which *a statute* gives the Attorney General such pure discretion.").

[118] *See In re* BCE West, L.P., 319 F.3d 1166, 1171 (9th Cir. 2003) ("[A]s long as the statutory scheme is coherent and consistent, there generally is no need for a court to inquire beyond the plain language of the statute." (quoting United States v. Ron Pair Enters., 489 U.S. 235, 240-41 (1989))).

[119] 8 U.S.C. § 1252(a)(2)(B)(ii) (2005). For the statute's text, see *supra* note 30.

[120] *See* § 1252(a)(2)(B)(ii).

[121] *See supra* note 118 and accompanying text.

[122] *See* Hamilton v. Rathbone, 175 U.S. 414, 419 (1899) ("[W]here the act is clear upon its face, and when standing alone it is fairly susceptible of but one construction, that construction must be given to it.").

within a statute.[123] Courts have long held that judges should not interpret any statutory provision in a manner that would negate another provision within the statute.[124] The accepted rules of construction dictate that courts interpret specific provisions in light of the entire statute, so that the statute forms a harmonious whole.[125] Thus, courts should not interpret § 1252(a)(2)(B)(ii) in a manner that contradicts any other provisions of the INA.[126]

The minority approach to § 1252(a)(2)(B)(ii), however, negates two other INA provisions.[127] First, the minority approach prevents the courts of appeals from effectively carrying out 8 U.S.C. § 1252(a)(1).[128] This provision gives the courts of appeals jurisdiction to review final orders of removal.[129] The courts agree that final orders

[123] *See* Weinberger v. Hynson, Westcott & Dunning, Inc., 412 U.S. 609, 633 (1973) ("[A]ll parts of a statute, if at all possible, are to be given effect."); AT&T Corp. v. FCC, 292 F.3d 808, 812 (D.C. Cir. 2002) (stating that "all parts of a statute are to be given effect"); Select Base Materials, Inc. v. Bd. of Equalization, 335 P.2d 672, 675 (Cal. 1959) ("Moreover, 'every statute should be construed with reference to the whole system of law of which it is a part so that all may be harmonized and have effect.'").

[124] *See, e.g.*, Mountain States Tel. & Tel. Co. v. Pueblo of Santa, 472 U.S. 237, 249 (1985) (describing basic canon of construction that court should not read statute so as to render one part inoperative); Colautti v. Franklin, 439 U.S. 379, 392 (1979) (declining to read statute "in violation of the elementary canon of construction that a statute should be interpreted so as not to render one part inoperative"); AD Global Fund, L.L.C. *ex rel.* N. Hills Holding, Inc. v. United States, 67 Fed. Cl. 657, 672 n.19 (2005) (stating that "effect [should] be given to every element of a statute so that provisions do not negate each other").

[125] Davis v. Mich. Dep't of Treasury, 489 U.S. 803, 809 (1989) ("It is a fundamental canon of statutory construction that the words of a statute must be read in their context and with a view to their place in the overall statutory scheme." (citing United States v. Morton, 467 U.S. 822, 828 (1984))); Am. Bankers Ass'n. v. Gould, 412 F.3d 1081, 1086 (9th Cir. 2005) ("Our goal in interpreting a statute is to understand the statute 'as a symmetrical and coherent regulatory scheme' and to 'fit, if possible, all parts into a . . . harmonious whole.'" (quoting FDA v. Brown & Williamson Tobacco Corp., 529 U.S. 120, 133 (2000))); Doe v. Ill. Dep't of Prof'l Regulation, 793 N.E.2d 119, 124 (Ill. App. Ct. 2003) (stating that each provision should be construed in connection with every other provision).

[126] *See Davis*, 489 U.S. at 809; *Am. Bankers Ass'n*, 412 F.3d at 1086; *AD Global Fund*, 67 Fed. Cl. at 672; *Doe*, 793 N.E.2d at 124.

[127] *See* Subhan v. Ashcroft, 383 F.3d 591, 594-95 (7th Cir. 2004) (stating that final orders of removal are not discretionary, factors leading to such orders are subject to review under § 1252(a)(1), and that denying review deprives alien of ability to receive labor certification under § 1255(i)).

[128] 8 U.S.C. § 1252(a)(1) (2005).

[129] *Id.*

of removal are non-discretionary and subject to review.[130] In reviewing a final order of removal, the court must consider the factors leading up to that order.[131] The discretionary decisions at issue in the split are among the factors leading up to a final order of removal.[132] For instance, an IJ's decision to deny continuance to a deportable alien directly results in a final order of removal.[133] Likewise, when the BIA denies a deportable alien's motion to reopen removal proceedings, the BIA finalizes the removal order.[134] Courts cannot review the propriety of a removal order without considering the integral decisions, such as those above, that directly lead to removal.[135] Therefore, if courts cannot review these decisions under § 1252(a)(2)(B)(ii), they are unable to dutifully exercise their authority to review final removal orders under § 1252(a)(1).[136]

Second, the minority approach to § 1252(a)(2)(B)(ii) counteracts 8 U.S.C. § 1255(i).[137] Under § 1255(i), a removable alien can seek permanent residency if he applies for and receives labor certification.[138] The majority recognizes that an IJ's decision to deny continuance undermines an alien's ability to receive labor certification.[139] Where an IJ denies an alien's request for continuance,

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[130] *E.g.*, *Subhan*, 383 F.3d at 594.

[131] *Id.* at 595.

[132] *Id.*

[133] *See* Onyinkwa v. Ashcroft, 376 F.3d 797, 798 (8th Cir. 2004) (stating that after IJ declined to grant continuance, BIA affirmed and ordered alien to depart United States within 30 days).

[134] *See* Medina-Morales v. Ashcroft, 371 F.3d 520, 523 (9th Cir. 2004) (stating that alien petitioned for review of BIA decision dismissing appeal from IJ's denial of motion to reopen).

[135] *See Subhan*, 383 F.3d at 595.

[136] *See, e.g.*, Lexecon, Inc. v. Milberg Weiss Bershad Hynes & Lerach, 523 U.S. 26, 36 (1998) ("[A] statute is to be considered in all its parts when construing any one of them.").

[137] *See Subhan*, 383 F.3d at 595.

[138] 8 U.S.C. § 1255(i) (2005) (stating that alien who is beneficiary of application for labor certification may apply to Attorney General for adjustment of status to that of alien lawfully admitted for permanent residence).

[139] *See, e.g.*, *Subhan*, 383 F.3d at 595 (reasoning that Congress did not intend that § 1252(a)(2)(B)(ii) place beyond review decisions by immigration authorities that "nullified" alien's ability to obtain labor certification). In *Subhan*, petitioner Mohammed Subhan entered the United States on a tourist visa. *Id.* at 593. Upon the expiration of his visa, Subhan became removable and sought to adjust his status. *Id.* Under § 1255(i), a removable alien can seek permanent residency if he applies for and receives labor certification. *Id.*; 8 U.S.C. § 1255(i). An IJ granted Subhan two six-month continuances to await the processing of his labor certificates by the state and federal departments of labor. *Subhan*, 383 F.3d at 593. However, the IJ refused to

the IJ prevents the alien from pursuing any further relief from removal, such as labor certification.[140] Thus, the majority concluded that an IJ's denial of continuance, issued without reason, violated § 1255(i).[141]

The majority reasoned that Congress did not intend that § 1252(a)(2)(B)(ii) allow immigration authorities to nullify § 1255(i) while escaping judicial review.[142] The majority stated that such an action impermissibly allowed one provision of the INA to counteract another.[143] If the court cannot review the IJ's denial of continuance, the court is unable to review the IJ's potential obstruction of the alien's labor certification.[144] The majority allows courts to review the significant factors leading to removal, such as denials of continuance, which safeguards aliens' ability to pursue other forms of relief.[145]

grant Subhan a third continuance and held him ineligible for an adjustment in status. *Id.* The BIA affirmed the IJ's denial of continuance. *Id.* at 595. On appeal, the Seventh Circuit found that it had jurisdiction over Subhan's petition for review and that the IJ and BIA improperly denied continuance. *Id.* The court emphasized that the federal and state departments of labor bore the responsibility for the delay in processing Subhan's certificate. *Id.* at 593. The court also emphasized that the IJ gave no reason for denying Subhan a third continuance. *Id.*

The Seventh Circuit held that it retained jurisdiction under § 1252(a)(2)(B)(ii) to review the IJ's decision to deny Subhan a third continuance. *Id.* at 595. The court reasoned that because courts have authority to review final immigration decisions under § 1252(a)(1), the court could review the order removing Subhan. *Id.* at 594. And because the IJ's denial of continuance was part of the final removal order, the court retained jurisdiction to review the denial. *Id.*

In granting Subhan's petition for review, the Seventh Circuit also considered the purpose of § 1255(i) in relation to 8 U.S.C. § 1229a(a)(2). *Id.* An IJ derives authority to conduct removal proceedings from § 1229a(a)(1). *Id.* Under § 1255(i), a removable alien can seek adjustment of status based on labor certification. 8 U.S.C. § 1255(i). The court reasoned that Congress did not intend that IJs be able to nullify § 1255(i) by exercising discretionary authority over removal proceedings via § 1252(a)(2)(B)(ii). *Subhan*, 383 F.3d at 595. Therefore, the court held that the IJ's denial of continuance in this case, issued without reason, violated § 1255(i). *Id.*

[140] *See Subhan*, 383 F.3d at 595.

[141] *See, e.g.*, *id.*

[142] *See id.* ("[W]e . . . think it unlikely that Congress, intending as it clearly did, to entitle illegal aliens to seek an adjustment of status upon the receipt of certificates from the state and federal labor departments, at the same time also intended section 1252(a)(2)(B)(ii) to place beyond judicial review decisions by the immigration authorities that nullified the statute.").

[143] *Id.*

[144] *Id.*

[145] *Id.*

Thus, the majority approach complies with the canons of statutory interpretation by preserving the integrity of other INA provisions.[146]

3. The Majority Approach Gives Effect to All the Words in the Statute

In addition to giving effect to every statutory provision, the canons of interpretation dictate that courts give effect to every word in the statute.[147] Thus, courts must avoid interpreting statutes in a manner that would render any words superfluous or void.[148] The minority approach to § 1252(a)(2)(B)(ii) renders the phrase "specified under this subchapter" superfluous while the majority approach gives the words effect.[149]

Opponents argue that the regulations implementing the immigration subchapter are part of the subchapter for purposes of determining subject matter jurisdiction.[150] According to this view, IIRIRA generally divests courts of jurisdiction when an implementing regulation confers discretion upon an IJ or the BIA.[151] Because the implementing regulations outline discretionary powers, the subchapter referred to in § 1252(a)(2)(B)(ii) incorporates these powers as well.[152]

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[146] *See supra* Part III.A.2.

[147] *See* Dole Food Co. v. Patrickson, 538 U.S. 468, 476-77 (2003) ("Absent a statutory text or structure that requires us to depart from normal rules of construction, we should not construe the statute in a manner that is strained and, at the same time, would render a statutory term superfluous."); United States v. Nordic Village, Inc., 503 U.S. 30, 36 (1992) (declining to adopt construction that would violate "settled rule that a statute must, if possible, be construed in such fashion that every word has some operative effect"); D.A.B.E., Inc. v. Toledo-Lucas City Bd. of Health, 773 N.E.2d 536, 541 (2002) ("[A]ll words should have effect and no part should be disregarded.").

[148] Cooper Indus., Inc. v. Aviall Servs., Inc., 543 U.S. 157, 166 (2004) (stating that Court is loathe to interpret statute in manner that renders part of statute superfluous); TRW Inc. v. Andrews, 534 U.S. 19, 31 (2001) ("It is 'a cardinal principle of statutory construction' that 'a statute ought, upon the whole, to be so construed that, if it can be prevented, no clause, sentence, or word shall be superfluous, void, or insignificant.'" (quoting Duncan v. Walker, 533 U.S. 167, 174 (2001))); United States v. Alaska, 521 U.S. 1, 59 (1997) (declining to adopt construction that would render terminology superfluous).

[149] *See infra* Part III.A.3.

[150] The minority takes this position in finding that the courts of appeals lack jurisdiction to review denials of continuances and motions to reopen removal proceedings. *See* Yerkovich v. Ashcroft, 381 F.3d 990, 994 (10th Cir. 2004); Onyinkwa v. Ashcroft, 376 F.3d 797, 799 (8th Cir. 2004).

[151] *See Onyinkwa*, 376 F.3d at 799.

[152] *See id.*

Such an interpretation, however, discounts Congress's choice of words.[153] Congress included the phrase "specified under this subchapter" when drafting the statute.[154] Congress clearly restricted judicial review of a number of decisions — those specified as discretionary in the immigration subchapter.[155] Thus, Congress intended to confine the list of discretionary actions beyond review to those actions specified accordingly.[156] Had Congress intended to further restrict jurisdiction, it could have stated that decisions specified as discretionary under the implementing regulations were beyond review as well.[157] By including the implementing regulations, the minority disregards part of the statute's text, which violates the canons of interpretation.[158] The majority, however, properly follows the fundamental canons of interpretation by giving effect to all the words in the statute.[159]

B. The Majority Properly Refuses to Allow Executive Agencies to Enlarge the Category of Non-Reviewable Discretionary Decisions

In addition to complying with the fundamental canons of statutory interpretation, the majority approach preserves the division of power within government.[160] The majority approach accomplishes this by refusing to allow the Attorney General to enlarge the category of non-reviewable discretionary decisions under § 1252(a)(2)(B)(ii).[161] In

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[153] *See* Zhao v. Gonzales, 404 F.3d 295, 303 (5th Cir. 2005) (stating that statutory language is "uncharacteristically pellucid" regarding which discretionary decisions it addresses).

[154] *Id.*

[155] 8 U.S.C. § 1252(a)(2)(B)(ii) (2005); *see also Zhao*, 404 F.3d at 303; *Yerkovich*, 381 F.3d at 992 (stating that "this subchapter" refers to discretionary decisions contained within 8 U.S.C. §§ 1151-1378).

[156] *See Zhao*, 404 F.3d at 303.

[157] *See* Stark v. Wickard, 321 U.S. 288, 309 (1944) ("When Congress passes an Act empowering administrative agencies to carry on governmental activities, the power of those agencies is circumscribed by the authority granted."); Morgan v. United States, 304 U.S. 1, 14 (1938) (stating that Congress must determine standards of administrative action); Ry. Labor Executives' Ass'n v. Nat'l Mediation Bd., 29 F.3d 655, 670 (D.C. Cir. 1994) ("Agencies owe their capacity to act to the delegation of authority, either express or implied, from the legislature.").

[158] *See* Walters v. Metro. Educ. Enter., Inc., 519 U.S. 202, 209 (1997) ("Statutes must be interpreted, if possible, to give each word some operative effect.").

[159] *See supra* Part III.A.3.

[160] *See infra* Part III.B.

[161] *See* Zafar v. U.S. Attorney Gen., 426 F.3d 1330, 1334 (11th Cir. 2005), *vacated*, 461 F.3d 1357 (11th Cir. 2006); *Zhao*, 404 F.3d at 303; Medina-Morales v. Ashcroft, 371 F.3d 520, 528 (9th Cir. 2004).

interpreting and implementing the INA, the Attorney General promulgated regulations to address IJ and BIA decisions regarding continuances and motions to reopen.[162] The Attorney General argued that these regulations establish that continuances and motions to reopen are discretionary decisions beyond review under § 1252(a)(2)(B)(ii).[163] The majority correctly rejects this contention.[164]

The Supreme Court established a two-part test in *Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.* to determine when courts must defer to an executive agency's interpretation of a statute.[165] First, a court must ask whether Congress has directly addressed the question at issue.[166] If Congress has done so, the court stops its inquiry and gives effect to the unambiguously expressed intent of Congress.[167] Second, if the statute is silent or ambiguous regarding the question at issue, the court asks if the agency's interpretation is reasonable.[168] If the agency's construction of the statute is permissible, the court must defer to the agency's interpretation.[169] The majority approach prevails under both prongs of the *Chevron* analysis.[170]

The majority approach properly denies deference to the Attorney General's interpretation of § 1252(a)(2)(B)(ii) under the first prong of *Chevron* because Congress directly addressed the question at issue.[171] This issue is whether discretionary decisions to grant or deny requests for continuance or motions to reopen in removal proceedings are beyond judicial review.[172] More broadly, the question is whether the

[162] *See Zafar*, 461 F.3d at 1361 (stating that discretion to continue removal proceedings is "administratively-determined and proscribed to the immigration judges via 8 C.F.R. § 1003.29, a federal regulation promulgated by the Attorney General"); *Zhao*, 404 F.3d at 303 ("A federal regulation, 8 C.F.R. § 1003.23(b)(3), furnishes the quantum of discretion the Attorney General enjoys when entertaining motions to reopen.").

[163] *See* cases cited *supra* note 13.

[164] *See Zafar*, 461 F.3d at 1361; *Zhao*, 404 F.3d at 303; Subhan v. Ashcroft, 383 F.3d 591, 595 (7th Cir. 2004); *Medina-Morales*, 371 F.3d at 528.

[165] 467 U.S. 837, 842-43 (1984).

[166] *Id.*; *see also* Bona v. Gonzales, 425 F.3d 663, 668 (9th Cir. 2005) (describing *Chevron* test for deference to administrative agency's interpretation); Morales-Izquierdo v. Ashcroft, 388 F.3d 1299, 1303 (9th Cir. 2004) (same); Akhtar v. Burzynski, 384 F.3d 1193, 1198 (9th Cir. 2004) (same).

[167] *See* cases cited *supra* note 166.

[168] *Id.*

[169] *Id.*

[170] *See infra* Part III.B.

[171] *See supra* notes 155-51 and accompanying text.

[172] *See supra* notes 40-41 and accompanying text.

INA subchapter referenced in § 1252(a)(2)(B)(ii) includes decisions described as discretionary in the implementing regulations.[173] The statute's language plainly and unambiguously answers this question.[174] The statute states that no court shall have jurisdiction to review any decision specified as discretionary under the immigration subchapter of the INA.[175] Congress clearly specified the range of discretionary decisions beyond review — those specified as discretionary under subchapter II.[176] In so doing, Congress made no mention of the implementing regulations.[177] Congress was very specific throughout subchapter II in stating which decisions are discretionary.[178] When conferring discretionary authority upon the Attorney General or his designees, Congress explicitly stated that he may *in his discretion* make the particular decision.[179] Nowhere in subchapter II did Congress state that the Attorney General has sole discretion over requests for continuance or motions to reopen.[180] Therefore, Congress reserved for itself the determination of which decisions made in removal proceedings are discretionary and thus beyond judicial review under § 1252(a)(2)(B)(ii).[181] The majority therefore appropriately stops at the first prong of the *Chevron* test in finding that Congress has directly spoken to the question at issue.[182]

While the minority should find that Congress directly addressed the issue and end there, the minority violates the second step of *Chevron*

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[173] *See supra* note 108 and accompanying text.

[174] *See supra* notes 117-16 and accompanying text.

[175] 8 U.S.C. § 1252(a)(2)(B)(ii) (2005). For the statute's text, see *supra* note 30.

[176] *See supra* note 156 and accompanying text.

[177] *See supra* text accompanying notes 116-13.

[178] *See, e.g.*, 8 U.S.C. § 1154(a)(1)(J) (2005) ("The determination of what evidence is credible and the weight to be given that evidence shall be *within the sole discretion of the Attorney General*.") (emphasis added); *id.* § 1157(c)(1) (2005) ("[T]he Attorney General may, *in the Attorney General's discretion* and pursuant to such regulations as the Attorney General may prescribe, admit any refugee who is not firmly resettled in any foreign country . . . .") (emphasis added); *id.* § 1159 (2005) ("The Secretary of Homeland Security or the Attorney General, *in the Secretary's or the Attorney General's discretion* and under such regulations as the Secretary or the Attorney General may prescribe, may adjust to the status of an alien lawfully admitted for permanent residence the status of any alien granted asylum . . . .") (emphasis added).

[179] *See supra* note 178 and accompanying text.

[180] *See supra* note 117 and accompanying text.

[181] *Cf.* Succar v. Ashcroft, 394 F.3d 8, 24 (1st Cir. 2005) (stating that where Congress has spoken clearly on issue, Congress has reserved for itself determination of that issue).

[182] *See supra* Part III.B; *see also supra* notes 115-13 and accompanying text.

as well.[183] Under the second prong, the court asks whether the agency's interpretation constitutes a permissible construction of the statute.[184] The minority's interpretation is impermissible because it violates basic principles of constitutional law.[185] Namely, the minority violates the principle that executive agencies and officers may not exceed the authority conferred upon them by statute.[186]

While the Constitution does not expressly mention executive agencies, the Supreme Court maintains that an agency's power must not exceed the authority that Congress delegated.[187] Here, Congress specified which agency decisions were beyond judicial review.[188] The minority, however, extends the list of discretionary decisions beyond those in the statute and includes those in the implementing regulations.[189] This allows immigration officials to circumvent congressional authority by placing a broader array of their discretionary decisions beyond judicial review.[190] Thus, the minority sanctions an increase in executive authority which Congress did not contemplate.[191] This approach violates the constitutional principles

[183] *See supra* Part III.B.

[184] *See supra* notes 163-65 and accompanying text.

[185] *See infra* note 186 and accompanying text.

[186] *See* Lyng v. Payne, 476 U.S. 926, 937 (1986) (stating that agency's power is no greater than that delegated to it by Congress); Atchison, Topeka & Santa Fe Ry. Co. v. Interstate Commerce Comm'n, 607 F.2d 1199, 1203 (7th Cir. 1979) ("[A]n administrative agency cannot exceed the specific statutory authority granted it by Congress."); *In re* Milton Hardware Co., 250 N.E.2d 262, 265 (Ohio Ct. App. 1969) ("An administrative agency can exercise only such jurisdiction and powers as conferred upon it by the Constitution or statute which created it or vested it with such power.").

[187] *See* ERWIN CHEMERINSKY, CONSTITUTIONAL LAW: PRINCIPLES AND POLICIES 319 (Chemerinsky et al. eds., 2002) ("The Constitution does not expressly mention such agencies and, in fact, in many ways they are in tension with basic constitutional principles.").

[188] *See* 8 U.S.C. § 1252(a)(2)(B)(ii) (2005). For statute's text, see *supra* note 30.

[189] *See* Yerkovich v. Ashcroft, 381 F.3d 990, 995 (10th Cir. 2004) (holding that § 1522(a)(2)(B)(ii) precludes judicial review of decision to deny continuance of removal proceedings); Onyinkwa v. Ashcroft, 376 F.3d 797, 799 (8th Cir. 2004) (concluding that court of appeals lacks jurisdiction to review denial of request to continue removal proceedings); Koenig v. INS, 64 F. App'x 996, 998 (6th Cir. 2003) (holding that decision to deny continuance was within IJ's discretion and beyond judicial review).

[190] *See* Metheny v. Hammonds, 216 F.3d 1307, 1310 n.10 (11th Cir. 2000) ("[A]gencies by interpretation cannot enlarge the scope of or change a properly enacted statute.").

[191] *See* Zafar v. U.S. Attorney Gen., 426 F.3d 1330, 1334 (11th Cir. 2005), *vacated*, 461 F.3d 1357 (11th Cir. 2006) ("The expressed authority of an immigration judge to

governing the division of power within government and fails under the second prong of the *Chevron* test.[192] The majority approach, however, properly finds that Congress addressed the question at issue and prevents executive agencies from overstepping the bounds of their authority.[193]

C. The Majority Approach Serves Important Policy Concerns

Two public policy reasons support finding that § 1252(a)(2)(B)(ii) allows the circuit courts to review discretionary authority contained in the federal regulations.[194] First, given the severity and finality of the consequences to the alien, courts should interpret any perceived ambiguity in favor of granting review.[195] Second, the Supreme Court has recognized a strong presumption in favor of judicial review of administrative actions.[196]

An IJ's decision to deny a continuance or motion to reopen removal proceedings can prove decisive in an alien's case and therefore warrants review.[197] In *Yerkovich*, for example, the IJ denied Yerkovich a continuance to await her daughter's anticipated naturalization.[198] If her daughter obtained naturalization, Yerkovich would presumably have been able to seek permanent resident status.[199] Instead, Yerkovich had to depart the United States and could no longer assist in the care of her daughter and grandchild.[200] Similarly, in *Subhan v. Ashcroft*, the IJ's denial of continuance prevented Subhan from pursuing an adjustment of status based on labor certification.[201] As the Seventh Circuit stated, the state and federal departments of labor bore the responsibility for the delay in processing Subhan's request for

grant or deny a motion to continue a hearing is *not* found under the particular 'subchapter' where § 1252(a)(2)(B)(ii) is contained, which is 'SUBCHAPTER II' of chapter 12, Title 8, entitled 'Aliens and Nationality.'").

192 *See supra* Part III.B.

193 *See supra* Part III.B.

194 *See infra* Part III.C.

195 *See* INS v. St. Cyr, 533 U.S. 289, 320 (2001) (explaining general principle of construing ambiguous deportation and removal provisions in favor of alien); INS v. Cardoza-Fonseca, 480 U.S. 421, 449 (1987) (same).

196 *See St. Cyr*, 533 U.S. at 298.

197 *See* Subhan v. Ashcroft, 383 F.3d 591, 595 (7th Cir. 2004) (stating that IJ's refusal to grant continuance could "sound the death knell" for requests for adjustment of status).

198 Yerkovich v. Ashcroft, 381 F.3d 990, 992 (10th Cir. 2004).

199 *Id.*

200 *Id.*

201 *Subhan*, 383 F.3d at 593.

labor certification.[202] Had the Seventh Circuit not granted review, the INS would have forced Subhan to depart the United States solely because of bureaucratic delay.[203] Further, as the court noted, Subhan could not pursue an adjustment of status based on employment once removed from the United States.[204]

The opponents argue, however, that § 1252 imposes a broad restriction on subject matter jurisdiction.[205] Congress passed the IIRIRA amendments, which included § 1252(a)(2)(B)(ii), for the purpose of instituting a more restrictive immigration system.[206] Thus, opponents reason that courts should favor denying judicial review to respect Congress's intent to restrict the immigration system.[207]

In addition to the policy of preferring aliens in ambiguous cases, this argument fails because the statute already succeeds in restricting the immigration system.[208] Granting review does not frustrate the purpose of the statute because the statute explicitly limits subject matter jurisdiction over certain discretionary decisions.[209] The statute, however, does not state that continuances or motions to reopen are discretionary decisions that an appeals court cannot review.[210] Thus, the majority respects congressional intent by declining to review only those discretionary decisions that Congress specified in the statute.[211] The majority adheres to the restrictive theme of IIRIRA by refusing to review the discretionary decisions listed in the statute.[212] The majority, however, respects aliens' need for judicial review of final

[202] *Id.*

[203] *Id.*

[204] *Id.* at 595.

[205] The minority opinion advances this argument in declining to find jurisdiction. Yerkovich v. Ashcroft, 381 F.3d 990, 994 (10th Cir. 2004).

[206] *See supra* note 28 and accompanying text.

[207] *See Yerkovich*, 381 F.3d at 994 (stating that protecting executive branch's discretion from courts is theme of IIRIRA).

[208] *See supra* note 28 and accompanying text.

[209] *See* Zhao v. Gonzales, 404 F.3d 295, 303 (5th Cir. 2005) (stating that statutory language is "uncharacteristically pellucid" regarding which discretionary decisions it addresses).

[210] *See supra* note 103 and accompanying text.

[211] *See, e.g.*, *Zhao*, 404 F.3d at 302 ("[T]he text of § 1252(a)(2)(B)(ii) makes plain that we do not have the jurisdiction to review certain discretionary actions of the Attorney General. The law, however, proscribes judicial review only where it is specified under the subsection of title 8 that governs immigration proceedings.").

[212] *See id.*

removal orders by refusing to review only those discretionary decisions barred under § 1252(a)(2)(B)(ii).[213]

The majority approach also furthers the Supreme Court's preference for judicial review of administrative action.[214] The Supreme Court has persistently echoed the sentiment that withholding judicial review threatens individual liberty.[215] The cases discussed in this Comment manifest this concern.[216] Specifically, the cases show how the minority approach threatens an alien's individual liberty by precluding review of IJ and BIA decisions.[217] As the court stated in *Subhan*, an alien cannot pursue an adjustment of status based on employment or marriage to a U.S. citizen after deportation.[218] Thus, when a court of appeals denies review of removal proceedings, it subjects aliens to administrative discretion with no available remedy to redress potential injustice.[219] This policy concern further supports finding that § 1252(a)(2)(B)(ii) only restricts review of discretionary decisions specified in the statute, not those listed in implementing regulations.[220]

IV. SOLUTIONS

Two possible solutions would clarify that § 1252(a)(2)(B)(ii) does not bar judicial review of decisions described as discretionary in the *Code of Federal Regulations*.[221] One possible resolution of the split is a Supreme Court decision adopting the majority approach to § 1252(a)(2)(B)(ii).[222] The issue is appropriate for Supreme Court review because seven circuits have addressed the issue and remain almost evenly divided.[223] Also, the courts of appeals have all decided their cases within the past three years — the most recent case having

[213] *See id.*

[214] *See* INS v. St. Cyr, 533 U.S. 289, 298 (2001).

[215] *See, e.g.*, *id.*

[216] *See* cases cited *supra* note 14.

[217] *See* cases cited *supra* note 14.

[218] Subhan v. Ashcroft, 383 F.3d 591, 595 (7th Cir. 2004) (citing Padilla v. Ashcroft, 334 F.3d 921, 925 (9th Cir. 2003); Valderrama v. INS, 260 F.3d 1083, 1089 n.7 (9th Cir. 2001)).

[219] *Id.*

[220] *See supra* Part III.C.

[221] *See infra* Part IV. Specifically, this Comment considers discretionary decisions regarding continuances or motions to reopen removal proceedings.

[222] *See infra* Part IV.

[223] *See* cases cited *supra* note 14.

been adjudicated on August 24, 2006.[224] This means that the split is very much active and ripe for review.[225] The Supreme Court, however, receives approximately 7,500 petitions for certiorari and issues roughly eighty to ninety formal written opinions per term.[226] This means that any one case has only a slim chance of being heard and decided by the Supreme Court.[227]

In lieu of a Supreme Court opinion, another solution would be a congressional amendment to the provision's text.[228] The split concerns whether the phrase "specified under this subchapter" includes the implementing regulations.[229] Congress could easily clarify the language's meaning by adding a phrase to the text addressing and excluding implementing regulations.[230] The provision could read:

> Notwithstanding any other provision of law . . . no court shall have jurisdiction to review — . . .
>
> (ii) any other decision or action of the Attorney General the authority for which is specified under this subchapter, *and not under the Code of Federal Regulations,* to be in the discretion of the Attorney General, other than the granting of relief under section 1158(a) of this title.[231]

This textual addition would leave no doubt as to whether Congress intended to bar review of decisions described as discretionary by the implementing regulations.[232] This addition would clarify that the federal courts of appeal have jurisdiction to review an IJ's discretionary decisions regarding continuances or motions to reopen

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[224] *Id.*

[225] *See supra* note 223 and accompanying text.

[226] U.S. Supreme Court, The Justices' Caseload, *available at* http://www.supremecourtus.gov/about/justicecaseload.pdf (last visited Mar. 22, 2007).

[227] U.S. Supreme Court, *supra* note 226.

[228] *See* United States v. Sepulveda, 115 F.3d 882, 885 (11th Cir. 1997) (stating that Congress may amend statute to clarify existing law, correct misinterpretation, or overrule wrongly decided cases).

[229] *See supra* text accompanying note 41.

[230] *See supra* note 228 and accompanying text.

[231] 8 U.S.C. § 1252(a)(2)(B)(ii) (2005) (emphasis added is author's proposed amendment).

[232] *See* Negonsott v. Samuels, 507 U.S. 99, 104 (1993) ("Our task is to give effect to the will of Congress, and where its will has been expressed in reasonably plain terms, that language must ordinarily be regarded as conclusive.").

removal proceedings.[233] While this solution is the most practical, either resolution would foster uniformity and predictability in future immigration cases.[234]

CONCLUSION

In 1996, Congress enacted the IIRIRA amendments to the INA, including § 1252(a)(2)(B)(ii), which prohibits judicial review of various decisions made in removal proceedings.[235] The federal circuit courts disagree over which discretionary decisions made in removal proceedings IIRIRA placed beyond review.[236] The minority circuits allow an extra-statutory regulation to preclude judicial review of requests for continuance and motions to reopen.[237] The majority circuits, however, prohibit judicial review only in those instances outlined within the statute, which do not include continuances and motions to reopen.[238]

The majority approach is correct for multiple reasons. First, the majority approach adheres to accepted canons of statutory construction by proscribing judicial review only in those instances specified in the statute.[239] Second, the majority view preserves the division of power within government by confining executive agencies to congressionally delegated authority.[240] Third, the majority approach furthers important policy considerations.[241]

Two possible solutions would definitively establish that § 1252(a)(2)(B)(ii) does not bar review of discretionary decisions contained in the *Code of Federal Regulations*. First, the Supreme Court could resolve the split by adopting the majority's interpretation.[242] Alternatively, Congress could resolve the split by a minor amendment to the statute's text.[243] Either solution would safeguard statutory integrity, preserve the division of power, and furnish non-citizens in all

[233] *See supra* note 104 and accompanying text.
[234] *See supra* Part IV.
[235] *See supra* note 29 and accompanying text.
[236] *See supra* note 107 and accompanying text.
[237] *See supra* Part III.A.1.
[238] *See supra* Part III.A.1.
[239] *See* discussion *supra* Part III.A.
[240] *See* discussion *supra* Part III.B.
[241] *See* discussion *supra* Part III.C.
[242] *See* discussion *supra* Part IV.
[243] *See* discussion *supra* Part IV.

jurisdictions with a means of redress against potentially improper decision-making during removal proceedings.