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P R O C E E D I N G S

(10:04 a.m.)

CHIEF JUSTICE ROBERTS: We will hear argument first this morning in Case 08-911, Kucana v. Holder.

Mr. Schoenfield.

ORAL ARGUMENT OF RICK M. SCHOENFIELD

ON BEHALF OF THE PETITIONER

MR. SCHOENFIELD: Mr. Chief Justice, and may it please the Court:

In enacting section 1252(a)(2)(B), Congress limited its reduction of judicial review to where the authority for the Attorney General's discretion is specified under subchapter 2 of chapter 12 of Title 8.

Congress did not express any intent to remove the courts' jurisdiction to review discretionary decisions, the authority for which is specified under any other subchapter or in regulations, nor did Congress express any intent to delegate its constitutional responsibility to determine Federal jurisdiction to the Attorney General --

CHIEF JUSTICE ROBERTS: Under what authority were these regulations issued?

MR. SCHOENFIELD: The regulation that grants discretion with regard to motions to reopen comes from a

1 section in subchapter 1, not subchapter 2, of the
2 regulations. And that was authorized by section 1103 of
3 Title 8.

4 I should say the authorizing statute for
5 the regulation is in subchapter 1, not subchapter 2.
6 And that's --

7 JUSTICE SCALIA: How does that -- how does
8 that read? I -- I recall the briefs say that, but I
9 don't recall reading it. Is it -- does it appear
10 somewhere?

11 MR. SCHOENFIELD: Section 1103, Your Honor?

12 JUSTICE SCALIA: The -- the provision that
13 -- that you contend provides the authority for the
14 Attorney General's regulation.

15 MR. SCHOENFIELD: Section 1103(g)(2)
16 authorizes the Attorney General to --

17 JUSTICE SCALIA: I know. Where is it, I'm
18 asking? Is it -- is it in the briefs somewhere?

19 You know, it's nice to know what we are
20 talking about. When -- when you are relying on a
21 section, it would be nice to have it in the materials.
22 I mean, I guess I can send for it, but --

23 MR. SCHOENFIELD: Sure. It -- it indicates,
24 on page 18 of the reply brief, that, quote, "Establish
25 such regulations... as he deems necessary for carrying

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

2 The fact that the statute we are focused on
3 states that authority must be specified in this
4 subchapter -- being subchapter 2 --

5 JUSTICE GINSBURG: Two. The -- the key word
6 that is emphasized in this case is it's "under,"
7 instead of "in."

8 MR. SCHOENFIELD: The words used in the --
9 in the statute is "under," which, of course, has a
10 variety of definitions. We believe that taking the
11 statute in context, that the correct definition to apply
12 is "according to" or "within."

13 JUSTICE GINSBURG: It would be clearer if
14 they had said "in."

15 MR. SCHOENFIELD: Congress could have said
16 "in," but I think Congress made it clear by using the
17 phrase "authority specified under," so we're not -- we
18 don't have a situation where, as Congress usually would
19 do, they would say: a regulation under such and such a
20 statute, where Congress uses the word "regulations."
21 There is the -- the term "regulation" is not used in the
22 statute.

23 CHIEF JUSTICE ROBERTS: If you were to
24 evaluate the validity of the regulation, as opposed to,
25 like, an APA case or similar to that, what statutory

1 provision would you look to, to see if the regulation
2 was consistent with that statutory provision?

3 MR. SCHOENFIELD: We would look to section
4 1103 in subchapter 1.

5 JUSTICE SCALIA: So it really doesn't matter
6 what "under" means, right? I mean, even -- even if you
7 accept the other interpretation of "under," to wit, that
8 it includes regulations pursuant to the subchapter, your
9 point is that this regulation is not even pursuant to
10 the subchapter.

11 MR. SCHOENFIELD: That's absolutely correct,
12 Your Honor. Although we don't think regulations are
13 included, even if they were, it's not in the subchapter.

14 JUSTICE SCALIA: I understand. Yes.

15 CHIEF JUSTICE ROBERTS: Yes, but -- is that
16 right? Would -- would subchapter 1 give you much
17 insight into the scope of the regulation and how it was
18 a fair interpretation of the authority under which the
19 Attorney General purported to act?

20 MR. SCHOENFIELD: I think that in terms of
21 looking at the discretion of the Attorney General,
22 historically, on motions to reopen, there have been --
23 there has been discretion.

24 What the regulation did was to codify that
25 historical authority and to be consistent with what the

1 courts had always done, but I think, in interpreting
2 the scope of Congress's intent to reduce judicial
3 review, we need to be very careful about that,
4 obviously. And so, therefore, when it says "as under
5 authority specified in this subchapter," we need to find
6 the authority in the subchapter, which we don't.

7 JUSTICE KENNEDY: The -- the -- subchapter 2
8 does talk about a special rule on reopening for battered
9 spouses, children, and parents. Is that a statute where
10 the discretion is committed to the Attorney General?

11 MR. SCHOENFIELD: No, Your Honor, because
12 subchapter 2 does not say that the Attorney General has
13 discretion to decide motions to reopen. That language
14 is only found in the regulation. The only reference --

15 JUSTICE KENNEDY: So -- so it -- so absent
16 the regulation, you would interpret the statute as
17 saying there is no discretion?

18 MR. SCHOENFIELD: Absent the regulation, I
19 would interpret the statute as being silent as to the
20 matter.

21 JUSTICE KENNEDY: No, that wasn't my
22 question. Let's say there's no regulation. And the
23 statute says, number one, there shall -- so subchapter 2
24 of the statute says, number one, there shall be motions
25 to reopen. And then there is a special rule for

1 battered spouses.

2 Now, you would interpret that statute,
3 absent any regulation, as saying this is not within the
4 discretion of the Attorney General?

5 MR. SCHOENFIELD: I would interpret the
6 statute as not providing for discretion, yes, Your
7 Honor.

8 JUSTICE GINSBURG: What was the --

9 JUSTICE KENNEDY: Well, how does an Attorney
10 General decide without -- without using discretion? He
11 must grant, in any case? Whether a battered spouse
12 waits for 15 years, he must grant?

13 Just under the statute, now.

14 MR. SCHOENFIELD: No.

15 JUSTICE KENNEDY: This is hypothetical.

16 MR. SCHOENFIELD: Yes.

17 No. I'm -- I'm not trying to say that, Your
18 Honor. What I'm trying to say is that --

19 JUSTICE KENNEDY: Well, then there must be a
20 discretionary component implicit.

21 MR. SCHOENFIELD: I would disagree in -- in
22 this way: If the statute is silent as to matters of
23 discretion, the Court can look to -- the Court could
24 look to other sources to determine --

25 JUSTICE GINSBURG: Could you clarify, what

1 is the provision about battered spouses? I thought that
2 that had to do with you could have more than one
3 petition to reopen.

4 MR. SCHOENFIELD: That's correct, Your
5 Honor. But --

6 JUSTICE GINSBURG: But the rule is you may
7 reopen once under that -- that provision on battered
8 spouses, but if you are in that category, you can reopen
9 again?

10 MR. SCHOENFIELD: I believe that's correct,
11 Your Honor. I believe that the provision on battered
12 spouses creates in a -- allows you to bring more than
13 one motion to reopen. It does -- it does not address
14 the issue of discretion.

15 JUSTICE SCALIA: Why -- why would it -- I
16 don't -- the big obstacle I find with your position is
17 that it doesn't make any sense.

18 Why would Congress want to exclude review
19 for discretionary judgments by the Attorney General that
20 are recited explicitly to be discretionary in the
21 statute, but provide judicial review for judgments that
22 are just as lawfully discretionary because the Attorney
23 General is given the authority to make them
24 discretionary and has done so?

25 I mean, a discretionary judgment is a

1 discretionary judgment. Why -- at least if it's a
2 legitimate one. I can understand why you would say
3 discretion which is given to the Attorney General under
4 the statute, as opposed to discretion which he has
5 wrongfully assumed, but -- but both -- both exercises of
6 discretion are just as lawful, right, under the statute?
7 One is explicit in the statute, and the other is
8 pursuant to the authority of the Attorney General to
9 make it discretionary.

10 Why would Congress want the one to be
11 subject to judicial review and not the other?

12 MR. SCHOENFIELD: Judicial review of motions
13 to reopen has -- has been the traditional normal process
14 for the court to take. I think what Congress was doing
15 here was saying: In certain specified instances, we are
16 going to remove judicial review, but not in all
17 instances.

18 And the question is, where did Congress draw
19 the line? Congress --

20 JUSTICE SCALIA: Yes, and I'm saying why
21 is it a rational line to say -- I think it's a rational
22 line to say, when lawful discretion is being exercised,
23 since it's a discretionary judgment, you're not entitled
24 to it anyway, and therefore, we won't review it. That
25 makes some sense.

1 And I -- but where discretion is lawfully
2 exercised, why would -- why would Congress say, oh, when
3 the discretion is lawfully exercised because the statute
4 says so, we have one approach, but where discretion is
5 lawfully exercised only because the statute allows the
6 Attorney General to prescribe discretion, we will not
7 allow it? I don't understand why -- why it would want
8 to do that.

9 MR. SCHOENFIELD: Well, let me suggest
10 several reasons, Your Honor.

11 JUSTICE SCALIA: Okay.

12 MR. SCHOENFIELD: First, if the Court was to
13 read the statute as allowing a regulation to create
14 discretion and, therefore, to remove judicial review --

15 JUSTICE SCALIA: Well, you -- you don't --
16 you don't contest that the regulation can provide
17 discretion. You -- you don't say the regulation is
18 invalid.

19 MR. SCHOENFIELD: That's correct.

20 JUSTICE SCALIA: So it is a valid exercise
21 of discretion, right?

22 MR. SCHOENFIELD: And courts frequently
23 review decisions for abuse of discretion. And motions
24 to reopen, I would suggest, are particularly important
25 because it creates a safety net for review. It deals

1 with -- like, rule 60(b) of the Federal rules, it deals
2 with potentially new evidence, matters that weren't
3 available to bring initially, and it's important that
4 potential mistakes be reviewed.

5 JUSTICE KENNEDY: I just want to return for
6 a moment to the battered spouse provision. The battered
7 spouse provision specifically says that in the Attorney
8 General's discretion, he may waive the time limit for
9 the 1 year for the battered spouse.

10 Now, that surely is discretion specified --
11 and I think the word "specified" is important here --
12 specified in subchapter 2. So there should be no
13 judicial review as to that.

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

16 MR. SCHOENFIELD: Yes, as to the -- as to
17 waiving -- as to waiving the -- on the number of
18 motions, yes. On that point, yes.

19 JUSTICE KENNEDY: All right. So then the
20 thing that Congress cares about most is something the
21 court can't review. That is counterintuitive.

22 MR. SCHOENFIELD: Congress specified some 30
23 instances of discretion to the Attorney General in
24 subchapter 2, and I believe it drew the line there and
25 said, if we did not specify it in subchapter 2, then it

1 is reviewable, just as courts have traditionally
2 reviewed these matters. If there --

3 JUSTICE GINSBURG: The ones that have been
4 codified by statute -- those prior to the codification
5 were by regulation. Is that -- is that so?

6 MR. SCHOENFIELD: The regulation regarding
7 motions to reopen existed before the statute. Congress
8 could readily have made that part of the statutory
9 scheme if it had chosen to do so, but it did not.

10 If there are no further questions, I would
11 like to reserve the rest of my time for rebuttal.

12 CHIEF JUSTICE ROBERTS: Thank you, counsel.

13 MR. SCHOENFIELD: Thank you.

14 CHIEF JUSTICE ROBERTS: Ms. Saharsky.

15 ORAL ARGUMENT OF NICOLE A. SAHARSKY

16 ON BEHALF OF THE RESPONDENT

17 IN SUPPORT OF THE PETITIONER

18 MS. SAHARSKY: Mr. Chief Justice, and may it
19 please the Court:

20 The statute at issue does not bar judicial
21 review of denials of motions to reopen. And I would
22 like to go right to one of the questions that was asked
23 by Justice Scalia, which is: How do you make sense out
24 of this statute, in terms of what Congress is doing in
25 not allowing judicial review of specifications of

1 discretion in regulations, but -- I'm sorry, and
2 allowing judicial review of things that are specified in
3 regulations, but not things that are specified in the
4 subchapter?

5 And I think that the answer to this question
6 comes from the text of the statute, particularly if you
7 compare the two things that are in 1252(a)(2)(B)(i) and
8 (ii), that all of the things that are listed in (i) and
9 that are covered by (ii) are substantive decisions that
10 are made by the Executive in the immigration context as
11 a matter of grace, things that involve whether aliens
12 can stay in the country or not. And those are matters,
13 at the end of the day, that the Executive, in the
14 exercise of its immigration and foreign affairs power,
15 has the authority to decide and that Congress did not
16 want the Federal courts in the business of reviewing.

17 But what the Federal courts have often
18 reviewed are things where discretion is committed by
19 regulation, and these are procedural matters that
20 relates to whether an alien had a fair shot of getting
21 his claim heard by the agency and by the Federal courts.
22 Things like --

23 JUSTICE KENNEDY: What about my question
24 with reference to motions to -- to reopen? That is
25 specified under subchapter 2. That's right there in

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

2 Now, if you had no regulations on it,
3 wouldn't you say that would be within the discretion of
4 the Attorney General?

5 MS. SAHARSKY: I would say that the Attorney
6 General has the discretion to issue regulations with
7 regard to that --

8 JUSTICE KENNEDY: No. No, that's not my
9 question. Hypothetical, not a real case. Just a
10 hypothetical.

11 MS. SAHARSKY: Yes.

12 JUSTICE KENNEDY: Just so we can talk about
13 the statute. The statute says there -- subchapter 2,
14 the one we are most interested in, specifies -- and
15 that's one of the words -- that there shall be a motion
16 to reopen.

17 Now, don't you think that's within the
18 discretion of the Attorney General, absent any
19 regulations?

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

21 JUSTICE KENNEDY: All right. So absent a
22 regulation, there would be jurisdiction stripping under
23 that provision, right?

24 MS. SAHARSKY: No.

25 JUSTICE KENNEDY: Why?

1 MS. SAHARSKY: Because in the case that you
2 are positing, the discretion of the Attorney General is
3 implicit in the statute. It's not specified in the
4 statute. And here, Congress didn't say any time there
5 is a discretionary decision, which is what implicit
6 discretion would go to. It says: When discretionary
7 authority is specified.

8 Under this subchapter, that means that there
9 needs to be something specific, specified, explicit,
10 specifically noted in the text of the statute.

11 JUSTICE KENNEDY: All right. But you would
12 give me, or would you, the concession that -- or
13 agreement that the Attorney General's discretion to
14 waive the time limit for battered spouses is committed
15 to him? And that's non-judiciary reviewable, wouldn't
16 you think?

17 MS. SAHARSKY: That's right. That wouldn't
18 be reviewable. Congress used the language of
19 discretion --

20 JUSTICE KENNEDY: Again, that seems odd,
21 that the thing Congress cares about so much that it
22 makes a specific provision can't be subject to judicial
23 review.

24 MS. SAHARSKY: I think that that is like the
25 -- the various matters that Congress listed as specified

1 as discretionary within the text of the relevant
2 subchapter, that it decided that this was a matter of
3 Executive grace that it did not want the Federal courts
4 involved in.

5 But the Federal courts have long reviewed
6 things like denials of motions to reopen, continuance
7 denials, where you have a situation in which the Federal
8 courts wanted to make sure that aliens were getting a
9 fair chance to have their claims heard.

10 JUSTICE BREYER: So, in fact, if -- if what
11 we have is a motion in the category of grace, except for
12 asylum, saying, of course, the Justice Department makes
13 a decision that can't be reviewed. But then the
14 department, let's imagine, has a regulation, and it
15 says: Anyone can ask the department for a rehearing in
16 such a matter, and we'll decide as a matter of grace
17 whether to give you one.

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

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

20 JUSTICE BREYER: Why wouldn't it be
21 reviewed?

22 JUSTICE SCALIA: Sure.

23 JUSTICE BREYER: You just said it was. You
24 said every procedural decision is reviewed, which to me,
25 makes no sense to begin with, because I can't imagine

1 that Congress, while they don't want them to review the
2 substance at all, is perfectly happy to have the courts
3 review every detailed matter of extra time to file a
4 brief, extra time to have an oral argument. All those
5 matters would be reviewable, I guess, in your view.

6 MS. SAHARSKY: Two answers, Your Honor.
7 First, the standard of review here is abuse of
8 discretion. It has long been abuse of discretion. That
9 doesn't mean that the Federal courts are involved in
10 second-guessing the agency --

11 JUSTICE BREYER: Exactly the same is true of
12 the substantive decision. I mean, that has nothing to
13 do with it.

14 I want to know -- look, this is where I'm
15 going. I don't think your -- I can't find a reading of
16 this statute that makes sense, except for one which I am
17 trying on, and I'm sure there's a lot wrong with it,
18 that what Congress meant to do here is to take all the
19 procedural decisions, including reopening ones, and
20 treat them the same way that they are treating the
21 substantive decisions. So that in his case, he wins.
22 Because he gets review of the substance, he should get
23 review of a reopening. It's the same thing. And in
24 some other case, they'd lose, because if you don't get
25 review of the substance, you shouldn't get review of the

1 reopening. Both are the same thing. They are just
2 filed at different times.

3 So that, to me, is the only reading of this
4 statute that I have yet found that made sense. But
5 since no one argues for it, I'm sure I must be making
6 some huge mistake. But that's what you can tell me.

7 (Laughter.)

8 MS. SAHARSKY: I don't think you are, if I
9 am understanding you correctly. We actually have a
10 footnote in our opening brief where --

11 JUSTICE BREYER: Yes, but you are on the
12 wrong side, if you agree with it, because --

13 (Laughter.)

14 JUSTICE BREYER: No, you are on the right
15 side, because he wins. No, you're on the right side.
16 He wins. I take that back. I'm sorry.

17 (Laughter.)

18 MS. SAHARSKY: Well, let me try to explain.
19 There are a number of matters that are committed to the
20 agency's discretion after (i), things like adjustment of
21 status. And if the alien sought review, judicial
22 review, of an adjustment of --

23 JUSTICE BREYER: Yes.

24 MS. SAHARSKY: -- status determination, we
25 would say that's unreviewable under -- under (i).

1 JUSTICE BREYER: Yes.

2 MS. SAHARSKY: Let's say that he then files
3 a motion to reopen --

4 JUSTICE BREYER: Yes.

5 MS. SAHARSKY: -- where he is essentially
6 trying to relitigate his adjustment of status.

7 JUSTICE BREYER: Oh, but, wait, new things
8 have happened. He doesn't just want to relitigate it.

9 MS. SAHARSKY: Well, what the --

10 JUSTICE BREYER: New things have happened;
11 that's why he wants it reopened.

12 MS. SAHARSKY: What the courts of appeals
13 have said is if what he's challenging is a discretionary
14 determination that the Executive has already made, that
15 that motion to reopen would not be --

16 JUSTICE BREYER: No, he's not, but his
17 motion to reopen is -- it's my hypothetical; I want to
18 deal with it; I accept yours. My hypothetical is,
19 something new came up. That's why he wants it reopened.

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

21 JUSTICE BREYER: Something new came up.
22 That's why he -- I think, isn't it true, often people
23 want it reopened because something new came up?

24 MS. SAHARSKY: Well, certainly that's what
25 the statute requires them to do.

1 JUSTICE BREYER: Okay.

2 MS. SAHARSKY: It's not our experience that
3 every case that's filed is that way.

4 JUSTICE BREYER: No, no.

5 MS. SAHARSKY: But in your hypothetical,
6 when something new comes up, we understand Congress as
7 have wanting that to have been judicially reviewable.

8 JUSTICE BREYER: Oh, I'm asking you, what
9 possible sense could it make?

10 MS. SAHARSKY: Because Congress wants to
11 make sense that the alien is getting -- make sure that
12 the alien is getting a fair shot in terms of the
13 process.

14 JUSTICE BREYER: Look, we're -- two issues.
15 One is grace in respect to -- let's call it fraud, and
16 he loses. Something new comes up, and what does he
17 want? Grace in respect of fraud in light of this new
18 fact.

19 Now, my question would be: What possible
20 sense does it make to say the courts cannot review the
21 first, but they could review the second?

22 MS. SAHARSKY: If what he's seeking is a
23 review of an exercise of discretion, then that is not
24 reviewable, because of the reason that the initial
25 determination is not reviewable.

1 JUSTICE BREYER: Oh, by the way, this
2 reopening is done by regulation, not done by statute.
3 That's where I get to the problem.

4 You are trying to distinguish between
5 whether it's done by regulation or done by statute. And
6 I'm trying to distinguish on a very different context.
7 Treat the motion to reopen the same as you treat the
8 initial motion, whether it's done by regulation or
9 whether it's done by statute.

10 MS. SAHARSKY: Right, and what I'm
11 suggesting is that the difference there is between a
12 substantive determination that's a matter of grace and a
13 procedural determination to make sure that an alien gets
14 a fair shot, and it is --

15 CHIEF JUSTICE ROBERTS: Counsel, I -- I'm
16 sorry, do you want to finish?

17 Okay.

18 I -- I find it curious -- and maybe you can
19 illuminate it for me -- that the Justice Department is
20 before us, arguing that the Justice Department can't be
21 trusted without judicial review. And I find that doubly
22 curious when the Justice Department won on the opposite
23 position below.

24 I mean, are you suggesting that the statute
25 is so absolutely clear that you could not stand there

1 and say that your colleague down the hall in the Justice
2 Department could be trusted to exercise his discretion,
3 but in fact you are saying: I know we won on that, but
4 we are not going to defend it because we think the
5 Attorney General needs judicial review to help him stay
6 in line?

7 MS. SAHARSKY: In the vast majority of
8 cases, of course we believe that the Board can be
9 trusted, and that's why review is for an abuse of
10 discretion, and it has been for many years. This Court
11 has said in Dada --

12 CHIEF JUSTICE ROBERTS: Yes, but if you take
13 -- if you continued to argue the position you won on
14 before the -- before the Seventh Circuit, it wouldn't be
15 that the standard of review is -- is so deferential that
16 it is okay. It would be there is no review at all.

17 MS. SAHARSKY: That's right, but we did not
18 argue to the Seventh Circuit that there was no
19 jurisdiction here.

20 In fact, it has been our position since 2004
21 that the text of this statute, particularly the text,
22 the context, the history, is so clear that we could not
23 reasonably take the alternate position. It has been --

24 CHIEF JUSTICE ROBERTS: And the position of
25 the Department of Justice was the opposite before 2004,

1 correct?

2 MS. SAHARSKY: There are only a handful of
3 cases, and in those cases, several individual attorneys
4 argued that there was no jurisdiction. And as soon as
5 the leadership of the Office of Immigration Litigation
6 heard of those cases, it sat down with the text of the
7 statute and said: We think that the text here is clear,
8 and we don't think the jurisdiction is taken away. And
9 it directed all of the attorneys in the Office of
10 Immigration Litigation not to be making this
11 jurisdiction-stripping argument anymore.

12 And it has been the United States'
13 consistent position since then, and we urged it to the
14 Seventh Circuit below, that when you look at the text of
15 the statute, you look at authority specified under
16 this subchapter. It's Congress that specifies
17 authority. "Specified under this subchapter" means "in
18 this subchapter." It means "in the text of the
19 subchapter." And we have to answer this question in
20 this case by looking at the text that Congress enacted.

21 I acknowledge that there is not legislative
22 history, for example, to tell us what Congress intended
23 to do here, but we think that the answer comes from the
24 text of the statute. That if you are looking at the
25 substantive determinations that Congress was most

1 concerned about in 1996 when it enacted IIRIRA, those
2 were the things where Executive discretion was
3 exercised it did not want the Federal courts getting
4 involved in. But this --

5 JUSTICE KENNEDY: Can you give me an idea of
6 how many motions to reopen are brought to the courts for
7 review each year?

8 MS. SAHARSKY: Well, there are approximately
9 between 8 and 10,000 motions to reopen filed by the
10 Board of -- before the Board of Immigration Appeals each
11 year, and about between 15 and 20 percent of those are
12 granted.

13 So if you look at the -- the remaining 80 to
14 85 percent that are denied, the general appeal rate for
15 the courts of appeals is about 30 percent from the Board
16 of Immigration Appeals. So if you assume that the
17 appeal rate is about the same for motions to reopen, you
18 could get a number that way. So, you know, we -- there
19 are a substantial number --

20 JUSTICE KENNEDY: So we are talking about 2
21 or 3,000 petitions to the court each year?

22 MS. SAHARSKY: But the -- the point that we
23 are making is that there are these circumstances that
24 Congress has recognized, and this Court recognized it in
25 Dada. The motions to reopen serve several important

1 purposes, and, yes, they are reviewed under a very
2 deferential abuse-of-discretion standard. We do not
3 think in many cases that the Board was doing something
4 wrong and that it needs to be overturned.

5 But, for example, in the -- in a similar
6 context of continuance denials, say there was an
7 immigration judge who did not allow an alien to seek a
8 continuance in order to get an attorney to bring forth
9 his case before the immigration judge. Continuance
10 denials, some circuits, including the Seventh Circuit,
11 have said, are barred under this language.

12 We don't think that judicial review of that
13 is barred. We think that in the rare cases --

14 JUSTICE KENNEDY: Well -- but that would
15 be a question of law which is accepted.

16 MS. SAHARSKY: I -- I am not sure that it
17 would be a question of law in that circumstance.

18 CHIEF JUSTICE ROBERTS: So if you think it's
19 so bad, the Attorney General doesn't have to do it. Why
20 do you need a court to tell you that?

21 MS. SAHARSKY: I think that the courts have
22 long served a very important check on the Board's
23 authority and on the Board's exercise -- you know, the
24 Board has many cases before it. In rare instances --

25 CHIEF JUSTICE ROBERTS: You keep saying "the

1 Board" --

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

3 CHIEF JUSTICE ROBERTS: You keep saying "the
4 Board." Under the statute, it's the Attorney General,
5 correct?

6 MS. SAHARSKY: Yes, that's right, but the
7 statute also -- the Attorney General -- the Board acts
8 on behalf of the Attorney General under the statute,
9 so the Board is --

10 CHIEF JUSTICE ROBERTS: And if he doesn't
11 like what they do, he has the authority to act himself.
12 Whenever somebody delegates authority, they retain
13 authority to act themselves.

14 MS. SAHARSKY: That's right. The Attorney
15 General does police the Board, but the courts of appeals
16 have long done that too, particularly in the context of
17 motions to reopen.

18 This Court, just a couple of years ago in
19 Dada, recognized the important functions that motions to
20 reopen serve and assumed that there would be judicial
21 review of motions to reopen. In fact, it noted that
22 judicial review of motions to reopen, albeit under the
23 abuse-of-discretion standards, goes back to 1916, and we
24 just didn't see anything in 1996 to suggest that
25 Congress wanted to change that. And I think --

1 JUSTICE GINSBURG: Do we know where the
2 motion -- where -- where did it originate? Where did it
3 -- it was -- we now know it's in the regulations. It's
4 in the statute. But how did motions to reopen BIA
5 decisions originate?

6 MS. SAHARSKY: Before the BIA existed, so
7 back in the 1916 context, there were immigration
8 officers, and you could ask them to reconsider or reopen
9 your case. In -- I think it was 1940 or 1941, the Board
10 came into being, and the Attorney General quickly
11 enacted regulations that provided for either sua
12 sponte reopening or for the filing of a motion to
13 reopen. And those regulations existed in substantially
14 the same form until 1996, when they were amended to make
15 discretion explicit in the regulation, and the 1996 is
16 essentially the same form that it's in today. So there
17 has -- there has always been an assumption that there
18 can be such a thing as reopening.

19 And I -- I just want to focus on what
20 Congress was doing in 1996, because I think it's very
21 telling. We know that Congress was focused on enacting
22 bars to judicial review, and we also know that Congress
23 was codifying for the first time an alien's right to
24 file one motion to reopen.

25 But Congress just didn't make any effort to

1 make denials of motions to reopen judicially
2 unreviewable, and that's very telling, because there's
3 any number of ways that Congress could have done that.

4 JUSTICE ALITO: I didn't do the math fast
5 enough in my head when you were answering Justice
6 Kennedy's question, but is he correct that the effect of
7 accepting your argument is about 2,000 additional
8 appeals that -- that the Department of Justice will have
9 to brief and the courts of appeals will have to decide?

10 MS. SAHARSKY: You know, I -- I haven't done
11 the math on that, either, and I think it requires the
12 assumptions that I set out to Justice --

13 JUSTICE ALITO: Yes. On the assumptions
14 that you made, do you know what the -- the result is?

15 MS. SAHARSKY: I -- I don't, because we
16 haven't calculated the number of motions throughout, and
17 we only have total numbers in the courts of appeals.

18 But let me say, if you are concerned about
19 the burden on the courts of appeals, every court but the
20 Seventh Circuit that has considered the issue has found
21 that the provision at issue doesn't bar judicial review.
22 So I don't think that this --

23 JUSTICE KENNEDY: Have any of those courts
24 said that they don't have a workload problem?

25 (Laughter.)

1 MS. SAHARSKY: I think you would know better
2 than I would. We ask the judgment below to be reversed.

3 JUSTICE GINSBURG: May I ask you, before you
4 sit down: Your response to the briefs here suggests
5 that all of this is beside the point because this was
6 a -- a second motion to reopen, and the statute allows
7 only one?

8 MS. SAHARSKY: Well, this is comprehensively
9 addressed in footnote 18 in our reply brief, so I will
10 just address it briefly here -- but if you have follow-
11 up questions -- which is: If you look at the statutory
12 language, it says that an alien may file one motion to
13 reopen. It doesn't limit the Attorney General's
14 authority to allow more than one motion to reopen in
15 certain circumstances. And, in fact, it --

16 CHIEF JUSTICE ROBERTS: Thank you, counsel.
17 Ms. Leiter.

18 ORAL ARGUMENT OF AMANDA C. LEITER

19 AS AMICUS CURIAE SUPPORTING THE JUDGMENT BELOW

20 MS. LEITER: Mr. Chief Justice, and may it
21 please the Court:

22 Congress enacted IIRIRA to reduce the burden
23 that immigration cases imposed, and continue to impose,
24 on the Federal courts. The plain language of the Act
25 strictly limits Federal court jurisdiction to review the

1 discretionary decisions of immigration officials. In
2 fact, as this Court has explained, the theme of the
3 legislation was to protect the Attorney General's
4 discretion from the courts.

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

7 Before I discuss the language and meaning of
8 the section, I want to make one point very clear. The
9 section does not preclude judicial review of legal and
10 constitutional claims. Both of those are expressly
11 preserved by section 1252(a)(2)(D).

12 JUSTICE SOTOMAYOR: But that provision came
13 after the original jurisdiction stripping, a number of
14 years after. So why should we look to that to inform
15 what Congress intended at an earlier time with respect
16 to judicial review --

17 MS. LEITER: Well, I have --

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

20 MS. LEITER: I have two answers to that,
21 Your Honor. The first is, to the extent that the Court
22 is concerned now about taking away judicial review of
23 the really sort of important central motions to reopen
24 --

25 JUSTICE SOTOMAYOR: You're talking about --

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

3 JUSTICE SOTOMAYOR: You're talking about us
4 acting as policymakers. The question is: Why should we
5 be looking to that to define what Congress intended
6 then, when it --

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

8 JUSTICE SOTOMAYOR: -- stripped jurisdiction
9 earlier or granted it?

10 MS. LEITER: I believe this Court always
11 would have understood and Congress understood that its
12 jurisdiction strip would have had an exception for
13 constitutional claims even as of 1996.

14 In 1988, this Court issued Webster v. Doe,
15 finding that section 701(a)(2), which is quite parallel
16 to this provision, recognizes certain claims as
17 committed to agency discretion by law. Congress --
18 excuse me -- this Court in 1988 recognized that
19 provision as requiring a constitutional exception. And
20 I think Congress, acting in 1996, would have recognized
21 that the same -- very similar language in section
22 1252(a)(2)(B)(ii) would also have a constitutional
23 exception.

24 I agree with you that there would not have
25 been a legal exception but for the enactment of

1 1252(a)(2)(D).

2 JUSTICE SOTOMAYOR: Well, couldn't we look
3 at the fact that when Congress was considering whether
4 to put back into the jurisdiction-stripping statute an
5 exception for constitutional claims, it then knew,
6 because the courts of appeals accepted the Seventh, who
7 just recently did it, were routinely taking jurisdiction
8 over motions to reopen?

9 Don't you think that was the time for them
10 to tell us: Hey, you guys got it wrong; we are going to
11 make motions to reopen statutorily discretionary, so if
12 there's any doubt about this, let's clear up what our
13 intent is.

14 MS. LEITER: Well, Justice Sotomayor,
15 certainly had Congress done that, we wouldn't be here.
16 However, it is not true that the courts of appeals as of
17 that date had been uniform in their view that section
18 1252(a)(2)(B)(ii) did not extend to regulations.

19 None had extended it to motions to reopen,
20 but in *CDI Services v. Reno* in 2002, the Sixth Circuit
21 recognized section 1252(a)(2)(B)(ii) as extending to
22 regulations. That was in the context of a -- a petition
23 for a visa extension. And *Onyinkwa v. Ashcroft* in 2004,
24 the -- excuse me -- Eighth Circuit similarly recognized
25 that. And then in *Yerkovich v. Ashcroft* in the same

1 year, the Eighth -- excuse me -- the Tenth Circuit also
2 recognized 1252(a)(2)(B)(ii) as extended to regulations.

3 So the confusion plainly existed as of the
4 date of the REAL ID Act. And I think the burden was on
5 Congress, frankly, in that position, actually to clarify
6 the reverse. If Congress wanted to make clear at that
7 point --

8 JUSTICE SOTOMAYOR: Wait a minute, you're --
9 you're arguing from a real negative, because
10 some courts had said that other statutes were covered by
11 the jurisdictional bar. And you're arguing that they
12 knew that no court had held that motions to reopen --
13 that there was no jurisdiction for motions to reopen,
14 that somehow it should have --

15 MS. LEITER: With respect, Your Honor, it is
16 the same statute at section 1252(a)(2)(B)(ii). And they
17 were holding exactly what the Seventh Circuit held and
18 what we argue here, which is that section
19 1252(a)(2)(B)(ii) extends two things specified as
20 discretionary in regulations issued under the Act.

21 They had not yet considered the issue with
22 respect to motions to reopen, but with respect to other
23 issues specified as discretionary in regulations, they
24 held that the -- that the Act clearly extended to those
25 issues and stripped the courts of jurisdiction.

1 JUSTICE GINSBURG: But on a motion to
2 reopen, there is -- Seventh Circuit stands alone,
3 doesn't it?

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

5 JUSTICE GINSBURG: And how many circuits are
6 on the other side?

7 MS. LEITER: I believe there are six.

8 JUSTICE GINSBURG: Was there any -- ever a
9 decision in any of those six circuits that went the way
10 the Seventh Circuit went on the motion to reopen?

11 MS. LEITER: No, Your Honor. And that
12 appears to be because the circuits, even the Sixth,
13 Eighth, and Tenth, were persuaded by the existence of
14 the consolidation provision, section 1252(b)(6), but
15 motions to reopen should for some reason be treated
16 differently than other things specified as discretionary
17 in regulations. But their --

18 JUSTICE SCALIA: Have they adhered -- have
19 those other courts that you said originally said that
20 other discretionary judgments made discretionary by
21 regulation were non-reviewable, have they adhered to
22 the -- to that view as to those other --

23 MS. LEITER: They have not repudiated the
24 view, but they have not adhered to it with respect to
25 motions to reopen. They seem to be reading the

1 statute --

2 JUSTICE SCALIA: Oh, I understand. I am
3 asking: Have they treated motions to reopen
4 differently?

5 MS. LEITER: Yes, they seem to treat motions
6 to reopen differently as reviewable, and they have been
7 persuaded to do that by the existence of section
8 1252(b)(6), the consolidation provision.

9 But as I explained earlier --

10 JUSTICE SCALIA: Has any of them, since
11 switching to -- or since holding this with respect to
12 motions to reopen, reaffirmed their view with regard to
13 other discretionary judgments?

14 MS. LEITER: Not that I have found, Your
15 Honor, but nor have they repudiated it. I haven't found
16 a situation in which, after considering motions to
17 reopen, they went back again to consider visa
18 extensions, for example.

19 JUSTICE KENNEDY: But we are talking about
20 what's "specified" under subchapter 2. I think that's
21 an important word, in addition to "under." And motions
22 to reopen are specified, and it doesn't say
23 "discretion." It just says there shall be a motion to
24 reopen.

25 Do you get any mileage from that, or you

1 seem to rest your argument instead on the regulations?
2 And I think that's almost a weaker argument.

3 MS. LEITER: Frankly, Your Honor, I do not
4 think that specification of discretion -- with the
5 exception of the battered spouse's provision that you --
6 that you raised earlier, I do not think the
7 specification of discretion with respect to other
8 aspects of motions to reopen is sufficiently clear in
9 the statute to convey discretion.

10 JUSTICE KENNEDY: So you -- you consider --
11 you -- you think it's plausible to have a regime where
12 motions to reopen are not discretionary at all, absent
13 regulation? That would seem very odd to me.

14 MS. LEITER: No, Your Honor. I think when
15 Congress referred to a specification of discretion in
16 section 1252(a)(2)(B)(ii), they intended, effectively,
17 to provide a notice requirement. There are many things
18 that the Attorney General did under the Immigration Acts
19 prior to the enactment of IIRIRA, after the enactment of
20 IIRIRA, that were understood to be discretionary.

21 What the statute calls for is a different
22 category of discretionary decisions: Those things that
23 are specified as discretionary to be unreviewable; other
24 things that have long been understood to be
25 discretionary remain reviewable.

1 JUSTICE BREYER: Do you want to say anything
2 about, apparently, this idiosyncratic thought that I
3 have had? This is -- it's -- my thought is that both
4 sides are arguing: We just look to see if it's
5 discretion given by statute or given by regulation, and
6 we draw the line on reviewability there.

7 Now, what we're talking about is a big set
8 of cases, including frauds and various things where
9 there is some discretion substantively to let the person
10 stay. Now, on that big set of cases, the statute says
11 if it's fraud, et cetera, we don't want review. But if
12 it's asylum, we want review. Isn't that how it works,
13 basically -- basically?

14 MS. LEITER: Basically.

15 JUSTICE BREYER: Okay. Fine. So, I'm
16 saying instead of looking to see whether it's a
17 rehearing or procedural or reopening matter, period, you
18 look to see whether it has to do with the basic
19 category. If it's something that Congress doesn't want
20 courts to meddle in, that carries over to reopening,
21 which is the same thing; it carries over to rehearing
22 petitions -- they're all about the same thing. And if
23 it's something that Congress did want courts to meddle
24 in, like asylum, it carries over to reopening, and it
25 carries over to rehearing petitions and other such

1 matters.

2 So Congress has one simple judgment: We
3 want courts to meddle in these affairs substantively or
4 we don't. And our job would be to say, right, if that's
5 what you want, unless it's unconstitutional, that's what
6 we give you.

7 Do you see the way -- I'm just drawing the
8 line vertically instead of horizontally. But I agree,
9 nobody has. Now, to me that makes sense, but apparently
10 to no one else. So I would like to be talked out.

11 (Laughter.)

12 MS. LEITER: With respect, Your Honor, I
13 think that no one includes Congress. I think that
14 that -- that that line --

15 JUSTICE BREYER: I didn't leave anyone out.
16 No one is universal.

17 (Laughter.)

18 MS. LEITER: That line might have made sense
19 had Congress drawn it, but Congress --

20 JUSTICE BREYER: How do we know they didn't?
21 I mean, there's such a thing in the law called -- what
22 we think of often -- they often use the word "ancillary"
23 to describe it. And when Congress passes a thing that
24 has to do with X, you often interpret a statute to carry
25 with it the application to ancillary matters, the thing

1 that are bound up in X, even though they don't have a
2 separate sentence because you can't think of everything
3 that describes every matter ancillary to X. That's
4 normal in law.

5 MS. LEITER: The words Congress used here,
6 though, are those decisions specified as discretionary
7 kind or --

8 JUSTICE BREYER: Yes, and we would say those
9 decisions specified include those decisions that are
10 totally wrapped up in the same thing. So that if a
11 person tries to escape this by simply making his main
12 argument in a rehearing petition, he can't escape it,
13 because it's really the same thing.

14 MS. LEITER: I agree, Your Honor, that that
15 category of things is unreviewable. What I'm struggling
16 with is that the regulation at issue here, regulation
17 1003.2, specifies in no uncertain terms that motions to
18 reopen are discretionary, and therefore, if "specified
19 under" extends to regulations, there is no way in my
20 view not to extend --

21 JUSTICE BREYER: Well, why not? This is not
22 a matter that is the subject of the special provision.
23 A reopening petition is the same kind of thing,
24 identical to the initial petition, and so something that
25 applies to the initial petition applies to the reopening

1 petition because they are the same kind of animal. If
2 you have a -- you know -- I mean, okay. I'll forget it.
3 I see the point, no point going further.

4 MS. LEITER: With respect, Your Honor, I
5 think the language Congress used was clear here and
6 extends clearly to decisions -- decisions specified as
7 discretionary under the subchapter. Congress could
8 easily have said decisions specified as discretionary in
9 the subchapter, but it did not. And the paragraphs --

10 JUSTICE GINSBURG: Is there any rhyme or
11 reason why some universe of things that could be
12 reviewed in court, Congress put some of the them in the
13 statute and left others out?

14 MS. LEITER: Well, Justice Ginsburg, the
15 description of something as discretionary has
16 consequences for the Attorney General, for the
17 administrative process. It has only the ancillary
18 consequence of stripping the courts of jurisdiction. So
19 court -- excuse me -- the Attorney General needs to
20 determine a rule of evidence for motions before it,
21 needs to determine rules of procedure, needs to
22 determine a rule of decision, and so there are -- there
23 are categories of matters where I could imagine Congress
24 saying to itself: The rule of decision here is really
25 not something with which we need to concern ourselves.

1 It is up to the Attorney General to decide whether this
2 is a discretionary decision or whether this is instead a
3 decision that he or she would like to -- to constrain in
4 some way by having certain specific rules of decision to
5 go by.

6 JUSTICE GINSBURG: Well, it's -- the
7 question isn't whether the Attorney General or the BIA
8 exercises discretion. In all of these, the Attorney
9 General exercises discretion. The question is immunity
10 from court review, and ordinarily that's done by
11 statute. And I do not know of another instance, perhaps
12 you do, where the decision whether a matter that the
13 agency rules on will be exempt from judicial review is
14 made by the agency itself -- the very agency that makes
15 the decision, rather than by the legislature.

16 MS. LEITER: I will answer your question
17 first. I can imagine Congress believing that there are
18 categories of decisions where even the rules of decision
19 are best left to the agency to determine. And in that
20 category, Congress leaves it open to the agency to
21 decide whether to specify those matters as discretionary
22 or instead to specify more constraining rules of
23 decision.

24 With respect to your question about
25 examples --

1 JUSTICE GINSBURG: And -- and I'm not
2 questioning the discretion. The Attorney General has
3 been given discretion to rule on the matter, but the
4 question is: Does that mean that the exercise of
5 discretion will be immune from judicial review?
6 Congress might well say: Agency, you decide what's
7 within your discretion. But not say: And, Agency, we
8 delegate to you, too, the matter whether the court will
9 -- will review your exercise of discretion.

10 MS. LEITER: Right. Two things, Your Honor.
11 First, the jurisdictional consequence of the
12 discretionary specification here attached after the
13 Attorney General applied the label. So here this is not
14 a situation in which the Attorney General was making a
15 determination as to what things should be reviewable.
16 The Attorney General was making a -- a decision as to
17 what rule of decision to apply in motions to reopen, and
18 Congress later attached the jurisdictional significance.

19 JUSTICE GINSBURG: If -- if your
20 interpretation of "under" is right.

21 MS. LEITER: Well, Congress acted later and
22 may, if our interpretation is correct, have attached the
23 jurisdictional significance at that point, yes.

24 With respect to your question about other
25 examples of situations in which an agency is left to

1 make a determination that has jurisdictional
2 consequences, I have a few examples. The first is the
3 Communications Act of 1934. This Court recognized in
4 Global Crossing that the agency there could determine
5 that a -- that conduct under the Act was unreasonable.
6 That is an administrative determination under one
7 section of the Act. It has the consequence under
8 another section of the Act of creating a cause of action
9 for individuals to recover in damages.

10 A second example is actually section
11 701(a)(2) of the Administrative Procedure Act which
12 refers to categories of decisions that are committed to
13 agency discretion by law. Courts have understood that
14 that is not the broad subset of discretionary decisions
15 but instead that subcategory of discretionary decisions
16 for which there is no law to apply, and many courts
17 recognize that the agencies may create the law to apply
18 in those circumstances.

19 So an agency may enact a regulation that
20 binds the agency's own discretion and renders the issue
21 reviewable where it would not otherwise have been. So
22 there --

23 JUSTICE KENNEDY: Do you think absent the
24 special provisions of the -- of the immigration act that
25 we are considering, if it were just under the APA, that

1 a motion to reopen would be committed by law to agency
2 discretion under 702? Because it seems to me that, you
3 know, there are sources we could look to, to see whether
4 or not it's rationally exercised.

5 MS. LEITER: I do not, Your Honor. I
6 believe there is law to apply in this circumstance,
7 particularly after enactment of IIRIRA. Congress now
8 has provided guidelines for when some motions to reopen
9 should be granted, the timeliness of motions to reopen,
10 et cetera. So I do not think this is the broad
11 category of -- or sorry -- the narrow category of things
12 that are committed to agency discretion by law. I was
13 using the example solely to show that there are other
14 circumstances in which an agency action has the
15 consequence of restoring --

16 JUSTICE KENNEDY: Well, I actually think it
17 helps you because -- there is -- there is something to
18 review, the agency does have discretion. But this
19 statute strips it, because it provides for motions to
20 reopen, specifically. But, of course, you --

21 MS. LEITER: Yes, and --

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

23 JUSTICE SCALIA: Are you going to talk about
24 "under"?

25 (Laughter.)

1 MS. LEITER: I would love to talk about
2 "under," Your Honor.

3 JUSTICE SCALIA: Good.

4 MS. LEITER: And if I may, I would like to
5 start on pages 6a and 7a. I have an illustration
6 here -- excuse me -- of the -- of the government's
7 opening brief. An illustration here of the fact that
8 Congress knows what it is doing when it chooses
9 prepositions. If you look at the section that
10 immediately precedes 1252(a)(2)(B)(ii) -- that is
11 section 1252(a)(2)(A). In (a)(2)(A) --

12 JUSTICE SCALIA: Where is this?

13 JUSTICE KENNEDY: Now, what -- on what page?
14 Look at page 6 --

15 MS. LEITER: I'm sorry. Pages 6a and 7a of
16 the government's opening brief -- so the Respondent's
17 opening brief.

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

20 MS. LEITER: And pages 6a and 7a in the
21 appendix. This is -- this is provision 1252(a)(2)(A) --
22 and borrowing the term "Romanette" -- Romanette (i),
23 (ii), and (iv) -- refers clearly to things provided in
24 subsection (e) of the statute; whereas, Romanette (iii)
25 refers to the application of such section to individual

1 aliens including the determination made under section
2 1225(b)(1)(B) of this title. That is a determination by
3 immigration officials at the border as to whether an
4 individual who is otherwise inadmissible may have
5 grounds to be detained and allowed to go through asylum
6 proceedings. Clearly there, where Congress recognized
7 that there was an administrative determination to be
8 made, it used the preposition "under" to reach through
9 the statute to the administrative determination.

10 I also have three examples, Your Honor, of
11 situations in chapter 8 in which Congress actually uses
12 the phrase "specified under," the same phrase at issue
13 here, to refer again through the statute to
14 administrative determinations. These are not
15 unfortunately in the briefs.

16 8 U.S.C. 1227 -- excuse me. Let me start
17 with 8 U.S.C. 1375a(a)(4) and (a)(6). This is a
18 provision that calls for the preparation of a pamphlet
19 on the legal rights of immigrant victims of domestic
20 violence. Paragraph 1375a(a)(6) calls for the pamphlet
21 to be distributed and made available, quote, "in the
22 language as specified under paragraph (4)." Turning to
23 paragraph (4) then, it clearly anticipates an
24 administrative determination, because it says the
25 Secretary of Homeland Security in consultation with the

1 Attorney General and the State Department shall
2 determine at least 14 languages into which the pamphlet
3 is translated.

4 So that's an example of Congress using
5 "specified under" to refer, yes, in the first instance
6 to statutory language, as it does in our provision,
7 specified under subchapter 2, but it is a situation in
8 which the statutory language to which "specified under"
9 refers clearly anticipates some exercise of
10 administrative authority.

11 Here, the exercise of administrative
12 authority is the specification of languages.

13 In our example, it is the specification of
14 procedures for motions to reopen.

15 JUSTICE STEVENS: May I ask this question
16 before you -- if it's is an appropriate time?

17 What is your response to their argument they
18 raise in the reply brief that this was specified under
19 subchapter 1, rather than subchapter 2?

20 MS. LEITER: Your Honor, subchapter 1
21 includes the language that grants authority broadly to
22 the Attorney General to issue regulations implementing
23 the chapter, and the language implemented by the motions
24 to reopen regulations exists in subchapter 2.

25 The motion to reopen regulations very

1 clearly implements Section 1229(a), which is in
2 subchapter 2. And a question asked earlier was where
3 one would look to determine whether Regulation 1003.2 is
4 a valid regulation, a reasonable interpretation of the
5 statute, and for that, I believe one would have to look
6 at the content of section 1229(a), which is in
7 subchapter 2, so although --

8 JUSTICE SCALIA: Except that the text refers
9 not just to the -- the discretion, it refers -- it says
10 the authority for which is specified under this
11 subchapter and the authority to issue that -- the
12 authority to issue the regulation is under subchapter 1.

13 MS. LEITER: Yes, Justice Scalia. I am
14 certainly not --

15 JUSTICE SCALIA: No. You would have to say,
16 no, Justice Scalia, if you want to win this.

17 (Laughter.)

18 MS. LEITER: Yes, the phrase includes the
19 word the authority, Justice Scalia, but I don't think it
20 can bear the weight that Petitioner and the government
21 put on it. I believe that "authority" there references
22 the authority that is clearly granted in section 1103 to
23 implement the entire chapter.

24 But what the section does is to indicate
25 where the specification of discretion must be located,

1 and in this case, it must be located in either the
2 statute or regulations issued under it, and to see
3 that, I think the easiest illustration is to suppose
4 that the statute read: No court shall have jurisdiction
5 to review any decision specified as discretionary --
6 excuse me -- decision, the authority for which is
7 specified as discretionary in the subchapter or in
8 regulations issued thereunder.

9 If Congress had used belts and suspenders in
10 that way and made itself doubly clear, there would be no
11 question here that the word "authority" was somehow
12 superfluous or misplaced.

13 JUSTICE BREYER: Do you have any reason why
14 Congress would have taken great trouble to make certain
15 that courts can review asylum decisions, but Congress
16 would not have wanted a court to review a reopening of
17 an asylum matter, which can be done, after all, only if
18 something new comes up that justifies asylum?

19 For example, a new government comes and
20 takes over a country, and now they are going to
21 murder the person, and that couldn't be considered the
22 first time because the old government was there, and
23 they were just going to torture him, all right? So --
24 so there's something new here.

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

1 to get courts involved in the first decision, but we
2 want to keep them out of the second decision?

3 MS. LEITER: The -- the best answer I have,
4 Justice Breyer, is that Congress wanted to cut off
5 review at some point, and it was a question of numbers
6 of bites at the apple. I understand your point, that --
7 that the second --

8 JUSTICE BREYER: Reopening is not a bite at
9 the apple. Reopening is a new thing; at least, by and
10 large, and supposed to be -- a change.

11 MS. LEITER: And that may have been part of
12 Congress's concern, that, of course, by and large, it is
13 supposed to be, but it may not always be used in that
14 way, and, at some point, Congress wanted to draw the
15 line. And I note here that Congress did not -- I mean,
16 what Congress did here was to set up a regime under
17 which things that are specified as discretionary are
18 unreviewable.

19 But there is some room here for the Attorney
20 General to remove the specification of discretion if
21 that system is unworkable --

22 JUSTICE SCALIA: And, of course, if your
23 interpretation produces the anomaly that Justice Breyer
24 just described, the government's interpretation produces
25 the opposite anomaly. Right?

1 MS. LEITER: Certainly, Your Honor.

2 JUSTICE BREYER: Exactly, and that's why I
3 ended up with this unusual --

4 (Laughter.)

5 CHIEF JUSTICE ROBERTS: And I suppose it's a
6 large question, if you are talking about, presumably,
7 the unusual cases in which the motion to reopen is -- is
8 justified, that you are talking about 2,000 or
9 3,000 cases, and the question is whether or not those
10 are -- should be reviewed in the executive branch or
11 should be reviewed in the judicial branch.

12 MS. LEITER: Well, the math that we were
13 given earlier, I believe, does come out to about 2,000
14 appeals per year, but I remind the Court that section
15 1252(a)(2)(D) preserves those that raise questions of
16 law or constitutional questions for review.

17 So this is a far narrower -- I assume,
18 although I do not have the numbers, but I assume a far
19 narrower subset of those decisions that would be
20 rendered unreviewable here, only those for which a
21 discretionary factual determination has been made by the
22 agency.

23 CHIEF JUSTICE ROBERTS: So we are looking
24 for needles in -- in a haystack, right?

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

1 Your Honor. I don't know what percent. I am not sure
2 whether it's a fraction of the haystack or a needle
3 within it, but -- but it is certainly a subset of the --
4 of the category of cases.

5 JUSTICE GINSBURG: Do you have other
6 examples where -- "under" is commonly used -- statute
7 and regulations thereunder -- but in the appendix that
8 you have given us, it says, "under regulations."
9 "Under" is always coupled with "regulations," and you
10 want us to transpose that to a statute that
11 conspicuously does not say, "regulations."

12 MS. LEITER: Justice Ginsburg, we included
13 the appendix to illustrate how Congress uses the
14 preposition "under," when it is talking about
15 regulations, so we specifically looked for examples
16 where Congress was talking already about regulations,
17 and the
18 preposition that accompanies that is always "under."

19 I do have two further -- excuse me.

20 JUSTICE SCALIA: You said, earlier, that you
21 had three examples --

22 MS. LEITER: I have two further --

23 JUSTICE SCALIA: -- that were not in your
24 brief. You better spit them out, or we won't know about
25 them. What are the other two?

1 (Laughter.)

2 MS. LEITER: Thank you, Justice Scalia. The
3 other two are section 1227(a)(1)(H), which refers to
4 1182(a)(5)(A). 1227(a)(1)(H) -- both in Chapter 8 --
5 refers to grounds of inadmissibility -- excuse me --
6 specified under paragraph (5)(A) of section 1182(a).

7 Turning to paragraph (5)(A) of section
8 1182(a), that calls for the Labor Department to
9 determine whether the United States needs immigrant
10 laborers in a particular category.

11 So, again, it's a use of the phrase
12 "specified under" to refer to statutory language, but
13 through the statutory language to what is clearly an
14 anticipated exercise of administrative discretion.

15 JUSTICE SCALIA: 1227(a)(1)(H). What's the
16 third one? And then I am going to ask you what the
17 first one was because I forgot it.

18 MS. LEITER: Okay. The third one is
19 section -- again, chapter 8, section 1537(b)(1) and
20 (b)(2). (B)(1) says that, after judicial review
21 affirming a removal order, the Attorney General, quote,
22 "shall remove the alien to a country specified under
23 paragraph 2."

24 And then, in paragraph 2, the statute says
25 that the alien may choose the country, but that the

1 Attorney General has authority to review the alien's
2 choice of country, and if the alien refuses to choose a
3 country, the Attorney General has authority to
4 specify the country.

5 The first --

6 JUSTICE SCALIA: Yes. What was the first
7 one? Just -- just give me the -- the cite for the first
8 one. I didn't write it down. I should have.

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

10 JUSTICE SCALIA: Thank you.

11 MS. LEITER: If there are no further
12 questions, Your Honor?

13 CHIEF JUSTICE ROBERTS: Thank you, counsel.

14 Mr. Schoenfield, you have 3 minutes
15 remaining.

16 REBUTTAL ARGUMENT OF RICK M. SCHOENFIELD

17 ON BEHALF OF THE PETITIONER

18 MR. SCHOENFIELD: Section 1252(b)(6)
19 mandates that review of the underlying decision should
20 be consolidated with review of a motion to reopen. I
21 think that tells us several things.

22 The first and foremost of which is Congress
23 intended there to be review of motions to reopen -- at
24 least some motions to reopen. To try to go back to
25 Justice Breyer's questions, I think one can extrapolate

1 from the consolidation provision that, if it is
2 impossible to consolidate because there is no review of
3 the underlying decision, you do not get to have a review
4 of those motions to reopen.

5 And that is referenced, I believe, in the
6 government's brief, at footnote 15 -- excuse me -- with
7 some cases cited, where courts have so held.

8 We did not focus on that because that is not
9 Mr. Kucana's issue. As the Court has alluded to,
10 Mr. Kucana's issue is the nature of asylum based upon
11 changed country conditions, and those situations are
12 where it may be a matter of life and death, certainly,
13 also a matter of -- of liberty, to be able to bring
14 forward new evidence, which did not exist before, about
15 changed country conditions, and it is not two bites at
16 the apple. It's the first bite at current conditions,
17 which is essential.

18 With regard to the case of Webster v. Doe,
19 that my colleague cited orally, that was an extremely
20 unusual case in which the Court essentially said that it
21 could not -- it did not have any criteria to evaluate
22 the discretion used by the director of the CIA.

23 That is certainly not the situation we have
24 here, where we are dealing with motions to reopen, which
25 are analogous to rule 60(b) and which are routinely

1 reviewed on abuse-of-discretion standard.

2 Additionally, let me note that, if you were
3 to determine that the statutory language "specified
4 under" is ambiguous that the applicable canons both
5 point us to favoring judicial review -- favoring
6 judicial review and not essentially allowing the
7 Executive to pass a regulation which insulates itself
8 from judicial review.

9 That would be both the clear statements
10 requirement as well as the principle laid down by this
11 Court that, in an ambiguous situation dealing with
12 deportation, ambiguities are to be construed in favor of
13 the alien.

14 If there are no further questions --

15 CHIEF JUSTICE ROBERTS: Thank you, counsel.

16 MR. SCHOENFIELD: Thank you.

17 CHIEF JUSTICE ROBERTS: Ms. Leiter, you
18 briefed and argued this case in support of the judgment
19 below, at the invitation of the Court, and have ably
20 discharged that responsibility, for which we are
21 grateful.

22 The case is submitted.

23 (Whereupon, at 11:06 a.m., the case in the
24 above-entitled matter was submitted.)

25

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