UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT
No. 06-3221

Indu GULATI	)	
	)	
Petitioner,	)	
	)	Appeal from the Board of
	)	Immigration Appeals
vs.	)	
	)	
Michael MUKASEY,	)	Immigration File No. A97-331-330
Attorney General,	)	
	)	
	)	
Respondent.	)	

PETITION FOR PANEL REHEARING AND SUGGESTION FOR REHEARING EN BANC

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CIRCUIT RULE 26.1 DISCLOSURE STATEMENT

Appellate Court No.: 06-3221

Short Caption: Gulati v. Mukasey

The undersigned counsel of record for Petitioner furnishes the following information in compliance with Circuit Rule 26.1.

(1) Our client's full name is Indu Gulati

(2) The only firms who have represented Ms. Gulati in this matter in the Immigration Courts and in this Court are:

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(3) The Petitioner is an individual, not a corporate entity

   i. Identify all its parent corporations, if any: N/A

   ii. List any publicly held company that owns 10% or more of the party's or amicus' stock: N/A

/s/ MaryLu Cianciolo Date: Nov. 23, 2007

MaryLu Cianciolo, Counsel of Record
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TABLE OF CONTENTS

TABLE OF AUTHORITIES v

BASIS OF EN BANC REQUEST 1

STATEMENT 2

ARGUMENT 7

I. THIS COURT SHOULD GRANT EN BANC REVIEW BECAUSE THE PANEL'S DECISION INTERPRETING IIRIRA'S JURISDICTION-STRIPPING PROVISION TO PRECLUDE JUDICIAL REVIEW OF CONTINUANCE DENIALS CONFLICTS WITH SIX OTHER CIRCUIT COURTS OF APPEALS AND IS AT ODDS WITH SUPREME COURT PRECEDENT 7

A. The Gulati Panel's Decision Conflicts With the Authoritative Holdings of Six Other Circuits to Have Addressed the Same Issue. 7

B. The Supreme Court Has Indicated that Courts Should Narrowly Construe Jurisdiction-Stripping Statutes in the Immigration Context. 9

C. The Plain Language of the Jurisdiction-Stripping Provision Does Not Render Continuance Denials Nonreviewable 11

D. The Legislative History of the Jurisdiction-Stripping Provision Indicates that Congress Intended to Create a Narrow Exception to Judicial Review. 13

II. IN THE ALTERNATIVE, THE PANEL SHOULD HOLD THE CASE FOR REHEARING PENDING THE SUPREME COURT'S FORTHCOMING DECISION IN *ALI V. ACHIM*, WHICH WILL PROVIDE GUIDANCE REGARDING THE INTERPRETATION OF IIRIRA'S JURISDICTION-STRIPPING PROVISIONS 14

CONCLUSION 15

APPENDIX

8 U.S.C. § 1252 .... 1a

Transcript of Removal Proceeding, Matter of Indu Gulati, June 16, 2005 .... 5a

Oral Decision of the IJ, Matter of Indu Gulati, June 16, 2005 .... 15a

Decision of the Board of Immigration Appeals,

In re Indu Gulati, July 24, 2006 .... 22a

Gulati v. Gonzales, No. 06-3221, Order Granting Stay of
Voluntary Departure (7th Cir. Oct. 2, 2006)... 24a
Brief of Indu Gulati, *Gulati v. Keisler*, 06-3221,
2007 WL 2988632 (7th Cir. Oct. 15, 2007).. 25a
Gulati v. Keisler, 06-3221, 2007 WL 2988632 (7th Cir. Oct. 15, 2007) 48a
Notice of Action - Voluntary Departure, Oct. 30, 2007....................................... 53a

TABLE OF AUTHORITIES

Cases

Abbott Laboratories v. Gardner, 387 U.S. 136 (1967)....... 10

Abu-Khaliel v. Gonzales, 436 F.3d 627 (6th Cir. 2006) 8

Ali v. Achim, 128 S.Ct. 29, *cert. granted* Sept. 25, 2007 2

Ali v. Achim, 468 F.3d 462 (7th Cir. 2006) 14

Ali v. Gonzales, 468 F.3d 659 (7th Cir. 2007)....... 6, 7, 8

Alsamhouri v. Gonzales, 484 F.3d 117 (1st Cir. 2007)....... 8

Ardestani v. I.N.S., 502 U.S. 129 (1991)....... 10

Bowen v. Michigan Academy of Family Physicians, 476 U.S. 667 (1986) 9, 10, 11

Felker v. Turpin, 518 U.S. 651 (1996)....... 10

Gulati v. Keisler, No. 06-3221, slip op. (7th Cir. Oct. 15, 2007) 5, 7, 9

I.N.S. v. St. Cyr, 533 U.S. 289 (2001) 9

Khan v. Att'y Gen., 448 F.3d 226 (3d Cir. 2006)....... 8

Leguizamo-Medina v. Gonzales, 493 F.3d 772 (7th Cir. 2007) 6

McNary v. Haitian Refugee Center, Inc., 498 U.S. 479 (1991)....... 9

Onyinkwa v. Ashcroft, 376 F.3d 797 (8th Cir. 2004) 9

Sanusi v. Gonzales, 445 F.3d 193 (2d Cir. 2006) 8

Van Dinh v. Reno, 197 F.3d 427 (10th Cir. 1999)....... 11

Yerkovich v. Ashcroft, 381 F.3d 990 (10th Cir. 2004) 9

Zafar v. Att'y Gen., 461 F.3d 1357 (11th Cir. 2006) 8

Zhou v. Gonzales, 404 F.3d 295 (5th Cir. 2005) 8, 12

Statutes

Immigration and Nationality Act

8 U.S.C. §§ 1151–1378 11

8 U.S.C. § 1154(a)(1)(A)(viii)(I)....... 11

8 U.S.C. § 1157(c)(1)....... 12

8 U.S.C. § 1229(c)....... 5

8 U.S.C. §1229a 6

8 U.S.C. § 1252(a)(2)(B) 14
8 U.S.C. § 1252(a)(2)(B)(i) 6
8 U.S.C. § 1252(a)(2)(B)(ii) .... passim
8 U.S.C. § 1255(i) 3, 4
Administrative Procedure Act, 5 U.S.C. §§ 551–559, 701–706 10
IIRIRA, Pub. L. No. 104-208, §§ 306(a), (d), 308(g)(10)(H), 309(c)(4)(E)371(b)(6), 110 Stat. 3009, 3009-607, -612, -625, -626, -645 (codified as amended at 8 U.S.C. § 1252) (1996) 6, 13

Rules

Fed. R. App. P. 35 1
Sup. Ct. R. 10(a) 2

Briefs and Other Court Documents

Decision of the Board of Immigration Appeals, *In re* Indu Gulati, July 21, 2006 5
Gulati v. Gonzales, No. 06-3221, Order Granting Stay of Voluntary Departure (7th Cir. Oct. 2, 2006) 5
Oral Decision of the IJ, June 16, 2005 5
Petition for Writ of Certiorari, *Ali v. Achim*, 2007 WL 1071084 (No. 06-1346) (April 5, 2007) 2
Transcript of Removal Proceeding, Matter of Indu Gulati, June 16, 2005 .... 3, 5

Legislative and Executive Materials

H.R. Rep. No. 1980, 79th Cong., 2d Sess. (1946) 11
Interoffice Memorandum, William R. Yates, Acting Associate Director for Operations, United States Citizenship and Immigration Services, *Clarification of Certain Eligibility Requirements Pertaining to an Application to Adjust Status under Section 245(i) of the Immigration and Nationality Act*, Mar. 9, 2005 4
S. Rep. No. 752, 79th Cong., 1st Sess., 26 (1945) 10

Other Authorities

American Heritage College Dictionary (3d ed. 1993) 11

Charles Gordon et al., *Immigration Law and Procedure* (1985 & Supp. 2007) 3

Executive Office for Immigration Review, Office of Planning, Analysis, &
Technology, *FY 2006 Statistical Yearbook* (2007) 1, 2

William N. Eskridge, Jr., et al., *Cases and Materials on Legislation: Statutes and the Creation of Public Policy* (3d ed. 2001) 13

Petition for Rehearing, with Suggestion for Rehearing En Banc

Petitioner Indu Gulati submits this Petition for Rehearing or Rehearing En Banc and the attached Motion for a Stay of Voluntary Departure.

BASIS OF EN BANC REQUEST[1]

This case presents a question of exceptional importance to the rights of litigants facing possible deportation. The Panel decision held that the jurisdiction-stripping provisions of 8 U.S.C. § 1252(a)(2)(B)(ii) bar appellate review of an Immigration Judge's ("IJ") denial of a continuance in a removal proceeding. This ruling leaves litigants with no recourse and prevents them from advancing a compelling case against removal. The Panel's decision also conflicts with authoritative decisions of six other United States Courts of Appeals that have addressed the issue.[2] Those courts have recognized that the text of the jurisdiction-stripping provision, Supreme Court precedent, and the provision's legislative history all require the conclusion that circuit courts retain jurisdiction to review such denials.

In addition, the issue is one that recurs frequently and impacts the rights of hundreds or thousands of litigants each year. Almost three hundred thousand immigrants were subject to removal proceedings in fiscal year 2006. Executive Office for Immigration Review, Office of Planning, Analysis, & Technology, *FY 2006 Statistical Yearbook*, at C3 (2007), *available at* http://www.usdoj.gov/eoir/statspub/fy06syb.pdf. Many of these immigrants request continuances during their removal proceedings, and

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[1] As required by Fed. R. App. P. 35.

[2] *See Alsamhouri v. Gonzales*, 484 F.3d 117 (1st Cir. 2007); *Sanusi v. Gonzales*, 445 F.3d 193 (2d Cir. 2006); *Zafar v. Att'y Gen.*, 461 F.3d 1357 (11th Cir. 2006); *Khan v. Att'y Gen.*, 448 F.3d 226 (3d Cir. 2006); *Zhou v. Gonzales*, 404 F.3d 295 (5th Cir. 2005).

continuances are appropriate for numerous reasons, including "to allow the alien time to obtain representation or to file an application for relief." *Id.* at B1. While continuances are discretionary, denials can affect core rights, including access to counsel and, ultimately, as in this case, the ability to secure relief for which the immigrant is eligible. The important ramifications of a continuance denial necessitate judicial review absent a clear statement of Congress's intent to the contrary. Consideration by the full Court is therefore necessary.

Finally, it is an indication of the exceptional importance of the issue at hand that the Supreme Court has recently granted certiorari in *Ali v. Achim*, 128 S.Ct. 29, *cert. granted* Sept. 25, 2007, to construe the very jurisdiction-stripping statute at issue in this case and to determine whether this Court "erred in narrowly construing the scope of its jurisdiction to review" a decision of the BIA arising in a different context. Petition for Writ of Certiorari, *Ali v. Achim*, 2007 WL 1074084, at *i (No. 06-1346) (Apr. 5, 2007). The Supreme Court will likely hold oral argument in *Ali* in February and hand down its decision before the end of June 2008. A grant of certiorari by the Supreme Court is strong evidence of an issue's importance. *See* Sup. Ct. R. 10(a) (explaining that one reason to grant certiorari is because "a United States court of appeals has entered a decision in conflict with the decision of another United States court of appeals on the same *important* matter") (emphasis added).

STATEMENT

Petitioner, Indu Gulati, is a native and citizen of India. She last entered the United States on or about December 8, 1997, as a non-immigrant visitor and stayed in the United

States beyond the time allowed by her visa. Petitioner was personally served with a Notice to Appear by the Department of Homeland Security on August 24, 2004, which charged her with removability on the basis that she stayed in the United States longer than permitted. At a proceeding before an Immigration Judge ("IJ") on June 16, 2005, Petitioner conceded removability on that basis. *See* Transcript of Removal Proceeding, June 16, 2005, at 12 [Pet. App. 7a].

An alien who has overstayed her visa must ordinarily leave the country before applying for lawful permanent residence. *See* Charles Gordon et al., *Immigration Law and Procedure* § 31.01 (1985 & Supp. 2007). Section 245(i) of the Immigration and Nationality Act ("INA") as amended by the LIFE Act Amendments of 2001, however, provides that an alien may seek an adjustment of status without leaving the country if (1) an employer filed a petition for labor certification on her behalf before April 30, 2001, and (2) the alien pays a $1,000 fee. 8 U.S.C. § 1255(i) ("Section 245(i)").[3] An alien who has taken advantage of these provisions is considered "grandfathered" or "section 245(i)

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

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

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

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

After conceding removability, Petitioner requested a continuance of the removal proceeding in order to allow her new employer to file a new Alien Labor Certification, pursuant to Section 245(i). The Certification would replace one that had been properly filed on her behalf with the California Workforce Development Agency by her then-employer prior to the April 30, 2001, deadline. *See* 8 U.S.C. § 1255(i). This new filing was required because the initial employer went out of business during the four years that the certification sat unaddressed before the agency. The timely filing of the first Labor Certification caused Ms. Gulati to be grandfathered within the terms of Section 245(i), allowing her to adjust status on the basis of a subsequent Labor Certification. "A grandfathered alien is not limited to seeking adjustment of status solely on the basis of the qualifying . . . application for labor certification that initially grandfathered the alien." Yates Memo, *supra*, at 2. According to the regulations, Ms. Gulati's initial Labor Certification serves to grandfather her even though the sponsoring company no longer exists: "A visa petition that was properly filed on or before April 30, 2001, and was approvable when filed, but was later withdrawn, denied, or revoked due to circumstances

that have arisen after the time of filing, will preserve the alien beneficiary's grandfathered status . . . .” 8 C.F.R. § 245.10(a)(3).

The IJ denied Petitioner’s request for a continuance on June 16, 2005. Oral Decision of the IJ, June 16, 2005, at 3 [Pet. App. 17a]. The IJ also granted Petitioner’s voluntary departure pursuant to 8 U.S.C. § 1229(c), in lieu of removal from the United States, and Petitioner was required to depart voluntarily on or before August 16, 2005. Transcript of Removal Proceeding, June 16, 2005, at 17 [Pet. App. 12a]. Petitioner made a timely direct appeal of the IJ’s denial of the continuance to the Board of Immigration Appeals (“BIA”). The BIA affirmed the decision of the IJ denying the continuance on July 21, 2006, and ordered Petitioner to voluntarily depart within sixty days, on or before September 19, 2006. *See* Decision of the Board of Immigration Appeals, *In re* Indu Gulati, July 21, 2006 [Pet. App. 23a].

On August 17, 2006, Petitioner timely filed with this Court a Petition for Review, and also, on September 5, 2006, filed a Motion for Stay of Voluntary Departure. This Court granted the Stay Motion on October 2, 2006, *see Gulati v. Gonzales*, No. 06-3221, Order Granting Stay of Voluntary Departure (7th Cir. Oct. 2, 2006) [Pet. App. 24a], on which date Petitioner had fourteen days remaining in her sixty-day voluntary departure period.

On October 15, 2007, following briefing and argument, this Court issued a nonprecedential decision dismissing for lack of appellate jurisdiction Petitioner’s challenge to the denial of the continuance, and denying on the merits a further constitutional challenge brought to the decisions of the IJ and the BIA. *Gulati v. Keisler*, No. 06-3221, slip op. at 4 (7th Cir. Oct. 15, 2007) [Pet. App. 51a].

In dismissing Ms. Gulati's challenge of the denial of her motion for continuance, the Panel relied on this Court's recent decision in *Ali v. Gonzales*, 502 F.3d 659 (7th Cir. 2007), holding that the jurisdiction-stripping provision of the Illegal Immigration Reform and Immigration Responsibility Act of 1996 ("IIRIRA")[4] bars judicial review of denials of continuances. The *Ali* court gave two bases for its conclusion that it had no jurisdiction to review the denial.

First, it considered the text of the jurisdiction-stripping provision, which reads, in pertinent part, "no court shall have jurisdiction to review . . . any other decision or action of the Attorney General . . . the authority for which is *specified under this subchapter* to be in the discretion of the Attorney General." 8 U.S.C. § 1252(a)(2)(B)(ii) [Pet. App. 1a] (emphasis added). The Court acknowledged that "[w]hile it is true that continuances are specifically mentioned only in the administrative regulations, *see* 8 C.F.R. § 1003.29, an immigration judge's *authority* to grant or deny a continuance is statutory; it derives from 8 U.S.C. §1229a, which confers upon immigration judges the plenary authority to conduct removal proceedings." *Ali*, 502 F.3d at 660. The Court reasoned that even though denials of continuances are not explicitly specified in the relevant subchapter, they are implicitly included and are therefore beyond judicial review. *Id.* at 660–61.

Second, the *Ali* Court reasoned that its earlier decision in *Leguizamo-Medina v. Gonzales*, 493 F.3d 772, 775 (7th Cir. 2007), dictated this result. Interpreting the preceding subsection of the jurisdiction-stripping statute, 8 U.S.C. § 1252(a)(2)(B)(i), the *Leguizamo-Medina* Court held that "where § 1252(a)(2)(B)(i) removes jurisdiction to

[4] Pub. L. No. 104-208, §§ 306(a), (d), 308(g)(10)(H), 371(b)(6), 110 Stat. 3009, 3009-607, -612, -625, -645 (codified as amended at 8 U.S.C. § 1252). IIRIRA adopted multiple jurisdiction-stripping provisions, including 8 U.S.C. § 1252(a)(2)(B)(ii), the provision at issue in *Ali v. Gonzales* and in the instant case.

review a final immigration decision . . . , review of continuance denials and other interim orders leading up to the final decision is also precluded." *Ali*, 502 F.3d at 661.

Based on these cases, the Panel in *Gulati* held that because "Gulati's motion was leading up to an anticipated petition to adjust status," the Panel "therefore lack[ed] jurisdiction to review the IJ's denial of Gulati's motion to continue." *Gulati*, slip op. at 3 [Pet. App. 50a]. In so holding, the Panel exacerbated the circuit split and aligned itself with the minority position on the question of the reviewability of a denial of continuance, as the *Ali* court recognized. *Ali*, 502 F.3d at 664.

ARGUMENT

I. THIS COURT SHOULD GRANT EN BANC REVIEW BECAUSE THE PANEL'S DECISION INTERPRETING IIRIRA'S JURISDICTION-STRIPPING PROVISION TO PRECLUDE JUDICIAL REVIEW OF CONTINUANCE DENIALS CONFLICTS WITH SIX OTHER CIRCUIT COURTS OF APPEALS AND IS AT ODDS WITH SUPREME COURT PRECEDENT.

In ruling that denials of continuances in removal proceedings are beyond the jurisdiction of the appellate courts, this Court has given the jurisdiction-stripping statute at issue a very expansive reading, which is in direct conflict with the decisions of six other circuits, in substantial tension with the decisions of the United States Supreme Court, and contrary to the text and legislative history of the provision at issue.

A. The Gulati Panel's Decision Conflicts With the Authoritative Holdings of Six Other Circuits to Have Addressed the Same Issue.

Six circuit courts have held that § 1252(a)(2)(B)(ii) does not strip their jurisdiction to review continuance denials. The core of those courts' interpretations of

that provision "lies in [the statute's] requirement that the discretion giving rise to the jurisdictional bar must be 'specified' by statute." *Khan v. Att'y Gen.*, 448 F.3d 226, 232 (3d Cir. 2006) (internal quotation marks omitted). Relying on the clear statement rule, the courts of appeals have held that jurisdiction exists to review a continuance decision because "the language of the statute in question must provide the discretionary authority before the bar can have any effect." *Khan*, 448 F.3d at 232. The Fifth Circuit has observed that the statutory language is "uncharacteristically pellucid" about which decisions are unreviewable and that this language does not include discretionary denials of continuances. *Zhou v. Gonzales*, 404 F.3d 295, 303 (5th Cir. 2005). The First, Second, Third, Fifth, and Eleventh Circuits have adopted this interpretation. *See Alsamhouri v. Gonzales*, 484 F.3d 117, 122 (1st Cir. 2007); *Sanusi v. Gonzales*, 445 F.3d 193, 198 (2d Cir. 2006); *Zafar v. Att'y Gen.*, 461 F.3d 1357, 1360 (11th Cir. 2006); *Khan*, 448 F.3d at 232 (3d Cir. 2006); *Zhou*, 404 F.3d at 303 (5th Cir. 2005).[5] The Attorney General agrees "that because continuances are referenced only in the immigration regulations, not the statutes, the discretionary authority to grant or deny a continuance is 'not specified under this subchapter' within the meaning of § 1252(a)(2)(B)(ii), and the jurisdictional bar therefore does not apply." *Ali v. Gonzales*, 502 F.3d 659, 663 (7th Cir. 2007).

The *Gulati* Panel, in adopting this Court's reasoning in *Ali v. Gonzales*, 502 F.3d 659, aligned itself with the Eighth and Tenth Circuits in holding that continuance denials

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

are unreviewable. *See Gulati v. Keisler*, No. 06-3221, slip op. at 4 (7th Cir. Oct. 15, 2007) [Pet. App. 50a]; *Onyinkwa v. Ashcroft*, 376 F.3d 797, 799 (8th Cir. 2004); *Yerkovich v. Ashcroft*, 381 F.3d 990, 993 (10th Cir. 2004). These courts have reasoned that "[w]henever a *regulation implementing* a subchapter II statute confers discretion upon an IJ, IIRIRA generally divests courts of jurisdiction to review the exercise of that discretion." *Onyinkwa*, 376 F.3d at 799. Such reliance on the regulations conflicts with the text of the jurisdiction-stripping provision, particularly in light of the presumption in favor of judicial review and Congress's requirement of a clear statement to remove review.

B. The Supreme Court Has Indicated that Courts Should Narrowly Construe Jurisdiction-Stripping Statutes in the Immigration Context.

In *I.N.S. v. St. Cyr*, 533 U.S. 289, 298 (2001), the Supreme Court held that despite specific jurisdiction-denying provisions of IIRIRA,[6] in immigration cases there still exists a "strong presumption in favor of judicial review of administrative action." In so stating, the Court reaffirmed the principle relied on in *Bowen v. Michigan Academy of Family Physicians*, 476 U.S. 667, 670 (1986), that "Congress intends judicial review of administrative action . . . unless there is persuasive reason to believe that [cutting off judicial review] was the purpose of Congress." *Id.* (internal citations omitted); *see also McNary v. Haitian Refugee Center, Inc.*, 498 U.S. 479, 498 (1991) (recognizing the "strong presumption in favor of judicial review of administrative action"). The Court's decision in *St. Cyr* explicitly incorporated this presumption into the context of immigration. *See St. Cyr*, 533 U.S. at 298 ("For the INS to prevail, it must overcome . . .

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[6] *St. Cyr* concerned 8 U.S.C. §§ 1252(a)(2)(C) and 1252(a)(1), which were enacted, along with §1252(a)(2)(B)(ii), the provision at issue in the instant case, in IIRIRA.

the strong presumption in favor of judicial review of administrative action . . . ."); *see also Felker v. Turpin*, 518 U.S. 651, 661 (1996) (declining to find a repeal of habeas jurisdiction by implication).

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

As *Bowen* indicates, there is a presumption of judicial review of actions taken during administrative proceedings, including removal proceedings before an IJ. *See Ardestani v. I.N.S.*, 502 U.S. 129, 131 (1991) (describing removal proceedings as "administrative"). The Court in *Bowen* discussed at length the legislative history of the Administrative Procedure Act, 5 U.S.C. §§ 551–559, 701–706 ("APA"), and concluded that it reinforces the presumption of justiciability. *Bowen*, 476 U.S. at 670–673. The Court noted that the Senate Committee on the Judiciary, in discussing the proposed APA, stated: "'Very rarely do statutes withhold judicial review. . . . [Without judicial review,] statutes would in effect be blank checks drawn to the credit of some administrative officer or board.'" *Bowen*, 476 U.S. at 671 (quoting S. Rep. No. 752, 79th Cong., 1st Sess., 26 (1945)). The House Judiciary Committee "agreed that Congress ordinarily intends that there be judicial review, and emphasized the clarity with which a

contrary intent must be expressed." *Bowen*, 476 U.S. at 671. The *Bowen* Court noted that the House Committee explained: "'To preclude judicial review under [the APA], a statute, if not specific in withholding [judicial] review, must upon its face give clear and convincing evidence of an intent to withhold it.'" *Id.* (quoting H.R. Rep. No. 1980, 79th Cong., 2d Sess., 41 (1946)). This legislative history demonstrates Congress's intent to retain judicial review of administrative actions absent a clear statement removing such review.

C. The Plain Language of the Jurisdiction-Stripping Provision Does Not Render Continuance Denials Non-Reviewable.

Given the strong presumption in favor of judicial review, a court can only find that the jurisdiction-stripping provision removes jurisdiction from the federal courts if the language of the statute does so expressly. The provision at issue in this case precludes judicial review of any "decision or action of the Attorney General or the Secretary of Homeland Security, the authority for which is *specified under this subchapter to be in the discretion* of the Attorney General or the Secretary of Homeland Security." 8 U.S.C. § 1252(a)(2)(B)(ii) [Pet. App. 1a] (emphasis added). The phrase "this subchapter" refers to Title 8, Chapter 12, Subchapter II of the United States Code, which includes §§ 1151–1378. *See Van Dinh v. Reno*, 197 F.3d 427, 433 (10th Cir. 1999). And "to specify" means "[t]o state explicitly or in detail." American Heritage College Dictionary 1307 (3d ed. 1993). A number of provisions of the subchapter do "specify" that decisions are to be within the discretion of the Attorney General or the Secretary of the Department of Homeland Security ("DHS"). *See, e.g.*, 8 U.S.C. § 1154(a)(1)(A)(viii)(I) (giving the

Secretary of DHS "unreviewable discretion" to determine that a United States citizen who has been convicted of a specified offense against a minor poses no risk to a relative whom the citizen seeks to sponsor for immigration to the United States); 8 U.S.C. § 1157(c)(1) (giving the Attorney General "discretion . . . [to] admit any refugee who is not firmly resettled in a foreign country, is determined to be of special humanitarian concern to the United States, and is admissible . . . as an immigrant under this chapter.").

But no provision of the subchapter—or of any other portion of the statute—specifies that an IJ's decision to grant or deny a continuance is within the discretion of any official. The IJ's authority to grant a continuance is instead derived solely from regulations promulgated by the Executive Office for Immigration Review in the Department of Justice. *See* 8 C.F.R. § 1003.29 (stating that "[t]he Immigration Judge may grant a motion for continuance for good cause shown."). Because authority to grant or deny a continuance is not specified in the relevant subchapter, circuit court jurisdiction to review such decisions remains intact.

Despite the provision's omission of any reference to continuances, the Panel mistakenly held that § 1252(a)(2)(B)(ii) stripped federal courts of the authority to review any discretionary immigration decision antecedent to a specified statutory decision, regardless whether it is "specified under the subchapter." But the jurisdiction-stripping provision is clear: "[I]t does not allude generally to 'discretionary authority' or to 'discretionary authority exercised *under this statute,*' but specifically to 'authority for which is *specified under this subchapter* to be in the discretion of the Attorney General.'" *Zhou v. Gonzales*, 404 F.3d 295, 303 (5th Cir. 2005).

D. The Legislative History of the Jurisdiction-Stripping Provision Indicates that Congress Intended to Create a Narrow Exception to Judicial Review.

The legislative history of IIRIRA supports a narrow reading of 8 U.S.C. § 1252(a)(2)(B)(ii). Among IIRIRA's provisions are transitional rules that govern judicial review of immigration proceedings where the proceedings began before IIRIRA's effective date of April 1, 1997, and where no final order was entered by October 30, 1996. *See* IIRIRA § 309(c)(4)(E), Pub. L. No. 104-208, 110 Stat. 3009-1, 3009-625–3009-626 (1997). Only with regard to these transitional cases, Congress withdrew jurisdiction over "any discretionary decision" made pursuant to several enumerated sections of the INA. IIRIRA § 309(c)(4)(E), 110 Stat. at 3009-626 (removing judicial review of discretionary decisions in adjustment of status or removal proceedings made under INA §§ 212(c), 212(h), 212(i), 244, and 245). In § 1252(a)(2)(B)(ii), Congress used distinctly different language in defining the permanent jurisdiction. Instead of referring to "discretionary decisions," as did the transitional rules, the new §1252(a)(2)(B)(ii) denies jurisdiction to review acts "the authority for which is specified to be in the discretion of the Attorney General." § 1252(a)(2)(B)(ii) [Pet. App. 1a]. It is a well-established canon of statutory interpretation that the use of different terms within a statute demonstrates that Congress intended to convey a different meaning for those terms. William N. Eskridge, Jr., et al., *Cases and Materials on Legislation: Statutes and the Creation of Public Policy* 834 (3d ed. 2001). If Congress had intended to withdraw jurisdiction over all "discretionary decisions," it could have easily used the same language already enacted in the transitional rules.

Accordingly, this Court should grant en banc review to correct the erroneous Panel decision, which is inconsistent with the decisions of six other circuits, Supreme Court precedent, and the plain language and legislative history of the statute.

II. IN THE ALTERNATIVE, THE PANEL SHOULD HOLD THE CASE FOR REHEARING PENDING THE SUPREME COURT'S FORTHCOMING DECISION IN *ALI V. ACHIM*, WHICH WILL PROVIDE GUIDANCE REGARDING THE INTERPRETATION OF IIRIRA'S JURISDICTION-STRIPPING PROVISIONS.

Should this Court decline to grant Petitioner's suggestion for en banc review, Petitioner requests that the Panel grant rehearing and hold the case for further consideration following the Supreme Court's decision in *Ali v. Achim*.

In *Ali v. Achim*, 468 F.3d 462 (7th Cir. 2006), a panel of this Court held that circuits "lack jurisdiction to review the BIA's exercise of discretion when the agency operates under the proper legal standard." *Id.* at 470 (citing 8 U.S.C. § 1252(a)(2)(B)). *Ali v. Achim* focused on whether the BIA has *discretion* to determine if an alien committed a "particularly serious" crime, which would bar him from receiving asylum and withholding of removal. *Id.* To answer this question, the *Ali v. Achim* panel construed the same statutory provision at issue in the instant case—"authority for which is specified under this subchapter to be in the discretion of the Attorney General," 8 U.S.C. § 1252(a)(2)(B)(ii)—and concluded that the relevant subchapter granted the BIA such discretion, thus foreclosing appellate review. *Ali v. Achim*, 468 F.3d at 470. Because the Court in *Ali* will be construing the same provision at issue in this case in a parallel context, its decision may well shed light upon the proper resolution of the issue presented here. Accordingly, at a minimum, the Panel should hold the petition for rehearing pending the resolution of *Ali v. Achim*.

CONCLUSION

For the foregoing reasons, the Court should grant rehearing en banc, or in the alternative, should grant panel rehearing and hold the case pending the Supreme Court's decision in *Ali v. Achim*.

Respectfully submitted,

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Dated: November 23, 2007

CERTIFICATE OF SERVICE

I hereby certify that on this 23rd day of November, 2007, I sent an original and thirty copies of the foregoing Petition for Panel Rehearing and Suggestion for Rehearing En Banc to the Clerk of the United States Court of Appeals for the Seventh Circuit by Federal Express. In addition, on this same day, I served two copies of the foregoing on the following counsel by Federal Express:

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I declare that the statements above are true to the best of my information, knowledge, and belief.

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