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Judicial Review of Administrative Immigration Decisions

Can the Doctrine of "Ejusdem Generis" Save It From Extinction?

by David B. Pakula and Lawrence P. Lataif

Until recently, immigration lawyers took for granted federal court jurisdiction to review denials of applications for work visas and other immigration benefits. Historically, judicial review has served as an important check on the government's power to control the entry, presence, and work authorization of aliens in the United States. Without judicial review, unlimited discretion over the fates of millions of aliens would be vested in the Bureau of Citizenship and Immigration Services (BCIS), which recently assumed the benefits adjudications duties of the now-dissolved Immigration and Naturalization Service.¹

During the past few years, a line of federal court decisions has called into question the power of federal courts to review BCIS-type immigration adjudications. The problem stems from a jurisdiction-limiting provision enacted by Congress in the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (IIRIRA).²

The provision appears in the midst of a group of statutory provisions limiting judicial review of immigration decisions made during the process of deporting ("removing," according to newly introduced IIRIRA terminology) aliens who have violated U.S. laws. However, some recent federal court decisions have held that the provision limits judicial review of immigration decisions affecting aliens who are not being removed, but are merely seeking to live and work lawfully in the U.S. While not all courts have ruled against judicial review, if the current trend continues discretionary immigration decisions outside the removal context may be on the brink of being totally shielded from judicial review.

This article examines the provision of the IIRIRA at the root of the controversy concerning federal court ju-

risdiction. The authors discuss legal theories, not previously discussed in the reported judicial decisions, that may be available to arrest the antireview trend. In particular, an overlooked rule of statutory interpretation known as "ejusdem generis" may be crucial in overcoming the government's jurisdictional defense.

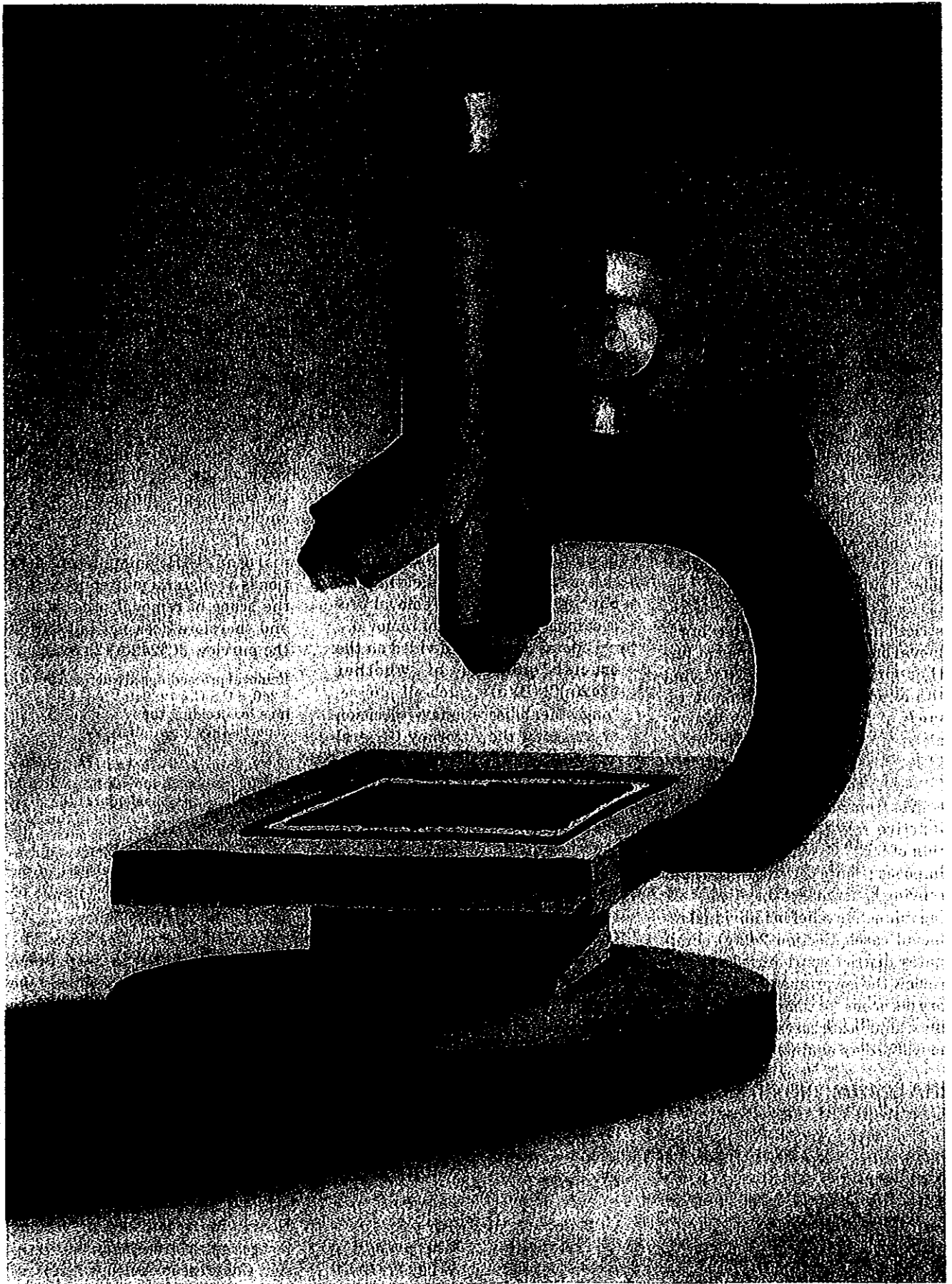
Judicial Review of Immigration Decisions Before and After the IIRIRA

Before 1996, §106 of the Immigration and Nationality Act, 8 U.S.C. §1105a, titled "Judicial review of orders of deportation and exclusion," governed federal court review of decisions made during deportation and exclusion proceedings. The overall effect of §106 was to streamline the review process. Section 106(a) granted exclusive jurisdiction to the U.S. courts of appeal to review final orders of deportation. Section 106(b) made habeas corpus the exclusive vehicle for review of exclusion orders (decisions denying entry into the U.S.). INS decisions made during the process of deportation were generally reviewed in a single circuit court proceeding following entry of the final order of deportation.³

Federal courts held that decisions made outside the context of deportation proceedings were beyond the scope of circuit court review under §106(a).⁴

District courts had subject matter jurisdiction to review such decisions under the Administrative Procedures Act.⁵

The IIRIRA repealed INA §106, 8 U.S.C. §1105a, and replaced it with INA §242, 8 U.S.C. §1252. Like its predecessor, §242, titled "Judicial review of orders of removal," is designed to streamline judicial review of removal decisions. Section 242(a) provides that exclusive



Joe McFadden

During the past few years, a line of federal court decisions has called into question the power of federal courts to review BCIS-type immigration adjudications.

jurisdiction to review final orders of removal remains in the circuit courts of appeal. Section 242(e) retains habeas corpus review of decisions regarding summary removal (analogous to “exclusion” under pre-IIRIRA law). The concept of preventing piecemeal review of nonfinal deportation decisions is codified in the new §242(b)(9). This provision, which the U.S. Supreme Court has called a “zipper clause,”⁶ provides that review of “all questions of law and fact” arising from removal proceedings “shall be available only in judicial review [by the circuit court of appeal] of a final order [of removal] under this section.”

However, §242 contains new restrictions on judicial review of removal orders that are aimed at further simplifying and expediting the removal of aliens. Habeas review of summary removal decisions is severely restricted under §§242(a)(2)(A) and 242(e). Section 242(f) prohibits federal district courts from granting classwide injunctive relief against the operation of 8 U.S.C. §§1221–1231,⁷ and imposes a more difficult “clear and convincing” standard on aliens seeking injunctive relief in individual removal cases. Section 242(g) eliminates district court jurisdiction to review the government’s discretionary decisions “to commence proceedings, adjudicate cases, or execute removal orders against any alien.”⁸

INA §242(a)(2)(B)(ii)’s Catch-all Phrase

The most controversial jurisdiction-limiting provision of IIRIRA is §242(a)(2)(B), 8 U.S.C. §1252(a)(2)(B), titled “Denials of discretionary relief,” which provides:

Notwithstanding any other provision of law, no court shall have jurisdiction to review—

(i) any judgment regarding the granting of relief under section 1182(h), 1182(i), 1229b, 1129c, or 1255 of this title,⁹ or

(ii) any other decision or action of the Attorney General the authority for which is specified under this subchapter¹⁰ to be in the discretion of the Attorney General, other than the granting of relief under section 1158(a)¹¹ of this title.

Section 242(a)(2)(B) refers to several statutory forms of relief that can be raised both before the commencement of removal proceedings and during removal proceedings: 212(h)&(i) waivers of inadmissibility, voluntary departure, adjustment of status and asylum. In addition, it refers to one form of relief that can only be raised during removal proceedings: cancellation of removal.

Federal courts are divided on the crucial question of whether §242(a)(2)(B)(ii)’s catch-all phrase, “any other [discretionary] decision or action of the Attorney General [except asylum]” should be given a narrow interpretation, as applying only to decisions made in the context of removal proceedings, or whether it should be construed broadly as barring federal court review of all discretionary immigration decisions. Three U.S. Circuit Courts of Appeal—the Sixth,¹² Seventh,¹³ and Ninth¹⁴ circuits—and four U.S. district courts¹⁵ have interpreted the provision broadly.¹⁶ Two U.S. district courts¹⁷ have interpreted §242(a)(2)(B)(ii) narrowly, and two other U.S. district courts¹⁸ have interpreted §242(a)(2)(B)(i) narrowly, applying an analysis similar to that used by the courts that have interpreted §242(a)(2)(B)(ii) narrowly.

Cases Interpreting §242(a)(2)(B)(ii) Narrowly

Cases interpreting §242(a)(2)(B)(ii) narrowly have found that the title of

§242, “Judicial review orders of removal,” indicates that Congress intended for §242(a)(2)(B)(ii) only to bar circuit court review of removal decisions. In *Talwar v. INS*, 2001 U.S. Dist. LEXIS 9248 (S.D.N.Y. 2001), a 2001 decision of the U.S. District Court for the Southern District of New York, the court stated:

Section 1252 is entitled “Judicial review of orders of removal,” suggesting that [§242(a)(2)(B)(ii)] only limits judicial review of discretionary decisions in the context of removal proceedings. While it is true, as the INS asserts, that the heading of a section cannot limit the plain meaning of the text, it is also true that headings serve as useful tools in resolving doubt about ambiguities in a statute.¹⁹

In *Shanti, Inc. v. Reno*, 36 F. Supp. 2d 1151 (D. Minn. 1999), a 1999 decision of the U.S. District Court for the District of Minnesota, the court emphasized the significance of the title of §242 and held that the denial of an H-1B nonimmigrant petition is a collateral matter not within the scope of removal proceedings, and therefore does not fall within the purview of §242(a)(2)(B)(ii):

Removal proceedings are defined in INA § 240, 8 U.S.C. § 1229a(a)(1) as “proceedings for deciding the inadmissibility or deportability of an alien.” The disposition of a visa petition has been held to be a collateral issue not within the scope of deportation, removal, or exclusion proceedings The denial of the H-1B nonimmigrant visa at issue in this case is therefore a collateral issue outside the scope of removal proceedings and consequently also outside the reach of the provisions limiting judicial review set forth in 8 U.S.C. §1252, “Judicial review of orders of removal.”²⁰

Cases narrowly interpreting §242(a)(2)(B)(ii) also have found the legislative history (or its absence) to be a persuasive factor. These courts have concluded that if Congress sought to expand the scope of INA §106, when replacing it with §242, there would be some indication of such an intent in the legislative history. In its 2000 decision in *Mart v. Beebe*, 94 F. Supp. 2d 1120 (D. Or. 2000), the U.S. District Court for the District of Oregon stated: “Nothing in the legislative history indicates that Congress intended, when it replaced INA §106 with the new INA

§242, to expand the applicability of the new section to final INS orders not involving removal.²¹

In *Talwar*, the court stated: "The legislative history of the IIRIRA refers to the effect of the amendments on removal proceedings and makes no mention of visa petitions, suggesting that Congress did not intend for the provisions of Section 1252 to reach beyond the context of removal proceedings."²²

In *Mart*, the court relied on an analysis of additional factors not addressed in *Shanti* or *Talwar*. The court stated that a broad interpretation of §242(a)(2)(B) would "violate the canon that limitations on jurisdiction are to be narrowly construed."²³ In addition, the court pointed out that a broad interpretation would have the effect of eliminating all judicial review of most nonremoval adjudications—a result that could not have been contemplated by Congress.²⁴ The court also stated that "[a broad] reading [of §242(a)(2)(B)] would . . . be Consti-

tutionally problematic because . . . an alien not subject to deportation would have no right to judicial review of any INS decision, no matter how arbitrary or unlawful that decision might be."²⁵

Cases Interpreting §242(a)(2)(B)(ii) Broadly

Cases interpreting §242(a)(2)(B)(ii) broadly have dismissed the significance of the title of §242, relying on the general rule that the title of a statutory section cannot limit the plain meaning of the text. According to these cases, §242(a)(2)(B)(ii) is itself unambiguous, and therefore the title is of no significance. In a 2002 decision, the U.S. District Court for the District of Oregon, in *Ana Int'l, Inc. v. Way*, 242 F. Supp. 2d 906 (D. Or. 2002), stated:

[T]he plain meaning of the statutory language in §1252(a)(2)(B)(ii) is clear and unambiguous: No court shall have jurisdiction to review any discretionary decision of the INS. The statute's language only becomes ambiguous if the Court examines the title of §1252. The

title of the statute, however, cannot create an ambiguity or limit the plain statutory language.²⁶

In addition, the three U.S. court of appeals decisions that broadly construe §242(a)(2)(B)(ii) have reasoned that, notwithstanding the title, "Judicial review of orders of removal," some of the provisions of §242 address the district court's jurisdiction over matters that are collateral to the final order of removal. Therefore, these courts have concluded, the title of §242 was intended to indicate the content of its provisions only in the most general manner. In the 1999 decision of the U.S. Court of Appeals for the Ninth Circuit in *Van Dinh v. Reno*, 197 F. 3d 427 (9th Cir. 1999), the court stated:

Reviewing §1252, which is both complicated and prolific, we see that it addresses a multitude of jurisdictional issues, including ones that are collateral to the review of the final order of deportation. See, e.g., §1252(a)(2)(B)(i) (providing that "no court" may review certain of the Attorney General's discretionary grants of relief in, inter alia, requests

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for voluntary departure, cancellation of removal, and adjustment of status); §1252(e) (limiting jurisdiction to review exclusion orders, including habeas review and collateral constitutional challenges to the validity of the system); §1252(g) (barring review in transitional cases of certain discretionary decisions of the Attorney General in any court and in any type of action). We conclude that §1252(a)(2)(B)(ii) is not limited in application only to review by the circuit courts of final orders of removal.²⁷

In 2002, the U.S. Court of Appeals for the Sixth Circuit, in *CDI Information Systems, Inc. v. Reno*, 278 F.3d 616 (6th Cir. 2002), followed *Van Dinh*, holding that §242(a)(2)(B)(ii) barred a district court from reviewing the INS denial of a request for an extension of stay as an H-1B non-immigrant. With regard to the title of §242, the court concluded:

Given the scope of section 1252, we conclude that its title does no more than indicate the provisions in a general manner. Therefore, we hold . . . that section 1252(a)(2)(B)(ii) is not limited to discretionary decisions made within the context of removal proceedings.²⁸

The Sixth Circuit disagreed with *Shanti's* analysis of the legislative history of IIRIRA, finding that the absence of any references to non-removal adjudications in the legislative history did not alter the plain language of §242(a)(2)(B)(ii):

[T]he *Shanti* decision simply makes too much of congressional silence. Because Congress did not specifically enumerate H-1B visa extensions in the legislative history does not render the plain language of section 1252(a)(2)(B)(ii) inoperative with respect to discretionary denials of H-1B extensions. In light of the range of discretionary decisions made by the Service, it would be unrealistic for us to require Congress to reference each variety in the legislative history before we would find it encompassed within the plain language of 1252(a)(2)(B)(ii).²⁹

Statutory Context: An Essential Ingredient in an Analysis of §242(a)(2)(B)(ii)

The missing ingredient in all of the judicial analyses of §242(a)(2)(B)(ii) is a thorough and accurate consideration of statutory context. The U.S. Supreme Court has stated, "The meaning—or ambiguity—of certain words or phrases may only become evident when placed in context."³⁰

On another occasion, the Court stated:

[T]he meaning of a statute, plain or not, depends on context "Words are not pebbles in alien juxtaposition; they have only a communal existence; and not only does the meaning of each interpenetrate the other, but all in their aggregate take their purport from the setting in which they are used."³¹

In interpreting the proper scope of §242(a)(2)(B)(ii), the context in which the provision appears is crucial. Section 242 is titled, "Judicial review of orders of removal." The various provisions of §242 all deal in one way or another with eliminating or streamlining the judicial review of removal decisions. Subsections (a) through (g) all deal with aspects of removal proceedings, as reflected in the headings: (a) "Applicable provisions [of chapter 158, of Title 28, regarding exclusive jurisdiction in the circuit courts to review final orders of removal]"; (b) "Requirements for review of orders of removal"; (c) "Requirements for [the circuit court] petition"; (d) "Review of final orders [of removal]"; (e) "Judicial review of orders under section 1225(b)(1) [summary removal]"; (f) "Limit on injunctive relief [enjoining the operation of 8 U.S.C. §§1221-1231, dealing with "Inspection, Apprehension, Examination, Exclusion, and Removal]"; (g) "Exclusive jurisdiction [in the circuit courts to review Attorney General's decisions to commence proceedings, adjudicate cases, or execute removal orders]."

Section 242(a) contains two paragraphs: 1) "General orders of removal," setting forth the general provision for circuit court review of final orders of removal, other than orders of summary removal of arriving aliens; and 2) "Matters not subject to judicial review." Paragraph (2) contains three subparagraphs: (A) "Review relating to section 1225(b)(1) [summary removal]"; (B) "Denials of discretionary relief [from removal]"; and (C) "[Final] Orders [of Removal] against criminal aliens."

As the headings suggest, §§242(a)(2)(A),(B)&(C) deal with removal decisions that are not subject to judicial review. Section

242(a)(2)(A) provides that "no court shall have jurisdiction to review" summary removal decisions, aside from the limited habeas corpus review authorized in subsection (e). Section 242(a)(2)(B), titled "Denials of discretionary relief," provides that "no court shall have jurisdiction to review" decisions denying 212(h)&(i) waivers of inadmissibility, cancellation of removal, voluntary departure and adjustment of status, and "any other [discretionary] decision" of the attorney general, other than asylum. Section 242(a)(2)(C) provides that "no court shall have jurisdiction to review" final orders against aliens who are removable by reason of having committed certain criminal offenses. Since the circuit court is the only court with jurisdiction to review final orders of removal, §242(a)(2)(C) means simply that the circuit court does not have jurisdiction to review the removal of aliens who have committed the enumerated criminal offenses.

The main thrust of §242 is to avoid piecemeal review of removal decisions. It accomplishes this goal by consolidating review of removal decisions in a single circuit court proceeding, or in a single district court habeas proceeding to review summary removal orders. In addition, §242 streamlines the removal of aliens by restricting district court review of certain removal decisions. For example, §242(f) limits claims for injunctive relief against the operation of provisions of the INA that deal with the "inspection, apprehension, examination, exclusion, and removal" of aliens, since district court suits seeking such relief can be used by aliens to delay their removal. Along the same lines, §242(g) eliminates district court challenges to the government's discretionary decisions to commence removal proceedings, adjudicate removal cases and execute removal orders.

Viewing the common thread connecting all of the various provisions of §242 compels the conclusion that §242(a)(2)(B)(ii) was intended to refer to immigration decisions made in the context of removal proceed-

ings. It would be anomalous for Congress to bury a provision wiping out judicial review of all nonremoval immigration decisions in the midst of a statutory section addressing judicial review of removal decisions. Barring district court review of denials of visa petitions and extensions of stay, for example, would not streamline the process of removing aliens. The aliens affected by such adjudications are not even in removal proceedings, and the aliens' employers and family members whose petitions have been denied can never be put into removal proceedings.

Statutory context provides a missing link in the *Shanti* analysis. The title of §242 is relevant because it sheds light on an ambiguity in §242(a)(2)(B)(ii). That ambiguity is created not by §242's title, as *Shanti* suggests, but by the context in which §242(a)(2)(B)(ii) appears. Viewed in isolation, §242(a)(2)(B)(ii) is susceptible to a broad interpretation, according to which all discretionary immigration decisions are shielded from judicial review. However, viewed in the context of a statute governing judicial review of removal decisions, the provision should be interpreted narrowly as applying only to discretionary decisions made in the context of removal proceedings.

Likewise, a proper consideration of statutory context refutes the *CDI Information Systems* and *Van Dinh* analyses. These cases reason that the title of §242 was not intended to limit the scope of its provisions to review of the final order of removal, since some of §242's provisions limit collateral district court review. However, the provisions of §242 restricting district court review are all directly related to removal proceedings, with the common goal of streamlining the process of removing aliens. For example, §242(f) limits suits to enjoin the operation of removal procedures, and §242(g) eliminates district court review of certain removal decisions. These provisions are all inextricably intertwined with the review of removal decisions and they only affect aliens

who are in removal proceedings.

Novel Approach: Doctrine of Ejusdem Generis

None of the cases interpreting the scope of §242(a)(2)(B)(ii)'s catch-all phrase, "any other [discretionary] decision of the attorney general [except asylum]," has explored the doctrine known as "ejusdem generis," which can be determinative in interpreting the scope of such catch-all phrases. The authors submit that ejusdem generis, which has been sanctioned by the U.S. Supreme Court and many U.S. courts of appeal since 1939, may be the key to a proper interpretation of §242(a)(2)(B)(ii).

According to the rule of "ejusdem generis," general terms in a statute following specific ones ordinarily are limited to matters similar to those specified.³²

Where general words follow the enumeration of particular classes of persons or things, the general words, under the rule or maxim of construction known as "ejusdem generis," will be construed as

applicable only to persons or things of the same general nature or class as those enumerated, unless an intention to the contrary is clearly shown The rule finds application and has frequently been applied where such terms as "other," "any other," "others," or "otherwise," or "other thing" follow an enumeration of particular classes, and where this occurs such words are to be read as "other such like," and are construed to include only others of the like kind or character.³³

The rule applies when the following conditions exist:

- (1) the statute contains an enumeration by specific words; (2) the members of the enumeration constitute a class; (3) the class is not exhausted by the enumeration; (4) a general term follows the enumeration; and (5) there is not clearly manifested an intent that the general term be given a broader meaning than the doctrine requires.³⁴

Courts have used ejusdem generis to limit the scope of catch-all phrases, like the one found in §242(a)(2)(B)(ii), that are seemingly boundless when viewed in isolation from their surrounding text. In *Garner v. Louisiana*, 368 U.S. 157 (1961),

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the U.S. Supreme Court invoked the doctrine of *ejusdem generis* to limit the scope of a criminal statute defining a "breach of the peace." The statute enumerated six specific acts describing tumultuous and disruptive behavior, such as "engaging in a fistful encounter," and "using . . . unnecessary loud, offensive, or insulting language." The list of six acts was followed by a concluding catch-all phrase: "or . . . any other act in such a manner as to unreasonably disturb or alarm the public." The Court limited the catch-all phrase, in accordance with the *ejusdem generis* rule, to cover other forms of violence or loud and boisterous conduct not already listed.³⁵

A number of decisions of the U.S. Court of Appeals for the 11th Circuit (as well as other U.S. courts of appeal) have used *ejusdem generis* to limit the scope of statutory catch-all phrases. In a 2000 decision, the 11th Circuit relied on *ejusdem generis* in holding that the seemingly broad statutory authorization for a court to award "such legal relief . . . as may be appropriate," in a retaliatory discharge case, did not include the authority to award punitive damages, in view of the statute's enumeration of specific forms of compensatory damages, namely employment, reinstatement, promotion, lost wages, and liquidated damages.³⁶

In a 1991 decision, the 11th Circuit held that the catch-all phrase "or otherwise disciplined," in a statute safeguarding union members against improper disciplinary action by the union, was limited to actions similar in kind to those described just before it—fine, expulsion, and suspension—and therefore did not include union members' forfeiture of voting and nomination rights based on their loss of good standing status.³⁷

In 1989, the 11th Circuit held that a mechanic at a coke plant did not meet the definition of a "miner" under the Black Lung Benefits Act, where the catch-all phrase "and such other work of preparing such coal as is usually done by the operator of a coal mine," did not include the mechanic's performance of washing and crushing at the coke plant, in view of the preceding enumeration of specific types of work occurring on a coal mine site.³⁸ In another 1989 decision, the 11th Circuit held that the statutory catch-all phrase "and other local conditions" did not include local conditions created by a local zoning ordinance, in view of the preceding restrictive term "climate," and therefore the Miami Heart Institute could not shorten the useful life of three facilities it replaced as a result of a zoning ordinance in order to recover unreimbursed costs from Medicare.³⁹

With regard to the interpretation of §242(a)(2)(B)(ii)'s catch-all phrase, "any other [discretionary] decision," all of the conditions exist for the application of *ejusdem generis*. Section 242(a)(2)(B) contains an enumeration by specific statutory references. The members of the enumeration constitute a class consisting of specific forms of discretionary relief that can be raised during removal proceedings as forms of relief from removal. Included in the class are the following: 212(h) and (i) waivers, cancellation of removal (which can only be raised during removal proceedings), voluntary departure, adjustment of status and asylum.⁴⁰ The class is not exhausted by the enumeration, since there are several additional, unmentioned forms of relief that can be raised during removal proceedings as grounds for relief from re-

moval.⁴¹ The catch-all phrase "any other decision or action of the attorney general" follows the enumeration. Finally, there is no clear expression of intent for the catch-all phrase to have a broader meaning than that of the specifically enumerated items.

Applying the doctrine of *ejusdem generis*, §242(a)(2)(B)(ii) should be limited to precluding judicial review only of discretionary denials of relief that can be raised during removal proceedings as relief from removal, in view of the specific enumeration of relief in §242(a)(2)(B). If the U.S. Supreme Court addresses the scope of §242(a)(2)(B)(ii), we feel certain it will apply *ejusdem generis* in its analysis.

Conclusion: The Way Our Government's Democratic Processes Should Work

The right to sue the BCIS in federal court is of inestimable importance. Federal court review of decisions of the BCIS serves not only to correct abuses of discretion when they occur, but also to deter careless and improper agency action in the first instance. That is the way our government's system of checks and balances is supposed to work.

The *CDI Information Systems* interpretation of §242(a)(2)(B)(ii), if followed by other U.S. courts of appeal, circumvents the normal democratic processes of our government. Congress may or may not have the power, within constitutional limits, to deprive millions of foreigners of judicial review in their first encounters with U.S. democracy. If Congress were to consider stripping federal courts of jurisdiction over all immigration decisions, the public policy issues would be thoroughly aired by our elected representatives. If enacted, the constitutionality of such a provision would be tested in the courts. However, it would be most unfortunate if a sweeping jurisdictional bar against judicial review of all immigration decisions came into existence through erroneous judicial interpretations of §242(a)(2)(B)(ii). □

¹ On March 1, 2003, the INS's administrative, service, and enforcement functions were transferred to the new Department of Homeland Security. Under the DHS, border protection, inspection, investigation, and enforcement will be handled by the Bureau of Customs and Border Protection and the Bureau of Immigration and Customs Enforcement. The BICE assumed the INS' enforcement functions, as required by the Homeland Security Act, Pub. L. No. 107-296, 116 Stat. 2135, codified primarily at 6 U.S.C. §101 *et seq.* Under the HSA, services and benefits will be administered by the Bureau of Citizenship and Immigration Services ("BCIS"). The BCIS has assumed all immigration service functions previously performed by the INS, including the adjudication of immigrant visa petitions, naturalization petitions, asylum and refugee applications, and adjudications performed at INS service centers.

² Pub. L. No. 104-208, 110 Stat. 3009 (1996).

³ See *Foti v. INS*, 375 U.S. 217 (1963).

⁴ See *Fatehi v. INS*, 729 F.2d 1086 (6th Cir. 1984); *Ghorbani v. INS*, 686 F.2d 784 (9th Cir. 1982); *Butterfield v. INS*, 409 F.2d 170 (D.C. Cir. 1969).

⁵ 5 U.S.C. §701 *et seq.* The APA does not provide a basis for exercising subject matter jurisdiction. Pre-IIRIRA cases relied on 8 U.S.C. §1329 as conferring subject matter jurisdiction on the district courts to review the INS' predeportation proceeding immigration decisions. The IIRIRA amended 8 U.S.C. §1329 to limit its applicability to suits brought by the government. In *Sibhari v. Reno*, 197 F.3d 938, 941-43 (8th Cir. 1999), the court held that 28 U.S.C. §1331 provides an alternative jurisdictional basis.

⁶ *Reno v. American-Arab Anti-Discrimination Committee*, 525 U.S. 471, 483 (1999).

⁷ The group of statutory sections referenced in §242(f) is titled "Inspection, Apprehension, Examination, Exclusion, and Removal," and as the title suggests, deals with immigration enforcement functions.

⁸ See *American-Arab Anti-Discrimination Committee*, 525 U.S. at 485.

⁹ Sections 1182(h) and (i) relate to waivers of inadmissibility for aliens who have committed certain crimes and immigration violations; 1229b relates to cancellation of removal; 1229c deals with voluntary departure; 1255 relates to adjustment of status.

¹⁰ "This subchapter" refers to subchapter II of Chapter 12 of Title 8, covering §§1151 through 1379, and encompassing §§201 through 294 of the INA.

¹¹ Section 1158(a) relates to asylum.

¹² *CDI Information Systems, Inc. v. Reno*, 278 F.3d 616 (6th Cir. 2002). See also *Thomas v. Jenifer*, 2002 U.S. App. LEXIS 7558 (6th Cir. 2002) (following *CDI Information Systems*).

¹³ *Samirah v. O'Connell*, 335 F.3d 545 (7th Cir. 2003).

¹⁴ *Van Dinh v. Reno*, 197 F.3d 427 (9th Cir. 1999).

¹⁵ *El-Khader v. Perryman*, 264 F. Supp. 2d 645 (N.D. Ill. 2003); *Ana Int'l, Inc. v. Way*, 242 F. Supp. 2d 906 (D. Or. 2002); *Systronics Corp. v. INS*, 153 F. Supp. 2d 7 (D.D.C. 2001); *Sacchov v. INS*, 24 F. Supp. 2d 406 (E.D. Pa. 1998).

¹⁶ Two additional district court decisions interpreted §242(a)(2)(B)(ii) broadly and held that it bars district court habeas review of discretionary decisions made by the district director while the alien is in removal proceedings. *Auramenkov v. INS*, 99 F. Supp. 2d 210 (D. Conn. 2000); *Curri v. Reno*, 86 F. Supp. 2d 413 (D.N.J. 2000). However, these cases are no longer valid in view of the U.S. Supreme Court's decision in *INS v. St. Cyr*, 533 U.S. 289 (2001), in which the Court held that §242 does not bar habeas corpus review because the term "review," as used in §242, does not refer to habeas review. *St. Cyr* did not specifically address §242(a)(2)(B)(ii), and dealt with other §242 provisions that use the term "review" when restricting federal court jurisdiction. However, the Court's reasoning would apply with equal force to §242(a)(2)(B)(ii), so that even when broadly interpreted, the provision would not bar district court habeas review. See the recently decided *Demore v. Kim*, 123 S. Ct. 1708 (2003), in which the Supreme Court held that a provision restricting judicial review of the Attorney General's discretionary decisions regarding detention and release did not bar habeas review raising a constitutional challenge to the statutory framework that permitted the alien's detention without bail.

¹⁷ *Shanti, Inc. v. Reno*, 36 F. Supp. 2d 1151 (D. Minn. 1999); *Talwar v. INS*, 2001 U.S. Dist. LEXIS 9248 (S.D.N.Y. 2001). A third district court, in an unreported decision, also interpreted the provision narrowly. See 80 Interpreter Releases 319 (March 3, 2003), summarizing the decision of the U.S. District Court for the District of Columbia in *Evangelical Lutheran Church in America v. INS*, No. 02-1297 (D.D.C. Oct. 5, 2002) (order granting preliminary injunction).

¹⁸ *Mart v. Beebe*, 94 F. Supp. 2d 1120 (D. Or. 2000); *Burger v. McElroy*, 1999 U.S. Dist. LEXIS 4854 (S.D.N.Y. 1999) (in which the INS conceded that §242(a)(2)(B)(i) only abolishes judicial review of adjustment of status denials by the BIA in removal proceedings).

¹⁹ *Talwar*, 2001 U.S. Dist. LEXIS 9248 at pg. 10 [citations omitted].

²⁰ *Shanti*, 36 F. Supp. 2d at 1158.

²¹ *Mart*, 94 F. Supp. 2d at 1124.

²² *Talwar*, 2001 U.S. Dist. LEXIS 9248, at pg. 12.

²³ *Mart*, 94 F. Supp. 2d at 1124.

²⁴ *Id.*

²⁵ *Id.*

²⁶ *Ana Int'l*, 2002 U.S. Dist. LEXIS 25483, at pp. 41-42.

²⁷ *Van Dinh*, 197 F.3d at 432.

²⁸ *CDI Information Systems*, 278 F.3d at 620.

²⁹ *Id.*

³⁰ *Food & Drug Admin. v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 133 (2000).

³¹ *King v. St. Vincent's Hospital*, 502 U.S. 215, 221 (1990), quoting *NLRB v. Federbush Co.*, 121 F.2d 954, 957 (2d Cir. 1941). (L. Hand, J.).

³² See *Snapp v. Unlimited Concepts, Inc.*, 208 F.3d 928, 934 (11th Cir. 2000); *Dept. of Labor v. Aluminum, Brick & Glass Workers Int'l Union*, 941 F.2d 1172, 1180 (11th Cir. 1991); *Fox v. Office of Workers Compensation Programs*, 889 F.2d 1037, 1040 n.15 (11th Cir. 1989); *Miami Heart Institute v. Sullivan*, 868 F.2d 410, 413 (11th Cir. 1989).

³³ *United States v. Baranski*, 484 F.2d 556, 566 (7th Cir. 1973), quoting 82 C.J.S. Statutes §332b, at 658, 662 (1953).

³⁴ *Baranski*, 484 F.2d at 567, quoting J. SUTHERLAND, 2 STATUTES AND STATUTORY CONSTRUCTION §4910, at 400-1 (3d ed. by F. Horack, 1943).

³⁵ *Garner*, 368 U.S. at 168.

³⁶ *Sapp*, 208 F.3d at 934.

³⁷ *Aluminum, Brick & Glass Workers Int'l Union*, 941 F.2d at 1180.

³⁸ *Fox*, 889 F.2d at 1040.

³⁹ *Miami Heart Institute*, 868 F.2d at 413.

⁴⁰ The reference to asylum appears at the end of §242(a)(2)(B)(ii) as an exception, but nonetheless is part of the list of items of discretionary relief that are set forth in §242(a)(2)(B).

⁴¹ See 8 C.F.R. § 240.11; *Matsuk v. INS*, 247 F.3d 999 (9th Cir. 2001) (holding that §242(a)(2)(B)(ii) bars circuit court review of the discretionary denial of withholding of removal during removal proceedings).

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