No. 04-670

In the Supreme Court of the United States

CONFIDENCE ALERU, PETITIONER

v.

ALBERTO R. GONZALES, ATTORNEY GENERAL

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether the Attorney General's regulation that permits the Board of Immigration Appeals (Board) to summarily affirm the decision of the immigration judge (IJ) and then designate the IJ's opinion as the final agency determination is facially invalid on the ground that it violates the Due Process Clause or prevents meaningful judicial review of the agency's action under *SEC* v. *Chenery Corp.*, 318 U.S. 80 (1943).

2. Whether, on a petition for review from an order of removal in which the Board designates the opinion of the IJ as the final agency determination, the court of appeals should review the Board's procedural decision not to refer the appeal to a three-member panel for a written opinion or should instead proceed to review the agency's final determination on the merits.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 3a-4a) is not published in the Federal Reporter but is reprinted in 103 Fed. Appx. 62, and is available in 2004 WL 1459395. The decisions of the immigration judge (Pet. App. 10a-21a) and the Board of Immigration Appeals (Pet. App. 7a-9a) are unreported.

JURISDICTION

The judgment of the court of appeals was entered on June 30, 2004 (Pet. App. 3a-4a). A petition for rehearing was denied on August 19, 2004 (Pet. App. 1a-2a). The petition for a writ of certiorari was filed on November 17, 2004. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. a. An alien who has been ordered removed from the United States by an immigration judge (IJ) may appeal the order to the Board of Immigration Appeals (Board). See 8 U.S.C. 1229a(c)(4); 8 C.F.R. 3.1(b)(1)-(3), 240.53(a) (2003).[1] Prior to 1999, administrative appeals from the removal orders of IJs were heard by three-member panels of the Board. On October 18, 1999, the Attorney General adopted new regulations, which were further amended on August 26, 2002, to streamline the appellate process. See 64 Fed. Reg. 56,135 (1999); 67 Fed. Reg. 54,878 (2002). Pursuant to these new rules, an appeal is assigned for initial review to a single member of the Board. 8 C.F.R. 3.1(e) (2003). If that member finds that the result reached in the IJ's decision was correct and that any errors "were harmless or nonmaterial," and further finds that either (A) the issues in the case are "squarely controlled by existing Board or federal court precedent and do not involve the application of precedent to a novel factual situation," or (B)

[1] Pursuant to the Homeland Security Act of 2002, Pub. L. No. 107-296, 116 Stat. 2135 (codified at 6 U.S.C. 101 *et seq.*), responsibility for the removal of aliens was transferred from the Attorney General to the Secretary of Homeland Security, see 6 U.S.C. 251(2) (Supp. II 2002), while the Attorney General retains responsibility for the administrative adjudication of removal cases by IJs and the Board. See *Aliens and Nationality; Homeland Security; Reorganization of Regulations*, 68 Fed. Reg. 9824, 9830-9846 (2003). The regulations governing the adjudication procedures are currently codified at 8 C.F.R. 1001 *et seq.* We refer in this brief to the 2003 version of the Code of Federal Regulations, which contains the regulations in effect at the time of the Board's order in this case, on May 13, 2003. See 67 Fed. Reg. 54,898-54,899 (2002) (providing that the August 26, 2002 procedural amendments to 8 C.F.R. 3.1(e) would take effect on September 25, 2002, and apply to all pending cases).

"[t]he factual and legal questions raised on appeal are not so substantial that the case warrants the issuance of a written opinion," the reviewing judge affirms the decision without issuing a separate opinion. 8 C.F.R. 3.1(e)(4)(i), (A) and (B) (2003).[2] In such cases, the Board issues the following order: "The Board affirms, without opinion, the results of the decision below. The decision below is, therefore, the final agency determination. *See* 8 C.F.R. 3.1(e)(4)." 8 C.F.R. 3.1(e)(4)(ii) (2003). Because an affirmance without opinion (AWO) renders the decision of the IJ "the final agency determination," the regulation specifies that "[a]n order affirming without opinion * * * shall not include further explanation or reasoning." *Ibid.*

If the alien files a petition for review in the court of appeals, the Attorney General has made clear that it is the decision of the IJ, and not the Board's summary affirmance, that is the proper subject of judicial review. See 64 Fed. Reg. at 56,137 ("[t]he decision rendered below will be the final agency decision for judicial review purposes"); *id.* at 56,138 ("[f]or purposes of judicial review * * * the Immigration Judge's decision becomes the decision reviewed").

b. The impetus for the streamlining reform was the explosive increase in the caseload of the Board. See 64 Fed. Reg. at 56,136. Between 1984 and 1998, the number of new appeals and motions before the Board increased eight-fold (from 3000 annually to 28,000

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[2] The regulation states that an affirmance without opinion "approves the result reached in the decision below," and that while "it does not necessarily imply approval of all of the reasoning of that decision, [it] * * * does signify the Board's conclusion that any errors in the decision of the immigration judge or the Service were harmless or nonmaterial." 8 C.F.R. 3.1(e)(4)(ii) (2003).

annually). *Ibid.* Faced with such a staggering increase, the Board's ability to accomplish its mission—"to provide fair and timely immigration adjudications and authoritative guidance and uniformity in the interpretation of the immigration laws"—had been compromised. *Ibid.* To ameliorate that problem, the Attorney General implemented a system of streamlined appellate review. The system is premised on the recognition that "in a significant number of appeals and motions filed with the Board, a single appellate adjudicator can reliably determine that the result reached by the adjudicator below is correct and should not be changed on appeal." *Id.* at 56,135. In such cases, "the rule authorizes a single permanent Board Member to review the record and affirm the result reached below without issuing an opinion." *Id.* at 56,135-56,136. The result is a system that enables the Board to render decisions in a more timely manner, while husbanding its limited resources. See *Belbruno* v. *Ashcroft*, 362 F.3d 272, 280 (4th Cir. 2004) ("[T]he agency adopted regulations that would allow it to focus a greater measure of its resources on more complicated cases.").

2. a. Pursuant to the Immigration and Nationality Act (INA), 8 U.S.C. 1101 *et seq.*, and implementing regulations, an IJ has the discretion to grant asylum to a "refugee." *INS* v. *Cardoza-Fonseca*, 480 U.S. 421, 428 n.5 (1987); 8 U.S.C. 1158(b)(1). The INA defines "refugee" as a person who is "unable or unwilling to return to" his or her country "because of persecution or a well-founded fear of persecution on account of race, religion, nationality, membership in a particular social group, or political opinion." 8 U.S.C. 1101(a)(42)(A).

The disposition of an application for asylum involves a two-step inquiry. First, the applicant must demon-

strate that she is a "refugee" within the meaning of 8 U.S.C. 1101(a)(42)(A). Specifically, the alien bears the burden of proving that she has either suffered past persecution or has a well-founded fear of future persecution. See *ibid.*; 8 C.F.R. 208.13(a) and (b) (2003). If the applicant establishes her eligibility as a refugee, and none of the statutory exceptions apply, then the Attorney General may, as a matter of discretion, grant the applicant asylum. See 8 U.S.C. 1158(b)(1) and (2) (2000 & Supp. II 2002).

An alien is entitled to withholding of removal if "the alien's life or freedom would be threatened in that country because of the alien's race, religion, nationality, membership in a particular group, or political opinion." 8 U.S.C. 1231(b)(3)(A). To satisfy that standard, the applicant must prove a "clear probability of persecution upon deportation," a higher standard than that required to establish eligibility for asylum. *Cardoza-Fonseca*, 480 U.S. at 430 (internal quotation marks omitted).

The Board has defined "persecution" as "harm or suffering" inflicted upon an individual "in order to punish h[er] for possessing a belief or characteristic a persecutor [seeks] to overcome." *In re Acosta*, 19 I. & N. Dec. 211, 222 (BIA 1985). Persecution is an "extreme concept." *Fatin* v. *INS*, 12 F.3d 1233, 1240 (3d Cir. 1993); see *Guzman* v. *INS*, 327 F.3d 11, 15 (1st Cir. 2003) (stating that establishing persecution is "a daunting task"). Persecution does not include every kind of treatment our society deems offensive or morally reprehensible. See *Nelson* v. *INS*, 232 F.3d 258, 263-264 (1st Cir. 2000); *Bradvica* v. *INS*, 128 F.3d 1009, 1012 (7th Cir. 1997).

b. The courts of appeals must uphold an IJ's or the Board's denial of asylum when that decision is supported

by substantial evidence. Specifically, pursuant to 8 U.S.C. 1252(b)(4)(B), the courts of appeals must uphold the determination by the IJ or the Board "unless any reasonable adjudicator would be compelled to conclude to the contrary." This standard adopts and codifies the decision of this Court in *INS* v. *Elias-Zacarias*, 502 U.S. 478 (1992). In *Elias-Zacarias*, this Court held that to obtain reversal of an asylum denial, the alien must establish that "the evidence he presented was so compelling that no reasonable factfinder could fail to find the requisite fear of persecution." *Id.* at 483-484.

3. a. Petitioner is a citizen of Sierra Leone. Pet. App. 11a. Petitioner was detained at the border in October 2000, when she attempted to enter on a false Canadian passport. *Id.* at 16a-17a. The government promptly commenced removal proceedings; petitioner conceded removability and requested asylum, withholding of removal, or protection under the United Nations Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (Convention Against Torture), 1465 U.N.T.S. 85. Pet. App. 12a. Petitioner testified that she had been given by her mother at a young age to a Lebanese couple who took her to Lebanon as an unpaid servant, where they held her against her will and mistreated her. *Id.* at 14a-15a. Petitioner stated that the only people who harmed her were those in the family to whom she had been given by her mother. *Id.* at 20a. Petitioner has not seen the family who abused her since January 1995, at which time they abandoned her, rather than pay for medical treatment that she needed. *Id.* at 15a. Between January 1995 and her coming to the United States in 2000, petitioner had remained in Lebanon, where she married

a man of African descent, had a job as a waitress, and had two children. *Ibid.*

The IJ concluded that, despite testifying credibly to outrageous treatment at the hands of the family to whom she was an unpaid servant, petitioner did not prove past persecution. Pet. App. 20a. The IJ found that, although the Lebanese family were "abusive people who took advantage of" petitioner, their abuse was unrelated to any of the five protected characteristics under the INA. *Ibid.* After noting the government's representation that it had no intention to remove petitioner to Lebanon, "or anywhere in the proximity of the [abusive] family," the IJ turned to consider whether petitioner had established a likelihood of persecution in Sierra Leone. *Ibid.* The IJ found "no indication that [petitioner] possesses a belief or a characteristic any persecutor in Sierra Leone would seek to overcome by means of mistreatment." *Id.* at 21a; see *ibid.* (petitioner failed to "establish[] any nexus between any characteristic that she holds and any persecution that may be inflicted on her in any country"). The IJ therefore ordered petitioner removed. *Ibid.*[3]

b. In her appeal to the Board, petitioner renewed her claim for asylum, withholding of deportation, or protection under the Convention Against Torture. Petitioner argued that she was entitled to asylum on the basis of persecution as a member of a particular social

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[3] At the time of petitioner's asylum hearing, Sierra Leone was experiencing internal armed conflict, and nationals of Sierra Leone, including petitioner, were extended Temporary Protected Status, which prevented their immediate removal. Pet. App. 20a. In light of the end of the armed conflict and relative peace that has been established, that status terminated effective May 3, 2004. See 68 Fed. Reg. 52,407-52,408 (2003).

group, which she asserted was comprised of "[c]hildren abandoned by their families to human trafficking and slavery." Pet. App. 28a. Petitioner also argued that she deserved humanitarian asylum because of the severity of her past persecution. *Id.* at 29a-30a.

Pursuant to 8 C.F.R. 3.1(e)(4) (2003), the Board summarily affirmed without issuing a separate written opinion. Pet. App. 9a. The Board's order designated the IJ's decision as the final agency determination. *Ibid.*

c. Petitioner then filed a petition for review of the removal order in the court of appeals. Petitioner contended, as she does here, that the Board's affirmance-without-opinion (AWO) procedures are facially invalid under the Constitution and principles of administrative law and that they had, in any event, been misapplied to her case. Pet. App. 4a. In an unpublished per curiam opinion, the court of appeals denied the petition. *Ibid.* The court of appeals observed that petitioner's challenges to the Board's AWO procedures were foreclosed by prior circuit precedent. *Ibid.* (citing *Ngure* v. *Ashcroft*, 367 F.3d 975 (8th Cir. 2004), and *Loulou* v. *Ashcroft*, 354 F.3d 706 (8th Cir. 2003)).

ARGUMENT

Petitioner argues that the Board's AWO procedures are facially invalid because they do not afford an opportunity for meaningful judicial review of an agency's decision (Pet. 12-23) and violate the constitutional requirement of due process (Pet. 26-28). The courts of appeals have uniformly rejected similar challenges. That consistent conclusion of the courts of appeals is correct and does not warrant this Court's review.

Petitioner also challenges (Pet. 23-26) the court of appeals' holding that the Board's determination to

affirm without opinion is not reviewable separate from the merits of the IJ's underlying decision, which is the agency's final determination. Although there is some divergence of opinion among the courts of appeals on that subsidiary question, the disagreement among the circuits is thus far essentially confined to narrow circumstances not presented here and does not, in any event, warrant review by this Court.[4]

1. a. Every court of appeals to address the question has upheld the Attorney General's AWO procedures against facial challenges like those raised by petitioner. See *Albathani* v. *INS*, 318 F.3d 365 (1st Cir. 2003); *Zhang* v. *DOJ*, 362 F.3d 155 (2d Cir. 2004); *Dia* v. *Ashcroft*, 353 F.3d 228 (3d Cir. 2003) (en banc); *Khattak* v. *Ashcroft*, 332 F.3d 250 (4th Cir. 2003); *Soadjede* v. *Ashcroft*, 324 F.3d 830 (5th Cir. 2003) (per curiam); *Denko* v. *INS*, 351 F.3d 717 (6th Cir. 2003); *Georgis* v. *Ashcroft*, 328 F.3d 962 (7th Cir. 2003); *Loulou* v. *Ashcroft*, 354 F.3d 706 (8th Cir. 2003); *Falcon Carriche* v. *Ashcroft*, 350 F.3d 845 (9th Cir. 2003); *Yuk* v. *Ashcroft*, 355 F.3d 1222 (10th Cir. 2004); *Mendoza* v. *Attorney General*, 327 F.3d 1283 (11th Cir. 2003).

Petitioner appears to concede (Pet. 27) that the aspect of the AWO regulation that allows for an appeal to be decided by a single member violates neither the Constitution nor the INA. The INA itself states nothing about the composition of the Board. Indeed, the statute's only reference to the Board is in the definition of "order of deportation," which provides that the IJ's order becomes final upon the earlier of "a determination by the Board of Immigration Appeals affirming such

[4] The pending petition for certiorari in *Kebede* v. *Gonzales*, No. 04-280 (filed Aug. 27, 2004), presents a similar question regarding the reviewability of the Board's application of its AWO procedures.

order" or the expiration of time in which to take an appeal. 8 U.S.C. 1101(a)(47)(A), (B)(i) and (ii). Thus, the Attorney General could, consistent with the INA, simply have provided that all appeals from orders of removal are to be adjudicated by a single member of the Board, as is the case in other administrative schemes. See *Vermont Yankee Nuclear Power Corp.* v. *NRDC*, 435 U.S. 519, 543 (1978) ("agencies should be free to fashion their own rules of procedure," so long as not proscribed by Congress) (citation omitted). Cf., *e.g.*, 7 C.F.R. 1.132, 1.145 (providing that decisions of administrative law judges are appealed to a single "judicial officer" acting for the Secretary of Agriculture). There could be no constitutional doubt as to the propriety of such a regulation. See *Falcon Carriche*, 350 F.3d at 850 (noting that the argument that aliens are "entitled to an additional procedural safeguard—namely, review of their appeal before three members of the BIA"—has "no support in the law").

Petitioner instead focuses her challenge (Pet. 12-23, 26-28) on the part of the regulation that allows the reviewing Board member to enter a summary affirmance, and thereby to designate the IJ's decision as the agency's final determination, without providing any further indication of the Board member's own thinking. Petitioner contends that this aspect of the AWO procedures violates the principle of administrative law, established in *SEC* v. *Chenery Corp.*, 332 U.S. 194 (1947), that judicial review of agency action is limited to the "grounds invoked by the agency," and that, therefore, the basis of the agency's decision "must be set forth with such clarity as to be understandable." Pet. 13-14 (quoting *Chenery*, 332 U.S. at 196-197)). The courts of appeals have uniformly rejected challenges to

the AWO regulation on this ground, and properly so. Nothing in the INA or the Constitution requires that the Board state its reasoning in a separate written opinion, rather than designating the IJ's decision as the agency's final decision that the courts should review. Indeed, as noted above, see pp. 9-10, *supra*, the INA says next to nothing about the Board, apart from noting its existence and stating that, if appealed, orders of removal do not become final until the Board makes "a determination * * * affirming such order." 8 U.S.C. 1101(a)(47)(A), (B)(i) and (ii).

Even before the Attorney General adopted formal streamlining procedures, the Board (sitting in three-member panels) would frequently affirm on the basis of the IJ's opinion. The courts of appeals had uniformly upheld that practice, noting that in such circumstances the court was able to review the determination of the IJ as that of the agency. See, *e.g.*, *Singh-Kaur* v. *INS*, 183 F.3d 1147, 1150 (9th Cir. 1999) ("When the BIA adopts an IJ's findings and reasoning, we review the IJ's opinion as if it were the opinion of the BIA."); *Giday* v. *INS*, 113 F.3d 230, 234 (D.C. Cir. 1997); *Chen* v. *INS*, 87 F.3d 5, 8 (1st Cir. 1996); *Dobrican* v. *INS*, 77 F.3d 164, 167 (7th Cir. 1996) ("[W]here the BIA adopts the reasoning of the IJ, we have held that the BIA adequately explains its decision when it adopts the IJ's decision, and we base our review solely on the IJ's analysis."); *Prado-Gonzalez* v. *INS*, 75 F.3d 631, 632 (11th Cir. 1996) ("[E]very court of appeals that has considered this issue (the Second, Fourth, Fifth, Seventh, Eighth, Ninth and Tenth Circuits) has held that the Board need not write a lengthy opinion that merely repeats the immigration judge's reasons for denying the requested relief, but instead may state that it affirms the immigration judge's

decision for the reasons set forth in the decision.") (collecting cases).

Those holdings apply equally to the Attorney General's streamlining regulations. As the First Circuit explained in *Albathani*, *Chenery*'s requirement of a clear explanation of an agency's decision "refers to *agencies* in their entirety, not individual components of agencies," such as the Board. *Albathani*, 318 F.3d at 377. Under the streamlining regulation, the *agency* "present[s] a statement of reasons for its decision, albeit from the IJ rather than the [Board]"; "*Chenery* does not require that this statement come from the [Board] rather than the IJ." *Ibid*. Similarly, the Third Circuit observed that "[a]ll that is required for our meaningful review is that the agency—as represented by an opinion of the [Board] or IJ—put forth a sufficiently reasoned opinion." *Dia*, 353 F.3d at 243. Under the AWO procedures, "[t]he [Board] presents for our review the reasoning and decision of the IJ as that of the Attorney General." *Ibid*.

Petitioner contends that the AWO regulation is different from the Board's prior practice of summary affirmances because the streamlining regulation permits the Board member to affirm without opinion even if the member disagrees in some respect with the IJ's reasoning. See 8 C.F.R. 3.1(e)(4)(ii) (2003) (an affirmance without opinion "does not necessarily imply approval of all of the reasoning of that decision, but does signify the Board's conclusion that any errors in the decision of the immigration judge * * * were harmless or nonmaterial"). But there is "no constitutional significance in the fact that an AWO does not necessarily imply approval of all of the reasoning of the IJ." *Dia*, 353 F.3d at 243.

The regulations specifically provide that when the Board affirms without opinion, the IJ's decision *is* the final agency determination, and the agency's determination must rise or fall on the quality of its reasoning. See 8 C.F.R. 3.1(e)(4)(ii) (2003). As the courts of appeals have correctly recognized, they are called upon only to "consider the reasons laid out by the Immigration Judge, not what the [Board] may or may not have additionally meant in affirming the Immigration Judge's decision." *Belbruno*, 362 F.3d at 281. The court of appeals will not "substitute different grounds," even though the Board could have done so. *Albathani*, 318 F.3d at 378; *Yuk*, 355 F.3d at 1231 ("the [Board] knows that faulty or inadequate reasoning in the IJ's decision will lead to the reversal of a * * * summary affirmance of that decision").

In numerous other administrative contexts as well, administrative appellate bodies may render the decisions of the administrative law judge as the agency's final decision. See, *e.g.*, 29 U.S.C. 661(j) (by statute, the decision of the administrative law judge becomes the final order of the Occupational Safety and Health Review Commission unless a member of the Commission affirmatively directs review within 30 days of the order); 42 C.F.R. 405.1877(c) (if the Administrator of the Centers of Medicare and Medicaid Services announces his intent to review a decision of the Provider Reimbursement Review Board, but fails to issue his own determination within 60 days, the inaction is deemed an affirmance of the Board's decision); 20 C.F.R. 404.981 (the Social Security Administration's Appeals Council may decline to review the administrative law judge's determination regarding social security benefits, in which case the administrative law judge's opinion

becomes the agency's final action); *Burton* v. *Stevedoring Servs. of Am.*, 196 F.3d 1070, 1073 (9th Cir. 1999) (noting that, pursuant to an appropriations rider, if the Benefits Review Board does not rule on an appeal under the Longshore and Harbor Workers Compensation Act, 33 U.S.C. 901 *et seq.*, within a year, the decision of the administrative law judge becomes the final order of the Board). Under each of those statutory and regulatory regimes, it is entirely possible that, as under the Board's AWO procedures, the appellate body or official declines to write a separate opinion because it finds that the decision under review reaches the correct result and that any errors were harmless or nonmaterial. Under petitioner's view, each of those regimes apparently would be subject to a facial challenge. Petitioner's view is not, however, the law.

Petitioner is correct that in a narrow class of cases, use of the AWO process could conceivably affect the court of appeals' ability to undertake judicial review. Petitioner's argument is largely based on an extended hypothetical in which the IJ denies relief from removal at least in part on a "ground * * * that is *not* subject to judicial review" (such as that an asylum application was filed out of time, see 8 U.S.C. 1158(a)(2)(B) and (3)), and the Board member affirms without opinion, but the affirmance actually rests on a rejection of the unreviewable ground relied on by the IJ together with a finding that another, reviewable, ground supports the same result. Pet. 17-20. In that situation, it has been noted, the court of appeals may not know whether it can review the final order. Significantly, that "jurisdictional conundrum," which the courts faced in *Zhu* v. *Ashcroft*, 382 F.3d 521, 527 (5th Cir. 2004), and *Haoud* v. *Ashcroft*, 350 F.3d 201, 206 (1st Cir. 2003) (cited by

petitioner at Pet. 17), and on which petitioner places so much weight, is not presented here. The only ground upon which petitioner's application for asylum was denied was the lack of evidence establishing a well-founded fear of persecution. Pet. App. 20a-21a. That is a determination over which the courts have review jurisdiction. See 8 U.S.C. 1252(a)(2)(B)(ii) (authorizing review of the Attorney General's decision whether to grant asylum under Section 1158(a)). Moreover, we have been informed by the Executive Office of Immigration Review in the Department of Justice that, in recognition of the potential problem identified in *Zhu* and *Haoud*, the Board has determined that in cases where the IJ's decision rests on both reviewable and nonreviewable grounds for denying relief from removal, AWO procedures should not be utilized.[5]

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[5] The petition speculates that the conundrum identified by the First and Fifth Circuits could occur even where the unreviewable ground was the *only* basis cited by the IJ for denying the application, because the Board member could affirm the IJ's order without opinion based upon another, reviewable, ground not indicated in the IJ's decision. See Pet. 17, 21. Petitioner miscomprehends the regulatory scheme. As discussed above, see pp. 12-13, *supra*, under 8 C.F.R. 3.1(e)(4) (2003), the Board member designates the IJ's decision as the agency's final determination. It would not be appropriate to designate as the agency's final determination an opinion that does not include the ground upon which the agency relies. Thus, if the Board member believes that the IJ's order should be affirmed on a ground other than one identified by the IJ, the Board member will either write his own brief opinion or refer the appeal to a three-member panel. See 8 C.F.R. 3.1(e)(5) (2003) ("If the Board member * * * determines * * * that the decision is not appropriate for affirmance without opinion," and does not warrant referral to a three-member panel under the criteria of 8 C.F.R. 3.1(e)(6) (2003), the single member to whom the appeal was assigned "shall issue a brief order affirming, modifying, or remanding the decision under review."). Thus, where the IJ's decision rests only on a nonreviewable

Where, as here, the only issues decided by the IJ and presented on appeal to the Board are reviewable grounds for denying relief from removal—such as failure to satisfy the criteria for asylum, withholding of deportation, and protection under the Convention Against Torture—the problem identified in the certiorari petition cannot arise. The IJ's explanation of his reasons for denying asylum and other relief to petitioner provided a fully adequate explanation of the agency's action.

b. Petitioner's due process argument also fails. Aliens have no constitutional right to an administrative appeal of the IJ's decision. Even in criminal cases, the right to appeal is created by statute, and is not compelled by the Constitution. See *Abney* v. *United States*, 431 U.S. 651, 656 (1977). The process provided by statute and regulation for an alien to raise her claim for asylum or other relief from removal more than satisfies the requirement of due process—"the opportunity to be heard at a meaningful time and in a meaningful manner." *Mathews* v. *Eldridge*, 424 U.S. 319, 333 (1976) (citation omitted). Even when the denial of an alien's request for asylum is affirmed under the Board's AWO procedure, as was petitioner's, she is provided an opportunity for a full hearing before and reasoned decision by the IJ, a right to appeal to and consideration of her arguments by a member of the Board, and further review by the court of appeals. The courts of appeals have correctly held that, in light of the Attorney General's interest in "accurate, efficient, and economical adjudication of immigration matters," and the leeway this Court has recognized agencies must have to "fash-

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ground, there is no conundrum, and judicial review is barred.

ion[] their own appropriate procedures," the process provided under the Board's AWO procedures is fully consistent with the demands of due process. *Denko*, 351 F.3d at 730 n.10 (citing *Vermont Yankee Nuclear Power Corp.*, 435 U.S. at 525); *Zhang*, 362 F.3d at 159; *Dia*, 353 F.3d at 242.

2. a. The court of appeals correctly concluded that the Board's use of its AWO procedure is not subject to judicial review. In its exhaustive opinion in *Ngure* v. *Ashcroft*, 367 F.3d 975 (2004), the Eighth Circuit provided a number of reasons in support of its conclusion that the Board's AWO decision was "committed to agency discretion and not subject to judicial review,"*id.* at 983:

First, the court recognized that, in light of separation of powers principles and deference to Executive expertise—which is especially appropriate in the immigration context—"agencies should be free to fashion their own rules of procedure" for discharging their many duties. *Ngure*, 367 F.3d at 983 (quoting *Vermont Yankee Nuclear Power Corp.*, 435 U.S. at 543).

Second, the court observed from "the text, structure, and history of the streamlining regulations" that the Attorney General "surely did not intend to create substantive rights for aliens," *Ngure*, 367 F.3d at 983, or "to confer important procedural benefits upon individuals," *id.* at 984 (quoting *American Farm Lines* v. *Black Ball Freight Serv.*, 397 U.S. 532, 538 (1970)), by promulgating the AWO regulation. To the contrary, "judicial review of the BIA's streamlining decision would have 'disruptive practical consequences' for the Attorney General's administration of the alien removal process." *Ibid.* (quoting *Southern Ry.* v. *Seaboard Allied Milling Corp.*, 442 U.S. 444, 457 (1979); see *id.* at

985 ("It has never been thought that the Supreme Court would review the propriety of this court's decision to affirm a district court without opinion * * * , as opposed to the merits of the underlying decision, and we see no reason to believe that the Department of Justice intended its comparable rule to have a different effect.").

Third, the Eighth Circuit reasoned that the decision to apply the Board's AWO procedure to a particular case was not susceptible to a "meaningful and adequate standard of review." *Ngure*, 367 F.3d at 985. The court compared the issue to that addressed in *ICC* v. *Brotherhood of Locomotive Engineers*, 482 U.S. 270 (1987), in which this Court held that it would not separately review the ICC's decision not to reopen a prior action on grounds of material error, because such review would merge with the Court's review of the underlying merits. *Id*. at 279.

Fourth, the Eighth Circuit observed that the decision whether a particular case presented a sufficiently "substantial" issue to "warrant[] the issuance of a written opinion" required the exercise of the Board member's own knowledge about the Board's limited resources and expertise as to whether a published decision in a particular case, as compared with others that might present the same issue, would advance the overall administration of the Attorney General's adjudication program and the development of immigration law. *Ngure*, 367 F.3d at 986.

Additional considerations confirm that the Attorney General did not intend to create private rights by adopting the AWO procedures. Rather, their purpose was to facilitate the efficient *internal* functioning of the agency. See 64 Fed. Reg. at 56,138 ("The streamlining

system will allow the Board to manage its caseload in a more timely manner while permitting it to continue providing nationwide guidance through published precedents in complex cases involving significant legal issues."); 67 Fed. Reg. at 54,888 (comparing the determination whether to issue a written opinion to the court of appeals' decision to publish an opinion). Indeed, the internal administrative character of the regulation is confirmed by the subsection's heading—"*[c]ase management system*." 8 C.F.R. 3.1(e) (2003). Furthermore, the regulation specifies that the member should use the AWO procedure "if *the Board member determines*" the criteria are satisfied, 8 C.F.R. 3.1(e)(4)(i) (2003) (emphasis added), not whether the criteria *are* satisfied, thus underscoring that the decision whether to utilize the AWO procedure is one for the judgment and discretion of the Board member alone. See *Webester* v. *Doe*, 486 U.S. 592, 600 (1988) (authorization under 50 U.S.C. 403(c) to terminate CIA employees whenever the Director of Central Intelligence "'shall *deem* such termination necessary or advisable' * * * not simply when the dismissal *is* necessary or advisable" "appears * * * to foreclose the application of any meaningful judicial standard of review").

Moreover, the regulation's express statement that the IJ's opinion becomes "the final agency determination," coupled with the provision that the single Board member will not make any statement apart from specifying that the decision of the IJ will be the final agency decision, 8 C.F.R. 3.1(e)(4)(ii) (2003), make clear that the Attorney General intended the courts of appeals to review the underlying decision of the IJ rather than that of the single Board member. See *Tsegay* v. *Ashcroft*, 386 F.3d 1347, 1357 (10th Cir. 2004) (noting that the only

way to review the Board member's decision to apply AWO would be "first remanding the case for an expanded explanation of why the BIA chose to apply the AWO regulation," which "would require the BIA to do exactly what it is prohibited from doing when it affirms without opinion"). Indeed, the Attorney General's explanation of the AWO procedures explicitly states that "for purposes of judicial review * * * the Immigration Judge's decision becomes the decision reviewed." 64 Fed. Reg. at 56,138. The Attorney General's view that his own AWO regulations create no judicially-enforceable rights is "controlling," since it is neither "plainly erroneous [n]or inconsistent with the regulation." *Auer* v. *Robbins*, 519 U.S. 452, 461 (1997) (citation omitted).

b. Although there is, as petitioner notes (Pet. 23-26), some divergence among the courts of appeals on the question whether the Board's application of the AWO procedures to a particular case is reviewable in its own right, apart from the underlying merits of the IJ's decision, the extent of disagreement among the circuits is uncertain and relatively limited and does not warrant review by this Court. Even under the approach adopted by the circuits on which petitioner relies, petitioner would not be entitled to a remand.

i. Like her administrative law challenge, petitioner's argument in favor of certiorari on the question of the reviewability of the Board's decision to use AWO procedures in a particular case relies heavily on the decisions of the Fifth and First Circuits in *Zhu* and *Haoud*. See Pet. 24-25. As discussed above, see pp. 14-15, *supra*, those cases involved a particular scenario that was not present in this case and should not arise in the future due to a change in the Board's procedures. Both *Zhu* and *Haoud* were cases in which it was unclear whether

the Board had affirmed the IJ's order denying asylum on the ground that the asylum application was untimely, in which case the court of appeals could not review the determination, see 8 U.S.C. 1158(a)(3), or because it found the standard for asylum unmet, which would be reviewable, 8 U.S.C. 1252(a)(2)(B)(ii). See *Zhu*, 382 F.3d at 527; *Haoud*, 350 F.3d at 206.[6] In such a circumstance, the reviewing court would find itself in "a jurisdictional conundrum," *Zhu*, 382 F.3d at 527, not knowing whether it had jurisdiction. In recognition of this potential problem, the Board has altered its practices and determined that the AWO procedures should not be utilized in cases where the IJ's decision includes both reviewable and nonreviewable grounds for denying the request for relief from removal. Furthermore, the Civil Division of the Department of Justice, which is responsible for representing the Attorney General on petitions for review of removal orders in the courts of appeals, has adopted a policy of consenting to remands in such cases, including those that were decided under AWO procedures prior to the policy change and that raise that jurisdictional conundrum. Thus, the particular problem confronted in *Zhu* and *Haoud*—which is not presented in this case in any event—does not require review by this Court.

ii. Petitioner cites decisions of two other circuits as having adopted the view that the Board's decision to utilize AWO procedures is reviewable independent of the underlying merits. Pet. 24 (citing *Smriko* v.

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[6] Subsequent to the filing of the petition for certiorari in this case, the Ninth Circuit has also remanded in cases presenting the same situation as *Zhu* and *Haoud*. See *Lanza* v. *Ashcroft*, 389 F.3d 917, 932 (9th Cir. 2004); *San Pedro* v. *Ashcroft*, 395 F.3d 1156, 1157 (9th Cir. 2005).

Ashcroft, 387 F.3d 279 (3d Cir. 2004), and *Chen* v. *Ashcroft*, 378 F.3d 1081 (9th Cir. 2004)). The Ninth Circuit's position on this question, however, is unclear. In *Chen* itself, the Ninth Circuit is considering whether to rehear the issue en banc. See note 7, *infra*. And, subsequent to *Chen*, the Ninth Circuit stated in *Ferreira* v. *Ashcroft*, 390 F.3d 1091 (2004), that the court would *not* separately review a "challenge[] [to] the BIA's decision to streamline [a] particular case," because that argument "collapses into our review of the merits of her case," *id*. at 1100.[7] That approach is entirely consistent with the position of the Eighth Circuit. See *Ngure*, 367 F.3d at 986 (review of the Board's use of the AWO procedure "serves 'no purpose whatever' when the court can directly review the IJ's decision" (citation omitted)).

Nor, notably, would petitioner's case warrant review of the Board's application of its AWO procedure under the standard adopted by the Third Circuit in *Smriko*. The Third Circuit there emphasized that it did *not* endorse a general practice of reviewing AWO decisions separate from the underlying merits. On the contrary, the Third Circuit recognized that, even on its view, "[i]n many situations * * * a streamlining decision * * * will have no material impact on a court's exercise of its judicial review function" and, in such cases, "the reviewing court may simply choose to

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[7] On November 19, 2004, after a member of the Ninth Circuit issued a sua sponte call for a vote on whether the *Chen* decision should be reheard en banc, the Ninth Circuit requested briefs on that question. See *Chen* v. *Ashcroft*, No. 02-73473 (9th Cir. filed Nov. 19, 2004). The government has filed a brief suggesting that the court of appeals take the case en banc in light of the intra-circuit conflict with *Ferreira* and the judicial resources that might otherwise be expended unnecessarily in reviewing the Board's AWO decisions.

address the merits of the IJ's decision without resolving the procedural challenge." *Smriko*, 387 F.3d at 296; see *Chen*, 378 F.3d at 1088 ("in most cases, review of the IJ's decision on the merits and the streamlining decision 'collapse into one analysis'" (quoting *Falcon Carriche*, 350 F.3d at 853 n.7)). Separate review would only be necessary, according to the Third Circuit, in situations like those addressed in *Zhu* and *Haoud*, see *Smriko*, 387 F.3d at 296-297, or that otherwise have a "material impact on a court's exercise of its judicial review function," *id.* at 296. *Id*. at 289, 297 (because the IJ failed to address adequately the novel and difficult issue of statutory construction raised by the petition, the court would need to address the issue without the agency having provided "its *Chevron* deference-entitled 'concrete meaning' to an ambiguous statute"). Cf. *Haoud*, 350 F.3d at 207 (IJ had not been able to consider seemingly applicable Board precedent that post-dated IJ's decision).

Petitioner's case does not fall into the narrow category of instances identified by the Third Circuit where the Board's AWO decision had a "material impact on a court's exercise of its judicial review function," *Smriko*, 387 F.3d at 296. The IJ gave a full and careful analysis of petitioner's asylum claim, finding that petitioner had failed to establish a well-founded fear of persecution in Sierra Leone. Pet. App. 20a-21a. The IJ noted that petitioner had been out of that country for some time and had never engaged in any activities there that would make her a target, and that she had no belief or characteristic that a persecutor would seek to overcome by mistreatment. *Ibid*. In fact, even in Lebanon, where petitioner had suffered mistreatment at the hands of the family for whom she was a domestic

servant, petitioner had lived for more than five years after last seeing the family, during which time she married, got a job as a waitress, and had two children. *Id*. at 14a-15a.

On appeal to the Board, petitioner attempted to recast her claim for asylum as one based on membership in a particular social group, which she characterized as a group consisting of children who were delivered by their families into international human trafficking and slavery. Pet. 9-10. Although petitioner argues that the Board should have addressed this new and substantial legal theory, petitioner's claim was neither new nor substantial. Petitioner's reformulated case suffered from the same "on account of" deficiency that the IJ found was fatal to her claim. Petitioner's new theory did not claim past persecution *on account of* her membership in the particular social group she described, but instead claimed membership in that group because of her *persecution*. Such circular reasoning does not establish a claim of asylum. As the Third Circuit recognized in *Lukwago* v. *Ashcroft*, 329 F.3d 157 (2003), for membership in a "particular social group" to serve as the basis for an asylum application, the group "must exist independently of the persecution suffered by the applicant." *Id*. at 172. The Board's utilization of AWO procedures thus did not have any "material impact on a court's exercise of its judicial review function," *Smriko*, 387 F.3d at 296.

Thus, there is no significant conflict among the courts of appeals warranting review by this Court on whether the AWO regulation confers private enforceable rights and whether its invocation in a particular case is subject to judicial review. If significant problems arise in the future, however, they may be ad-

dressed through an amendment of the regulation or a revision of policies concerning its application by the Board. The prospect for resolution through administrative action is an additional reason for the Court to deny review. See, *e.g.*, *Braxton* v. *United States*, 500 U.S. 344, 347-348 (1991) (observing that change by agency may moot conflict among the circuits, "at least as far as their continuation into the future is concerned"); *Richardson* v. *Wright*, 405 U.S. 208, 209 (1972) (per curiam).

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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