No. 09-79

In the Supreme Court of the United States

BEAUVAIS BELLEVUE, PETITIONER

v.

ERIC H. HOLDER, JR., ATTORNEY GENERAL

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

BRIEF FOR THE RESPONDENT IN OPPOSITION

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QUESTION PRESENTED

Whether the court of appeals correctly determined that it lacks jurisdiction to review a decision of the Board of Immigration Appeals not to exercise its *sua sponte* authority to reopen removal proceedings.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-2a) is not published in the *Federal Reporter* but is reprinted in 309 Fed. Appx. 755. The decisions of the Board of Immigration Appeals (Pet. App. 4a-5a) and the immigration judge (Pet. App. 6a-9a) are unreported.

JURISDICTION

The judgment of the court of appeals was entered on January 27, 2009. A petition for rehearing was denied on April 21, 2009 (Pet. App. 3a). A petition for a writ of certiorari was filed on July 20, 2009. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. a. Section 245 of the Immigration and Nationality Act (INA), 8 U.S.C. 1255, provides that the Attorney

General may, in his discretion, adjust the status of certain aliens to that of a lawful permanent resident.[1] As relevant here, an alien who is physically present in the United States as of December 21, 2000, and is the beneficiary of an approved application for labor certification filed on or before April 30, 2001, may apply to the Attorney General for adjustment of status. 8 U.S.C. 1255(i). Several prerequisites must be met, including that the alien must be "eligible to receive an immigrant visa," be "admissible to the United States for permanent residence," and have "an immigrant visa * * * immediately available to" him. 8 U.S.C. 1255(i)(2).

Even if all of the statutory prerequisities are met, adjustment is not automatic. "The grant of an application for adjustment of status under section 245 [8 U.S.C. 1255] is a matter of administrative grace," and the applicant "has the burden of showing that discretion should be exercised in his favor." *In re Patel*, 17 I. & N. Dec. 597, 601 (B.I.A. 1980). Whether a particular applicant warrants a favorable exercise of discretion is a case-specific determination that depends upon whether the applicant has demonstrated that any adverse factors present in his application are "offset * * * by a showing of unusual or even outstanding equities." *In re Arai*, 13 I. & N. Dec. 494, 495-496 (B.I.A. 1970).

b. An alien may file a motion to reopen removal proceedings based on previously unavailable, material evidence. 8 U.S.C. 1229a(c)(7)(B); 8 C.F.R. 1003.2(c). Such a motion is to be filed with the immigration judge (IJ) or the Board of Immigration Appeals (Board), depending upon which was the last to render a decision in the

[1] The reference to the Attorney General in Section 1255(i) also encompasses the Secretary of Homeland Security. See Homeland Security Act of 2002, Pub. L. No. 107-296, § 1517, 116 Stat. 2311.

matter. 8 C.F.R. 1003.2(c) (Board), 1003.23 (IJ). The alien must "state the new facts that will be proven at a hearing to be held if the motion is granted" and must support the motion "by affidavits or other evidentiary material." 8 U.S.C. 1229a(c)(7)(B); 8 C.F.R. 1003.2(c)(1), 1003.23(b)(3). Where the motion to reopen is filed with the Board, it "shall not be granted unless it appears to the Board that evidence sought to be offered is material and was not available and could not have been discovered or presented at the former hearing." 8 C.F.R. 1003.2(c)(1); see 8 C.F.R. 1003.23(b)(3) (IJ). An alien is entitled to file only one such motion to reopen, and it generally must be filed within 90 days of entry of the final order of removal. 8 U.S.C. 1229a(c)(7)(A) and (C)(i); 8 C.F.R. 1003.2(c)(2), 1003.23(b)(1).

Motions to reopen removal proceedings are "disfavored" because "[t]here is a strong public interest in bringing litigation to a close as promptly as is consistent with the interest in giving the adversaries a fair opportunity to develop and present their * * * cases." *INS* v. *Abudu*, 485 U.S. 94, 107 (1988). The Board has broad discretion in adjudicating a motion to reopen, and it may "deny a motion to reopen even if the party moving has made out a *prima facie* case for relief." 8 C.F.R. 1003.2(a); see *INS* v. *Doherty*, 502 U.S. 314, 323 (1992).

If an alien does not file his motion to reopen within the 90-day time period, the IJ or the Board may reopen his case *sua sponte*. 8 C.F.R. 1003.2(a) ("The Board may at any time reopen or reconsider on its own motion any case in which it has rendered a decision."), 1003.23(b)(1) (similar for IJ). The Board "invoke[s] [its] sua sponte authority sparingly, treating it not as a general remedy for any hardships created by enforcement of the time and number limits in the motions regulations, but as an

extraordinary remedy reserved for truly exceptional situations." *In re G-D-*, 22 I. & N. Dec. 1132, 1133-1134 (B.I.A. 1999).

c. At the time of petitioner's removal hearing, the INA provided that "[t]he Attorney General may, in his discretion, permit any alien under deportation proceedings * * * to depart voluntarily from the United States at his own expense in lieu of deportation." 8 U.S.C. 1254(e)(1) (1988). Voluntary departure permits aliens "to choose their own destination points, to put their affairs in order without fear of being taken into custody at any time, [and] to avoid the stigma * * * associated with forced removals." *Lopez-Chavez* v. *Ashcroft*, 383 F.3d 650, 651 (7th Cir. 2004). In order to obtain voluntary departure, the alien was required to "establish to the satisfaction of the Attorney General that he is, and has been, a person of good moral character for at least five years immediately preceding his application for voluntary departure under this subsection." 8 U.S.C. 1254(e)(1) (1988). The Board has determined that failing to depart voluntarily is a "very serious adverse factor which warrants the denial of a motion to reopen deportation proceedings as a matter of discretion." *In re Barocio*, 19 I. & N. Dec. 255, 257-258 (B.I.A. 1985).[2]

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[2] Beginning in 1990, Congress took additional steps to ensure that aliens who have been granted the privilege of voluntary departure actually depart in a timely fashion. See Immigration Act of 1990, Pub. L. No. 101-649, § 545(a), 104 Stat. 5061. For example, if the alien does not depart within the time specified in the order granting voluntary departure, the alien is ordered removed and the alien becomes "ineligible, for a period of 10 years," to receive certain forms of discretionary relief, including adjustment of status. 8 U.S.C. 1229c(d)(1)(B); 8 C.F.R. 1240.26(a).

2. Petitioner is a native and citizen of Haiti. Pet. App. 6a. He arrived in the United States on a nonimmigrant (visitor) visa in July 1986, with authorization to remain for six months. Administrative Record 107 (A.R.).

Petitioner remained in the United States beyond the time permitted, and the former Immigration and Naturalization Service (INS)[3] charged him with being removable. A.R. 105-107.

Petitioner conceded that he was removable and requested that he be granted voluntary departure. A.R. 101. An IJ determined that petitioner was removable as charged and granted him voluntary departure. A.R. 101; Pet. App. 6a-7a. Petitioner did not depart within the time allowed and has remained in the United States illegally ever since. Pet. App. 7a; see A.R. 76 (petitioner's acknowledgment that he failed to depart the United States).

3. In June 2007, more than 17 years after petitioner's removal order became final, petitioner filed a motion with the IJ to reopen his immigration proceedings. Pet. App. 7a; A.R. 76-79. Petitioner sought reopening in order to pursue adjustment of status based on an approved labor petition (one of the prerequisites for adjustment of status). Pet. App. 7a; A.R. 76-77. Because petitioner's motion to reopen was untimely, he asked the IJ to reopen his case *sua sponte*. Pet. App. 7a.

The IJ denied petitioner's motion to reopen. Pet. App. 6a-9a. The IJ explained that petitioner's motion to reopen was untimely, which meant that reopening was

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[3] On March 1, 2003, the INS ceased to exist as an agency within the Department of Justice and its enforcement functions were transferred to the Department of Homeland Security, pursuant to the Homeland Security Act of 2002, 6 U.S.C. 101 *et seq.*

only available in an exercise of the court's *sua sponte* authority. *Id.* at 7a. The IJ therefore considered whether to exercise his *sua sponte* authority to reopen proceedings. Noting that *sua sponte* reopening is reserved for "exceptional circumstances," the IJ declined to exercise that discretionary authority. *Id.* at 8a-9a. The IJ noted that petitioner had waited "over seventeen years" to file his motion and "gave no specific reason for his failure to comply with the court's 1989 [removal and voluntary departure] order." *Id.* at 7a. The IJ determined that "[t]he fact that [petitioner] could not lawfully adjust [status] in the United States at the time he was granted voluntary departure is no basis for his failure to comply with the grant of voluntary departure"; petitioner "could have complied with the voluntary departure order and returned to the United States at some future date" after adjusting his status through consular processing. *Id.* at 9a. In the IJ's view, *sua sponte* reopening here would have the effect of "reward[ing] someone" who "refuse[d] to comply with a voluntary departure order, evade[d] immigration authorities for a decade, and then claim[ed] to be eligible anew for relief from that order of removal." *Id.* at 10a.

4. The Board affirmed. Pet. App. 4a-5a. The Board "agree[d] with the Immigration Judge * * * that reopening was not warranted under applicable law and as a matter of discretion." *Ibid.* The Board explained that petitioner had no right to reopening because his motion was filed well beyond the 90-day deadline, and the Board "decline[d] to exercise [its] limited *sua sponte* authority on the facts presented in this case." *Id.* at 5a.

5. The court of appeals denied petitioner's petition for review in an unpublished, per curiam opinion. Pet. App. 1a-2a. The court stated that it "lack[s] jurisdiction

to review the Board's discretionary authority to sua sponte reopen proceedings." *Id.* at 2a (citing *Lenis* v. *United States Att'y Gen.*, 525 F.3d 1291, 1292-1293 (11th Cir. 2008), and *Tamenut* v. *Mukasey*, 521 F.3d 1000, 1004 (8th Cir. 2008) (en banc) (per curiam)).

ARGUMENT

Petitioner seeks review (Pet. 9-13) of the court of appeals' denial of his petition for review, which challenged the Board's denial of *sua sponte* reopening. The court of appeals' decision is correct and consistent with the unanimous view of the courts of appeals. Review of the court of appeals' unpublished opinion is unwarranted.

1. a. The court of appeals correctly determined that it lacked jurisdiction over the Board's denial of *sua sponte* reopening. The relevant statute and regulation clearly provide that a motion to reopen "must be filed no later than 90 days after the date on which the final administrative decision was rendered in the proceeding sought to be reopened." 8 C.F.R. 1003.2(c)(2); see 8 U.S.C. 1229a(c)(7)(C). That rule is subject to limited exceptions, see 8 U.S.C. 1229a(c)(7)(C)(iv); 8 C.F.R. 1003.2(c)(3), but petitioner does not contend that any of them applies here. Petitioner filed his motion to reopen over a decade late; accordingly, his proceedings could only be reopened if the Board exercised its *sua sponte* reopening authority. Pet. App. 5a, 7a. Petitioner has acknowledged as much in his motion to reopen, A.R. 78, and before the court of appeals, Pet. C.A. Br. 12-14. And he does not contend otherwise in this Court, instead contending only that the Board erred in denying *sua sponte* reopening.

The court of appeals correctly held that it could not review the Board's denial of *sua sponte* reopening. In

support of its conclusion that denials of *sua sponte* reopening are unreviewable, the court of appeals cited *Lenis* v. *United States Att'y Gen.*, 525 F.3d 1291, 1292-1293 (11th Cir. 2008), and *Tamenut* v. *Mukasey*, 521 F.3d 1000, 1004 (8th Cir. 2008) (en banc) (per curiam), each of which held that the decision whether to reopen removal proceedings *sua sponte* is unreviewable because it is committed to the Board's discretion by law. As the *Lenis* Court explained, "under the Administrative Procedure Act, judicial review is not available when 'agency action is committed to agency discretion by law,'" 525 F.3d at 1293 (quoting 5 U.S.C. 701(a)(2)), which occurs when "the statute is drawn so that a court would have no meaningful standard against which to judge the agency's exercise of discretion," *ibid.* (quoting *Heckler* v. *Chaney*, 470 U.S. 821, 830 (1985)). In the case of *sua sponte* reopening, the court explained, "[n]either the statute nor the regulation at issue today provides any meaningful standard against which to judge the agency's exercise of discretion"; "no statute expressly authorizes the [Board] to reopen cases *sua sponte*," and "the regulation * * * expressly gives the [Board] discretion to *sua sponte* reopen cases" but "provides absolutely no standard to govern the [Board's] exercise of its discretion." *Id.* at 1293-1294 (citing 8 U.S.C. 1103(g)(2) and 8 C.F.R. 1003.2(a) (internal quotation marks omitted)). "Instead," the court explained, the regulation "merely provides the [Board] the discretion to reopen immigration proceedings as it sees fit." *Id.* at 1294 (internal quotation marks and citation omitted). In addition, the regulations allowing an IJ and the Board to reopen a case on their own motion, see 8 C.F.R. 1003.2(a); 1003.23(b)(1), do not confer any privately enforceable rights. Accordingly, the

Board's decision whether to reopen proceedings *sua sponte* is committed to agency discretion by law.

The decision below is consistent with the unanimous view of the courts of appeals that a denial of *sua sponte* reopening is not subject to judicial review. See *Lenis*, 525 F.3d at 1292-1293 (agreeing with ten other courts of appeals).[4] Petitioner does not contend that there is any disagreement in the circuits on this point.

b. Instead, petitioner suggests (Pet. 9-11) that his claim is reviewable because it raises a "question[] of law" within the meaning of 8 U.S.C. 1252(a)(2)(D). Section 1252(a)(2)(D) provides:

> Nothing in subparagraph (B) or (C) [of 8 U.S.C. 1252(a)], or in any other provision of this chapter (other than this section) which limits or eliminates judicial review, shall be construed as precluding review of constitutional claims or questions of law raised upon a petition for review filed with an appropriate court of appeals in accordance with this section.

8 U.S.C. 1252(a)(2)(D).

As an initial matter, petitioner did not raise any argument regarding Section 1252(a)(2)(D) in the court of appeals, and the court of appeals did not pass on it. This

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[4] See also *Luis* v. *INS*, 196 F.3d 36, 40 (1st Cir. 1999); *Ali* v. *Gonzales*, 448 F.3d 515, 518 (2d Cir. 2006); *Calle-Vujiles* v. *Ashcroft*, 320 F.3d 472, 474-475 (3d Cir. 2003); *Mosere* v. *Mukasey*, 552 F.3d 397, 400-401 (4th Cir.), cert. denied, 130 S. Ct. 137 (2009); *Enriquez-Alvarado* v. *Ashcroft*, 371 F.3d 246, 248-250 (5th Cir. 2004); *Harchenko* v. *INS*, 379 F.3d 405, 410-411 (6th Cir. 2004); *Pilch* v. *Ashcroft*, 353 F.3d 585, 586 (7th Cir. 2003); *Tamenut* v. *Mukasey*, 521 F.3d 1000, 1004 (8th Cir. 2008) (en banc) (per curiam); *Ekimian* v. *INS*, 303 F.3d 1153, 1159 (9th Cir. 2002); *Belay-Gebru* v. *INS*, 327 F.3d 998, 1000-1001 (10th Cir. 2003).

Court therefore should decline to address that issue in the first instance. *E.g.*, *United States* v. *Williams*, 504 U.S. 36, 41 (1992). Moreover, petitioner does not allege that there is any disagreement in the circuits regarding the applicability of Section 1252(a)(2)(D) to denials of *sua sponte* reopening.

In any event, Section 1252(a)(2)(D) does not apply here. By its plain text, Section 1252(a)(2)(D) provides a rule of construction for certain provisions of the INA that "limit[] or eliminate[] judicial review." 8 U.S.C. 1252(a)(2)(D). Denials of *sua sponte* reopening are not made unreviewable due to a provision in Section 1252(a) or elsewhere in Chapter 12 of Subchapter II of Title 8. Instead, they are unreviewable as committed to agency discretion by law, both because the regulations allowing for *sua sponte* reopening create no privately enforceable right and because there are no judicially manageable standards to evaluate the agency's exercise of its discretion. See pp. 7-9, *supra*.

Even assuming that Section 1252(a)(2)(D) applies to matters that are committed to agency discretion by law, it does not make petitioner's claim reviewable. The question whether *sua sponte* reopening is warranted is quintessentially a discretionary determination, rather than a legal determination. See 8 C.F.R. 1003.2(a); *In re Patel*, 17 I. & N. Dec. 597, 601 (B.I.A. 1980); *In re Arai*, 13 I. & N. Dec. 494, 495-496 (B.I.A. 1970). Here, the Board reviewed the equities of petitioner's situation, including his failure to abide by his previous removal order and his lengthy period of illegal residence in the United States, and "decline[d] to exercise [its] limited *sua sponte* authority." Pet. App. 4a-5a. Contrary to petitioner's contention (Pet. 6-7), the Board did not deny *sua sponte* reopening based on the legal determination

that he was ineligible for adjustment of status; rather, the Board declined to exercise its discretion "on the facts presented in this case." Pet. App. 5a. The Board's denial of *sua sponte* reopening in the exercise of its discretion therefore does not present a legal issue.

Petitioner is also mistaken in contending (Pet. 11-13) that his claim is reviewable because it raises a constitutional claim. Importantly, petitioner did not raise any due process claim before the court of appeals, and any such claim therefore has been waived. In any event, he does not raise any colorable due process claim here. *Sua sponte* reopening of removal proceedings is inherently discretionary in nature; the applicable regulations do not confer any privately enforceable rights, and petitioner does not have any protected liberty interest that requires that reopening be granted. See, *e.g.*, *Naeem* v. *Gonzales*, 469 F.3d 33, 38-39 (1st Cir. 2006).[5] Petitioner was accorded the process he was due at his removal hearing in 1989, and the Constitution does not entitle him to reopen his case more than seventeen years later. See *INS* v. *Rios-Pineda*, 471 U.S. 444, 450 (1985) (Attorney General may legitimately "avoid creating a further incentive for stalling by refusing to reopen * * * proceedings for those who became eligible for [further relief] only because of the passage of time while their meritless appeals dragged on."). Further review is therefore unwarranted.

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[5] The decisions petitioner cites (Pet. 12-13) are inapposite. Both *Arevalo* v. *Ashcroft*, 344 F.3d 1 (1st Cir. 2003), and *Goncalves* v. *Reno*, 144 F.3d 110 (1st Cir. 1998), cert. denied, 526 U.S. 1004 (1999), addressed whether certain statutory changes should be applied retroactively. Neither addressed the type of due process claim petitioner attempts to present here.

2. Petitioner contends (Pet. 4-9) that this case raises the question whether an alien who fails to comply with a voluntary departure order may seek adjustment of status after a period of ten years has elapsed. That question is not presented here. The court of appeals did not address that statutory question; instead, it held only that a denial of *sua sponte* reopening is unreviewable because it is entrusted to the agency's discretion. Pet. App. 2a.

The IJ did mention the fact that, under 8 U.S.C. 1229c(d)(1)(B), an alien who fails to comply with a voluntary departure order "shall be ineligible, for a period of 10 years, to receive" adjustment of status. Pet. App. 8a. But the IJ did not rely on a finding of ineligibility to deny *sua sponte* reopening. Instead, the IJ determined that, under all of the circumstances of petitioner's case, he would deny relief as a matter of discretion. *Id.* at 9a (declining to "reward someone" who "refuse[d] to comply with a voluntary departure order, evade[d] immigration authorities for a decade, and then claim[ed] to be eligible anew for relief from that order of removal"). Likewise, the Board did not affirm the IJ's decision on the ground that petitioner was ineligible for adjustment of status; rather, it reviewed the record and declined to exercise its *sua sponte* reopening authority "on the facts presented in this case." *Id.* at 5a. Both the IJ and the Board permissibly considered petitioner's failure to abide by the prior voluntary departure order as a "very serious adverse factor" that counseled against taking the exceptional step of exercising discretionary authority to reopen petitioner's case *sua sponte* to consider his request for relief from removal that is itself discretionary. *In re Barocio*, 19 I. & N. Dec. 252, 257-258 (B.I.A. 1985).

Petitioner is mistaken in contending (Pet. 5) that there is disagreement in the circuits on the question whether an alien may apply for adjustment of status after failing to comply with a voluntary departure order and then waiting ten years. The only court of appeals decision he cites suggesting that an alien would not be eligible for relief under those circumstances is the decision below, which did not pass on the question, Pet. App. 2a, and does not create circuit precedent in any event, *id.* at 1a. And the only decision he cites in favor of the opposite view was reversed on rehearing en banc. See *Velezmoro* v. *Ashcroft*, 362 F.3d 1231, reh'g en banc granted, 384 F.3d 1091 (9th Cir. 2004), petition for review denied, 120 Fed. Appx. 185 (9th Cir. 2005) (en banc) (unpublished).[6] Accordingly, there is no disagreement in the circuits, and further review of petitioner's fact-bound claim is unwarranted.

3. There is no basis to hold this case pending the decision in *Kucana* v. *Holder*, No. 08-911 (argued Nov. 10, 2009). That case presents the question whether 8 U.S.C. 1252(a)(2)(B)(ii) removes federal-court jurisdiction to review the Board's denial of a motion to reopen immigration proceedings. *Kucana* addresses a motion to reopen filed as of right, in accordance with the statutory

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[6] Petitioner cites (Pet. 7) *Succar* v. *Ashcroft*, 394 F.3d 8 (1st Cir. 2005), but that case is inapposite. *Succar* addressed whether a regulation that defines certain aliens as ineligible to apply for adjustment of status conflicted with 8 U.S.C. 1255, which generally provides eligibility requirements for adjustment of status, *Succar*, 394 F.3d at 9-10; it did not address an administrative judgment call as to whether to favorably exercise discretion on the facts of an individual alien's case.

Petitioner also cites (Pet. 8) *Iavorski* v. *United States INS*, 232 F.3d 124 (2d Cir. 2000), but that case is likewise inapposite. It addressed equitable tolling of the time limitation for filing a motion to reopen, *id.* at 129-130, which is not at issue here.

and regulatory procedures and deadlines, rather than *sua sponte* reopening, and considers whether such a motion is made unreviewable by operation of a specific jurisdictional bar in the INA, 8 U.S.C. 1252(a)(2)(B)(ii). See Gov't Br. at 23 n.15, *Kucana*, *supra* (No. 08-911) (distinguishing between the two types of reopening). The court of appeals here did not rely on Section 1252(a)(2)(B)(ii) as precluding jurisdiction; it found the denial of *sua sponte* reopening was unreviewable because the matter is committed to agency discretion by law. Pet. App. 2a. There is therefore no occasion to hold this petition pending the outcome of *Kucana*.

4. On January 13, 2010, the Secretary of Homeland Security announced that Department of Homeland Security (DHS) has temporarily suspended removals to Haiti of Haitian nationals who were ordered removed from the United States prior to the earthquake. See Office of the Press Sec'y, Dep't of Homeland Sec., *Statement by Deputy Press Sec. Matt Chandler* <http://www.dhs.gov/ynews/releases/pr_1263409824202.shtm>. In addition, on January 15, 2010, the Secretary announced the designation of Haiti for temporary protected status (TPS), allowing certain Haitian nationals who were in the United States as of January 12, 2010, to remain the United States with employment authorization for a period of 18 months. Office of the Press Sec'y, Dep't of Homeland Sec., *Statement from Homeland Security Secretary Janet Napolitano* <http://www.dhs.gov/ynews/releases/pr_1263595952516.shtm>; see 8 U.S.C. 1254a; 8 C.F.R. Pts. 244, 1244. To qualify for TPS under this designation, Haitian nationals must have continuously resided in the United States since January 12, 2010, must generally be admissible to the United States under 8 U.S.C. 1182(a), must not be subject to the crimi-

nal bars to eligibility, and must meet other eligibility requirements set forth in the governing statutory and regulatory provisions. See 8 U.S.C. 1254a(c); 8 C.F.R. 244.2-.4. The Secretary's designation of Haiti for TPS and detailed application instructions will be published in the *Federal Register*.

The availability of those measures does not affect the resolution of the legal question presented here, which is whether the courts of appeals have jurisdiction to review denials of *sua sponte* reopening. That question does not warrant this Court's review, and the certiorari petition therefore should be denied.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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