No. 13-400

In the Supreme Court of the United States

SULEMAN MERCHANT, PETITIONER

v.

ERIC H. HOLDER, JR., ATTORNEY GENERAL

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

BRIEF FOR THE RESPONDENT IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether the Due Process Clause of the Fifth Amendment protects aliens against the ineffectiveness of retained counsel in removal proceedings.

2. Whether the Suspension Clause requires reviewing courts to exercise more robust review of legal and constitutional claims than the Seventh Circuit exercised below.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1-13) is not published in the *Federal Reporter* but is reprinted at 520 Fed. Appx. 459. The opinion of the Board of Immigration Appeals (Pet. App. 14-23) denying petitioner's third motion to reopen is unreported. Prior decisions of the Board and the immigration judge (Pet. App. 25-27, 28, 30-33, 34-36) are unreported.

JURISDICTION

The judgment of the court of appeals was entered on April 5, 2013. A petition for rehearing was denied on June 28, 2013 (Pet. App. 37). The petition for a writ of certiorari was filed on September 26, 2013. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

This is an immigration case in which petitioner seeks to reopen the final decision of an immigration judge ordering him to voluntarily depart the United States by August 24, 2006. Petitioner filed two unsuccessful motions to reopen in 2006 and 2009, each time represented by a different private attorney. Now he seeks to reopen his case a third time, claiming that each of the two prior attorneys provided him with ineffective assistance of counsel in violation of his constitutional due process rights. The Board of Immigration Appeals (Board) rejected this third motion to reopen, and the Seventh Circuit denied his petition for review of that decision.

1. 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, depending upon which was the last to render a decision in the matter. 8 C.F.R. 1003.2(a) and (c) (Board); 8 C.F.R. 1003.23(b)(1) and (3) (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). 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 IJs and the Board have discretion in adjudicating a motion to reopen, and they 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) (Board); see 8 C.F.R. 1003.23(b)(3) (IJ); see also *INS* v. *Doherty*, 502 U.S. 314, 323 (1992).

If the alien fails to file a timely motion to reopen, he may suggest to the IJ or Board that his case should be reopened *sua sponte*. The IJ or the Board may exercise discretion to reopen an alien's case *sua sponte* at any time. 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).

2. Petitioner, a native and citizen of Pakistan, was admitted to the United States on October 9, 1990, as a nonimmigrant visitor with permission to remain until April 8, 1991. Pet. App. 2, 30. Petitioner failed to depart consistent with the terms of his nonimmigrant admission and has resided unlawfully in the United States for the past 22 years. *Id.* at 2.

a. In April 2003, petitioner reported to the Department of Homeland Security (DHS) for registration in the National Security Entry-Exit Registration System. Pet. App. 2-3. Following that registration, petitioner was served with a Notice to Appear, charg-

ing him with being subject to removal pursuant to 8 U.S.C. 1227(a)(1)(B), as a nonimmigrant who overstayed his period of lawful admission. Pet. App. 3, 30.

Before an IJ, and through his privately retained counsel, Guy Croteau, petitioner admitted the factual allegations against him and conceded his removability. Pet. App. 3, 31. Petitioner submitted an application for cancellation of removal based in part on alleged hardship to his son, a U.S. citizen, pursuant to 8 U.S.C. 1229b(b)(1). Pet. App. 3. Croteau also informed the IJ that, in 2001, an employer in South Carolina had filed a labor certification on petitioner's behalf, and that this application was still pending. *Id.* at 2-3, 31. In mid-2004, the South Carolina company withdrew the 2001 labor certification application. *Id.* at 3. According to petitioner, Croteau further advised him that he would not likely obtain cancellation of removal and that he should solely seek voluntary departure pursuant to 8 U.S.C. 1229c. Pet. App. 3.

At a hearing on April 26, 2006, petitioner withdrew his application for cancellation of removal and applied for voluntary departure. Pet. App. 3, 31. The IJ granted that relief the same day and ordered petitioner to depart the United States by August 24, 2006. *Id.* at 31. The parties waived any administrative appeal, and the order thus became the final administrative decision in petitioner's underlying removal proceedings. *Id.* at 28, 36.

b. On May 26, 2006, Croteau filed petitioner's first motion to reopen his removal proceedings. That motion argued that due to an unforeseen delay, it was unlikely that the 2001 labor certification application filed on petitioner's behalf would be processed prior to the expiration of his voluntary departure period. Pet.

App. 32; Administrative Record (A.R.) 1811-1813. The IJ denied that motion to reopen in July 2006, after concluding that the motion was filed as a delaying tactic and failed to establish grounds for reopening. See Pet. App. 30-33. The Board affirmed the IJ's decision in November 2006, *id.* at 28, and petitioner did not seek judicial review.

c. Petitioner did not voluntarily depart the United States as required by the IJ's April 2006 order. Pet. App. 4. In October 2008, petitioner was arrested for speeding and taken into custody based on the outstanding warrant for his removal. *Ibid.* He remained in custody until July 6, 2009, when he was released under an order of supervision. *Id.* at 4; Pet. 19.

On October 14, 2008, while petitioner was in custody, his wife met with an immigration attorney who advised her that petitioner's first attorney had mishandled his case. Pet. App. 4, 8; A.R. 128. His wife was further advised to file a complaint against the attorney with the Illinois Attorney Registration and Disciplinary Committee (ARDC). Pet. App. 4, 8. Despite being alerted to Croteau's potentially ineffective representation, petitioner did not immediately move to reopen his case on that ground; nor did he immediately file the recommended disciplinary complaint. See *ibid.*

In February 2009, petitioner's wife met and ultimately retained a new attorney, Raymond Sanders, to file a motion to reopen on petitioner's behalf. Pet. App. 4. Their retainer agreement, signed on February 7, 2009, covered only the filing of an asylum claim, and it did not mention either a disciplinary complaint against Croteau or a motion to reopen petitioner's removal proceedings on the ground that Croteau's

representation was ineffective. A.R. 1134, 1163 (Feb. 7, 2009 retainer agreement); see Pet. App. 4-5, 16; A.R. 1133, 1161 (July 31, 2009 retainer agreement).

On March 26, 2009, Sanders filed petitioner's second motion to reopen the April 2006 voluntary departure order together with an application for asylum. Pet. App. 3-5, 25; A.R. 128. The filing did not allege that Croteau had provided petitioner with ineffective assistance of counsel. Rather, it argued that petitioner should not be removed due to changed conditions in Pakistan since April 2006. Pet. App. 25-27. The motion expressly acknowledged that unless petitioner could establish such changed country conditions, it would be "barred by the 90-day deadline for filing motions to reopen." A.R. 1688 (citing 8 U.S.C. 1229a(c)(7)(C)(ii)). In support of his motion and claim for asylum, Sanders submitted fraudulent documents —which he had received from petitioner's wife— falsely stating that petitioner had been kidnapped and persecuted in Pakistan based on his religion. Pet. App. 4-5.

The Board denied petitioner's motion to reopen on July 21, 2009. Pet. App. 25-27. It concluded that the motion to reopen was untimely and did not fall within any exception to the timeliness requirements. *Ibid.* Specifically, the Board held that country conditions in Pakistan had not changed materially since petitioner's underlying removal proceedings, when he could have applied for asylum but failed to do so. *Id.* at 26-27. The Board's decision did not mention the fraudulent claim that petitioner had been kidnapped in Pakistan. Petitioner did not seek further review.

Shortly after the Board's denial of his second motion to reopen, petitioner signed a new retainer agree-

ment with Sanders on July 31, 2009. A.R. 1133, 1161. Whereas his first agreement with Sanders covered only his motion to reopen for purposes of filing an asylum request, this second agreement was for the purpose of filing a disciplinary complaint against Croteau, his first attorney, with the Illinois ARDC. A.R. 1133, 1161 (July 31, 2009 retainer agreement); see Pet. App. 16 n.1. Petitioner filed his ARDC complaint in August 2009. A.R. 286, 454. In November 2009, petitioner ended his relationship with Sanders after learning that a non-attorney advisor associated with Sanders had been arrested for his alleged association with the 2008 Mumbai terrorist attack. Pet. App. 5, 16-17 & n.2; A.R. 14, 287, 306, 371.

d. Petitioner retained his current counsel, Maria Baldini-Potermin, in December 2009. A.R. 14. On March 3, 2010, petitioner filed his third motion to reopen his removal proceedings. Pet. App. 3, 14; A.R. 128. The motion argued that Croteau had ineffectively represented him in the initial removal proceedings, and that Sanders had submitted false documents in support of his second motion to reopen. Pet. App. 5, 14; A.R. 107-109.

The Board denied the third motion on April 16, 2010. Pet. App. 14-23. Regarding the ineffective-assistance-of-counsel claim concerning Croteau, the Board held that the motion was untimely and that equitable tolling was not warranted, as petitioner had failed to exercise due diligence in pursuing that claim. *Id.* at 15-16. The Board found that "the prospect of an ineffective assistance of counsel claim against Mr. Croteau was raised in October 2008," and yet petitioner failed to promptly file a bar complaint or motion to reopen based on that claim. *Ibid.*

The Board also rejected the ineffective-assistance claim concerning Sanders, which was premised on Sanders' filing of a fraudulent asylum claim and supporting documents in conjunction with petitioner's second motion to reopen. Pet. App. 16-18. After noting that petitioner's wife had abetted the misconduct by providing the fraudulent documents to Sanders in the first place, the Board found that petitioner was not prejudiced by the misconduct. *Ibid.* Specifically, the Board noted that the second motion to reopen had been denied because it was untimely, not because of the alleged fraud. *Id.* at 18 & n.4. The Board therefore concluded that "[i]t has not been demonstrated that the outcome of that motion would have been any different had that fraudulent claim been omitted, inasmuch as [the Board] did not rely on that claim in denying that motion." *Id.* at 18.

Insofar as petitioner sought reopening to apply for asylum, the Board held that the motion did not establish changed country conditions in Pakistan so as to excuse its untimeliness. Pet. App. 19. The Board also held that regardless of the motion's untimeliness, petitioner failed to establish prima facie eligibility for relief, as his evidence failed to demonstrate past persecution or any likelihood of future persecution. *Id.* at 19-22. The Board also declined to reopen the proceedings to allow petitioner to apply for cancellation of removal, as a joint motion to reopen was necessary to seek such relief and DHS affirmatively opposed reopening. *Id.* at 22. Finally, the Board declined to reopen the removal proceedings *sua sponte*, concluding that petitioner's case was not sufficiently exceptional so as to warrant the exercise of the Board's discretionary *sua sponte* reopening authority. *Id.* at 22-23.

3. Petitioner sought judicial review of the Board's decision in the Seventh Circuit, which denied the petition in an unpublished order issued in April 2013. Pet. App. 1-13. The court of appeals began by noting that "[b]ecause there is no constitutional or statutory right to effective assistance of counsel in immigration proceedings," petitioner's motion "is only a request for a favorable exercise of the agency's discretion." *Id.* at 6. The court explained that it lacked jurisdiction to review the Board's denial of petitioner's motion to reopen based on Croteau's allegedly deficient performance because petitioner's request did not raise a constitutional or legal question. *Id.* at 6-7. It noted, however, that even if the court had jurisdiction, petitioner would not be entitled to relief because the Board's denial of his motion was not an abuse of discretion. *Id.* at 8. The court explained that the Board had appropriately concluded that the third motion was untimely—and that equitable tolling was not appropriate because petitioner had failed to pursue his claim with "due diligence" after learning of Croteau's alleged ineffectiveness in October 2008. *Ibid.*[1]

The court of appeals also upheld the Board's decision regarding the claim of ineffectiveness by Sanders in connection with petitioner's second motion to reo-

[1] The court of appeals stated that "[a]lthough [petitioner] had knowledge of Croteau's deficient performance in October 2008, [he] did not move to reopen his case until March 2010, almost a year and a half later." Pet. App. 8. Petitioner states (Pet. 25) that the court "overlooked" the fact that he filed his second motion to reopen in March 2009, but the March 2009 motion did not allege that Croteau had been ineffective, and the context makes clear that the court's point was that petitioner waited until March 2010 to raise the *ineffective-assistance claim* as a basis for reopening. See Pet. App. 4-5.

pen. Pet. App. 9-10. The court explained that the Board had correctly concluded that Sanders' decision to include the false kidnapping claim in his request for reopening and asylum did not prejudice petitioner, because the Board rejected the motion on entirely different grounds—its untimeliness and the lack of changed country conditions in Pakistan. *Ibid.*

The court of appeals also rejected petitioner's argument that the circumstances in Pakistan had changed in such a way as to excuse his untimely filing of the third motion to reopen. Pet. App. 10-13. It further explained that the Board had not abused its discretion in concluding that he was not eligible for asylum, withholding of removal, or protection under the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, *adopted* Dec. 10, 1984, S. Treaty Doc. No. 20, 100th Cong., 2d Sess. (1988), 1465 U.N.T.S. 85, because he had not established that he would be subject to religious persecution or torture in Pakistan. Pet. App. 10-13. Finally, the court of appeals held that it lacked jurisdiction to review petitioner's claim that the Board had erred in declining to exercise its authority to reopen his case *sua sponte*. *Id.* at 13 (citing *Johnson* v. *Gonzales*, 478 F.3d 795, 799 (7th Cir. 2007)).[2]

ARGUMENT

The unpublished decision of the court of appeals does not warrant review by this Court. Petitioner urges (Pet. ii, 22-38) this Court to decide whether aliens possess a due process right to effective assistance of counsel in removal proceedings and to deter-

[2] The court of appeals denied petitioner's subsequent petition for rehearing on June 28, 2013. Pet. App. 37.

mine whether the courts of appeals should "exercise more robust review of legal and constitutional claims" when reviewing removal orders so as to avoid any Suspension Clause concerns. There is no occasion to address those issues in this case, however, as the decisions of the Board and the court of appeals rest on dispositive grounds that are independent of the issues now raised by petitioner, and there is no conflict in the circuits on those factbound issues. Certiorari should accordingly be denied.

1. Petitioner's main argument is that certiorari is appropriate so that this Court can address whether the Due Process Clause affords an alien a right to relief based on the ineffective assistance of his or her privately retained counsel in removal proceedings. Although petitioner is correct that there is disagreement among the courts of appeals on that question, the decision below rested on alternative and independent grounds, and so petitioner could not obtain relief even if he were to prevail on the merits of the constitutional issue.

a. Petitioner correctly points out (Pet. 27-28) that there is a split of authority over whether aliens have a Due Process Clause right to effective performance by their privately retained counsel in immigration proceedings. The Seventh and Eighth Circuits have held that aliens have no such constitutional right.[3] By

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[3] See, *e.g.*, Pet. App. 6 (citing *Jezierski* v. *Mukasey*, 543 F.3d 886, 888 (7th Cir. 2008), cert. denied, 556 U.S. 1126 (2009)); *Rafiyev* v. *Mukasey*, 536 F.3d 853, 861 (8th Cir. 2008); *Magala* v. *Gonzales*, 434 F.3d 523, 525-526 (7th Cir. 2005); but see *Mojsilovic* v. *INS*, 156 F.3d 743, 748 (7th Cir. 1998) (noting that in some cases counsel in immigration proceedings "may be so ineffective as to have impinged upon the fundamental fairness of the hearing in violation

contrast, a number of other circuits have suggested or held that the Due Process Clause creates a right to assistance by counsel that is sufficiently effective to prevent removal proceedings from being fundamentally unfair.[4] The United States has acknowledged that split of authority in prior filings with this Court.[5]

b. This case would not be a suitable vehicle for addressing that question, however, because the court of appeals' decision below rested on alternative and independent grounds for denying petitioner's motion to reopen. These alternative grounds make it unnecessary for this Court to reach the constitutional issue, and they make clear that petitioner could not obtain relief even if the Court concluded that aliens do have a due process right to effective assistance of private counsel in immigration proceedings.

Petitioner alleges (Pet. 24-25) that two of his attorneys—Croteau and Sanders—provided him with constitutionally ineffective representation in connection with his removal proceedings. With respect to Croteau, the court of appeals first concluded that it

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of the fifth amendment due process clause") (quoting *Castaneda-Suarez* v. *INS*, 993 F.2d 142, 144 (7th Cir. 1993)); see also *Afanwi* v. *Mukasey*, 526 F.3d 788, 798 (4th Cir. 2008), vacated on other grounds, 558 U.S. 801 (2009).

[4] See, *e.g.*, *Nehad* v. *Mukasey*, 535 F.3d 962, 967 (9th Cir. 2008); *Aris* v. *Mukasey*, 517 F.3d 595, 600-601 (2d Cir. 2008); *Zeru* v. *Gonzales*, 503 F.3d 59, 72 (1st Cir. 2007); *Fadiga* v. *Attorney Gen.*, 488 F.3d 142, 155 (3d Cir. 2007); *Dakane* v. *United States Att'y Gen.*, 399 F.3d 1269, 1273-1274 (11th Cir. 2005); *Tang* v. *Ashcroft*, 354 F.3d 1192, 1196 (10th Cir. 2003); *Denko* v. *INS*, 351 F.3d 717, 723-724 (6th Cir. 2003).

[5] See, *e.g.*, U.S. Br. in Opp. at 8, *Villanueva-Diaz* v. *United States*, 132 S. Ct. 110 (2011) (No. 10-1463); Gov't Br. at 12-13, *Afanwi* v. *Holder*, 558 U.S. 801 (2009) (No. 08-906).

lacked jurisdiction to review petitioner's ineffective-assistance claim because it did not implicate petitioner's constitutional rights. Pet. App. 6-7. But the court went on to deny the motion on the alternative ground that it was untimely. *Id.* at 8. The court correctly explained that a motion to reopen must be filed within 90 days of a final order of removal, see 8 U.S.C. 1229a(c)(7)(C)(i), and that equitable tolling is available only if the alien "exercised due diligence" and "could not have reasonably been expected to file his motion earlier." Pet. App. 8. The court concluded that the Board did not abuse its discretion in holding that petitioner failed to pursue his claim with due diligence, given the delay between when he learned of Croteau's allegedly deficient performance (in October 2008) and when he filed the motion to reopen alleging ineffective assistance of counsel (in March 2010). *Ibid.*

The court of appeals' analysis is correct. Even if the 90-day deadline was equitably tolled until petitioner learned of Croteau's alleged ineffectiveness on October 14, 2008, petitioner's third motion to reopen was still untimely, as it was not filed until March 3, 2010—505 days later.[6] In any event, the questions presented in the petition for certiorari do not encom-

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[6] With equitable tolling, petitioner would have been entitled—at most—to have the 90-day clock start to run on October 14, 2008, in which event his time to file a motion to reopen would have expired on January 12, 2009. See, *e.g.*, *Cabello* v. *Fernandez-Larios*, 402 F.3d 1148, 1156 (11th Cir. 2005) ("When a statute is equitably tolled, the statutory period does not begin to run until the impediment to filing a cause of action is removed."); but see, *e.g.*, *Cada* v. *Baxter Healthcare Corp.*, 920 F.2d 446, 452 (7th Cir. 1990) ("We do not think equitable tolling should bring about an automatic extension of the statute of limitations by the length of the tolling period or any other definite term."), cert. denied, 501 U.S. 1261 (1991).

pass any challenge to the court of appeals' assessment of the Board's equitable-tolling analysis, see Pet. ii, and that inherently factbound analysis is plainly unworthy of review. Cf. *Credit Suisse Secs. (USA) LLC* v. *Simmonds*, 132 S. Ct. 1414, 1421 (2012) (noting "fact-intensive" nature of disputes over equitable tolling). Moreover, because the untimeliness of the motion was an independent basis for the court of appeals' decision denying reopening, there is no reason for this Court to address the Due Process Clause issue on which petitioner *does* seek certiorari. Indeed, even the circuits that recognize a due process right to effective assistance of counsel in removal proceedings have required the alien to show due diligence in order to obtain equitable tolling with respect to an otherwise untimely motion to reopen.[7] Finally, even if the Court reached the due process question and resolved it in petitioner's favor, the court of appeals' alternative holding that the motion was untimely would prevent petitioner from obtaining any benefit from that decision.

Petitioner's ineffective-assistance claim with respect to Sanders suffers from the same problem. The court of appeals, like the Board, addressed that claim on the merits, concluding that petitioner could not show that he suffered any prejudice as a result of Sanders' alleged misconduct in submitting false documents to the Board. Pet. App. 9-10. As the court of

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[7] See, *e.g.*, *Bead* v. *Holder*, 703 F.3d 591, 593-595 (1st Cir. 2013); *Avagyan* v. *Holder*, 646 F.3d 672, 678-680 (9th Cir. 2011); *Alzaarir* v. *Attorney Gen. of U.S.*, 639 F.3d 86, 90-91 (3d Cir. 2011); *Rashid* v. *Mukasey*, 533 F.3d 127, 130-133 (2d Cir. 2008); *Barry* v. *Mukasey*, 524 F.3d 721, 724-726 (6th Cir. 2008); *Mahamat* v. *Gonzales*, 430 F.3d 1281, 1283-1284 (10th Cir. 2005).

appeals explained, the Board "denied [petitioner's] second motion to reopen on the basis of untimeliness and a failure to demonstrate changed circumstances in Pakistan." *Ibid.* The Board "did not mention" the allegations of persecution made in the false documents, which "therefore were not material to the decision and did not prejudice [petitioner]." *Id.* at 10.

Here again, the court of appeals' factbound analysis is correct, and petitioner offers no reason to doubt the court's conclusion that Sanders' alleged ineffectiveness was not prejudicial. Neither of the questions presented in the petition implicate the prejudice analysis. See Pet. ii. Petitioner's claim that Sanders was ineffective would therefore fail even if the Court concluded that aliens in removal proceedings do have a Due Process Clause right to effective assistance of private counsel in immigration proceedings.[8]

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[8] The petition suggests (Pet. 24) that Sanders was ineffective not merely because he made fraudulent claims in connection with the second motion to reopen, but also because he did not seek relief based on the alleged prior ineffective assistance by Croteau, thereby "preclud[ing] [p]etitioner from satisfying the requirement of 'due diligence' on which the [Board] issued its 2010 decision denying reopening." That claim is forfeited, because petitioner failed to make that argument to the Board in his third motion to reopen. See A.R. 109, 117-120, 123, 129 (setting forth allegations against Sanders). It is also meritless. Even if petitioner's ineffective-assistance claim against Croteau was subject to equitable tolling—and even if Sanders had immediately filed a motion to reopen raising that claim the moment he was hired in February 2009—that claim would still have been filed more than 90 days after petitioner learned of Croteau's alleged ineffectiveness in October 2008. See pp. 5-6, 13 & n.6, *supra*. Moreover, as the Board recognized, it appears that petitioner made a conscious choice not to have Sanders raise Croteau's ineffectiveness until July 2009, *after* his second motion to reopen had been rejected.

In short, the court of appeals correctly concluded that the Board did not abuse its discretion in denying petitioner's third motion to reopen based on various grounds independent of any issues concerning an asserted constitutional right to the effective assistance of counsel. Petitioner offers no valid reason to disturb the court's factbound analysis, and further review is unwarranted.

c. Even if the constitutional question petitioner asks this Court to resolve were cleanly presented in this case, petitioner's contention lacks merit. As the court of appeals correctly noted, there is no constitutional right to effective assistance by privately retained counsel in immigration proceedings. That conclusion follows from this Court's decision in *Coleman* v. *Thompson*, 501 U.S. 722 (1991), which held that when the government is not constitutionally required to furnish counsel in a proceeding, the errors of privately retained counsel in that proceeding are not imputed to the government. *Id.* at 752-754. When "[t]here is no constitutional right to an attorney" furnished by the government in a particular kind of proceeding, a client "cannot claim constitutionally ineffective assistance of counsel in such proceedings." *Id.* at 752. In that situation, the attorney performs in a private capacity as the client's agent, not a state actor, and the client therefore must "'bear the risk of attorney error.'" *Id.* at 753 (quoting *Murray* v. *Carrier*, 477 U.S. 478, 488 (1986)); see *Link* v. *Wabash R.R.*, 370 U.S. 626, 634 (1962) (noting that in "our system of

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Pet. App. 15-16. In any event, this factbound challenge to the court of appeals' ineffective-assistance analysis is beyond the scope of the questions presented to this Court. See Pet. ii.

representative litigation, * * * each party is deemed bound by the acts of his lawyer-agent").

It is undisputed that aliens have no constitutional right to publicly funded counsel in immigration proceedings. See, *e.g.*, *Romero* v. *INS*, 399 F.3d 109, 112 (2d Cir. 2005); *Al Khouri* v. *Ashcroft*, 362 F.3d 461, 464 (8th Cir. 2004). Rather, Congress has provided as a statutory matter that an alien shall have the "privilege" of being represented by the counsel of his choice "at no expense to the Government." 8 U.S.C. 1229a(b)(4)(A), 1362; cf. 28 U.S.C. 1654 (parallel provision stating that a party may appear through counsel in any court of the United States). Accordingly, when an alien invokes that privilege and retains a lawyer to represent him in removal proceedings or in filing a petition for review, counsel's actions are attributed to the client, not the government. See *Afanwi* v. *Mukasey*, 526 F.3d 788, 799 (4th Cir. 2008) (explaining that privately retained counsel is "not a state actor"), vacated on other grounds, 558 U.S. 801 (2009).

Thus, even if the issues were otherwise suitable for review in this case, petitioner would be unable to prevail on his constitutional claim. But as noted above, the Board in fact did address one of petitioner's ineffective-assistance-of-counsel claims on the merits and rejected the other as untimely. See pp. 7-8, *supra*; Pet. App. 15-18. The court of appeals sustained those rulings. *Id.* at 7-10. As a result, petitioner is unable to prevail on his ineffective-assistance-of-counsel claims whether they are put in constitutional or non-constitutional terms. Further review is therefore not warranted.

2. Petitioner also raises (Pet. ii) a separate question, addressing whether the Suspension Clause of the

Constitution, Art. I, § 9, Cl. 2, requires reviewing courts to exercise "more robust review of legal and constitutional claims than the Seventh Circuit exercised below." Though the petition is somewhat unclear, this appears to be a reference to the court of appeals' conclusion that it lacked jurisdiction to review the Board's decision not to reopen petitioner's case *sua sponte*. Pet. 25-26; Pet. App. 13. Petitioner asserts (Pet. 25-26) that the courts of appeals are split over whether reviewing courts have jurisdiction to review such a decision—under 8 U.S.C. 1252(a)(2)(D)—in circumstances where the alien suggests *sua sponte* reopening so that he or she may raise a legal or constitutional claim.[9]

Petitioner forfeited any argument that Section 1252(a)(2)(D) grants the courts of appeals jurisdiction to review denials of requests for *sua sponte* reopening by failing even to cite that provision in the court below.[10] In any event, petitioner is wrong in contending that the courts of appeals are divided over whether a Board decision not to reopen a case *sua sponte* is subject to judicial review. As this Court recognized in *Kucana* v. *Holder*, 558 U.S. 233 (2010), the courts of appeals have consistently held that "such decisions are unreviewable because *sua sponte* reopening is

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[9] This Court has repeatedly—and recently—denied review in cases presenting the same question of whether the Board's denial of a suggestion for *sua sponte* reopening is subject to judicial review. See, *e.g.*, *Anaya-Aguilar* v. *Holder*, 133 S. Ct. 1467 (2013); *Gor* v. *Holder*, 131 S. Ct. 3058 (2011); *Ochoa* v. *Holder*, 131 S. Ct. 3058 (2011); *Neves* v. *Holder*, 131 S. Ct. 3025 (2011).

[10] See Pet. C.A. Reply Br. 1-7 (presenting lengthy argument in favor of court of appeals' jurisdiction over Board's denial of *sua sponte* reopening, without specifically mentioning 8 U.S.C. 1252(a)(2)(D)).

committed to agency discretion by law." *Id.* at 251 n.18.

That conclusion is correct. Judicial review is not available when "agency action is committed to agency discretion by law." 5 U.S.C. 701(a)(2). That is true with respect to *sua sponte* reopening, because the decision whether to reopen a case is entirely discretionary and there are no meaningful standards or guidelines by which to review the Board's decision. See, *e.g.*, *Heckler* v. *Chaney*, 470 U.S. 821, 830 (1985) (explaining that "review is not to be had if [a] statute is drawn so that a court would have no meaningful standard against which to judge the agency's exercise of discretion"); Gov't Br. in Opp. at 11-16, 18-20, *Gor* v. *Holder*, 131 S. Ct. 3058 (2011) (No. 10-940). Moreover, unlike the statutory and regulatory provisions allowing an alien to file one motion to reopen as of right, see p. 2, *supra*, the regulation permitting the Board to reopen a case on its own motion, 8 C.F.R. 1003.2(a), establishes a procedural mechanism for the Board itself to invoke in aid of its own internal administration. It does not confer any privately enforceable rights on an alien. See *Lenis* v. *United States Att'y Gen.*, 525 F.3d 1291, 1294 (11th Cir. 2008) (noting that regulation permitting *sua sponte* reopening "merely provides the [Board] the discretion to reopen immigration proceedings as it sees fit") (citation omitted). Accordingly, the Board's decision whether to reopen proceedings *sua sponte* is not reviewable by a court.

Petitioner cites three cases allegedly adopting an exception to this general rule that would allow courts to exercise limited jurisdiction under 8 U.S.C. 1252(a)(2)(D) to review *sua sponte* Board decisions not to reopen removal proceedings. Pet. 25 (citing

Anaya-Aguilar v. *Holder*, 697 F.3d 1189 (7th Cir. 2012), cert. denied, 133 S. Ct. 1467 (2013); *Pllumi* v. *Attorney Gen. of U.S.*, 642 F.3d 155 (3d Cir. 2011); *Tamenut* v. *Mukasey*, 521 F.3d 1000 (8th Cir. 2008)). Section 1252(a)(2)(D) provides that "[n]othing in [Section 1252(a)(2)(B) or (C)], 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." 8 U.S.C. 1252(a)(2)(D).[11]

To the extent that petitioner's three cases suggest that there may be some limited role for judicial review of the Board's decisions not to reopen proceedings *sua sponte*, they do so in circumstances that are not implicated here. In each of those cases, the court of appeals indicated that review might be appropriate if the alien's claim were that the Board made a legal or constitutional error in the course of declining to reopen the proceedings on its own motion. *Anaya-Aguilar*, 697 F.3d at 1190; *Pllumi*, 642 F.3d at 159-160; *Tamenut*, 521 F.3d at 1005. Here, however, petitioner has not pointed to any legal or constitutional error in the Board's conclusion that this case does not warrant *sua sponte* reopening. To the contrary, the

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[11] Section 1252(a)(2)(D) provides a rule of construction for certain provisions of the Immigration and Nationality Act, 8 U.S.C. 1101 *et seq.*, that "limit[] or eliminate[] judicial review." 8 U.S.C. 1252(a)(2)(D). Board determinations not to reopen *sua sponte* are not made unreviewable by any provision in Section 1252(a) or elsewhere in the relevant chapter of the United States Code. Instead, they are unreviewable as committed to agency discretion by law, and because the regulation allowing the Board to reopen a prior decision on its own motion does not confer any privately enforceable rights on an alien. See p. 19, *supra*.

Board simply concluded that petitioner failed to demonstrate the sort of extraordinary circumstances that might warrant the exercise of its *sua sponte* reopening authority as a matter of discretion. Pet. App. 22-23.

Rather, petitioner's constitutional claim is based on the ineffective assistance allegedly rendered by Croteau and Sanders with respect to the underlying removal proceeding and petitioner's second motion to reopen. Petitioner cites no authority supporting his view that an appellate court may review the Board's determination not to exercise its *sua sponte* reopening authority whenever an alien's underlying claim for relief raises a constitutional or legal issue, even if the decision not to reopen was based on an exercise of discretion and did not itself reflect any legal error.

Petitioner offers no sound reason for this Court to address the established rule—applied uniformly by the courts of appeals—that the Board's decision to deny an alien's suggestion for *sua sponte* reopening on discretionary grounds is not subject to judicial review. There is no circuit split on this issue, and no basis for doubting the validity of that rule. Further consideration by this Court is therefore unwarranted.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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