No. 23-1003

# In the Supreme Court of the United States

JESUS FIGUEROA OCHOA, PETITIONER

*v.*

MERRICK B. GARLAND, ATTORNEY GENERAL

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

**BRIEF FOR THE RESPONDENT IN OPPOSITION**

ELIZABETH B. PRELOGAR
*Solicitor General*
*Counsel of Record*
BRIAN M. BOYNTON
*Principal Deputy Assistant Attorney General*
JOHN W. BLAKELEY
MELISSA NEIMAN-KELTING
W. MANNING EVANS
*Attorneys*

*Department of Justice*
*Washington, D.C. 20530-0001*
*SupremeCtBriefs@usdoj.gov*
*(202) 514-2217*

## QUESTION PRESENTED

Whether the court of appeals properly dismissed petitioner's challenge to the agency's denials of a continuance and of a remand for lack of jurisdiction under 8 U.S.C. 1252(a)(2)(B)(i).

## TABLE OF CONTENTS



## TABLE OF AUTHORITIES

Cases:

Statutes, regulations, and rule: Page

Regulations and rule—Continued: Page

# In the Supreme Court of the United States

No. 23-1003

JESUS FIGUEROA OCHOA, PETITIONER

*v.*

MERRICK B. GARLAND, ATTORNEY GENERAL

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

## BRIEF FOR THE RESPONDENT IN OPPOSITION

### OPINIONS BELOW

The order and amended opinion of the court of appeals (Pet. App. 12a-22a) is reported at 91 F.4th 1289. The prior opinion of the court of appeals (Pet. App. 1a-11a) is reported at 71 F.4th 717. The decision of the Board of Immigration Appeals dismissing petitioner's appeal and the immigration judge's removal order are unreported.

### JURISDICTION

The judgment of the court of appeals was entered on June 20, 2023. On February 6, 2024, after a court of appeals judge *sua sponte* called for a vote whether to rehear the case en banc, the court amended its decision and directed that no further rehearing petitions would be allowed (Pet. App. 12a-13a). The petition for a writ of certiorari was filed on March 11, 2024. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

**STATEMENT**

1. a. A noncitizen who is present in the United States without admission or parole is removable. See 8 U.S.C. 1182(a)(6)(A)(i).[1] The Immigration and Nationality Act (INA), 8 U.S.C. 1101 *et seq.*, however, authorizes various forms of discretionary relief for removable noncitizens. A noncitizen seeking such relief bears the burden of establishing that he "satisfies the applicable eligibility requirements" and "merits a favorable exercise of discretion." 8 U.S.C. 1229a(c)(4)(A)(i) and (ii); see 8 C.F.R. 1240.8(d). Two forms of discretionary relief are relevant here.

First, the Attorney General may cancel the removal of a removable noncitizen. 8 U.S.C. 1229b(b)(1). To qualify for cancellation, a noncitizen who is not a lawful permanent resident must establish that (i) he has been physically present in the United States for a continuous period of at least ten years; (ii) he has been a person of good moral character; (iii) he has not been convicted of certain listed crimes; and (iv) "removal would result in exceptional and extremely unusual hardship to the alien's spouse, parent, or child, who is a citizen of the United States or an alien lawfully admitted for permanent residence." 8 U.S.C. 1229b(b)(1)(D); see 8 U.S.C. 1229b(b)(1). As relevant here, the disqualifying offenses include controlled-substance offenses. 8 U.S.C. 1229b(b)(1)(C); see 8 U.S.C. 1182(a)(2)(A)(i)(II), 1227(a)(2)(B)(i).

Second, the Attorney General may adjust the status of a removable noncitizen to that of a noncitizen lawfully admitted for permanent residence. 8 U.S.C. 1255; see 8 C.F.R. 1245.1, 1245.2. Section 1255 provides various

---

[1] This brief uses the term "noncitizen" as equivalent to the statutory term "alien." See *Barton* v. *Barr*, 590 U.S. 222, 226 n.2 (2020) (quoting 8 U.S.C. 1101(a)(3)).

means by which a noncitizen may become eligible for an adjustment of status, including if the noncitizen entered without inspection and is the beneficiary of an immediate-relative visa petition filed on or before April 30, 2001. See 8 U.S.C. 1255(i)(1)(B)(i). To qualify for adjustment on that basis, a noncitizen must, among other things, be admissible to the United States for permanent residence and have an immigrant visa immediately available to him at the time of his application. 8 U.S.C. 1255(i)(2)(A) and (B). The grounds of inadmissibility include convictions for violating a law "relating to a controlled substance." 8 U.S.C. 1182(a)(2)(A)(i)(II).

b. In the removal setting, "[a]n immigration judge (IJ) conducts the initial proceedings." *Mata* v. *Lynch*, 576 U.S. 143, 145 (2015); see 8 U.S.C. 1229a(a)(1). If the IJ orders removal, the noncitizen "has the opportunity to appeal that decision" to the Board of Immigration Appeals (Board or BIA). *Mata*, 576 U.S. at 145; see 8 C.F.R. 1003.1(a)(1), 1003.10(c).

The Attorney General has adopted procedural regulations to "assist in the expeditious, fair, and proper resolution of matters coming before Immigration Judges." 8 C.F.R. 1003.12. As relevant here, those rules provide that an IJ "may grant a motion for continuance for good cause shown." 8 C.F.R. 1003.29; see 8 C.F.R. 1240.6 ("After the commencement of the hearing, the immigration judge may grant a reasonable adjournment either at his or her own instance or, for good cause shown, upon application by the respondent or the Department of Homeland Security.").

The INA also provides that a noncitizen "may file one motion to reopen" removal proceedings based on "new facts." 8 U.S.C. 1229a(c)(7)(A) and (B); see *Dada* v. *Mukasey*, 554 U.S. 1, 12-15 (2008). A motion to re-

open may be filed with either the IJ or the Board, depending on which adjudicator was the last to render a decision in the matter. 8 C.F.R. 1003.2(c), 1003.23(b). Requests for remand made to the Board in the course of an appeal are treated as motions to reopen, subject to the same substantive requirements, when they seek to present evidence not available during the initial proceedings. See *In re Coelho*, 20 I. & N. Dec. 464, 471 (B.I.A. 1992).

c. The INA provides that a noncitizen may seek judicial review of a final order of removal by filing a petition for review in the appropriate court of appeals. 8 U.S.C. 1252(a)(1). "Judicial review of all questions of law and fact * * * arising from any action taken or proceeding brought to remove an alien from the United States" is "available only in judicial review of a final order" under Section 1252. 8 U.S.C. 1252(b)(9).

Congress has insulated certain discretionary determinations of the agency from review. See 8 U.S.C. 1252(a)(2) (entitled "Matters not subject to judicial review") (emphasis omitted). In particular, Section 1252(a)(2)(B), entitled "Denials of discretionary relief," provides as follows:

> Notwithstanding any other provision of law * * * , and except as provided in subparagraph (D) * * * , no court shall have jurisdiction to review—
>
> (i) any judgment regarding the granting of relief under section 1182(h), 1182(i), 1229b, 1229c, or 1255 of this title, or
>
> (ii) any other decision or action of the Attorney General or the Secretary of Homeland Security the authority for which is specified under this subchapter to be in the discretion of the Attorney General or

> the Secretary of Homeland Security, other than the granting of relief under section 1158(a) of this title.

8 U.S.C. 1252(a)(2)(B) (emphasis omitted). As relevant here, the cross-references in clause (i) to Sections 1229b and 1255 deprive courts of jurisdiction to review "any judgment regarding" the Attorney General's decisions to grant or deny cancellation of removal or adjustment of status. 8 U.S.C. 1252(a)(2)(B)(i).

Section 1252(a)(2)(D) provides an exception to the general bar on review of discretionary relief. It states that "[n]othing in subparagraph (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).

2. a. Petitioner is a native and citizen of Mexico. Pet. App. 13a. In 2017, the Department of Homeland Security (DHS) charged him as removable for entering without inspection. *Ibid.* Petitioner conceded removability but applied for cancellation of removal for nonpermanent residents under 8 U.S.C. 1229b(b)(1) and for adjustment of status under 8 U.S.C. 1255(i). Pet. App. 13a; Gov't C.A. Br. 3. DHS contended that petitioner was ineligible for either form of relief because he had three state controlled-substance convictions, in 1996, 1999, and 2000. Pet. App. 13a-14a. Before the IJ, petitioner sought to avoid the consequences of each.

As to the 1996 conviction, petitioner contended that he had been "granted a diversion by the state court, and that after he successfully completed the diversion program, his conviction was 'dismissed.'" Pet. App. 14a. The IJ rejected that argument because petitioner had

"not submitted the court records from his case show[ing] that he successfully completed probation." Administrative Record (A.R.) 119.

As to the 1999 conviction, petitioner argued that it was actually his brother's conviction, not his own. See Pet. App. 14a. The IJ rejected that argument, too. A.R. 119-120. The IJ thoroughly examined the record, including prior state records and legal filings, and concluded that "respondent has not shown that he is not the person" subject to the 1999 conviction. A.R. 120.

Finally, as to the 2000 conviction, petitioner requested a continuance pending a decision on a motion he had filed in state court to vacate the conviction. A.R. 118. The motion was based on a state law authorizing vacatur if "prejudicial error impaired the defendant's 'ability to meaningfully understand, defend against, or knowingly accept the actual or potential adverse immigration consequences of a' conviction." Pet. App. 14a (citation omitted). The IJ denied petitioner's request. A.R. 120. The IJ found that the possibility of vacatur was "speculative," A.R. 118, and concluded, in any event, that "the 1996 and 1999 convictions would be independent barriers to his eligibility" for the forms of relief he was seeking. Pet. App. 14a.

After denying a continuance, the IJ denied the applications for adjustment of status and for cancellation of removal and ordered that petitioner be removed from the United States. A.R. 120.

b. The Board dismissed petitioner's appeal. A.R. 76-78. Although petitioner asserted that the state courts had, in fact, vacated his 2000 conviction after the IJ's decision, the Board affirmed the IJ's denial of a continuance and denied petitioner's motion to remand for reconsideration of his applications for relief in light of the

vacatur of the 2000 conviction. A.R. 76-77. The Board reasoned that the 1999 conviction remained a bar to relief in any event. A.R. 77. As a result, the Board was "not persuaded that a remand would change the outcome in the case." *Ibid.*[2]

c. Petitioner filed a petition for review in the court of appeals, challenging the agency's denials of a continuance and of a remand. The court determined that it lacked jurisdiction over petitioner's challenge and dismissed the petition. Pet. App. 1a-11a.

A judge on the court of appeals then *sua sponte* called for a vote on whether to rehear the case en banc. See C.A. Doc. 38 (Aug. 14, 2023); see also 9th Cir. Gen. Order 5.4(c)(3). Although the government had not disputed jurisdiction at the panel stage, see Gov't C.A. Br. 1-2, at the en banc stage it changed positions and argued that the panel's jurisdictional conclusion was correct, see Gov't C.A. Br. in Opp. to Reh'g 10-13.

The court of appeals then issued an order and amended opinion dismissing the petition and directing that no further rehearing petitions would be allowed. Pet. App. 12a-22a. The court observed that petitioner's "challenge hinges on" a question "of historical fact: 'Who was convicted in 1999—[petitioner] or his brother?'" *Id.* at 15a, 17a. The court summarized the issue as "whether the Board erred in determining that [petitioner] was convicted of a drug offense in 1999; that, as a result, he is ineligible for cancellation of removal or adjustment of status; and that he accordingly was not entitled to a continuance or a remand" in light

---

[2] As the court of appeals noted, the Board's decision contains a scrivener's error referring to petitioner's 2000 conviction as a 1996 conviction. See Pet. App. 15a. The Board did not discuss petitioner's actual 1996 conviction. See *id.* at 16a.

of the potential or actual vacatur of his 2000 conviction. *Id.* at 16a.

The court of appeals found that it lacked jurisdiction under Section 1252(a)(2)(B)(i) over the factual question whether petitioner was subject to the 1999 conviction. Pet. App. 16a-17a. The court noted that it was "guided by the Supreme Court's recent decision in" *Patel* v. *Garland*, 596 U.S. 328 (2022), which "held that the jurisdiction-stripping provision 'encompasses any and all decisions relating to the granting or denying of discretionary relief,' which 'plainly includes factual findings,'" Pet. App. 17a (quoting *Patel*, 596 U.S. at 337, 339). The court explained that because it could not "review the agency's factual finding that [petitioner] was convicted of an offense related to a controlled substance in 1999," it saw "no error in the agency's denial of the continuance or the motion to remand." *Id.* at 18a.

Petitioner argued that "'procedural' decisions" like those at issue here "are not subject to the jurisdictional bar." Pet. App. 18a. The court of appeals rejected that argument in these particular circumstances, noting that *Patel* had broadly construed the reference in Section 1252(a)(2)(B)(i) to "any judgment regarding" the granting of relief, concluding that it encompasses "any authoritative decision" "relating to" the grant or denial of relief. *Id.* at 18a-19a (quoting *Patel*, 596 U.S. at 337, 339). The court explained that the agency's procedural decisions in this case satisfied that test because, "[i]n ruling on the motion for continuance and the motion to remand, the agency assessed how the vacatur of the 2000 conviction would affect [petitioner's] eligibility for discretionary relief." *Id.* at 19a. And it concluded that the agency's "finding—that [petitioner], not his brother, was the subject of the 1999 conviction—was determina-

tive of the ultimate granting or denying of relief." *Id.* at 20a-21a.

**ARGUMENT**

Petitioner renews (Pet. 21-24) his contention that the court of appeals had jurisdiction to resolve his challenges to the agency's denials of a continuance and of a remand. He contends (Pet. 12-21) that the courts of appeals are divided over whether jurisdiction lies in these circumstances. But the decision below was correct, and any disagreement in the circuits is far narrower than petitioner suggests and does not merit this Court's intervention. This case would also be a poor vehicle for resolving the questions presented. Further review is unwarranted.

1. The court of appeals correctly held that it lacked jurisdiction over petitioner's challenges to the agency's denials of a continuance and of a remand.

a. In *Patel* v. *Garland*, 596 U.S. 328 (2022), this Court considered whether the jurisdictional bar in Section 1252(a)(2)(B)(i) extends to factual findings underlying eligibility for adjustment of status. See *id.* at 335-336. The factual question in that case was whether the noncitizen had intentionally represented that he was a United States citizen, which would render him ineligible for adjustment. See *id.* at 334. The noncitizen conceded the misrepresentation but argued that it was accidental. *Ibid.* The agency rejected that argument, finding, as a matter of fact, that the misrepresentation had been intentional. *Id.* at 334-335.

The Court concluded that Section 1252(a)(2)(B)(i) barred review of the agency's finding. *Patel*, 596 U.S. at 338-339. The Court reasoned that "'judgment' means any authoritative decision," rather than just discretionary decisions or the ultimate decision to grant or deny

relief. *Id.* at 337; see *id.* at 337-338. As confirmation of that view, the Court observed that the term "'any' means that the provision applies to judgments 'of whatever kind,'" and is not restricted "to certain kinds of decisions." *Id.* at 338 (citation omitted). And the Court further explained that "the use of 'regarding' 'in a legal context generally has a broadening effect, ensuring that the scope of a provision covers not only its subject but also matters relating to that subject.'" *Id.* at 338-339 (citation omitted). As a result, Section "1252(a)(2)(B)(i) encompasses not just 'the granting of relief' but also any judgment *relating to* the granting of relief," a category "[t]hat plainly includes factual findings." *Id.* at 339.

In light of *Patel*, the court of appeals correctly construed Section 1252(a)(2)(B)(i) to bar review of petitioner's particular challenge here. Petitioner originally sought a continuance of proceedings before the IJ based on the possibility that his 2000 conviction would be vacated, and later sought a remand from the Board to the IJ on the ground that his 2000 conviction had actually been vacated. See Pet. App. 14a-15a. The agency denied both of those requests for futility: Given petitioner's separate 1999 conviction for a controlled-substance offense, "no matter what happened with the 2000 conviction, [petitioner] would remain ineligible for relief." *Id.* at 18a. Petitioner argued before the agency that the 1999 conviction actually belonged to his brother, not petitioner. See A.R. 119; see also Pet. 8 (renewing this assertion). But the agency rejected that contention as a matter of fact. See A.R. 77, 119-120; see also *Pereida* v. *Wilkinson*, 592 U.S. 224, 238 (2021) (noting that "to ask what crime the defendant was convicted of committing is to ask a question of fact").

That factual finding is a "judgment regarding the granting of relief" that is unreviewable under 8 U.S.C. 1252(a)(2)(B)(i). Section 1252(a)(2)(B)(i) "plainly includes factual findings." *Patel*, 596 U.S. at 339. And the agency's conclusion that neither a continuance nor a remand was appropriate because petitioner would nevertheless remain ineligible for adjustment of status or cancellation of removal based on his 1999 conviction was clearly a "judgment *relating to* the granting of relief." *Ibid.* In short, the decision below represents a straightforward application of the statutory text as construed in *Patel*.

A contrary rule would encourage circumvention of the jurisdictional bar. If the Board had granted a remand in light of the vacatur of the 2000 conviction, the IJ would have simply denied relief again based on his determination about the 1999 conviction. See A.R. 120 (IJ decision, stating that the 1999 conviction "also would render [petitioner] ineligible for adjustment of status and non-LPR cancellation"). Nor would a continuance pending the conclusion of the state vacatur proceedings have resulted in any change in the final result, since the outcome of those proceedings would not have affected the 1999 conviction. Even if the 2000 conviction were vacated, the court of appeals would indisputably lack jurisdiction to review the agency's factual finding that it was petitioner, not his brother, who was subject to the 1999 conviction. Petitioner offers no reason why a different outcome is appropriate when the Board denied a remand or a continuance.

b. Petitioner contends (Pet. 23) that Section 1252(a)(2)(B)(i) does not foreclose jurisdiction over "procedural motion[s]." But the Ninth Circuit's holding was not so broad. The court held only that it lacked ju-

risdiction in the particular circumstances here, where "[i]n ruling on the motion for continuance and the motion to remand, the agency assessed how the vacatur of the 2000 conviction would affect [petitioner's] eligibility for discretionary relief." Pet. App. 19a. The court had no occasion to address whether denials of procedural motions in other contexts would be reviewable. See *id.* at 21a (expressly noting that it "need not decide whether" a motion to reopen might be reviewable in different circumstances).

Taking the decision below on its actual terms, petitioner's arguments (Pet. 21-24) are unconvincing. Petitioner contends that his challenge falls outside the jurisdictional bar because he "did not ask the court of appeals to 'review the Board's denial of discretionary relief under' one of the enumerated sections." Pet. 21 (brackets omitted). But the *Patel* Court expressly rejected the notion that Section 1252(a)(2)(B)(i) is limited to "only the decision 'whether to grant relief.'" 596 U.S. at 343 (citation omitted). As the Court explained, although the statute's "reference to 'the granting of relief' appears to constrain the provision from sweeping in judgments that have nothing to do with that subject," Section 1252(a)(2)(B)(i) "extends to any judgment 'regarding' that ultimate decision." *Id.* at 343-344. Petitioner has no explanation for why his challenge does not "relat[e] to" his request for relief. *Id.* at 339 (citation omitted).

Petitioner cites (Pet. 22-23) *Kucana* v. *Holder*, 558 U.S. 233 (2010), which assessed the scope of a companion provision barring review of any action "the authority for which is specified under this subchapter to be in the discretion of the Attorney General." 8 U.S.C. 1252(a)(2)(B)(ii). In *Kucana*, the Court held that Sec-

tion 1252(a)(2)(B)(ii) does not bar review of the agency's denial of a motion to reopen removal proceedings to present new evidence in support of an asylum claim. 558 U.S. at 236-237. Specifically, it held that the provision applies only to decisions made discretionary by statute, not by regulation. *Id.* at 237.

*Kucana* does not help petitioner in this case. Critically, the underlying form of relief at issue in *Kucana* was itself amenable to judicial review, unlike the forms of relief (cancellation and adjustment) involved here. See *Kucana*, 558 U.S. at 250 (observing that "[i]t is unsurprising" that review would be available "where, as here, the alien's underlying claim (for asylum) would itself be reviewable"); see also 8 U.S.C. 1252(a)(2)(B)(ii) (exempting "the granting of relief under section 1158(a) of this title," which governs asylum). Indeed, the *Kucana* Court explicitly stated that "[w]e do not reach the question whether review of a reopening denial would be precluded if the court would lack jurisdiction over the alien's underlying claim for relief." 558 U.S. at 250 n.17.

Petitioner also invokes separation-of-powers concerns, contending (Pet. 26) that the decision below gives the agency authority to shield its own decisions from review because "the discretion over motions for a remand or a continuance was created by the Board, not Congress." But the decision below did not hinge on the fact that remands and continuances are discretionary by regulation. Instead, it turned on whether the agency's finding about petitioner's eligibility for cancellation and adjustment—two forms of relief expressly specified by Congress, see 8 U.S.C. 1252(a)(2)(B)(i)—qualifies as a judgment "regarding" the grant or denial of relief, Pet. App. 20a.

Finally, petitioner invokes (Pet. 22) the presumption in favor of judicial review. But *Patel* rejected the same argument, reasoning that "the text and context of § 1252(a)(2)(B)(i)—which is, after all, a jurisdiction-stripping statute—clearly indicate that judicial review of fact determinations is precluded in the discretionary-relief context." 596 U.S. at 347. As in that case, "[b]ecause the statute is clear," there is "no reason to resort to the presumption of reviewability." *Ibid.*

2. Petitioner contends (Pet. 12-21) that the decision below conflicts with the decisions of other courts of appeals. But petitioner significantly overstates the extent of disagreement in the circuits. Any conflict that does exist does not warrant this Court's review.

a. With respect to the first question presented, petitioner contends (Pet. 12-19) that the First and Eighth Circuits exercise jurisdiction over remand denials in all cases; that the Third, Fourth, Sixth, and Seventh Circuits would have exercised jurisdiction over the remand denial in these particular circumstances; and that the Tenth Circuit's precedent is mixed. The decisions in virtually all of those cases are distinguishable or otherwise unhelpful to petitioner's cause.

The First Circuit in *Moreno* v. *Garland*, 51 F.4th 40 (2022), stated that courts have "jurisdiction to review denials of motions to reopen, even where the petitioner's ultimate goal before the agency was to garner some form of discretionary relief as to which [their] jurisdiction has been substantially curtailed by statute." *Id.* at 46. But the court went on to suggest that only legal questions—not factual ones, as in this case—are reviewable. See *id.* at 47 ("[B]ecause we cannot discern any error of law in the BIA's explanation of its conclu-

sion, we have no authority to review the BIA's exercise of discretion.").

The Third Circuit's decision in *Mendieta-Morales* v. *Attorney General*, 419 Fed. Appx. 282 (2011) (per curiam), is both non-precedential and predates *Patel*.

The Fourth Circuit in *Obioha* v. *Gonzales*, 431 F.3d 400 (2005), exercised jurisdiction over a remand denial on the ground that Section 1252(a)(2)(B)(i) "bars review only of discretionary decisions on the merits of the enumerated sections." *Id.* at 406. But that rationale does not survive *Patel*, which rejected the argument "that only discretionary judgments are covered by" Section 1252(a)(2)(B)(i). 596 U.S. at 343.

The Sixth Circuit held in *Pilica* v. *Ashcroft*, 388 F.3d 941 (2004), "that a motion to reopen that does not involve the consideration of relief on the merits should not be treated as 'regarding' the granting of relief under § 1255" pursuant to Section 1252(a)(2)(B)(i). *Id.* at 948. *Pilica* does not help petitioner because the decision here *did* involve consideration of relief on the merits. The reason the Board denied the motion to remand was its determination that, regardless of the status of his 2000 conviction, petitioner's 1999 conviction independently bars the relief he seeks. Pet. App. 4a. In any event, *Pilica* predates *Patel*.

The Seventh Circuit's decision in *Calma* v. *Holder*, 663 F.3d 868 (2011), which also predates *Patel*, is similar. There, the court held that "judicial review is foreclosed by § 1252(a)(2)(B)(i) only if the agency's rationale for denying the procedural request also establishes the petitioner's inability to prevail on the merits of his underlying claim." *Id.* at 876. Again, that is the case here.

Petitioner asserts (Pet. 18) that "the Tenth Circuit has conflicting case law." But any intracircuit tension

would not warrant this Court's review. See *Wisniewski* v. *United States*, 353 U.S. 901, 902 (1957) (per curiam) ("It is primarily the task of a Court of Appeals to reconcile its internal difficulties.").

That leaves only the Eighth Circuit's decision in *Llanas-Trejo* v. *Garland*, 53 F.4th 458 (2022), which distinguished *Patel* and reaffirmed prior precedent holding that courts "have jurisdiction to review the denial of the motion to reopen for abuse of discretion." *Id.* at 462. But the narrow, recent conflict of authority between the decision below and the Eighth Circuit does not warrant this Court's review. Rather, because the opinions in both cases turned heavily on *Patel*, they confirm that additional percolation in light of *Patel* is appropriate. See *Trejo-Gamez* v. *Garland*, 81 F.4th 817, 819 (8th Cir. 2023) (Colloton, J., concurring) (arguing that *Llanas-Trejo* misread both *Kucana* and *Patel*).

b. With respect to the second question presented, petitioner asserts (Pet. 19) that "[a]ll ten of the other numbered courts of appeals recognize jurisdiction to review the denial of a continuance, at least where other proceedings are pending." One of the decisions that petitioner cites is *Calma*, which supports the government for the reasons discussed above. With one exception, all of the remaining decisions pertain to Section 1252(a)(2)(B)(ii) rather than Section 1252(a)(2)(B)(i). Petitioner contends (Pet. 20) that "their reasoning equally applies to clause (i)," but the reasoning of the cases themselves belies that claim, see, *e.g.*, *Sanusi* v. *Gonzales*, 445 F.3d 193, 199 (2d Cir. 2006) (per curiam) (analyzing specific text of clause (B)(ii)), and *Patel* rejected the analogy the government attempted to draw between the two clauses, see 596 U.S. at 342-343. More-

over, again with a single exception, all of the cases that petitioner cites predate *Patel*.

The sole exception in both instances is an unpublished summary order. See *Toxtega-Olin* v. *Garland*, No. 22-6537, 2024 WL 807436 (2d Cir. Feb. 27, 2024). Thus, petitioner identifies no cognizable conflict on the second question presented.

3. In any event, this case would be a poor vehicle to resolve the questions presented. Petitioner frames those questions as whether courts generally have "jurisdiction to review the denial of a remand" or "denial of a continuance * * * pending the outcome of other proceedings" where review of the underlying relief is barred. Pet. I. But this case does not present those questions.

Instead, as discussed above, see pp. 11-12, *supra*, the court of appeals held only that review is barred in these particular circumstances, where the agency's denials of a remand and a continuance were predicated on its determination that petitioner would not be entitled to the underlying relief even if a remand or continuance were granted. See Pet. App. 20a (noting that resolving the motions "necessarily required the agency to evaluate [petitioner's] eligibility for * * * relief"); see also Pet. 11 (acknowledging that the court's amended opinion "no longer rested * * * on the ground that the decisions were made in the course of ruling on procedural motions"). And the court cited other Ninth Circuit precedent permitting review of "the denial of a motion to reopen proceedings for cancellation of removal" in different circumstances. Pet. App. 21a (discussing *Fernandez* v. *Gonzales*, 439 F.3d 592, 603 (9th Cir. 2006)). Because the court did not adopt the broad holdings that petitioner ascribes to it, this case would be an unsuita-

ble vehicle for addressing petitioner's broadly phrased questions.

**CONCLUSION**

The petition for a writ of certiorari should be denied.

Respectfully submitted.

ELIZABETH B. PRELOGAR
*Solicitor General*
BRIAN M. BOYNTON
*Principal Deputy Assistant Attorney General*
JOHN W. BLAKELEY
MELISSA NEIMAN-KELTING
W. MANNING EVANS
*Attorneys*

MAY 2024