No. 04-280

In the Supreme Court of the United States

MEKDES KEBEDE, PETITIONER

v.

ALBERTO R. GONZALES, 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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QUESTIONS PRESENTED

1. Whether, on a petition for review of an order of removal in which the Board of Immigration Appeals (Board) summarily affirms the decision of the immigration judge (IJ) and then designates the IJ's opinion as the final agency determination, the court of appeals should review the Board's procedural decision not to refer the appeal to a three-member panel for a written opinion or should instead proceed to review the agency's final determination on the merits.

2. Whether the court of appeals properly upheld the IJ's finding that petitioner failed to establish a reasonable possibility of persecution if she were removed to Ethiopia.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-3a) is not published in the Federal Reporter but is reprinted in 97 Fed. Appx. 454, and is available in 2004 WL 1191774. The decision of the immigration judge (Pet. App. 10a-16a) and order of the Board of Immigration Appeals (Pet. App. 4a-5a) are unreported.

JURISDICTION

The judgment of the court of appeals was entered on June 1, 2004. The petition for a writ of certiorari was filed on August 27, 2004. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

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

[1] Pursuant to the Homeland Security Act of 2002, Pub. L. No. 107-296, 116 Stat. 2135 (6 U.S.C. 101 *et seq.*), responsibility for the removal of aliens was transferred from the Attorney General to the Secretary of Homeland Security, see 6 U.S.C. 251(2) (Supp. II 2002), although the Attorney General retains responsibility for the administrative adjudication of removal cases by IJs and the Board. See *Aliens and Nationality; Homeland Security; Reorganization of Regulations*, 68 Fed. Reg. 9824, 9830-9846 (2003). The regulations governing the adjudication procedures are currently codified at 8 C.F.R. 1001 *et seq.* We refer in this brief to the 2003 version of the Code of Federal Regulations, which contains the regulations in effect at the time of the Board's order in this case, on December 23, 2002. See 67 Fed. Reg. 54,898-54,899 (2002) (providing that the August 26, 2002 procedural amendments to 8 C.F.R. 3.1(e) would take effect on September 25, 2002, and apply to all pending cases).

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

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

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

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

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

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

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

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

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

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

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

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

3. a. On May 10, 2000, the INS issued petitioner Mekdes Kebede a Notice to Appear, charging her with deportability under 8 U.S.C. 1227(a)(1)(B) (2000 & Supp. II 2002), for remaining in the United States longer than permitted after being admitted as a non-immigrant. Pet. App. 10a-11a. Petitioner conceded she was removable as charged. *Ibid.* Petitioner applied for asylum, withholding of removal, and protection under the United Nations Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (Convention Against Torture), 1465 U.N.T.S. 85 to avoid removal from the United States. Pet. App. 11a.

Petitioner is an ethnic Oromo and citizen of Ethiopia who claims she suffered past persecution under the since-deposed Mengistu regime in Ethiopia. She also claims that she has a well-founded fear of future persecution if returned to Ethiopia on account of her membership in, or suspected support for, the Oromo Liberation Front (OLF), an organization that "advocates the violent overthrow of the current government." C.A. App. 187, 254, 264-270.

Petitioner testified that the former Mengistu regime detained her father from 1985 to 1989 because of his support for the OLF. C.A. App. 72. Petitioner's uncle, who later was appointed Minister of Agriculture under a transitional government, was also detained under the prior Mengistu regime. *Ibid.*[3]

Petitioner testified that she too had encountered some difficulties with the Mengistu regime. In 1983, a security officer approached petitioner and a friend and found OLF literature in the friend's bag. C.A. App. 264-265. A few days later, a security officer returned to question petitioner about her friend's political activities. The officer told petitioner that if she did not cooperate, she would be arrested like her uncle. *Id.* at 73, 265. Petitioner was detained for three days and warned not to get involved in anti-government activities. *Ibid.* On another occasion, petitioner lost her job at a hotel after security personnel accused her of discussing the OLF with other employees. *Id.* at 74. Later, according to petitioner, security officers showed an interest in a shop she ran because Oromo congregated there. *Id.* at 75.

Petitioner left Ethiopia for Greece in 1990 "[b]ecause of the problem we encountered." C.A. App. 72. With the exception of a one-month return to Ethiopia in 1997, petitioner lived in Greece from March 1990 until August 1999. Pet. App. 12a; C.A. App. 72. Petitioner stated that she applied for asylum in Greece, but that the application was denied. *Id.* at 76.

The Mengistu regime in Ethiopia fell in 1991 only a year after petitioner's departure to Greece. C.A. App.

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[3] Petitioner testified that one of her sisters was shot and killed in the street in 1984. C.A. App. 70. The record gives no indication, however, who was responsible for the shooting or what their motive might have been. *Ibid.*

250. After that, a transitional government was in place until 1995, when the Government of the Federal Democratic Republic of Ethiopia (FDRE) was established. *Id.* at 216. The situation of Oromo Ethiopians has dramatically improved since the end of the Mengistu regime. In recognition of Oromo claims of past discrimination, a federal system of government was adopted under which ethnic groups such as the Oromo have their own state and considerable autonomy in fiscal and political matters. *Id.* at 249, 257. Oromo have been included in the national government. Petitioner's own uncle was appointed Minister of Agriculture in the transitional government. *Id.* at 72. And, in 1995, the Ethiopian Parliament elected an ethnic Oromo as President of the new government. *Id.* at 249.

The OLF has refused to accept the new government and continues its efforts to overthrow the government by violence. C.A. App. 254. Nonetheless, the government has encouraged expatriates who foreswear violence to return to Ethiopia. *Id.* at 252. Even prominent OLF sympathizers are able to live openly "without serious government harassment." *Ibid.* See *id.* at 253 ("[A] number of individual members of the OLF * * * have [renounced violence] and are in fact politically and economically active in Addis Ababa.").

In 1991 or 1992, petitioner's brother went to the south of Ethiopia to work with a group associated with the OLF, and petitioner's family does not know what became of him. C.A. App. 78, 269. In 1997, petitioner's father also disappeared. *Ibid.*

In July 1997, petitioner returned to Ethiopia. C.A. App. 77. Prior to petitioner's trip home, she obtained a passport from the Ethiopian Embassy without difficulty. *Ibid.* Upon petitioner's arrival in Ethiopia, she was

detained for five hours while authorities questioned her, and she was then released. *Id.* at 77-78. During her time in Ethiopia, petitioner was required to check in with the local government office, but was not otherwise harmed or bothered. *Id.* at 79-80.

Petitioner returned to Greece after one month in Ethiopia. C.A. App. 80. Once back in Greece, petitioner arranged to come to the United States with the help of her godmother in Virginia. *Id.* at 80-81.

Petitioner testified that she, her mother, and younger sister are all members of the OLF. C.A. App. 87. Petitioner's activities as a member of the OLF were limited to reading papers and discussing them with others. *Ibid.* Petitioner's mother and sister have remained in Ethiopia throughout this period, and have never been harmed on account of their OLF membership. *Id.* at 88.

b. The IJ denied petitioner's applications for asylum, withholding of removal, and protection under the Convention Against Torture. Pet. App. 13a. The IJ first concluded that petitioner's three-day detention under the former Mengistu regime did not rise to the level of persecution, and, even if it did, that episode would not establish a well-founded fear of future persecution because the Mengistu regime is no longer in power in Ethiopia. *Ibid.* The IJ further concluded that petitioner failed to establish a well-founded fear of persecution by the current Ethiopian government because when she voluntarily returned there in July 1997, she was detained only for five hours at the airport in order to ascertain her identity. *Id.* at 14a. The judge reasoned that "if the government of Ethiopia was focused on this respondent, they had every opportunity to arrest her during July of 1997." *Ibid.* The IJ also

relied on the fact that petitioner's mother and sister, whose situations he found comparable to that of petitioner, have remained unharmed in Ethiopia. *Ibid*. The IJ further found that petitioner's long absences from Ethiopia— from March 1990 until July 1997, and from August 1997 until the time of her hearing—would have lessened the Ethiopian government's interest in her. *Ibid*. Finally, the IJ determined that petitioner's voluntary return to Ethiopia in 1997 reduced the reasonableness of her claim to fear persecution. *Id*. at 15a.

The Board affirmed the IJ's decision without issuing its own written opinion. Pet. App. 4a. The Board's order, entered by a single member, stated: "The Board affirms, without opinion, the results of the decision below. The decision below is, therefore, the final agency determination. *See* 8 C.F.R. § 3.1(e)(4)." *Ibid*.

c. The court of appeals affirmed. Pet. App. 1a-3a. The court rejected petitioner's request to review the Board's determination to apply its AWO procedure to her case. Pet. App. 2a. Even assuming that the Board's reliance on the summary affirmance procedures was erroneous, the court stated that the proper course is for the court of appeals to review the IJ's decision on the merits. *Ibid*. The court went on to hold that petitioner had failed to establish that the record compelled a finding that she was entitled to asylum. *Ibid*.

ARGUMENT

Although, as petitioner observes (Pet. 9-10), the courts of appeals have taken differing approaches in addressing the Board's decision to apply its AWO procedure to an appeal, the disagreement among the circuits is essentially confined to narrow circumstances

not presented here and does not, in any event, warrant review by this Court.[4] Petitioner's challenge to the Board's application of its AWO procedures is nothing more than a recasting of her argument that the IJ and affirming Board member were wrong on the merits of the ultimate question whether petitioner established a reasonable fear of persecution in her home country. Petitioner's mere speculation that two additional Board members might have weighed the evidence differently (Pet. 12-13) would not be a basis for concluding that the AWO procedures were misapplied, even if that decision were separately reviewable.

With regard to the second question presented, the court of appeals' application of the standard of review for asylum determinations to the facts of petitioner's case is correct and does not conflict with any decision of this Court or any other court of appeals and does not warrant this Court's review.

The petition for a writ of certiorari should be denied.

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

[4] The pending petition for certiorari in *Aleru* v. *Gonzales*, No. 04-670 (filed Nov. 17, 2004), presents a similar question regarding the reviewability of the Board's application of its AWO procedures.

Ashcroft, 355 F.3d 1222 (10th Cir. 2004); *Mendoza* v. *Attorney General*, 327 F.3d 1283 (11th Cir. 2003).

Neither the Constitution nor the INA imposes a requirement that appeals be heard by multi-member panels. The INA provides only that an IJ shall inform an alien of "the right to appeal" the IJ's order of removal, 8 U.S.C. 1229a(c)(4), and that the IJ's "order of deportation" becomes final upon the earlier of "a determination by the Board of Immigration Appeals affirming such order" or the expiration of time in which to take an appeal, 8 U.S.C. 1101(a)(47)(A), (B)(i) and (ii). See 8 U.S.C. 1158 (noting deadline for filing "any administrative appeal" from denial of asylum). Thus the Attorney General could, consistent with the INA, simply have provided that all appeals from orders of removal are to be adjudicated by a single member of the Board, as is the case in many other administrative schemes. See *Vermont Yankee Nuclear Power Corp.* v. *NRDC*, 435 U.S. 519, 543 (1978) ("agencies should be free to fashion their own rules of procedure," so long as not proscribed by Congress) (citation omitted). Cf., *e.g.*, 7 C.F.R. 1.132, 1.145 (providing that decisions of administrative law judges are appealed to a single "judicial officer" acting for the Secretary of Agriculture). There could be no constitutional doubt as to the propriety of such a regulation. See *Albathani*, 318 F.3d at 375 (observing that, even when the Board streamlines a case, the alien still has a right to a full and fair asylum hearing before the IJ, the opportunity to present her arguments to the Board, and a decision by a Board member); *Falcon Carriche*, 350 F.3d at 850 (noting that the argument that aliens are "entitled to an additional procedural safeguard—namely, review of their appeal

before three members of the BIA"—has "no support in the law").

Nor does anything in the INA or the Constitution require that the Board state its reasoning in a separate written opinion, rather than affirming on the basis of the IJ's own explanation of its holding. Indeed, even before the Attorney General adopted formal streamlining procedures, the Board (sitting in three-member panels) would frequently affirm on the basis of the IJ's opinion. The courts of appeals had uniformly upheld that practice, noting that in such circumstances the court was able to review the opinion of the IJ. See, *e.g.*, *Singh-Kaur* v. *INS*, 183 F.3d 1147, 1150 (9th Cir. 1999) ("When the BIA adopts an IJ's findings and reasoning, we review the IJ's opinion as if it were the opinion of the BIA."); *Dobrican* v. *INS*, 77 F.3d 164, 167 (7th Cir. 1996) ("[W]here the BIA adopts the reasoning of the IJ, we have held that the BIA adequately explains its decision when it adopts the IJ's decision, and we base our review solely on the IJ's analysis."); *Prado-Gonzalez* v. *INS*, 75 F.3d 631, 632 (11th Cir. 1996) ("[E]very court of appeals that has considered this issue (the Second, Fourth, Fifth, Seventh, Eighth, Ninth and Tenth Circuits) has held that the Board need not write a lengthy opinion that merely repeats the immigration judge's reasons for denying the requested relief, but instead may state that it affirms the immigration judge's decision for the reasons set forth in the decision.") (collecting cases). These observations are equally valid regarding the Attorney General's streamlining regulations, which provide that when the Board affirms without opinion, the IJ's decision *is* the final agency determination. See 8 C.F.R. 3.1(e)(4)(ii) (2003); see also *Albathani*, 318 F.3d at 377 (concluding that the Board's streamlining

procedure does not render judicial review of agency decisions impossible even if the Board does not explicate its reasons for its affirmance of the IJ's order, because courts have the IJ's decision and the record upon which it was based available for review); *Falcon Carriche*, 335 F.3d at 1013 (same); *Georgis*, 328 F.3d at 967 (holding that when the Board summarily affirms the IJ, the court's "ability to conduct a full and fair appraisal of the petitioner's case is not compromised"); *Soadjede*, 324 F.3d at 832-833 ("[w]e hold that the summary affirmance procedures * * * do not deprive this court of a basis for judicial review").

b. Rather than attacking the streamlining procedures directly, in the face of the uniform appellate decisions upholding them, petitioner tries to fit her case within a debate among the circuits on whether the Board's application of the AWO procedures to a particular case is reviewable apart from the underlying merits. Pet. 9-10. But the extent of disagreement among the circuits is uncertain and relatively limited and does not warrant review by this Court. Even under the approach adopted by the circuits on which petitioner relies, petitioner's challenge to the Board's application of the AWO procedures would be subsumed in the court of appeals' review of the underlying merits.

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

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

Second, the court observed from "the text, structure, and history of the streamlining regulations" that the Attorney General "surely did not intend to create substantive rights for aliens," *Ngure*, 367 F.3d at 983, or "to confer important procedural benefits upon individuals," *id.* at 984 (quoting *American Farm Lines* v. *Black Ball Freight Serv.*, 397 U.S. 532, 538 (1970)), by promulgating the AWO regulation. To the contrary, "judicial review of the BIA's streamlining decision would have 'disruptive practical consequences' for the Attorney General's administration of the alien removal process." *Ibid.* (quoting *Southern Ry.* v. *Seaboard Allied Milling Corp.*, 442 U.S. 444, 457 (1979)). See *id.* at 985 ("It has never been thought that the Supreme Court would review the propriety of this court's decision to affirm a district court without opinion * * *, as opposed to the merits of the underlying decision, and we see no reason to believe that the Department of Justice intended its comparable rule to have a different effect.").

Third, the Eighth Circuit reasoned that the Board's decision to apply the AWO procedure to a particular case was not susceptible to a "meaningful and adequate standard of review." *Ngure*, 367 F.3d at 985. The court compared the issue to that addressed in *ICC* v. *Brotherhood of Locomotive Engineers*, 482 U.S. 270 (1987), in which this Court held that it would not

separately review the ICC's decision not to reopen a prior action on grounds of material error, because such review would merge with the Court's review of the underlying merits. *Id.* at 279.

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

Additional considerations confirm that the Attorney General did not intend to create private rights by adopting the AWO procedures. Rather, their purpose was to facilitate the efficient *internal* functioning of the agency. See 64 Fed. Reg. at 56,138 ("The streamlining system will allow the Board to manage its caseload in a more timely manner while permitting it to continue providing nationwide guidance through published precedents in complex cases involving significant legal issues."); 67 Fed. Reg. at 54,888 (comparing the determination whether to issue a written opinion with a court of appeals' decision to publish an opinion). Indeed, the internal administrative character of the regulation is confirmed by the subsection's heading—"[c]ase management system." 8 C.F.R. 3.1(e) (2003). Furthermore, the regulation specifies that the member should use the AWO procedure "[i]f *the Board member determines*" the criteria are satisfied, 8 C.F.R. 3.1(e)(4)(i) (2003) (emphasis added), not if the criteria *are* satisfied, thus

underscoring that the decision whether to utilize the AWO procedure is one for the judgment and discretion of the Board member alone. See *Webester* v. *Doe*, 486 U.S. 592, 600 (1988) (authorization under 50 U.S.C. 403(c) to terminate CIA employees whenever the Director of Central Intelligence "'shall *deem* such termination necessary or advisable' * * * not simply when the dismissal *is* necessary or advisable" "appears * * * to foreclose the application of any meaningful judicial standard of review").

Moreover, the regulation's express statement that the IJ's opinion becomes "the final agency determination," coupled with the provision that the single Board member will not make any statement apart from specifying that the decision of the IJ will be the final agency decision, 8 C.F.R. 3.1(e)(4)(ii) (2003), make clear that the Attorney General intended the courts of appeals to review the underlying decision of the IJ rather than that of the single Board member. See *Tsegay* v. *Ashcroft*, 386 F.3d 1347, 1357 (10th Cir. 2004) (noting that the only way to review the Board member's decision to apply the AWO procedure would be "first remanding the case for an expanded explanation of why the BIA chose to apply the AWO regulation," which "would require the BIA to do exactly what it is prohibited from doing when it affirms without opinion"). Indeed, the Attorney General's explanation of the AWO procedures explicitly states that "for purposes of judicial review * * * the Immigration Judge's decision becomes the decision reviewed." 64 Fed. Reg. at 56,138. The Attorney General's view that his own AWO regulations create no judicially-enforceable rights is "controlling," since it is neither "plainly erroneous [n]or inconsistent

with the regulation." *Auer* v. *Robbins*, 519 U.S. 452, 461 (1997) (citation omitted).

ii. Petitioner cites a number of decisions of other courts of appeals as evidence of a conflict among the circuits on the question whether the Board's decision to apply its AWO procedures can be reviewed apart from the underlying merits. The true extent of any conflict is uncertain. At least two of the courts cited by petitioner as having adopted the view that the decision to utilize AWO procedures is independently reviewable have apparently reconsidered that position. For example, petitioner cites the Tenth Circuit's decision in *Batalova* as such an instance (see Pet. 9 (citing *Batalova* v. *Ashcroft*, 355 F.3d 1246, 1252-1253 (2004)), but the Tenth Circuit revisited the issue in *Tsegay* v. *Ashcroft*, 386 F.3d 1347 (2004), and held, distinguishing *Batalova*, that the Board's application of the AWO procedure was not reviewable. *Id.* at 1358. Likewise, the Ninth Circuit's position on this question is unclear. Petitioner relies (Pet. 9) upon *Chen* v. *Ashcroft*, 378 F.3d 1081 (2004), but the Ninth Circuit is considering whether to rehear that case en banc. See note 5, *infra*. And, subsequent to *Chen*, the Ninth Circuit stated in *Ferreira* v. *Ashcroft*, 390 F.3d 1091 (2004), that the court would not separately review a "challenge[] [to] the BIA's decision to streamline [a] particular case," because that argument "collapses into our review of the merits of her

case," *id.* at 1100.[5] That approach is entirely consistent with that of the Fourth Circuit here. Pet. App. 2a.[6]

In addition, the decisions of the Fifth and First Circuits relied on by petitioner (Pet. 9 (citing *Zhu* v. *Ashcroft*, 382 F.3d 521, 527 (5th Cir. 2004), and *Haoud* v. *Ashcroft*, 350 F.3d 201, 205-206 (1st Cir. 2003))) involved a particular scenario that is not present in this case and should not arise in the future due to a change in the Board's procedures. Both *Zhu* and *Haoud* were cases in which it was unclear whether the Board had affirmed the IJ's order denying asylum on the ground that the asylum application was untimely, in which case the court of appeals could not review the determination, see 8 U.S.C. 1158(a)(3), or because it found the standard for asylum unmet, which would be reviewable in the court of appeals, 8 U.S.C. 1252(a)(2)(B)(ii). See *Zhu*, 382

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

[6] As the petition recognizes, the Sixth and Seventh Circuits have only *assumed*, without deciding the question, that they have jurisdiction to review the Board's decision to apply its AWO procedure. See *Denko* v. *INS*, 351 F.3d 717, 732 (6th Cir. 2003); *Georgis* v. *Ashcroft*, 328 F.3d 962, 967 (7th Cir. 2003). But those courts recognized that their review of the AWO decision, if it is separately reviewable, and of the merits would generally merge. *Ibid.* The view of the Fourth Circuit, from which petitioner seeks certiorari, is not very dissimilar. Rather, it has held that the remedy for an erroneous AWO decision is judicial review by the court to correct the error. See *Belbruno* v. *Ashcroft*, 362 F.3d 272, 281 (4th Cir. 2004).

F.3d at 527; *Haoud*, 350 F.3d at 206.[7] In such a circumstance, the Fifth Circuit was of the view that it would find itself in "a jurisdictional conundrum," *Zhu*, 382 F.3d at 527, not knowing whether it had jurisdiction or not. We have been informed by the Executive Office of Immigration Review in the Department of Justice that, in recognition of this potential problem, the Board has altered its practices and determined that in cases where the IJ's decision rests on both reviewable and nonreviewable grounds for denying relief from removal, AWO procedures should not be utilized. Furthermore, the Civil Division of the Department of Justice, which is responsible for representing the Attorney General on petitions for review of removal orders in the courts of appeals, has adopted a policy of consenting to remands in such cases, including those that were decided under the AWO procedures prior to the policy change and that raise that jurisdictional conundrum. Thus, the particular problem confronted in *Zhu* and *Haoud*—which is not presented in this case in any event—does not require review by this Court.

iii. Notably, petitioner does not maintain that her case presents one of the exceptional circumstances under which the Third Circuit held, in *Smriko* v. *Ashcroft*, 387 F.3d 279 (3d Cir. 2004), that separate review of the AWO decision would be appropriate. The Third Circuit there emphasized that it did *not* endorse a general practice of reviewing AWO decisions separate from the underlying merits. On the contrary, the Third Circuit recognized that, even on its view, "[i]n many

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

situations * * * a streamlining decision * * * will have no material impact on a court's exercise of its judicial review function" and, in such cases, "the reviewing court may simply choose to address the merits of the IJ's decision without resolving the procedural challenge." *Smriko*, 387 F.3d at 296. See *Chen*, 378 F.3d at 1088 ("in most cases, review of the IJ's decision on the merits and the streamlining decision 'collapse into one analysis'" (quoting *Falcon Carriche*, 350 F.3d at 853 n.7)). Separate review would only be necessary, according to the Third Circuit, in situations like those addressed in *Zhu*, and *Haoud*, see *Smriko*, 387 F.3d at 296-297, or that otherwise have a "material impact on a court's exercise of its judicial review function," *Smriko*, 387 F.3d at 296. *Id.* at 289, 297 (because the IJ failed to address adequately the novel and difficult issue of statutory construction raised by the petition, the court would need to address the issue without the agency having provided "its *Chevron* deference-entitled 'concrete meaning' to an ambiguous statute"). Cf. *Haoud*, 350 F.3d at 207 (IJ had not been able to consider seemingly applicable Board precedent that post-dated IJ's decision).

Petitioner does not contend that her case falls into the narrow category of instances where the Board's AWO decision had a "material impact on a court's exercise of its judicial review function," *Smriko*, 387 F.3d at 296. There is no novel legal issue presented by petitioner's case. Rather, petitioner's sole argument is that the IJ erred on the merits of the asylum determination. Pet. 12-13. Petitioner simply observes that the Board's review of the IJ is less deferential than the court of appeals', Pet. 10-11, and then speculates that two additional members of a three-member panel

might have disagreed with the single member who affirmed the IJ's decision, Pet. 13. But the possibility of a different outcome identified by petitioner exists in every case that is affirmed by a single member—or indeed is affirmed by one three-member panel rather than another. In essence, therefore, petitioner does not urge the Court to adopt the position of those courts of appeals that have upheld separate review of the AWO determination in certain limited circumstances, but rather to require three-member panels in every case. As noted above, see pp. 11-14, *supra*, the courts of appeals are united in their rejection of that argument.

Thus, there is no significant conflict among the courts of appeals warranting review by this Court on whether the AWO regulation confers private enforceable rights and whether its invocation in a particular case is subject to judicial review. If significant problems arise in the future, however, they may be addressed through an amendment of the regulation or a revision of policies concerning its application by the Board. The prospect for resolution through administrative action is an additional reason for the Court to deny review. See, *e.g.*, *Braxton* v. *United States*, 500 U.S. 344, 347-348 (1991) (observing that change by agency may moot conflict among the circuits, "at least as far as their continuation into the future is concerned"); *Richardson* v. *Wright*, 405 U.S. 208, 209 (1972) (per curiam).

2. The second question presented in the petition is merely a challenge to the IJ's and court of appeals' application to the facts of this case of the established standard for granting asylum. Petitioner points to no conflict, and the court of appeals' holding, which was correct, does not warrant further review by this Court.

a. In *INS* v. *Cardoza-Fonseca*, 480 U.S. 421 (1987), this Court held that the standard for assessing whether an alien had a well-founded fear of future persecution sufficient to render an alien eligible for a grant of asylum is less than that required for withholding of deportation under former 8 U.S.C. 1253(h) (recodified at 8 U.S.C. 1231(b)(3)(A)). *Cardoza-Fonseca*, 480 U.S. at 440-441. The Court recognized, however, that the courts owe deference to the Board's or IJs' determinations applying the statutory test to the facts on a case-by-case basis. *Id*. at 448

The Board further explained the standard for establishing a "well-founded fear" in *In re Mogharrabi*, 19 I. & N. Dec. 439, 445 (BIA 1987), in which the Board held that an applicant for asylum establishes a well-founded fear if a reasonable person in his circumstances would fear persecution. The Attorney General has promulgated regulations defining the term "well-founded fear of persecution" as fear based on "a *reasonable possibility* of suffering such persecution if [the individual] were to return to that country." 8 C.F.R. 1208.13(b)(2)(i) and (i)(B) (emphasis added).

The court of appeals is required to uphold the IJ's factual findings "unless any reasonable adjudicator would be compelled to conclude to the contrary." 8 U.S.C. 1252(b)(4)(B). The statutory standard adopts and codifies the standard announced by this Court in *INS* v. *Elias-Zacarias*, 502 U.S. 478, 481 & n.1, 483-484 (1992) (to obtain a reversal of a denial of asylum, an alien must establish that "the evidence he presented was so compelling that no reasonable factfinder could fail to find the requisite fear of persecution").

b. There is no question that the IJ applied the proper standard. The IJ correctly stated the test: "An

applicant for asylum has established a well-founded fear of persecution if she can show that a reasonable person in her circumstances would fear persecution." Pet. App. 11a. After reviewing the evidence, the IJ concluded, again invoking the proper standard, that petitioner had "failed to demonstrate that there is a *reasonable possibility* of her persecution in the future." *Id.* at 13a-14a (emphasis added).

The court of appeals' decision affirming the finding of the IJ is also correct. Petitioner's evidence did not compel a finding that there was a reasonable possibility that petitioner would suffer persecution if returned to Ethiopia. The evidence reflected that petitioner has had an extremely long period of absence from Ethiopia from March 1990 to July 1997, and again from August of 1997 to September 2000. Pet. App. 12a. As the IJ found, these periods of absence would have lessened any interest of the Ethiopian government in petitioner. *Id.* at 14a. Indeed, in the intervening period, the former government, which had detained her once for three days and questioned her on other occasions, was removed from power, and there was little reason to believe its officials had any continuing presence in Ethiopia. *Id.* at 13a. In fact, petitioner voluntarily returned to Ethiopia for a month in 1997, and, apart from being detained for five hours in order to establish her identity, she was neither arrested nor otherwise physically harmed at that time. *Id.* at 14a.

Although petitioner relied heavily on the unexplained disappearances of her father and brother after the former regime's ouster, the IJ reasonably concluded that petitioner's situation was more analogous to that of her mother and younger sister, who have remained unharmed in Ethiopia throughout the period in question.

See Pet. App. 14a. Unlike petitioner, her father was believed to be sufficiently implicated in the OLF that he was detained by the prior regime for four years, C.A. App. 72, and petitioner's brother had gone to work for an OLF-related entity, Pet. App. 38a. In contrast, petitioner testified that while she, her mother, and younger sister are all members of the OLF, their participation was more limited, with petitioner's own activities limited to reading papers and discussing them with others. C.A. App. 87.

The evidence did not compel a finding that petitioner had a well-founded fear of persecution. The court of appeals' decision affirming the IJ's order was correct and does not warrant this Court's review.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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