No. 16-471

In the Supreme Court of the United States

ABEL CEJA-LUA, PETITIONER

v.

LORETTA E. LYNCH, ATTORNEY GENERAL

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

BRIEF FOR THE RESPONDENT IN OPPOSITION

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QUESTION PRESENTED

Whether the court of appeals correctly concluded that 8 U.S.C. 1252(a)(2)(B)(i) deprived it of jurisdiction to review the factual determinations made by the Board of Immigration Appeals when denying petitioner's motion to reopen.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1-5) is not published in the *Federal Reporter* but is reprinted at 647 Fed. Appx. 508. The opinions of both the Board of Immigration Appeals (Pet. App. 6-16) and the immigration judge (Pet. App. 17-29) are unreported.

JURISDICTION

The judgment of the court of appeals was entered on May 11, 2016. The court denied a petition for rehearing *en banc* on July 13, 2016 (Pet. App. 30-31). The petition for certiorari was filed on October 6, 2016. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Petitioner is an alien who was ordered removed from the United States after both an immigration judge

(IJ) and the Board of Immigration Appeals (Board or BIA) rejected his request for cancellation of removal. Pet. App. 8-9. The Board subsequently denied his motion to reopen based on new evidence allegedly supporting his claim for that form of relief. *Id.* at 9. In an unpublished decision, the court of appeals rejected petitioner's challenge to that denial. *Id.* at 1-5.

1. a. The Immigration and Nationality Act (INA), 8 U.S.C. 1101 *et seq.*, grants the Attorney General discretion to "cancel removal of" an alien who is unlawfully present in the United States. 8 U.S.C. 1229b(b)(1). To be eligible for that relief, an alien must meet all requirements contained in subparagraphs (A), (B), (C), and (D) of 8 U.S.C. 1229b(b)(1). Subparagraph (D) requires the alien to establish that his removal would result in "exceptional and extremely unusual hardship to the alien's spouse, parent, or child, who is either a citizen of the United States or an alien lawfully admitted for permanent residence." 8 U.S.C. 1229b(b)(1)(D).

b. The INA guarantees each alien "the right to file 'one motion to reopen [removal] proceedings.'" *Dada* v. *Mukasey*, 554 U.S. 1, 15 (2008) (quoting 8 U.S.C. 1229a(c)(7)(A)). That motion must be filed with the Board or the IJ, whichever was last to render a decision in the case. 8 C.F.R. 1003.2(a) and (c) (Board); 8 C.F.R. 1003.23(b)(1) and (3) (IJ). The motion must be "supported by affidavits or other evidentiary material" showing "new facts," 8 U.S.C. 1229a(c)(7)(B), that are "'material' and of the sort that 'could not have been discovered or presented at the former hearing.'" *Dada*, 554 U.S. at 14 (quoting 8 C.F.R. 1003.2(c)(1)); see 8 C.F.R. 1003.23(b)(3) (IJ).

"The decision to grant or deny a motion to reopen" lies "within the discretion of the Board." 8 C.F.R. 1003.2(a); see 8 C.F.R. 1003.23(b)(1)(iv) (IJ). The Board may deny a motion to reopen on any of "at least three independent grounds." *INS* v. *Abudu*, 485 U.S. 94, 104 (1988). First, the Board may conclude that the alien failed to establish a "prima facie case" of eligibility for the underlying relief sought by failing to show a "reasonable likelihood of success on the merits" if proceedings were reopened. *In re L-O-G-*, 21 I. & N. Dec. 413, 419-420 (B.I.A. 1996); see *Abudu*, 485 U.S. at 104. Second, the Board may deny reopening if it finds that the alien failed to proffer "previously unavailable, material evidence" or otherwise to explain adequately his failure to seek relief earlier. *Abudu*, 485 U.S. at 104-105; see 8 C.F.R. 1003.2(c)(1), 1003.23(b)(3) (IJ). Third, where the ultimate grant of relief is discretionary (*e.g.*, cancellation of removal), the Board may conclude that, regardless of the proper resolution of the "two threshold concerns" just discussed, the alien should not be afforded the "discretionary grant" of relief. *Abudu*, 485 U.S. at 105.

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," *Abudu*, 485 U.S. at 107, and because, as a general matter, "every delay works to the advantage of the deportable alien who wishes merely to remain in the United States," *INS* v. *Doherty*, 502 U.S. 314, 323 (1992). Accordingly, an alien moving the Board for reopening must "meet[] a 'heavy burden' and present[] evidence of such a nature that the Board is

satisfied that if proceedings * * * were reopened, with all the attendant delays, the new evidence offered would likely change the result in the case." *In re Coelho*, 20 I. & N. Dec. 464, 473 (B.I.A. 1992); see *Abudu*, 485 U.S. at 110.

c. The INA generally provides that an alien aggrieved by a final order of removal may seek judicial review of that order by filing a petition for review in the appropriate court of appeals within 30 days of the final order of removal. 8 U.S.C. 1252(a)(1) and (b)(1); see 8 U.S.C. 1252(a)(5) (noting that such a petition is the "sole and exclusive means" of obtaining judicial review of a removal order). This Court has held that Section 1252(a)(1) also authorizes judicial review of an order denying an alien's motion to reopen. *Mata* v. *Lynch*, 135 S. Ct. 2150, 2154 (2015). When an alien seeks review of an order under Section 1252(a)(1), any review sought of a motion to reopen or to reconsider that same order must be consolidated, in the court of appeals, with the review of the underlying removal order. 8 U.S.C. 1252(b)(6); see also *Stone* v. *INS*, 514 U.S. 386, 394-395 (1995).

Although Congress generally authorized judicial review of final orders of removal (along with denials of motions to reopen), Congress also chose to insulate certain discretionary determinations of the Attorney General from such review. Section 1252(a)(2)(B) of the INA—which addresses "Denials of discretionary relief"—provides that

> Notwithstanding any other provision of law * * * 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 [Title 8 of the United States Code], or

> (ii) any other decision or action of the Attorney General or the Secretary of Homeland Security the authority for which is specified under [8 U.S.C. 1151-1381] 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 [Title 8 of the United States Code].

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

Section 1252(a)(2)(B)(i)'s cross-reference to 8 U.S.C. 1229b thereby generally deprives courts of appeals of jurisdiction to review any judgment regarding the Board's decision to grant or deny cancellation of removal. Notably, however, Congress has also provided that Section 1252(a)(2)(B)'s jurisdictional bar does not apply to "constitutional claims or questions of law" raised in a duly filed petition for review. 8 U.S.C. 1252(a)(2)(D).

2. Petitioner is a native and citizen of Mexico. Pet. App. 1, 13, 17. In early 2003, he entered the United States near Brownsville, Texas, without having been admitted or inspected by an immigration officer. *Id.* at 17; Administrative Record (A.R.) 1270-1271, 1509, 1535.

a. As a result of his illegal entry, petitioner was placed in removal proceedings. In immigration court, he admitted the factual allegations against him and conceded removability. Pet. App. 17-18. In June 2009, the IJ found him removable as charged. *Id.* at 13, 18. As relief from removal, petitioner sought cancellation of removal. *Id.* at 18. The IJ found that petitioner had failed to meet his burden, under 8 U.S.C. 1229b(b)(1)(D), of showing that his removal would result in exceptional and extremely unusual hardship to his lawful-permanent-resident mother or

his U.S.-citizen children, and he accordingly denied the application for cancellation of removal. Pet. App. 18.

In May 2010, the Board affirmed the IJ's ruling, concluding that Petitioner had failed to establish eligibility for cancellation of removal because he failed to demonstrate the requisite hardship. A.R. 1213-1214. Petitioner did not seek judicial review of that removal order.

b. Petitioner moved the Board to reopen his removal proceeding based on additional evidence of hardship regarding his older son—specifically, medical evidence, including a psychiatric exam. Pet. App. 18; A.R. 1069-1081. In February 2011, the Board granted the motion to reopen and remanded the case to the IJ for additional findings based on the new, previously unavailable evidence. A.R. 1057.

The IJ conducted a new hearing and considered petitioner's new evidence alongside the evidence introduced at the original hearing. In October 2012, the IJ again concluded that petitioner had failed to meet his burden of establishing, under 8 U.S.C. 1229b(b)(1)(D), that his removal would cause "exceptional and extremely unusual hardship" to his qualifying relatives. Pet. App. 23-27. The IJ therefore again denied petitioner's application for cancellation of removal. *Id.* at 28.

In March 2014, the Board affirmed the IJ's decision. Pet. App. 12-16. Once again, petitioner did not seek judicial review of the Board's decision.

c. In June 2014, petitioner filed a second motion to reopen the proceedings. A.R. 74-91. As relevant here, petitioner sought to present additional evidence of hardship to his children and new, previously unavaila-

ble evidence of hardship to his mother. *Ibid.* Petitioner argued that the new evidence provided a justification for granting cancellation of removal. *Ibid.*

In October 2014, the Board denied petitioner's motion to reopen. Pet. App. 8-11. First, the Board noted that "the evidence pertaining to the hardship that will accrue to [petitioner's] children, much of which refers to facts that the Immigration Judge and Board have previously considered, is not indicative of a change in their circumstances to warrant reopening for further consideration of the hardship factors in this case." *Id.* at 9. The Board cited its own precedent establishing that "a party who seeks a remand or reopening of proceedings to pursue relief bears a 'heavy burden' of proving that if proceedings before the [IJ] were reopened; with all the attendant delays, the new evidence would likely change the result in the case." *Ibid.* (quoting *In re Coelho*, 20 I. & N. Dec. at 472).

The Board also rejected petitioner's reliance on the new evidence pertaining to his mother. Pet. App. 9-10. It explained that the IJ's 2009 opinion had already found her medical condition to be serious, and that petitioner's new evidence "indicates that [petitioner's] mother continues to suffer" from the same maladies. *Id.* at 10. The Board noted that although petitioner had offered evidence from four siblings indicating that "they do not or cannot care for their mother," petitioner "is one of eleven siblings" and "it has not been shown that [petitioner] is the sole person who can care for his mother." *Ibid.*

Having considered petitioner's new evidence, the Board concluded by stating that "we are not persuaded that the new evidence satisfies [petitioner's] heavy burden to show that if the proceedings were reopened,

the outcome of [petitioner's] application for cancellation of removal would likely be altered." Pet. App. 10 (citing *In re Coehlo*, *supra*). The Board also declined to exercise its regulatory authority to reopen the case again *sua sponte*. *Ibid.* And it denied petitioner's alternate request for administrative closure of the matter. *Id.* at 11.

Petitioner then moved the Board to reconsider its denial of his motion to reopen. A.R. 14-27. In February 2015, the Board denied that motion. Pet. App. 6-7. The Board indicated that it was not persuaded by Petitioner's arguments that it had erred as a matter of fact or law in rendering its previous order. *Id.* at 7. In addition, it concluded that no argument or evidence was offered that would persuade the Board to reopen the proceedings *sua sponte*. *Ibid.*

3. Petitioner sought judicial review, in the court of appeals, of both the Board's denial of his latest motion to reopen and its denial of his motion to reconsider. Petitioner argued that: (1) in denying his motion to reopen and his motion to reconsider, the Board had failed to properly consider the evidence that he satisfied Section 1229b(b)(1)(D)'s requirement that his qualifying relatives would suffer exceptional and extremely unusual hardship if he were removed from the United States; (2) the Board had violated the Administrative Procedure Act, 5 U.S.C. 706(2)(a), by failing to rationally consider the new arguments and evidence set forth in his motions to reopen and reconsider; and (3) the Board's denial of the motion to reconsider lacked sufficient analysis and was therefore procedurally inadequate. Pet. App. 2-4. In response, the government argued that 8 U.S.C. 1252(a)(2)(B)(i)'s juris-

dictional bar prohibited the court from reviewing petitioner's claims on the merits. Pet. App. 2.

In May 2016, the court of appeals issued an unpublished, per curiam decision that dismissed aspects of the petition for lack of jurisdiction and denied other aspects of the petition on the merits. Pet. App. 5.

First, the court of appeals explained that Section 1252(a)(2)(B)(i)'s jurisdictional bar prohibits review of the BIA's denial of discretionary relief in the form of cancellation of removal under Section 1229b(b)(1). Pet. App. 2. It noted that the court lacks jurisdiction to adjudicate challenges to such denials "whether the petitioner is appealing from a final order of removal or from the denial of a motion to reopen." *Id.* at 2-3 (citing *Assaad* v. *Ashcroft*, 378 F.3d 471, 474 (5th Cir. 2004) (per curiam)). The court also noted, however, that "[j]udicial review is not precluded * * * to the extent that the petition for review raises constitutional claims or questions of law." *Id.* at 3 (citing 8 U.S.C. 1252(a)(2)(D)).

The court of appeals then applied that jurisdictional bar and held that it lacked authority to address petitioner's claim "that the BIA failed to properly consider the evidence that his qualifying relatives would suffer the requisite hardship if he were removed." Pet. App. 3. The court explained that petitioner's argument "constitutes a substantive challenge to the BIA's hardship determination, which is a factual question that falls squarely within the jurisdictional bar of [Section] 1252(a)(2)(B)." *Ibid.* (citing *Sattani* v. *Holder*, 749 F.3d 368, 372 (5th Cir. 2014) (per curiam), and further noting that petitioner's basic claim involved a "challenge to the BIA's evaluation of the evidence").

The court of appeals also rejected petitioner's assertion "that the BIA applied an improper legal standard and failed to follow precedent." Pet. App. 3. Specifically, the court explained that "[t]he BIA here applied the appropriate legal standard by imposing on [petitioner] the heavy burden of proving that if his removal proceedings were reopened, the new evidence would likely alter the outcome of his application for cancellation of removal by establishing exceptional and extremely unusual hardship to his qualifying relatives." *Ibid.* (citing *In re Coelho*, 20 I. & N. Dec. at 472-473, and 8 U.S.C. 1229b(b)(1)(D)).

Second, the court of appeals held that petitioner's APA-based challenge to the Board's consideration of the evidence raised a legal question that was amenable to review on the merits under 8 U.S.C. 1252(a)(2)(D). Pet. App. 4. The court nonetheless rejected that challenge, concluding that (1) petitioner forfeited the claim by failing to raise it until his reply brief, and (2) in any event, the relevant APA provision "does not apply to the [Board's] individual adjudications in immigration proceedings." *Ibid.* (citing *Ardestani* v. *INS*, 502 U.S. 129, 133-134 (1991), and circuit precedent).

Finally, the court of appeals also denied petitioner's challenge to the procedural adequacy of the Board's denial of his motion for reconsideration. Pet. App. 4-5. The court stated that it was "unclear" whether petitioner's challenge raised a legal question amenable to judicial review under Section 1252(a)(2)(D), but it held that petitioner's claim lacked merit "[e]ven assuming this court has jurisdiction." *Id.* at 4.

ARGUMENT

Petitioner asks this Court to grant review of the court of appeals' conclusion that aspects of his chal-

lenge to the denial of his motion to reopen are jurisdictionally barred by 8 U.S.C. 1252(a)(2)(B)(i). But the unpublished decision below was correct, and the asserted split of authority on the question presented is not worthy of review at this time.

1. The court of appeals correctly held that 8 U.S.C. 1252(a)(2)(B)(i) deprived it of jurisdiction to review the Board's substantive determination that petitioner had failed to establish "that his qualifying relatives would suffer the requisite hardship if [petitioner] were removed" from the United States. Pet. App. 3. That determination reflected the Board's discretionary judgment that petitioner is not eligible for cancellation of removal under 8 U.S.C. 1229b(b)(1), and it is not subject to review.

a. As explained above, Section 1252(a)(2)(B)(i) bars judicial review of "any judgment regarding the granting of relief under [8 U.S.C. 1229b]," subject to Section 1252(a)(2)(D)'s authorization of review of legal or constitutional claims. See pp. 4-5, *supra*. Section 1229b is the provision of the INA governing cancellation of removal, and it authorizes that form of relief only if the alien establishes, *inter alia*, "that 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).

Here, the Board considered the evidence that petitioner submitted with his motion to reopen in order to establish the "exceptional and extremely unusual hardship" required by Section 1229b(b)(1)(D). After reviewing that evidence, the Board concluded that petitioner was not eligible for cancellation of removal

under Section 1229b. Pet. App. 9-10. The Board determined that the evidence of hardship that would be suffered by petitioner's children "is not indicative of a change in their circumstances" and that the evidence of hardship with respect to petitioner's mother likewise did not warrant relief. *Id.* at 9. Specifically, the Board held that the "new evidence" failed to "satisf[y] [petitioner]'s heavy burden to show that if the proceedings were reopened, the outcome of the respondent's application for cancellation of removal would likely be altered." *Id.* at 10.

The Board's rejection of petitioner's motion to reopen falls squarely within Section 1252(a)(2)(B)(i)'s jurisdictional bar. The Board's decision reflects its discretionary judgment that petitioner cannot meet the threshold "exceptional and extremely unusual hardship" requirement for obtaining cancellation of removal under Section 1229b(b)(1)(D). See *Martinez* v. *United States Att'y Gen.*, 446 F.3d 1219, 1222 (11th Cir. 2006) (citing cases for proposition that "exceptional and extremely unusual hardship" determination is discretionary and subject to Section 1252(a)(2)(B)(i)'s jurisdictional bar).[1] The Board's decision is unambig-

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[1] See also, *e.g.*, *Vidinski* v. *Lynch*, 840 F.3d 912 (7th Cir. 2016) (denial of cancellation for failure to establish hardship is discretionary decision that courts have no jurisdiction to review absent constitutional claims or questions of law); *Lemuz-Hernandez* v. *Lynch*, 809 F.3d 392, 393-394 (8th Cir. 2015) (per curiam) (challenge to agency's weighing of evidence in support of claim for cancellation of removal is outside court's jurisdiction); *Sattani* v. *Holder*, 749 F.3d 368, 372 (5th Cir. 2014) (per curiam) (claim that IJ did not properly take into account all hardship factors merely asks court to replace IJ's evaluation of evidence with new outcome, falling squarely within jurisdictional bar of 8 U.S.C. 1252(a)(2)(B)(i)); *Patel* v. *Attorney Gen. of U.S.*, 619 F.3d 230, 233

uously a "judgment regarding the granting of relief under [8 U.S.C. 1229b]," and the court of appeals accordingly lacked jurisdiction to review it under 8 U.S.C. 1252(a)(2)(B)(i).[2]

b. Petitioner concedes (Pet. 4) that Section 1252(a)(2)(B)(i)'s jurisdictional bar would preclude judicial review of an *initial* decision by the Board concluding that an alien has not established Section 1229b(b)(1)(D)'s "exceptional and extremely unusual hardship" requirement for cancellation of removal. But he argues (Pet. 5-9) that a different rule applies when the Board reaches that same conclusion in the context of denying a motion to reopen. To justify that counterintuitive assertion, he relies on this Court's decisions in *Mata* v. *Lynch*, 135 S. Ct. 2150 (2015), and *Kucana* v. *Holder*, 558 U.S. 233 (2010). Neither decision supports his argument.

In *Mata*, this Court addressed whether a court of appeals has jurisdiction to review an alien's petition for review of a Board decision denying a motion to reopen on the ground that the motion was untimely and the alien was not entitled to equitable tolling. 135 S. Ct. at 2153. The Court held that the courts of appeals do have such jurisdiction. *Ibid.* In reaching that conclusion, the Court relied on 8 U.S.C. 1252(a)(1),

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(3d Cir. 2010) (no jurisdiction to review IJ's discretionary determination that hardship to alien's relatives did not satisfy "exceptional and extremely unusual" statutory requirements).

[2] Petitioner does not argue in this Court that his challenge to the Board's hardship determination raises a "constitutional claim[]" or "question[] of law" subject to review under 8 U.S.C. 1252(a)(2)(D). As the court of appeals recognized, petitioner's challenge to the hardship determination ultimately contested the Board's "evaluation of the evidence." Pet. App. 3 (also noting that petitioner's challenge implicated a "factual question").

the INA's general grant of jurisdiction over final orders of removal. 135 S. Ct. at 2154. The Court explained that under Section 1252(a)(1), as previously interpreted in *Kucana*, *supra*, "circuit courts have jurisdiction when an alien appeals from the Board's denial of a motion to reopen a removal proceeding." *Ibid.* The Court then elaborated on its interpretation of Section 1252(a)(1) and *Kucana* as follows:

> Nothing changes when the Board denies a motion to reopen because it is untimely—nor when, in doing so, the Board rejects a request for equitable tolling. *Under the INA, as under our century-old practice, the reason for the [Board's] denial makes no difference to the jurisdictional issue.* Whether the [Board] rejects the alien's motion to reopen because it comes too late *or because it falls short in some other respect*, the courts have jurisdiction to review that decision.

Id. at 2154-2155 (emphasis added).

Petitioner argues (Pet. 4-7) that the language italicized above establishes that 8 U.S.C. 1252(a)(2)(B)(i)'s express bar on judicial review of "any judgment [of the Board] regarding the granting of relief under [8 U.S.C. 1229b]" does not apply when an alien seeks judicial review of such a determination on petition for review of the denial of a motion to reopen. He is mistaken. The *Mata* Court was interpreting the general grant of jurisdiction set forth in Section 1252(a)(1) and discussed in *Kucana*. See *Mata*, 135 S. Ct. at 2154. The Court made clear that this general grant of jurisdiction itself covers any denial of a motion to reopen. But the Court did not address whether Section 1252(a)(2)(B)'s jurisdictional bar would preclude re-

view of the subset of those denials covered by the terms of that provision.

Notably, *Mata* involved the denial of a motion to reopen on timeliness grounds. 135 S. Ct. at 2153. The case therefore did not implicate the Board's discretionary judgment that an alien was not eligible for cancellation of removal (or any other judgment specifically identified in Section 1252(a)(2)(B)). Indeed, the government's brief in *Mata* made clear that the question whether the denial of a motion to reopen is jurisdictionally barred if the reviewing court "would lack jurisdiction over the alien's underlying claim for relief" pursuant to Section 1252(a)(2)(B) "is not presented in this case." U.S. Br. at 20 n.6, *Mata*, *supra*. The *Mata* decision did not even mention Section 1252(a)(2)(B), and there is no reason to believe that the Court intended to adopt petitioner's blanket rule that motions to reopen are categorically exempt from that provision.

Two additional considerations confirm that petitioner's interpretation of *Mata* is incorrect. First, the Court's analysis in *Mata* relied heavily on its prior holding, in *Kucana*, that Section 1252(a)(1) generally establishes jurisdiction over petitions for review of the Board's denial of a motion to reopen. See *Mata*, 135 S. Ct. at 2154. But the *Kucana* Court expressly declined to "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. It is not plausible that the *Mata* Court intended to resolve that previously-reserved question, *sub silentio*, in a case that did not actually present the issue.

Second, petitioner's interpretation of *Mata* to authorize jurisdiction over any motion to reopen would permit an easy end-run around Section 1252(a)(2)(B)'s jurisdictional bar. Any alien precluded by that provision from seeking review of the Board's initial denial of relief could simply file a motion to reopen and then seek judicial review of the Board's denial of that motion. By doing so, the alien would thereby obtain the same judicial review that Congress plainly intended Section 1252(a)(2)(B) to preclude.

As this Court has acknowledged, the courts of appeals have repeatedly recognized the potential circumvention of Section 1252(a)(2)(B) enabled by petitioner's proposed rule. In *Kucana*, the Court noted that courts confronting "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" due to Section 1252(a)(2)(B) have "refused to consider petitions for review of a reopening denial that seeks to revisit the denial of the underlying claim." 558 U.S. at 250 n.17 (citing *Assaad* v. *Ashcroft*, 378 F.3d 471, 473-475 (5th Cir. 2004) (per curiam)); see U.S. Br. at 23-24 n.15, *Kucana*, *supra* (citing cases). As the Court explained, the courts of appeals have recognized that "hearing the petition would end-run [Section 1252(a)(2)(B)'s] bar to review of the petitioner's core claim." *Kucana*, 558 U.S. at 250 n.17 (citation omitted). Those courts are correct, and there is no reason that either Congress or this Court would have wanted to authorize such a straightforward evasion of Section 1252(a)(2)(B)'s jurisdictional bar.[3]

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[3] Petitioner also argues (Pet. 7-9) that the court of appeals had jurisdiction in light of the presumption favoring judicial review of

2. Petitioner argues (Pet. 9-11) that the court of appeals' unpublished decision in this case conflicts with the First Circuit's interpretation of *Mata* in *Mazariegos* v. *Lynch*, 790 F.3d 280 (2015). He is correct that the First Circuit appears to have interpreted *Mata* to authorize jurisdiction over any petition for review of the Board's denial of a motion to reopen—even when the denial reflects the Board's discretionary determination that the alien is not entitled to a form of relief specifically identified in Section 1252(a)(2)(B)(i)'s jurisdictional bar. *Id.* at 285; see *Pandit* v. *Lynch*, 824 F.3d 1, 4 n.3 (1st Cir. 2016). For the reasons noted above, the First Circuit's interpretation of *Mata* is incorrect.

In any event, the asserted split of authority does not warrant this Court's review at this time. The Fifth Circuit's decision in this case is unpublished, and no other court of appeals has yet weighed in on whether *Mata* categorically authorizes the courts of appeals to exercise jurisdiction over the denial of motions to reopen that would otherwise be barred by Section 1252(a)(2)(B). Moreover, the First Circuit's interpretation of *Mata* in *Mazariegos* contained only a single sentence of relevant analysis that did not address either (1) the context in which the jurisdictional issue arose in *Mata*, (2) the fact that Section 1252(a)(2)(B) was not at issue in that case, or (3) the circumvention problem that the First Circuit's interpretation of *Mata* would create. It is possible that the

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motions to reopen recognized in *Kucana*. But that presumption is rebutted by the plain text of Section 1252(a)(2)(B)(i), which expressly bars review of the Board's discretionary judgments regarding the grant or denial of cancellation of removal. See pp. 11-13, *supra*.

First Circuit will reconsider its flawed interpretation of *Mata*, particularly if and when other circuits formally adopt a different view. In these circumstances, it makes sense for the Court to allow for percolation of the question presented in the lower courts.[4]

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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[4] Petitioner is wrong to imply (Pet. 10-11) that the decision below conflicts with the Eighth Circuit's decision in *Vargas* v. *Holder*, 567 F.3d 387 (2009). As petitioner explains, the *Vargas* court held that a court of appeals has jurisdiction to review the denial of a motion to reopen based on "new hardship evidence if the 'new evidence provides a completely new basis for seeking cancellation of removal.'" Pet. 10-11 (quoting *Vargas*, 567 F.3d at 390). Here, however, petitioner's new evidence merely supplements the evidence that he originally submitted to establish the alleged hardship that would be suffered by his children and mother. Pet. App. 9-10. Petitioner does not claim that the new evidence "provides a completely new basis for seeking cancellation of removal," *Vargas*, 567 F.3d at 390, and it therefore does not justify judicial review under the Eighth Circuit's test.