No. 18-813

In the Supreme Court of the United States

MARIA SUYAPA VELASQUEZ, ET AL., PETITIONERS

v.

WILLIAM P. BARR, ATTORNEY GENERAL

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

BRIEF FOR THE RESPONDENT IN OPPOSITION

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QUESTION PRESENTED

Whether the court of appeals erred by dismissing petitioners' petition for review challenging the determination of the Board of Immigration Appeals not to exercise its discretionary authority to reopen petitioners' immigration proceedings *sua sponte*.

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OPINIONS BELOW

The order of the court of appeals (Pet. App. 1-2) is not published in the Federal Reporter. The decisions of the Board of Immigration Appeals (Pet. App. 5-13) and the immigration judge (Pet. App. 33-65) are unreported. A prior relevant decision of the court of appeals is published at 866 F.3d 188.

JURISDICTION

The judgment of the court of appeals was entered on August 21, 2018. A petition for rehearing was denied on October 22, 2018 (Pet. App. 66). The petition for a writ of certiorari was filed on December 20, 2018. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. "The Immigration and Nationality Act (INA), 66 Stat. 163, as amended, 8 U.S.C. § 1101 *et seq.*, and its implementing regulations set out the process for

removing aliens from the country." *Mata* v. *Lynch*, 135 S. Ct. 2150, 2153 (2015). First, "[a]n immigration judge (IJ) conducts the initial proceedings; if [the IJ] orders removal, the alien has the opportunity to appeal that decision to the Board of Immigration Appeals (B.I.A. or Board)." *Ibid.* (citing 8 U.S.C. 1229a(a)(1) and (c)(5)). Pursuant to 8 U.S.C. 1252, with certain exceptions, if the Board upholds the removal order, the alien may seek judicial review by filing a petition for review in a court of appeals under the Administrative Orders Review Act (Hobbs Act), ch. 1189, 64 Stat. 1129 (28 U.S.C. 2341 *et seq.*); see 8 U.S.C. 1252(a)(1).

The INA also permits an alien to file a motion to reopen removal proceedings based on previously unavailable, material evidence. 8 U.S.C. 1229a(c)(7)(A) and (B); see 8 C.F.R. 1003.2(c), 1003.23(b)(3); see also *Dada* v. *Mukasey*, 554 U.S. 1, 4-5, 12-15 (2008). Such a motion is to be filed with either the IJ or the Board, depending on which was the last to render a decision in the matter. 8 C.F.R. 1003.2(c), 1003.23(b). The alien must "state the new facts that will be proven at a hearing to be held if the motion is granted" and must support the motion "by affidavits or other evidentiary material." 8 U.S.C. 1229a(c)(7)(B); 8 C.F.R. 1003.2(c)(1), 1003.23(b)(3). With exceptions not relevant here, an alien is entitled to file only one such motion to reopen, and it generally must be filed within 90 days of entry of the final order of removal, *i.e.*, within "no later than 90 days after the date on which the final administrative decision was rendered in the proceeding sought to be reopened." 8 C.F.R. 1003.2(c)(2); see 8 C.F.R. 1003.23(b)(1); 8 U.S.C. 1229a(c)(7)(A) and (C)(i).

Motions to reopen removal proceedings are "disfavored" because "[t]here is a strong public interest in bringing litigation to a close as promptly as is consistent

with the interest in giving the adversaries a fair opportunity to develop and present their * * * cases." *INS* v. *Abudu*, 485 U.S. 94, 107 (1988). Applicable regulations grant the Board and IJs broad "discretion" in adjudicating motions to reopen. 8 C.F.R. 1003.2(a) (Board); see 8 C.F.R. 1003.23(b)(3) (IJ). Either the Board or an IJ may "deny a motion to reopen even if the party moving has made out a prima facie case for relief." *Ibid.*; see *INS* v. *Doherty*, 502 U.S. 314, 323 (1992).

In addition, "the BIA's regulations provide that, separate and apart from acting on the alien's motion, the BIA may reopen removal proceedings 'on its own motion'—or, in Latin, *sua sponte*—at any time." *Mata*, 135 S. Ct. at 2153 (quoting 8 C.F.R. 1003.2(a) (2015)). An alien who has failed to file a timely motion to reopen may suggest to the IJ or the Board that her case should be reopened *sua sponte*. The Board "invoke[s] [its] sua sponte authority sparingly, treating it not as a general remedy for any hardships created by enforcement of the time and number limits in the motions regulations, but as an extraordinary remedy reserved for truly exceptional situations." *In re G-D-*, 22 I. & N. Dec. 1132, 1133-1134 (B.I.A. 1999); see *In re J-J-*, 21 I. & N. Dec. 976, 984 (B.I.A. 1997).

2. a. Petitioners Maria Suyapa Velasquez and her minor son, D.A.E.V., are natives and citizens of Honduras who entered the United States unlawfully on April 13, 2014. Pet. App. 36. United States Citizenship and Immigration Services in the Department of Homeland Security commenced removal proceedings against petitioners by filing notices to appear charging them with being removable under 8 U.S.C. 1182(a)(7)(A)(i)(I) as aliens who lacked valid, unexpired immigrant visas or other valid entry documents. Pet. App. 36. On October 9, 2014, at

a hearing before an IJ, petitioners admitted to the factual allegations in the notices to appear and conceded the charge of removability. *Id.* at 36-37. The same day, petitioner Velasquez filed an application for asylum, withholding of removal, and protection under the regulations implementing the Convention Against Torture (CAT); petitioner D.A.E.V. was a derivative beneficiary of that application. *Id.* at 37.

On November 19, 2015, after hearing testimony from petitioner Velasquez and reviewing other evidence, the IJ denied the application for asylum, withholding of removal, and protection under the CAT and ordered petitioners removed to Honduras. Pet. App. 35-65. The IJ concluded that petitioner Velasquez was not entitled to asylum because she "ha[d] not established that her life or freedom would be threatened on account of" membership in a "particular social group." *Id.* at 45. Petitioner Velasquez had testified that, after the father of her son D.A.E.V., Carlos Estrada, was murdered, Estrada's family began demanding custody of D.A.E.V. *Id.* at 38. She testified that, when she rebuffed those demands, the Estrada family had repeatedly kidnapped and abused D.A.E.V.; had made death threats to petitioner Velasquez; had murdered her sister (mistakenly believing the sister was petitioner Velasquez); and had continued to make threats. *Id.* at 38-39. The IJ explained that petitioner Velasquez's proposed social group—"'her family'"—was not "defined with sufficient particularity" and that her "familia[l] and kinship ties do not make her socially distinct." *Id.* at 49-51 (brackets and citation omitted). The IJ also determined that petitioner Velasquez did not demonstrate the required "nexus" between past violence and membership in her family, concluding that her "'familia[l]/kinship ties' [we]re not

one central reason that the Estrada family targets her." *Id.* at 55. The IJ "f[ound] that [petitioner Velasquez's] harm is consistent with an intra-family custody dispute over D.A.E.V." *Ibid.* The IJ additionally "f[ound] that since [petitioner Velasquez] ha[d] not otherwise met the standard for asylum, she ha[d] necessarily failed to meet the higher standard for withholding of removal." *Id.* at 58. As to petitioner Velasquez's CAT claim, the IJ found that she did not show she was likely to be tortured in the future if returned to Honduras or that "the Honduran government is unwilling to protect [her]." *Id.* at 62; see *id.* at 62-64.

Petitioners appealed the IJ's decision to the Board, and on May 25, 2016, the Board dismissed their appeals. Pet. App. 28-32. Petitioners filed petitions for review of the Board's decision in the court of appeals. *Velasquez* v. *Sessions*, 866 F.3d 188 (4th Cir. 2017). In June 2017, the court denied the petitions. See *id.* at 191-198. The court concluded (*inter alia*) that "[s]ubstantial evidence in the record support[ed] the IJ's factual conclusion that th[e] case [wa]s solely one of personal conflict among family members." *Id.* at 194. In September 2017, the court denied rehearing. *Velasquez* v. *Sessions*, No. 16-1669 (4th Cir. Sept. 26, 2017).

b. On January 23, 2018—long after the 90-day deadline for filing a motion to reopen had passed—petitioners filed motions "seek[ing] reopening *sua sponte*." Pet. App. 173; see *id.* at 172-213. Petitioners contended that the IJ "never considered crucial record evidence of the involvement of MS-13," and they also asserted that "new and material evidence of MS-13's involvement" existed that could not have been discovered or introduced at the prior hearing. *Id.* at 177-178. Petitioner Velasquez additionally contended that the Board had

erred in deeming the case "'a personal matter within the family,'" arguing that she is "not * * * related by blood or marriage" to the members of the Estrada family (*i.e.*, the family of the father of her son D.A.E.V.) who have "persecut[ed]" her. *Id.* at 178. Petitioner D.A.E.V. separately contended that, at the time of the prior proceedings, he was "not old enough to file his own application" for asylum and sought reopening "to allow him to file for asylum in his own right." *Id.* at 176-177.

Days later, on January 29, 2018, petitioners filed an "Emergency Petition for Writs of Habeas Corpus" in the United States District Court for the Western District of North Carolina, asking the court to stay their removal and detention pending the Board's resolution of their motions to reopen. D. Ct. Doc. 1, at 1, 8-9, *Velasquez* v. *ICE*, No. 18-47 (W.D.N.C.) (capitalization altered); see Pet. App. 14, 18. Petitioners contended that due process compelled reopening based on the arguments presented in their motions to reopen that the Board had committed factual errors and failed to consider certain evidence of gang involvement, that new evidence existed on that issue, and that petitioner D.A.E.V. had been too young to file his own asylum application at the time of the prior proceedings. D. Ct. Doc. 2, at 32-37, *Velasquez*, *supra* (Jan. 29, 2018) (No. 18-47).

On January 30, 2018, the district court issued a temporary restraining order (TRO) barring petitioners' removal, finding that petitioners had shown "a likelihood of succeeding in their claim that they were denied due process in their prior immigration hearing," that they would "experience irreparable injury via deportation and the risk of violence and persecution if they [we]re deported," and that the governmental and public interest did not weigh against relief. Pet. App. 26. On

February 8, 2018, after a hearing, the court issued a preliminary injunction, enjoining the government from removing petitioners or detaining them pending the Board's disposition of their motions to reopen. *Id.* at 14-15; see *id.* at 18-22 (bench ruling). The court stated that the government had not challenged the court's analysis in its TRO ruling of the merits and injunctive-relief factors. *Id.* at 19. The court rejected the government's argument that it lacked jurisdiction under 8 U.S.C. 1252(g), which precludes judicial review of "the decision or action * * * to commence proceedings, adjudicate cases, or execute removal orders against any alien" under the INA except through the judicial-review framework of Section 1252 itself. *Ibid.*; see Pet. App. 19-21. The court concluded that, "in this instance, and under these facts, applying Section 1252(g)" to preclude review would be "in violation of the Suspension Clause" of the Constitution, U.S. Const. Art. I, § 9, Cl. 2. Pet. App. 20. The government appealed.

c. In July 2018, while the government's appeal of the preliminary injunction was pending, the Board denied petitioners' motions that had urged *sua sponte* reopening. Pet. App. 5-13. The Board "f[ound] no basis to sua sponte reopen these proceedings." *Id.* at 12. The Board explained that it "d[id] not find exceptional circumstances that would warrant" *sua sponte* reopening, explaining that it "d[id] not discern any clearly erroneous findings o[f] fact or erroneous conclusions of law in [its] prior decision that would warrant additional proceedings." *Id.* at 8-9. The Board also noted that "[t]he Fourth Circuit upheld [the Board's] decision in a thorough and well-reasoned opinion." *Id.* at 9. The Board accordingly "decline[d] to disturb it." *Ibid.*

The Board also rejected petitioners' claims that it had violated their due-process rights by "alleged[ly] fail[ing] to consider" in its prior decision "a claim based on the involvement of the MS-13 gang." Pet. App. 11; see *id.* at 11-12. The Board "note[d] that [petitioner Velasquez] was represented by counsel" in the prior proceedings, but "counsel's written statement did not mention the claim of MS-13 involvement." *Id.* at 12. In addition, the Board "f[ound] no merit to [petitioners'] contention that this matter does not involve a family dispute." *Id.* at 11. "The evidence relating to MS-13 involvement," it observed, "stems purely from" an "alleged affiliation" of the member of the Estrada family who had killed petitioner Velasquez's sister "with the gang, as well as the fact that someone sprayed MS-13 graffiti on [her] house." *Ibid.* The Board concluded that, "even if" the Estrada family members at issue "[we]re affiliated with MS-13, that d[id] not alter [the Board's] conclusion, affirmed by the Fourth Circuit, that [petitioner Velasquez's] claim arises out of an intra-family dispute," not a risk of harm based on a "protected ground." *Id.* at 12. It also found that petitioner "ha[d] not shown that the government of Honduras is unable or unwilling to control any gang-related violence [petitioners] may face." *Ibid.*

3. On August 8, 2018, petitioners filed a petition for review of the Board's decision denying *sua sponte* reopening in the court of appeals and sought a stay of removal pending resolution of the petition. The same day, the government filed a motion to dismiss the petition, contending that the Board's discretionary decision not to exercise its authority to reopen *sua sponte* is unreviewable. Pet. App. 214, 219-221. The government initially opposed a stay, see *id.* at 221-222, but it subsequently notified the court that it did not oppose a stay

of petitioners' removal pending disposition of the government's motion to dismiss, see C.A. Doc. 10, at 2 (Aug. 9, 2018); see also C.A. Doc. 14, at 1 (Aug. 13, 2018). On August 10, 2018, the court of appeals denied petitioners' request for a stay. C.A. Doc. 12. The government filed, and the court granted, an unopposed motion to dismiss its appeal of the preliminary injunction, which had barred removal of petitioners only pending the Board's disposition of the motion to reopen. 8/13/18 Order, *Velasquez* v. *Kundel*, No. 18-6422 (4th Cir.).

On August 21, 2018, the court of appeals granted the government's motion to dismiss the petition for review. Pet. App. 1-2. It also denied reconsideration of its earlier order denying a stay and denied a new motion for a stay pending a petition for rehearing. C.A. Doc. 19 (Aug. 21, 2018); C.A. Doc. 31 (Oct. 12, 2018). On October 22, 2018, the court denied rehearing. Pet. App. 66.

4. On October 26, 2018, petitioners filed an application in this Court for a stay of removal pending disposition of a petition for a writ of certiorari. 18A454 Appl. On November 13, 2018, the government notified the Court that this Office had been informed by the Department of Homeland Security that the Department "w[ould] not take action to remove [petitioners] pending the filing and disposition of [their] petition for a writ of certiorari and any further proceedings in this Court" and that a stay was accordingly unnecessary. 18A454 Gov't Letter. Petitioners thereafter withdrew their stay application.

ARGUMENT

Petitioners contend (Pet. 11-19) that the court of appeals erred in dismissing their petition for review of the Board's determination not to exercise its discretion to reopen petitioners' removal proceedings *sua sponte*.

The court of appeals correctly dismissed the petition because the Board's exercise of that discretion is not judicially reviewable. *Sua sponte* reopening—a procedure established by Board regulations, not the INA—is a matter committed to agency discretion by law. The procedure confers no privately enforceable rights on an alien, and no standard exists by which courts can assess the validity of the Board's exercise of that discretion in a particular circumstance. The courts of appeals are in accord that the Board's denial of *sua sponte* reopening generally is not judicially reviewable, and this Court has repeatedly and recently denied certiorari on that question. See, *e.g.*, *Gonzalez-Cantu* v. *Sessions*, 138 S. Ct. 677 (2018) (No. 17-653); *Butka* v. *Sessions*, 138 S. Ct. 299 (2017) (No. 16-790); *Gor* v. *Holder*, 564 U.S. 1037 (2011) (No. 10-940); *Ochoa* v. *Holder*, 564 U.S. 1037 (2011) (No. 10-920); *Da Silva Neves* v. *Holder*, 564 U.S. 1030 (2011) (No. 10-1030).

Petitioners identify disagreement among the circuits on the narrower, subsidiary question whether courts of appeals may undertake review of constitutional or other legal questions raised in a petition for review challenging the Board's denial of *sua sponte* reopening. This case, however, does not squarely implicate that question because petitioners did not present any substantial constitutional or other legal challenge. As the Board explained, petitioners' arguments in substance raise factual disputes concerning the Board's assessment of certain evidence in its original decision and urge that new evidence might alter that assessment. Pet. App. 8-12. At a minimum, this case would be an unsuitable vehicle in which to address that narrower question.

1. The court of appeals correctly dismissed petitioners' petition for review because the Board's exercise of

its discretionary authority to reopen proceedings *sua sponte* is not judicially reviewable. In their original removal proceedings, petitioners conceded the charge of removability and sought asylum, withholding of removal, and CAT relief. Pet. App. 36-37. The IJ and the Board denied that relief. *Id.* at 28-65. They proceeded to seek judicial review, and the court of appeals upheld the Board's decision, finding that the factual determinations petitioners challenged were supported by substantial evidence. *Velasquez* v. *Sessions*, 866 F.3d 188, 191-193 (4th Cir. 2017). Although petitioners had a statutory right to file a motion to reopen within 90 days of the Board's 2016 decision, 8 U.S.C. 1229a(c)(7)(A), they did not do so.

In 2018—long after the 90-day deadline for moving to reopen had passed—petitioners requested *sua sponte* reopening, arguing that the Board had made factual errors and failed to consider particular evidence in the underlying proceedings, that new evidence cast doubt on the Board's findings, and that petitioner D.A.E.V. should be allowed to pursue his own independent asylum claim. *Sua sponte* reopening is entrusted to the Board's broad discretion, 8 C.F.R. 1003.2(a), and the court of appeals correctly declined to second-guess the Board's determination not to take the extraordinary step of reopening the proceedings on its own motion.

a. Under the Administrative Procedure Act (APA), 5 U.S.C. 701 *et seq.*, judicial review is not available when "agency action is committed to agency discretion by law." 5 U.S.C. 701(a)(2); see *Lincoln* v. *Vigil*, 508 U.S. 182, 190-192 (1993); *Heckler* v. *Chaney*, 470 U.S. 821, 829-831 (1985). As the courts of appeals have consistently held, that principle applies to the Board's determination whether to reopen a removal proceeding *sua*

sponte, a determination that by its very nature is committed to the Board's own judgment and is not based on any rights of the alien. See, *e.g.*, *Tamenut* v. *Mukasey*, 521 F.3d 1000, 1003 (8th Cir. 2008) (en banc) (per curiam) (collecting cases); see also *Kucana* v. *Holder*, 558 U.S. 233, 251 n.18 (2010) (noting circuit consensus).

The Board exercises *sua sponte* reopening authority only in exceptional situations, and whether to do so in a particular circumstance is entirely discretionary, with no meaningful standards or guidelines by which to review the Board's determination. See 8 C.F.R. 1003.2(a); *In re G-D-*, 22 I. & N. Dec. 1132, 1133-1134 (B.I.A. 1999). "[N]o statute expressly authorizes the [Board] to reopen cases *sua sponte*," and the regulation that "expressly gives the [Board] discretion to *sua sponte* reopen cases * * * provides absolutely no standard to govern the [Board's] exercise of its discretion." *Lenis* v. *United States Att'y Gen.*, 525 F.3d 1291, 1293 (11th Cir. 2008). The regulation does not require the Board to reopen a removal proceeding under any particular circumstances. "The discretion accorded in this provision is so wide that 'even if the party moving has made out a prima facie case for relief,' the BIA can deny a motion to reopen a deportation order." *Id.* at 1294 (quoting 8 C.F.R. 1003.2(a)).

Furthermore, in contrast to the statutory and regulatory provisions affording an alien the right to file a single motion to reopen within 90 days, the regulation permitting the Board to reopen a case *sua sponte* establishes a procedural mechanism for the Board itself, in aid of its own internal administration. Consistent with the strong interest in finality in immigration proceedings, neither Congress nor the regulation allowing *sua sponte* reopening has conferred any privately enforceable right in this setting. See *Gor* v. *Holder*, 607 F.3d

180, 195 (6th Cir. 2010) (Batchelder, C.J., concurring) ("The power of the [Board] to reopen *sua sponte* arises only from its own regulations"; "Congress has taken no steps to establish an individual right applicable to [aliens]."), cert. denied, 564 U.S. 1037 (2011). Both the existence of *sua sponte* reopening and the Board's exercise of that authority in any particular case are entirely matters of administrative grace, which the Board has complete discretion to dispense "as it sees fit." *Lenis*, 525 F.3d at 1294.

Indeed, it would be inconsistent with the statutory and regulatory framework to conclude that an alien who is time-barred from exercising her statutory right to file a motion to reopen has cognizable *rights* in seeking to have the Board reopen her case *sua sponte* and to obtain judicial review of the Board's determination that the alien did not show, to the satisfaction of the Board, any exceptional situation warranting that extraordinary relief. See 5 U.S.C. 701(a)(1) (barring review if a statute precludes judicial review). Put another way, because the regulation allowing the Board to reopen a removal proceeding *sua sponte* confers no personal right on an alien, an alien whose request for *sua sponte* reopening is denied by the Board is not "aggrieved by agency action within the meaning of [the] relevant statute," 5 U.S.C. 702, and therefore has no right to judicial review.

b. The purposes of the INA, and of its judicial review provisions, would also be undermined if determinations by the Board not to exercise its discretionary *sua sponte* reopening authority were subject to judicial review. Congress enacted statutory provisions governing motions to reopen and judicial review in 1990 and 1996 to prevent abuses of motions to reopen by imposing time and numerical limitations on such motions,

shortening the time for judicial review, and requiring the consolidation of a petition for review of the denial of a motion to reopen with a petition for review of the final order of removal. See 8 U.S.C. 1252(b)(6). Those changes were adopted to expedite the process of administrative and judicial review, the final resolution of removal proceedings, and the actual removal of the alien. See *Dada* v. *Mukasey*, 554 U.S. 1, 12-15 (2008); *Stone* v. *INS*, 514 U.S. 386, 393-394 (1995).

A determination by the Board whether to exercise its discretion to reopen a case *sua sponte* may be made many months or years after the order of removal became final, the time for filing a statutory motion to reopen has long since passed (or such a motion has been denied), and the time for judicial review has expired. If determinations made in such circumstances were then judicially reviewable, the result would be to circumvent the time and numerical limits Congress imposed on motions to reopen. Cf. *Califano* v. *Sanders*, 430 U.S. 99, 108 (1977) (holding that judicial review of a decision not to reopen Social Security benefits determination was barred because, *inter alia*, allowing such review "would frustrate the congressional purpose * * * to impose a 60-day limitation upon judicial review of the Secretary's final decision on the initial claim for benefits"); see also *ICC* v. *Brotherhood of Locomotive Eng'rs*, 482 U.S. 270, 279-280 (1987); *In re J-J-*, 21 I. & N. Dec. 976, 984 (B.I.A. 1997). An alien, simply by requesting that an IJ or the Board reopen a case *sua sponte*, could thereby trigger one or more new rounds of judicial review, perhaps seeking stays of removal, and creating delays and congestion in the courts and possible remands to the Board or even back to the IJ for further proceedings. The result would be to add a whole new category of

cases to an already overburdened administrative process. The potential for those consequences weighs heavily against recognizing a right of judicial review.

c. That conclusion is strongly supported by the history of the Board's reopening authority. Congress enacted the INA in 1952, see Immigration and Nationality Act, ch. 477, § 103(a), 66 Stat. 173, charging the Attorney General "with the administration and enforcement" of the Act, and providing for him to "establish such regulations * * * as he deems necessary for carrying out [that] authority." *Ibid.* In accordance with that delegated authority, the Attorney General promulgated a series of regulations defining the "[p]owers of the Board," which included the power to "reopen[] * * * any case in which a decision has been made by the Board." 17 Fed. Reg. 11,475 (Dec. 19, 1952) (§§ 6.1(b) and (d), 6.2) (emphasis omitted). In 1958, the Attorney General clarified that the Board may reopen proceedings in response to a motion by the parties or on its own motion. See 23 Fed. Reg. 9118-9119 (Nov. 26, 1958) (§ 3.2); see also *Zhang* v. *Holder*, 617 F.3d 650, 656 (2d Cir. 2010).

Congress thereafter addressed motions to reopen filed by aliens, but it has never addressed the Board's *sua sponte* reopening power. In 1990, Congress became concerned that aliens illegally present in the United States were filing motions to reopen to prolong their stay in the country, and it directed the Attorney General to issue regulations to limit the number of motions to reopen that an alien may file and the time period for filing such motions. See *Dada*, 554 U.S. at 13. After the Attorney General promulgated the regulations, see 61 Fed. Reg. 18,905 (Apr. 29, 1996), Congress codified key portions of them, providing that each alien may file one motion to reopen, subject to specified time and

other limits. See Illegal Immigration Reform and Immigrant Responsibility Act of 1996, Pub. L. No. 104-208, Div. C, § 304(a)(3), 110 Stat. 3009-593. Notably, however, Congress left untouched the entirely discretionary nature of the Board's *sua sponte* reopening authority under the Attorney General's regulations. Thus, although Congress has decided that aliens have a personal right under the INA to file one motion to reopen within the time limit specified, it has "taken no steps to establish an individual right" for aliens to seek or obtain *sua sponte* reopening, instead leaving that discretionary mechanism entirely to the Board. *Gor*, 607 F.3d at 195; see *Zhang*, 617 F.3d at 662 (noting that, although Congress had codified standards for timely motions to reopen based on new evidence, it "was silent as to * * * the [Board's] *sua sponte* authority"). Accordingly, the Board's assessment of whether to reopen proceedings *sua sponte* remains entirely committed to agency discretion by law, the alien is not aggrieved within the meaning of the INA if the Board declines to do so, and judicial review of that discretionary determination is unavailable. See 5 U.S.C. 701(a)(1) and (2), 702.

2. Petitioners' contrary arguments lack merit.

a. Petitioners contend (Pet. 11-12) that the Board's determination not to reopen proceedings *sua sponte* is judicially reviewable because Section 1252 confers jurisdiction over the Board's denial of a motion to reopen. That contention lacks merit. As an initial matter, there is substantial reason to doubt that Congress contemplated that a Board decision not to reopen proceedings *sua sponte* is the sort of decision over which a court of appeals would have jurisdiction when it authorized judicial review of final removal orders in 8 U.S.C. 1252. To be sure, this Court has concluded that the jurisdiction

of a court of appeals "to review 'final orders of removal'" under Section 1252(a)(1) extends to the Board's denial of a *motion* to reopen under 8 U.S.C. 1229a(c)(7). *Mata* v. *Lynch*, 135 S. Ct. 2150, 2154 (2015) (quoting 8 U.S.C. 1252(a)(1)) (brackets omitted). But that is not because the denial of a motion to reopen constitutes a freestanding final order of removal, as petitioners suggest. Pet. 11. When the Board denies a motion to reopen, it merely declines to disturb an already-final removal order. See *Zhao Quan Chen* v. *Gonzales*, 492 F.3d 153, 155 (2d Cir. 2007) (per curiam) ("Courts have long recognized that the filing of a motion to reopen before the BIA does not impact the finality of a removal order[.]" (citing *Stone*, 514 U.S. at 405-406)); cf. *Sanders*, 430 U.S. at 107-109 (Social Security Administration's denial of a motion to reopen, authorized by regulations rather than by statute, is not reviewable as a "final decision of the Secretary made after a hearing" (citation omitted)).

Instead, as the Court explained in *Mata*, the denial of a motion to reopen is reviewable because Section 1252 "expressly contemplates" that courts can review the denial of such a motion, by stating that "'[a]ny review sought of a motion to reopen or reconsider [a removal order] shall be consolidated with the review of the [underlying] order.'" 135 S. Ct. at 1254 (quoting 8 U.S.C. 1252(b)(6)) (second and third sets of brackets in original). In addition, the INA itself entitles an alien to "file one motion to reopen proceedings," subject to specified time and other limits. 8 U.S.C. 1229a(c)(7)(A). It makes sense that Congress would have expected that denials of such motions would be judicially reviewable in light of the fact that Congress authorized such motions by statute. See *Cheng Fan Kwok* v. *INS*, 392 U.S. 206, 216

(1968) (predecessor statute to Section 1252 contemplated judicial review of "only those determinations made during a [removal] proceeding," "including those determinations made incident to a *motion* to reopen such proceedings" (emphasis added)).

Neither of those reasons for concluding that denials of motions to reopen pursuant to Section 1229a(c)(7) are reviewable extends to the Board's discretionary determination not to reopen proceedings *sua sponte*. Section 1252(b)(6)'s direction that "review sought of a motion to reopen" be "consolidated" with a petition for review of the underlying order, 8 U.S.C. 1252(b)(6), refers to a motion to reopen that the INA itself expressly authorizes in Section 1229a(c)(7). It does not sensibly encompass the Board's determination whether to reopen *sua sponte*, which is a creature of the Board's regulations, is not addressed by the INA at all, and is by definition not governed by procedures for the filing of motions by an alien.

Moreover, unlike a motion to reopen under Section 1229a(c)(7), an alien has no personal right in connection with *sua sponte* reopening of final removal proceedings, and the alien's request that the Board do so therefore is not a true "motion" of the sort that gives rise to reviewable agency action. Cf. *Pilch* v. *Ashcroft*, 353 F.3d 585, 586 (7th Cir. 2003) (Easterbrook, J.) ("[O]f course, if reopening were to occur in response to a motion, it could not have been *sua sponte*."). That is especially so because to authorize judicial review of a determination not to reopen a case *sua sponte* would extend immigration proceedings substantially, contrary to the strong need for finality that Congress has recognized in several provisions in the INA. See *Stone*, 514 U.S. at 399-400 (noting Congress's concern that "every delay works to

the advantage of the deportable alien who wishes merely to remain in the United States" (citation omitted)).[1]

In any event, even assuming arguendo that Section 1252's conferral of *jurisdiction* on a court of appeals could be construed in the abstract to be broad enough to encompass review of a determination by the Board not to reopen a proceeding *sua sponte*, the *substance* of the Board's determination not to exercise its discretionary authority to revisit a prior removal order in particular circumstances is nevertheless not judicially reviewable. By the express terms of the Board's regulations, 8 C.F.R. 1003.2, whether to reopen *sua sponte* is a matter "committed to agency discretion by law." 5 U.S.C. 701(a)(2). And the regulations authorizing the Board to do so create no privately enforceable right. See pp. 12-13, 18, *supra*.

b. Petitioners' reliance (Pet. 12-13) on this Court's decision in *Kucana*, *supra*, holding that denials of motions to reopen are reviewable fails for similar reasons. *Kucana* did not address judicial review of a failure to reopen a proceeding *sua sponte*. The question in *Kucana* was one of statutory interpretation: whether 8 U.S.C. 1252(a)(2)(B)(ii), which provides that no court shall have jurisdiction to review any action of the Attorney General "the authority for which is specified under

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[1] In *Mata*, this Court concluded that the court of appeals had erred in deeming the Board's denial of a motion to reopen unreviewable because that court had mistakenly "construe[d]" a motion to reopen under the statute as "an invitation for the BIA to exercise its *sua sponte* authority" to reopen, the denial of which the court deemed unreviewable. 135 S. Ct. at 2155 (citation and internal quotation marks omitted). In this case, petitioners expressly sought only "reopening *sua sponte*," Pet. App. 173, and they have not argued that the Board or the court of appeals erred in construing their motion as such.

this subchapter to be in the discretion of the Attorney General," *ibid.*, applies to actions the discretionary authority for which is specified in regulations, rather than the relevant statutory subchapter. *Kucana*, 558 U.S. at 237. The Court concluded that Section 1252(a)(2)(B)(ii) does not bar judicial review of determinations that are made discretionary by regulation, such as determinations on an alien's motion to reopen under Section 1229a(c)(7). *Id.* at 245-249.

Kucana's holding has no application here. The court of appeals lacked authority to review the Board's declining of petitioners' invitation to reopen their proceedings *sua sponte* not because of Section 1252(a)(2)(B)(ii)'s express preclusion of review, but instead because the Board's action is unreviewable under the principle codified in the APA that matters "committed to agency discretion by law" are not reviewable, 5 U.S.C. 701(a)(2). Whether Congress has "affirmatively precluded review" is a different question than whether review is unavailable because Congress reserved a matter to the agency's discretion, such that "a court would have no meaningful standard against which to judge the agency's exercise of discretion." *Chaney*, 470 U.S. at 830 (distinguishing matters unreviewable because they are committed to agency discretion, which are addressed by 5 U.S.C. 701(a)(2), from matters of which Congress has "affirmatively precluded" review, which are separately addressed by 5 U.S.C. 701(a)(1)). *Kucana*'s analysis of Section 1252(a)(2)(B)(ii) as applied to the denial of statutory motions to reopen does not speak to the latter question. To the contrary, the Court "express[ed] no opinion on whether federal courts may review the Board's decision not to reopen removal proceedings sua sponte," while noting that 11 courts of appeals had held

that "such decisions are unreviewable because *sua sponte* reopening is committed to agency discretion by law." *Kucana*, 558 U.S. at 251 n.18 (citing *Tamenut*, 521 F.3d at 1003-1004).

Petitioners' suggestion (Pet. 18) that "*Kucana*'s rationale" nevertheless extends to the denial of *sua sponte* reopening is also mistaken. The Court's holding in *Kucana* rested squarely on its interpretation of the particular statutory provision at issue, not on a determination that the denial of reopening is the proper subject of judicial review in every circumstance. See 558 U.S. at 243-253. And petitioners' assertion (Pet. 19) that, "[f]rom a judicial review standpoint, there is no meaningful distinction between" motions to reopen that Congress expressly authorized in Section 1229a(c)(7) and invitations to the Board (whether or not styled as a "motion") to exercise its discretion to reopen *sua sponte* is incorrect for the reasons explained above. See pp. 12-19, *supra*.

c. Petitioners additionally contend (Pet. 14-16) that the principle codified in the APA precluding review of matters "committed to agency discretion by law," 5 U.S.C. 701(a)(2), has no application here because petitioners sought review under the INA, not under the APA. That contention lacks merit. The INA provides that, with exceptions not implicated here, "[j]udicial review of a final order of removal * * * is governed only by chapter 158 of title 28," 8 U.S.C. 1252(a)(1), *i.e.*, the Hobbs Act, 28 U.S.C. 2341 *et seq.* The Hobbs Act, in turn, generally "specifies the form of proceeding for judicial review" of orders subject to it, but "it is the [APA] that codifies the nature and attributes of judicial review, including the traditional principle of its unavailability 'to the extent that . . . agency action is committed to agency discretion by law.'" *Brotherhood of Locomotive Eng'rs*, 482 U.S. at

282 (quoting 5 U.S.C. 701(a)(2)); see also S. Rep. No. 2618, 81st Cong., 2d Sess. 4 (1950) (explaining that "[t]he scope of review" under the Hobbs Act "is governed by section 10(e) of the [APA]," *i.e.*, 5 U.S.C. 706). Thus, as the cases petitioners cite illustrate, questions of the form of proceedings to review orders of removal are not governed by the APA. See Pet. 16 (citing *Ardestani* v. *INS*, 502 U.S. 129, 133-134 (1991) (APA did not govern award of attorney's fees in immigration proceedings), and *Marcello* v. *Bonds*, 349 U.S. 302, 304-310 (1955) (APA did not govern hearing procedures in immigration proceedings)). But in the absence of anything in the INA displacing or altering the APA's provisions limiting the *scope* of review, those provisions apply to petitions for review under the INA.

Petitioners contend (Pet. 15) that the INA provision at issue in *Kucana* barring jurisdiction over certain matters committed by the INA itself to the Attorney General's discretion, 8 U.S.C. 1252(a)(2)(B)(ii), implicitly displaces the APA's limitations on the scope of review. That contention also lacks merit. As explained above, Congress's withdrawal of jurisdiction over those particular matters does not imply that Congress intended courts to second-guess the substance of the Board's determinations whether to exercise discretion conferred not by the statute but by its own regulations. See pp. 19-21, *supra*. It makes little sense to construe a statutory provision that takes the additional step of stripping federal-court jurisdiction altogether over particular discretionary actions governed by the INA as implicitly *authorizing* judicial review over discretionary actions the INA does not address at all.

d. Petitioners finally contend (Pet. 17) that courts' inability to review the Board's discretionary determination not to reopen a proceeding *sua sponte* does not extend to "the BIA's rulings on constitutional claims and questions of law encompassed within a BIA denial of a *sua sponte* motion." That is incorrect. The very nature of *sua sponte* reopening makes it unreviewable.

That does not change based on the arguments the alien presents in her request for challenging the Board's original decision, or the reasons (if any) the Board gives in denying the request. This Court has emphatically rejected the contention that, "if the agency gives a 'reviewable' reason for otherwise unreviewable action, the action becomes reviewable." *Brotherhood of Locomotive Eng'rs*, 482 U.S. at 283. As an example, the Court "observe[d] that a common reason for failure to prosecute an alleged criminal violation is the prosecutor's belief (sometimes publicly stated) that the law will not sustain a conviction." *Ibid.* As the Court explained, "[t]hat is surely an eminently 'reviewable' proposition, in the sense that courts are well qualified to consider the point; yet it is entirely clear that the refusal to prosecute cannot be the subject of judicial review." *Ibid.*

The Board may choose not to reopen a case for a variety of reasons, and the Board is not required to explain why it has declined to do so in a particular case. When it does not reopen proceedings *sua sponte*, the Board is not adjudicating the merits of the original removal order anew. To the contrary, it is electing *not* to exercise its discretion to revisit the removal order—reflecting only that in the Board's judgment the case does not constitute a "truly exceptional situation[]" that warrants that "extraordinary remedy." *In re G-D-*, 22 I. & N. Dec. at 1133-1134. That determination no more constitutes an

adjudication of the merits of the underlying removal order than a determination by this Court or other appellate courts in declining to grant discretionary review. That is clear from the text of the regulations authorizing reopening, which state that the Board may deny reopening (whether on motion or *sua sponte*) "even if the party moving has made out a prima facie case for relief." 8 C.F.R. 1003.2(a).

To be sure, the Board often does give reasons for such a determination for the benefit of the parties, as it did in this case. Pet. App. 8-12. But the Board's choice to do so does not then make its discretionary determination subject to judicial review. See *Brotherhood of Locomotive Eng'rs*, 482 U.S. at 283. If the reviewability of the Board's determination not to reopen a proceeding *sua sponte* turned on the reasons the Board articulated, it would create a substantial disincentive for the Board to explain its action for the benefit of the parties.[2]

In any event, even if judicial review of the Board's determination not to reopen proceedings *sua sponte* were available where an alien has raised a colorable

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[2] Although the fact that the Board might discuss in a particular instance the asserted constitutional or other legal issues raised about its original decision does not render its discretionary determination not to reopen *sua sponte* judicially reviewable, that would not necessarily foreclose judicial review of a contention that the reopening determination *itself* violated cognizable constitutional rights—for example, a contention that the Board violated equal-protection principles by denying *sua sponte* reopening based on discrimination against a protected class. This case does not present that type of challenge. The constitutional contentions petitioners presented below were that, in its original decision, the Board misinterpreted or failed to consider particular evidence, and that petitioner D.A.E.V. did not have the opportunity to pursue his own independent asylum claim in the original proceeding. See Pet. App. 198-205.

claim of constitutional or other legal error in the Board's original decision, no viable issues of that nature exist here. As the government explained below, in urging *sua sponte* reopening, petitioners did not identify any colorable constitutional or legal errors in the Board's original decision, but instead asserted various factfinding errors or unexhausted claims. Pet. App. 219-220. Petitioners argued that the evidence they submitted in the original proceedings showed a strong tie to the MS-13 gang; that the IJ never reviewed certain evidence concerning MS-13 involvement in their persecution; that the Board never reviewed evidence that the Honduran government was unwilling or unable to protect them; and that the Board did not address petitioner D.A.E.V.'s claim that reopening should be granted so that he may pursue asylum in his own right. See *id.* at 8, 174-176. Those claims amount to assertions of factual errors or disagreement with the exercise of discretion.

Moreover, the Board acknowledged that petitioners styled their claims as constitutional in nature, but it concluded that, even if such a violation had been established, petitioners still had failed to demonstrate the requisite prejudice—a determination that also turns on purely factual questions. Pet. App. 11. This Court's review is unwarranted because even the rule petitioners advocate would not entitle them to judicial review here. At a minimum, the nature of petitioners' challenges and the circumstances of this case would make this an unsuitable vehicle to address the question petitioners raise.

3. a. As this Court noted in *Kucana*, every circuit that considers immigration issues has recognized that "the Board's decision not to reopen removal proceedings *sua* sponte" is "unreviewable because *sua sponte*

reopening is committed to agency discretion by law." 558 U.S. at 251 n.18 (citing *Tamenut*, 521 F.3d at 1003-1004, as "agreeing with ten other Courts of Appeals"). Petitioners contend (Pet. 1) that review is warranted because, "[s]ince *Kucana*, conflict has developed among the lower courts regarding whether the denial of a motion to reopen *sua sponte*—a motion based on evidence that was not available within the 90-day window for statutory reopening—is subject to judicial review." See Pet. 7-11. The courts of appeals have continued to agree, however, that the Board's exercise of discretionary authority to reopen *sua sponte* is generally unreviewable. See, *e.g.*, *Gyamfi* v. *Whitaker*, 913 F.3d 168, 176 (1st Cir. 2019); *Luna* v. *Holder*, 637 F.3d 85, 96 (2d Cir. 2011); *Desai* v. *Attorney Gen.*, 695 F.3d 267, 269 (3d Cir. 2012); *Lawrence* v. *Lynch*, 826 F.3d 198, 206-207 (4th Cir. 2016); *Lopez-Dubon* v. *Holder*, 609 F.3d 642, 647 (5th Cir. 2010), cert. denied, 563 U.S. 960 (2011); *Rais* v. *Holder*, 768 F.3d 453, 459-464 (6th Cir. 2014); *Anaya-Aguilar* v. *Holder*, 683 F.3d 369, 372 (7th Cir. 2012), cert. denied, 568 U.S. 1205 (2013); *Barajas-Salinas* v. *Holder*, 760 F.3d 905, 907 (8th Cir. 2014); *Mejia-Hernandez* v. *Holder*, 633 F.3d 818, 823-824 (9th Cir. 2011); *Salgado-Toribio* v. *Holder*, 713 F.3d 1267, 1270-1271 (10th Cir. 2013); *Butka* v. *United States Att'y Gen.*, 827 F.3d 1278, 1283-1286 (11th Cir. 2016), cert. denied, 138 S. Ct. 299 (2017).

b. As petitioners observe (Pet. 7-10), disagreement does exist among the courts of appeals on the narrower question whether a court may review legal and constitutional issues that are raised in connection with the Board's determination not to reopen proceedings *sua sponte*. Several circuits have concluded that a court may review the denial of *sua sponte* reopening if the

denial was based on an asserted legal error and review is limited to correcting the legal error and remanding to the agency for further consideration. See *Centurion* v. *Sessions*, 860 F.3d 69, 74 (2d Cir. 2017); *Pllumi* v. *Attorney Gen.*, 642 F.3d 155, 159-160 (3d Cir. 2011); *Fuller* v. *Whitaker*, 914 F.3d 514, 519 (7th Cir. 2019); *Bonilla* v. *Lynch*, 840 F.3d 575, 587-589 (9th Cir. 2016). In contrast, the Eleventh Circuit has concluded that a denial of *sua sponte* reopening is not reviewable even where the alien asserts legal errors (but the court has reserved judgment on constitutional errors). See *Butka*, 827 F.3d at 1285-1286 & n.7; see also *Bing Quan Lin* v. *United States Att'y Gen.*, 881 F.3d 860, 871 (11th Cir. 2018). And the Sixth Circuit has held that neither constitutional nor other legal errors render the denial of *sua sponte* reopening reviewable. See *Rais*, 768 F.3d at 463-464.

Three other circuits have either stated or assumed that colorable claims that the denial of *sua sponte* reopening violated constitutional rights are judicially reviewable, but held that review was unavailable in the cases before them because no such colorable constitutional claim had been presented. See *Gyamfi*, 913 F.3d at 177-178 (reserving judgment on whether colorable constitutional claim is reviewable and concluding that alien's due-process claim in that case was not colorable, given that alien had no "cognizable liberty interest" in "the BIA's decision whether to exercise its purely discretionary sua sponte authority" (citation and internal quotation marks omitted)); *Mejia* v. *Whitaker*, 913 F.3d 482, 490 (5th Cir. 2019) (stating that constitutional claims are reviewable but rejecting due-process claim because "no liberty interest exists in a motion to reopen"); *Salgado-Toribio*, 713 F.3d at 1271 (same). Two other circuits have reserved judgment on the question. See

Lawrence, 826 F.3d at 206-207 & n.5; *Barajas-Salinas*, 760 F.3d at 907-908 & n.*.

That disagreement, however, does not warrant review in this case. As explained above, petitioners' arguments for *sua sponte* reopening, although styled as claims of constitutional or other legal error, are in substance assertions that the Board erred in its assessment of the factual record in its prior decision and that new evidence casts doubt on that factual assessment. See pp. 24-25 & n.2, *supra*. The question whether courts may review assertions of constitutional or other legal error in the Board's reasoning in declining to exercise its discretion to reopen *sua sponte* is therefore not squarely implicated here. Petitioners did not present any colorable claim that the denial of *sua sponte* reopening by itself violated their constitutional rights. At a minimum, substantial doubt exists whether the Board's decision not to reopen the proceedings in this case *sua sponte* would be deemed reviewable by any of the courts of appeals that do or might permit judicial review of such decisions in other circumstances.

4. This case would be an unsuitable vehicle for addressing the question presented in the petition for a writ of certiorari for the additional reason that the court of appeals dismissed petitioners' petition for review in an unpublished, two-sentence order with no analysis of the issue petitioners raise. Pet. App. 1-2. As noted above, the Fourth Circuit has previously reserved judgment on whether an exception to the general rule of nonreviewability of denials of *sua sponte* reopening exists for some or all claims of legal error. See *Lawrence*, 826 F.3d at 206-207 & n.5 (explaining that, "[e]ven if [the court of appeals] were to adopt" an exception for determinations not to reopen based on a

possibly mistaken view that "a reopening would necessarily fail" on the merits, "it would not apply here" (citation and internal quotation marks omitted)). As this case comes to the Court, there is no indication that the court of appeals panel dismissed the petition because it determined that review of the denial of *sua sponte* reopening is categorically unavailable, notwithstanding its published precedent reserving that question. And it is not established whether the court instead dismissed the petition on the ground that, even if such review is available in some circumstances, it would not extend to the particular challenges petitioners raised to the Board's original decision in this case, or on some other basis. Further review is not warranted.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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