No. 10-940

IN THE
Supreme Court of the United States

TUSHAR PRAVINKUMAR GOR,

Petitioner,

v.

ERIC H. HOLDER, JR., ATTORNEY GENERAL,

Respondent.

On Petition For A Writ Of Certiorari To The
United States Court Of Appeals
For The Sixth Circuit

PETITIONER'S REPLY BRIEF

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES

STATUTES AND REGULATIONS

REPLY BRIEF

Tushar Gor was not removable, but the government has removed him to India nonetheless. The Sixth Circuit deemed meritorious the legal and constitutional arguments Mr. Gor raised in his motion before the BIA to reopen *sua sponte*: that the statute on which his removal was based does not apply to him, Pet.App.27a, and that the immigration judge abridged his due process rights by failing to follow binding agency regulations concerning legal representation, Pet.App.24a. In the Sixth Circuit's words, "Gor's case is a textbook example of the propriety – and the necessity – of judicial review of agency decisions." Pet.App.28a. And this case does not stand alone. In a variety of circumstances, judicial review of a denial of a motion for *sua sponte* reopening is absolutely essential as the only available mechanism to redress legal and constitutional errors.

The Sixth Circuit nevertheless held that it lacked jurisdiction to review the denial of Mr. Gor's motion, thereby placing in sharp focus two important issues that warrant this Court's attention. First, most – but not all – Courts of Appeals have recognized their jurisdiction to review a denial of *sua sponte* reopening where the petitioner raises legal or constitutional claims, as Mr. Gor did. The government's attempts to explain away this deep split are unconvincing. Second, as the Sixth and Ninth Circuits have recognized, this Court's holding in *Kucana v. Holder*, 130 S. Ct. 827 (2010), casts doubt on circuit precedent indicating that denials of *sua sponte* reopening are generally committed to agency discretion by law and thus unreviewable.

Here, too, the government fails to explain away this important dispute, which calls out for resolution by this Court.

1. The government contends that the lower courts have "unanimously" held that denials of *sua sponte* reopening are "unreviewable because [they are] committed to agency discretion by law." Opp.20. That is not just incorrect; it gets the state of the law backward. Although the Fourth and Sixth Circuits have taken that position, almost every other circuit to have considered the question has recognized that such denials *are* reviewable where a motion raises constitutional issues or questions of law. And the government's strained attempt to dismiss this substantial contrary authority as dicta is unavailing.

For example, in *Luis v. INS*, 196 F.3d 36 (1st Cir. 1999), the court held that denial of *sua sponte* reopening was generally unreviewable because there was no law to apply within the meaning of *Heckler v. Cheney*, 470 U.S. 821 (1985), but then went on recognize that it "had jurisdiction" to hear the plaintiff's due process claim, which "does not involve a matter that Congress committed to agency discretion." 196 F.3d at 41. The government opaquely asserts that the First Circuit's determination that it could hear the constitutional claim "did not qualify" its holding that such denials were generally unreviewable. Opp.26. But that is precisely what the First Circuit did – and what the Sixth Circuit in Mr. Gor's case did not do.

Likewise, in *Pllumi v. Attorney General of the United States,* 2011 WL 1278741 (3d Cir. Apr. 6, 2011), the Third Circuit squarely held that "[i]f the

reasoning given for a decision not to reopen *sua sponte* reflects an error of law, we have the power and responsibility to point out the problem, even though ultimately it is up to the BIA to decide whether it will exercise its discretion to reopen." *Id.* at *3; *see also Mahmood v. Holder*, 570 F.3d 466, 469 (2d Cir. 2009) (same). The government's opposition relegates *Plummi* to a footnote, Opp.25 n.9, and despite its contention of circuit unanimity, the government does not deny that the case permits judicial review of legal questions. That holding (along with the Second Circuit's identical holding in *Mahmood*) irreconcilably conflicts with the Sixth Circuit decision here, in which the court expressly found that it could *not* remand to the BIA in light of a legal error underlying the agency's determination.

The Eighth Circuit's en banc determination in *Tamenut v. Mukasey*, 521 F.3d 1000 (8th Cir. 2008) (en banc), reached the same conclusion as these cases from the First, Second, and Third Circuits. Citing earlier authority from the Eighth and Ninth Circuits, the en banc court held that reopening determinations were ordinarily committed to the BIA's discretion, but the court "generally" had the power to review constitutional claims. *Id.* at 1005. The government claims that this is dicta because the court ultimately concluded that the *Tamenut* petitioner lacked a valid constitutional claim, Opp.25, but the Eighth Circuit would have had no reason to address that issue at all if it had agreed with the Sixth Circuit's position. *See*

521 F.3d at 1005; *see also Lenis v. U.S. Att'y Gen.*, 525 F.3d 1291, 1294 n.7 (11th Cir. 2008).[1]

Whether these cases explicitly rely on 8 U.S.C. § 1252(a)(2)(D) is irrelevant. Opp.22-26. As the Petition explains, that subsection mandates that nothing in the statutory chapter "which limits . . . judicial review" should be "construed as precluding review of constitutional claims or questions of law." 8 U.S.C. § 1252(a)(2)(D). But the Petition does not assert that there is a split over the proper interpretation of this provision, which provides only *one* possible argument in support of the review that Mr. Gor seeks. Rather, the Petition demonstrates that Mr. Gor would have been able to obtain review of his legal and constitutional claims outside the Sixth Circuit and the result of his case likely would have been different. Only this Court can resolve that split in authority.

To be sure, the Petition cites § 1252(a)(2)(D), Pet.24-26, but only to argue that if this Court departs from the analysis in *Kucana* and finds that decisions on *sua sponte* reopening *are* committed to

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[1] This lopsided split is sufficient to warrant review, but it is deepened further by those circuits that have concluded they have jurisdiction to review questions of law in the closely related context of whether reopening is permitted under the post-departure bar. 8 C.F.R. § 1003.2(d). *See, e.g.*, *Ovalles v. Holder*, 577 F.3d 288, 296-300 (5th Cir. 2009); *Cardoso-Tlaseca v. Gonzales*, 460 F.3d 1102, 1104-05 (9th Cir. 2006); *Rosillo-Puga v. Holder*, 580 F.3d 1147, 1152-58 (10th Cir. 2009). Likewise, contrary to the government's contention, the Seventh Circuit has recognized that legal questions are reviewable even where the BIA has denied "an untimely petition to reopen." *Cevilla v. Gonzales*, 446 F.3d 658, 659-60 (7th Cir. 2006).

agency discretion by statute, then § 1252(a)(2)(D) would separately preserve jurisdiction for review of legal and constitutional questions. It is thus neither a surprise nor a defect that the provision is not central to the lower-court analysis of the jurisdictional issue.

2. There is also a different and broader issue that warrants this Court's attention: under the logic of *Kucana*, denials of *sua sponte* reopening motions (whether or not they involve constitutional or legal questions) should be reviewable for abuse of discretion, because the statutory and regulatory provisions at issue in *Kucana* governing standard motions to reopen apply equally to motions to reopen *sua sponte*. Pet.18-24.

The government first argues that there is no split on this issue because "no court . . . agrees with petitioner's primary argument about the effect of *Kucana*." Opp.22. That argument ignores Petitioner's citation to *Munoz de Real v. Holder*, 595 F.3d 747 (7th Cir. 2010), which reviewed for abuse of discretion a decision to deny reopening *sua sponte*. Pet.16. It also ignores the Sixth Circuit's conclusion in this case that the principle in *Kucana* applies with equal force to motions for *sua sponte* reopening, even as the court also found that it was bound by circuit precedent not to review the BIA's decision. And while other circuits have concluded that *Kucana* does not change the reviewability of *sua sponte* reopening determinations, Pet.17, the Sixth Circuit is not alone in its view. The Ninth Circuit recently reached a nearly identical conclusion in *Mejia-Hernandez v. Holder*, 633 F.3d 818 (9th Cir. 2011), when it held that "[t]he overall thrust of *Kucana* suggests that

sua sponte reopening should be subject to review," especially in light of the "separation of powers concern [in] withhold[ing] cases from judicial review." *Id.* at 823.

Like the court below, the Ninth Circuit ultimately found itself bound by pre-existing precedent to deny review, but that cannot be taken to mean that its decision supports the government's view about the relevance of *Kucana*. To the contrary, the decisions of the Sixth Circuit in this case and the Ninth Circuit in *Mejia-Hernandez* demonstrate that only this Court can clarify the effect of *Kucana* on the reviewability of denials of *sua sponte* reopening motions.

Apart from dismissing the split, the government primarily attempts to explain away *Kucana* by arguing that *sua sponte* reopening motions are committed to agency discretion by law in a way that standard motions to reopen are not. Opp.17-20. But the government does not explain how this is so. The agency regulations at issue in *Kucana* govern *sua sponte* reopening motions as well as standard motions, and cannot be read to place decisions on *any* of those motions beyond the reach of judicial review. *See* 8 C.F.R. § 1003.2(a); *Kucana*, 130 S. Ct. at 839-840.

The government seems to argue that decisions on *sua sponte* reopening are different because 8 U.S.C. § 1229a(c)(7) sets certain procedural limitations on an alien's first motion to reopen, and no statute sets out similar restrictions for *sua sponte* reopening. Opp.15-16, 18-19. But *Kucana* did not rely on § 1229a(c)(7) to show that standard decisions to

reopen were reviewable or not committed to agency discretion, and the lack of such a statute for *sua sponte* reopening therefore does not distinguish *Kucana*. Pet.22-23. The government also should not be heard to assert that Congress's silence with respect to *sua sponte* reopening is dispositive, since a clear *affirmative* statement by Congress is required in order to deprive courts of the power to review agency decisions. *Kucana*, 130 S. Ct. at 839.

The government repeatedly claims that, in the case of *sua sponte* reopening, "there are no meaningful standards or guidelines to review the Board's decision." Opp.12. But, aside from the purely procedural statutory provision that provides no substantive guidance, the government does not explain how this differs from the review of Board decisions on standard reopening that was at issue in *Kucana*. The government's arguments that the Board's "unfettered" *sua sponte* reopening decisions are unreviewable leaves no room for *Kucana's* holding that equally "unfettered" reopening decisions are to be reviewed for abuse of discretion.

In truth, courts are well versed in reviewing agency decisions for abuse of discretion. Further, as the government acknowledges, the BIA's own precedent provides a guiding legal principle. Opp.27; Pet.23. The BIA routinely uses an "exceptional circumstances" standard in addressing *sua sponte* reopening motions, and review and remand for further consideration will ensure that the agency does not act on an erroneous view of the law or abuse its discretion in other ways. In this case, the legal and constitutional issues raised by Mr. Gor are well within the competence of a reviewing court, and

could be readily addressed without any interference with the discretionary authority that the agency has bestowed upon itself by regulation.

3. The availability of some form of judicial review of denials of *sua sponte* reopening motions is extraordinarily important in Mr. Gor's case, as well as in the cases of many others in analogous positions.

As the Sixth Circuit acknowledged, Pet.App.27a-28a, Mr. Gor is very likely not removable at all, since the offense of which he was convicted is not in fact a removable offense. He also very likely suffered a violation of due process when the IJ disregarded binding regulations, including one requiring that the IJ ensure that an immigration respondent receives a list of low-cost counsel. Pet.App.25a. Absent these errors, Mr. Gor contends, he could have retained counsel and pressed his meritorious legal argument at an earlier stage. Instead, he was unrepresented prior to seeking *sua sponte* reopening, and therefore in no position to determine that the legal case for his removal was fundamentally flawed. Notably, the government says virtually nothing opposing any of these meritorious arguments.[2]

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[2] The government disputes that the IJ failed to provide a list of low-cost counsel and contends that the IJ "offered" such a list. Opp.28 & n.11. But the administrative record shows only that the IJ stated the government "would" give Mr. Gor such a list, and that Mr. Gor indicated he wanted a lawyer. A.R.133-134. The court below accepted Mr. Gor's uncontested assertion that he never actually received such a list. Pet.App.4a. And there is no dispute that on several occasions *after* the IJ's "offer" Mr. Gor (who was incarcerated) told the IJ that he was looking for counsel and had contacted 75 attorneys but could not find anyone he was able to afford. Even those statements did not

Yet under the Sixth Circuit's decision there is no avenue for Mr. Gor to ask a court to address the BIA's legal errors. Unless this Court intervenes, an agency will be permitted to promulgate a regulation stripping the judicial branch of its power to review the executive's decisions. And Mr. Gor will be unable to reside in the country where his children live and where he has spent his whole life, despite his clear legal right to do so.

Mr. Gor's case is not unusual. There are a variety of circumstances in which there is a pressing need for the safety valve of *sua sponte* reopening with judicial review for abuse of discretion. While Mr. Gor was deprived of counsel entirely, there are many cases in which a respondent has counsel but that counsel is wholly ineffective. Pet.15. There are also cases in which a predicate conviction is later vacated, or subsequent case law undermines the legal basis for removal. *See, e.g., Carachuri-Rosendo v. Holder*, 130 S. Ct. 2577, 2580 (2010); *Leocal v. Ashcroft*, 543 U.S. 1, 11-12 (2004). If in such a case the BIA denies a *sua sponte* reopening motion that points out why removal must be set aside, then – in the absence of judicial review – there is no further recourse. This is an intolerable situation.

The government warns that permitting review of *sua sponte* denials runs the risk of circumventing Congress's limits on standard reopening motions, or of creating delay and indefinitely postponing

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cause the IJ to inquire further or "ascertain that the respondent [had] received a list of [low-cost] programs," despite the regulatory requirement that he do so. A.R.113-19; 8 C.F.R. § 1240.10(a).

removal. Opp.14. Those concerns are misplaced. The procedural requirements associated with statutory motions have no bearing on *sua sponte* motions – and while Congress is of course free to limit *sua sponte* motions in similar ways, it has not chosen to exercise that power. Moreover, as Mr. Gor's own removal indicates, delay is not a serious concern.[3] A motion to reopen does not automatically stay removal, and the merits of the motion can be assessed in determining whether a stay should be granted. *Dada v. Mukasey*, 554 U.S. 1, 21 (2008).

In the end, as *Kucana* recognizes, there is no good reason to allow the BIA to abuse its discretion in denying reopening. This Court should now clarify that this principle applies to denials of *sua sponte* reopening as well.

4. Finally, the government argues that this case is an inappropriate vehicle because Mr. Gor, appearing *pro se*, did not raise his purely legal arguments in his original removal hearing or on direct appeal. Opp.26-28. As discussed above, however, Mr. Gor argued in his *sua sponte* reopening motion (and at all subsequent stages below) that it is *the agency's fault* that he did not raise these arguments earlier – that the agency erred as a matter of law so as to deprive him of counsel, and that the assistance of counsel would have enabled him to recognize and assert that he was not removable in the first instance because the offense of

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[3] Mr. Gor has been removed to India, but his case can nevertheless proceed, since there is relief available to him if this Court permits review. *See Pruidze v. Holder*, 632 F.3d 234, 237-38 (6th Cir. 2011).

which he was convicted did not qualify him for removal. The government does not (and cannot) contest the strength of these arguments, and the Sixth Circuit – after an extensive discussion, Pet.App.27a-28a – agreed that Mr. Gor was almost certainly right on the merits. This case therefore cleanly presents the question of whether judicial review should be available.

The government also cites two other pending petitions that raise similar issues. These cases highlight the importance of clarifying the impact of *Kucana* on *sua sponte* reopening decisions, but this case presents the superior vehicle. In *Neves v. Holder*, petition for cert. filed, No. 10-1030, the lower court has already held that the BIA did not abuse its discretion in refusing to equitably toll the deadline for petitioner's motion to reopen because the petitioner did not show he had exercised reasonable diligence in pursuing the motion. *Neves v. Holder*, 613 F.3d 30, 37 (1st Cir. 2010). Even if this Court were to now hold that the lower court also could review the BIA's denial of *sua sponte* reopening, it is likely that the holding on reasonable diligence would present a bar to relief in the *sua sponte* context as well. In *Ochoa v. Holder*, petition for cert. filed, No. 10-920, the government argues that it is unclear that the petitioner actually moved for *sua sponte* reopening or that the BIA decided the motion on that basis. Here, the lower court recognized the merit of Mr. Gor's motion for *sua sponte* reopening, but held it was unable to address the agency's denial. This

case thus squarely presents the critical jurisdictional issues that call for this Court's resolution.[4]

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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May 31, 2011

[4] If the Court were to grant in *Neves* or *Ochoa*, it should also grant Mr. Gor's case and consolidate for briefing and argument.