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No. 09-____

In the Supreme Court of the United States

LUIS ENRIQUE ARAMBULA-MEDINA,
Petitioner,
v.
ERIC H. HOLDER, JR.,
UNITED STATES ATTORNEY GENERAL,
Respondent.

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

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether the courts of appeals have jurisdiction to review "streamlining" decisions made by members of the Board of Immigration Appeals pursuant to 8 C.F.R. § 1003.1(e).

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PETITION FOR A WRIT OF CERTIORARI

Luis Enrique Arambula-Medina respectfully petitions this Court for a writ of certiorari to review the judgment of the United States Court of Appeals for the Tenth Circuit.

OPINIONS BELOW

The decision of the court of appeals is reported at 572 F.3d 824 (10th Cir. 2009) and reprinted as Appendix A, Pet. App. 1a–9a. The court of appeals dismissed for want of jurisdiction Mr. Arambula-Medina's petition to review the decision of the Board of Immigration Appeals ("BIA"), which challenged, *inter alia*, a single BIA member's decision to affirm, without opinion, the decision of the Immigration Judge. *See* Appendix B, Pet. App. 10a–11a. The Immigration Judge's denial of petitioner's cancellation-of-removal request, dated November 15, 2007, is reprinted as Appendix C, Pet. App. 12a–44a.

JURISDICTIONAL STATEMENT

The United States Court of Appeals for the Tenth Circuit entered its judgment and opinion on July 10, 2009. Justice Sotomayor granted petitioner's application to extend the time to file a petition for a writ of certiorari through and including December 7, 2009. Supreme Court Dkt. No. 09A315. This Court has jurisdiction over this matter pursuant to 28 U.S.C. § 1254(1).

RELEVANT STATUTORY AND REGULATORY PROVISIONS

Relevant portions of the Administrative Procedure Act, the Immigration and Naturalization Act,

and the Code of Federal Regulations are reproduced as Appendix D.

STATEMENT OF THE CASE

1. Petitioner Luis Arambula-Martinez is a 23-year-old native and citizen of Mexico. Pet. App. 12a–13a. He entered the United States in December 1991, at the age of six, and has lived in this country ever since. Pet. App. 13a. He remains extremely close with his younger, permanent resident siblings, Anthony (age 10) and Edwin (age 9). Pet. App. 16a–17a. Petitioner cannot read or write Spanish, and he failed the subject in high school. Pet. App. 18a. Petitioner also is extremely close to his mother, who relies on him to help care for her younger children. Pet. App. 16a, 24a.

In 2006, the Department of Homeland Security charged Mr. Arambula-Martinez with being subject to removal from the United States. Pet. App. 2a. Mr. Arambula-Medina admitted his removability but applied for cancellation of removal under 8 U.S.C. § 1229b(b), which authorizes the Attorney General to cancel removal of an alien in certain circumstances. Pet. App. 3a–4a; *see also* 8 U.S.C. § 1229b(b).

Mr. Arambula-Medina's application was reviewed by an Immigration Judge ("IJ"). Through a written decision issued November 15, 2007, the IJ rejected Mr. Arambula-Medina's cancellation request. Pet. App. 12a–44a. The IJ agreed that Mr. Arambula-Medina satisfied three of the statutory requirements for cancellation of removal: he has been present in the United States for a continuous period of not less than ten years, Pet. App. 28a, he has been a person of good moral character during that time,

Pet. App. 28a–31a, and he has never been convicted of a relevant criminal offense, Pet. App. 31a. With respect to the final cancellation factor, however, the IJ concluded that Mr. Arambula-Medina's "qualifying relatives would not suffer hardship 'substantially beyond that which would ordinarily be expected to result from the respondent's deportation.'" Pet. App. 32a–33a (quoting *In re Monreal*, 23 I&N Dec. 56, 56 (BIA 2001)); *see also* 8 U.S.C. § 1229b(b)(1)(D). As a result, the IJ denied Mr. Arambula-Medina's application for cancellation of removal. Pet. App. 42a. Mr. Arambula-Medina appealed the IJ's decision to the Board of Immigration Appeals ("BIA").

2. Prior to 1999, all such appeals were decided by panels of three BIA members. Under "streamlining" regulations promulgated in 1999 and 2002, however, most appeals are now resolved by less than a full BIA panel. Rather, all cases are first assigned to a single BIA member responsible for determining, under 8 C.F.R. § 1003.1(e)(6), whether the case must be referred to a full three-member panel. *See* 8 C.F.R. § 1003.1(e)(3) ("A single Board member assigned under the case management system shall determine the appeal on the merits . . . unless the Board member determines that the case is appropriate for review and decision by a three-member panel under the standards of paragraph (e)(6) of this section."); *see also* § 1003.1(e)(1) ("Unless a case meets the standards for assignment to a three-member panel . . . all cases shall be assigned to a single Board member for disposition."). Subsection (e)(6), in turn, sets forth a variety of circumstances that require full panel review, including but not limited to the need to settle inconsistencies among the rulings of different IJs, *see* § 1003.1(e)(6)(i); the need to review

an IJ decision that is not in conformity with applicable law or precedents, *see* § 1003.1(e)(6)(iii); the need to review an IJ's clearly erroneous factual determination, *see* § 1003.1(e)(6)(v); and, in most circumstances, the need to reverse an IJ's decision, *see* § 1003.1(e)(6)(vi).

In cases where the subsection (e)(6) factors are not met, the single BIA member must dispose of the appeal on his or her own. The regulations provide only two ways to do so. First, in limited circumstances, the BIA member must instead summarily affirm the IJ's decision. *See* § 1003.1(e)(4). Subsection (e)(4) requires affirmance without opinion whenever the IJ's decision was "correct" and the issues on appeal are "squarely controlled by existing precedent" or "not so substantial" to warrant a written opinion. *See id.* Second, in cases where affirmance without opinion is not required, the BIA member must instead issue a brief order resolving the appeal under Section 1003.1(e)(5). *See also* §§ 1003.1(e)(1), (e)(3). Under this framework, a single BIA member has almost no authority to reverse an IJ's decision. *See* §§ 1003.1(e)(4), (e)(5). Rather, he or she may only reverse when doing so is "plainly . . . required by intervening" law, such as a BIA decision, an act of Congress, or a regulation. *See* § 1003.1(e)(5).

Once a single BIA member affirms an IJ's decision to deny cancellation of removal, appellants cannot challenge the underlying merits of that discretionary decision. *See* 8 U.S.C. § 1252(a)(2)(B)(i) (stating that no court has jurisdiction to review any judgment regarding the granting of relief under Section 1229b); *Morales Ventura v. Ashcroft*, 348 F.3d 1259, 1261–1262 (10th Cir. 2003) (stating that can-

cellation-of-removal hardship determination is an unreviewable discretionary decision under Section 1252(a)(2)(B)(i)). As a practical matter, therefore, applicants such as Mr. Arambula-Medina cannot prevail on appeal unless the first survive the streamlining process and have their cases heard by a three-member BIA panel.

3. In petitioner's case, a single BIA member resolved his appeal by issuing an affirmance without opinion under subsection (e)(4), *see* Pet. App. 6a, even though petitioner had expressly requested full panel review under subsection (e)(6), *see* Pet. App. 9a. Mr. Arambula-Medina's appellate brief argued that full panel review was required under subsection (e)(6) because there was a complete absence of "squarely controll[ing]" precedent covering cancellation of removal for immigrants in petitioner's position, a child whose parents are reliant upon him. *See* Appellant's 10th Cir. Br. at 36–37. Petitioner's case is thus strikingly different from the only three precedents on cancellation of removal, as *In re Monreal*, 23 I&N Dec. 56 (BIA 2001), *In re Andazola*, 23 I&N Dec. 319 (BIA 2002), and *In re Recinas*, 23 I&N Dec. 467 (BIA 2002), each deal with petitioners who were the *parents* of permanent resident *children. See* Pet. App. 32a–35a.[1] Nevertheless, the single BIA member affirmed the IJ's findings without opinion, rather

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[1] At best, Mr. Arambula-Medina's situation resembles that of the children of the petitioner in *Recinas*—both of whom received lawful permanent resident status upon their mother's successful appeal seeking such status for herself. 23 I&N Dec. 467, 473 (BIA 2002).

than referring the case to a three-member panel. Pet. App. 6a.

4. Mr. Arambula-Medina petitioned to the United States Court of Appeals for the Tenth Circuit, as provided for by 8 U.S.C. § 1252(b). He argued, *inter alia*, that the BIA member violated Section 1003.1(e)(6) by refusing to refer his case to a three-member panel and Section 1003.1(e)(4) by affirming the case without opinion.

The Tenth Circuit, in a precedential opinion, rejected Mr. Arambula-Medina's petition. Pet. App. 1a–9a. With respect to the streamlining issue, the court simply stated that the process "of having a single member affirm, without opinion, the IJ's decision, is clearly authorized by regulation." Pet. App. 9a. In reaching this conclusory holding, the Court invoked the general proposition that "[a]n alien has no constitutional right to any administrative appeal at all," Pet. App. 9a, citing *Yuk v. Ashcroft*, 355 F.3d 1222, 1229 (10th Cir. 2004), in order to undermine petitioner's demand for a procedurally-proper review of his cancellation-of-removal request. As a result, the Tenth Circuit dismissed Petitioner's appeal for lack of jurisdiction under 8 U.S.C. § 1252(a)(2)(D). Pet. App. 9a.

REASONS FOR GRANTING THE PETITION

In every BIA appeal, streamlining regulations require a single member of the Board to first determine whether, according to a series of defined criteria, the appeal must be referred to a three-member panel for detailed review, affirmed without opinion, or resolved through a new opinion by the single BIA member. Although these regulations were originally

justified as necessary to help the BIA address a substantial backlog of appeals, and appeared to achieve that goal, this ostensible success has masked deep structural problems—rapid case handling has come at the expense of consistent, fair decisionmaking. As a result, it is unsurprising that immigration petitioners across the United States, along with courts and commentators, have questioned whether BIA members are, through their hasty and unfounded use of the streamlining process, violating the very regulations that created the regime.

In response to these challenges, the courts of appeals have fractured, adopting three different approaches. Several circuits have held categorically that the federal courts may review whether a BIA member's decision to affirm without opinion complied with the regulatory criteria, finding the question within the jurisdiction of the federal courts. By contrast, others have categorically rejected jurisdiction over any such claims, holding that streamlining decisions are committed to agency discretion by law. A third group has charted a middle course, finding jurisdiction to review compliance with the streamlining regulations exists *only* in cases where the court of appeals also has jurisdiction to review the merits of the streamlined decision. The decision below exacerbates the tripartite conflict on this precise issue, demonstrating the critical need for this Court's review.

The availability of judicial review of a BIA member's decision to affirm without opinion is of critical importance to participants in the immigration appeals process, many of whom have no other means to ensure that the BIA's focus on swift resolution does

not deny them fair and effective review of their administrative appeals. The question is equally important to the administration of the federal circuit courts, which are buried under the avalanche of appeals that followed the adoption of the streamlining regulations. Finally, the decision below is simply wrong on the merits, contradicting both statutory text and the Court's precedents concerning the scope of judicial review over agency decisionmaking. This court should grant the petition, issue a writ of certiorari to the Tenth Circuit, and reverse the decision below.

I. The Decision Below Deepens a Mature Circuit Split Regarding the Availability of Judicial Review Over a BIA Member's Decision to Affirm Without Opinion.

Whether the courts of appeals may review a BIA member's decision to affirm without opinion under 8 C.F.R. § 1003.1(e)(4) turns on whether such review is authorized by the Administrative Procedure Act ("APA"). The APA broadly provides for judicial review of agency action. *See* 5 U.S.C. §§ 702, 706. Indeed, this Court has read the APA as "embodying a 'basic presumption of judicial review.'" *Lincoln v. Vigil*, 508 U.S. 182, 190 (1993) (quoting *Abbott Labs. v. Gardner*, 387 U.S. 136, 140 (1967)). Nonetheless, the APA also includes a narrow exception forbidding review of decisions "committed to agency discretion by law." *See* 5 U.S.C. § 701(a)(2). As this Court explained, "'review is not to be had' in those rare circumstances where the relevant statute 'is drawn so that a court would have no meaningful standard against which to judge the agency's exercise of dis-

cretion.'" *See Lincoln*, 508 U.S. at 191 (quoting *Heckler v. Chaney*, 470 U.S. 821, 830 (1985)).

Applying these standards to a BIA member's decision to affirm without opinion under 8 C.F.R. § 1003.1(e)(4), the courts of appeals have divided over a simple question: is a determination under subsection (e)(4) on of those "rare" decisions "committed to agency discretion by law?" With the circuits having reached every possible answer to the question presented—"yes," "no," and "maybe"—the result is an indisputable split that only this Court can resolve.

A. Several Circuits Have Categorically Found Jurisdiction to Review BIA Decisions to Affirm Without Opinion.

In direct conflict with the decision below, several circuits have categorically exercised jurisdiction to review BIA decisions to affirm an appeal without opinion, without reference to whether the court also possessed jurisdiction over the substantive merits of the affirmed decision. In the view of these circuits, 8 C.F.R. § 1003.1(e)(4)'s factors are mandatory, not discretionary, and therefore are subject to ordinary judicial review under the APA.

1. *Smriko v. Ashcroft*, 387 F.3d 279 (3d Cir. 2004), provides the clearest and most comprehensive explanation why the federal courts have jurisdiction to review the BIA's application of the streamlining regulations. After first invoking the APA's requirement that agency determinations are reviewable unless "agency action is committed to agency discretion by law," the Third Circuit held that the APA provides jurisdiction to review the BIA's application of 8 C.F.R. § 1003.1(e)(4). *Smriko*, 387 F.3d at 291.

According to the *Smriko* panel, subsection (e)(4)'s criteria for when affirmance without opinion is appropriate "are clearly intended to require the single BIA member to determine whether the correct outcome was reached and, if so, whether a Board opinion would have significant value in the context of an appeal of the matter or in the context of other matters yet to be adjudicated." *Smriko*, 387 F.3d at 292. Unlike a typical discretionary agency decision, the streamlining criteria "have nothing to do with the BIA's caseload or other internal circumstances," but present "the kinds of issues [courts] routinely consider in reviewing cases." *Smriko* 387 F.3d at 292 (quoting *Batalova v. Ashcroft,* 355 F.3d 1246, 1253 (10th Cir. 2004)). As such, the criteria provide "sufficient law" for courts to apply, making streamlining decisions under (e)(4) appropriate for appellate review.

2. Through more limited holdings, the First and Ninth Circuits have each also adopted, at minimum, the core holding of the *Smriko* approach: that streamlining decisions are not "committed to agency discretion" under the APA.

In *Haoud v. Ashcroft*, 350 F.3d 201 (1st Cir. 2003), the First Circuit expressly rejected the government's argument that streamlining decisions were committed to the BIA's discretion under the APA, concluding that "the Board's own regulation provides more than enough 'law' by which a court could review the Board's decision to streamline." 350 F.3d at 206. Although later panels have questioned the scope of *Haoud*'s holding, the First Circuit recently confirmed the court's view that it has "jurisdiction to review the BIA's decision to streamline," at

least in certain cases, notwithstanding the APA. *See Hoxha v. Gonzales*, 446 F.3d 210, 220–221 (1st Cir. 2009).

Similarly, in *Chen v. Ashcroft*, 378 F.3d 1081, 1088 (9th Cir. 2004), the Ninth Circuit concluded that it has categorical jurisdiction to review application of at least *some* of subsection (e)(4)'s streamlining factors: whether "the issue on appeal is squarely controlled by existing Board or federal court precedent and does not involve the application of precedent to a novel fact situation" and whether the questions raised on appeal are sufficiently "insubstantial." As such, the Ninth Circuit has held that it categorically has jurisdiction to review certain elements of streamlining decisions.

3. This approach is also implicitly supported by holdings in the Fifth, Sixth, and Seventh Circuits. Although all three circuits claim to have left the question open, they have each nevertheless asserted jurisdiction to review decisions to affirm without opinion.

For example, in *Zhu v. Ashcroft*, 382 F.3d 521 (5th Cir. 2004), the Fifth Circuit recognized that it had found jurisdiction to review a BIA member's application of subsection (e)(4) in several persuasive yet non-precedential decisions, but had not yet had the occasion to decide the issue in a published case. *See* 382 F.3d at 525–527 (citing *Dika v. Ashcroft*, 85 Fed. Appx. 374 (5th Cir. 2004); *Turribiartes-Vitales v. Ashcroft*, 75 Fed. Appx. 312 (5th Cir. 2004); *Patel v. Ashcroft*, 71 Fed. Appx. 306 (5th Cir. 2003) (reviewing decision under predecessor to subsection (e)(4)). Nevertheless, regardless of whether such decisions are actually non-precedential, *see Anastasoff v.*

United States, 223 F.3d 898 (8th Cir. 2000), *vacated en banc as moot*, No. 99-3917, 2000 U.S. App. LEXIS 33247 (8th Cir. Dec. 18, 2000), the Fifth Circuit has nevertheless repeatedly exercised jurisdiction to review a BIA member's alleged non-compliance with subsection (e)(4)'s terms, without any suggestion that such jurisdiction was conditioned upon the court's ability to review any other aspect of the case.

The Sixth and Seventh Circuits have also exercised jurisdiction to review application of subsection (e)(4)'s regulatory predecessor, which had identical criteria. In *Denko v. INS*, rather than directly discussing the jurisdictional issue, the Sixth Circuit "assum[ed] without deciding" that such jurisdiction exists. *See Denko*, 351 F.3d 717, 731–732 (6th Cir. 2003); *see also Hassan v. Gonzales*, 403 F.3d at 437–438. Similarly, in *Georgis v. Ashcroft*, 328 F.3d 962, 967 (7th Cir. 2003), the Seventh Circuit declined to "explicitly decid[e]" whether the streamlining decisions were subject to judicial review but carried on as though jurisdiction were established. *Id.* Of course, a court of appeals may not "assume" jurisdiction exists in order to review the merits of a case. *See Sinochem Int'l Co. v. Malay. Int'l Shipping Corp.*, 549 U.S. 422, 431 (2007) (quoting *Ex parte McCardle*, 74 U.S. 506 (1869)). ("'Without jurisdiction the court cannot proceed at all in any cause;' it may not assume jurisdiction for the purpose of deciding the merits of the case."). The Sixth and Seventh Circuits' decisions therefore provide at least tacit support for the position that streamlining determinations are properly subject to judicial review.

B. The Second and Eighth Circuits Have Refused to Review Decisions Under Subsection (e)(4), Claiming That Such Decisions Are "Committed to Agency Discretion Under Law."

Just as some courts have found that they *always* have jurisdiction to review subsection (e)(4) determinations, some circuits have found that that they *never* have jurisdiction to do so. In the view of the Second and Eighth Circuits, the streamlining regulations vest the BIA with complete and unreviewable discretion regarding whether to affirm without an opinion, barring judicial review under 5 U.S.C. § 701(a)(2).

1. In *Kambolli v. Gonzales*, 449 F.3d 454 (2d Cir. 2006), the Second Circuit held that streamlining decisions are entirely committed to agency discretion. The court based this holding upon the fact that "a Board member acting pursuant to 8 C.F.R § 1003.1(e)(4) is prohibited from making any record whatsoever of his reasoning when deciding to act alone and affirm an IJ's decision without opinion." *Id.* at 461. As a result, "a reviewing court therefore has no knowledge—and can have no knowledge—of the decision-making process of the BIA member," which militates against judicial review. *Id.* at 462. The Second Circuit then asserted that courts lack the "expertise necessary to evaluate" whether a case is appropriate for affirmance without opinion. *Id.* at 464 It accordingly held that courts always lack jurisdiction to review application of the streamlining regulations. *Id.* at 465.

2. The Eighth Circuit has taken a similarly hard line against review, even where courts have jurisdic-

tion over at least some of the merits of a case. In *Ngure v. Ashcroft*, 367 F.3d 975, 983 (8th Cir. 2004), the Eighth Circuit held that the BIA's use of the affirmance-without-opinion procedure "in a particular case is committed to agency discretion and not subject to judicial review." As the court noted, the subsection (e)(4) procedure was established to help the BIA better allocate its scarce resources, an area "traditionally . . . free from judicial supervision." *Ngure*, 367 F.3d at 983. The Eighth Circuit, like the Second Circuit, also found judicial review thwarted by the prohibition against a BIA member making a record when using the affirmance-without-opinion procedure. The court thus concluded that, given the "basic principle of administrative law that where agency action is subject to judicial review, the agency must provide an adequate reasoned explanation of its decision," streamlining decisions cannot be reviewed on appeal. *Ngure*, 367 F.3d at 984.

Critically, *Ngure* predicated its holding on the claim that "it is not possible to devise a meaningful and adequate standard of review with respect to either" the third or fourth criteria of (e)(4). 367 F.3d at 985. This holding, made without caveat or exception, was expressly rejected by the Third Circuit in *Smriko*:

> [T]hese criteria [discussed in subsection e(4)] present "the kinds of issues [courts] routinely consider in reviewing cases," and provide amply sufficient "law" for courts to apply. The fact that they may require the exercise of some discretion on the part of the single BIA member that may be deserving of some deference is, of course, not relevant; the APA

> expressly authorizes review of the exercise of discretion for abuse.

Smriko, 387 F.3d at 292–293 (citations omitted). Thus, much like the Second Circuit in *Kambolli*, the Eighth Circuit has refused jurisdiction over a streamlining challenge even though it had jurisdiction to review the merits of the petitioner's withholding of removal claim.

C. The Tenth Circuit Has Rejected Jurisdiction to Review Certain Streamlining Decisions on the Grounds That the INA Includes a Statutory Bar Against Judicial Review.

Further complicating the debate, the Tenth Circuit has adopted a rule that conflicts with both of the absolute positions explored above: judicial review of streamlining decisions is allowed, but *only* in those cases in which appellate jurisdiction over some aspect of the underlying merits of the BIA decision is not restricted by statute.

This convoluted approach originated in *Tsegay v. Ashcroft*, 386 F.3d 1347 (10th Cir. 2004). In *Tsegay*, the court held that the question of whether to use affirmance-without-opinion procedures is committed to agency discretion by law and, therefore, not reviewable on appeal. 386 F.3d at 1356. But, in order to distinguish *Batalova*, 355 F.3d 1246—an earlier case in which the Tenth Circuit held that court *have* jurisdiction to review streamlining decisions—the *Tsegay* court concluded that jurisdiction over streamlining decisions remains available in cases in which the court has jurisdiction over some aspect of underlying merits of the appeal. 386 F.3d at 1347. As a result,

the Tenth Circuit has developed its own conditional approach to judicial review of streamlining decisions—in effect, that while streamlining decisions are not "committed to agency discretion by law" under 5 U.S.C § 701(a)(2), judicial review of streamlining decisions is barred by 5 U.S.C. § 701(a)(1) unless jurisdiction over the underlying appeal is present.

This middle-ground position contradicts aspects of both categorical rules. On one hand, it rejects the Second and Eighth Circuits' holding that streamlining decisions are committed to agency discretion, as the Tenth Circuit allows review of streamlining decisions in certain cases. On the other hand, by requiring a court to have jurisdiction over some other aspect of an appeal in order to review the BIA's application of subsection (e)(4), the Tenth Circuit's conditional approach erects a barrier to jurisdiction unrecognized by the First, Third, Fifth, Sixth, and Ninth Circuits.

D. The Circuit Split Regarding Review of Subsection (e)(4) Determinations Is Acknowledged and Indisputable.

Despite the tripartite conflict regarding the question presented, the circuits unquestionably agree that this circuit split is well recognized and firmly entrenched.

1. Nearly every major decision addressing the subject has acknowledged that the circuits are divided. *See, e.g.*, *Kambolli*, 449 F.3d at 459–460, 463 (noting split, following *Ngure* and *Tsegay*); *Smriko*, 387 F.3d at 294–295 (noting split, rejecting *Ngure*); *Ngure*, 367 F.3d at 988 (noting split); *Tsegay*, 386 F.3d at 1354. The split's existence is confirmed by

courts that have purported to avoid entering the debate. *See, e.g.*, *Hassan v. Gonzales*, 403 F.3d 429, 437 (6th Cir. 2005) (noting split); *Kacaj v. Gonzales*, 132 Fed. Appx. 584 (6th Cir. 2005) ("Several courts of appeals have arrived at different conclusions on [the streamlining] issue[.]").

Indeed, even the Executive Office for Immigration Review (EOIR), in a since-abandoned rulemaking, acknowledged the division among the circuits regarding appellate jurisdiction to review streamlining decisions. *See* Affirmance Without Opinion, Referral for Panel Review, and Publication of Decisions as Precedents, 73 Fed. Reg. 34,654, 34,657 (June 18, 2008) (discussing split). Though the EOIR cleared a final version of an amendment to 8 C.F.R. § 1003.1(e) that would have purported to restrict appellate review of streamlining decisions, the Department of Justice withdrew the proposed rule in December 2008. *See* American Immigration Law Foundation, Litigation Clearinghouse Newsletter (Jan. 9, 2009).[2] As a result, the circuit split remains live and controversial—the mere fact that the agency might *like* to shield such determinations from judicial review does nothing to obviate the split's existence or impact.

2. This conflict among the circuits cannot be recast as a limited dispute regarding whether to exercise streamlining jurisdiction *when* underlying jurisdiction is present—as the government has claimed elsewhere. *See, e.g.*, 73 Fed. Reg. 34,657 (2008). The Third Circuit's opinion in *Smriko* went to great

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[2] *Available at* http://www.aila.org/content/default.aspx?docid=27583.

lengths to explain that judicial review of streamlining decisions is in no way restricted by the APA—a holding that rejects the premise that the APA requires underlying jurisdiction before a streamlining decision may be reviewed. Likewise, the categorical bar recognized by the Second and Eighth Circuits holds streamlining committed to agency discretion by law under 5 U.S.C. § 701(a)(2), an analysis unaffected by whether the courts also have jurisdiction over other, unrelated issues. Only the Tenth Circuit has given any suggestion that underlying jurisdiction somehow affects the debate over streamlining jurisdiction.

Furthermore, any argument that the INA's removal of appellate jurisdiction over aspects of cancellation-of-removal proceedings impacts the streamlining debate simply cannot withstand scrutiny. Although the APA *could* bar review of streamlining decisions if any statute eliminated such jurisdiction, the INA provision that insulates some immigration decisions from judicial review, 8 U.S.C. § 1252(a)(2)(B), expressly preserves judicial review of questions of law arising out of such petitions—only purely discretionary decisions are insulated from review. Under the *Smriko* rule, streamlining decisions are questions of law that fit within this exception, ensuring that judicial review is available even where jurisdiction to review the underlying discretionary decision at issue is lacking. *See* Part IV, *infra*.

The government has an obvious interest in minimizing the scope of the circuit split, to cultivate the impression that streamlining decisions made in cancellation-of-removal proceedings remain unreviewable under any circuit's approach. But nothing

in the APA or INA supports any pretense that the circuits are not divided over the availability of judicial review over streamlining decisions even in cases such as petitioner's, where the court of appeals did not have jurisdiction to review the underlying merits of his BIA appeal. To focus on underlying jurisdiction is to take a side in the debate amongst the circuits, not to explain the disagreement away.

II. The Circuits Are Similarly Split Regarding Jurisdiction to Review BIA Refusals to Refer Appeals to Three-Member Panels Under Subsection (e)(6).

By reviewing this case, this Court would also provide critical guidance on a parallel split regarding whether the courts of appeals have jurisdiction to review BIA compliance with another subsection of the streamlining regulations, 8 C.F.R. § 1003.1(e)(6). To date, some courts hold that the courts of appeals have jurisdiction to review a single BIA member's refusal to send a case to a three-judge panel under subsection (e)(6), while others take the opposite view. This split is significantly related to—and in most cases intertwined with—the split that has emerged about the reviewability of decisions under subsection (e)(4).

1. As explained above, every decision by a BIA member to affirm without opinion under subsection (e)(4) necessarily includes within it a prior decision under subsection (e)(6) to not refer the case to a three-member panel. *See supra* pp. 3–4. Whether the single BIA member subsequently affirms without opinion under subsection (e)(4) or writes a short opinion under subsection (e)(5), therefore, makes lit-

tle difference—in both cases, the BIA member had to *first* decide to keep the case.

The close relationship between these two streamlining decisions—whether to refer to a full panel under subsection (e)(6) and whether to affirm without opinion under (e)(4)—has been recognized throughout the courts. For example, the Second Circuit in *Kambolli* explained that "[i]n nearly all cases of unilateral decisions without opinion [under subsection (e)(4)], the BIA member's review of the merits of the underlying IJ decision will merge with his choice to dispose of the case without reference to a three-member panel." *Kambolli*, 449 F.3d at 462 n.12. Given this overlap, it is not surprising that cases evaluating review of affirmances without opinion under subsection (e)(4) have relied upon subsection (e)(6) precedents, and vice versa. *See, e.g., Purveegiin v. Gonzales*, 448 F.3d 684 (3d Cir. 2006) (applying *Smriko* to non-affirmance-without-opinion case; explaining that both subsections (e)(4) and (e)(6) "impose affirmative limits on a single member's authority to resolve an appeal without panel participation").

Here, petitioner expressly argued below that his BIA appeal should be resolved by a three-member panel due to the absence of controlling precedent governing cancellation-of-removal petitions made by children of permanent resident parents, as opposed to parents of permanent resident children. Pet. App. 8a–9a. As a result, the instant case presents this Court with the means to resolve both circuit splits simultaneously

2. Like the split about the reviewability of decisions under subsection (e)(4), the split under subsec-

tion (e)(6) is indisputable. As is unsurprising given the close relationship between the two determinations, the splits parallel each other.

a. The Third and Fourth Circuits have expressly found jurisdiction to review decisions to decline to refer a case to a three-member panel.

In *Purveegiin*, the Third Circuit rejected the argument that whether to send a case to a full panel was committed to agency discretion. Reading subsections (e)(5) and (e)(6) in tandem, the court held that referral to a three-member panel was mandatory in all cases satisfying subsection (e)(6)'s requirements. 448 F.3d at 689–690. Much like in the affirmance-without-opinion cases, the *Purveegiin* court found jurisdiction over streamlining decisions without any reference to whether it also had jurisdiction over the merits of the case. Rather, it turned to the merits only *after* settling the jurisdictional question of streamlining. *See id.* at 692.

The Fourth Circuit reached the same conclusion in *Quinteros-Mendoza v. Holder*, 556 F.3d 159 (4th Cir. 2009). Although the *Quinteros-Mendoza* court recognized "the division in the circuits on this question," it agreed with the Third Circuit that it had jurisdiction over subsection (e)(6) decisions. 556 F.3d at 163. According to the court, "the six factors found in § 1003.1(e)(6) are not cast in such discretionary terms as to preclude meaningful review of them." *Id.* at 163. Like the Third Circuit in *Purveegiin*, the *Quinteros-Mendoza* court made no suggestion that its broad holding in favor of jurisdiction required the court to have jurisdiction over the underlying merits of the case.

b. In contrast, the Second and the Eighth Circuits have concluded that the courts of appeals lack jurisdiction to review a BIA member's refusal to refer a case to a three-member panel.

The Eighth Circuit's opinion in *Ngure* addressed both the three-member-panel question and the affirmance-without-opinion question in tandem. In the process, the *Ngure* court disagreed with nearly every conclusion later reached by the Third Circuit in *Purveegiin*, holding (1) that subsection (e)(6)'s factors governing full-panel review were not mandatory, see *Ngure*, 367 F.3d at 986–988; *but see Purveegiin*, 448 F.3d at 689–690); (2) that the streamlining regulations did not provide immigrant applicants with any "important procedural benefits," *see Ngure*, 367 F.3d. at 984–985; *but see Purveegiin* 448 F.3d at 690–692; and (3) that streamlining decisions were never intended to be susceptible to judicial review, *see Ngure*, 367 F.3d. at 984–985. The court later reiterated this holding in *Bropleh v. Gonzales*, 428 F.3d 772 (8th Cir. 2005), a non-affirmance-without-opinion case that only presented the question of whether "the Board of Immigration Appeals erred in its decision not to refer Bropleh's appeal to a three-member panel." *Id.* at 779.

The Second Circuit reached the same conclusion in *Kambolli*. There, the court concluded that "the language of subsection (e)(6) allowing reference to three-member BIA panels in certain circumstances does not provide a meaningful standard for judicial review." 449 F.3d at 461 & n.11. The Second Circuit concluded that that it lacked jurisdiction to review decisions by a single BIA member to affirm IJ decisions "without reference to a three-member BIA

panel—substantially for the reasons articulated by our sister circuits reaching the same result." *See id.* at 463 (citing *Ngure,* 367 F.3d at 983, and *Tsegay,* 386 F.3d at 1353–1358).

c. The Tenth Circuit has similarly applied the same logic to streamling challenges based on subsections (e)(4) and (e)(6). In *Batalova v. Ashcroft,* 355 F.3d 1246 (10th Cir. 2004), the court of appeals recognized that subsection (e)(6) determinations could indeed be challenged before courts of appeals. *See Batalova,* 355 F.3d at 1252–1253. This position was refined in *Tsegay v. Ashcroft,* 386 F.3d 1347, 1358 (10th Cir. 2004), where the court suggested that it lacks jurisdiction to review a streamlining decision when it also lacks jurisdiction to consider the underlying merits of the appeal. As a result, the Tenth Circuit applies the same conditional approach to both streamlining regulations.

Thus, the courts of appeals remain bitterly divided over the reviewability of two related issues regarding the interpretation of 8 C.F.R. § 1003.1(e)'s streamlining provisions—refusals to refer cases to three-member panels as required by subsection (e)(6) and decisions to affirm without opinion under subsection (e)(4). While the two questions are analytically distinct, they overlap in substantial respects. This petition presents the Court with an ideal vehicle through which it can review both, resolving the more general question of whether streamlining decisions may be reviewed on appeal.

III. Judicial Review of BIA Streamlining Determinations Presents Several Issues of National Importance That Require This Court's Review.

Whether federal courts may review BIA streamlining decisions is of critical importance, both to persons involved in immigration decisions and to the courts of appeals themselves. As a result, this Court's intervention is warranted to finally resolve this longstanding dispute.

1. First, judicial review of streamlining decisions provides a much-needed check upon the general administration of the immigration appeals system. When the streamlining process was first adopted in 1999, it was justified based on an "enormous and unprecedented increase in the caseload of the [BIA]." *See* Board of Immigration Appeals: Streamlining, 64 Fed. Reg. 56,135 (Oct. 18, 1999). The number of annual appeals from IJ decisions had outpaced the BIA's capacity to render decisions, creating a substantial backlog. *Id.* Allegedly, streamlining was to respond by furthering four goals: (1) promoting uniformity in IJ decisions, (2) deciding cases in a more "timely and fair manner," (3) assuring the correct dispositions of individual cases, and (4) eliminating the BIA's backlog. *Id.* at 56,136. Yet experience teaches that this final goal—faster case resolution—has trumped all other considerations, leading the BIA to err frequently and to fail to develop consistent jurisprudence.

Judicial review of streamlining decisions would help to safeguard against these persistent, widespread problems. Absent such review, improper streamlining determinations will continue to under-

mine the accuracy and quality of BIA decisionmaking, prejudicing the rights of applicants in the immigration process.

a. Independent audits contracted by the EOIR and the ABA demonstrate that streamlining has allowed the BIA to process appeals far more quickly than before. *See* Dorsey & Whitney LLP, *Board of Immigrant Appeals: Procedural Reforms to Improve Case Management* ("Dorsey Report"), at 18 (July 22, 2003) (unpublished study, submitted to the American Bar Association Commission on Immigration Policy, Practice and Pro Bono)[3] (discussing "immediate effect" of streamlining rules on BIA backlog); Arthur Andersen & Co., *Board of Immigration Appeals (BIA) Streamlining Pilot Assessment Report* ("Andersen Report"), at 5 (2001) (study conducted on behalf of EOIR)[4] (streamlining "directly contributed to a 53% increase in the overall number of BIA cases completed during its implementation period"). Yet the single-member review system achieves this goal by constraining the BIA's ability to afford relief in any given appeal. As single members can never reverse when an IJ simply erred in applying existing law, *see, e.g.*, *Purveegiin*, 448 F.3d at 692 ("permission to 'reverse' a decision of an immigration judge" is "[n]otably absent" from subsection (e)(5)), any appeal

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[3] *Available at* http://www.dorsey.com/files/upload/DorseyStudyAba_8mgPDF.pdf.

[4] *Available at* http://www.dorsey.com/files/upload/DorseyStudyABA_8mgPDF.pdf, as Appendix 21 to the Dorsey Report.

must survive the streamlining process before an applicant can hope to prevail.

This restriction has a hard-to-dispute practical consequence: hasty use of the streamlining regulations has caused the BIA to repeatedly deny objectively meritorious appeals. Although the streamlining regulations have helped the BIA review an ever-increasing amount of appeals—thousands per month—the amount of *reversals* it grants has stayed amazingly constant. *See* Dorsey Report at 40; *see also id.* ("Before the spring of 2002, approximately one in four appeals was granted; since then, approximately one in ten appeals is granted."). If streamlining had no substantive effect on the outcome of appeals, one would expect the ratio of affirmed-to-reversed appeals to remain at least *close* to the pre-streamlining figures—it cannot be that the BIA's backlog included only meritless appeals. Instead, the statisitical evidence establishes that streamlining is having a substantive effect.

So long as unchecked single-member review remains the regulatory norm, the BIA will continue to erroneously reject scores of meritorious appeals. Judicial review of streamlining decisions would provide critical recourse against this injustice, by ensuring that valid appeals do not fall through the cracks.

b. The BIA's structural problems are magnified by its refusal to ensure consistent decisionmaking by developing a comprehensive body of jurisprudence. Although the streamlining regulations are designed to require three-member panel review whenever necessary to establish precedent on an issue, *see* subsection (e)(6)(ii), and to forbid use of the affirmance-without-opinion procedure in cases not "squarely

controlled" by existing precedent, *see* subsection (e)(4)(i)(A), the BIA has instead repeatedly abdicated its responsibility to resolve cases through precedential opinions. Instead, by affirming without opinion in so many situations in conflict with the regulations, the BIA has stunted the growth of a body of precedent that can be easily applied to the breadth of immigration appeals.

The instant case provides a clear example of this problem. Petitioner, the child of permanent resident aliens, applied for cancellation of removal based on the extreme hardship removal would cause both him and his family. At present, only three precedential cases regarding cancellation of removal even exist: *Monreal*, *Andazola*, and *Recinas*. All three of these cases focus on the hardship to resident *children* of a non-resident *parent* facing removal—the exact opposite of the issue presented by Arambula-Medina's cancellation request. Yet rather than issue a precedential decision on this subject, either in this case or any other that has presented it over the past several years, the BIA has fostered confusion and inconsistency by instead issuing non-precedential affirmances without opinion. As a result, the BIA's failure to properly apply the streamlining regulation has ensured inconsistent decisionmaking by immigration judges across the country, directly undermining both the quality and reliability of the immigration review process.

Petitioner is of course sensitive to the administrative issues facing the BIA, and he recognizes that almost any case could be cast as involving some "new" issue rendering it unfit for summary disposition. But, given the BIA's systemic failure to develop

any meaningful precedent regarding the cancellation-of-removal process, the government cannot take shelter behind some objection that too many cases would require full-panel review if compliance with the streamlining regulations were judicially enforced—this is a problem of the government's own creation. Having promulgated binding regulations promising the development of a clear and comprehensive body of law, the government cannot protest that compliance with its own regulations would be unduly burdensome. Rather, judicial review of streamlining decisions would only ensure that the BIA provides the attention that the regulations already require.

c. Streamlining's substantive effects are particularly troubling in cases such as petitioner's, where the underlying substantive issues are not subject to judicial review. *See, e.g.*, 8 U.S.C. § 1252(a)(2)(B). In cases where the merits of a BIA's decision are later reviewed by a court of appeals, any streamlining errors may be rendered harmless—the court will be free to address any substantive errors in the case regardless of what procedure the BIA followed. *See, e.g.*, *Batalova*, 355 F.3d at 1253 (noting that "it ma[de] little difference . . . whether the BIA acted through a single member or a three-member panel" where court could "directly review the IJ's decision, which the BIA member adopted"); *Falcon Carriche v. Ashcroft*, 350 F.3d 845, 851 (9th Cir. 2003 ("The IJ's decision becomes the final agency action when a case is streamlined. Thus, the streamlining procedures do not compromise our ability to review the INS's decision, to the extent we have jurisdiction to do so, because we can review the IJ's decision directly." (citations omitted)). But when such substantive review is

unavailable, the BIA's procedural compliance with the streamlining regulations is an applicant's only reassurance that his or her appeal has received fair consideration.

In such cases, whether the courts of appeals can review the correctness of BIA streamlining decisions is of critical importance. When a single BIA member errs when applying 8 C.F.R. § 1003.1(e)'s standards, otherwise-meritorious appeals fail to reach the only BIA panels capable of reversing IJ decisions. The promise of BIA review is thus rendered toothless, as victims of erroneous IJ decisions will never reach a body capable of affording them the relief they deserve. Dorsey Report at 7 (streamlining regulations make substantive mistakes "more likely to happen and more difficult to detect"). As such, even if the streamlining regulations can be justified in theory, practice under them consistently threatens the due process rights of immigration petitioners. Judicial review would hold the BIA accountable, helping to put an end to these absuses.

2. Furthermore, the advent of streamlining has served to overwhelm the federal courts of appeals. In part due to confusion regarding the appropriate scope of judicial review of immigration decisions, petitions to review BIA decisions have become a skyrocketing part of the federal appellate docket. Resolution of the question presented, regardless of this Court's answer, would have the valuable effect of reducing this strain.

The statistics in this area speak for themselves: "The increased quantity of BIA decisions, and the dissatisfaction of aliens and their counsel with unexpected affirmances, have created a surge of appeals

from the BIA to the federal courts of appeals." Dorsey Report at 40. In 1999, appeals from INS decisions constituted less than 2,000 of the over-54,000 appeals commenced throughout the federal courts of appeals. Administrative Office of the U.S. Courts, *Judicial Business of the United States Courts – 1999 Annual Report of the Director*, Table B-3 at 96 (1999).[5] Yet by 2003, after the adoption of the more stringent streamlining regulations now in effect, "BIA decisions were being appealed to the federal circuit courts at a rate of over 800–900 per month." Dorsey Report at 40. Last year, over 10,000 BIA decisions were challenged in the courts of appeals, with BIA appeals constituting over one-sixth of the *total* workload of the appellate courts. Administrative Office of the U.S. Courts, *Judicial Business of the United States Courts – 2008 Annual Report of the Director*, Table B-3 at 96 (2008).[6] This steady increase reflects both applicants' concerns regarding the substance of BIA decisions and the widespread uncertainty regarding the limits of judicial review.

3. Finally, there is little hope that the question presented will be resolved absent this Court's intervention. The conflict among the circuits on this point is entrenched, with the circuits aware of their conflicting views yet remaining divided. *See* Part I.D, *supra* (collecting cases). Nor is it likely that the executive branch will resolve the dispute. As noted

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[5] *Available at* http://www.uscourts.gov/judbus1999/b03sep99.pdf.

[6] *Available at* http://www.uscourts.gov/judbus2008/appendices/B03Sep08.pdf.

above, in June 2008 the EOIR initiated a rulemaking specifically targeting the question of judicial review of streamlining decisions—through a proposed rule purporting to expressly establish the BIA's intent that such determinations be unreviewable—but such efforts were abandoned. *See* 73 Fed. Reg. 34,654 (June 18, 2008); American Immigration Law Foundation, Litigation Clearinghouse Newsletter (Jan. 9, 2009). Moreover, even if such a new rule were adopted in the future, it would not eliminate the disagreement among the circuits: several have held that determinations under the current streamlining factors are reviewable regardless of the BIA's intent, *see, e.g.*, *Purveegiin*, 448 F.3d at 690, while others have preemptively held that the EOIR does not possess the statutory authority to adopt any unreviewable streamlining regime, *see, e.g.*, *Quinteros-Mendoza v. Holder*, 556 F.3d 159, 162 (4th Cir. 2009). As a result, even if the agency were to adopt new regulations purporting to make streamlining decisions unreviewable, the circuit split would remain unresolved.

Only this Court can put an end to the longstanding division regarding judicial review of BIA streamlining determinations. Given that the streamlining system has been shrouded in uncertainty since its adoption, the Court should finally take the opportunity to provide much-needed clarity.

IV. Under the APA and This Court's Jurisprudence, Streamlining Decisions Are Subject to Judicial Review.

By refusing to exercise jurisdiction to review a BIA member's decision to affirm a case without opinion, the Tenth Circuit contradicted this Court's in-

structions regarding the scope of judicial review under the APA.

Any question of judicial review of streamlining decisions must begin with this Court's "strong presumption that Congress intends judicial review of administrative action." *See Bowen v. Michigan Acad. of Family Physicians*, 476 U.S. 667, 670 (1986). The APA codifies that presumption at 5 U.S.C. § 701(a), which provides that Congress can only preclude judicial review of final agency action by adopting an express jurisdiction-stripping provision, *see* 5 U.S.C. § 701(a)(1), or by committing agency action "to agency discretion by law," *see id.* at § 701(a)(2). *See also Quinteros-Mendoza*, 556 F.3d at 162. Neither of these limitations serves to bar judicial review of streamlining decisions. As a result, when properly construed, 8 C.F.R. § 1003.1(e) creates judicially enforceable standards that constrain the decisionmaking of BIA members.

1. First, no statute purports to eliminate judicial review of streamlining decisions. *See Smriko,* 387 F.3d at 290–291. Though the Secretary of Homeland Security is broadly empowered to adopt regulations governing the administration of immigration laws, *see* 8 U.S.C. § 1103(a)(3), nothing in this grant of authority suggests that the administration of those regulations is inherently unreviewable. Rather, this Court has regularly distinguished between review over an agency's power to *promulgate* regulations, which is strictly limited, and review of an agency's *adherence* to such regulations, which is broadly available. *Compare Vermont Yankee Nuclear Power Corp. v. NRDC*, 435 U.S. 519, 523–525 (1978), *with Morton v. Ruiz,* 415 U.S. 199, 235–236 (1974), *and*

Am. Farm Lines v. Black Ball Freight Serv., 397 U.S. 532, 538–539 (1970); *see also* 33 Charles H. Koch, Jr., *Federal Practice & Procedure* § 8392 at 384–385 n.3 (2006). Furthermore, though certain immigration-related decisions are made unreviewable by the Immigration and Naturalization Act ("INA"), *see e.g.*, 8 U.S.C. § 1252(a)(2)(B), the act expressly preserved judicial review of questions of law arising out of cancellation-of-removal proceedings such as Mr. Arambula-Medina's, *see* 8 U.S.C. § 1252(a)(2)(D). Thus, the statute preserves appellate jurisdiction of legal questions such as compliance with the streamlining regulations, and the EOIR lacks any authority to promulgate regulations purporting to restrict this statutorily granted jurisdiction.

The Tenth Circuit's claim that the lack of underlying merits jurisdiction in cancellation-of-removal cases can serve to preclude judicial review of streamlining decisions must, therefore, fail. Any statutory bar to judicial review of immigration matters preserves jurisdiction over non-discretionary legal decisions made as part of those matters, inviting the question of whether the streamlining factors are discretionary or mandatory. As a result, any claim that the INA bars review turns only upon whether such decisions are "committed to agency discretion by law" under 5 U.S.C. § 701(a)(2)—the crux of the conflict between the circuits.

2. As this Court has stressed, the "committed to discretion" exception is very narrow, applicable only "in those rare circumstances where the relevant statute 'is drawn so that a court would have no meaningful standard against which to judge the agency's exercise of discretion.'" *Lincoln*, 508 U.S. at

191 (quoting *Heckler*, 470 U.S. at 830). But here, no *statute* purports to commit streamlining decisions to agency discretion by law, or to establish standards unsusceptible to judicial review. *See, e.g.*, *Quinteros-Mendoza*, 556 F.3d at 162. Rather, decisions rejecting judicial review have relied on the tautological conclusion that the streamlining regulation itself, 8 C.F.R. § 1003.1(e), provides the BIA with the claimed "unreviewable" discretion. *See Ngure*, 367 F.3d at 985; *see also Quinteros-Mendoza*, 556 F.3d at 162–163 (rejecting argument).

Such a claim does not withstand scrutiny. Subsection (e)(4) provides that a BIA member "shall" issue an affirmance without opinion upon a finding that:

> the result reached in the decision under review was correct; that any errors in the decision under review were harmless or nonmaterial; and that
>
> (A) The issues on appeal are squarely controlled by existing Board or federal precedent and do not involve the application of precedent to a novel factual situation; or
>
> (B) The factual and legal issues raised on appeal are not so substantial that the case warrants the issuance of a written opinion in the case.

8 C.F.R. § 1003.1(e)(4). As a result, the regulation creates a mandatory rule, not a permissive standard—affirmance without opinion *cannot* be used unless subsection (e)(4)'s factors are present.

Nor are subsection (e)(4)'s factors so malleable as to offer "no meaningful standard against which to judge the agency's exercise of discretion"—*Heckler's* high standard for withholding judicial review. Rather, Section 1003.1(e) "provides more than enough 'law' by which a court could review" a BIA member's streamlining decision. *See Haoud*, 350 F.3d at 206; *cf. C.C. Distributors, Inc. v. United States*, 883 F.2d 146, 154 (D.C. Cir. 1989) ("Notwithstanding the lack of judicially manageable standards in the underlying statute, regulations promulgated by an administrative agency in carrying out its statutory mandate can provide standards for judicial review of agency action."). Indeed, many of subsection (e)(4)'s factors are determinations regularly made by courts of appeals in countless other contexts, such as judging a decision's accuracy," or reviewing whether the issues on appeal are squarely controlled by precedent. *Smriko*, 387 F.3d at 292–294. As a result, there is no reason that courts of appeals could not engage in meaningful review of streamlining decisions. *Id.*

Although the question is closer, detailed review of the streamlining regulations establishes that subsection (e)(6)'s factors are also mandatory. Subsection (e)(6) does state that a BIA member "may only" refer an appeal to a three-member panel upon a finding that one of the six factors is present, suggesting that referrals to full panels could be discretionary. *See Purveegiin*, 448 F.3d at 689. Reading subsections (e)(5) and (e)(6) together, however, it becomes clearer that the regulations *require* review by a three-member panel whenever a referral factors is present: "By directing that a single member 'shall' resolve a case 'unless' it falls within the categories of

paragraph (e)(6), [subsection (e)(5)] necessarily implies that a single member 'shall not' resolve a case if it does fall within one of those categories." *Purveegiin* 448 F.3d at 689. In any event, any concern that referral to a full panel under subsection (e)(6) is discretionary does not alter the fact that application of subsection (e)(4) is not.

Finally, review of streamlining decisions in denial-of-cancellation cases, such as Mr. Arambula-Medina's, would not constitute an end-run around the statutory unreviewability of the BIA member's underlying cancellation decision, as the Tenth Circuit incorrectly maintained. None of the subsection (e)(4) factors share common ground with the underlying merits of a hardship determination. In addition, allowing courts to review and remand cases that were improperly streamlined does not disturb the BIA's final and unreviewable authority over the substance of a hardship determination. Judicial enforcement of the streamlining regulations would simply ensure that individual immigration petitioners receive the full process promised to them by law, while also providing future applicants clearer direction regarding the potential merits of their claims.

Thus, under this Court's precedents and the controlling statutory provisions, the federal courts of appeals retain appellate jurisdiction to review BIA streamlining decisions. The Tenth Circuit's contrary decision is in error and should be reversed.

CONCLUSION

For the reasons set forth above, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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