No. 16-790

In the Supreme Court of the United States

KAP SUN BUTKA, PETITIONER

v.

JEFFERSON B. SESSIONS III, ATTORNEY GENERAL

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

BRIEF FOR THE RESPONDENT IN OPPOSITION

JEFFREY B. WALL
Acting Solicitor General
Counsel of Record
CHAD A. READLER
Acting Assistant Attorney General
DONALD E. KEENER
JOHN W. BLAKELEY
ROBERT N. MARKLE
Attorneys
Department of Justice
Washington, D.C. 20530-0001
SupremeCtBriefs@usdoj.gov
(202) 514-2217

QUESTION PRESENTED

Whether the court of appeals erred in holding that the Board of Immigration Appeals' decision not to exercise its discretionary authority to reopen petitioner's immigration proceedings *sua sponte* is unreviewable.

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OPINIONS BELOW

The decision of the court of appeals (Pet. App. 1a-18a) is published at 827 F.3d 1278. The decisions of the Board of Immigration Appeals (Board) (Pet. App. 19a-20a) and the immigration judge (IJ) (Pet. App. 33a-35a) are unreported. A prior relevant decision of the court of appeals (Pet. App. 21a-27a) is not published in the *Federal Reporter* but is reprinted at 427 Fed. Appx. 819. Prior relevant decisions of the Board (Pet. App. 28a-32a) and IJ (Pet. App. 33a-35a) are unreported.

JURISDICTION

The judgment of the court of appeals was entered on July 5, 2016. A petition for rehearing was denied on September 20, 2016 (Pet. App. 39a). The petition for a writ of certiorari was filed on December 16, 2016.

The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. a. The Immigration and Nationality Act (INA), 8 U.S.C. 1101 *et seq.*, provides that the Attorney General may, in his discretion, adjust the status of an alien inspected and admitted to the United States to that of a lawful permanent resident. See 8 U.S.C. 1255. Several prerequisites must be met, including that the alien be "admissible to the United States for permanent residence." 8 U.S.C. 1255(a)(2). Even if all of the statutory prerequisites are met, adjustment is not automatic. "The grant of an application for adjustment of status under [8 U.S.C. 1255] is a matter of administrative grace," and the alien "has the burden of showing that discretion should be exercised in his favor." *In re Patel*, 17 I. & N. Dec. 597, 601 (B.I.A. 1980). Whether an alien warrants a favorable exercise of discretion is a case-specific determination that depends on whether he has demonstrated that any adverse factors in his application are "offset * * * by a showing of unusual or even outstanding equities." *In re Arai*, 13 I. & N. Dec. 494, 495-496 (B.I.A. 1970).

Certain classes of aliens are inadmissible for permanent residence and thus are ineligible for adjustment of status under Section 1255. As relevant here, an alien convicted of a violation of any foreign or domestic law relating to a controlled substance is inadmissible. See 8 U.S.C. 1182(a)(2)(A)(i)(II). The Attorney General has the discretion to waive that ground of inadmissibility if the alien's controlled-substance offense relates to a single offense of simple possession of 30 grams or less of marijuana and other conditions are met. See 8 U.S.C. 1182(h).

b. Under the INA, an alien may 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); see also *Dada* v. *Mukasey*, 554 U.S. 1, 15 (2008). Such a motion is to be filed with the immigration judge (IJ) or the Board of Immigration Appeals (Board), depending on which was the last to render a decision in the matter. 8 C.F.R. 1003.2(d), 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). An alien is entitled under the INA 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. 8 U.S.C. 1229a(c)(7)(A) and (C)(i); 8 C.F.R. 1003.2(c)(2), 1003.23(b)(1).

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). The IJs and the Board have broad discretion in adjudicating motions to reopen, and they may "deny a motion to reopen even if the party moving has made out a *prima facie* case for relief." 8 C.F.R. 1003.2(a) (Board); see 8 C.F.R. 1003.23(b)(3) (IJ); see also *INS* v. *Doherty*, 502 U.S. 314, 323 (1992).

If the alien fails to timely file a motion to reopen, she may suggest to the IJ or the Board that her case should be reopened *sua sponte*. The IJ or the Board may exercise discretion to reopen an alien's case *sua*

sponte at any time. 8 C.F.R. 1003.2(a), 1003.23(b)(1). 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).

2. Petitioner is a native and citizen of South Korea. Pet. App. 2a. She entered the United States in 1981 as a nonimmigrant visitor authorized to stay for six months. *Ibid.*; Administrative Record (A.R.) 508. She overstayed her visa and has remained in the United States ever since. Pet. App. 2a.

In 2007, the Department of Homeland Security (DHS) charged petitioner with being removable as an alien convicted of a controlled substance offense. Pet. App. 2a; see 8 U.S.C. 1182(a)(2)(A)(i)(II). The charging document cited a 1977 South Korean conviction for possession of 105 grams of marijuana. Pet. App. 2a; A.R. 508-510.

Petitioner admitted the allegations in the notice to appear, including the drug conviction, and conceded removability. Pet. App. 2a; see A.R. 495. To avoid removal, petitioner sought discretionary adjustment of status to that of a lawful permanent resident. Pet. App. 2a; see 8 U.S.C. 1255(a). Petitioner's drug conviction made her inadmissible to the United States and therefore ineligible for adjustment of status. See 8 U.S.C. 1182(a)(2)(A)(i)(II). Petitioner therefore sought a waiver of inadmissibility. Pet. App. 2a-3a; see 8 U.S.C. 1182(h).

DHS then charged petitioner with being removable on a second ground, which is that she overstayed her

visa without authorization. Pet. App. 3a; A.R. 506; see 8 U.S.C. 1227(a)(1)(B). Petitioner requested additional time within which to respond to the new charge, and the IJ set a deadline for her to file a written response, which was to include any defenses to the charge and any requests for relief. Pet. App. 3a. Petitioner did not file a response by the deadline. *Ibid.*

After considering the record, which included petitioner's prior requests for adjustment of status and waiver of inadmissibility, the IJ concluded that petitioner was removable and ineligible for adjustment of status. Pet. App. 33a-35a; see *id.* at 3a. The IJ found, by clear and convincing evidence, that petitioner was removable as charged. *Id.* at 34a. The IJ reviewed the documents of petitioner's prior drug conviction (translated from Korean) and concluded that the conviction made her ineligible for adjustment of status because it was a conviction under a "law or regulation of a State, the United States, or a foreign country relating to a controlled substance." *Ibid.* (quoting 8 U.S.C. 1182(a)(2)(A)(i)(I)); see A.R. 492-494 (translated conviction documents). The IJ also determined that petitioner could not obtain a waiver of that ground of inadmissibility because the "conviction record shows a conviction for an amount in excess of 30 grams of marijuana." Pet. App. 34a; see 8 U.S.C. 1182(h) (waiver of inadmissibility available only for personal-use possession offense involving 30 grams or less of marijuana).

3. The Board dismissed petitioner's appeal. Pet. App. 28a-32a. The Board first reviewed the conviction documents for petitioner's 1977 drug offense. *Id.* at 29a. The Board then held that the IJ correctly found petitioner ineligible for adjustment of status, because

her drug conviction made her "*prima facie* inadmissible" under 8 U.S.C. 1182(a)(2)(A)(i)(II) and she was not eligible for a waiver of inadmissibility under 8 U.S.C. 1182(h) due to her failure to demonstrate that her drug offense was "a single offense of simple possession of 30 grams or less of marihuana." Pet. App. 30a. The Board also rejected petitioner's argument that the IJ deprived her of the opportunity to seek voluntary departure and therefore violated due process. *Id.* at 31a-32a.

4. The court of appeals denied petitioner's petition for review in a decision dated May 26, 2011. Pet. App. 21a-27a (per curiam). The court first rejected petitioner's argument that the government should be equitably estopped from removing her because it allowed her to enter the United States on a temporary basis in 1981. *Id.* at 24a-25a. The court then rejected petitioner's due-process claim, explaining that the IJ "gave [petitioner] sufficient opportunity to apply for voluntary departure." *Id.* at 26a. The court also concluded that "the IJ did not have to hold a hearing on [petitioner's] application for adjustment of status" because "the documentary evidence clearly established that she was not eligible for that form of relief" and petitioner herself "admitted that she had a prior conviction for possession of 105 grams of marijuana." *Id.* at 27a.

5. On March 2, 2015, petitioner filed a motion to reopen her immigration proceedings with the Board. Pet. App. 5a-6a. Recognizing that her motion to reopen was not filed within the 90-day statutory deadline, petitioner requested that the Board reopen her case *sua sponte*. A.R. 11. Petitioner argued that the Board should reopen her case because her 1977 South

Korea drug offense actually was comprised of two offenses—one for possession of 100 grams of marijuana, and another for distribution of 5 grams of marijuana—and neither offense made her inadmissible. Pet. App. 6a; A.R. 8-12. In particular, she contended that the first offense did not categorically qualify as a "controlled substance" offense under the version of Korean law in effect at the time, and the second offense was a ground of inadmissibility that could be waived because it involved "the social sharing of" less than 30 grams of "marijuana on a single occasion." Pet. App. 7a.

The Board denied petitioner's request for *sua sponte* reopening. Pet. App. 19a-20a. The Board noted its previous conclusion that petitioner is ineligible for adjustment of status based on her drug conviction, and it was not persuaded that any of petitioner's various arguments could lead to a different result. *Id.* at 19a. The Board further stated that there was "no exceptional situation to justify reopening sua sponte." *Id.* at 20a.

6. The court of appeals dismissed petitioner's petition for review. Pet. App. 1a-18a. The court explained that the Board has "broad discretion over motions for *sua sponte* reopening" and that it exercises that authority "only in exceptional circumstances." *Id.* at 11a. The court further explained that it had held in *Lenis* v. *United States Attorney General*, 525 F.3d 1291 (11th Cir. 2008), that the Board's denial of a request for *sua sponte* reopening is not judicially reviewable because it is "committed to agency discretion by law" and that there is no "meaningful standard against which to judge the agency's exercise of discretion." Pet. App. 12a (citation omitted). That is true,

the *Lenis* court explained, even if the challenge to a denial of *sua sponte* reopening involves a legal claim. *Id.* at 17a.

The court of appeals rejected petitioner's argument that *Mata* v. *Lynch*, 135 S. Ct. 2150 (2015), requires courts of appeals to review requests for *sua sponte* reopening that include legal claims. Pet. App. 14a. The court explained that *Mata* addressed statutory motions to reopen—which must be filed within the 90-day time limit, subject to the possibility of equitable tolling—not requests for *sua sponte* reopening, and that the Court assumed that the latter are not judicially reviewable. *Id.* at 14a-17a.

ARGUMENT

Petitioner contends (Pet. 8-16) that the court of appeals erred in concluding that the Board's decision not to reopen petitioner's immigration proceedings *sua sponte* is not judicially reviewable. The court of appeals' decision is correct, and this case would be a poor vehicle for addressing disagreement in the circuits on the question presented. This Court has denied certiorari on the question presented in several cases,[1] and it should do the same here.

1. The court of appeals correctly concluded that the Board's decision not to reopen petitioner's immigration proceedings *sua sponte* is not judicially reviewable. In her original removal proceedings, petitioner conceded that she was removable and, in particular, conceded that she had a 1977 conviction in South Korea for possession of 105 grams of marijuana.

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[1] See, *e.g.*, *Gor* v. *Holder*, 564 U.S. 1037 (2011) (No. 10-940); *Ochoa* v. *Holder*, 564 U.S. 1037 (2011) (No. 10-920); *De Silva Neves* v. *Holder*, 564 U.S. 1030 (2011) (No. 10-1030).

Pet. App. 5a, 22a. She sought judicial review of her removal order but did not raise any issue about the prior conviction. *Id.* at 21a-27a. Although petitioner had a statutory right to file a motion to reopen her case within 90 days of when her removal order became final, she did not do so. Instead, she waited almost five years and then requested *sua sponte* reopening, arguing that the Board had misunderstood the facts of her prior conviction (even though she had conceded those facts). *Id.* at 5a-6a; see A.R. 10, 16-21. *Sua sponte* reopening is entrusted to the Board's broad discretion, 8 C.F.R. 1003.2(a), and the Board declined to take the extraordinary step of reopening petitioner's case more than four years after her removal order became final. Pet. App. 19a-20a. The court of appeals then held that the Board's discretionary decision is not judicially reviewable. *Id.* at 11a-18a.

a. The court of appeals correctly recognized that the Board's decision not to exercise its authority to reopen proceedings *sua sponte* is not judicially reviewable. Under the Administrative Procedure Act, 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). That is especially true with respect to *sua sponte* reopening, which by its very nature is committed to the Board's own judgment and is not based on any rights of the alien. The Board exercises that 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 decision. Pet. App.

12a-13a; see, *e.g.*, *Tamenut* v. *Mukasey*, 521 F.3d 1000, 1003 (8th Cir. 2008) (per curiam) (en banc).

As the court of appeals explained, "no 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 1293 (11th Cir. 2008). The regulation does not require the Board to reopen a removal proceeding under any particular circumstances. Rather, it simply provides the Board with discretion to reopen proceedings if and when it elects to do so.

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); *Lenis*, 525 F.3d at 1294 (the regulation permitting *sua sponte* reopening "merely provides the [Board] the discretion to reopen immigration proceedings as it sees fit") (citation omitted).

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 decision that she has not shown to the satisfaction of the Board the presence of an exceptional situation warranting that extraordinary relief. See 5 U.S.C. 701(a)(1) (no review when 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 decisions 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 petitions for review of the denials of motions to reopen with the petition for review of the final order of removal (see 8 U.S.C. 1252(b)(6)). Those changes were adopted for the purpose of expediting the process of both 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 not 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. 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.[2]

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[2] Indeed, 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 even have *jurisdiction* when it authorized judicial review of final removal orders in 8 U.S.C. 1252. The INA provides an alien with the right to file one motion to reopen, subject to specified time and other limits; 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

c. That conclusion is strongly supported by the history of the Board's reopening authority. Congress enacted the INA in 1952, see Pub. L. No. 82-414, § 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." 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, §§ 6.1(b) and (d), 6.2 (Dec. 19, 1952). 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, § 3.2 (Nov. 26, 1958); 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 be-

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proceedings") (emphasis added); 8 U.S.C. 1252(b)(6) (judicial review of "*motion* to reopen or reconsider" shall be consolidated with petition for review of an underlying removal order) (emphasis added). But 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. That is especially so because to authorize judicial review of decisions not to reopen a case *sua sponte* would extend immigration proceedings substantially, contrary to the 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" (internal quotation marks omitted)).

came concerned that aliens illegally present in the United States were filing motions to reopen to prolong their stay, 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, Congress said nothing about the Board's *sua sponte* reopening authority. 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 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 decision 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 is precluded by the INA. See 5 U.S.C. 701(a)(1) and (2), 702.

d. Petitioner contends (Pet. 11-13) that, although the "discretionary aspects" of a Board decision denying a request to reopen a case *sua sponte* are unre-

viewable, a "legal question" related to that decision is reviewable. In petitioner's view (Pet. 12), whether an alien has made out a "*prima facie* case" for relief "necessarily relates to a legal question." Petitioner is mistaken. The very nature of *sua sponte* reopening makes it unreviewable, and that does not change based on the reasons the alien presents in her request. 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 chosen not to do so in a particular case. Although the Board often does give reasons for such a decision for the benefit of the parties, the Board's decision to do so does not then make its decision subject to judicial review. If the courts were to hold that the reviewability of the Board's determination not to reopen a case *sua sponte* turned on the reasons the Board gave, it would create a substantial disincentive for the Board to explain its action for the benefit of the parties. And petitioner's view that all *sua sponte* reopening requests contain a legal question about whether an alien has made out a *prima facie* case, if accepted, would lead to routine judicial review of *sua sponte* reopening decisions.

e. Petitioner does not address these considerations demonstrating that the Board's decision not to reopen *sua sponte* is not subject to judicial review. Nor does she respond to the court of appeals' explanation of how *sua sponte* reopening is committed to agency discretion by law. And the arguments petitioner does make are mistaken.

First, petitioner argues (Pet. 9-10) that, because 8 U.S.C. 1252(a)(2)(B) does not apply to motions for *sua sponte* reopening, they "remain subject to judicial review." That argument misses the point. The court of

appeals' decision does not rest on Section 1252(a)(2)(B) (which bars *jurisdiction* to review decisions made discretionary by *statute*), but on the inherently discretionary nature of *sua sponte* reopening. See Pet. App. 11a-14a.

Petitioner next relies (Pet. 10, 12) on *Kucana* v. *Holder*, 558 U.S. 233 (2010), but that decision does not aid her. *Kucana* did not address judicial review of a denial of *sua sponte* reopening. 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 this subchapter to be in the discretion of the Attorney General," applies to actions the discretionary authority for which is specified in regulations, rather than the relevant statutory subchapter. 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 8 U.S.C. 1229a(c)(7). 558 U.S. at 245-249.

The reviewability of the Board's decision not to reopen petitioner's case *sua sponte* did not depend on Section 1252(a)(2)(B)(ii), the statutory provision at issue in *Kucana*. Instead, the Board's decision not to reopen a case *sua sponte* is unreviewable because it is committed to agency discretion by law, and because the regulations allowing *sua sponte* reopening create no personal right in the alien. That issue was not addressed in *Kucana*. Pet. App. 11a-18a. Indeed, the *Kucana* Court specifically stated that it "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." 558 U.S. at 251 n.18 (emphasis omitted).

Petitioner next argues (Pet. 10-11) that the Board's decision not to reopen a case *sua sponte* is reviewable under 8 U.S.C. 1252(a)(2)(D) because it raises a question of law. Section 1252(a)(2)(D) provides:

> Nothing in subparagraph (B) or (C) [of 8 U.S.C. 1252(a)], or in any other provision of this chapter (other than this section) which limits or eliminates judicial review, shall be construed as precluding review of constitutional claims or questions of law raised upon a petition for review filed with an appropriate court of appeals in accordance with this section.

Ibid. As the court of appeals correctly explained (Pet. App. 17a n.7), Section 1252(a)(2)(D) is inapplicable here. By its plain text, that section provides a rule of construction for certain provisions of the INA that "limit[] or eliminate[] judicial review." 8 U.S.C. 1252(a)(2)(D). Denials of *sua sponte* reopening requests are not made unreviewable because of a provision in Section 1252(a) or elsewhere in Chapter 12 of Subchapter II of Title 8. Instead, they are unreviewable as committed to agency discretion by law and because the regulations allowing the Board to reopen or reconsider a case on its *own* motion create no privately enforceable right. See pp. 9-14, *supra*. Because Section 1252(a)(2)(D) is inapplicable by its terms, it lends no support to petitioner's argument that the Board's decision not to exercise its *sua sponte* reopening discretion is judicially reviewable.

Petitioner also relies (Pet. 10-11) on *Mata* v. *Lynch*, 135 S. Ct. 2150 (2015). But as the court of appeals explained (Pet. App. 14a-15a), that decision was about a different issue (equitable tolling of the 90-day period for filing a statutory motion to reopen), not *sua sponte* reopening. See *Mata*, 135 S. Ct. at 2153. The *Mata* Court did not hold that courts may review denials of requests for *sua sponte* reopening. Indeed, it assumed that courts may *not* review such decisions. Pet. App. 15a (quoting *Mata*, 135 S. Ct. at 2155).

2. As this Court noted in *Kucana*, 558 U.S. at 251 n.18, every circuit that considers immigration issues has recognized that *sua sponte* reopening generally is entrusted to the Board's broad discretion. That has remained true after *Kucana*.[3] Petitioner contends, however, that the circuits disagree on whether courts may review legal and constitutional issues raised by the alien in challenging a denial of *sua sponte* reopening. Pet. 12-14. Petitioner does not purport to raise any constitutional claim, and this case would be a poor vehicle in which to address the question presented.

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[3] See, *e.g.*, *Desai* v. *Attorney Gen. of U.S.*, 695 F.3d 267, 269 (3d Cir. 2012); *Anaya-Aguilar* v. *Holder*, 683 F.3d 369, 372 (7th Cir. 2012), cert. denied, 133 S. Ct. 1467 (2013); *Luna* v. *Holder*, 637 F.3d 85, 96 (2d Cir. 2011); *Mejia-Hernandez* v. *Holder*, 633 F.3d 818, 823-824 (9th Cir. 2011); *De Silva Neves* v. *Holder*, 613 F.3d 30, 35 (1st Cir. 2010) (per curiam), cert. denied, 564 U.S. 1030 (2011); *Lopez-Dubon* v. *Holder*, 609 F.3d 642, 647 (5th Cir. 2010), cert. denied, 563 U.S. 960 (2011); *Gor*, 607 F.3d at 187-188; *Ochoa* v. *Holder*, 604 F.3d 546, 549 n.3 (8th Cir. 2010), cert. denied, 564 U.S. 1037 (2011); *Bakanovas* v. *Holder*, 438 Fed. Appx. 717, 722 (10th Cir. 2011) (unpublished); *Jaimes-Aguirre* v. *United States Att'y Gen.*, 369 Fed. Appx. 101, 103 (11th Cir. 2010) (per curiam) (unpublished).

a. The Second, Third, and Ninth Circuits have held that they may review denials of *sua sponte* reopening when the denial was based on an asserted legal error, where review is for the limited purpose of correcting the legal error and remanding to the agency for further consideration. See *Bonilla* v. *Lynch*, 840 F.3d 575, 583, 588 (9th Cir. 2016); *Pllumi* v. *Attorney Gen. of the U.S.*, 642 F.3d 155, 159 (3d Cir. 2011); *Mahmood* v. *Holder*, 570 F.3d 466, 469 (2d Cir. 2009). The Sixth Circuit, like the court of appeals below, has held that a denial of *sua sponte* reopening is not reviewable even if the alien raises an issue of law. See *Rais* v. *Holder*, 768 F.3d 453, 463-464 (2014).

Petitioner also cites decisions of the Seventh and Tenth Circuits (Pet. 13-14), but those decisions do not clearly hold that such review is appropriate. *Vahora* v. *Holder*, 626 F.3d 907 (7th Cir. 2010), did not concern *sua sponte* reopening; the question there was whether a request for administrative closure (akin to a request for a continuance) is a decision committed to agency discretion by law. *Id.* at 915-916. The only time the court mentioned *sua sponte* reopening, it said that such decisions are *not* judicially reviewable. *Id.* at 916-917 & n.9. *Cevilla* v. *Gonzales*, 446 F.3d 658 (7th Cir. 2006), appears to address statutory motions to reopen, not *sua sponte* reopening, *id.* at 660, and the Seventh Circuit later made clear in *Anaya-Aguilar* v. *Holder*, 683 F.3d 369 (2012), cert. denied, 133 S. Ct. 1467 (2013), that denials of sua sponte reopening are not judicially reviewable. *Id.* at 372. In *Shah* v. *Holder*, 736 F.3d 1125 (2013), the Seventh Circuit suggested in *dicta* that it could correct a legal error in a denial of *sua sponte* reopening, but there

was no such claim of legal error in that case. *Id.* at 1126.

Salgado-Toribio v. *Holder*, 713 F.3d 1267 (10th Cir. 2013), addressed whether the court of appeals should deny an alien *in forma pauperis* status because all of his arguments were frivolous. *Id.* at 1270-1271. The court said yes, and although the court stated in passing that it could review constitutional claims and questions of law, it did not include any further analysis on that issue. *Id.* at 1271. The other Tenth Circuit decisions petitioner cites (Pet. 14) are not published and do not create binding circuit precedent.

The disagreement in the circuits does not warrant this Court's review here. Every circuit has recognized that the exercise of the Board's *sua sponte* reopening authority is generally committed to agency discretion by law, although some have held that a court may review denials of *sua sponte* reopening with respect to legal issues. A number of other circuits, however, have not addressed that question, and the Court may benefit from further percolation of the issue.

b. In any event, this case would be a poor vehicle for resolving disagreement in the courts of appeals about whether courts may review the Board's discussion of a legal issue in denying *sua sponte* reopening.

As an initial matter, this case does not implicate the disagreement in the circuits because petitioner's petition for review does not directly present an issue of law. Petitioner sought *sua sponte* reopening on the ground that the IJ and Board misunderstood the facts of her prior drug conviction. Pet. App. 6a-7a; A.R. 16-21. Although petitioner had previously conceded that her conviction was for possession of 105 grams of marijuana (based on translated conviction documents

that were before the IJ), she now claims that she was convicted of two separate offenses and that the first was for possession of 100 grams of marijuana and the second was for distribution of 5 grams of marijuana. Pet. App. 6a. To support this contention, she provided new translations of the conviction documents and asked the Board to find that there were in fact the two offenses she claims instead of one offense. A.R. 46-49. This is a factual claim based on South Korean conviction documents, not an issue of law. Further, in its decision denying *sua sponte* reopening, the Board did not misstate any legal proposition. Instead, it stated simply that under the particular circumstances of petitioner's case, it was "not persuaded that [petitioner's] various arguments" could change the prior result and that there "is no exceptional situation to justify reopening sua sponte." Pet. App. 19a-20a. Accordingly, even if this Court were inclined to address the question presented in an appropriate case, this is not an appropriate case because petitioner does not raise a question of law.

Moreover, resolution of the question presented would not matter to the ultimate result in this case. The burden is on petitioner to demonstrate that she is eligible for adjustment of status. *Thawatchai Foythong* v. *Holder*, 743 F.3d 1051, 1053 (6th Cir. 2014) (quoting 8 U.S.C. 1229a(c)(4)(A)(i)); see 8 C.F.R. 1240.8(d). Even if she met that burden, the Board would not be required to reopen her case; it is up to the Board whether to exercise its discretion to take the extraordinary step of reopening a case more than four years after it became final. Petitioner had previously conceded the facts of her prior convictions, A.R. 495, and it is well-established that such concessions are binding

as judicial admissions. *In re Velasquez*, 19 I. & N. Dec. 377, 382 (B.I.A. 1986); see 8 C.F.R. 1240.10. Petitioner simply ignores this concession. But the concession makes petitioner ineligible for adjustment of status. Pet. App. 2a; see 8 U.S.C. 1182(a)(2)(A)(i)(II). And the concession was based on documentary evidence—a copy of the Korean court's judgment of conviction, translated from Korean to English. A.R. 492-494. The Board was well within its authority to decline to reopen petitioner's case *sua sponte* when she previously conceded that she is ineligible for the ultimate relief she seeks.

Further, even if the Board ignored petitioner's prior admission and assumed that petitioner's new explanation of her prior conviction were accurate, petitioner still would be ineligible to adjust her status. That is because, according to petitioner (Pet. 6-7; Pet. App. 7a; A.R. 19), she has a conviction for *distributing* 5 grams of marijuana, which is a drug offense that makes her inadmissible to the United States (and therefore ineligible to adjust status) under 8 U.S.C. 1182(a)(2)(A)(i)(II). That ground of inadmissibility may not be waived because it is not an offense of "simple possession of 30 grams or less of marijuana," 8 U.S.C. 1182(h)—it is a distribution offense.[4] Thus, even if petitioner has two offenses as she claims, and her first offense (the 100-gram offense) did not bar

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[4] The fact that federal law treats distribution of a small amount of marijuana for no remuneration as a possession offense for federal criminal sentencing purposes, see 21 U.S.C. 841(b)(4), does not aid petitioner, because that provision does not transform a distribution offense into a possession offense for purposes of the relevant immigration law, 8 U.S.C. 1182(a)(2).

adjustment of status, her second offense (the distribution offense) would.

Finally, the Board already has decided that petitioner's case does not raise an "exceptional situation to justify reopening *sua sponte*." Pet. App. 20a. *Sua sponte* reopening is an "extraordinary remedy reserved for truly exceptional situations." *In re G-D-*, 22 I. & N. Dec. 1132, 1133-1134 (B.I.A. 1999). The Board ultimately has the discretion not to reopen a case *sua sponte* even if the alien makes out a claim for relief from removal. Here, the Board has already decided that it will not exercise its discretion to reopen this case, five years after it became final. For that reason as well, further review is unwarranted.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

JEFFREY B. WALL
Acting Solicitor General
CHAD A. READLER
Acting Assistant Attorney General
DONALD E. KEENER
JOHN W. BLAKELEY
ROBERT N. MARKLE
Attorneys

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