No. 07-

IN THE

Supreme Court of the United States

JULIO CESAR VALENZUELA GRULLON,
Petitioner,

v.

MICHAEL B. MUKASEY, ATTORNEY GENERAL, MICHAEL J. GARCIA, EDWARD J. MCELROY, BUREAU OF IMMIGRATION AND CUSTOMS ENFORCEMENT,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Second Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

1. Whether compliance with the exhaustion requirement of 8 U.S.C. § 1252(d)(1) of the Immigration and Naturalization Act ("INA") requires a person subject to an order of removal to file an appeal to the Board of Immigration Appeals (the "Board") in order to raise an argument that the Board already squarely rejected *en banc*.

LIST OF PARTIES AND AFFILIATES

The parties to the proceeding are set forth in the caption to this Petition.

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PETITION FOR A WRIT OF CERTIORARI

Petitioner Julio Cesar Valenzuela Grullon ("Valenzuela") respectfully requests that this Court grant the petition for a writ of certiorari to review the decision and judgment of the United States Court of Appeals for the Second Circuit.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Second Circuit is reported at 509 F.3d 107 (2d Cir. 2007) and is reproduced in the Appendix to this Petition ("Pet. App.") 1a-17a. The transfer Order of the U.S. District Court, Southern District of New York appears at Pet. App. 18a. The order of the Immigration Judge appears at Pet. App. 19a-21a.

JURISDICTION

The United States Court of Appeals for the Second Circuit entered judgment on November 27, 2007, amended on January 7, 2008. Pet. App. 1a. On February 13, 2008, this Court granted an application for an extension of time within which to file a petition for certiorari to and including March 26, 2008. On March 18, 2008, this Court granted an application for a second extension of time within which to file a petition for certiorari to and including April 15, 2008. This Court has jurisdiction under 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

8 U.S.C. § 1252(d)(1) provides in pertinent part:

> Judicial review of orders of removal .... (d) Review of final orders. A court may review a final order of removal only if – (1) the alien has exhausted all administrative remedies available to the alien as of right ...."

Section 8 C.F.R. § 1003.1(a)(5) provides in relevant part:

> En banc process. A majority of the permanent Board members shall constitute a quorum for purposes of convening the Board en banc. The Board may on its own motion by a majority vote of the permanent Board members, or by direction of the Chairman, consider any case en banc, or reconsider as the Board en banc any case that has been considered or decided by a three-member panel. En banc proceedings are not favored, and shall ordinarily be ordered only where necessary to address an issue of particular importance or to secure or maintain consistency of the Board's decisions.

Section 8 C.F.R. § 1003.1(e) provides in relevant part:

> Case management system. The Chairman shall establish a case management system to screen all cases and to manage the Board's caseload. Unless a case meets the standards for assignment to a three-member panel under paragraph (e)(6) of this section, all cases shall be assigned to a single Board member for disposition. The Chairman, under the supervision of the Director, shall be responsible for the success of the case management system. The Chairman shall designate, from time to time, a screening panel comprising a sufficient number of Board members who are authorized, acting alone, to adjudicate appeals as provided in this paragraph.
>
> (1) Initial screening. All cases shall be referred to the screening panel for review. Appeals subject to summary dismissal as provided in

paragraph (d)(2) of this section should be promptly dismissed.

....

(3) Merits review .... A single Board member assigned under the case management system shall determine the appeal on the merits as provided in paragraph (e)(4) or (e)(5) of this section, 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. The Board member may summarily dismiss an appeal after completion of the record of proceeding.

(4) Affirmance without opinion.

(i) The Board member to whom a case is assigned shall affirm the decision of the Service or the immigration judge, without opinion, if the Board member determines 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 court 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.

(ii) If the Board member determines that the decision should be affirmed without opinion, the Board shall issue an order that reads as follows: "The Board affirms, without opinion, the result of the decision below. The decision below is,

therefore, the final agency determination. See 8 CFR 1003.1(e)(4)." An order affirming without opinion, issued under authority of this provision, shall not include further explanation or reasoning. Such an order approves the result reached in the decision below; it does not necessarily imply approval of all of the reasoning of that decision, but does signify the Board's conclusion that any errors in the decision of the immigration judge or the Service were harmless or nonmaterial.

(5) Other decisions on the merits by single Board member. If the Board member to whom an appeal is assigned determines, upon consideration of the merits, that the decision is not appropriate for affirmance without opinion, the Board member shall issue a brief order affirming, modifying, or remanding the decision under review, unless the Board member designates the case for decision by a three-member panel under paragraph (e)(6) of this section under the standards of the case management plan. A single Board member may reverse the decision under review if such reversal is plainly consistent with and required by intervening Board or judicial precedent, by an intervening Act of Congress, or by an intervening final regulation. A motion to reconsider or to reopen a decision that was rendered by a single Board member may be adjudicated by that Board member unless the case is reassigned to a three-member panel as provided under the standards of the case management plan.

(6) Panel decisions. Cases may only be assigned for review by a three-member panel if the case presents one of these circumstances:

(i) The need to settle inconsistencies among the rulings of different immigration judges;

(ii) The need to establish a precedent construing the meaning of laws, regulations, or procedures;

(iii) The need to review a decision by an immigration judge or the Service that is not in conformity with the law or with applicable precedents;

(iv) The need to resolve a case or controversy of major national import;

(v) The need to review a clearly erroneous factual determination by an immigration judge; or

(vi) The need to reverse the decision of an immigration judge or the Service, other than a reversal under § 1003.1(e)(5).

....

STATEMENT OF THE CASE

This case presents a square conflict among the courts of appeals as to the construction of 8 U.S.C. § 1252(d)(1) which sets the requirements for exhausting administrative remedies before a person subject to an order of removal may obtain judicial review. In his appeal to the Second Circuit, petitioner sought to challenge the construction of federal law by the Board of Immigration Appeals in an en banc ruling of the Board in another case. That construction of law was applied by an Immigration Judge ("IJ") to petitioner in ordering petitioner's removal. Petitioner's sole claim in federal court was that the Board had misconstrued federal law; that the reasoning of the four Board dissenters, rather than the 11 majority panelists, is correct; and therefore that he should not have been ordered

removed. Before seeking federal court review, petitioner did not take the fruitless step of appealing to the Board, whose regulations required summary affirmance of the IJ's decision without consideration even by a panel of the Board of the basis of its previous en banc decision.

In a ruling that expressly "rejected" a prior decision of the Ninth Circuit, *see Sun v. Ashcroft*, 370 F.3d 932 (9th Cir. 2004), and that conflicts with a Fifth Circuit decision as well, *see Arce-Vences v. Mukasey*, 512 F.3d 167 (5th Cir. 2007), the Second Circuit held that it is barred even from considering petitioner's argument that the Board has misconstrued federal law. Specifically, the court held that petitioner's failure to appeal the order of removal to the Board amounts to a failure to exhaust "all administrative remedies available to the alien *as of right*." 8 U.S.C. § 1252(d)(1) (emphasis added), even though the Board's own streamlining regulations would have constrained the Board to reject petitioner's appeal.

Critically, the Department of Justice ("DOJ") has promulgated "streamlining" regulations that remove any right an alien would otherwise have to Board reconsideration of a prior en banc holding. In response to a deluge of appeals, the DOJ adopted rules that send each newly filed appeal to a single Board member for screening. A single member is forbidden to refer an appeal to a three-member panel or the Board en banc if the decision below correctly applied controlling Board precedent and the appellant does not point to any intervening regulation, Board or judicial precedent, or act of Congress. Had petitioner filed an appeal with the Board, the Board's streamlining rules would have required the Board to summarily affirm the decision below.

In short, the Board's own rules state plainly that the petitioner has no right to have even a panel (let alone the Board en banc) reconsider a prior deeply divided en banc decision. To the contrary, the DOJ's regulations ensure that access to such reconsideration is at best discretionary. The Second Circuit has nonetheless held that an alien must first file an appeal that the Board will not hear in order to obtain review of an order of removal in federal court. To characterize the burdensome, expensive and fruitless appeal as a "remedy available as of right" robs these words of any sensible meaning.

The Second Circuit's construction of Section 1252(d)(1) conflicts with that of the Ninth Circuit. Drawing a practical distinction between remedies that are merely "available" and those that are available "as of right," the Ninth Circuit has held that a person subject to an order of removal has a remedy "as of right" only when the Board's review is not wholly constrained by prior adverse decisions. In the Ninth Circuit's view, where the Board has previously ruled on a question of law and thus would be required to apply that precedent to a subsequent litigant without any reconsideration, a person's appeal to the Board is not available "as of right." Similarly, the Fifth Circuit has concluded that appeal to the Board is not available "as of right" under Section 1252(d)(1) when the Board's decision would be wholly constrained by prior adverse judicial precedent.

The question presented is both important and recurring. Section 1252(d)(1) is an important federal statute and should receive a uniform interpretation. Aliens seeking review of orders of removal in the Second Circuit must pursue a pointless and burdensome appeal, while those in the Ninth and

Fifth Circuits need not do so. Those unaware or confused by the Second Circuit's departure from the exhaustion rule in other circuits will lose their ability to obtain federal court review of their removal orders. Some 40 thousand appeals on average are filed with the Board annually, and nearly all of these are disposed of after review by a single Board member. Whether participation in this truncated process is a prerequisite for an alien who wishes to challenge one of the Board's binding precedents thus affects innumerable individuals. Many of these individuals have limited means to finance unnecessary Board appeals, yet must do so or lose their opportunity to challenge an order of removal in federal court.

The stakes are high, as well, for our system of justice and for the integrity of the scheme of review devised by Congress. A federal court that lacks subject matter jurisdiction cannot provide relief to a litigant even to avoid "manifest injustice." Pet. App. 16a-17a; *see Bowles v. Russell*, 127 S. Ct. 2360, 2366 (2007). There is no safety-valve to address injustice where subject-matter jurisdiction is lacking. It is therefore exceptionally important that this Court ensure that the lower courts correctly apply the jurisdictional lines drawn by Congress and do not turn away cases that Congress has empowered them to hear.

I. STATUTORY BACKGROUND

A. The Board Of Immigration Appeals

The Board is the highest administrative body for interpreting and applying immigration laws, subject to the general supervision of the Executive Office for Immigration Review ("EOIR") within the DOJ. 8 C.F.R. § 1003.1(a)(1). The Board's 15 members who are attorneys appointed by the Attorney General to

act as the Attorney General's delegates in the cases that come before them. *Id.*

The Board has jurisdiction over administrative appeals filed from decisions rendered by Immigration Judges ("IJs") and certain Department of Homeland Security ("DHS") officials.[1] *Id.* § 1003.1(b). The Board's decisions are final, *id.* § 1003.1(d)(7),[2] and are "binding on all officers and employees of the Department of Homeland Security or immigration judges." *Id.* § 1003.1(g). By majority vote, the Board may designate selected decisions of the Board "to serve as precedents in all proceedings involving the same issue or issues." *Id.*

B. The Streamlining Regulations

Before 1999, panels comprised of three Board members reviewed all appeals, even those presenting no colorable basis for appeal. *See Board of Immigration Appeals: Procedural Reforms To Improve Case*

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[1] On March 1, 2003, the functions of the Immigration and Naturalization Service ("INS") were transferred to the Department of Homeland Security ("DHS"), with immigration enforcement functions placed within the United States Immigration and Customs Enforcement ("ICE") and immigration service functions placed within the United States Citizen and Immigration Services ("USCIS").

[2] Except in those cases reviewed by the Attorney General in accordance with paragraph (h). 8 C.F.R. § 1003.1(d)(7). Section 1003.1(h)(1) provides that:

> The Board shall refer to the Attorney General for review of its decision all cases that: (i) The Attorney General directs the Board to refer to him. (ii) The Chairman or a majority of the Board believes should be referred to the Attorney General for review. (iii) The Secretary of Homeland Security, or specific officials of the Department of Homeland Security designated by the Secretary with the concurrence of the Attorney General, refers to the Attorney General for review.

Management, 67 Fed. Reg. 54,878, 54,879 (Aug. 26, 2002). The volume of appeals proved too great for the panels to handle. The number of appeals to the Board grew from fewer than 3,000 in 1984 to more than 28,000 in 1998. *See Executive Office for Immigration Review; Board of Immigration Appeals: Streamlining,* 64 Fed. Reg. 56,135, 53,136 (Oct. 18, 1999). By September 2001, the number of pending appeals had grown to nearly 58,000. 67 Fed. Reg. at 54,878.

In response to a growing backlog of appeals, the DOJ promulgated the "streamlining" regulations, to "enable the Board to render decisions in a more timely manner, while concentrating its resources primarily on cases where there is a reasonable possibility that the result below was incorrect, or where a new and significant issue is presented." 64 Fed. Reg. at 56,136. Under the 1999 rules, the Chairman of the Board "may" designate certain categories of cases as suitable for review by a single Board member. The single Board member, in turn, "may affirm" an Immigration Judge's ("IJ's") decision without opinion if certain conditions are met. 8 C.F.R. § 3.1(a)(7) (1999).

In 2002, the DOJ expanded the single member process, initially assigning all cases to a single member and providing that the single Board member "shall affirm" an IJ's decision if certain conditions are met, and may refer a case to a three-member panel "only" under certain circumstances. 8 C.F.R. § 1003.1(e)(4)(i) & (6). The DOJ intended "the single-member process to be the dominant method of adjudication for the large majority of cases before the Board." 67 Fed. Reg. at 54,879. In 2003 and 2004, more than ninety percent of appeals to the Board were decided by a single member. *See* Office of

Planning & Analysis, U.S. Dep't of Justice, *EOIR Review FY2004: Statistical Yearbook* U1 (2005), *available at* http://www.usdoj.gov/eoir/statspub/fy04syb.pdf; Office of Planning & Analysis, U.S. Dep't of Justice, *EOIR Review FY2003: Statistical Yearbook* U1 (2004), *available at* http://www.usdoj.gov/eoir/statspub/fy03syb.pdf. By January 2006, the backlog had been reduced by nearly fifty percent to 28,000. *See* EOIR, *Fact Sheet: BIA Restructuring and Streamlining Procedures* (rev. ed. Mar. 9, 2006), *available at* http://www.usdoj.gov/eoir/press/06/BIAStreamliningFactSheet030906.htm.

The scope of any single Board member's review is constrained by rules set forth in paragraphs (e)(4), (e)(5) and (e)(6). Paragraph (e)(4) sets forth the conditions under which a Board member "shall affirm" a decision of an IJ without opinion. 8 C.F.R. § 1003.1(e)(4)(i). Summary affirmance is required

> if the Board member determines 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 court precedent and do not involve the application of precedent to a novel factual situation; or (B) The factual and legal questions raised on appeal are not so substantial that the case warrants the issuance of a written opinion in the case.

Id. If the Board member affirms without opinion, "the Board shall issue an order that reads as follows: 'The Board affirms, without opinion, the result of the decision below. The decision below is, therefore, the final agency determination. *See* 8 C.F.R. 1003.1(e)(4).'" *Id.* § 1003.1(e)(4)(ii). Such order "shall not include further explanation or reasoning," and

only "approves the result reached in the decision below [and] does not necessarily imply approval of all of the reasoning of that decision." *Id.*

Paragraph (e)(5) permits the Board member to render other types of decisions on the merits under other specified circumstances. If the Board member determines "that the decision is not appropriate for affirmance without opinion, the Board member shall issue a brief order affirming, modifying, or remanding the decision under review, unless the Board member designates the case for decision by a three-member panel under paragraph (e)(6)." *Id.* § 1003.1(e)(5). The Board member may reverse the decision below only "if such reversal is plainly consistent with and required by intervening Board or judicial precedent, by an intervening Act of Congress, or by an intervening final regulation." *Id.*; *see also* 67 Fed. Reg. at 54,887 (stating that "it is reasonable to expect that most reversals would likely have been handled by a three-member panel rather than by single Board members," and indicating purpose of the (e)(5) reversal provision is to permit single Board member to summarily vacate IJ's order in "cases where reversals may be required as a nondiscretionary matter").

Paragraph (e)(6) limits the Board member's ability to refer an appeal to a three-member panel.

> Cases may only be assigned for review by a three-member panel if the case presents one of these circumstances:
>
> (i) The need to settle inconsistencies among the rulings of different immigration judges;
>
> (ii) The need to establish a precedent construing the meaning of laws, regulations, or procedures;

> (iii) The need to review a decision by an immigration judge or the Service[3] that is not in conformity with the law or with applicable precedents;
>
> (iv) The need to resolve a case or controversy of major national import;
>
> (v) The need to review a clearly erroneous factual determination by an immigration judge; or
>
> (vi) The need to reverse the decision of an immigration judge or the Service, other than a reversal under § 1003.1(e)(5).

8 C.F.R. § 1003.1(e)(6).

A single Board member may not refer an appeal to the Board en banc. Only the Board "on its own motion by a majority vote of the permanent Board members," or the Chairman may initiate en banc proceedings. *Id.* § 1003.1(a)(5). Such proceedings "are not favored, and shall ordinarily be ordered only where necessary to address an issue of particular importance or to secure or maintain consistency of the Board's decisions." *Id.*

An appeal to the Board is an optional part of the administrative process. "[T]he decision of [an] Immigration Judge becomes final ... upon expiration of the time to appeal if no appeal is taken." 8 C.F.R. § 1003.39. A final decision can then become the basis for judicial review. "Judicial review of a final order of removal ... is governed ... by chapter 158 of title 28" of the United States Code. 8 U.S.C. § 1252(a)(1). A

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[3] The term "Service" means the Immigration and Naturalization Service ("INS"), as it existed prior to March 1, 2003. Unless otherwise specified, references to the Service after that date mean the USCIS, the United States Customs and Border Protection, and ICE. *See* 8 C.F.R. § 1.1(c).

court may review such an order, however, "only if – (1) the alien has exhausted all administrative remedies available to the alien as of right." *Id.* § 1252(d)(1).

II. FACTUAL AND PROCEDURAL HISTORY

Mr. Valenzuela Grullon ("Valenzuela") entered the United States as a lawful permanent resident with his sister on December 5, 1994. Though Valenzuela became eligible to apply for United States citizenship status after five years of lawful residency, he did not file an application for naturalization. He remained an alien under the law, and thus vulnerable to deportation from the United States for conviction for the commission of an offense.

A. Valenzuela's Arrest and Conviction

On November 29, 2001, Valenzuela was arrested and, on February 6, 2002, he pleaded guilty to and was convicted of a single offense – criminal possession of a controlled substance in the second degree. At the time of his plea bargain, Valenzuela was unaware of the immigration consequences that would automatically follow his state law conviction. Neither counsel nor the state trial court advised him of these consequences. Because he had been in state custody for two months pending his criminal case, a guilty plea in exchange for a short drug program appeared fair "while not taking into account the consequence of deportation lurking in the background." *Taveras-Lopez v. Reno*, 127 F. Supp. 2d 598, 604 (M.D. Pa. 2000). At the time of his conviction, Valenzuela had accumulated seven years and two months of continuous residency in the United States.

B. Removal Proceedings

One month before his October 2002 release on parole, the Immigration and Naturalization Service ("INS") initiated removal proceedings against Valenzuela based on his conviction for violating a state law related to a controlled substance. 8 U.S.C. § 1227(a)(2)(B)(i).[4] Upon his release from state custody, he was detained by the INS. On December 3, 2002, Valenzuela filed a petition for writ of habeas corpus in the United States District Court for the Southern District of New York, arguing that mandatory detention without bond during the pendency of his removal proceedings was unconstitutional. His petition was granted and he was released on December 23, 2002, on $5,000 bond. He returned to his home in New York City and began serving his term of parole.

After Valenzuela's release, the INS transferred his removal proceedings to the Immigration Court in New York City. Valenzuela duly appeared before an Immigration Judge ("IJ") in New York City at three master calendar hearings during the spring of 2003. During these proceedings, Valenzuela argued that he was eligible for cancellation of removal Section 240A(a) of the Immigration and Naturalization Act ("INA"), which provides for cancellation if an alien "(1) has been an alien lawfully admitted for permanent residence for not less than 5 years, (2) has resided in the United States continuously for 7 years after having been admitted in any status, and (3) has

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[4] Section 237(a)(2)(B)(i) of the Immigration and Nationality Act, 8 U.S.C. § 1101 *et seq.* ("INA"), provides that any alien may be removed if "convicted of a violation of (or a conspiracy or attempt to violate) any law or regulation of a State, the United States, or a foreign country relating to a controlled substance." *Id.* § 1227(a)(2)(B)(i).

not been convicted of any aggravated felony." 8 U.S.C. § 1229b(a).

A provision commonly referred to as the "stop-time rule" states that the period of continuous residence required by section 240A(a)(2)

> shall be deemed to end ... when the alien has committed an offense referred to in section 1182(a)(2) of this title that renders the alien inadmissible to the United States under section 1182(a)(2) of this title or removable from the United States under section 1227(a)(2) or 237(a)(4), whichever is earliest.

8 U.S.C. § 1229b(d). Because the dates of Valenzuela's offense and arrest occurred five days before he met the seven-year residence requirement, and his conviction occurred two months after he met the requirement, his eligibility for cancellation depended upon interpretation of the stop-time rule. Valenzuela argued that the rule should be interpreted to terminate the period of continuous residence only upon conviction rather than upon the date of an arrest or of the underlying conduct.

The Board had previously addressed the issue of when the stop-time period begins to run in a precedential en banc decision, *In re Perez*, 22 I&N Dec. 689 (BIA 1999) (en banc). There, the Board stated that "[i]t would strain our reading of section 240A(d)(1) to interpret the statute as permitting any date to be used for calculating the period of continuous residence or presence other than the date the offense was committed." *Id.* at 693. The four dissenters, however, argued that termination of residence time could occur only upon the event that rendered the alien removable, which, in the case of Perez, was his conviction for a controlled substance

violation. *Id.* at 701, 707. Valenzuela admitted that "[p]ursuant to the current agency's interpretation of the time-stop provision, it appears that [he] is ineligible for cancellation of removal," but, relying on the *Perez* dissent, argued that the "agency interpretation of the time-stop rule is unreasonable." *See* JA at 21-22, *Valenzuela Grullon v. Ashcroft*, 509 F.3d 107 (2d Cir. 2007) (No. 05-4622).

Declaring Valenzuela to be ineligible for cancellation of removal, the IJ pretermitted his application and ordered him removed from the United States on August 21, 2003. The IJ also denied Valenzuela's request to continue proceedings. Valenzuela did not appeal the IJ's decision to the Board. Accordingly, the IJ's order of removal became a final agency decision. 8 C.F.R. § 1003.39.

C. The Second Circuit's Consideration Of Valenzuela's Petition For Review

To obtain review in federal court of the Board's construction of the stop-time rule, Valenzuela filed a second habeas petition in the United States District Court for the Southern District of New York on October 10, 2003. The petition was later transferred to the United States Court of Appeals for the Second Circuit pursuant to the REAL ID Act of 2005, Pub. L. No. 109-13, § 106(c), 119 Stat. 231, 311, and treated as a petition for review. Valenzuela argued that the Second Circuit "should reject the agency's interpretation announced by the *Perez* majority and adopt the interpretation of the provision at issue provided by the *Perez* [d]issent." Pet'r Br. at 27, *Valenzuela Grullon v. Ashcroft*, 509 F.3d 107 (2d Cir. 2007) (No. 05-4622). He also argued that the court should assume jurisdiction in spite of his failure to file an appeal with the Board because, *inter alia*, "[t]he issue raised by Mr. Valenzuela was so entirely

foreclosed by prior precedent, that in light of that precedent and in light of the streamlining procedures, there was no remedy 'as of right' with regard to that issue." *Id.* at 28, 49-53.

The Second Circuit did not reach the merits of Valenzuela's challenge to the Board's construction of the stop-time rule. Instead, relying on this Court's opinions in *Booth v. Churner*, 532 U.S. 731 (2001), and *Bowles v. Russell*, 127 S. Ct. 2360 (2007), the Second Circuit concluded that Valenzuela failed, for purposes of § 1252(d)(1), to exhaust the administrative remedies available to him as of right, because he did not present his challenge to the en banc decision in *Perez* in an appeal to the Board. Pet. App. 10a-16a. Accordingly, the Second Circuit dismissed Valenzuela's petition for lack of jurisdiction.

The Second Circuit acknowledged that the Board's "precedential decision" in *Perez* had "'definitively decided'" Valenzuela's stop-time argument against him. Pet. App. 11a. Nevertheless, the court held that an appeal to the Board was a remedy "available 'as of right'" within the meaning of § 1252(d)(1) because the Board "'ha[d] authority to act on the subject of the' appeal. *Id.* at 11a-12a. The court speculated that the Board "could have reconsidered the *Perez* holding *in banc*, or it could have certified the question to the Attorney General." *Id.* at 11a. Because the Board had "'authority to act on the subject of the [petition]'" *id.* (citing *Booth,* 532 U.S. at 736 n.4), the Second Circuit concluded that his failure to file an appeal with the Board barred the federal courts from considering his petition: "'That [Valenzuela]'s argument would likely have failed'" before the Board did not relieve him of the obligation to appeal to the Board. *Id.* (alteration in original).

The Second Circuit also rejected Valenzuela's argument that the streamlining regulations effectively removed whatever discretion the Board might otherwise be thought to have had to consider his arguments on the merits that the en banc decision in *Perez* was wrongly decided. The court pointed to paragraph 1003.1(e)(4)(i), which states that a panel member cannot affirm unless he or she determines "that the result reached in the decision under review was correct," and to a panel member's ability to refer an appeal to a panel when there is a "need to reverse the decision of an immigration judge or the Service," 8 C.F.R. § 1003.1(e)(6)(vi), as indicating that a panel member is free under the regulations to conclude that an IJ decision that followed a controlling en banc Board precedent has been incorrectly decided and warrants review. Pet. App. 11a-12a.

Finally, the court rejected Valenzuela's statutory argument, based on Ninth Circuit precedent, that an appeal to the Board was not a remedy available as of right within the meaning of 8 U.S.C. § 1252(d)(1). The court acknowledged that the statutory language here, which limits the remedies that must be exhausted to those "'available as of right,'" is different than the language considered in *Booth*, where the statute "spoke only of 'such administrative remedies as are available.'" Pet. App. 12a (emphasis omitted). Noting that the Ninth Circuit "has parsed these phrases to mean that a remedy is available 'as of right' . . . only if the remedy is not 'constrained by past adverse administrative decisions,'" the Second Circuit "reject[ed] the Ninth Circuit's interpretation." *Id.* (citing *Sun*, 370 F.3d at 941-42). Relying instead on this Court's decision in *Booth*, the panel observed "'[t]hat [Venezuela]'s argument would likely have failed'" before the Board, *id.* at 11a (alteration in

original) did not relieve him of the obligation to appeal because "a statutory requirement for exhausting 'remedies' necessarily entails exhausting 'processes[]'" rather than "'forms of relief.'" *Id.* at 13a (quoting *Booth*, 532 U.S. at 739). The Second Circuit therefore concluded that, because an appeal to the Board is an available "process" that an alien has a right to invoke, Valenzuela was "statutorily required to exercise that right before appealing to this Court." *Id.*

REASONS FOR GRANTING THE PETITION

The decision below creates an acknowledged conflict with the Ninth Circuit and an equally clear conflict with the Fifth Circuit over the requirements for administrative exhaustion under 8 U.S.C. § 1252(d)(1). Thus, three circuits in which two-thirds of all immigration cases are brought are split 2 to 1 over the question presented.[5] As the Second Circuit sees it, Section 1252(d)(1) requires an alien to present his claim on appeal to the Board, so long as the Board would be within its power to act on it, even if binding precedent forecloses the claim on the merits. The Fifth and Ninth Circuits see it differently. They do not require an appeal to the Board where prior Board or judicial precedent would compel the Board to reject the alien's appeal.

This Court should grant plenary review to provide a uniform construction of Section 1252(d)(1). The Board processes tens of thousands of appeals each year, and disposes of nearly all of them through summary affirmance by a single member. No useful

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[5] *See* Office of Planning & Analysis, U.S. Dep't of Justice, *EOIR Review FY2006: Statistical Yearbook* B3 (2007), *available at* http://www.usdoj.gov/eoir/statspub/fy06syb.pdf.

purpose is served by construing the statute's requirement to exhaust "remedies available to the alien as of right" to mean that an alien must take an appeal of an IJ decision that regulations require a single member of the Board summarily to affirm. The Board's streamlining rules foreclose reconsideration of its previous decisions, and so appeals that ask the Board to reconsider prior decisions are not an administrative remedy available as of right.

Congress is free, of course, to impose a requirement that would place a pointless burden on both the alien and the Board. It could write a statute that requires aliens to file appeals whenever the Board's procedural rules permit them to do so, regardless of whether the rules require the Board to reconsider its prior precedents. But Section 1252(d)(1) does not require an alien to exhaust all administrative remedies that are merely available It expressly requires exhaustion only of administrative remedies available "as of right." Unlike the Second Circuit, the Fifth and Ninth Circuits have properly given content to the "as of right" restriction, requiring an appeal only where the alien would have a right, under existing Board and judicial precedent, to have the Board consider the legal issue the alien seeks to raise. Appeals that challenge established precedents, like motions for reconsideration or to re-open proceedings, at best provide an avenue for relief that is discretionary rather than a matter of right, because the Board is free to deny them without consideration of the legal issue the alien seeks to raise.

Establishing a uniform rule on exhaustion for legal issues on which the Board's review is constrained is important, because there are tens of thousands of appeals to the Board each year, and while the

streamlining regulations ease the Board's burdens in dealing with them, individuals continue to bear their burden and expense. Failing to comply with exhaustion requirements, even if due to an attorney's good faith misunderstanding over the requirements of Section 1252(d)(1), carries significant consequences, for it deprives an individual of the right to have a federal court review a removal order, and precludes a federal court from addressing even situations of manifest injustice. The Court should resolve this conflict now.

I.

The decision below conflicts with a line of cases in the Ninth Circuit concerning the scope of § 1252(d)(1)'s exhaustion requirement. *See, e.g., Sun*, 370 F.3d at 942; *Puga v. Chertoff*, 488 F.3d 812, 815 (9th Cir. 2007); *Noriega-Lopez v. Ashcroft*, 335 F.3d 874, 881 (9th Cir. 2003); *Castro-Cortez v. INS*, 239 F.3d 1037, 1045 (9th Cir. 2001), *abrogated on other grounds, Fernandez-Vargas v. Gonzales*, 548 U.S. 30 (2006); *Castillo-Villagra v. INS*, 972 F.2d 1017, 1023-24 (9th Cir. 1992). The Second Circuit acknowledged a conflict with *Sun*, and *Sun* most clearly explains the Ninth Circuit's approach to exhaustion under Section 1252(d)(1).

In *Sun*, the INS initiated removal proceedings after the petitioner was convicted of an aggravated felony. The IJ issued an order of removal, finding petitioner ineligible for asylum or cancellation of removal. Sun waived his right to appeal, and filed a habeas petition. In response to the government's contention that he had failed to exhaust his administrative remedies under Section 1252(d)(1), Sun contended that no appeal was needed because his arguments

were foreclosed by a prior en banc Board decision. 370 F.3d at 941-42.

The Ninth Circuit first held that "§ 1252(d)(1) establishes a statutory administrative exhaustion requirement." *Id.* at 941. As a result, the requirement could not be excused based merely on a judicial conclusion of futility. *Id.*

Unlike the Second Circuit, however, the Ninth Circuit applied this Court's directive that "the doctrine of administrative exhaustion should be applied with a regard for the particular scheme at issue." *See Weinberger v. Salfi*, 422 U.S. 749, 765 (1975). Focusing on the language of Section 1252(d)(1), and in particular on the limitation on exhaustion to those remedies available to the alien as of right, the Ninth Circuit held that an appeal per se is not automatically a remedy available as of right:

> [T]he statutory exhaustion requirement [of § 1252(d)(1)] applies only to those remedies not constrained by past adverse administrative decisions. To qualify as a remedy "available to the alien as of right" under § 1252(d)(1), a remedy must enable the agency to give unencumbered consideration to whether relief should be granted.

Sun, 370 F.3d at 941-42.

To the Ninth Circuit, an appeal foreclosed by an en banc Board decision is akin to a motion to reopen or reconsider a previous Board order. Each is a remedy that is not "available ... as of right" under § 1252(d)(1) because, "[w]hen the BIA receives ... a motion [to reopen], it need only consider whether to reopen its prior order, but it is not required to do so." *Id.* at 942 (quoting *Castro-Cortez*, 239 F.3d at 1045). *See also, e.g.*, *Noriega-Lopez*, 335 F.3d at 881 ("[M]otions to

reconsider, like motions to reopen, are not 'remedies available ... as of right' within the meaning of 8 U.S.C. § 1252(d)(1).") (omission in original).

Similarly, the Ninth Circuit explained, "[s]ome issues may be so entirely foreclosed by prior BIA case law that no remedies are 'available ... as of right' with regard to them before IJs and the BIA." *Sun*, 370 F.3d at 942. Thus, "'where the agency's position on the question at issue appears already set, and it is very likely what the result of recourse to administrative remedies would be, such recourse would be futile and is not required.'" *Id.* at 942-43 (quoting *El Rescate Legal Servs., Inc. v. EOIR*, 959 F.2d 742, 747 (9th Cir. 1991)); *see also SAIF Corp./Oregon Ship v. Johnson,* 908 F.2d 1434, 1441 (9th Cir. 1990). [6]

The conflict with *Sun* is particularly stark because the constraint at issue in both cases is the same – a precedential en banc decision by the Board. Had Valenzuela's petition been brought in the Ninth Circuit, it would have been heard on the merits.

The decision below also conflicts with the Fifth Circuit's construction of Section 1252(d)(1) in *Arce-Vences v. Mukasey*, 512 F.3d 167 (5th Cir. 2007). There, the INS had initiated removal proceedings

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[6] On the particular facts of *Sun*, the Ninth Circuit concluded that Sun had failed to exhaust his administrative remedies because prior Board case law had not foreclosed the issue Sun sought to raise. 370 F.3d at 944. The Ninth Circuit continues to follow the interpretation of Section 1252(d)(1) that *Sun* and its predecessors set forth. *Puga*, 488 F.3d at 815 (citing *Sun* for principle that motion to re-open is not a remedy available as of right under Section 1252(d)(1), and thus finding no jurisdictional bar to the appeal, but requiring as a prudential matter that petitioner's claim of ineffective assistance of counsel be presented first to the Board).

against a legal resident who pleaded guilty to possession of a controlled substance. The resident conceded he was removable, but argued that he was eligible for cancellation of removal given the timing of his conviction. The IJ rejected the argument and the Board affirmed.

On a petition for review in the Fifth Circuit, the resident renewed his prior argument about timing and added a new claim that, in light of this Court's intervening decision in *Lopez v. Gonzales*, 127 S. Ct. 625 (2006), his offense should not be considered an aggravated felony.

Acknowledging that "[t]he exhaustion requirement of § 1252(d)(1) operates as a jurisdictional bar to our review of unexhausted claims," *Arce-Vences*, 512 F.3d at 172, the Fifth Circuit nevertheless emphasized that Section 1252(d)(1) only required exhaustion of remedies that are available "as of right." *Id.* The Fifth Circuit construed this language to mean that "'exhaustion is not required when administrative remedies are inadequate.'" *Id.* (quoting *Ramirez-Osorio v. INS*, 745 F.2d 937, 939 (5th Cir. 1984) (motion to reopen is not a remedy "as of right")). Accordingly, the court held that its jurisdiction was "not precluded by an alien's failure to raise before the Board a claim that the Board has no power or authority to remedy." *Id.* (citing *Goonsuwan v. Ashcroft*, 252 F.3d 383, 389 (5th Cir. 2001) (motion to reopen generally not remedy "as of right")).

Applying that standard, the Fifth Circuit rejected the government's argument that the resident had failed to exhaust his remedies available as of right. The court found that the Board would have been constrained to reject the resident's argument under the Fifth Circuit's pre-*Lopez* decisions. *Id.* at 172. As a result, an appeal to the Board on that issue

afforded the resident no remedy "as of right." "[W]here Fifth Circuit precedent has directly addressed the status of the particular statute at issue and remains binding during all stages of proceedings before the Immigration Judge and the Board, our jurisdiction is not precluded by an alien's failure to argue to the contrary below." *Id.*

Here, the constraint on the Board's authority flows from the Board's own precedent rather than from decisions of a federal court. But the constraint is no less binding. Valenzuela's only argument on the merits is that the dissenters in *Perez*, rather than the majority, correctly construed the stop-time rule in section 240A(d)(1). Not only did the Board definitively lay that legal issue to rest in *Perez*, but the rules governing the Board's consideration of subsequent appeals deny any aliens access to further en banc review as of right. The decision to consider a case en banc is entirely discretionary,[7] and "shall ordinarily be ordered only where necessary to address an issue of particular importance or to secure or maintain consistency of the Board's decisions." 8 C.F.R. § 1003.1(a)(5).[8] En banc re-consideration of

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[7] The decision to refer a case to the Attorney General for review under Section 1003.1(h) is similarly discretionary, occurring only when the Attorney General or certain DHS officials "direct" such referral or when the Chairman or a majority of the Board "believe" that a case should be referred.

[8] In committing the decision to initiate en banc proceedings to a majority vote of the Board or the Chairman's direction, Section 1003.1(a)(5) parallels 28 U.S.C. § 46(c), which provides "'[c]ases and controversies shall be heard and determined by a court or panel of not more than three judges, unless a hearing or rehearing before the court in banc is ordered by a majority of the circuit judges of the circuit who are in regular active service.'" *See Western Pac. R.R. Corp. v. Western Pac. R.R. Co.*, 345 U.S.

arguments made in dissent is therefore not available to an alien as of right.

Indeed, under the Board's streamlining regulations, Valenzuela's appeal would not have even reached a three-member panel, let alone en banc review. *Id.* § 1003.1(e). An appeal may be assigned to a three-member panel of the Board "only" under specific circumstances. *Id.* § 1003.1(e)(6); *Kambolli v. Gonzales*, 449 F.3d 454, 459 n.7 (2d Cir. 2006) ("The beginning of subsection (e) makes clear that unless a case meets an enumerated standard in subsection (e)(6), referral to a three-member panel is not allowed."). None of those circumstances is present here.[9]

Instead, the single Board member would have had no choice but to "affirm the decision ... without opinion" under Section 1003.1(e)(4). While the Second Circuit notes that the Board member would not have been compelled to affirm unless he or she concluded "that the result reached in the decision

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247, 257 n.18 (1953) (stating that 28 U.S.C. § 46(c) commits the power to initiate en banc proceedings to the courts of appeals).

[9] The en banc decision in *Perez* eliminated any "need to settle inconsistencies among the rulings of different immigration judges," 8 C.F.R. § 1003.1(e)(6)(i), mooted any "need to establish a precedent construing the meaning of" the stop time rule, *id.* § 1003.1(e)(6)(ii), and "resolve[d] a case or controversy of major national import" to the extent there was one. *Id.* § 1003.1(e)(6)(iv). The IJ's decision was concededly "in conformity with the ... applicable precedents," *id.* § 1003.1(e)(6)(iii), did not raise any "need to review a clearly erroneous factual determination by an immigration judge," *id.* § 1003.1(e)(6)(v). Finally, from the Board's perspective, there would have been no "need to reverse the decision of an immigration judge or the Service," *id.* § 1003.1(e)(6)(vi), because the IJ's decision followed existing Board precedent, and there was no decision of the Service at issue.

under review was correct," such a conclusion is inescapable when the legal issue is whether the IJ was correct in choosing to follow the majority, rather than the dissent, of an en banc precedential opinion. 8 C.F.R. § 1003.1(e)(4)(i).

In short, the Board would have been constrained by its own precedent and governing rules in Valenzuela's case just as tightly as it would have been bound by the Fifth Circuit's case law on aggravated felony in Arce-Vences's case. Had the Fifth Circuit applied its interpretation of Section 1252(d)(1) in *Arce-Vences* to Valenzuela's petition, it would have rejected the government's exhaustion claim.

II.

The conflict over the exhaustion requirement of Section 1252(d)(1) is an important rift that the Court should resolve now. The burden of filing fruitless appeals, purely to punch a ticket into federal court, is a heavy one, particularly for aliens. Immigration Courts in the states of the Second Circuit receive nearly thirty thousand new matters each year, all of which lead to final orders that are eligible for appeal to the Board and subject to petitions for review in the federal courts.[10] The Board has eased its own burden by adopting streamlining regulations that allow individual Board members to methodically affirm the many decisions that are controlled by existing Board precedent. But the same streamlining is not available to individuals facing removal. Individuals who want to petition the federal courts for review still incur the delay and expense of pursuing an

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[10] *See* Office of Planning & Analysis, U.S. Dep't of Justice, *EOIR Review FY2006: Statistical Yearbook* B3 (2007).

administrative appeal that is foreclosed by Board precedent; they still have to present their appeal clearly and amply to the Board, even though the Board need only summarily affirm the IJ's decision. If that burden on aliens is being wrongly imposed, then it should be removed forthwith.

The petition also should be granted because the problems of a lack of uniformity and clarity are particularly acute in the area of exhaustion. Were this Court to delay resolution of this conflict, individuals with unlimited time and resources might wisely choose to pursue a scorched earth approach to ensure that the requisites of Section 1252(d)(1) are met. But many aliens lack unlimited resources, and they and their counsel must make educated guesses – or less than educated, if they do not canvass and weigh the differing standards in the various circuits – as to how much exhaustion is enough. Such guesswork, when incorrect, will have serious consequences. An alien will lose his or her only opportunity to invoke the review of federal courts on an issue of federal law that may determine whether the alien remains in the United States.

This Court's recent decision in *Bowles v. Russell* underscored just how important it is for the federal courts to correctly draw the lines that limit their jurisdiction. Because federal courts have "no authority to create equitable exceptions to jurisdictional requirements," they may not cushion the inequitable consequences of even a justifiable failure to comply with jurisdictional prerequisites. 127 S. Ct. at 2366; *see id.* at 2368, 2371-72 (Souter, J., joined by Stevens, Ginsburg, and Breyer, JJ., dissenting) ("The stakes are high in treating ... limits as jurisdictional" because "if a limit is taken to be jurisdictional, waiver becomes impossible [and] meritorious excuse irrele-

vant.") The decision below illustrates this point, because the Court of Appeals, having determined that it lacked jurisdiction due to the failure to exhaust administrative remedies, was obliged to reject petitioner's claim of "manifest injustice" out of hand. Pet. App. 15a-16a. False negatives in the area of jurisdiction thus carry a heavy cost, because courts that refuse jurisdiction will be unable to manage the equities of individual cases until this Court resolves the issue.

There is ample reason to suspect that the Second Circuit (at 12a-13a) did not correctly draw the jurisdictional line that Congress set in Section 1252(d)(1). The court purported to preserve a distinction between purely discretionary remedies, such as motions for reconsideration or to reopen, and appeals that are foreclosed by binding Board precedent. Pet. App. 14a. But the streamlining rules eliminate any principled distinction between them. The discretion that the Board would have to reject an appeal by Valenzuela challenging *Perez* is no less than it would have to reject a motion for reconsideration by Perez himself in the original case. Both would be filings the alien has a right to file under the rules, but both would at most trigger discretionary review; neither constitutes a remedy available as of right. The Fifth and Ninth Circuit recognize this distinction, and therefore properly look beyond the alien's right to file an appeal in deciding the requisites of exhaustion under § 1252(d)(1).

The Second Circuit also erred in construing Section 1252(d)(1) in accordance with this Court's construction of the substantially different statutory language of the Prison Litigation Reform Act in *Booth v. Churner*, 532 U.S. 731 (2001). The Court held that, under 42 U.S.C. § 1997e(a), an inmate must exhaust

such remedies as are available, even if some forms of relief, such as money damages, are not available through the administrative process. Key to the Court's holding was the statutory language, that "no action shall be brought with respect to prison conditions . . . until such administrative remedies as are available are exhausted," and its history, in which Congress had removed certain qualifiers the Court had previously relied upon to hold that a prisoner seeking only money damages need not exhaust administrative remedies. *Booth*, 532 U.S. at 740.

No such open-ended language, or confining history, is present here. To the contrary, the statutory language invites a distinction between remedies that are "available" (*Booth*) and those that are available only "as of right;" the latter excludes remedies that are merely "discretionary." This Court has repeatedly recognized the discretionary nature of certain relief available from the Board. For example, the Court has noted that "[t]he granting of a motion to reopen is discretionary." *INS v. Doherty*, 502 U.S. 314, 323 (1992) (citing *INS v. Phinpathya*, 464 U.S. 183, 188 n.6 (1984)). In *INS v. Jong Ha Wang*, 450 U.S. 139, 143 (1981), this Court explained that the regulation governing a motion to reopen "is framed negatively; it directs the Board not to reopen unless certain showings are made. It does not affirmatively require the Board to reopen the proceedings under any particular condition." It is undisputed, even by the panel below, that a single Board member could not provide a remedy to Valenzuela. Yet the regulations governing the Board's en banc consideration, and referral to a three-member panel are framed in the same "negative" manner, foreclosing review except when certain circumstances are met, or

permitting it at the discretion of the Board. Because obtaining en banc reconsideration of a prior Board decision is just as "discretionary" as a motion to reopen, neither should be deemed a remedy available "as of right." *See, e.g., Northwest Env't Advocates v. EPA*, 340 F.3d 853, 854 (9th Cir. 2003) (Kleinfeld, J., dissenting) ("The rarely exercised certiorari jurisdiction of the Supreme Court is not an adequate substitute for an appeal as of right.")[11]

The Second Circuit's rule serves neither the interests of Congress, the Board, nor aliens. Nor will it improve the quality of review in the federal courts. In upholding the streamlining regulations against challenges that they eviscerated meaningful appellate review by the Board, the courts of appeals have noted that meaningful review by the Board is unnecessary, because the IJ's decision and supporting record "permit[] a court to carry out an intelligent review."[12] The DOJ ought not be permitted, on the

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[11] The Second Circuit's construction of Section 1252(d)(1) also runs afoul of the rule of lenity, a "longstanding principle of construing any lingering ambiguities in deportation statutes in favor of the alien." *INS v. Cardoza-Fonseca*, 480 U.S. 421, 449 (1987). Under the rule of lenity, when a limitation on relief from removal is ambiguous, it must be afforded the narrower meaning. *Id.* at 449-50. Given the drastic consequences of deportation or removal, Congress must speak clearly and definitely before courts apply a bar to relief from removal. *See INS v. Errico*, 385 U.S. 214, 225 (1966) (construing section 241(f) of the Act, 8 U.S.C. § 1251(f) (1964), and indicating that doubts as to the correct construction of the statute affording relief from deportation should be resolved in the alien's favor); *see also Fong Haw Tan v. Phelan*, 333 U.S. 6, 10 (1948) (stating that any doubts regarding the construction of the Act are to be resolved in the alien's favor).

[12] *Albathani v. INS*, 318 F.3d 365, 378 (1st Cir. 2003); *see also Falcon Carriche v. Ashcroft*, 350 F.3d 845, 851 (9th Cir. 2003)

one hand, to offer many aliens only a discretionary and highly contingent appellate review within the agency, and then simultaneously to label such review a "remedy available as of right" in order to bar the federal courts from reviewing judgments of law that the Board has already fully considered and rendered. The Board has evaluated and definitively construed the stop-time rule. Valenzuela properly invoked the jurisdiction of the federal courts to review that ruling. Access to the federal courts should be protected as zealously when Congress has granted it, as it is denied when Congress has withheld it. This Court should grant the petition, and restore the jurisdictional line for review of final orders of removal that Congress originally drew.

("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.") *Cf. Georgis v. Ashcroft*, 328 F.3d 962, 967 (7th Cir. 2003) ("Since we can review directly the decision of the IJ when a case comes to us from the BIA pursuant to 1003.1(a)(7), our ability to conduct a full and fair appraisal of the petitioner's case is not compromised."); *Guentchev v. INS*, 77 F.3d 1036, 1037-38 (7th Cir. 1996) ("The Attorney General could dispense with the Board and delegate her powers to the immigration judges, or could give the Board discretion to choose which cases to review.... The combination of a reasoned decision by an administrative law judge plus review in a United States Court of Appeals satisfies constitutional requirements.").

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

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