No. 08-656

In the Supreme Court of the United States

TERESA JEZIERSKI,

Petitioner,

v.

ERIC H. HOLDER, JR.,
Attorney General of the United States,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

REPLY BRIEF FOR THE PETITIONER

PAUL DJURISIC
SARA HERBEK
AzulaySeiden Law Group
205 North Michigan Avenue, 40th Floor
Chicago, IL 60601
(312) 832-9200

MARK T. STANCIL
Robbins, Russell, Englert, Orseck, Untereiner & Sauber LLP
1801 K Street, N.W., Suite 411
Washington, D.C. 20006
(202) 775-4500

DAVID T. GOLDBERG*
Donahue & Goldberg, LLP
99 Hudson Street, 8th Floor
New York, NY 10013
(212) 334-8813

DANIEL R. ORTIZ
University of Virginia School of Law Supreme Court Litigation Clinic
580 Massie Road
Charlottesville, VA 22903
(434) 924-3127

**Counsel of Record*

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As the petition documented, the refusal of jurisdiction in this case raises two questions on which the courts of appeals are deeply divided: (1) the Seventh Circuit read the Immigration and Nationality Act's jurisdiction-stripping provision, 8 U.S.C. § 1252(a)(2)(B)(ii), to bar judicial review of Board of Immigration Appeals decisions that are not "specified" by Congress "to be in the discretion of the Attorney General," *ibid*, so long as a *regulation* declares them discretionary; and (2) that court also construed the Act's jurisdiction-restoring provision, 8 U.S.C. § 1252(a)(2)(D), as limited to "pure questions" of law.

This Court's intervention, the petition explained, is especially warranted because these legal questions arise with extraordinary frequency in an area of law in which national uniformity is recognized to be of signal importance. Pet. 29-31. Indeed, the statute at issue was enacted to restore uniformity and to provide immigrants facing removal a "day in court," in the face of serious constitutional concerns that denying such review would raise. *Id.* at 5. The petition further explained that the Seventh Circuit's interpretations are wrong and subject individuals to a restrictive jurisdictional gauntlet that Congress did not authorize. *Id.* at 32-33.

Respondent does not contend that the Seventh Circuit resolved either question correctly. On the contrary, he concedes that the "government has concluded" that the Seventh Circuit's construction of the jurisdictional bar is wrong. Opp. 15. Respondent's discussion of the second question presented is reduced to a single footnote, see *id.* at 16 n.5, which offers no defense of the Seventh Circuit's minority view. Likewise, respondent expressly

acknowledges the existence of a broad conflict, *id.* at 11, and he does not deny that Congress and this Court have placed special importance on national uniformity in the administration of this statute.

Respondent nonetheless claims that review "is not warranted at this time," Opp. 16—asserting that it would be "premature," *id.* at 11, for the Court to settle the circuit split in this case; that the "narrow issue[s] of reviewability" presented do not affect enough cases to warrant this Court's attention, *id.* at 16; and that this case is an "unsuitable vehicle," *id.* at 18.

Those purportedly "prudent[ial]," Opp. 17, reasons for withholding review are, upon even passing inspection, little more than a Potemkin Village. The suggestion that the circuit split "may well resolve itself," *id.* at 16, would require one of two startlingly implausible developments: (1) the Seventh Circuit's reversing course "in light of the government's position," *id.* at 24, although that court has expressed its awareness of—and disagreement with—the government's view, has repeatedly and recently reaffirmed its position, and has refused en banc reconsideration, see pp. 3-5, *infra*; or (2) *all the other circuits'* reversing themselves and adopting the interpretation the government recognizes to be wrong. Respondent's suggestion of "narrow" significance, Opp. 16, is likewise insubstantial. The issue of jurisdiction to review denials of reopening recurs constantly in the courts of appeals, and the Seventh Circuit's construction of the statute bars judicial review of still other categories of decisions. See Pet. 19-20. Moreover, the Seventh Circuit's rule is almost invariably consequential, by denying

immigrants the "day in court" respondent concedes Congress provided them.

Respondent's "vehicle" objection rests on a similarly mistaken premise: that this Court's review of outcome-determinative jurisdictional decisions should depend on the likelihood the court below *would have* granted relief had it instead given the individual her lawful day in court. But erroneous denials of judicial review do not become unimportant simply because the standard of review is deferential. This Court should intervene and reverse the judgment below, either summarily or after full argument.

I. The Conceded Conflict Will Not Resolve On Its Own

Respondent's claim that there is "some prospect that the Seventh Circuit may reconsider" its erroneous interpretation on the first question, Opp. 17, rests on the premise that a *minority* of judges voted to rehear en banc the case that overturned circuit precedent adopting Ms. Jezierski's (and the government's) view of the statute. See *ibid.* That inference is, to say the least, highly optimistic. If a minority voted to rehear the case en banc, a *majority* just as surely voted against doing so. And that majority refused over an impassioned and comprehensive dissent, *Kucana* v. *Mukasey*, 533 F.3d 534, 540 (7th Cir. 2008), to reconsider a deeply divided panel decision expressly overruling circuit precedent.

Respondent's assertion that "the court below did not have the opportunity to fully consider the government's position," Opp. 17, is misleading.

Although respondent did not specifically argue his view of the jurisdictional bar within the four corners of his brief, respondent did not dispute jurisdiction. More importantly, the Seventh Circuit has long known the government's position—and has repeatedly rejected it. See, *e.g.*, *Kucana*, 533 F.3d at 537 ("Surprisingly, the Department of Justice argued that § 1252(a)(2)(B)(ii) does not [preclude judicial review of] decisions not to reopen."); *Ali* v. *Gonzales*, 502 F.3d 659, 662 (7th Cir. 2007) ("We have carefully considered the Department's changed position [on 8 U.S.C. § 1252(a)(2)(B)(ii)] and find ourselves unable to agree with it.").

Indeed, respondent's suggestion that this split may resolve itself has only weakened since the last time respondent told this Court that there was "some prospect that the Seventh Circuit may reconsider" its rule. Br. in Opp. at 17, *Gulati* v. *Mukasey*, 128 S. Ct. 1877 (2008) (No. 07-1005). On that occasion, respondent pointed to a pending rehearing submission in *Potdar* v. *Mukasey*, 550 F.3d 594 (7th Cir. 2008). But the court's opinion on rehearing in that case noted that the Seventh Circuit "recently has reaffirmed" its position, citing *Kucana.* See *id.* at 597 n.2; accord Br. in Opp. at 14, *Ali* v. *Mukasey*, 128 S. Ct. 1870 (2008) (No. 07-798) (also asserting "some prospect" and citing *Potdar* petition).

Respondent's remarks on the absence of published opinions in some circuits explicitly addressing the regulatory preclusion theory are puzzling. See Opp. 13 n.4. To the extent this discussion is meant to suggest that the petition exaggerated the character or extent of the circuit conflict, it fails on its face. The petition carefully noted that not all ten circuits that routinely review denials of motions to reopen have

explicitly addressed the (erroneous) § 1252(a)(2)(B)(ii) objection. Pet. 14. The petition also scrupulously explained that these courts' practices are sufficiently settled that their decisions are almost invariably unpublished. Pet. 14 n.1.

To the extent respondent implies that further percolation is warranted, matters get much worse. Respondent would be (1) saying that courts that did *not* accept the restrictive interpretation in the long time the government affirmatively urged it will do so now that the government has *disavowed* that position; and (2) simultaneously urging that respondent's (not-so-recent) reversal of course will catalyze an opposite change in the Seventh Circuit.

II. The Questions Presented Are Undeniably Important

Respondent contends that, despite the conflict and the Seventh Circuit's (resolute) adherence to an erroneous rule, this Court's review is unwarranted because the questions presented involve a "narrow aspect of judicial review," Opp. 17, that "affect[s] the outcome of very few cases," *id.* at 18.

These assertions are truly startling. First, few questions of federal statutory law recur more frequently and widely than the one respondent seeks to minimize. In just the three months since the filing of this petition, the Second Circuit *alone* has decided at least 79 cases challenging denials of motions to reopen and similar motions. See App., *infra*, 1a-8a. And as both Congress and this Court have recognized, the right to reopen is an "important safeguard" to "ensure a proper and lawful disposition," *Dada* v. *Mukasey*, 128 S. Ct. 2307, 2318

(2008), and it is often "the sole means of raising certain [important] issues," *INS* v. *Doherty*, 502 U.S. 314, 331 (1992) (Scalia, J., concurring in the judgment and dissenting in part); see also 8 U.S.C. § 1229a(c)(7).

Respondent's answer—that the erroneous interpretation of 8 U.S.C. § 1252(a)(2)(B)(ii) will not "affect the outcome of many cases" because claims like this one are reviewed under a deferential abuse-of-discretion standard, Opp. 16—is wrong as a matter of law and of fact. The Seventh Circuit's position is almost always outcome-determinative: Petitioners in Ms. Jezierski's position are denied their "day in court" (unless they can satisfy the Seventh Circuit's miserly view of the jurisdiction-restoring provision, see Pet. 23-28). The right to judicial review, however deferential, is no trifle. Congress provided it out of serious constitutional concern. In the context of a system of administrative adjudication that the author of the opinion below elsewhere has described as having "fallen below the minimum standards of legal justice," *Benslimane* v. *Gonzales*, 430 F.3d 828, 830 (7th Cir. 2005) (Posner, J.), it has especially great importance. Judicial review is often the only mechanism available to correct errors having profound, life-altering consequences.

But even on its own terms, respondent's argument is mistaken. In the time respondent took to prepare his brief in opposition, courts of appeals outside the Seventh Circuit issued at least fifteen decisions *granting* relief under the deferential "abuse of discretion" standard respondent maligns. See *Habchy* v. *Filip*, 552 F.3d 911 (8th Cir. 2009); *Chen* v. *Attorney General*, No. 07-3705, 2009 WL 146531 (3d Cir. Jan. 22, 2009); *Bizabishaka* v. *Mukasey*, No. 08-

60191, 2009 WL 139579 (5th Cir. Jan. 21, 2009); *Ogunmowo* v. *Mukasey*, No. 06-71095, 2009 WL 141235 (9th Cir. Jan. 21, 2009); *Liu* v. *Attorney General*, No. 07-3088, 2009 WL 32732 (3d Cir. Jan 7, 2009); *Lyou* v. *Attorney General*, No. 06-3615, 2009 WL 32750 (3d Cir. Jan 7, 2009); *Al Sayar* v. *Mukasey*, No. 08-1597-ag(L), 2009 WL 27687 (2d Cir. Jan. 6, 2009); *Dong* v. *Attorney General*, No. 07-2130, 2009 WL 27430 (3d Cir. Jan 6, 2009); *Lin* v. *Attorney General*, No. 07-2998, 2009 WL 27434 (3d Cir. Jan 6, 2009); *Zhou* v. *Attorney General*, No. 07-3276, 2009 WL 27437 (3d Cir. Jan. 6, 2009); *Donoso-Ortiz* v. *Mukasey*, No. 05-76575, 2008 WL 5395952 (9th Cir. Dec. 26, 2008); *Zheng* v. *Mukasey*, No. 07-5737-ag, 2008 WL 5174773 (2d Cir. Dec. 11, 2008); *Ping Sai Zian* v. *BIA*, No. 05-5152-ag, 2008 WL 5120681 (2d Cir. Dec. 8, 2008); *Zheng* v. *Attorney General*, 549 F.3d 260 (3d Cir. 2008); *Clara-Mendez* v. *Mukasey*, No. 05-74110, 2008 WL 5054332 (9th Cir. Nov. 25, 2008).

Moreover, the Seventh Circuit also has applied its construction of 8 U.S.C. § 1252(a)(2)(B)(ii) to allow the Attorney General to preclude (by mere regulation) review of denials of motions to reconsider and to continue. See *Johnson* v. *Mukasey*, 546 F.3d 403, 403-404 (7th Cir. 2008); *Ali*, 502 F.3d at 660. Indeed, as the petition noted, two circuits that do not recognize regulatory preclusion with respect to denials of reopening paradoxically hold that review of denials of continuances are precluded by regulation. See Pet. 21.

Respondent's bold assertion that these cases "do not shed light on" the question presented here, Opp. 15 n.4, defies logic. Not only is jurisdiction to hear challenges to reconsideration and continuance

denials governed by the same statutory provision, 8 U.S.C. § 1252(a)(2)(D), but decisions on both sides of the split concerning continuances also rely on the same arguments about the meaning of the phrase "specified under this subchapter" that appears in § 1252(a)(2)(B)(ii). See *Kucana,* 533 F. 3d at 536-537 (no review of reopening denial "follows" from construction in *Ali*, which involved continuances); *Alsamhouri* v. *Gonzales*, 484 F.3d 117, 122 (1st Cir. 2007) (describing issue as the "same" in reopening and continuance cases). Tellingly, respondent offers no argument why the same language should apply differently in these contexts.

III. The Entrenched Circuit Conflict Over The Meaning Of The Jurisdiction-Restoring Provision Also Warrants This Court's Review

Respondent musters only a single footnote to address the second question presented in the petition—whether 8 U.S.C. § 1252(a)(2)(D) restores jurisdiction only to review "pure" questions of law. Respondent does not dispute that the courts of appeals are divided on this question, nor does respondent deny the practical and legal importance of the sharply divergent interpretations. Respondent also offers no defense of the Seventh Circuit's interpretation and does not even allude to a "prospect" that the court will reconsider its position on this question. Respondent argues only that, by "agree[ing] that there is jurisdiction over petitioner's claim that the Board abused its discretion in denying her motion to reopen," it has obviated the need for review of this question. Opp. 16 n.5.

Not so. Even if respondent concedes the merits of the first question, this Court should grant review on both questions presented. First, the Court may not agree with the respondent's—and petitioner's—position on the merits of the first question. If it does not, review of the second question will be necessary not only to settle whether judicial review is available in this case, but also to resolve the circuits' conflicting approaches. Second, if the Court agrees with respondent (and petitioner) on the first question, conflict will remain regarding how circuits treat cases presenting "mixed questions" of law and fact in those situations where the jurisdiction-stripping provision *is* operative.

IV. This Case Is An Especially Suitable Vehicle For Resolving The Conflicts Presented

Although respondent asserts that this case is not a "suitable vehicle," Opp. 18, he does not: (1) dispute that the jurisdictional issues dividing the courts of appeals are squarely presented here; (2) identify anything about the facts or procedural posture of this case that would pose an obstacle to the Court's reaching those questions; or (3) suggest how a future case might present the Court with a more developed record for settling the issue. Since the meanings of Sections 1252(a)(2)(B)(ii) and 1252(a)(2)(D) are pure questions of law resolved at the threshold of any case, no court would ever build a more substantial factual record, nor would one be helpful. And respondent does not deny that this case presents the fortuitous opportunity to consider simultaneously the two provisions, which operate interdependently. See Pet. 33-34.

Rather, respondent's "vehicle" claim simply asserts that, had the Seventh Circuit reached the underlying merits, it is "unlikely," Opp. 20-23 (reiterating "unlikely" seven times), that the court would have ruled in her favor. Even if these assertions were credited, nothing would distinguish petitioner's case from many others in which a would-be petitioner bears the burden of persuading a court that an agency abused its discretion. Congress, however, regularly grants such parties judicial review, see 5 U.S.C. §§ 701-706, and this Court protects that right vigilantly. Considerations of efficient judicial administration alone weigh powerfully against litigants' arguing—and this Court's guessing at—the merits in order to choose a vehicle for addressing important, but discrete, jurisdictional issues. The underlying merits are, at this point, irrelevant. No court can reach them without this Court's *first* deciding one or both of the questions presented and reversing the judgment below. See *Steel Co.* v. *Citizens for a Better Env't*, 523 U.S. 83, 94 (1998) (looking at merits before establishing jurisdiction "carries the courts beyond the bounds of authorized judicial action").[1]

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[1] Respondent's offhand allusion to a "bar[to] judicial review of the underlying order," Opp. 14, is a chimera. The courts of appeals do review orders concerning waiver denials and cancellation of removal. See, *e.g.*, *Pohan* v. *Mukasey*, 266 Fed. Appx. 786, 787 n.1 (10th Cir. 2008); *Cho* v. *Gonzales*, 404 F.3d 96, 102 (1st Cir. 2005); *Gutierrez* v. *Mukasey*, 273 Fed. Appx. 596, 598 (9th Cir. 2008). But the argument fails for a more basic reason. Even if jurisdiction to review such orders were in doubt, in this case there *were no such underlying orders*. The reason petitioner seeks to reopen her case is because her attorney *failed* to seek relief under Sections 1186a(c)(4)(A) and 1229b(b). See generally *Guerra-Soto* v. *Ashcroft*, 397 F.3d 637,

Finally, while respondent unsurprisingly depicts Ms. Jezierski's case in a relentlessly negative light, he does not dispute (nor did the BIA) that she was represented by an attorney who, after taking a substantial sum of money, failed to file any appellate brief whatsoever. To the extent respondent's (legally irrelevant) merits argument impugns petitioner personally, it bears emphasis that Ms. Jezierski entered the country lawfully, paid taxes, violated no criminal law, was victimized—first by her husband and then by an attorney on whom she depended—and seeks to remain in the country to continue providing care to an aging close relative.

V. Reversal, Not Vacatur, Is The Proper Summary Disposition

Respondent's fall-back position—that, instead of granting certiorari and reversing the judgment below, this Court should vacate the Seventh Circuit's judgment and remand for "further consideration in light of the government's position," Opp. 11, 24—makes no sense at all. As explained above, this is not a case "[w]here intervening developments, or recent developments that [there is] reason to believe the court below did not fully consider, reveal a reasonable probability that the decision below rests upon a premise that the lower court would reject if given the

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640 (8th Cir. 2005) ("[The] petition simply asks us to review the BIA's refusal to reopen a case which, if it had been reopened, would have resulted in the Attorney General deciding whether to grant a form of discretionary relief. Section 1252(a)(2)(B)(i) would have prohibited our review only if the case had been reopened, and discretionary relief had actually been denied. This case never got that far, and thus we have jurisdiction to review the BIA's decision for an abuse of discretion.").

opportunity for further consideration." *Lawrence* v. *Chater*, 516 U.S. 163, 167 (1996) (per curiam). On the contrary, the Seventh Circuit was well aware of the government's position when it decided this case and has repeatedly made clear that it rejects that position. See pp. 3-4, *supra*. The questions presented here warrant full review, but should the Court wish to dispose of the case summarily, reversal—not vacatur—would be the proper course in light of the government's concession that the basis of the decision below was legally erroneous.

CONCLUSION

The petition for a writ of certiorari should be granted or the judgment below summarily reversed.

Respectfully submitted.

PAUL DJURISIC
SARA HERBEK
AzulaySeiden Law Group
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