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No. 08-911

In the Supreme Court of the United States

AGRON KUCANA, PETITIONER

v.

ERIC H. HOLDER, JR., ATTORNEY GENERAL

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

BRIEF FOR THE RESPONDENT IN OPPOSITION

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QUESTION PRESENTED

Whether the court of appeals correctly held that it lacked jurisdiction to review the Board of Immigration Appeals' denial of petitioner's motion to reopen immigration proceedings under 8 U.S.C. 1252(a)(2)(B)(ii) and (D).

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-21a) is reported at 533 F.3d 534. The decision of the Board of Immigration Appeals denying petitioner's motion to reopen (Pet. App. 22a-26a) is unreported.

JURISDICTION

The judgment of the court of appeals was entered on July 7, 2008. The petition for a writ of certiorari was filed on October 3, 2008. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. a. In 1996, Congress amended the Immigration and Nationality Act (INA), 8 U.S.C. 1101 *et seq.*, to expedite the removal of criminal and other illegal aliens from the United States. See Illegal Immigration

Reform and Immigrant Responsibility Act of 1996 (IIRIRA), Pub. L. No. 104-208, Div. C, 110 Stat. 3009-546. As relevant here, Congress amended the INA to limit judicial review of certain discretionary decisions of the Attorney General. As amended, the relevant section of the INA now provides that no court shall have jurisdiction to review any

> decision or action of the Attorney General or the Secretary of Homeland Security the authority for which is specified under this subchapter to be in the discretion of the Attorney General or the Secretary of Homeland Security, other than the granting of relief under section 1158(a) of this title.

8 U.S.C. 1252(a)(2)(B)(ii). The phrase "this subchapter" refers to Title 8 of the United States Code, Chapter 12, Subchapter II, which is codified at 8 U.S.C. 1151-1381 and pertains broadly to immigration matters. See *Van Dinh* v. *Reno*, 197 F.3d 427, 433 (10th Cir. 1999).

In 2005, Congress amended the INA to include the following provision:

> Nothing in subparagraph (B) or (C), 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.

8 U.S.C. 1252(a)(2)(D), as added by the REAL ID Act of 2005, Pub. L. No. 109-13, Div. B, § 106(a)(1)(A)(iii), 119 Stat. 310.

b. The Board of Immigration Appeals (Board) may reopen any proceedings in which it has previously entered a decision. 8 U.S.C. 1229a(c)(7). If an alien

has been ordered removed *in absentia*, he may file a motion to reopen to rescind that order. 8 C.F.R. 1003.23(b)(4). The alien must demonstrate either that he failed to receive adequate notice of his removal hearing or that "exceptional circumstances" justify reopening. 8 C.F.R. 1003.23(b)(4)(iii)(A). If the motion alleges "exceptional circumstances," it must be filed within 180 days of the removal order. 8 C.F.R. 1003.23(B)(4)(iii)(A)(1).

An alien may also file a motion to reopen removal proceedings based on previously unavailable, material evidence. 8 U.S.C. 1229a(c)(7)(B); 8 C.F.R. 1003.2(c). As a general matter, an alien may file only one such motion to reopen, and it must be filed within 90 days of the 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). Those limitations do not apply if the motion to reopen alleges that asylum or withholding of removal is appropriate based on "changed country conditions arising in the country of nationality or in the country to which removal has been ordered," but only "if such evidence is material and was not available and would not have been discovered or presented at the previous proceeding." 8 U.S.C. 1229a(c)(7)(C)(ii).

Based on a strong interest in finality, motions to reopen are disfavored, and the movant must meet a heavy burden to satisfy those requirements. *INS* v. *Abudu*, 485 U.S. 94, 107-108, 110 (1988); *In re Coelho*, 20 I. & N. Dec. 464, 473 (B.I.A. 1992). That is because "every delay works to the advantage of the deportable alien who wishes merely to remain in the United States." *INS* v. *Doherty*, 502 U.S. 314, 323 (1992). The Board has broad discretion in adjudicating a motion to reopen, and it "has discretion to 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); see *Abudu*, 485 U.S. at 110.

2. Petitioner is a native and citizen of Albania. Pet. App. 1a. He was admitted to the United States as a non-immigrant visitor in 1995 and has remained here beyond the time authorized. *Ibid.* In May 1996, he filed an application for asylum and withholding of removal with the former Immigration and Naturalization Service (INS),[1] alleging that he would be persecuted based on his political opinion if returned to Albania. Administrative Record (A.R.) 37 n.2, 543, 547, 550-560. The INS charged petitioner with being removable as an alien who overstayed his visa, A.R. 607, 609, and it referred his asylum and withholding application to an immigration judge (IJ), A.R. 37 n.2.

Petitioner appeared with counsel before the IJ. A.R. 37. He conceded that he was removable and renewed his request for asylum and withholding of removal. *Ibid.* The IJ determined that petitioner was removable as charged and scheduled a hearing to determine petitioner's asylum eligibility. A.R. 37, 253. Petitioner failed to appear for his hearing, and the IJ ordered him removed to Albania *in absentia*. Pet. App. 1a; A.R. 268.

3. Petitioner filed a motion to reopen his removal proceedings. Pet. App. 1a; A.R. 38. He alleged that he missed his hearing because he overslept. Pet. App. 1a-2a; A.R. 261.

The IJ denied petitioner's motion to reopen. A.R. 253-254; see Pet. App. 2a. The IJ determined that there was no allegation that petitioner failed to receive ade-

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[1] On March 1, 2003, the INS ceased to exist as an agency within the Department of Justice and its enforcement functions were transferred to the Department of Homeland Security, pursuant to the Homeland Security Act of 2002, 6 U.S.C. 101 *et seq.*

quate notice of the hearing and that petitioner's motion failed to demonstrate "exceptional circumstances" warranting reopening of his proceedings. A.R. 254.

The Board affirmed the IJ's decision without an opinion. Pet. App. 2a; A.R. 135.

4. Four years later, petitioner filed a second motion to reopen his removal proceedings with the IJ. Pet. App. 2a; A.R. 48-51. He contended that he was eligible for asylum, withholding of removal, and protection under the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (CAT), *adopted* Dec. 10, 1984, 1465 U.N.T.S. 85, based on changed country conditions in Albania. Pet. App. 2a; A.R. 48-50. Petitioner also contended that he was eligible for adjustment of status because his mother, a naturalized United States citizen, filed a visa petition on his behalf, and that petition had been approved. Pet. App. 11a; A.R. 50.

The IJ denied petitioner's second motion to reopen. Pet. App. 2a; A.R. 37-41. The IJ determined that petitioner failed to present new evidence that warranted reopening his case: "The evidence [petitioner] has submitted is not 'new' nor so significant as to impact the basis for his asylum claim * * * first filed in May of 1996." A.R. 40. Petitioner contended that he would be persecuted in Albania because he had been a member of the Democratic Party in the early 1990s, but the IJ disagreed, explaining that the Democratic Party won Albania's most recent election and that a candidate that petitioner claimed he formerly supported became the Albanian Prime Minister. *Ibid.* The IJ observed that the affidavits petitioner presented "discuss the current government's difficulty in fighting crime and stopping political fighting but they do not reflect that this is a 'new'

event or that the government of Albania actually participates in the violence or that it is utterly unable to stop it from occurring." *Ibid.* And the IJ "question[ed] the sincerity of [petitioner's] asylum claim," because it appeared that petitioner was only raising the claim in order to overcome the time limitations on filing a motion to reopen in order to raise his claim for adjustment of status to that of an alien admitted for permanent residence. A.R. 40-41.

The IJ also determined that the approved visa petition did not justify reopening. A.R. 40-41. The IJ suggested that petitioner would not warrant a favorable exercise of discretion because he "has known of the pendency of his deportation proceedings since 1996," "was made aware that he was ordered deported in 1997," "was notified that his appeal was dismissed in 2002," and "only c[ame] forward after a new form of relief has become available in 2006." A.R. 41.

5. Petitioner appealed to the Board, arguing that reopening was justified based on changed circumstances that made him eligible for asylum, withholding of removal, or CAT relief. Pet. App. 25a; A.R. 12-19. Petitioner abandoned the argument that reopening was warranted in order to allow him to pursue adjustment of status. Pet. App. 2a; A.R. 12-19.

The Board dismissed the appeal. Pet. App. 22a-26a. It first determined that the IJ lacked jurisdiction to consider petitioner's second motion to reopen because the Board "was last to render a decision in this matter." *Id.* at 23a; see 8 C.F.R. 1003.2(a) (providing that "[a] request to reopen or reconsider any case in which a decision has been made by the Board * * * must be in the form of a written motion to the Board").

The Board then concluded that reopening was not warranted because petitioner failed to demonstrate material changed circumstances that would make him *prima facie* eligible for relief from removal. Pet. App. 24a-26a. The Board rejected petitioner's claim that he would be persecuted in Albania because he had been a supporter of the Democratic Party, explaining that conditions in Albania had improved since petitioner left. *Id.* at 24a-25a. The Democratic Party "participates in the political system and holds seats in Parliament, and the current Prime Minister of Albania is from the Democratic Party." *Id.* at 24a. The Board observed that the Albanian Constitution "provides citizens with the right to change their government peacefully, and citizens exercised this right in practice," with "no confirmed cases of people being killed or detained strictly for political reasons." *Ibid.* The Board also noted that "there had been no major outbreaks of political violence since 1998" and that "neither the Government nor the major political parties engage in policies of abuse or coercion against their political opponents." *Id.* at 25a n.1. The Board concluded that, "[b]ased on the evidence submitted," petitioner failed to demonstrate material changed circumstances that would make him eligible for the relief from removal he sought. *Id.* at 25a-26a.

6. The court of appeals dismissed petitioner's petition for review. Pet. App. 1a-21a. The court determined that the Board's denial of reopening would be reviewed only for an abuse of discretion and that "[i]t is difficult to perceive an abuse of discretion" here. *Id.* at 3a. The court noted that "[n]o statute requires the Board to reopen under *any* circumstances, and a regulation confirms that the Board has discretion to deny relief even to an alien who would have received a favorable decision,

had the argument been presented earlier." *Ibid.* (citing 8 C.F.R. 1003.2(a)). The court then explained that petitioner's primary argument was that the Board erred in failing to explicitly address one affidavit included with his motion to reopen, but that affidavit "does not document a change in Albanian conditions since 1997; it is instead a historical narrative reaching back to the time when Albania was a totalitarian dictatorship." *Ibid.*

The court went on to hold, however, that it lacked jurisdiction to consider petitioner's claim under 8 U.S.C. 1252(a)(2)(B)(ii). Pet. App. 3a-12a. It explained that the Board's decision to grant or deny a motion to reopen is a "decision or action * * * the authority for which is specified under" the relevant subchapter of the INA (8 U.S.C. 1151-1381) to be in the discretion of the Attorney General, 8 U.S.C. 1252(a)(2)(B)(ii), because it is based on a regulation that the Attorney General promulgated to authorize the Board to reopen proceedings, which in turn specifies that the power to grant or deny a motion to reopen is within the discretion of the Board. Pet. App. 4a-7a. In so holding, the court overruled its prior decision in *Singh* v. *Gonzales*, 404 F.3d 1024 (7th Cir. 2005). Pet. App. 7a-10a.

The court acknowledged that it retained jurisdiction over questions of law and constitutional claims under 8 U.S.C. 1252(a)(2)(D), but it determined that petitioner did not raise any such contention, because his "entire argument is that the Board abused its discretion." Pet. App. 9a-10a.

Finally, the court rejected petitioner's argument that reopening was warranted based on his approved visa

petition, explaining that petitioner had failed to present that claim to the Board. Pet. App. 11a-12a.[2]

Judge Ripple concurred but suggested that 8 U.S.C. 1252(a)(2)(B)(ii) should be limited to "procedural rulings." Pet. App. 12a-15a. Judge Cudahy dissented, contending that the court has jurisdiction because "there is no statutory language suggesting the level of deference to be afforded a denial of a motion to reopen." *Id.* at 15a-20a.

The panel had circulated its decision to the full court of appeals. Pet. App. 10a. Five judges voted to rehear the case en banc. *Ibid.*; see *id.* at 20a-21a (Ripple, J., dissenting from denial of rehearing en banc).

ARGUMENT

Petitioner seeks review of the court of appeals' determination that 8 U.S.C. 1252(a)(2)(B)(ii) precluded it from reviewing the Board's denial of his motion to reopen immigration proceedings. Pet. i. The courts of appeals have divided on that question, but review would be premature at this time. Moreover, this case would not be a suitable vehicle for addressing the existing tensions in lower court authority. Because petitioner could not in any event show that the Board abused its discretion in denying his motion to reopen and could not show eligibility for asylum, withholding of removal, or CAT relief, petitioner could not ultimately succeed on the merits of his challenge to the removal order. This Court recently denied review of the same issue in *Jezierski* v. *Holder*,

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[2] Petitioner initially argued to the court of appeals that the Board should have reopened his case based on his approved visa petition, Pet. C.A. Br. 16-17, but he later conceded that he had failed to exhaust that claim, Pet. C.A. Supp. Br. 2.

No. 08-656 (Mar. 23, 2009), and there is no reason for a different result here.

1. a. In the decision below, the Seventh Circuit held that it lacks jurisdiction to consider the Board's denial of a motion to reopen under 8 U.S.C. 1252(a)(2)(B)(ii). Pet. App. 4a-5a. In reaching that conclusion, the Seventh Circuit reasoned that the Board's decision to grant or deny a motion to reopen is a "decision or action * * * the authority for which is specified under" the relevant subchapter of the INA (8 U.S.C. 1151-1381) to be in the discretion of the Attorney General, 8 U.S.C. 1252(a)(2)(B)(ii), because it is based on a regulation that the Attorney General promulgated to authorize the Board to reopen proceedings, which in turn specifies that the power to grant or deny a motion to reopen is within the discretion of the Board. Pet. App. 4a-7a.

The Second, Third, Fifth, Eighth, Ninth, and Tenth Circuits have reached a contrary conclusion, holding that 8 U.S.C. 1252(a)(2)(B)(ii) does not bar judicial review of the Board's denial of a motion to reopen. See *Singh* v. *Mukasey*, 536 F.3d 149, 153-154 (2d Cir. 2008); *Jahjaga* v. *Attorney Gen. of the United States*, 512 F.3d 80, 82 (3d Cir. 2008); *Zhao* v. *Gonzales*, 404 F.3d 295, 302-303 (5th Cir. 2005); *Miah* v. *Mukasey*, 519 F.3d 784, 789 n.1 (8th Cir. 2008); *Medina-Morales* v. *Ashcroft*, 371 F.3d 520, 528-529 (9th Cir. 2004); *Infanzon* v. *Ashcroft*, 386 F.3d 1359, 1361-1362 (10th Cir. 2004).[3]

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[3] See also, *e.g.*, *Manzano-Garcia* v. *Gonzales*, 413 F.3d 462, 465-466 (5th Cir. 2005). Petitioner also cites (Pet. 19) *Zafar* v. *United States Att'y Gen.*, 461 F.3d 1357, 1361 (11th Cir. 2006), and *Thongphilack* v. *Gonzales*, 506 F.3d 1207, 1209-1210 (10th Cir. 2007). *Zafar* addressed whether Section 1252(a)(2)(B)(ii) bars judicial review of a challenge to a denial of a motion for continuance, and it therefore does not shed light on whether there is jurisdiction in this case, which is limited to the

The Second, Fifth, Eighth, and Ninth Circuits have explained that a decision by the Board to grant or deny a motion to reopen is not a decision "the authority for which is specified" under the relevant subchapter of the INA "to be in the discretion of the Attorney General," 8 U.S.C. 1252(a)(2)(B)(ii), because the Board's discretionary authority to act on a motion to reopen is specified in a regulation, not a statutory provision within the relevant subchapter itself. See *Singh* v. *Mukasey*, 536 F.3d at 153-154; *Miah*, 519 F.3d at 789 n.1; *Medina-Morales*, 371 F.3d at 528-529. The Tenth Circuit has reached the same result through a different analysis, concluding that Section 1252(a)(2)(B)(ii) does not preclude jurisdiction over a motion to reopen because "[a] motion to reopen * * * is separately authorized by 8 U.S.C. § 1229a(c)(6)" and because 8 U.S.C. 1252(b)(6), which directs courts to consolidate appeals of denials of motions to reopen with appeals of the order sought to be reopened, assumes that courts of appeals generally have jurisdiction to review denials of motions to reopen. *Infanzon*, 386 F.3d at 1361-1362. The Third Circuit has come to the same conclusion in the context of a motion to reissue a Board decision, which it treated as a motion to reopen. See *Jahjaga*, 512 F.3d at 82.[4]

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specific context of motions to reopen. *Thongphilack* does not address the question whether 8 U.S.C. 1252(a)(2)(B)(ii) precludes judicial review of the Board's denial of a motion to reopen.

[4] Contrary to petitioner's contention (Pet. 16), the decision below does not conflict with any decision of this Court. Petitioner never argued below that any ambiguities in 8 U.S.C. 1252(a)(2)(B)(ii) should be resolved in favor of the alien, and the court of appeals accordingly did not consider that issue. And the decision below does not conflict with this Court's decision in *INS* v. *St. Cyr*, 533 U.S. 289, 298 (2001). *St. Cyr* did not consider the question presented here, and, as the court of

b. After reexamining its prior filings on this issue, the government has concluded that the majority position represents the better reading of the statute. The relevant statutory text requires that the "authority" for the "decision or action" at issue—here, the denial of a motion to reopen immigration proceedings—be "specified under this subchapter [Subchapter II of Chapter 12 of Title 8] to be in the discretion of the Attorney General." 8 U.S.C. 1252(a)(2)(B)(ii).

Although the relevant statutory "subchapter" provides that "[a]n alien may file one motion to reopen," 8 U.S.C. 1229a(c)(7)(A); specifies that the motion "shall state the new facts that will be proven at a hearing to be held if the motion is granted, and shall be supported by affidavits or other evidentiary material," 8 U.S.C. 1229a(c)(7)(B); and provides a deadline for the filing of such a motion, 8 U.S.C. 1229a(c)(7)(C), it does not "specif[y]" that motions to reopen may be granted "in the discretion of the Attorney General." Rather, a regulation provides that the Board has broad discretion to grant or deny a motion to reopen. See 8 C.F.R. 1003.2(a) ("The decision to grant or deny a motion to reopen or reconsider is within the discretion of the Board * * * . The Board has discretion to deny a motion to reopen even if the party moving has made out a *prima facie* case for relief."); see also 8 C.F.R. 1003.23(b)(3) (IJ has discretion to grant or deny motion to reopen). Given the general presumption in favor of judicial review, *St. Cyr*, 533 U.S. at 298, and the terms of Section 1252(a)(2)(B)(ii), the government agrees with the majority of circuit courts that the Board's

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appeals explained, the statute does not preclude judicial review, because Congress expressly preserved review of constitutional claims and questions of law in 8 U.S.C. 1252(a)(2)(D). Pet. App. 9a-10a.

discretionary decision to deny a motion to reopen is not covered by the jurisdictional bar in 8 U.S.C. 1252(a)(2)(B)(ii). The government did not argue otherwise to the court below. See Gov't C.A. Br. 13-24; Gov't C.A. Supp. Br. 2-10.

2. As discussed above, the courts of appeals are divided with respect to the underlying question upon which petitioner seeks review. Despite petitioner's contrary assertion, Pet. 19-20, this Court's plenary consideration is not warranted at this time, because the conflict in lower-court authority may well resolve itself without this Court's intervention, and because the question concerns a narrow issue of reviewability that is unlikely to affect the outcome of many cases.

In its decision in this case, the Seventh Circuit overruled *Singh* v. *Gonzales*, *supra*, which held that Section 1252(a)(2)(B)(ii) does not preclude judicial review of the denial of a motion to reopen immigration proceedings. Pet. App. 10a. The opinion states that it had "been circulated * * * to all active judges" and that "[a] majority did not favor a hearing en banc"; the opinion also noted, however, that five judges had voted to rehear the case en banc. *Ibid.* There accordingly is some prospect that the Seventh Circuit may reconsider its ruling on the question presented en banc.

Further, the court below did not have the opportunity to fully consider the government's position on the question presented. Although the government did state its view that Section 1252(a)(2)(B)(ii) permits judicial review of a denial of a motion to reopen in supplemental briefing in this case, the government's analysis rested in large part on the court of appeals' prior decision in *Singh*. See Gov't C.A. Supp. Br. 4-7. Because the court of appeals in this case did not have the benefit of the gov-

ernment's statutory analysis on the question presented, it would be prudent for this Court to decline to address the issue at this time.

There is, moreover, no pressing need for review by this Court, because the issue concerns a narrow aspect of judicial review in the courts of appeals affecting only one procedural feature of the conduct of removal proceedings. The Board's denial of a motion to reopen is reviewable only for abuse of discretion, a highly deferential standard. *Doherty*, 502 U.S. at 323. Under that standard, the court will defer to the Board's ruling unless the ruling inexplicably departs from established policies, was made without rational explanation, or rested on an impermissible basis. See, *e.g.*, *Pelinkovic* v. *Ashcroft*, 366 F.3d 532, 536 (7th Cir. 2004).

The question whether such judicial review is available therefore is likely to affect the outcome of very few cases, as this case amply demonstrates: The Board manifestly did not abuse its discretion in denying the motion to reopen here. See pp. 14-16, *infra*. Nor is this case unusual in that respect: In fact, in almost all of the decisions petitioner cites that reviewed the Board's denial of a motion to reopen, Pet. 19, the courts concluded that the Board did not abuse its broad discretion in denying the motion to reopen. See *Singh* v. *Mukasey*, 536 F.3d at 154-155; *Miah*, 519 F.3d at 789-790; *Manzano-Garcia*, 413 F.3d at 469-470; *Medina-Morales*, 371 F.3d at 529-531; *Thongphilack*, 506 F.3d at 1209-1211. Review therefore is not warranted at this time.

3. Even if the issue were presently ripe for and warranted this Court's review, this case would be an unsuitable vehicle for resolving it.

a. First, the claim upon which petitioner sought to obtain review in the court of appeals—that the Board

abused its discretion in denying his motion to reopen immigration proceedings—is meritless. In his motion to reopen, petitioner argued that he had new, material, previously unavailable evidence that established his *prima facie* eligibility for asylum, withholding of removal, and CAT relief because he was "still a target of attack in Albania" due to his membership in the Democratic Party in the early 1990s. A.R. 48-50, 52-56.

After reviewing the evidence petitioner presented, the Board disagreed. Pet. App. 22a-26a. It explained that the Democratic Party "participates in the political system and holds seats in Parliament, and the current Prime Minister of Albania is from the Democratic Party." *Id.* at 24a. The Board also observed that "there ha[ve] been no major outbreaks of political violence since 1998"; that "neither the Government nor the major political parties engage in policies of abuse or coercion against their political opponents"; and that Albanian citizens have been exercising their right to "change their government peacefully" without any "people being killed or detained strictly for political reasons." *Id.* at 24a-25a & n.1.

Although the court of appeals dismissed the petition for review on jurisdictional grounds, it observed that it otherwise would review the denial of a motion to reopen for an abuse of discretion. The court noted that it would be "difficult to perceive an abuse of discretion" in this case, because petitioner's argument was that the Board erred in failing to explicitly address one affidavit, yet that affidavit "does not document a change in Albanian conditions since 1997; it is instead a historical narrative reaching back to the time when Albania was a totalitarian dictatorship." Pet. App. 3a.

It is well-settled that, in a motion to reopen based on changed country conditions, the movant must show that the conditions in his home country have changed between the time of the first removal order and the motion to reopen. See, *e.g.*, *Patel* v. *Gonzales*, 442 F.3d 1011, 1017 (7th Cir. 2006). The Board determined that petitioner failed to make that showing, and it stated that it had considered "the evidence [petitioner] submitted." Pet. App. 25a. And, although the court of appeals dismissed the appeal on jurisdictional grounds, it made clear its view that the Board's decision was not an abuse of discretion because petitioner had not demonstrated changed conditions that would make him eligible for asylum, withholding of removal, or CAT relief. *Id.* at 3a. Indeed, as the court noted, even if petitioner had established eligibility for such relief, the Board could nonetheless deny his motion to reopen in its broad discretion. See *ibid.* (citing 8 C.F.R. 1003.2(a)). Petitioner does not contend in his petition that the Board abused its discretion in denying his motion to reopen. There is, accordingly, no reasonable prospect that the court of appeals would conclude that the Board abused its discretion in denying petitioner's motion to reopen.[5]

b. Even if the court of appeals had exercised jurisdiction and determined that the Board should have reopened petitioner's proceedings, it is extremely unlikely

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[5] Petitioner also sought to reopen his case based on the approved visa petition, but he failed to present that claim to the Board, and the court of appeals therefore determined that he could not challenge the Board's decision on that basis. See Pet. App. 11a-12a; see 8 U.S.C. 1252(d)(1) (requiring alien to exhaust claim by raising it to the Board). Petitioner conceded that he had failed to exhaust that claim with the Board, Pet. C.A. Supp. Br. 2, and he does not attempt to revive that claim before this Court.

that the agency would grant petitioner asylum, withholding of removal, or relief under the CAT.

To establish eligibility for asylum, an alien must demonstrate past persecution or a well-founded fear of future persecution on account of a protected ground. See 8 U.S.C. 1101(a)(42)(A); 8 C.F.R. 1208.13(b)(1) and (2). To establish eligibility for withholding of removal, an alien must prove a "clear probability of persecution" upon removal, a higher standard than that required to establish asylum eligibility. *INS* v. *Cardoza-Fonseca*, 480 U.S. 421, 430-432 (1987). Under either standard, "acts of private citizens do not constitute persecution unless the government is complicit in those acts or is unable or unwilling to take steps to prevent them." *Ingmantoro* v. *Mukasey*, 550 F.3d 646, 650 (7th Cir. 2008) (citation omitted).

To obtain protection under the CAT, an alien must demonstrate that it is more likely than not that he would be tortured in the country of removal. 8 C.F.R. 1208.16(c). The acts alleged to constitute torture must be inflicted "by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity." 8 C.F.R. 1208.18(a)(1).

As the Board explained, petitioner cannot demonstrate that he would be persecuted or tortured by the government or with government acquiescence if returned to Albania. It is extremely unlikely that petitioner would be persecuted or tortured based on his membership in the Democratic Party, because members of that party hold important positions in the Albanian government, including the position of Prime Minister. Pet. App. 24a. Although petitioner contends (Pet. 12) that "he would be in danger of being beaten or murdered" if returned to Albania, the Board found that

"there ha[ve] been no major outbreaks of political violence since 1998"; that "neither the Government nor the major political parties engage in policies of abuse or coercion against their political opponents"; and that Albanian citizens have been exercising their right to "change their government peacefully" without any "people being killed or detained strictly for political reasons." Pet. App. 24a-25a & n.1. See, *e.g.*, *Bejko* v. *Gonzales*, 468 F.3d 482, 486-487 (7th Cir. 2006) (while "serious political repression existed in the past" in Albania, "there ha[ve] been no major outbreaks of political violence since 1998" and "the available evidence[] suggests that neither the Government nor the major political parties engage in policies of abuse or coercion against their political opponents"); *Hoxhallari* v. *Gonzales*, 468 F.3d 179, 188 (2d Cir. 2006) (denying petition for review of an active supporter of the Albanian Democratic Party based on the agency's finding that country conditions changed for the better in Albania "beginning in 1990").

Because petitioner is unlikely to be granted any of the underlying forms of relief that he seeks, this case is not a suitable vehicle for resolving the question whether 8 U.S.C. 1252(a)(2)(B)(ii) precludes judicial review of the denial of a motion to reopen. For that reason as well, further review is unwarranted.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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