No. 08-911

IN THE

Supreme Court of the United States

AGRON KUCANA, PETITIONER

v.

ERIC H. HOLDER, JR., ATTORNEY GENERAL
OF THE UNITED STATES

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

REPLY BRIEF

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Introduction

The government's brief disregards the strong statement by Judges Ripple, Rovner, Wood and Williams, that not rehearing *Kucana* en banc, "take[s] the Circuit down a path so contrary to the manifest intent of Congress and to the Supreme Court's understanding of that intent. If we take such a course, our decision will no doubt warrant close scrutiny by the Supreme Court. *See* Sup. Ct. R. 10." *Kucana v. Mukasey*, 533 F.3d 534, 542 (7th Cir. 2008), Ripple, Rovner, Wood and Williams, J.J., dissenting from the denial of a rehearing en banc. Certainly these four Seventh Circuit judges believe that certiorari should be granted.

I. REVIEW IS NOT PREMATURE

The government first argues that certiorari should be denied because review of the jurisdictional issue is premature. It is not premature to resolve the conflict created by the Seventh Circuit's decision in this case. Not only the petitioner, but the government and every other circuit which has reached the issue has concluded that jurisdiction exists. The government acknowledges that the Second, Fifth, Eighth, Ninth and Tenth Circuits have so held. The Third and Eleventh Circuits have also concluded that jurisdiction exists because the statute, 8 U.S.C. 1252(a)(2)(B), does not specify that the motion is excluded. *See Jahjaga v. Attorney General of the United States*, 512 F.3d 80, 82 (3d Cir. 2008); *Zafar v. U.S. Attorney General*, 461 F.3d 1357, 1361 (11th Cir. 2006). The Seventh Circuit is clearly wrong on a matter which affects the structural

integrity of the judicial system, jurisdiction, and which affects people's lives, the legal right to remain in this country.

Contrary to the government's downplaying the importance of the judicial procedure involved here, a motion to reopen, in *Dada v. Mukasey*, 128 S.Ct. 2307, 2318, 171 L.Ed.2d 178 (2008), this Court described motions to reopen as an "important safeguard" to "ensure a proper and lawful disposition." The government is not heeding that admonition.

The government notes that certiorari was recently denied in *Jezierski v. Holder*. But, it is this case, not *Jezierski*, where the Seventh Circuit took its jurisdictional position, overruling its prior decision in *Singh v. Gonzales*, 404 F.3d 1024 (7th Cir. 2005). In this case, the government filed a supplemental brief telling the Seventh Circuit that there was jurisdiction. In contrast, in *Jezierski*, the government acknowledged in its brief in opposition to the petition for certiorari that it "did not argue that the court lacked jurisdiction" in the Seventh Circuit. 2009 WL 420584, p.10, n.2.; *see* 2008 WL 2116454.

Kucana v. Mukasey is the leading case in the Seventh Circuit on this jurisdictional issue. In less than a year, it has been cited in twenty-two Seventh Circuit decisions, a number of which involved multiple cases consolidated on appeal. In contrast, because it is wrong on the scope of appellate jurisdiction, *Kucana v. Mukasey* has not been cited outside of the Seventh Circuit.

Of those twenty-two cases, *Kucana v. Mukasey* was dispositive of the entire case, or of one or more issues raised by the alien, fifteen times, including *Jezierski*. *Malik v. Holder*, 2009 WL 667224 (7th Cir. 2009); *Mohinudeen v. Holder*, 2009 WL 613021, 1 (7th Cir. 2009) ("Because this court lacks jurisdiction to review discretionary decisions by the Board, see Kucana v. Mukasey, 533 F.3d 534 (7th Cir.2008), we dismiss the petition for lack of jurisdiction."); *Chen v. Holder*, 2009 WL 465788, 1 (7th Cir. 2009) ("Because this court lacks jurisdiction to review discretionary decisions by the Board, see Kucana v. Mukasey, 533 F.3d 534 (7th Cir.2008), we dismiss the petition for lack of jurisdiction."); *Xu v. Holder*, 2009 WL 465105, 1 (7th Cir. 2009) ("But under Kucana v. Mukasey, 533 F.3d 534 (7th Cir.2008), we lack jurisdiction to review the BIA's discretionary determination that conditions have or have not changed."); *Duad v. U.S.*, 556 F.3d 592 (7th Cir. 2009); *Patel v. Mukasey,* 298 Fed.Appx. 525, 2008 WL 4866890 (7th Cir. 2008); *Adebowale v. Mukasey,* 546 F.3d 893 (7th Cir. 2008); *Johnson v. Mukasey*, 546 F.3d 403, 404 (7th Cir. 2008) ("Because (as we shall see) he does not present a question of law or a colorable constitutional claim, the denial of his motion, so far as it seeks reopening, is outside our jurisdiction to review. Kucana v. Mukasey, 533 F.3d 534 (7th Cir.2008)."); *Jezierski v. Mukasey,* 543 F.3d 886 (7th Cir. 2008); *Sharashidze v. Mukasey*, 542 F.3d 1177, 1179 (7th Cir. 2008) ("The jurisdictional bar against factual arguments defeats most of Sharashidze's other arguments. See Kucana v. Mukasey, 533 F.3d 534, 2008 WL 2639039 (7th Cir.2008)."); *Mitreva v. Mukasey,* 291 Fed.Appx. 780, 781-782, 2008 WL 4093567 (7th Cir. 2008); *Yan Zhen Yang v. Mukasey*, 289 Fed.Appx. 132, 2008 WL 3852744 (7th Cir. 2008); *Fontus v. Mukasey,* 290

Fed.Appx. 922, 923, 2008 WL 2906762, 1 (7th Cir. 2008) ("Fontus argues in this court that the Board abused its discretion by denying his motion to reopen. Claims of abuse of discretion in dealing with motions to reopen are outside this court's jurisdiction. Kucana v. Mukasey, 533 F.3d 534 (7th Cir.2008)"); *Rizvi v. Mukasey*, 285 Fed.Appx. 287, 289, 2008 WL 2906764, 1 (7th Cir. 2008) ("Rizvi contends that the Board abused its discretion by denying his third motion to reopen, but claims of abuse of discretion in dealing with motions to reopen fall outside this court's jurisdiction. Kucana v. Mukasey, 533 F.3d 534 (7th Cir.2008)"); *Huang v. Mukasey*, 534 F.3d 618 (7th Cir. 2008) (dismissing two of the four consolidated petitions for lack of jurisdiction).

The government suggests that it would be prudent to give it the opportunity to present its revised statutory analysis to the Seventh Circuit, so that the Seventh Circuit will change its position and overrule its decision in this case. Aside from that not providing Kucana with the appellate process to which he is entitled, the government's suggestion is wholly unrealistic.

Indeed, the trend in the Seventh Circuit is to no longer even publish these decisions dismissing for lack of jurisdiction, sometimes deeming oral argument unnecessary. *See Malik v. Holder*, 2009 WL 667224 (7th Cir. 2009); *Mohinudeen v. Holder*, 2009 WL 613021 (7th Cir. 2009); *Chen v. Holder*, 2009 WL 465788 (7th Cir. 2009); *Xu v. Holder*, 2009 WL 465105, 1 (7th Cir. 2009). In other words, finding no jurisdiction, based on *Kucana v. Mukasey*, has become a matter of routine in the Seventh Circuit.

As noted above, in reaching its decision in this case, the Seventh Circuit overruled its prior decision in *Singh v. Gonzales*, *supra*. It knew its holding placed it in "a minority within the minority, giving the executive branch the authority to insulate its decisions from judicial review where there is no clear indication in the statute that Congress intended to strip [courts] of [their] jurisdiction" and that its position was "isolated." *Kucana v. Mukasey*, 533 F.3d 534, 540 (7th Cir. 2008), Cudahy, J. dissenting. The Seventh Circuit was undoubtedly aware of the analysis employed by the other circuits to reach their contrary conclusions. The government's statutory analysis is not unique. An explanation from the government will not result in an epiphany.

Furthermore, the government has already had the opportunity to provide its revised statutory analysis to the Seventh Circuit. In *Malik v. Holder*, *supra*, the Seventh Circuit ordered the government to brief the jurisdictional issue. *Id.*, Docket No. 08-2846, Item 4, July 25, 2008. In response, the government footnoted its disagreement with the *Kucana* decision, but cited it as controlling precedent to dismiss for lack of jurisdiction. *Id.*, Docket No. 08-2846, Item 17, Dec. 22, 2008. That brief was filed on December 22, 2008, more than two months after the petition for certiorari was filed in this case, and more than a month after the petition for certiorari was filed in *Jezierski*.

So, the government has already had the opportunity to present its revised statutory analysis to the Seventh Circuit, but chose not to do so. In what case would the government choose to really argue the jurisdictional issue to the Seventh Circuit and when

would that be? In its brief, the government seems to tie the significance of appellate jurisdiction to the alien's ultimate chance of success on the merits of the underlying substantive issue. (See Section II, *infra*.) It is likely to be a long wait before a case arises where the government deems that condition to be met. The reality is that the government is satisfied with the Seventh Circuit's results, the alien does not get relief, even though it ethically acknowledges disagreement with the way in which the Seventh Circuit reaches those results. The government's argument that certiorari is premature rings hollow.

II. THE GOVERNMENT'S EFFORT TO TIE CERTIORARI TO THE PETITIONER'S ULTIMATE CHANCE FOR SUCCESS ON THE MERITS IS INAPPROPRIATE.

The government's second argument is that Kucana will ultimately lose even if he receives an appellate review. That argument is inappropriate. This is neither the time, nor the forum, to argue the underlying merits of Kucana's motion to reopen the immigration proceedings or of his right remain in the United States. (However, it should be noted that Judge Easterbrook's opinion appears to mischaracterize the affidavit of Professor Fisher submitted in support of Kucana's motion. Compare Appendix A, p. 3a and JA 113-15 and 120-21.)

The question presented for review is purely one of federal jurisdiction. Therefore, even if certiorari is granted, it would be entirely improper to argue the merits of the underlying motion to reopen or to argue whether conditions in Albania are such that Kucana is

legally entitled to remain in this Country. *Izumi Seimitsu Kogyo Kabushiki Kaisha v. U.S. Phillips*, 510 U.S. 27, 31-34, 114 S.Ct. 425, 126 L.Ed2d 396 (1993); S.Ct. R.14.1(a). Since the substance of Kucana's arguments on those issues are outside the scope of the petition before this Court, and would remain outside the scope of this Court's review if certiorari is granted, then it logically follows that they should not factor into determining whether to grant certiorari.

Just as the critical importance of a fair trial is never affected by prejudging guilt, so too the importance of jurisdiction and access to appellate review can never be affected by prejudging whether the petitioner will prevail. The government's argument to the contrary should be rejected.

III AT A MINIMUM, LOWER COURT DECISION MUST BE VACATED

Even if the Court does not choose to grant full review, at a minimum, the Court should grant the petition, vacate the lower court decision, and remand for reconsideration of the government's decision. *See Lawrence v Chater*, 516 U.S. 163, 174-75, 116 S.Ct. 604, 133 L.Ed.2d 545 (1996) (per curiam).

CONCLUSION

In light of the need for uniformity among the circuits on an important matter of federal jurisdiction, the petition for certiorari should be granted.

Respectfully submitted,

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