No. 09-664

In the Supreme Court of the United States

LUIS ENRIQUE ARAMBULA-MEDINA,
Petitioner,
v.
ERIC H. HOLDER, JR.,
UNITED STATES ATTORNEY GENERAL,
Respondent.

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

REPLY TO BRIEF IN OPPOSITION

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The most telling aspect of the government's brief in opposition is that which it does *not* oppose. Nowhere does the government contest that the courts of appeals are divided about whether they have jurisdiction to review decisions by the Board of Immigration Appeal ("BIA") to "streamline" certain cases for single-member review under 8 C.F.R. §§ 1003.1(e)(4)–(6). Nor does the government respond to the systemic problems created by this streamlining system, including that streamlining has overwhelmed the courts of appeals with immigration appeals. *See* Pet. at 24–31. Rather, the government's opposition focuses on two arguments: (1) that the instant case presents a poor vehicle for this Court's resolution of that conflict, and (2) that this Court's intervention is not warranted because, on the merits, streamlining decisions should be unreviewable. Neither premise is correct. This Court should therefore grant the petition for writ of certiorari.

I. The Instant Case Presents An Ideal Vehicle Through Which This Court Can Review An Undisputed Circuit Split.

1. The government argues that Petitioner failed to raise below the question of whether the Tenth Circuit had jurisdiction to review the BIA's streamlining decision in his case—a curious position, given the detailed briefing on the subject before the Tenth Circuit. In his opening brief below, Petitioner argued repeatedly that the BIA erred in resolving his appeal through a single-member affirmance without opinion ("AWO"). *See, e.g.*, Pet. C.A. Br. at 36

("Again, [prior precedent] did not provide for 'Affirmance without Opinion' by the single Board panel member under the criteria identified in 8 C.F.R. 1003.1(a)(7)(ii)."); *see also* Pet. at 5. In response, the government below devoted several pages of its response brief to the argument that the Tenth Circuit lacked jurisdiction to review the AWO procedures because the court lacked jurisdiction over the merits of Petitioner's immigration appeal. See Gov't C.A. Br. at 16–19. In making this argument, the government cited much of the authority it now references in its opposition before this Court, including 8 U.S.C. § 1252's removal of appellate jurisdiction over discretionary BIA decisions and *Tsegay v. Ashcroft*, 386 F.3d 1347 (10th Cir. 2004). *See* Gov't C.A. Br. at 17. In reply, Petitioner pointed to § 1252(a)(2)(D)'s exception for constitutional and other legal challenges, just as he does before this Court. *See* Pet. C.A. Reply Br. at 2.

As petitioner has already explained, the arguments advanced by the government and accepted by the Tenth Circuit below are one side of an acknowledged circuit split—a split implicated by the government's arguments below, and the very split Petitioner now asks this Court to resolve. Pet. at 8–19. It is disingenuous for the government now to suggest the issue was never raised below, after it specifically briefed the issue before the lower court in response to Petitioner's arguments that the BIA erred in resolving his appeal through an affirmance without opinion. That Petitioner did not anticipatorily raise the jurisdictional question in his opening brief below is irrelevant—he challenged the BIA's streamlining decision, the government objected that

courts of appeals lacked jurisdiction over streamlining issues, and the issue was submitted to the Tenth Circuit.

Given that the jurisdictional question was raised below, it is of no importance that the Tenth Circuit's decision below does not discuss the subject in great detail. As long as an issue is pressed below, review in this Court is appropriate, even if the court of appeals fails to pass upon the issue. *See United States v. Williams*, 504 U.S. 36, 41 (1992) (grant of certiorari is precluded "only when 'the question presented was not pressed or passed upon below.'").

Nor does the brevity of the Tenth Circuit's opinion provide any practical barrier to this Court's review of the question presented. Although the Tenth Circuit focused its opinion on due-process guarantees rather than upon the jurisdictional precedent discussed in the petition, it nevertheless did address the streamlining issue through its holding that streamlining is permitted by regulation and consistent with the Constitution. *See* Pet. App. 9a. Although not discussed in the decision below, the contours of the circuit split regarding streamlining jurisdiction are well defined elsewhere, as they have been articulated in detail throughout the opinions of at least nine circuits. *See* Pet. at 8–19. Having already spoken clearly to the issue in *Batalova* and *Tsegay*, the Tenth Circuit did not need to repeat its analysis in Petitioner's case as well. Rather, the decision below and the briefing which led to it provide this Court with all the basis it needs to use Petitioner's case to finally and fairly resolve the question presented.

2. As Petitioner anticipated, the government has adopted a narrow view of the circuit split in a further effort to evade review. *Compare* Br. in Opp. at 11–13 *with* Pet. at 17–19. To do so, the government strives to assign legal significance to a mere coincidence—the fact that each circuit that has held it has jurisdiction to review streamlining decisions has done so in a case where the court also possessed jurisdiction over some other issue arising out of the merits of the BIA's decision. But nothing in the relevant opinions supports the distinction the government has attempted to draw.

As explained in the petition, not one of the circuits that have categorically asserted jurisdiction to review streamlining regulations has suggested this question is influenced by the presence or absence of jurisdiction over the underlying merits of an appeal. Pet. at 9–12; 17–19. Rather, the five circuits that have held they have jurisdiction to review immigration streamlining regulations have done so because application of the streamlining regulations is *not* "committed to agency discretion" under the Administrative Procedure Act. *See Smriko v. Ashcroft*, 387 F.3d 279 (3d Cir. 2004); *Zhu v. Ashcroft*, 382 F.3d 521 (5th Cir. 2004); *Haoud v. Ashcroft*, 350 F.3d 201 (1st Cir. 2003); *Denko v. INS*, 351 F.3d 717, 731–732 (6th Cir. 2003); *Georgis v. Ashcroft*, 328 F.3d 962, 967 (7th Cir. 2003).

For example, in *Smriko*, the Third Circuit held that "the issues addressed by single BIA members under § 1003.1(e)(4)(i) of the streamlining regulations are not committed to agency discretion and that the resolutions of those issues are judicially reviewable." *Smriko*, 387 F.3d at 294. In the same

opinion, the *Smriko* Court also reviewed a merits question—whether the Appellant had been convicted of a crime of moral turpitude. But the court discussed the merits issue only after first fully addressing the streamlining-jurisdiction issue. The Third Circuit never suggested the merits inquiry was in any way relevant in determining whether the court had jurisdiction to review the Board's streamlining procedures. Rather, the court's jurisdictional conclusion was rooted solely in the APA's standard for judicial review of an agency's procedural determinations—a standard that in no way relates to the merits of Petitioner's appeal. The same is true of the other leading cases supporting appellate review of streamlining decisions.

Challenges to the BIA's application of the streamlining regulations arise in all sorts of immigration-related appeals. In some of these cases, the courts of appeals also possess jurisdiction to review some other challenged aspect of the BIA's final decision. In others, they do not. But in each case, the streamlining question is the same: Whether judicial review of the application of the streamlining regulations is available under the APA, or is barred because the decision is committed to agency discretion. Thus, this case is the ideal vehicle for this Court to resolve the longstanding, intractable, and undisputed circuit split regarding the availability of streamlining jurisdiction.

II. The Government's Incorrect Merits Arguments Provide No Sound Reason For Denying Review.

With these procedural objections resolved, the government's only remaining argument is that this Court should deny review because, in the government's view, the Tenth Circuit was correct. Although the government makes this claim in a variety of ways, the arguments reduce to two contentions: (1) that judicial review of Petitioner's streamlining determination was statutorily barred by 8 U.S.C. § 1252(a)(2)(B)(i), and (2) that streamlining determinations are committed to agency discretion by law. Petitioner anticipated both of these arguments and addressed them in detail in Part IV of his petition, which explained both that (1) no statute, including § 1252(a)(2)(B), purports to eliminate judicial review of streamlining determinations, and (2) the regulations establish a meaningful legal framework that constrains agency decision-making in a way susceptible to judicial review. *See* Pet. at 31–36. As a result, only a short response to each contention is warranted.

1. The government argues that courts lack jurisdiction to review the AWO procedures because 8 U.S.C. § 1252(a)(2)(B)(i) "expressly deprived the court of appeals of jurisdiction to review the final agency action." Br. in Opp. at 15. Although the APA provides that judicial review of agency action can be barred by statute, here the government misinterprets the text of 8 U.S.C. § 1252.

The government's principal claim is that, because § 1252 deprives courts of appeals of the juris-

diction to review discretionary cancellation-of-removal decisions, the statute deprives the courts of appeals of jurisdiction to review any issues arising out of such cancellation proceedings. Br. in Opp. at 15. But a statutory bar on reviewing *certain questions* arising out of a final agency action does not somehow mean that no final action exists. Rather, as Petitioner has already explained, § 1252(a)(2)(D) preserves judicial review over "constitutional claims or questions of law" arising out of cancellation proceedings—questions that are judicially reviewable upon the BIA's resolution of an immigrant's administrative appeal. Pet. at 32–33. Section 1252(a)(2)(B) is therefore not a bar to *all* questions arising out of final agency actions on immigration appeals, but only bars review of specific discretionary decisions such as whether a petitioner qualifies for cancellation of review.

The crux of Petitioner's argument is that streamlining decisions are "questions of law," and that judicial review of such legal questions falls comfortably within § 1252(a)(2)(D)'s preservation clause. The government therefore cannot evade review by claiming that operation of § 1252 somehow bars review of any and all issues arising out of the BIA's final agency action. Rather, the BIA's affirmance without opinion represented the agency's final action with respect to Petitioner's cancellation petition, and legal questions arising out of that petition are judicially reviewable under § 1252(a)(2)(D). The decision to streamline, as an antecedent legal question, merges with this final action for purposes of review. *See* 5 U.S.C. § 704 ("A preliminary, procedural, or intermediate agency action or ruling not

directly reviewable is subject to review on the review of the final agency action."); *Smriko*, 387 F.3d at 291 ("[R]eview of a final agency action, generally speaking, encompasses all of a petitioner's contentions of legal error by the agency at any stage of the agency's proceedings.").

The government's only response to this argument is a protest that review of streamlining decisions would somehow constitute an end-run around § 1252(a)(2)(B)'s ban on review of merits of the BIA's discretionary decision whether or not to grant a cancellation of removal. *See* Br. in Opp. at 15–16. But, as the circuit courts have recognized, many of the streamlining factors raise legal questions distinct from the merits of an immigration appeal. *See, e.g.*, *Smriko*, 387 F.3d at 292 ("[T]hese criteria present 'the kinds of issues [courts] routinely consider in reviewing cases.'" (citation omitted)). Just as an appellate court in a criminal case can review challenges to evidentiary rulings or the quality of counsel's representation without intruding into the merits of the jury's verdict, courts may consider streamlining determinations without delving into the merits of a cancellation-of-removal appeal. *Cf. id.* at 297 (remanding improperly streamlined case for full-panel BIA review "rather than usurping the role of the BIA and establishing a precedent that the Board's experience might counsel against").

Thus, nothing in § 1252(a)(2)(B) prevents courts of appeals from reviewing streamlining determinations. Rather, the statute provides an express carve-out for appellate review of legal issues such as whether the BIA correctly applied the streamlining regulations—an issue appellate courts can review

without intruding upon the BIA's protected role as the arbiter of the discretionary merits of cancellation-of-removal petitions. *See* 8 U.S.C. § 1252(a)(2)(D).

2. Finally, the government insists it is settled law that "the Board's application of streamlining regulations is committed to agency regulations by law," that application of affirmance-without-opinion procedures is "not susceptible to a 'meaningful and adequate standard of review,'" and that a Board member's decision regarding whether an opinion is substantial enough to warrant a written opinion falls within agency discretion. *See* Br. in Opp. at 13–15. Petitioner has already explained, however, how the streamlining regulations set forth meaningful legal standards that are susceptible to judicial review—a position supported both by this Court's precedent and the views of several circuits. *See* Pet. at 9–12, 33–36. Here, where no statute "purports to commit streamlining decisions to agency discretion by law, or to establish standards unsusceptible to judicial review," judicial review is available under the APA. See *Quinteros-Mendoza v. Holder*, 556 F.3d 159, 162 (4th Cir. 2009).

The government's argument to the contrary is simply a recapitulation of the positions the Eighth Circuit expressed in *Ngure v. Ashcroft*, 367 F.3d 975 (8th Cir. 2004). See Br. in Opp. at 13–15. Each of the *Ngure* Court's positions was addressed and disputed by the Third Circuit in *Smriko*. *See* 387 F.3d at 293, 294, 296. Although the government is free to take a side in the circuit split on these issues, such an approach merely proves the existence of the split at issue.

Without question, Petitioner and the government disagree about the merits of the question presented. But this is no reason to deny review. Rather, given the undisputed division among the circuits, this Court's intervention is required.

CONCLUSION

For the reasons set forth above and in the petition for a writ of certiorari, the petition should be granted.

Respectfully submitted,

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