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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,

Respondent.

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

BRIEF OF NATIONAL IMMIGRANT JUSTICE CENTER, AMERICAN IMMIGRATION LAWYERS ASSOCIATION, ASIAN AMERICAN JUSTICE CENTER, FLORIDA IMMIGRANT ADVOCACY CENTER, HEBREW IMMIGRANT AID SOCIETY, IMMIGRANT LAW CENTER OF MINNESOTA, MEXICAN AMERICAN LEGAL DEFENSE AND EDUCATIONAL FUND, NATIONAL IMMIGRATION LAW CENTER, AND NORTHWEST IMMIGRANT RIGHTS PROJECT AS *AMICI CURIAE* IN SUPPORT OF PETITIONER

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INTEREST OF *AMICI CURIAE*[1]

Amicus Heartland Alliance's National Immigrant Justice Center ("NIJC") is a non-profit organization accredited by the Board of Immigration Appeals ("BIA") to provide immigration assistance since 1980. NIJC promotes human rights and access to justice for immigrants, refugees, and asylum seekers through legal services, policy reform, impact litigation, and public education. NIJC provides legal education and representation to low-income immigrants, asylum seekers, and refugees, including survivors of domestic violence and victims of crimes, detained immigrant adults and children, and victims of human trafficking, as well as immigrant families and other non-citizens facing removal and family separation. In fiscal year 2008, NIJC provided legal services to more than 8,000 non-citizens.

Amicus American Immigration Lawyers Association ("AILA") is a national association with over 11,000 members throughout the United States, including lawyers and law school professors who practice and teach in the field of immigration and nationality law. AILA seeks to advance the administration of law pertaining to immigration, nationality, and naturalization; to cultivate the jurisprudence of the immigration laws; and to facilitate the administration of justice and elevate the

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[1] Pursuant to Supreme Court Rule 37.6, *amici curiae* state that no counsel for any party authored this brief in whole or in part and that no entity or person, aside from *amici curiae*, its members, and its counsel, made any monetary contribution towards the preparation and submission of this brief. Pursuant to Supreme Court Rule 37.3, counsel of record for all parties have consented to the filing of this brief in letters on file with the Clerk's office.

standard of integrity, honor, and courtesy of those appearing in a representative capacity in immigration and naturalization matters. AILA's members practice regularly before the Department of Homeland Security and before the Executive Office for Immigration Review (immigration courts), as well as before the U.S. District Courts, the U.S. Courts of Appeals, and the Supreme Court of the United States.

Amicus Asian American Justice Center ("AAJC") is a national non-profit, non-partisan organization whose mission is to advance the human and civil rights of Asian Americans. Collectively, AAJC and its Affiliates, the Asian American Institute, Asian Law Caucus, and the Asian Pacific American Legal Center of Southern California, have over 50 years of experience in providing legal public policy, advocacy, and community organization. A nationally recognized voice on immigration and immigrant rights on behalf of Asian Americans, AAJC has long spearheaded advocacy and education in the community on matters affecting families and individuals in immigration proceedings.

Amicus Florida Immigrant Advocacy Center ("FIAC"), a not-for-profit law firm, was founded in 1996 when federal funding restrictions limited Legal Services' ability to handle immigration cases on behalf of indigent clients. FIAC's mission is to protect and promote the basic human rights of immigrants of all nationalities. FIAC serves the most vulnerable immigrant populations through direct services, federal court litigation, impact advocacy, and education. For more than twelve years, FIAC attorneys have represented individual clients in removal proceedings before immigration judges, the

Board of Immigration Appeals ("BIA"), and the U.S. Courts of Appeals.

Since its founding in 1881, the central mission of *Amicus* Hebrew Immigrant Aid Society ("HIAS") has been to rescue Jews and others fleeing persecution and to assist them to start their lives anew in peace and security in the United States and elsewhere. In fulfillment of this mission, HIAS maintained staff at Ellis Island to assist individuals through the immigration process, including representation in exclusion proceedings. More recently, HIAS attorneys and accredited representatives have provided legal representation to asylum seekers in immigration courts in the New York area, including at immigration detention facilities. HIAS has successfully represented numerous asylum seekers throughout the appellate process, up to and including the U.S. Courts of Appeals. Through this experience we have learned how difficult it can be for asylum seekers to present sufficient evidence for their claims to be adjudicated, and how often it is necessary to go through several levels of review before all evidence is presented and considered and a just decision is reached. Therefore, HIAS believes it is crucial that individuals fleeing persecution have the opportunity for full judicial review of their cases, including when necessary the ability to move for their cases to be reopened for further review when the evidence and circumstances warrant.

Amicus Immigrant Law Center of Minnesota is a Minnesota-based organization that engages in advocacy, direct services, education, outreach, and impact litigation to protect the civil rights of immigrants.

Amicus Mexican American Legal Defense and Educational Fund ("MALDEF") is a national civil

rights organization established in 1968. Its principal objective is to promote the civil rights and equality of treatment of Latinos living in the United States. MALDEF's mission includes a commitment to pursuing political and civil equality and opportunity through advocacy, community education, and the courts. MALDEF therefore has an interest in the fair, predictable, and even-handed interpretation and enforcement of the nation's immigration laws.

Amicus National Immigration Law Center ("NILC") is a nonprofit legal advocacy organization dedicated to advancing and promoting the rights of low-income immigrants and their family members. NILC conducts trainings, produces legal publications, and provides technical assistance to nonprofit legal assistance organizations across the country concerning immigrants' rights. NILC also conducts litigation to promote the rights of low-income immigrants in the areas of immigration law, employment, and public benefits. A major concern of the organization is to ensure that the government treats immigrants with fairness and due process. NILC has a direct interest in the issues in this case.

Amicus Northwest Immigrant Rights Project ("NWIRP") is a non-profit legal organization dedicated to the defense and advancement of the rights of noncitizens in the United States. NWIRP provides direct representation to low-income immigrants who are applying for immigration and naturalization benefits and to persons who are placed in removal proceedings. NWIRP works both by providing direct representation to indigent persons in removal proceedings and by participating in legal orientation programs for detained individuals in removal proceedings who are unable to obtain direct representation.

SUMMARY OF THE ARGUMENT

Section 1252(a)(2)(B)(ii) of Title 8 of the United States Code limits federal court jurisdiction to review certain discretionary decisions made by the immigration courts. Contrary to the Seventh Circuit's holding below, however, the proper legal construction of this provision does not implicate judicial review of motions to reopen immigration proceedings. Rather, the statutory language confirms that Congress intended the courts of appeals to retain oversight of these important rulings.

This brief underscores the baneful consequences of adopting the Seventh Circuit's jurisdictional view of § 1252(a)(2)(B)(ii) in the reopening context. There is a critical need for judicial review of the BIA's denials of motions to reopen, particularly in light of the recognized failures of the immigration courts in recent years. See *infra* at 8-9.

This Court has recognized that a motion to reopen is an important safeguard of immigrant rights. *Dada* v. *Mukasey*, 128 S. Ct. 2307, 2318 (2008). As the case studies presented below demonstrate, judicial review of agency decisions is essential to ensure the proper resolution of individual cases and to protect immigrants from the severe consequences of an erroneous agency ruling. There is a substantial national interest in avoiding errors in asylum and other immigration cases; to this point, the government itself agrees that Congress did not intend to foreclose judicial review of motions to reopen. See Gov't Br. at 13. Thus, this Court should be hesitant to presume, as the Seventh Circuit did in the decision below, that Congress intended to dispense with this important check on agency decision-making where it has not clearly stated a desire to do so.

ARGUMENT

The Illegal Immigration Reform and Immigrant Responsibility Act of 1996 ("IIRIRA"), Pub. L. No. 104-208, Div. C, 110 Stat. 3009, 3009-546 to -724, stripped the federal courts of jurisdiction to review BIA decisions where the agency's authority is "specified" under the relevant statutory subchapter to be within the Attorney General's discretion. 8 U.S.C. § 1252(a)(2)(B)(ii). Motions to reopen do not fall within this limited category. IIRIRA codified the right to file a motion to reopen and set forth certain procedural guidelines for filing such motions at 8 U.S.C. § 1229a(c)(7). The authority of the Attorney General to grant or deny motions to reopen is notably absent from this statutory provision. Rather, the Attorney General's discretion over these motions is imparted exclusively by regulation. 8 C.F.R. § 1003.2(a). Because nothing in the relevant statutory subchapter, 8 U.S.C. §§ 1151-1381, specifies that motions to reopen are within the Attorney General's discretion, by its own terms, § 1252(a)(2)(B)(ii) does not apply.

Amici concur with petitioner's legal argument, that the Seventh Circuit erred in holding that § 1252(a)(2)(B)(ii) applies to the BIA's denial of a motion to reopen. This brief is intended to illustrate the effects that would follow from the Court's adoption of the Seventh Circuit's interpretation of § 1252(a)(2)(B). Looking at a broad range of immigration rulings across the federal circuits, it catalogues the many instances in which judicial review was necessary to the correct disposition of the case.

As a practical matter, an adverse ruling by an immigration judge ("IJ") or the BIA can result in severe consequences to the individual immigrant or

asylum-seeker, "in loss of both property and life, or of all that makes life worth living." *Ng Fung Ho* v. *White*, 259 U.S. 276, 284 (1922) (Brandeis, J.); see also *Bridges* v. *Wixon*, 326 U.S. 135, 147 (1945). Judges, legal scholars, and practitioners agree that widespread problems have at times plagued the immigration system, calling into doubt the accuracy of administrative rulings in particular cases. See Michele Benedetto, *Crisis on the Immigration Bench*, 73 Brook. L. Rev. 467, 469 (2008).

None of these erroneous rulings would be subject to judicial review under the construction of § 1252(a)(2)(B)(ii) adopted by the Seventh Circuit, which would preclude review of *all* claims underlying motions to reopen (subject to the limited exception in subparagraph (D) for "questions of law").[2] Indeed, many prior decisions of the Seventh Circuit—including those in which the court concluded that the "record d[id] not come close to supporting [the BIA's] finding," *Gaberov* v. *Mukasey*, 516 F.3d 590, 596 (7th Cir. 2008)—would be outside the court's jurisdiction under its current reading of § 1252(a)(2)(B)(ii). To provide immigrants with a full and fair opportunity to present their claims, this Court should hold, in accordance with the plain language of § 1252(a)(2)(B)(ii), that the courts of appeals retain

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[2] The Seventh Circuit interprets § 1252(a)(2)(B) as applying not only to discretionary decisions, but to anything related to discretionary applications. Pet. App. 8a-9a. The Seventh Circuit's view is erroneous and conflicts with the majority of the circuits. *See generally* Br. *Amicus Curiae* of ACLU 12-18; *cf., e.g.*, *Sepulveda* v. *Gonzales*, 407 F.3d 59, 62 (2d Cir. 2005). This brief illustrates the effects that would follow from adoption of the Seventh Circuit's interpretation of § 1252(a)(2)(B), of which only one aspect (*i.e.*, whether § 1252(a)(2)(B)(ii) applies to motions to reopen) is included within the question presented and has been briefed by the parties.

jurisdiction to review and correct errors by the BIA in addressing motions to reopen.

I. FLAWS IN THE AGENCY'S ADJUDICATIVE PROCESS STRONGLY SUGGEST THE NEED FOR JUDICIAL REVIEW.

It seems beyond cavil that the immigration system has, on occasion, issued final administrative decisions that are biased, unreasoned, plainly erroneous, and that "fall[] below the minimum standards of legal justice." *Benslimane* v. *Gonzales*, 430 F.3d 828, 829-30 (7th Cir. 2005). Without wishing to generalize, the existence of such decisions suggests the utility of continued federal court review over immigration decisions.

For instance, in *Wang* v. *Att'y Gen.*, 423 F.3d 260 (3d Cir. 2005), the Third Circuit noted "a disturbing pattern of IJ misconduct" and reprimanded the IJ for failing to function as a neutral and impartial arbiter. *Id.* at 268. In *Galina* v. *INS*, 213 F.3d 955 (7th Cir. 2000), the Seventh Circuit found the BIA's analysis "woefully inadequate" and the result of "a rather astounding lapse of logic." *Id.* at 958-59. In *Fiadjoe* v. *Att'y Gen.*, 411 F.3d 135 (3d Cir. 2005), the Third Circuit granted a Ghanaian woman's petition and remanded the case for rehearing before a different IJ because of the "hostile" and "extraordinarily abusive" nature of the initial hearing. *Id.* at 154, 163. The court also found that the IJ mischaracterized petitioner's testimony and based his decision on factual conclusions that were "totally wrong." *Id.* at 155-57; see also *Shah* v. *Att'y Gen.*, 446 F.3d 429, 430, 436-37 (3d Cir. 2006) (the IJ's factual conclusions, which the BIA summarily affirmed, were "entirely unsupportable" and "disturbing," and based on an "apparent zeal to deny relief to petitioner"); *Niam* v. *Ashcroft*, 354 F.3d 652, 654-55 (7th Cir. 2004)

(criticizing IJ analysis which flatly failed to engage with the evidence presented to him).

The BIA has proven to be an unreliable check on such agency errors. Beginning in 2002, the BIA implemented streamlined review procedures that often resulted in only a cursory review of IJ decisions by the BIA. See, *e.g.*, *Berishaj* v. *Ashcroft*, 378 F.3d 314, 331 (3d Cir. 2004); *Niam*, 354 F.3d at 656; Evelyn H. Cruz, *Double the Injustice, Twice the Harm: The Impact of the Board of Immigration Appeals's Summary Affirmance Procedures*, 16 Stan. L. & Pol'y Rev. 481, 505-08 (2005); Lindsey R. Vaala, *Bias on the Bench*, 49 Wm. & Mary L. Rev. 1011, 1021 (2007). Aimed at reducing the large backlog of BIA cases, the 2002 procedural changes made single-member review of IJ decisions the default, permitted summary affirmance without opinion in most cases, and reduced the BIA's scope of review to reach fewer claims for relief. Vaala, *supra*, at 1018-20.

These changes had a measurable and negative impact on administrative appeals. They led to a vast increase in the number of summary affirmances, see Benedetto, *supra*, at 478 (noting a 57 percent increase in summary affirmances in a seven-month period in 2002), and a sharp decrease in BIA decisions granting relief to immigrants, see *id.* at 479 (finding BIA decisions grating relief to immigrants fell from 25 percent to 10 percent). In the absence of meaningful administrative review of immigration rulings, agency errors have come directly to the federal courts. See *id.*

II. THE AGENCY'S HISTORY OF EGREGIOUS ERRORS IN ADDRESSING MOTIONS TO REOPEN CONFIRMS THE NEED FOR JUDICIAL REVIEW.

The cases highlighted below show that the agency frequently denies motions to reopen based on erroneous factual findings and flawed reasoning. In such cases, the courts of appeals provide the only opportunity to obtain a proper and lawful disposition of an immigrant's claim for relief. The practical consequences of barring judicial review of these decisions would be severe.

A. Adoption Of The Seventh Circuit's Rule Would Effectively Eliminate Review Over *In Absentia* Removal Orders.

An order of removal issued *in absentia* may not be administratively appealed, see *Gonzalez-Lopez*, 20 I. & N. Dec. 644, 646 (BIA 1993), but may be rescinded upon a motion to reopen showing that notice was improper or ineffective, or that "exceptional circumstances" excused the failure to appear. 8 U.S.C. § 1229a(b)(5)(C); 8 C.F.R. § 1003.23(b)(4)(ii). The BIA has nevertheless denied motions to reopen *in absentia* orders in cases in which this standard was plainly satisfied, including when the individual missed the hearing because he was refused entrance to the courthouse, see *Twum* v. *INS*, 411 F.3d 54, 57 (2d Cir. 2005), or because immigration officials sent notice of the hearing to the wrong address. See *Qumsieh* v. *Ashcroft*, 134 F. App'x 48, 48 (6th Cir. 2005). In such cases, the BIA wrongly deprived the immigrant of the opportunity to present his claims,

and appellate review was necessary to correct the injustice.[3]

One such case is *Ba* v. *Holder*, 561 F.3d 604 (6th Cir. 2009), where the BIA denied a motion to reopen filed by a citizen of Mauritania, who was ordered removed *in absentia* after she failed to appear for a hearing on her claims for asylum, despite compelling evidence that she never received notice of the hearing. *Id.* at 605-06. Reversing the BIA's order, the Sixth Circuit reasoned that the petitioner's act of notifying immigration officials of her change of address subsequent to the missed hearing date (but prior to learning she had been ordered removed *in absentia*) dispelled any notion that she willfully failed to appear. *Id.* at 607-08.

Similarly, in *Qumsieh*, a Jordan immigrant was ordered removed *in absentia* notwithstanding a factual record that clearly demonstrated that the petitioner did not receive notice of the hearing. 134 F. App'x at 51-52. The immigration court sent the notice to appear to the wrong address, even though the petitioner's attorney timely advised immigration officials of his client's new address, and then failed to correct its mistake when the notice was returned as undeliverable prior to the hearing date. *Id.* at 49. The court of appeals held that the motion to reopen should have been granted because the petitioner did not receive the requisite notice. *Id.* at 52.

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[3] Motions to reopen seeking recession of removal orders entered *in absentia* are subject to different procedural requirements than other motions to reopen. *Armendarez-Mendez*, 24 I. & N. Dec. 646, 654 n.6 (BIA 2008). However, the text of the statute regarding recession and reopening is similar, and the Seventh Circuit has held that, under *Kucana*'s authority, judicial review is prohibited over both. *Adebowale* v. *Mukasey*, 546 F.3d 893, 896 (7th Cir. 2008).

In *Mecaj* v. *Mukasey*, 263 F. App'x 449 (6th Cir. 2008), the BIA was reversed for failing to credit evidence that the petitioner lacked notice of his removal hearing. The Sixth Circuit held that the IJ "ignored" strong circumstantial evidence that the petitioner had not actually received notice that his hearing had been rescheduled (for a second time) to an earlier date, including that he attended the initial hearing and arrived in court on the date of the first rescheduled hearing, only to learn he had been ordered removed *in absentia*. *Id.* at 451.

In *Lopes* v. *Gonzales*, 468 F.3d 81 (2d Cir. 2006) (per curiam), the Second Circuit flatly disagreed with the BIA's statement that a Brazilian immigrant offered "no proof" of non-receipt of a hearing notice. *Id.* at 85-86. That court specifically identified three facts that suggested the petitioner would not have ignored a hearing notice, all of which the BIA failed to even consider—(1) he filed an application with immigration officials to obtain a benefit; (2) he promptly notified immigration officials of his change of address; and (3) he disclosed the order of removal on a subsequent application for relief. *Id.* at 86.

In *Galvez-Vergara* v. *Gonzales*, 484 F.3d 798 (5th Cir. 2007), the alien failed to appear through the fault of his attorney, but the BIA ignored its precedential caselaw finding that ineffective assistance of counsel could constitute an extraordinary circumstance. *Id.* at 802-03. The Fifth Circuit found that the agency's failure to analyze or even cite its contrary caselaw was an abuse of discretion and required remand. *Id.*

In perhaps the most obvious example of BIA error, in *Twum*, the court held that the IJ abused her discretion in finding an alien from Ghana could not show "reasonable cause" for his failure to appear at

the hearing, when that failure was attributable solely to the fact that security guards refused to allow him to enter the courthouse because his lawyer, who was already inside the building, had the hearing notice. 411 F.3d at 60-62. The IJ's decision, which mischaracterized the petitioner's claim as one for ineffective assistance of counsel, "made no mention whatsoever of the crucial allegation that the guards would not permit Twum to enter [the courthouse] without his hearing notice despite his urgent protestations that he had a hearing." *Id.* at 59. The Second Circuit held that the IJ's failure to consider this evidence rendered the decision arbitrary, and noted that "[w]hile the Immigration Court can and must expect respondents who are ordered to appear before it to make every responsible effort to comply with the order, it cannot expect the impossible." *Id.* at 61.

In all of these cases, the BIA misread or simply ignored critical evidence that the individual had not received notice of a hearing and, as a result, improperly denied motions to reopen. Under the Seventh Circuit's interpretation of 8 U.S.C. § 1252(a)(2)(B)(ii), however, none of these cases would be reviewable. Pet. App. 3a-12a; see also *Adebowale*, 546 F.3d at 896. The individuals adversely affected by the BIA's mistakes would, through no fault of their own, be denied relief and subject to removal.

B. Jurisdiction Over Reopening Is Necessary To Effectuate Congressional Intent Preserving Review Over Asylum Claims.

Congress permits aliens to seek reopening of their cases where a material change in conditions in their home country creates a situation where they might reasonably fear returning to that country. See 8

U.S.C. § 1229a(c)(7)(C)(ii). The BIA, however, has erroneously denied motions to reopen based on its refusal to consider, among other things, a State Department report documenting a "sharply deteriorating human rights situation" for Jewish individuals in Iran, see *Norani* v. *Gonzales*, 451 F.3d 292, 294 (2d Cir. 2006) (per curiam), news articles reporting the deaths of twenty-two Ethiopians for protesting government-sponsored election fraud, see *Kebe* v. *Gonzales*, 473 F.3d 855, 856 (7th Cir. 2007), and evidence of a new military conflict between Lebanon and Israel presented by a Lebanese petitioner who had previously been detained and tortured by Hizballah for being an Israeli collaborator. See *Habchy* v. *Filip*, 552 F.3d 911, 913-15 (8th Cir. 2009). None of these decisions—all of which were reversed by the courts of appeals as clearly in error—would be reviewable under the Seventh Circuit's rule.

In *Norani*, a married couple of Iranian nationality filed a motion to reopen based on changed circumstances in Iran, alleging a fear of persecution if removed to Iran based on the husband's Jewish religion and nationality and the couple's interfaith marriage. 451 F.3d at 293. Among other evidence, the petitioners submitted various country reports, all of which post-dated the initial closing of their immigration proceedings, describing "a sharply deteriorating human rights situation, torture in prisons, increasingly virulent and official antisemitism . . . and a prohibition against interfaith marriage." *Id.* at 293-94. In a three-sentence order, the BIA found that the petitioners failed to show this evidence was material and previously unavailable and denied the motion. *Id.* at 294. The Second Circuit termed the decision "conclusory" and "devoid

of reasoning" and noted that it ignored the substantial record evidence of declining country conditions. *Id.* at 294-95.

The Seventh Circuit reversed the BIA for a similar abuse of discretion in *Kebe* (which predates *Kucana*), a case in which an Ethiopian national and member of the Oromo Liberation Front ("OLF") presented material new evidence that the Ethiopian government increased repression of opposition groups, including the OLF, after the 2005 elections—evidence the BIA failed to discuss or analyze in denying the motion. 473 F.3d at 856-57. The court explained, "the absence of any articulated reasons for the BIA's decision constitutes an abuse of discretion and requires a remand." *Id.* at 857.

The BIA likewise erred in denying a motion to reopen based on changed country conditions in Lebanon in *Habchy*. Specifically, the Eighth Circuit found that the BIA erroneously confined its review to one aspect of the petitioner's claim for relief—a fear of persecution based on his Christian religion. 552 F.3d at 913-15. It failed, however, to even consider whether the newly presented evidence, related to the military conflict between Lebanon, Hizballah, and Israel in July and August 2006, supported the petitioner's claimed fear of persecution on the basis of political opinion. *Id.* This evidence was highly relevant to the petitioner's claim given his past affiliation with the Lebanese Forces, a Christian political party that opposes Hizballah and is a perceived supporter of Israel. *Id.*

If the Seventh Circuit's rule were adopted by this Court, individuals such as those described above, erroneously denied an adequate opportunity to present their asylum claims, would have been removed to countries where they fear death or

persecution, without ever having a chance to have the agency's decision reviewed. This is a plainly unreasonable result, and one which Congress did not intend. See, *e.g.*, 8 U.S.C. § 1252(a)(2)(B)(ii) (specifically exempting asylum claims from the jurisdictional bar on review of discretionary decisions).

C. The Seventh Circuit's Rule Would Preclude Review Over Agency Refusals To Correct Its Errors.

A motion to reopen serves as a means to correct or supplement the factual record with new evidence that substantiates an alien's claims for relief. See, *e.g.*, *Cerna*, 20 I. & N. Dec. 399, 403 (BIA 1991). The merit of appellate review is particularly apparent where the BIA denies a motion to reopen that would clarify material facts, such as medical evidence that the petitioner's wife was forcibly sterilized, see *Chen* v. *U.S. Att'y Gen.*, 262 F. App'x 984, 984-85 (11th Cir. 2008) (per curiam), a subsequent judicial determination that the government's key witness, whose testimony formed the basis of the IJ's adverse credibility ruling, made fraudulent statements about the petitioner, see *Verano-Velasco* v. *U.S. Att'y Gen.*, 456 F.3d 1372, 1376-77 (11th Cir. 2006) (per curiam), and undisputed evidence that the petitioner's marriage to a U.S. citizen qualifies him for adjustment of status. See *Chu Ying Kwao* v. *U.S. Citizenship & Immigration Serv.*, 255 F. App'x 578, 579 (2d Cir. 2007). The Seventh Circuit's rule would bar judicial review of motions to reopen in these circumstances, leaving aliens with no recourse to challenge demonstrably incorrect rulings.

In *Hen Shi Yang* v. *Gonzales*, 187 F. App'x 88 (2d Cir. 2006), the Second Circuit held that the BIA's denial of the motion to reopen could not stand

because "its decision is premised on errors of fact, including a mischaracterization of the IJ's decision." *Id.* at 89. Specifically, the court rejected the BIA's conclusion that the IJ's adverse credibility finding was not based entirely on inconsistencies between the petitioner's testimony and a State Department report because the only alleged testimonial inconsistency—whether the petitioner was home when government officials came to take his wife for one of her IUD insertions—was not supported by the record. *Id.* at 90.

In another example of BIA error, *Chen*, a Chinese national sought to reopen removal proceedings based on new medical evidence that his wife had been forcibly sterilized. 262 F. App'x at 985. The evidence submitted in support of petitioner's asylum claim included an x-ray, an x-ray report, and a separate physician's report confirming the x-ray showed a sterilization. *Id.* After finding the physician's report to be "the key evidence" in the case, the BIA erroneously deemed it "indecisive," stating that the physician's report did not identify the patient by name. *Id.* at 987. Taking its own look at the evidence, the court of appeals found that the patient identification and film numbers on the x-ray and x-ray report matched those on the physician's report. *Id.* It held that "the BIA's factual determination with respect to the physician's report is not supported by the record" and vacated the order "in light of the BIA's clear factual error." *Id.*

Moreover, newly discovered evidence can be used to challenge an adverse credibility finding, which is sometimes the IJ's sole basis for rejecting an immigrant's claims. That is precisely what happened in *Verano-Velasco*, where the IJ denied a Colombian immigrant's claim for asylum based on political

persecution because the IJ believed the father of petitioner's child, a government witness, whose testimony contradicted the petitioner's testimony. 456 F.3d at 1375. The petitioner filed a motion to reopen to submit evidence that, in a later custody proceeding, a family court found the father's claims against the petitioner to be fraudulent. *Id.* at 1376-77. Incredibly, the government argued that the new information was immaterial. *Id.* Reversing the BIA's denial of the motion to reopen, the Eleventh Circuit stated, "[w]e can think of nothing more crucial to an evaluation of the credibility of Verano than a full consideration of the character and credibility of Lopez." *Id.*

Because an alien who has been ordered removed must file a motion to reopen to seek adjustment of status based on new evidence, proper resolution of the motion to reopen is imperative and appellate review is often the deciding factor in assuring a correct disposition of such claims. See, *e.g.*, *Wellington* v. *INS*, 108 F.3d 631, 635 (5th Cir. 1997); see also 8 C.F.R. § 1245.2. In *Chu Ying Kwao*, for example, the Second Circuit vacated a BIA order affirming the IJ's denial of a motion to reopen for adjustment of status because the BIA failed to consider material evidence in the record that demonstrated the bona fides of the petitioner's marriage, including a statement by INS that the petitioner had established prima facie eligibility for adjustment of status. 255 F. App'x at 579.

In all of these circumstances, consideration of evidence overlooked or refused by the BIA was necessary to correct mistaken factual findings and properly adjudicate the claims. Yet, again, adoption of the Seventh Circuit's rule would bar courts of appeals from acting, even where the agency's error is

clear and likely dispositive, without regard to the consequences to the alien or their family. Pet. App. 3a-12a.

D. The Seventh Circuit's Rule Would Preclude Review Over The Agency's Wrongful Use Of Procedural Bars To Deny Reopening.

In addition to denying motions to reopen on substantive grounds, the immigration courts also have erected procedural barriers to relief. The courts of appeals have found an abuse of discretion where the BIA has discredited equitable factors, including where the petitioners were defrauded by an individual claiming to act on their behalf, see *Rodriguez-Lariz* v. *INS*, 282 F.3d 1218, 1225-26 (9th Cir. 2002), and where the petitioners justifiably relied on immigration officials' faulty advice. See *Gaberov*, 516 F.3d at 592-93, 596-97; *Socop-Gonzalez* v. *INS*, 272 F.3d 1176, 1193-94 (9th Cir. 2001). None of these errors could be reviewed or corrected under the holding of the judgment below.

In *Rodriguez-Lariz*, for instance, the BIA denied petitioners' motion to reopen, erroneously refusing to permit an equitable waiver because it found that the petitioners should have been able to discover their counsel's fraudulent actions before filing the initial motion. 282 F.3d at 1224. The Court of Appeals rejected this finding, stating the "facts demonstrate that petitioners were taken advantage of by an unscrupulous immigration consultant who persuaded petitioners to pay relatively large sums of money in exchange for faulty and ineffective representation and lied to them about his own defaults." *Id.* at 1225. On this factual record, the court simply disagreed that equitable relief was not warranted, and

concluded that the BIA had abused its discretion. *Id.* at 1225-26.

The courts of appeals also have stepped in to reverse cases in which the immigration courts unreasonably refused to equitably toll the time limit for filing motions to reopen. *Gaberov* is a fitting example. In that case, a Bulgarian immigrant maintained that he did not receive proper notice of the BIA's final decision on his asylum application because the BIA mistakenly mailed its decision in a *different* case to his counsel. 516 F.3d at 592-93. In trying to ascertain the status of his case, the petitioner subsequently relied on several erroneous assurances by immigration officials that the deficient notice his counsel received was not binding. *Id.* It was not until years later, upon receiving a "bag and baggage" letter instructing him to report for deportation, that the petitioner filed a motion to reopen based on the deficient notice. *Id.* at 593. Reversing as an abuse of discretion the BIA's order denying the motion to reopen as untimely, the court categorically rejected the BIA's conclusion that the petitioner's evidence of due diligence was "irrelevant" and held that the circumstances warranted equitable tolling. *Id.* at 596-97.

In *Socop-Gonzalez*, a Guatemalan national relied on incorrect advice from immigration officials that he should withdraw his application for asylum and submit an application for adjustment of status in light of his recent marriage to a U.S. citizen, unaware that following this advice triggered his deportation. 272 F.3d at 1193-94. Reversing and remanding the case, the court held that the BIA should have tolled the limitations period to allow the petitioner to file a motion to reopen to adjust his status. *Id.* at 1194. As the court explained, the facts clearly demonstrated

that the petitioner was "diligently pursuing his rights," and the BIA had abused its discretion in denying the motion. *Id.*

The procedural errors in these cases reflect fundamental misapprehensions of the factual record at issue. They clearly call for appellate review and correction, particularly in light of the potentially devastating consequences of the BIA's errors. The Seventh Circuit would nevertheless preclude judicial review in these and many other decisions, permitting individuals to be removed not only despite, but *because of* the BIA's mistakes. Pet. App. 3a-12a; see also *Johnson* v. *Mukasey*, 546 F.3d 403, 405 (7th Cir. 2008).

* * * *

It is clear from the statutory text of § 1252(a)(2)(B)(ii) that Congress intended to retain judicial review over motions to reopen. See *supra* at 6. And as the appellate caselaw above copiously illustrates, this was a wise choice. Without scrutiny by the federal courts there is a very real risk that immigrants will be denied a fair opportunity to present their meritorious claims for relief. See *supra* at 10-21. Left uncorrected, the BIA errors in these and other cases would undoubtedly have substantial adverse consequences for immigrants—most notably, removal from the United States, permanent separation from family members, and persecution in the country of removal. Judicial review in this context is absolutely necessary to effectuate the just administration of U.S. immigration law and to maintain the integrity of U.S. immigration policy.

CONCLUSION

For these reasons, and those stated in petitioner's brief, the judgment of the Seventh Circuit should be reversed and this case should be remanded for further proceedings.

Respectfully submitted,

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