No. 20-1679

In the Supreme Court of the United States

JITENDRAKUMAR PATEL, PETITIONER

v.

MERRICK B. GARLAND, ATTORNEY GENERAL

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

BRIEF FOR THE RESPONDENT IN OPPOSITION

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QUESTION PRESENTED

Whether an immigration judge abuses her discretion in denying a noncitizen's motion to reopen his completed removal proceedings based on a deferred-action notice issued in connection with the noncitizen's pending petition for "U" nonimmigrant status under 8 U.S.C. 1101(a)(15)(U).

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. A1-A5) is unreported but is available at 2021 WL 2253966. The decisions of the Board of Immigration Appeals (Pet. App. B) and the immigration judge (Pet. App. C1-C4) are unreported.

JURISDICTION

The judgment of the court of appeals was entered on February 1, 2021. The petition for a writ of certiorari was filed on April 5, 2021. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Petitioner is a foreign national who was ordered removed from the United States after conceding his removability. See Pet. App. A1-A2. Petitioner subsequently moved to reopen his removal proceedings based

on a letter from United States Citizenship and Immigration Services (USCIS) regarding his pending petition for "U" nonimmigrant status. *Id.* at A2. The immigration judge denied the motion to reopen. *Id.* at C1-C4. The Board of Immigration Appeals (Board) summarily affirmed. *Id.* at B. The court of appeals denied a petition for review. *Id.* at A1-A5.

1. The Battered Immigrant Women Protection Act of 2000, Pub. L. No. 106-386, Div. B, Title V, § 1513, 114 Stat. 1533, provides that certain noncitizens may petition USCIS for U nonimmigrant status (often referred to as a "U visa") if they have been the victim of certain serious crimes in the United States and a prosecutor or other official certifies that the noncitizen was or likely will be helpful in an investigation or prosecution of that crime. See 8 U.S.C. 1101(a)(15)(U); 8 U.S.C. 1184(p); 8 C.F.R. 214.14. A noncitizen who requests U nonimmigrant status may also petition for derivative U nonimmigrant status for certain family members such as spouses or children. See 8 C.F.R. 214.14(f)(1) and (2). A derivative petitioner must establish that he is a qualifying family member of a U-visa petitioner and is himself admissible to the United States. See 8 C.F.R. 214.14(f)(1)(i) and (ii). Federal law charges the Secretary of Homeland Security with "determin[ing]" whether a petitioner satisfies the requirements for U nonimmigrant status, 8 U.S.C. 1101(a)(15)(U)(i), and "USCIS has sole jurisdiction" to adjudicate petitions for U nonimmigrant status, 8 C.F.R. 214.14(c)(1).

Congress has prescribed that only 10,000 U visas may be issued each year to principal petitioners. See 8 U.S.C. 1184(p)(2)(A). (There is no annual cap on derivative family-member U visas. See 8 U.S.C. 1184(p)(2)(B).) Because the number of annual petitions

regularly exceeds the number of available U visas, USCIS uses a waiting-list process. See 8 C.F.R. 214.14(d). According to a USCIS report, the statutory cap on principal U visas has been reached in every fiscal year since 2010. See *U Visa Filing Trends* 7 (Apr. 2020), https://go.usa.gov/xMGBu. As of the end of Fiscal Year 2019, nearly 152,000 U-visa petitions were pending, and the waiting time for a principal petitioner to receive a final decision was approximately five to ten years from the date of filing. *Id.* at 3.

Under the waiting-list process, petitioners for U nonimmigrant status who would be eligible to receive that status but who cannot be granted a U visa solely because of the annual numerical cap are notified that they have been placed on a waiting list and given priority based on the date of their petition. See 8 C.F.R. 214.14(d)(2). USCIS also generally "will grant deferred action" to U-visa petitioners "and qualifying family members" while they "are on the waiting list." *Ibid.* Deferred action is a form of prosecutorial discretion whereby "no action will * * * be taken [by the government] to proceed against an apparently [removable] alien" while the deferred action is in effect. *Reno* v. *American-Arab Anti-Discrimination Comm.*, 525 U.S. 471, 484 (1999) (citation omitted). Those on the waiting list for a U visa, and their qualifying family members, may receive employment authorization at the discretion of USCIS. 8 C.F.R. 214.14(d)(2). By providing that noncitizens who would be eligible for U nonimmigrant status but for the annual statutory cap are granted deferred action and employment authorization while awaiting a U visa, the USCIS regulations "balance the statutorily imposed numerical cap against the dual goals of enhancing law enforcement's ability to in-

vestigate and prosecute criminal activity and providing protection to alien victims of crime." *New Classification for Victims of Criminal Activity; Eligibility for "U" Nonimmigrant Status*, 72 Fed. Reg. 53,014, 53,027 (Sept. 17, 2007); see also *id.* at 53,033-53,0334 (discussing USCIS's policy). The regulations provide, however, that a U-visa petitioner "may be removed from the waiting list, and the deferred action * * * may be terminated at the discretion of USCIS." 8 C.F.R. 214.14(d)(3).[1]

USCIS's regulations also describe how U-visa petitioners or qualifying family members who have pending or completed immigration proceedings can seek relief from those proceedings or from an order of removal. See 8 C.F.R. 214.14(c)(1)(i)-(ii) and (f)(2)(i)-(ii). As relevant here, a qualifying family member in removal proceedings may request that United States Immigration and Customs Enforcement (ICE) file "a joint motion to terminate proceedings without prejudice * * * while the petition for U nonimmigrant status is being adjudicated by USCIS." 8 C.F.R. 214.14(f)(2)(i). If the family member is already subject to a final order of removal, he may submit a request to ICE for a stay of removal pending resolution of the U-visa petition, although the mere "filing of a petition" for U nonimmigrant status "has no effect on ICE's authority to execute a final order [of removal]." 8 C.F.R. 214.14(f)(2)(ii). Finally, if

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[1] On June 14, 2021, USCIS published guidance in its Policy Manual modifying the process for adjudicating U-visa petitions in certain respects not relevant here, in order to improve and streamline the agency's handling of such petitions until the petitioners can receive full adjudications consistent with the statutory cap. See USCIS, Policy Alert PA-2021-13, *Bona Fide Determination Process for Victims of Qualifying Crimes, and Employment Authorization and Deferred Action for Certain Petitioners*, https://go.usa.gov/xM6RP.

the family member's petition for derivative U nonimmigrant status is granted, he may seek cancellation of an order of removal issued by an immigration judge by filing a motion to reopen and terminate the removal proceedings with the immigration judge or the Board. See 8 C.F.R. 214.14(f)(6).

2. Petitioner is a native and citizen of India who overstayed his nonimmigrant visa in the United States. See Pet. App. A1. In March 2018, immigration authorities charged petitioner with being removable for having remained in the United States longer than permitted. See *id.* at A1, C1. Petitioner conceded his removability. See *id.* at A2. He requested, however, a one-year continuance of his removal proceedings, asserting (among other things) that he was a derivative beneficiary of his wife's pending petition for U nonimmigrant status. See *ibid.*; Certified Administrative Record (A.R.) 85-88. The immigration judge granted a continuance until April 2019. Pet. App. A2.

Shortly before his next hearing, petitioner filed another motion for a one-year continuance on the ground that the petition for his derivative U nonimmigrant status was still pending. See Pet. App. C1-C2; A.R. 74-77. The immigration judge denied that motion. See Pet. App. A2; A.R. 102. At the hearing, the immigration judge again denied a further continuance and ordered petitioner's removal. See Pet. App. A2. Petitioner did not appeal that order. *Ibid.*

In June 2019, petitioner filed a motion with the immigration judge to reopen his removal proceedings. See Pet. App. A2; A.R. 43-48. Petitioner asserted that he was entitled to reopening based on a letter he had received from USCIS, issued after he was ordered removed, stating that petitioner had been placed on the

waiting list for U nonimmigrant status and had received deferred action. A.R. 44-46, 52-53. The letter stated, however, that petitioner's U nonimmigrant status "cannot be approved at this time" and that the notice "does not constitute valid U nonimmigrant status * * * and may not be used to demonstrate legal immigration * * * status." A.R. 52-53.

The immigration judge denied petitioner's motion to reopen, Pet. App. C1-C4, stating that petitioner's potential eligibility for U nonimmigrant status was not an appropriate basis for reopening his removal proceedings because only USCIS, not the immigration judge, had authority to grant a U visa. *Id.* at C3.[2] The Board affirmed the denial of the motion to reopen without issuing a separate opinion. *Id.* at B.

3. The court of appeals denied a petition for review. Pet. App. A1-A5. As relevant here, the court determined that the immigration judge had not abused her discretion in denying the motion to reopen, and had instead "provided a rational explanation" for concluding

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[2] Petitioner sought reopening on the additional ground that he was afraid to return to India, and he claimed that he had been unable to seek withholding of removal in his removal proceedings. See Pet. App. C3. The immigration judge denied reopening on that ground because petitioner had not attempted to seek withholding of removal before being ordered removed, and had instead informed the immigration judge that his potential status as a derivative beneficiary of his wife's U-visa petition was his only ground for avoiding removal. See *ibid.* Moreover, the immigration judge found that petitioner's motion to reopen did not present any new facts that had not been available or discoverable at the prior removal hearing. See *ibid.* The court of appeals denied petitioner's petition for review challenging that aspect of the immigration judge's decision, see *id.* at A5, and the petition for a writ of certiorari does not renew that challenge.

that petitioner's placement on the U-visa waiting list did not warrant disturbing the previously entered order of removal. *Id.* at A4. The court observed that petitioner's deferred action "is an 'administrative convenience' giving such cases lower priority for removal," but petitioner had not actually received U nonimmigrant status and the immigration judge lacked authority to grant a U visa. *Ibid.* The court further observed that the Board has held that it is generally not appropriate to "reopen removal proceedings for aliens who seek relief that neither the [Board] nor the [immigration judge] has jurisdiction to grant," and that is "especially so where reopening is sought simply as a mechanism to stay a final order of removal while the collateral matter is being resolved." *Ibid.* (citations omitted); see *In re Yauri*, 25 I. & N. Dec. 103, 107-110 (B.I.A. 2009).

ARGUMENT

Petitioner renews his contention (Pet. 8-12) that the immigration judge abused her discretion by declining to reopen his completed removal proceedings based on the notice from USCIS that petitioner had been waitlisted for derivative U nonimmigrant status and given deferred action. The court of appeals correctly rejected that contention, and the decision below does not conflict with any decision of another federal court of appeals. Further review is unwarranted.

1. The court of appeals, applying abuse-of-discretion review, correctly denied the petition for review of the immigration judge's decision declining to reopen petitioner's removal proceedings.

a. Requests for reopening removal proceedings are committed to the "broad discretion" of the immigration judge or the Board. *Kucana* v. *Holder*, 558 U.S. 233, 250 (2010); see 8 C.F.R. 1003.23(b)(3) (immigration

judge); 8 C.F.R. 1003.2(a) (Board). "[M]otions to reopen are disfavored," on account of the "strong public interest in bringing litigation to a close as promptly as is consistent with the interest in giving the adversaries a fair opportunity to develop and present their respective cases." *INS* v. *Abudu*, 485 U.S. 94, 107 (1988). A motion to reopen before an immigration judge requires the noncitizen to "satisf[y]" the immigration judge that, if the proceedings were reopened, the noncitizen could offer new evidence that both is "material" to his removal proceedings and was not available or discoverable at the former hearing. 8 C.F.R. 1003.23(b)(3); see *Abudu*, 485 U.S. at 106-107. A decision denying reopening on the ground that the noncitizen has failed to offer new material evidence is subject only to "an abuse-of-discretion standard of review." *Abudu*, 485 U.S. at 107. And an immigration judge abuses her discretion only when her decision was made "without a rational explanation, inexplicably departed from established policies, or rested on an impermissible basis such as invidious discrimination." Pet. App. A3 (citation omitted).

Here, the court of appeals correctly determined (Pet. App. A3-A4) that the immigration judge gave a rational explanation (*id.* at C3) for denying the motion to reopen: petitioner's letter from USCIS regarding the progress of his still-pending petition for derivative U nonimmigrant status was "a collateral matter" that was not necessarily "material" to his removal proceedings. *Id.* at A4. Although the letter informed petitioner that he had been waitlisted for U nonimmigrant status and granted deferred action, the letter was clear that petitioner had not received a U visa. See *id.* at A4; A.R. 52-53. And because only USCIS, not the immigration judge, had authority to grant petitioner's request for U non-

immigrant status, the immigration judge could reasonably conclude that his outstanding request for that status was not material to his removability—the issue that was the subject of petitioner's completed removal proceedings. See Pet. App. A4; *id.* at C3.

The court of appeals also explained (Pet. App. A4) why the immigration judge's decision was consistent with established policy: the Board "ha[s] long been of the view that administratively *final* * * * removal proceedings should not be reopened for matters over which neither the Immigration Judge nor the Board has jurisdiction, and that referencing the absence of such jurisdiction [i]s a rational basis in itself to decline to reopen proceedings." *In re Yauri*, 25 I. & N. Dec. 103, 107 (B.I.A. 2009). In particular, the Board will not accept a reopening request that "is sought simply as a mechanism to stay a final order of removal while [a] collateral matter is being resolved." *Id.* at 110. Instead, the Board has explained that "[a]ny stay request should go to the agency or court that does have jurisdiction over the matter." *Id.* at 109.

The court of appeals additionally found that the immigration judge's decision was bolstered by the fact that petitioner had declined to avail himself of other potential avenues to seek relief from his final order of removal. Pet. App. A4. Petitioner "did not appeal" his removal order, *ibid.*, which would have been the appropriate way to present the argument he now raises (Pet. 11-12) that the immigration judge should have further continued his case while his U-visa petition was pending. Petitioner also never requested that ICE file a joint motion to terminate his proceedings without prejudice while his U-visa petition was pending. See 8 C.F.R. 214.14(f)(2)(i). The immigration judge did not

abuse her discretion by declining to allow petitioner to use a motion to reopen as a substitute for those procedurally proper requests of relief.

b. Petitioner asserts (Pet. 10) that his deferred-action letter from USCIS "[was] material because it necessitates either a grant of a continuance or administrative closure [of his proceedings], or in this case reopening." But whether petitioner's deferred-action letter might have supported a continuance or an administrative closure is not presented by this case. Petitioner did not request either of those forms of relief based on the USCIS letter, either before the immigration judge or in an appeal to the Board. Petitioner instead sought *reopening* after his immigration proceedings were complete, a request that required a new "material" development. 8 C.F.R. 1003.23(b)(3). And as discussed above, the Board has interpreted that regulation to mean that an outstanding application to another agency on a collateral matter, where the immigration judge lacks authority to address the matter itself, is generally not a "material" fact that warrants reopening. *Yauri*, 25 I. & N. Dec. at 110; see *Juan Antonio* v. *Barr*, 959 F.3d 778, 788 (6th Cir. 2020) (the court of appeals "give[s] 'substantial deference to the Board's interpretations of the [Immigration and Nationality Act] and its accompanying regulations'") (brackets and citations omitted).

Petitioner also asserts (Pet. 11) that he "does not deserve a removal order while he has deferred action status." As USCIS's letter made clear, however, deferred action is "an act of administrative convenience to the government" that makes the recipient a "lower priority for removal" but does not "demonstrate legal immigration * * * status" or establish that petitioner is not removable from the United States. A.R. 52-53. In addition,

as stated above, USCIS's regulations contemplate that a qualifying family member of a U-visa petitioner may be in pending removal proceedings or subject to a final order of removal, and the regulations permit the noncitizen in that circumstance to request that ICE either file a motion to terminate the proceedings without prejudice or agree to stay removal. See 8 C.F.R. 214.14(f)(2)(i) and (ii). But those regulations do not provide that a derivative U-visa petitioner necessarily should not be ordered removed merely because he has been found provisionally eligible for U nonimmigrant status.

2. Contrary to petitioner's contention (Pet. 8-11), the court of appeals' decision below does not conflict with the decision of any other court of appeals.

a. First, there is no conflict with the First Circuit's decision in *Benitez* v. *Wilkinson*, 987 F.3d 46 (2021). While the court in that case concluded that the Board had abused its discretion by denying a motion to reopen filed by a waitlisted U-visa petitioner, the court found that the Board had inadequately explained its decision, see *id.* at 49, and the Board's decision in that case rested on reasoning different from that of the immigration judge here.

In *Benitez*, the Board had given "two reasons for its denial" of the noncitizen's motion to reopen: first, that the Board "could only reopen [the noncitizen's] case if the U visa was granted"; and second, that the noncitizen "could pursue his U visa application in spite of the removal order." 987 F.3d at 51-52. The First Circuit found those explanations insufficient because the Board had not considered its own prior precedent regarding when "a continuance in light of a U visa application" is warranted—precedent which suggested that, if the case were reopened, the noncitizen would have a strong

claim for a continuance. *Id.* at 53; see *id.* at 53-54; see also *In re Sanchez Sosa*, 25 I. & N. Dec. 807, 812-815 (B.I.A. 2012). The court also found that the Board had mischaracterized the noncitizen's motion as seeking reopening for the purpose of terminating the removal proceedings as opposed to continuing them, and thus the Board had applied the wrong regulatory standard. See *Benitez*, 987 F.3d at 54-55. Finally, the court faulted the Board for having failed to consider an ICE directive regarding U-visa petitioners that the noncitizen had raised in his motion to reopen. See *id.* at 55-56.

The immigration judge here rejected petitioner's motion to reopen on grounds different from those at issue in *Benitez*. Unlike in *Benitez*, the immigration judge here applied the correct regulatory provision by asking whether petitioner's new information was material to his removal proceedings. The immigration judge then faithfully applied the Board's precedent in *Yauri* holding that a request for a stay based on a collateral matter not within the immigration judge's jurisdiction is generally not material to removability. *Yauri* is directly relevant to the motion that petitioner presented to the immigration judge—whether to reopen the removal proceedings—and is thus more relevant here than the Board decision cited in *Benitez* (*Sanchez Sosa*), which addressed the distinct issue of when a continuance is appropriate for a U-visa petitioner. Cf. *Benitez*, 987 F.3d at 53 (reasoning that the Board should have either applied *Sanchez Sosa* or else "explain[ed] its reasons for applying a different standard"). Moreover, petitioner here did not invoke the ICE directive that was at issue in *Benitez*, so the immigration judge did not abuse her discretion by declining to address that policy. *Benitez* therefore does not suggest that the reasoning

of the immigration judge in this case was so irrational or deficient as to constitute an abuse of discretion.

b. There is likewise no conflict between the court of appeals' decision here and the Seventh Circuit's decision in *Meza Morales* v. *Barr*, 973 F.3d 656 (2020) (Barrett, J.). *Meza Morales* did not involve a motion for reopening. Instead, the noncitizen there appealed his final order of removal—unlike petitioner here—on the ground that the immigration judge should have agreed "to continue or administratively close his case instead of ordering removal." *Id.* at 663. The government asked the court of appeals to grant the noncitizen's petition for review and remand the matter to the Board for reconsideration in light of intervening authority addressing when a continuance is warranted based on a pending U-visa petition. See *ibid.* (citing *In re L-N-Y-*, 27 I. & N. Dec. 755 (B.I.A. 2020), and *Guerra Rocha* v. *Barr*, 951 F.3d 848, 853 (7th Cir. 2020)). The court "agree[d] that the Board should be given the opportunity to apply" the new authority "in the first instance." *Id.* at 663-664.

The Seventh Circuit's decision did not describe the circumstances when reopening—as opposed to a continuance or administrative closure—may be appropriate for a U-visa petitioner. See *Meza Morales*, 973 F.3d at 663 n.3 (noting that a continuance or administrative closure "would stave off entry of a final order of removal"). That decision therefore does not bear on the question presented here.

c. Petitioner also invokes (Pet. 8) the Eighth Circuit's decision in *Caballero-Martinez* v. *Barr*, 920 F.3d 543 (2019), but that case too does not conflict with the decision below. The court in *Caballero-Martinez* granted a petition for review in part because it found that the Board had not "offer[ed] a coherent, 'rational explana-

tion' for its denial of [the noncitizen's] motion to reopen or reconsider." *Id.* at 551 (citation omitted). In particular, the Board's decision was ambiguous about whether its denial of relief in the noncitizen's appeal had been on "jurisdictional rather than evidentiary" grounds. *Ibid.* The court remanded the case to the Board to "clarify its reasons" for denying relief and "to explain its decision not to apply the [*Sanchez-Sosa*] factors" to the noncitizen's request for a remand to the immigration judge. *Ibid.* (internal quotation marks omitted).

As explained above, petitioner here, unlike the noncitizen in *Caballero-Martinez*, did not appeal his final order of removal to the Board on the ground that the immigration judge should have granted a continuance based on *Sanchez Sosa*. Moreover, *Caballero-Martinez* is distinguishable because the immigration judge in petitioner's case was clear about her reasons for concluding that petitioner's U-visa petition was not material to his removal proceedings, and those reasons were rational, not an abuse of discretion.

3. Finally, petitioner has not shown that the question presented has practical importance that warrants a writ of certiorari.

Although petitioner is subject to an order of removal, his receipt of deferred action means that, "absent exceptional circumstances, ICE will refrain from" executing petitioner's removal order while his derivative petition for U nonimmigrant status remains pending. ICE Directive No. 11005.3: *Using a Victim-Centered Approach with Noncitizen Crime Victims* § 2 (Aug. 10, 2021), https://go.usa.gov/xM76x; see *id.* §§ 3.1-3.2, 5.4(b). Petitioner has not shown that an un-executed order of removal will substantially affect him while he remains on the U-visa waiting list and has deferred action. If

petitioner is ultimately granted U nonimmigrant status, then he will be able at that time to "seek cancellation" of the order of removal "by filing, with the immigration judge or the Board, a motion to reopen and terminate removal proceedings"—essentially the same relief that he seeks in this case—on the ground that he is no longer removable. 8 C.F.R. 214.14(f)(6). And if petitioner is at any time removed from the U-visa waiting list, or if his deferred action is terminated "at the discretion of USCIS," 8 C.F.R. 214.14(d)(3), then he would lose his basis for requesting reopening (as relevant here). See pp. 5-6, *supra*.

In the meantime, petitioner can still request that ICE file a joint motion to reopen and terminate his immigration proceedings without prejudice, or agree to a stay of removal. See p. 4, *supra*; see also ICE Directive No. 11005.3 § 5.4(a) ("Where USCIS has granted deferred action to a noncitizen crime victim," ICE should "consider whether seeking dismissal of proceedings would be appropriate" or, "[w]here the noncitizen is subject to a final order, * * * should review the case for a discretionary stay of removal."). If petitioner requested that ICE file a joint motion to reopen and terminate the removal proceedings, and ICE agreed to file such a motion and an immigration judge granted it, then this case would become moot—a vehicle problem that further counsels against granting the petition for a writ of certiorari. Even in the event of mootness, the petition for a writ of certiorari should still be denied (as opposed to granting the petition, vacating the decision below, and remanding for further proceedings), because the petition does not present a question that would independently be worthy of this Court's review. See, *e.g.*, Stephen M. Shapiro et al., *Supreme Court Practice*

§ 5.13, at 5-50 (11th ed. 2019); see also *id.* § 19.4, at 19-28 n.34 ("[O]bservation of the Court's behavior across a broad spectrum of cases since 1978 suggests that the Court denies certiorari in arguably moot cases unless the petition presents an issue (other than mootness) worthy of review.").

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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OCTOBER 2021