NO. 10-70545
PRO BONO

IN THE UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

LARRY SMITH TAUSERE AND ANITA DEVI TAUSERE,
Petitioners,

v.

ERIC H. HOLDER, JR., Attorney General,
Respondent.

ON PETITION FOR REVIEW FROM A FINAL ORDER OF THE
BOARD OF IMMIGRATION APPEALS,
AGENCY NOS. A077-378-780 & A077-378-781

BRIEF OF AMICI CURIAE LAWYERS' COMMITTEE FOR CIVIL RIGHTS OF THE SAN FRANCISCO BAY AREA AND COMMUNITY LEGAL SERVICES IN EAST PALO ALTO IN SUPPORT OF PETITIONER'S MOTION FOR PANEL RECONSIDERATION AND RECONSIDERATION EN BANC

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Amici curiae Lawyers' Committee for Civil Rights of the San Francisco Bay Area and Community Legal Services in East Palo Alto hereby submit this brief in support of Petitioner Tausere's Motion for Panel Reconsideration and Reconsideration En Banc. Counsel for all parties have consented to the filing of this *amici* brief.

I. INTRODUCTION

Petitioner Tausere's motion gives the Court a valuable opportunity to make a course correction in its immigration docket. By granting Tausere's motion, the Court will be able to clear up an intra-Circuit split that can only cause confusion for litigants and the Court itself, and at the same time firmly harmonize its jurisprudence with that of the U.S. Supreme Court. What is at stake here is a question of jurisdiction: Will this Court allow the Executive Branch to shield from judicial review the discretionary determinations of the Board of Immigration Appeals, or will it follow the clear logic of the Supreme Court commanding the lower federal courts *not* to surrender their jurisdiction over such matters? The answer to that question could make a difference in numerous motions to reopen each year, including in that of Petitioner himself.

II. INTEREST OF *AMICI CURIAE*

Amici Lawyers' Committee for Civil Rights of the San Francisco Bay Area and Community Legal Services in East Palo Alto are legal-services organizations

that provide *pro bono* assistance to hundreds of immigrants annually. Amici have a direct interest in the issues raised by Tausere's motion because they counsel immigrants with respect to their rights and obligations under American law, including on the procedures entailed in reopening removal proceedings.

III. ARGUMENT

Reconsideration *en banc* (or at least panel reconsideration) is warranted so that this Court may resolve its intra-Circuit split by bringing its case law in line with U.S. Supreme Court precedent. In *Ekimian v. INS*, 303 F.3d 1153 (9th Cir. 2002), this Court held that determinations by the Board of Immigration Appeals (the "Board") under its *sua sponte* power to reopen immigration proceedings are not judicially reviewable. But as the Court recognized in *Zetino v. Holder*, 622 F.3d 1007 (9th Cir. 2010), that holding is no longer tenable in light of the Supreme Court's decision in *Kucana v. Holder*, __ U.S. __; 130 S. Ct. 827 (2010).

A. *Kucana* Establishes That Executive Agencies Cannot Deprive Courts Of Jurisdiction To Review Those Agencies' Discretionary Decisions When The Authority For That Discretion Is A Regulation, Rather Than A Statute.

"A motion to reopen is a traditional procedural mechanism in immigration law with a basic purpose that has remained constant—to give aliens a means to provide new information relevant to their cases to the immigration authorities." *Meza-Vallejos v. Holder*, 669 F.3d 920, 924 (9th Cir. 2012) (internal quotation marks and citation omitted). Until 1996, a petitioner's ability to seek reopening

was strictly a creature of regulation. But then Congress enacted the Illegal Immigration Reform and Immigrant Responsibility Act of 1996, 110 Stat. 3009-546 ("IIRIRA"), and codified petitioners' rights to file one motion to reopen within ninety days of the entry of a final administrative order of removal. *Dada v. Mukasey*, 554 U.S. 1, 12-14 (2008); 8 U.S.C. §1229a(c)(7). If a petitioner falls outside of IIRIRA's numerical and time limitations, however, he may still seek to reopen pursuant to the Board's *sua sponte* authority to do so.

Federal regulation confers on the Board the discretion to determine whether to reopen an immigration petitioner's proceedings. 8 C.F.R. § 1003.2(a) ("The Board may at any time reopen or reconsider on its own motion any case in which it has rendered a decision."). That discretionary authority covers both statutory motions to reopen and motions seeking relief under the Board's *sua sponte* power.

Kucana considered whether, where IIRIRA strips the courts of jurisdiction to review the Board's discretionary determinations, they nonetheless retain jurisdiction to review Board determinations concerning statutory motions to reopen. The Court concluded that they do. It reasoned that because the Board's discretion over reopening motions was conferred by the *Executive* via regulation, and not by *Congress* via statute, IIRIRA did not curb the power of the courts to review the Board's discretionary reopening decisions.

As noted above, irrespective of whether the Board's exercise of discretion is over a statutory motion to reopen or a *sua sponte* motion to reopen, that discretion originates in exactly the same place, namely, the federal regulation found at 8 C.F.R. § 1003.2, not the statute, which merely sets forth the Board's power to reopen. Under a straightforward reading of *Kucana* then, the Board's disposition of *sua sponte* motions to reopen are no less judicially reviewable than its disposition of statutory motions to reopen. The discretion exercised in both cases is conferred by *regulation* and *Kucana* instructs that in such circumstances federal jurisdiction exists.

True, *Kucana* remarked in a footnote that it was not reaching the question of the reviewability of the Board's *sua sponte* determinations, but there is nothing unusual or surprising about that. 130 S. Ct. at 839 n.18 ("We express no opinion on whether federal courts may review the Board's decision not to reopen removal proceedings *sua sponte*."). *Kucana* arose as a result of a statutory motion to reopen and so there was no need for the Court to venture beyond that context.

What's more, just because the Court did not expressly extend its holding to *sua sponte* motions does not mean that the driving force behind *Kucana* is any less applicable there. *Kucana* at bottom is a separation-of-powers case. The Court's principal concern—one it described as a "paramount factor" and felt compelled to "stress"—was that if administrative agencies like the Board are permitted to brand

their decision-making as "discretionary" and thereby avoid judicial review, the Executive will be able to dictate to the courts the scope of their jurisdiction. 130 S. Ct. at 839-40. As the Court warned, "the Executive would have a free hand to shelter its own decisions from abuse-of-discretion appellate court review simply by issuing a regulation declaring those decisions 'discretionary.'" *Id.* at 840.

This concern about an over-reaching Executive is equally at play in the context of *sua sponte* reopening decisions. Indeed, given the strict numerical and timing requirements on statutory motions to re-open—wherein a petitioner only has one shot at it and must take that shot within ninety days of the final administrative order of removal—many motions to re-open will fall outside those requirements and will therefore be considered under the Board's *sua sponte* power. It would make a mockery of the "paramount factor" influencing the *Kucana* Court if the Board could shield all these many exercises of its discretion from judicial scrutiny.

B. *Ekimian*'s Rationale Cannot Survive *Kucana*.

Most Circuits have wrongly concluded that *Kucana* leaves intact their prior precedents holding that the Board's *sua sponte* reopening decisions are not judicially reviewable. They have simply relied on *Kucana*'s footnote described above and have failed to come to terms with the essential separation-of-powers concerns that animate *Kucana*. *See e.g., Ndreca v. Atty. Gen'l*, No. 11-12597, 2012

U.S. App. LEXIS 3562, *7-*8 (11th Cir. Feb. 23, 2012) (unpub.); *Bakanovas v. Holder*, 438 F. App'x 717, 722 (10th Cir. 2011) (unpub.); *Neves v. Holder*, 613 F.3d 30, 35 n.4 (1st Cir. 2010). Moreover, just because the *Kucana* Court did not explicitly apply its holding to *sua sponte* determinations does not mean that the Court would decline to do so in a proper case. As already described, the most faithful reading of *Kucana* suggests that's exactly what the Court would do.

The Circuit courts have also continued to rely on the proposition, as this Court did in *Ekimian* and again in *Mejia-Hernandez v. Holder*, 633 F.3d 818, 824 (9th Cir. 2011), that judicial review is unavailable in the *sua sponte* reopening context because courts lack any meaningful standards by which to evaluate the Board's exercise of its *sua sponte* discretion. *See also, Anaya-Aguilar v. Holder*, __ F.3d __; No. 11-3052, 2012 U.S. App. LEXIS 12037, *823-24 (7th Cir. June 14, 2012). In support of this theory, this Court and its sister Circuits have relied on the Supreme Court's decision in *Heckler v. Chaney*, 470 U.S. 821 (1985).

In the face of *Kucana*, it simply makes no sense to draw on the completely disparate factual and legal issues involved in *Heckler*. *Heckler* was not an immigration case; it was an Administrative Procedure Act case. It has never been cited in any Supreme Court majority opinion in an immigration case and even the *Kucana* Court did not cite it when explaining that it "express[ed] no opinion" on the reviewability of the Board's *sua sponte* determinations. And most importantly,

unlike in *Kucana* and here, *Heckler* did not deal with an administrative agency's discretion conferred by regulation. It dealt instead with an agency's general discretion to determine what enforcement actions to bring and what not to bring. *Heckler* might have been apposite authority before *Kucana* insofar as it provided guidance on general questions of jurisdiction over administrative agencies' discretionary decisions. But now that the Supreme Court has spoken in *Kucana* to the same agency regulation at issue here, *Heckler* inevitably falls out of the picture.

At least two Circuits have expressed considerable skepticism about the ongoing vitality of their precedents on *sua sponte* reopening since *Kucana*. The Sixth Circuit has gone so far as to say that its precedents "ought to be reexamined by the *en banc* court," although the panel's recommendation was not heeded by the full Court. *Gor v. Holder*, 607 F.3d 180, 191 (6th Cir. 2010). Likewise, this Court in *Mejia-Hernandez* commented that "[t]he overall thrust of *Kucana* suggests that *sua sponte* reopening should be subject to review." 633 F.3d at 823. The time has come for this Court to follow through on *Mejia-Hernandez* and align its jurisprudence with *Kucana*.

IV. CONCLUSION

For all of the reasons set forth above, amici respectfully request that the Court grant Petitioner Tausere's Motion for Panel Reconsideration and Reconsideration En Banc.

Date: June 29, 2012

Respectfully submitted,

COBLENTZ, PATCH, DUFFY & BASS, LLP

By: */s/ Allison L. Ehlert*
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STATEMENT PURSUANT TO CIRCUIT RULE 29(c)(5)

Neither a party nor a party's counsel authored this brief in whole or in part, nor has any party or any party's counsel, or any other person, contributed money intended to fund the preparation or submission of this brief.

By: */s/ Allison L. Ehlert*
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CERTIFICATE OF COMPLIANCE
PURSUANT TO CIRCUIT RULE 32-1

I HEREBY CERTIFY that the enclosed principal brief complies with the type-volume limitation set forth in Rule 32(a)(7)(B). The brief has a typeface of 14 points or more and contains 1,675, words as indicated by the word count of the word-processing system used to prepare the brief.

By: */s/ Allison L. Ehlert*
Allison L. Ehlert
As Amici Curiae

CERTIFICATE OF SERVICE

I hereby certify that I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system on June 29, 2012.

I certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the appellate CM/ECF system.

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