NOS. [redacted]

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

[redacted]

Petitioner,

v.

William P. BARR,
Attorney General of the United States,

Respondent.

PETITION FOR REVIEW
FROM THE UNITED STATES DEPARTMENT OF JUSTICE
EXECUTIVE OFFICE FOR IMMIGRATION REVIEW
BOARD OF IMMIGRATION APPEALS
AGENCY CASE NUMBER: [redacted]

REPLY BRIEF OF PETITIONER

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I. Introduction

Petitioner [redacted] ("[redacted] is an ethnic Hmong citizen of Laos who was granted withholding of removal in 2005 under 8 U.S.C. § 1231(b)(3)(A) and ordered removed to any country other than Laos that would accept him. A.R. 73/Add. 6; A.R. 79/Add. 10; A.R. 125, 237. [redacted] was initially placed in removal proceedings following his conviction for Engaging in Prostitution with a Child in violation of Minn. Stat. § 609.324, subd. 1(c)(2), involving a victim who was at least sixteen years old and under the age of eighteen. A.R. 73/Add. 6; A.R. 127/Add. 17; A.R. 130. He was found to be removable under 8 U.S.C. § 1227(a)(2)(A)(iii) for a conviction for an aggravated felony defined in § 1101(a)(43)(A), related to sexual abuse of a minor.

On May 30, 2017, the Supreme Court held that a state conviction did not satisfy the federal generic definition of sexual abuse of a minor where the victim, categorically, is not necessarily under the age of sixteen. *Esquivel-Quintana v. Sessions*, 137 S. Ct. 1562 (2017). In light of this decision, [redacted] filed a motion to reopen with the Immigration Court, asserting that *Esquivel-Quintana* extended to his conviction, and therefore that he was no longer lawfully removable as charged. A.R. 75/Add. 8; A.R. 84. This motion was denied by the Immigration Judge. A.R. 73/Add. 6. There, the IJ held that the Supreme Court's ruling was limited to only

one particular type of sexual abuse of a minor offense, and the original definition of minor—under 18 years of age—continued to apply in all other offenses. A.R. 75/Add. 8. [redacted] appealed to the Board of Immigration Appeals, which denied the appeal in a single-member decision on June 26, 2018. A.R. 22/Add. 3.

[redacted] filed a timely Petition for Review of the BIA decision on July 25, 2018. [redacted] also filed a motion to reconsider at the BIA, citing new Circuit Court cases interpreting *Esquivel-Quintana*. That motion was again denied on November 14, 2018, by a single-member panel. A.R. 3–4/Add. 1–2. [redacted] filed a second timely Petition for Review with this Court on December 14, 2018. The two Petitions were consolidated for review.

II. This Court Has Jurisdiction to Consider [redacted] Petitions.

Respondent conflates several legal principles and precedents in arguing that this Court's jurisdiction to review [redacted] Petitions is "limited to colorable constitutional claims." Resp. Br. at 2, 18. Respondent bases this argument, first, on the jurisdictional bar to review orders of removal predicated on a conviction for an aggravated felony under 8 U.S.C. § 1227(a)(2)(A)(iii), described in §§ 1252(a)(2)(C) and (D). *Id.* at 18. Second, Respondent asserts that this Court "lacks jurisdiction to review the Board's decision declining to reopen proceedings *sua sponte*." *Id.* Third, Respondent asserts that [redacted] has waived any argument regarding equitable tolling by not "lay[ing] out the standard for equitable tolling"

or using the phrase. *Id.* at 19–20. Respondent's additional arguments collapse into these three. [redacted] responds in turn to each assertion.

A. This Court Has Jurisdiction to Review [redacted] Petitions under 8 U.S.C. § 1252(a)(2)(D).

First, Respondent claims that jurisdiction is barred by [redacted] conviction for an aggravated felony. Resp. Br. at 18–19. And he is correct—to an extent. The jurisdiction-stripping provisions of the Immigration and Nationality Act state that "no court shall have jurisdiction to review any final order of removal against an alien who is removable by reason of having committed a criminal offense covered in . . . 1227(a)(2)(A)(iii)." 8 U.S.C. § 1252(a)(2)(C). However, that provision cannot "be construed as precluding review of constitutional claims or questions of law raised upon a petition for review filed with an appropriate court of appeals in accordance with this section." *Id.* at § 1252(a)(2)(D). [redacted] has been convicted of an offense that an Immigration Judge has determined is covered in § 1227(a)(2)(A)(iii), that much is not in dispute. But the analysis does not end there.

As a fundamental principle, this Court has jurisdiction to determine if it has jurisdiction over the Petition for Review. *Hanan v. Mukasey*, 519 F.3d 760, 763 (8th Cir. 2008) ("As an initial matter, we must determine whether we have jurisdiction to review the BIA's denial of Hanan's motion to reopen."); *see Munoz-Yepez v. Gonzales*, 465 F.3d 347, 351 (8th Cir. 2006) (finding petitioner's

conviction to not fall under § 1252(a)(2)(C)); *see also Morris v. Holder*, 676 F.3d 309, 313–14 (2d Cir. 2012) (reviewing *de novo* whether criminal conviction was for aggravated felony).

Because the question before the BIA and now here on appeal is whether [redacted] conviction is for an aggravated felony—a question of law—the merits and jurisdiction essentially collapse into one analysis; or, in other words, the jurisdictional analysis under 8 U.S.C. § 1252(a)(2)(C) will be dispositive of the merits, and vice-versa. This also provides the exception under § 1252(a)(2)(D). *See Brikova v. Holder*, 699 F.3d 1005, 1008 (8th Cir. 2012); *Munoz-Yepez*, 465 F.3d at 351.

B. This Court Has Jurisdiction to Review the Denials of [redacted] Motions to Reopen and Reconsider and Should Review the Decisions for Legal Error.

Respondent next asserts that the BIA's decision declining to reopen proceedings *sua sponte* is committed to agency discretion because there is no meaningful standard to review it against.[1] Resp. Br. at 18. This ignores the actual

[1] This assumes that the BIA treated the motion to reopen as *sua sponte*, but that is not clear in the decision. As discussed in Section II.C, *infra*, equitable tolling would make the motion timely, but the BIA did not reach that issue, and this leaves an open question as to what standard of review this Court should employ, or even if it has jurisdiction. *See Garcia-Mata v. Sessions*, 893 F.3d 1107, 1110 (8th Cir. 2018) (remanding where agency did not identify standard of review used). Respondent also asserts that [redacted] has waived *all* jurisdictional arguments by failing to preemptively address Respondent's meritless claims; however, Respondent is

agency decision in issue. [redacted] made a three-step argument for reopening before the agency, and again for reconsideration: 1) Under *Esquivel-Quintana*, his conviction is no longer for an aggravated felony; 2) If so, then it is a fundamental change of law; and 3) If so, then reopening is warranted. *See* A.R. 22–24/Add. 1–3. The BIA made its decisions at step 1 and did not reach the latter arguments. *Id.* Thus, the BIA's decisions did not reach any discretionary factors, but rather made a strictly legal decision interpreting legal precedent and statute.[2]

"Implicit in the grant of authority to review a final BIA order is the authority to review an order denying a motion to reopen the final order." *Jalloh v. Gonzales*, 423 F.3d 894, 895 (8th Cir. 2005); *see also Tamenut v. Mukasey*, 521 F.3d 1000, 1003 (8th Cir. 2008) ("[W]e have held that the grant of jurisdiction extends to review of these decisions."). "[T]o the extent the BIA's refusal to reopen proceedings *sua sponte* is not committed to agency discretion, we would have jurisdiction to review the decision pursuant to § 1252." *Id.* at 1003. However, given that there is no statutory or regulatory guidance for the standards the BIA should follow in deciding whether to reopen *sua sponte* in the exercise of

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essentially putting forward a motion to dismiss in his brief, and [redacted] would ordinarily be allowed to respond to a motion to dismiss for lack of jurisdiction.

[2] While this Court has touched on the argument raised in this Petition, it appears that the specific question raised here may be one of first impression.

discretion, courts have found that such a decision is generally committed to agency discretion. *Id.* at 1004–05.

That deference should not apply where there is a fundamental change in law. *See In re G-D-*, 22 I. & N. Dec. 1132, 1135 (BIA 1999). Where the Supreme Court issues a decision overruling two decades of BIA and Circuit Court precedent, making the petitioner one day removable and the next day not, as here, there has clearly been a "fundamental change in the law" notwithstanding the subjective nature of the term. *Cf. Barajas-Salinas v. Holder*, 760 F.3d 905, 907–08 (8th Cir. 2014); *G-D-*, 22 I. & N. Dec. at 1135. Nor should deference to agency discretion be given where, as here, there is no traditional discretionary element; rather, this petition hinges on whether, in light of *Esquivel-Quintana*, [redacted] conviction is for an aggravated felony. If it is, then nothing else matters. If it is not, then remand to the BIA is appropriate to determine whether reopening is warranted. In other words, [redacted] challenges a strictly legal interpretation by the BIA, *not* the decision whether to grant *sua sponte* reopening, and the concern about substituting the discretion of the court "for that of the executive departments in a matter belonging to the proper jurisdiction of the latter" does not arise. *McGrath v. Kristensen*, 340 U.S. 162, 170 (1950) (separating jurisdiction to review legal claim from discretionary determination); *N.L.R.B. v. Hearst Publications*, 322 U.S. 111, 130–31 (1944) ("Undoubtably questions of statutory interpretation, especially when

arising in the first instance in judicial proceedings, are for the courts to resolve, giving appropriate weight to the judgment of those whose special duty it is to administer the questioned statute."); *Ramirez-Barajas v. Sessions*, 877 F.3d 808, 810 (8th Cir. 2017) ("This court reviews the BIA's legal determinations *de novo*, according substantial deference to the BIA's interpretation of the statutes and regulations it administers."); *Vargas v. Holder*, 567 F.3d 387, 390 n.5 (8th Cir. 2009) ("We may, however, review non-discretionary determinations underlying such a decision, constitutional claims, and questions of law." (citing *Guled v. Mukasey*, 515 F.3d 872, 880 (8th Cir. 2008)); *Arellano-Hernandez v. Holder*, 564 F.3d 906, 910 (8th Cir. 2009) ("We review the BIA's legal determinations *de novo*.").

Respondents also assert that there is "only one exception to this jurisdictional bar for colorable constitutional claims." Resp. Br. at 18. This argument is based on this Court's decision in *Tamenut*, which found that the petitioner's challenges to "the BIA's fact-specific discretionary decision whether to reopen his case" "are simply cloaking an abuse of discretion argument in constitutional garb." 521 F.3d at 1005 (quotations omitted). However, importantly, the language used by the Court is permissive, rather than mandatory, finding that "we generally do have jurisdiction over any colorable constitutional claim," rather than holding that the Court *only* has jurisdiction over any colorable

constitutional claim. *Id.* at 1005. This Court, in *Barajas-Salinas*, potentially went a step further, finding that the phrase "fundamental change in law," just like "exceptional situations" discussed in *Tamenut*, was without any standard and subject to agency discretion. 760 F.3d at 908. But that is not relevant here. Instead, there is a pure question of law as to the applicability of *Esquivel-Quintana* to [redacted] conviction, and this Court has not limited the "constitutional claims or questions of law" exception in 8 U.S.C. § 1252(a)(2)(C) beyond what Congress intended, nor would review of this legal question go against precedent; and limiting review of a denial of a motion to reopen to only "colorable constitutional claims" would contravene Congress' intent behind § 1252(a)(2)(D).

Further, *Barajas-Salinas* sidestepped the question of whether an "incorrect legal premise" underlying the denial of a *sua sponte* motion to reopen, as it was not before the Court in that case. 760 F.3d at 907–08 & note. In *Pllumi v. Att'y Gen.*, discussed in *Barajas-Salinas*, the Third Circuit found that

> If the reasoning given for a decision not to reopen *sua sponte* reflects an error of law, we have the power and responsibility to point out the problem, even though ultimately it is up to the BIA to decide whether it will exercise its discretion to reopen. We therefore conclude that, when presented with a BIA decision rejecting a motion for *sua sponte* reopening, we may exercise jurisdiction to the limited extent of recognizing when the BIA has relied on an incorrect legal premise. In such cases we can remand to the BIA so it may exercise its authority against the correct "legal background." On remand, the BIA would then be free to deny or grant reopening *sua sponte*, and we would have no jurisdiction to review that decision.

642 F.3d 155, 160 (3d Cir. 2011) (quoting *Mahmood v. Holder*, 570 F.3d 466, 469 (2d Cir. 2009)). Since *Barajas-Salinas*, at least two other circuits have taken this position, as this Court recognized in *Carrasco-Palos v. Sessions*, 695 F.App'x 992, 995 (8th Cir. 2017) (citing *Bonilla v. Lynch*, 840 F.3d 575, 588–89 (9th Cir. 2016), and *Salgado-Toribio v. Holder*, 713 F.3d 1267, 1271 (10th Cir. 2013), but declining to follow "in these circumstances"). This reasoning makes sense and is consistent with both the statutory scheme and precedent finding no standard upon which to consider a discretionary decision. *See Pllumi*, 642 F.3d at 160. This Court should follow the Second and Third Circuits and recognize that pure questions of law may be reviewed, especially where, as here, the character and standard of review is materially the same as if this Petition were a direct appeal from a removal order. The posture of this case, moreover, does not require the Court to address "partial reviewability" or "limited jurisdiction," as it feared in *Barajas-Salinas*, because *only* the question of law was decided by the BIA and is now the only issue before this Court. This approach also finds support in *Mata v. Lynch*, in which the Supreme Court held that the Courts of Appeals must address questions of law *in addition to* the decision by the BIA to exercise discretion in granting or denying a motion to reopen *sua sponte*. 135 S. Ct. 2150, 2155–56 (2015). There is one other key difference between [redacted] case and the cases cited above, which militates even more heavily in favor of review, and that is that [redacted]

did not file a time-barred motion to reopen in order to apply for relief; instead, he is contesting whether he *is lawfully removable at all* in light of an instantaneous and fundamental change in law, and this is not the type of question that the agency is entitled to shield from review.

Finally, the issue here is much more squarely a question of legal error, going beyond a "misperce[ption of] the legal background" upon which the motion to *sua sponte* reopen was denied, as in *Mahmood* and *Pllumi*. *Cf.* 642 F.3d at 163 (remanding "[g]iven the possibility that the BIA mistakenly thought it did not have the authority to consider Pllumi's health concerns as 'other serious harm under 8 C.F.R. § 1208.13(b)(1)((iii)(B)"); 570 F.3d at 469 ("But it is at best unclear whether the Agency declined to exercise its *sua sponte* authority to reopen Mahmood's removal proceedings because it believed that doing so would be futile, as on the Agency's understanding of the law, Mahmood would still be automatically barred from seeking adjustment of status even if the untimeliness of his petition were excused."). Without jurisdiction to assess legal error which this Court is competent to review, the BIA would effectively be granted the absolute, unreviewable power—contrary to statute and legal precedent—to contravene the law under the cloak of agency discretion; because that is not permissible, review must be permitted here. *See Mata*, 135 S. Ct. at 2156 (finding that "recharacterizing appeals like Mata's as challenges to the Board's *sua sponte*

decisions and then declining to exercise jurisdiction over them" and "wrap[ping] such a merits decision in jurisdictional garb" may "effectively insulate[] a circuit split from our review"); *see also Schilling v. Rogers*, 363 U.S. 666, 683–84 (1960) (Brennan, J., dissenting) ("[T]he ultimate determination . . . which is clearly where the ultimate reservoir of discretion lies . . . was never reached. . . . [W]here the administrative decision under it was not rendered on the basis for the exercise of discretion the statute provided, but as a matter of law, judicial review was available. We retreat from established principles of administrative law when we say it is unavailable here.").

Separately, even if the motion to reopen was committed to *sua sponte* discretion—which [redacted] disputes—the motion to reconsider was timely and based exclusively on a change of law, and thus not *sua sponte*. *Averianova v. Holder*, 592 F.3d 931, 935 (8th Cir. 2008). This much is not disputed by Respondent. Resp. Br. at 23. That motion was predicated on the emergence of Circuit Court caselaw interpreting *Esquivel-Quintana*, contrary to the BIA's decision to deny the motion to reopen, and is not subject to the jurisdictional bars, as this Court can assess the decision on its legal merits. *See Fongwo v. Gonzales*, 430 F.3d 944, 948 (8th Cir. 2005) (quoting *In re J-J-*, 21 I. & N. Dec. 976, 977 n.1 (BIA 1997)). Moreover, while the denial of a motion to reconsider is ordinarily reviewed for abuse of discretion, this standard cannot apply where the question is purely one of

legal error, as the BIA does not have discretion to follow the law. *See Thobhani v. Holder*, 536 F.App'x 676 (8th Cir. 2013) (reviewing motion to reopen for questions of law); *Hanan*, 519 F.3d at 763 (same); *see also Khan v. Gonzales*, 495 F.3d 31, 34 (2d Cir. 2007) ("[A] question of law arises 'where a discretionary decision is argued to be an abuse of discretion because it was . . . based on a legally erroneous standard.").

C. Equitable Tolling Was Not Reached by the BIA and Therefore is Neither Waived Nor Before This Court.

Third, Respondent asserts that "the Board found no basis to grant equitable tolling," and because it was not raised in his opening brief [redacted] has waived the issue. Resp. Br. at 19. However, the BIA did not get past the first step of [redacted] argument, noting that "we need not address [redacted] argument that the motions deadline should be equitably tolled." A.R. 24/Add. 5. If it was not reached by the BIA, it could not be properly raised before this Court.[3] *Ortega-Marroquin v. Holder*, 640 F.3d 814, 820 (8th Cir. 2011) (quoting *Gonzales v. Thomas*, 547 U.S. 183, 187 (2006) (per curiam) and holding that remand was necessary where the BIA did not decide an issue).

[3] While Respondent makes several assertions about the applicability of equitable tolling here, the cases cited are not on point to the issue, and, regardless, equitable tolling is not properly before this Court.

Additionally, it is not clear whether a fundamental change in law is more properly covered by equitable tolling, which would result in a timely filed—and not *sua sponte*—motion, or by *sua sponte* consideration. *See Holland v. Florida*, 560 U.S. 631 (2010) (finding a rebuttable presumption that equitable tolling is read into every federal statute of limitations). However, the BIA did not get this far, and therefore this is not properly before this Court at this time. Instead, it should be addressed in the first instance on remand.[4] *See Ortega-Marroquin*, 640 F.3d at 819–20 ("[B]ecause the Board decision here did not decide whether the doctrine of equitable tolling applied to his case . . . this court remands this case to the Board to consider Ortega's equitable-tolling claim.").

Therefore, [redacted] is not arguing before this Court that equitable tolling applies; instead, he asks this Court to do nothing more than what it has the power to do: to reverse the BIA on the first step of the argument and remand to the BIA for further consideration of the motions in light of this decision.

However, Respondent's invocation of equitable tolling raises a significant problem. The Supreme Court has held that jurisdiction to review a request for equitable tolling is not affected by a *sua sponte* denial. *Mata*, 135 S. Ct. at 2155. However, the BIA did not reach the equitable tolling argument because it stopped at the question of whether [redacted] conviction is still for an aggravated felony, and so

[4] [redacted] has, clearly, preserved the argument before the BIA.

this Court must first resolve that legal question before [redacted] can potentially even receive a decision on equitable tolling.

CONCLUSION

For the foregoing reasons, and for the reasons stated in Petitioner's Opening Brief, the Court should grant [redacted] Petitions for Review.

Dated: July 5, 2019

Respectfully submitted,

s/ *John Bruning*

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UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

[redacted] **Petitioner,** **v.** **William Barr,** **U.S. Attorney General,** **Respondent.**	**Nos.** [redacted] Immigration File No. [redacted] Petition for Review from the Decision of the Board of Immigration Appeals

CERTIFICATE OF SERVICE

I hereby certify that on July 5, 2019, I electronically filed the foregoing REPLY BRIEF OF PETITIONER with the Clerk of the Court for the United States Court of Appeals for the Eighth Circuit by using the CM/ECF system. I certify that all participants in the case are registered CM/ECF users and will be served by the CM/ECF system.

Dated: July 5, 2019

s/ John Bruning

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[redacted] **Petitioner,** **v.** **William Barr,** **U.S. Attorney General,** **Respondent.**	**Nos.** [redacted] Immigration File No. [redacted] Petition for Review from the Decision of the Board of Immigration Appeals

CERTIFICATE OF COMPLIANCE

Pursuant to Fed. R. App. P. 32(g), I hereby certify that the foregoing REPLY BRIEF OF PETITIONER has been prepared in a proportionally spaced typeface of 14-point or more, and contains 3,370 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(f).

Pursuant to Eighth Cir. R. 28A(h), I certify that the foregoing Petitioner's Opening Brief has been scanned for viruses and is virus-free.

Dated: July 5, 2019

s/ John Bruning

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CERTIFICATE OF SERVICE

I hereby certify that on July 10, 2019, pursuant to Eighth Cir. R. 28A(d), I caused 10 paper copies of the foregoing document to be sent to the Court and 1 copy to be served on Respondent at the following address:

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Dated: July 10, 2019

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