U.S. COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 25-1490

JOSE ARCENIO ARISTY-ROSA,
Petitioner

v.

ATTORNEY GENERAL OF THE UNITED STATES OF AMERICA

On Petition for Review of the Board of Immigration Appeals
Immigration Judge John P. Ellington, No. A043-907-039

Before: BIBAS, PORTER, and BOVE, *Circuit Judges*
Argued Jan. 27, 2026; Decided Sep. 1, 2026

OPINION OF THE COURT

BOVE, *Circuit Judge*. For the fourth time, Petitioner Jose Arcenio Aristy-Rosa seeks to reopen a final removal order that was entered on consent in 2011. The primary basis for the removal order was a 1997 narcotics conviction in New York State. Despite the removal order and the conviction, Petitioner has been permitted to remain in the United States for 15 years, at liberty, while pressing meritless challenges to forestall his exit.

The Petition For Review focuses on a 2023 decision by the Second Circuit interpreting the New York statute that Petitioner violated in connection with his drug crime. Petitioner contends that the decision calls into question the basis for the removal order entered long ago. He sought reopening and reconsideration of that order. The BIA denied his motions. We see no issue with the BIA's decision.

Changes in law are not a basis for relief under the statute that provides for motions to reopen. *See* 8 U.S.C. § 1229a(c)(7). A change in law may be a basis for statutory reconsideration, but Petitioner's motion was time-barred and he did not establish that equitable tolling was appropriate. *See id.* § 1229a(c)(6). Petitioner also sought so-called "sua sponte" reopening from the BIA. *See* 8 C.F.R. § 1003.2(a). The BIA declined, and we lack jurisdiction to review that decision.

We previously vacated Petitioner's removal stay in a precedential opinion. *See Aristy-Rosa v. AG*, --- F.4th ----, 2026 WL 2363039 (3d Cir. 2026). We will now deny the Petition as to the motions for statutory reopening and reconsideration, and dismiss the Petition as to sua sponte reopening.

I.

Petitioner has been in the United States for almost 30 years. He has been subject to a final order of removal for about half that time. With the aid of counsel, he has been able to remain in the Country by stringing together four meritless challenges to the removal order.

A.

Petitioner was admitted to the United States in 1993. The Executive Branch granted him the status of a lawful permanent resident based on his mother's status, which meant that he was a "noncitizen who is authorized to live permanently in the United States" so long as he obeyed the law. *Blanche v. Lau*, 146 S. Ct. 1981, 1986 (2026).[1] He did not. Just four years after Petitioner arrived, he pleaded guilty in Queens, New York to attempted third-degree criminal sale of cocaine, in violation of New York Penal Law § 220.39(1). The court sentenced Petitioner principally to five years' probation. He did not appeal the conviction and completed the term of probation in May 2002.

By 2011, Petitioner had moved to Pennsylvania. He did not notify immigration authorities of the move. In Pennsylvania, Petitioner had a wife, four minor children, and a girlfriend. The record indicates that, after Petitioner's New York conviction, he and his wife had issues with state-law criminal tax offenses and repeated traffic violations. CAR261-62. The record lacks detail about the disposition of those matters.

In January 2011, DHS issued Petitioner a Notice to Appear for removal proceedings based largely on his New York conviction and detained him pending those proceedings. DHS alleged that Petitioner was removable because the conviction was both a controlled-substance offense and an aggravated felony. *See* 8 U.S.C. § 1227(a)(2)(B)(i), (a)(2)(A)(iii). On February 22, 2011, an IJ ordered Petitioner removed to the

[1] Unless otherwise indicated, case quotations omit all internal citations, quotation marks, footnotes, alterations, and subsequent history.

Dominican Republic. Petitioner did not appeal the removal order to the BIA. He was bailed and permitted to remain in the United States.

Around the same time as the removal order, Petitioner collaterally attacked his drug conviction in New York. Relying on *Padilla v. Kentucky*, 559 U.S. 356 (2010), which post-dated the conviction, Petitioner argued that his trial counsel provided constitutionally ineffective assistance because the lawyer did not advise Petitioner of the immigration consequences associated with his guilty plea. The New York court denied the motion and granted Petitioner leave to appeal, but New York's intermediate appellate court later affirmed. *See People v. Aristy*, 979 N.Y.S.2d 634, 634 (N.Y. App. Div. 2014).

In June 2012, Petitioner filed a motion for sua sponte reopening. *See* 8 C.F.R. § 1003.23(b). Similar to his strategy in New York's courts, Petitioner argued that he received ineffective assistance in connection with his narcotics conviction because counsel did not advise him about immigration consequences. An IJ denied the motion. Petitioner did not appeal.

Petitioner filed a statutory motion to reopen in July 2012. He reiterated the ineffective-assistance arguments and also relied on recently filed applications for asylum, withholding of removal, and relief under the Convention Against Torture. An IJ denied the motion. The IJ held that Petitioner's narcotics conviction foreclosed asylum and withholding. The IJ also observed that Petitioner's recent application for removal relief was limited to "conclusory statements" and supported by "no evidence." CAR123. Petitioner did not appeal.

In May 2018, Petitioner filed a second motion for sua sponte reopening. This time, he relied on a December 2017 pardon from New York's governor relating to his narcotics conviction. An IJ denied the motion, and the BIA dismissed Petitioner's appeal. We denied Petitioner's Petition For Review. *Aristy-Rosa v. AG*, 994 F.3d 112, 117 (3d Cir. 2021). The pardon extinguished the aggravated-felony basis for Petitioner's removal but not the controlled-substance ground under 8 U.S.C. § 1227(a)(2)(B)(i). *See Aristy-Rosa*, 994 F.3d at 115.

B.

That brings us to the circumstances underlying the current Petition For Review. In May 2024, Petitioner filed a motion for relief from the 2011 removal order with the BIA. He invoked statutory reopening (for the second time), statutory reconsideration (for the first time), and the BIA's sua sponte authority (for the third time). Petitioner argued that under *United States v. Minter*, 80 F.4th 406 (2d Cir. 2023), his narcotics conviction did not qualify as a controlled-substance offense under § 1227(a)(2)(B)(i). The Second Circuit held in *Minter* that the New York statute Petitioner violated was not a "serious drug offense" under the Armed Career Criminal Act, 18 U.S.C. § 924(e)(1). *See* 80 F.4th at 407.

The BIA denied Petitioner's motions on March 3, 2025. The Board explained that the statutory motions were time-barred, that equitable tolling did not apply, and that sua sponte reopening was not appropriate. The Board cited *Matter of M-N-I-*, 28 I. & N. Dec. 803, 804-05 (BIA 2024), and other BIA authorities in support of the conclusion that *Minter* was not binding in the Third Circuit.

Petitioner timely filed his Petition For Review.

II.

The BIA had jurisdiction under 8 C.F.R. § 1003.2. *Darby v. AG*, 1 F.4th 151, 159 (3d Cir. 2021). The Supreme Court has interpreted 8 U.S.C. § 1252(a) to provide federal appellate courts with jurisdiction to review denials of statutory motions to reopen. *See Mata v. Lynch*, 576 U.S. 143, 147-48 (2015). The reasoning of *Mata* suggests that we have jurisdiction to review denials of statutory motions for reconsideration. *See Suchite-Salguero v. AG*, 147 F.4th 355, 358 (3d Cir. 2025). We apply a deferential abuse of discretion standard when reviewing both types of motions. *Id.*; *Darby*, 1 F.4th at 159. We generally lack jurisdiction to review motions to reopen based on sua sponte regulatory discretion. *Darby*, 1 F.4th at 159.

III.

Petitioner seeks retroactive application of the Second Circuit's 2023 *Minter* decision to his 2011 removal order. But not only that. Because *Minter* did not address immigration removals, Petitioner also asks us to extend that out-of-Circuit precedent. There are numerous defects in Petitioner's presentation of these arguments, which start to look a lot like another delay tactic upon close examination.

"The purpose of an appeal is to correct legal errors which occurred at the initial determination of deportability; it is not to permit an indefinite stalling of physical departure in the hope of eventually satisfying legal prerequisites." *INS v. Rios-Pineda*, 471 U.S. 444, 450 (1985). As a procedural matter, Petitioner's motions were essentially dead on arrival. Today, we hold that a change in law is not a basis for statutory reopening. *See* 8 U.S.C. § 1229a(c)(7). Such a change may make statutory reconsideration appropriate in some situations, but Petitioner's motion was untimely and he did not establish an extraordinary circumstance worthy of equitable tolling. *See id.* § 1229a(c)(6). Finally, sua sponte reopening is committed to agency discretion, and there is no basis for us to question the Board's determination. *See* 8 C.F.R. § 1003.2(a).

A.

Not everyone would see *Minter* as a change in the law in the context of a Third Circuit appeal, but we will credit Petitioner's characterization for purposes of this analysis. Petitioner assumes that equitable tolling is available to him based on *Minter* for purposes of reopening, but he skipped by a bigger problem with his argument. Changes in law are not a basis for statutory reopening, which means that equitable tolling does not come in to play here under § 1229a(c)(7). *See Gonzalez Hernandez v. Garland*, 9 F.4th 278, 285-86 (5th Cir. 2021). This follows from the application of basic tools of statutory interpretation.

"Statutory interpretation proceeds on the assumption that those who draft and enact a provision generally intend its terms to mean what they mean in ordinary usage." *Mullin v. Doe*, 146 S. Ct. 2121, 2135 (2026). Statutory motions to reopen must "state the new facts" to be "proven at a hearing" by "evidentiary material" such as "affidavits." 8 U.S.C. § 1229a(c)(7)(B). These are firm requirements introduced by the term "shall," *id.*, which "creates an obligation impervious to judicial discretion," *Smith v. Spizzirri*, 601 U.S. 472, 476 (2024). Judicial decisions like *Minter* are not "new facts" or "evidentiary material." 8 U.S.C. § 1229a(c)(7)(B).

Recognizing the restrictive plain meaning of these terms is consistent with the statute's strict textual limitations on opportunities for reopening. Absent compelling circumstances, an alien may only file one statutory motion to reopen and must do so within 90 days of the final removal order. *See* 8 U.S.C. § 1229a(c)(7). These restrictions demonstrate that such motions are strongly disfavored because they "implicate important finality concerns." *Sevoian v. Ashcroft*, 290 F.3d 166, 172 (3d Cir. 2002). "Granting such motions too freely will permit endless delay . . . ." *INS v. Abudu*, 485 U.S. 94, 108 (1988). "[E]very delay works to the advantage of the deportable alien who wishes merely to remain in the United States," and to the disadvantage of Executive Branch actors seeking to deploy core Article II authorities and implement laws passed by Congress. *INS v. Doherty*, 502 U.S. 314, 323 (1992). There can be little doubt that Petitioner has obtained these types of advantages several times since 2011.

The immediately adjacent provision relating to statutory motions for reconsideration drives home the point that a change in law is not a basis for statutory reopening. *See* 8 U.S.C. § 1229a(c)(6). Whereas "reopening accounts for *new* facts," a motion for reconsideration "addresses 'errors of law or fact in the previous order.'" *Santos-Zacaria v. Garland*, 598 U.S. 411, 424 (2023) (quoting 8 U.S.C. § 1229a(c)(6)(C)) (emphasis added). Statutory reconsideration motions must be "supported by pertinent authority." 8 U.S.C. § 1229a(c)(6)(C). Subsequent judicial decisions can plausibly address "errors of law" and may serve as "pertinent authority" under § 1229a(c)(6)(C). "We are required to give effect to Congress' express inclusions and exclusions." *Mullin v. Al Otro Lado*, 146 S. Ct. 2079, 2091 (2026). Thus, unlike a motion to reopen, a "change of law" can be a basis for a statutory motion for reconsideration. *In re O-S-G-*, 24 I. & N. Dec. 56, 57 (BIA 2006).

There is also a tighter deadline for statutory reconsideration motions: 30 days rather than the 90 days allotted for statutory reopening. *Compare* 8 U.S.C. § 1229(c)(7)(C)(i), *with id.* § 1229a(c)(6)(B). "To allow changes of law to be addressed in motions to reopen would contravene the statute and collapse the difference between a motion to reconsider and a motion to reopen with respect to changes in law, making the 30-day time limit for motions to reconsider new legal decisions superfluous." *Gonzalez Hernandez*, 9 F.4th at 286. That is not the single, best meaning of § 1229(c)(7). *See Essintial Enter. Sols., LLC v. SBA*, 166 F.4th 380, 384-85 (3d Cir. 2026). Accordingly, there can be no equitable tolling based on a change in law for a statutory motion to reopen because changes in law are not a basis for that form of motion.

B.

Petitioner hedged his bet on further delay by seeking statutory reconsideration too. Facing a 30-day deadline, he filed the motion about 13 years after his removal order. *See* 8 U.S.C. § 1229a(c)(6)(B). The motion was obviously time-barred. So he sought equitable tolling. The BIA did not err in denying that request.

We cannot disregard statutory restrictions that are the product of bicameralism and presentment. But equitable tolling is not "a matter of some independent authority to reconsider the fairness of legislative judgments balancing the needs for relief and repose." *Lozano v. Montoya Alvarez*, 572 U.S. 1, 18 (2014). The theoretical basis for this kind of tolling is that "Congress is presumed to incorporate equitable tolling into federal statutes of limitations because equitable tolling is part of the established backdrop of American law." *Id.* at 11. Nevertheless, the institutional implications of this equitable relief are so serious, whether provided by an agency or a court, that instances in which this kind of tolling is appropriate are exceedingly rare. *See Wallace v. Kato*, 549 U.S. 384, 396 (2007). Thus, litigants like Petitioner face an Everest-level uphill battle in asking an IJ, the BIA, or a court to excuse noncompliance with express statutory limitations.

Indeed, no precedent of ours makes equitable tolling available on statutory motions for reconsideration. Nor have we ever held that equitable tolling applies to number bars on statutory motions for reconsideration or reopening. *See Luntungan v. AG*, 449 F.3d 551, 557 (3d Cir. 2006). There are "good reasons" to conclude that equitable tolling does not apply to these number bars. *Enbridge Energy, LP v. Nessel ex rel. Michigan*, 146 S. Ct. 1074, 1084-85 (2026); *see also Lozano*, 572 U.S. at 12 (warning against "export[ing] such background principles of United States law to contexts outside their jurisprudential home"); *Garcia Morin v. Bondi*, 152 F.4th 626, 632-35 (5th Cir. 2025); *Estrada-Cardona v. Garland*, 44 F.4th 1275, 1287 n.3 (10th Cir. 2022). Yet only the time bar is at issue in this case. Assuming equitable tolling is available to cure the untimeliness of a statutory reconsideration motion, Petitioner did not show that the relief he sought was appropriate.

Equitable tolling requires a showing of diligence and that the alien "in some extraordinary way has been prevented from asserting her rights." *D.J.S.-W. ex rel. Stewart v. United States*, 962 F.3d 745, 750 (3d Cir. 2020); *see also Nkomo v. AG*, 986 F.3d 268, 272-73 (3d Cir. 2021). "Extraordinary" means "'most unusual,' 'far from common,' or 'having little or no precedent.'" *Rutherford v. United States*, 146 S. Ct. 1320, 1330 (2026) (quoting Webster's Third New International Dictionary 807 (1976)). Common examples—which are referenced in passing more often than they are adequately substantiated—are active deceit by an adversary or some other type of fraud. *See Hedges v. United States*, 404 F.3d 744, 751 (3d Cir. 2005); *Borges v. Gonzales*, 402 F.3d 398, 406-07 (3d Cir. 2005).

Nothing of the sort happened to Petitioner. A recent judicial opinion interpreting long-standing statutes is not the type of extraordinary circumstance that warrants equitable tolling for an alien with a decades-old removal order. *See Omar v. Lynch*, 814 F.3d 565, 570 (1st Cir. 2016) (finding no abuse of discretion in BIA's rejection of equitable tolling based on "emerging . . . precedent" due to "the BIA's interest in finality"). There is no requirement that the BIA revisit removal orders "whenever, years later, the Supreme Court or a court of appeals disagrees with the Board's legal conclusions." *Shah v. Holder*, 736 F.3d 1125, 1127 (7th Cir. 2013); *cf. Debeato v. AG*, 505 F.3d 231, 237 (3d Cir. 2007) (holding that collateral attacks on removal orders must be based on "the law as it existed at the time of the original deportation"). No precedent or equitable consideration required the BIA to assume that we would adopt the Second Circuit's reasoning, extend it to the immigration setting, and apply it retroactively for Petitioner's benefit. [2]

[2] Sometimes Circuits see these types of issues differently. *Compare Gayle v. AG*, 2023 WL 4077332, at *6 (3d Cir. 2023) (holding that N.J. Stat. Ann. § 2C:35-5 is divisible), *and Martinez v. AG*, 906 F.3d 281, 287 (3d Cir. 2018) (noting concession that § 2C:35-5 is divisible), *with Amaro Luna v.*

Even a Third Circuit holding that matched *Minter* would not justify equitable tolling. The argument addressed in that opinion is not extraordinary. *See, e.g.*, *United States v. Gott*, 2023 WL 362388, at *6-7 & n.4 (M.D. Pa. 2023); *see also Penaranda Arevalo v. Bondi*, 130 F.4th 325, 337 (2d Cir. 2025) ("Somebody has to be the first one to raise a legal argument, and it could just as easily have been [Petitioner] who did so . . . ."). In fact, for more than 35 years, aliens have been making arguments about the status of the drug crime Petitioner committed under federal immigration laws. *See Leader v. Blackman*, 744 F. Supp. 500, 503-04 (S.D.N.Y. 1990); *see also Gutierrez v. Reno*, 2000 WL 1643585, at *1 (S.D.N.Y. 2000). Thus, even if *Minter* was a Third Circuit immigration case, which it is not, such a precedent would not be extraordinary for purposes of equitable tolling because Petitioner could have made the same argument prior to the decision.

For all of these reasons, equitable tolling is not available based on a judicial decision that rests on statutory interpretation reasoning that the alien could have presented himself. That type of situation is not extraordinary. Regardless of the jurisdiction that issues such an opinion, permitting equitable tolling under those circumstances would undermine finality in a manner that is wholly inconsistent with the statutory scheme. Petitioner did not identify an obstacle to a timely motion for reconsideration or any other inequitable circumstances sufficient to require tolling. Accordingly, the BIA did not err in rejecting this argument and denying Petitioner's motion for statutory reconsideration.

Bondi, 2025 WL 2886323, at *2 (2d Cir. 2025) (holding that § 2C:35-5 is not divisible).

C.

We will dismiss the Petition For Review for lack of jurisdiction insofar as Petitioner challenges the BIA's denial of his motion for sua sponte reopening.

"If a party's *request* to reopen a case sua sponte sounds like a misnomer, that's because it is." *Herrera v. Bondi*, 162 F.4th 617, 622 (6th Cir. 2025). BIA action in response to an alien's motion is not sua sponte in any conventional sense. The usage appears to derive from the fact that this narrow alternative pathway to reopening is a "creature[] of regulation, crafted by the Attorney General at the behest of Congress." *In re G-D-*, 22 I. & N. Dec. 1132, 1134 (BIA 1999) (en banc). As such, sua sponte reopening is committed to "the discretion of the Board," and DOJ has empowered the BIA to deny a motion invoking this authority even where "the moving party has made out a *prima facie* case for relief." 8 C.F.R. § 1003.2(a).

"The Attorney General can, in exercising his discretion, legitimately avoid creating a further incentive for stalling" by authorizing the denial of these motions for any reason or no reason at all. *Rios-Pineda*, 471 U.S. at 450. The BIA, in turn, "is entitled to conclude that an alien cannot avoid the consequences of his own litigation strategy by filing years-late requests with a '*sua sponte*' label attached." *Shah*, 736 F.3d at 1127. Even if there is an "exceptional situation," "the BIA may still decide against reopening." *Sang Goo Park v. AG*, 846 F.3d 645, 650 (3d Cir. 2017).

"Because such motions are committed to the unfettered discretion of the BIA," we generally "lack jurisdiction to review a decision on whether and how to exercise that discretion." *Pllumi v. AG*, 642 F.3d 155, 159 (3d Cir. 2011).

Our precedent recognizes a "limited" exception that permits a remand—not reversal—where "the BIA has relied on an incorrect legal premise." *Id.* at 160. There was no such error here. The Board expressly recognized Petitioner's invocation of the sua sponte reopening authority but declined to exercise it based on *Minter*. The Board cited precedential decisions of its own requiring that course, which we have previously cited with approval. *See Abdulai v. Ashcroft*, 239 F.3d 542, 553 (3d Cir. 2001).

A separate line of BIA precedent instructs that sua sponte reopening may be appropriate based on a "fundamental change" in the law, such as the statutory amendments pursuant to the Illegal Immigration Reform and Immigrant Responsibility Act of 1996. *In re X-G-W-*, 22 I. & N. Dec. 71, 74 (BIA 1998) (en banc). The Board has warned, however, that "[n]ew case law" does not typically result in a fundamental change in law. *In re G-D-*, 22 I. & N. Dec. at 1135.

> Much of that case law builds on the past, seldom reflecting dramatic departures from the legal principles that are routinely applied to resolve the appeals that come before us. If each incremental development in the case law were considered to be a change warranting reopening on the Board's own motion, the implications for the motions regulations and for the finality of proceedings would be profound.

Id. The BIA's logic is sound and consistent with the government's well-established interests in finality.

When the BIA makes a decision regarding whether a judicial decision reflects a "fundamental" change in law sufficient for sua sponte relief, the Board is simply exercising its broader regulatory authority to determine whether an "intervening development constitutes an 'exceptional situation' warranting an exercise of its discretion to reopen." *Barajas-Salinas v. Holder*, 760 F.3d 905, 908 (8th Cir. 2014). The Board's "discretion is essentially complete" in making these types of decisions, and "there is simply no meaningful standard against which such a decision can be judged." *Pllumi*, 642 F.3d at 160. We therefore lack jurisdiction. Accordingly, we will dismiss Petitioner's challenge to the BIA's denial of his sua sponte motion to reopen.

IV.

For the foregoing reasons, we will deny the Petition For Review as to Petitioner's motions for statutory reopening and statutory reconsideration, and dismiss the Petition as to the denial of the motion for sua sponte reopening.

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