No. 09-194 DEC 1 - 2009

IN THE

Supreme Court of the United States

FRANCOISE ANATE GOMIS,

Petitioner,

—v.—

ERIC H. HOLDER, JR.,
United States Attorney General,

Respondent.

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

REPLY TO BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

LUCAS GUTTENTAG
CAROLINE CINCOTTA
AMERICAN CIVIL LIBERTIES
UNION FOUNDATION
39 Drumm Street
San Francisco, California 94111
(415) 343-0770

KELL ENOW
ENOW & ASSOCIATES
2470 Windy Hill Road
Marietta, Georgia 30067
(770) 956-8515

LEE GELERNT
Counsel of Record
STEVEN R. SHAPIRO
AMERICAN CIVIL LIBERTIES
UNION FOUNDATION
125 Broad Street, 18th Floor
New York, New York 10004
(212) 549-2500

CHARLES ROTH
NATIONAL IMMIGRANT
JUSTICE CENTER
208 South LaSalle Street
Suite 1818
Chicago, Illinois 60604
(312) 660-1613

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INTRODUCTION

The government does not dispute that there is a direct circuit split on the precise issue in this case: whether the term "questions of law" in 8 U.S.C. 1252(a)(2)(D) allows review of an asylum seeker's claim that she satisfied one of the statutory exceptions to the filing deadline. BIO 17 (acknowledging "disagreement in the courts of appeals").

The government also does not dispute that the circuits are splintered in both result and analysis, that the split is entrenched and longstanding, that eleven circuits have now ruled on the issue, and that further litigation in the lower courts will not eliminate the disagreement. Pet. 23-26.

The government likewise does not dispute that the precise jurisdictional issue has arisen in hundreds of asylum cases over the past few years. Pet. 22. *See also* Amicus Brief 2-4, 14 (brief by asylum experts noting the substantial number of cases). Nor does the government take issue with petitioner's observation that the courts of appeals have generally cited Section 1252(a)(2)(D) in over 1000 cases and have adopted conflicting interpretations of the term "questions of law." Pet. 23-29, 36-37.

Finally, the government does not claim that the Fourth Circuit failed to rule on the issue presented by the petition or that any other obstacle would prevent the Court from reaching the issue in

this case. In short, the government does not dispute that this case would allow the Court to reach a recurring and nationally-significant jurisdictional issue that has divided the courts of appeals for many years and has life and death consequences for asylum seekers.

Instead, the government argues that this case suffers from two vehicle problems: (1) petitioner did not brief the jurisdictional issue below and the Fourth Circuit's analysis was "relatively" short, and (2) petitioner may not have prevailed on the merits even if there had been jurisdiction. BIO 17-21. The government also argues that the Fourth Circuit's jurisdictional decision was correct. The government thus submits that the Court should deny the petition, as the Court has in other cases involving this issue. BIO 10-11 (citing cases).

The government's arguments in this case mirror its position in these prior cases. Although the government has consistently opposed review on vehicle grounds, it has previously acknowledged that the issue is an "important" one, BIO 5 in *Kourouma v. Mukasey*, No. 07-7726, and that the split "may warrant this Court's attention in an appropriate case," BIO 10 in *Eman v. Holder*, No. 08-1317 (2009); *see also* BIO 10 in *Viracacha v. Mukasey*, No. 07-1363 (2008) (same). But whatever vehicle problems may

have existed in these other cases, this case presents an especially suitable vehicle.[1]

ARGUMENT

I. THIS CASE PROVIDES AN IDEAL VEHICLE TO RESOLVE AN ENTRENCHED CIRCUIT SPLIT.

A. The Briefing And Length Of The Opinion Below Do Not Make This Case An Unsuitable Vehicle.

The government does not dispute that this Court routinely reviews cases where the issue was not briefed below, provided that the court passed on the question. Pet. 15 n.2 (citing cases).

The government also does not claim that the Fourth Circuit failed to address the issue. The Fourth Circuit received jurisdictional briefing from the government, directly ruled on the issue and also provided its rationale (that Ms. Gomis' claim was a "*discretionary determination* based on factual circumstances" and not a question of law). Pet. 10a-13a (emphasis in original). Moreover, the court of appeals acknowledged the circuit split, cited the leading circuit cases on the issue and specifically noted that the Ninth Circuit had adopted a conflicting view. Pet. 12a-13a (noting Ninth Circuit's view that the claim is a reviewable "mixed question of law and fact").

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[1] The jurisdictional issue in this case is also presented in *Khan v. Holder*, No. 09-229, *pet. for certiorari filed*, Aug. 20, 2009.

The government argues, however, that this is an unsuitable vehicle because the Fourth Circuit's opinion was "relatively brief." But at the time of its ruling, the Fourth Circuit was the *eleventh* circuit to address the issue. There was thus little need for it to rehash the arguments.[2]

Nor is the Fourth Circuit's decision short in comparison to the lead decisions from most of the other circuits -- decisions on which the government relies heavily. BIO 10, 15-16. *See, e.g.*, *Usman v. Holder*, 566 F.3d 262, 267 (1st Cir. 2009) (one-paragraph analysis); *Sukwanputra v. Gonzales*, 434 F.3d 627, 635 (3d Cir. 2006) (two paragraphs); *Ignatova v. Gonzales*, 430 F.3d 1209, 1213-14 (8th Cir. 2005) (one paragraph); *Ferry v. Gonzales*, 457 F.3d 1117, 1130 (10th Cir. 2006) (one paragraph); *Chacon-Botero v. U.S. Att'y Gen.*, 427 F.3d 954, 957 (11th Cir. 2005) (two paragraphs).

In sum, the Fourth Circuit squarely addressed the issue and acknowledged the contrary authority. And because the Fourth Circuit was the eleventh court of appeals to address the question, this is not a situation where this Court will be without the benefit of the courts of appeals' thinking.

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[2] The government suggests that the Fourth Circuit did not address certain arguments "presumably" because they were not briefed by petitioner. BIO 18. But all of these arguments were addressed in the Ninth Circuit's *Ramadan* decision, which the Fourth Circuit expressly chose not to follow. Pet. 13a.

B. Petitioner Would Likely Prevail On Her Asylum Claim.

1. The government speculates that petitioner would be unable to demonstrate changed circumstances on remand. The IJ and BIA, however, did not dispute that circumstances changed in Ms. Gomis' case, but rather concluded that the changes were not the type contemplated by the statute. Specifically, as the government acknowledges (at 19-20), the IJ and BIA concluded that Ms. Gomis had not satisfied the statute because the changes "simply confirm[ed] the preexistent risk" of FGM, and did not involve a different type of persecution. Pet. 44a (IJ). *See also* Pet. 30a (BIA) (stating that the statute was not satisfied because the original reason Gomis left Senegal was "to avoid the threat of FGM").

But, as *amici* asylum experts explain (14-18), the statute is satisfied where the likelihood of the same type of persecution occurring has increased. Notably, the only court of appeals to rule on this merits issue has rejected the government's position. *Fakhry v. Mukasey*, 524 F.3d 1057, 1062-64 (9th Cir. 2008).

Indeed, it would make little sense to require applicants to apply within a year even where they wished to return home and believed there was a chance they would be able to do so (or believed that the risk of harm at the time of the deadline was not legally sufficient). *Id.* at 1064 (asking why Congress would want to penalize an asylum seeker who chose not "to clog the immigration courts with a meritless

application" rather than waiting until asylum became necessary and viable); *id.* at 1063 ("a likely purpose of the [asylum] exception [is] to excuse late applications when an alien previously had a weak or nonexistent case for asylum").[3]

2. The government alternatively speculates (at 20-21) that petitioner's asylum application would be denied on the merits. Yet both the IJ and Fourth Circuit specifically acknowledged the risk of persecution if Ms. Gomis is returned to Senegal, and held only that she had not satisfied the "more likely than not" standard governing withholding. Pet. 17a, 46a; *see also* 8 C.F.R. 1208.13(b)(2)(i)(B) (requiring only a "reasonable possibility" of harm to satisfy asylum well-founded fear standard).

In fact, the Fourth Circuit divided evenly (5-5) on whether the evidence compelled the conclusion that Ms. Gomis satisfied the "more likely than not" standard governing *withholding*. *See* Pet. Reply 8a (dissent of 5 judges stating that "were [Gomis] to return to Senegal, there is no chance that she could escape circumcision").

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[3] Contrary to the government's assertion (at 19-20), the IJ's determination would not survive "substantial evidence" review. More fundamentally, the government does not explain why that standard would apply if this Court concludes that petitioner raised a question of *law* under 8 U.S.C. 1252(a)(2)(D). *See, e.g.*, *Ornelas v. United States*, 517 U.S. 690, 699-700 (1996) ("*de novo*" review proper because the claim involved the application of law to fact).

Notably, the government does not claim that Ms. Gomis would be unable to satisfy the 10 percent well-founded fear standard if she were returned to her home. Pet. 4. Instead, citing cryptic statements made by the IJ, the government argues that the agency's decision might be upheld on the ground that Ms. Gomis could conceivably relocate within Senegal. BIO 20-21. But the BIA did not discuss relocation. Pet. 29a-30a. And even the IJ did not make an actual finding on relocation, which would have required the IJ to assess, among other things, whether relocating would avoid not only FGM but any other "serious harm," and whether there would be other "social and cultural constraints" in relocating. 8 C.F.R. 1208.13(b)(3). *See, e.g.*, *Arboleda v. U.S. Att'y Gen.*, 434 F.3d 1220, 1226 (11th Cir. 2006).[4]

Furthermore, as the government recognizes (at 21), the IJ's vague statements on relocation appeared in the context of whether Ms. Gomis had met her burden as to *withholding* -- where the

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[4] The government's reliance on *In re A-K-*, 24 I. & N. Dec. 275 (BIA 2007), is misplaced. BIO 21. The one-sentence of dicta in that case does not represent the Board's considered view that all women in Senegal can escape FGM and certainly does not bear on whether Ms. Gomis could relocate given her very different circumstances; indeed, in that case, the father would have *assisted* in his daughters' relocation. *Compare* Pet. 26a (Letter from Gomis' father stating: "I guarantee you that you'll not get from this situation.")

applicant must establish that it is *more likely than not* that she will be harmed. Pet. 46a.[5]

3. Finally, the government implies that petitioner's inability to apply for asylum is ameliorated by the fact that she was able to apply for withholding. BIO 10, 12. But asylum is the principal form of relief for refugees because, among other things, the applicant need only show a 10 percent likelihood of harm. Amicus Br. 2-4. That difference could not be more relevant here, where the Fourth Circuit divided 5-5 even under the "more likely than not" standard.[6]

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[5] Insofar as the government is suggesting (at 21) that Ms. Gomis would have to satisfy the "more likely than not" standard as to relocation, that is patently incorrect and misreads the BIA's decision in *In re D-I-M-*, 24 I. & N. Dec. 448 (BIA 2008). Like other civil litigants, Ms. Gomis would simply have to show by a preponderance of the evidence that she satisfied the applicable *substantive* standard, which for asylum is the well-founded fear (*i.e.*, 10 percent) standard. *Cf. Borovikova v. U.S. Dep't of Justice*, 435 F.3d 151, 155-156 (2d Cir. 2006) (requiring applicant to show by "a *preponderance of the evidence* that he [has] . . . a *well-founded fear*'") (emphasis added). Indeed, any other rule would mean that an asylum applicant with a well-founded fear of persecution (*i.e.*, over 10 percent) could nonetheless be deported if the chance of harm was no greater than 50 percent in another part of the country. Not surprisingly, there is no federal court authority, or direct BIA support, for that proposition.

[6] The government also seems to imply (at 8) that Ms. Gomis may have acted improperly by not accepting voluntary departure. But Ms. Gomis understandably (and lawfully) chose to pursue her statutorily-authorized right to appeal, rather than voluntarily returning to a country where she fears FGM.

II. THE FOURTH CIRCUIT'S RULING WAS INCORRECT.

A. Section 1252(a)(2)(D) Covers The Application Of Law To Fact.

The government does not offer its own view of the scope of Section 1252(a)(2)(D). More significantly, the government does not directly dispute that Congress was concerned with avoiding Suspension Clause problems, that Section 1252(a)(2)(D) was intended to preserve the traditional scope of habeas review, or that habeas review has always encompassed claims involving the application of law to fact. Pet. 7-9, 29-31. In light of its failure to dispute these central points, the government's arguments have little force.

The government notes that *INS v. St. Cyr*, 533 U.S. 289 (2001), involved a "pure" question of law. BIO 14. But the government does not dispute that *St. Cyr* specifically recognized that habeas review has always included review of the proper "application" of the laws. 533 U.S. at 302. And the government wholly ignores that this Court subsequently reaffirmed *St. Cyr*'s analysis. *Boumediene v. Bush*, 128 S.Ct. 2229, 2266 (2008) (quoting *St. Cyr*); Pet. 30-31 (citing additional authority).

The government also relies on a sentence in the Conference Report stating that courts can review the "legal" but not the "factual" aspects of a mixed question. BIO 14-15. But that says nothing about

whether a legal claim is limited to an artificial subset of pure legal claims. As the Report makes expressly clear, that question must be answered by reference to the traditional scope of habeas law. *See* Pet. 29-31.

Finally, the government states that Congress did not mean to alter "fundamentally" its 1996 decision to eliminate review of the asylum filing exceptions. BIO 13. But that was the precise purpose of Section 1252(a)(2)(D): to restore review of previously barred claims to the extent such review was traditionally available in habeas. *See* Pet. 7-9, 29-31; *Chen v. United States Dep't of Justice*, 471 F.3d 315, 326-27 (2d Cir. 2006) (finding jurisdiction over asylum exceptions to the extent available in habeas).[7]

B. Petitioner's Claim Involves The Application Of Law To Fact.

The government contends that petitioner's claim is unreviewable because it is factual and discretionary. Both contentions are wrong.

1. A claim involving the application of law to fact (a "mixed" question) is one where the "rule of law is undisputed," the "historical facts" are established, and the "issue is whether the facts satisfy the statutory standard." *Pullman-Standard v. Swint*,

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[7] The government's discussion of the circuit split (at 15-16) ignores the Second Circuit's intermediate approach to this issue. *See* Pet. 21-22; *Liu v. INS*, 508 F.3d 716, 721 (2d Cir. 2007).

456 U.S. 273, 289 n.19 (1982); *Ornelas v. United States*, 517 U.S. 690, 696-97 (1996). Pet. 31-32.

Significantly, the government never argues that Ms. Gomis' claim fails to satisfy this well-settled definition. Nor could the government do so since Ms. Gomis does not challenge the adjudicated "historical facts" of her case and argues only that her "facts satisfy the statutory standard." *Pullman-Standard*, 456 U.S. at 289 n.19.

The government nonetheless argues that Ms. Gomis' claim is unreviewable because it involves a "fact-bound" dispute and the "applicable principles are undisputed." BIO 13. But Ms. Gomis' claim is necessarily "fact-bound" insofar as the issue is "whether the facts satisfy the statute." *Pullman-Standard*, 456 U.S. at 289 n.19. That is the very definition of a claim involving the application of law to fact. The government is thus wrong in arguing (at 13) that Ms. Gomis' claim is unreviewable because she "takes issue with the Board's holding that she failed to adduce facts sufficient" to satisfy the changed circumstances exception. Pet. 31-33.

As this Court has repeatedly explained, a legal standard will often be settled only at the most general level and will "acquire content only through application." *Ornelas*, 517 U.S. at 697. *See* Pet. 31-33. Here, the IJ and BIA properly recognized that, as a general matter, Ms. Gomis had to show changes relevant to her asylum eligibility. But, in applying the statute, the IJ and BIA concluded that the changes in Ms. Gomis' case were not sufficient under

the statute because they involved the same fear of FGM that originally led her to flee Senegal. Pet. 44a (IJ); Pet. 29a-30a (BIA). It is thus absolutely clear that this case turned on the meaning of the statute, as applied to the facts in Ms. Gomis' case. *Ornelas*, 517 U.S. at 697.[8]

2. The government also contends that the filing exceptions are *discretionary*, noting that the statute provides only that the Attorney General "may" excuse a late-filed application if the applicant satisfies the threshold statutory eligibility criteria (*i.e.*, changed or extraordinary circumstances). BIO 11. But the fact that a statute may vest the ultimate decision in the agency's discretion does not mean that the threshold statutory eligibility criteria are likewise discretionary and unreviewable. *St. Cyr*, 533 U.S. at 307-08 (finding jurisdiction to review statutory eligibility criteria despite the fact that the agency could ultimately deny the waiver as a matter of unreviewable discretion).[9]

Furthermore, in no sense did the IJ or BIA in this case make a subjective determination. Pet. 35 (citing cases involving definition of discretion). The

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[8] Given these conceptual differences about the nature of mixed questions of law and fact, the government is incorrect that the significance of the jurisdictional issue in this case is limited to the asylum filing context. BIO 17 n.2. See Pet. 26-28.

[9] Petitioner has previously addressed the statute's use of the phrase "to the satisfaction," and the government has not responded to those arguments. Pet. 33-36.

IJ and BIA concluded that Ms. Gomis had not satisfied the statute because she still feared FGM, and not some other type of persecution. That was a legal determination about how to apply the statute: whether the "changed circumstances" exception enacted by Congress can be satisfied where the applicant demonstrates an increased risk of the same type of persecution occurring. It was not a discretionary (or factual) determination.

Finally the government is wrong that review of Ms. Gomis' claim would "convert every" claim into a question of law. BIO 13-14. Review of her claim in no way means that Ms. Gomis would be entitled to review of the historical facts or any ultimate discretionary authority the IJ may possess.

* * * *

Section 1252(a)(2)(D) is the linchpin of the Immigration Act's current judicial review scheme and has been cited in over 1000 cases since its 2005 enactment (including in over 350 *published* decisions). This case provides an ideal opportunity to address the conflicting interpretations of Section 1252(a)(2)(D) and to do so in the important context of asylum.

CONCLUSION

The petition should be granted.

Respectfully submitted,

LUCAS GUTTENTAG
CAROLINE CINCOTTA
American Civil Liberties Union Foundation
39 Drumm Street
San Francisco, California 94111
(415) 343-0770

Kell Enow
Enow & Associates
2470 Windy Hill Road
Marietta, Georgia 30067
(770) 956-8515

LEE GELERNT
Counsel of Record
STEVEN R. SHAPIRO
American Civil Liberties Union Foundation
125 Broad Street,
18th Floor
New York, New York 10004
(212) 549-2500

CHARLES ROTH
National Immigrant Justice Center
208 South LaSalle Street
Suite 1818
Chicago, Illinois 60604
(312) 660-1613

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