No. _____

IN THE

Supreme Court of the United States

ABDUL H. KHAN, YASMEEN HASEEB,
SARAH HASEEB, SANA HASEEB,
Petitioners,

—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 SEVENTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

In the immigration field, Congress has enacted a series of jurisdictional provisions that generally permit the courts to review "questions of law" pursuant to 8 U.S.C. 1252(a)(2)(D), but which bar review of most discretionary claims and certain factual findings. The courts of appeals sharply disagree, however, about how to differentiate "questions of law" from unreviewable factual and discretionary claims. The disagreement has led to jurisdictional conflicts in a number of substantive immigration areas. This case arises in the asylum context, where the conflict is especially entrenched and has proven outcome-determinative in hundreds of cases over the past few years. In particular, this case involves the extent to which the courts may review whether aliens have satisfied one of the statutory exceptions permitting the agency to consider a late-filed asylum application. The question presented is:

Did the Seventh Circuit err in holding that petitioner had not presented a question of law within the meaning of 8 U.S.C. 1252(a)(2)(D), where he challenged only the application of the statutory eligibility standards to the facts of his case, and not the underlying facts themselves or any ultimate discretionary authority the agency may possess to deny an asylum application as untimely.

PARTIES TO THE PROCEEDING

Petitioners are Abdul H. Khan, Yasmeen Haseeb, Sarah Haseeb and Sana Haseeb. Petitioners were also petitioners in the court of appeals, but were respondents before the Immigration Court and Board of Immigration Appeals.

Respondent is the Attorney General of the United States, Eric H. Holder, Jr. The respondent in the court of appeals was then Acting Attorney General Mark Filip.

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PETITION FOR A WRIT OF CERTIORARI

Petitioners Abdul H. Khan, Yasmeen Haseeb, Sarah Haseeb and Sana Haseeb respectfully petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the Seventh Circuit in this case.

OPINIONS BELOW

The opinion of the court of appeals (App. 3a)[1] is reported at 554 F.3d 681. There were no district court proceedings. The decision and order of the immigration judge (App. 35a), and the decisions of the Board of Immigration Appeals (App. 26a, 30a), are unreported.

JURISDICTION

The judgment of the court of appeals was entered on January 29, 2009. Rehearing en banc was denied on April 1, 2009. Justice Stevens extended the deadline for filing a petition for a writ of certiorari, until the current date of August 20, 2009. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Reprinted in an appendix to this petition (App. 71a-78a) are pertinent portions of the Suspension of Habeas Corpus Clause of the Constitution, Art. I,

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[1] "App." refers to the appendix attached to this petition.

§ 9, Cl. 2; and 8 U.S.C. 1158(a)(2), 1158(a)(3), 1252(a)(2)(B), and 1252(a)(2)(D).

STATEMENT

In 1996, Congress enacted a 1-year filing deadline for asylum applications, but tempered that rule with two statutory exceptions. Here, Mr. Khan argued that he satisfied the "extraordinary circumstances" exception because he suffered from serious post-traumatic symptoms due to his experiences in Pakistan, and that those symptoms significantly impaired his ability to apply for asylum upon arriving in the United States. The Board of Immigration Appeals rejected that contention and thus refused to consider his late-filed asylum application. The Seventh Circuit held that it lacked jurisdiction to review the extraordinary circumstances determination and that jurisdictional ruling is the subject of this petition.

A. Statutory Background.

1. The Filing Deadline Provisions. To qualify for asylum, applicants must show that they cannot return to their home countries because of persecution or a well-founded fear of persecution on account of race, religion, nationality, membership in a particular social group, or political opinion. *I.N.S. v. Cardoza-Fonseca*, 480 U.S. 421, 423 (1987); 8 U.S.C. 1158(b)(1)(A); 8 U.S.C. 1101(a)(42)(A). The "well-founded fear" standard does not require asylum applicants to demonstrate that persecution is a certainty, or even that it is more likely than not to

occur. *See, e.g.*, *Cardoza-Fonseca*, 480 U.S. at 449-50; *I.N.S. v. Abudu*, 485 U.S. 94, 99 n.3 (1988). Rather, an applicant may establish a well-founded fear even if he "only has a 10% chance" of being persecuted. *Cardoza-Fonseca*, 480 U.S. at 440.

In 1996, for the first time, Congress enacted a filing deadline, requiring asylum seekers to file within one year of arrival in the United States. 8 U.S.C. 1158(a)(2)(B); 8 U.S.C. 1158(a)(2)(D). But, in response to significant controversy over the proposed deadline, Congress also simultaneously enacted two statutory exceptions in the 1996 legislation, for *changed* or *extraordinary* circumstances:

> An application for asylum of an alien may be considered, notwithstanding subparagraphs (B) and (C), if the alien demonstrates to the satisfaction of the Attorney General either the existence of changed circumstances which materially affect the applicant's eligibility for asylum or extraordinary circumstances relating to the delay in filing an application within the period specified in subparagraph (B).

8 U.S.C. 1158(a)(2)(D). *See* 142 Cong. Rec. S11838-01, S11840 (Sept. 30, 1996) (statement of Sen. Hatch) (explaining that the "changed" and "extraordinary" exceptions were added out of the "concern" that asylum remain "available for those with legitimate claims").

Congress recognized that there would often be legitimate reasons for an alien's failure to submit a timely application and that these exceptions were thus critically important given the life and death stakes at issue. *See* 142 Cong. Rec. S11491-02, S11491 (Sept. 27, 1996) (statement of Sen. Hatch) (emphasizing that "the two exceptions" are intended to "provide adequate protections to those with legitimate claims of asylum"). Among the various examples cited by Congress were aliens who failed to apply within one year but subsequently obtained "more information about likely retribution [they] might face if [they] returned home," 142 Cong. Rec. S11838-01, S11840 (Sept. 30, 1996) (statement of Sen. Hatch), or who learned their "home government may have stepped up its persecution of people of [their] religious faith or political beliefs," 142 Cong. Rec. S11491-02, S11491 (Sept. 27, 1996) (statement of Sen. Hatch).

Congress made clear that these exceptions were to be given a liberal interpretation to ensure that no alien with a genuine claim for asylum would be turned away for failing to apply within the deadline. 142 Cong. Rec. S11838-01, S11839-40 (statement of Sen. Hatch) (stating that the "important exceptions" are meant to "ensur[e] that those with legitimate claims of asylum are not returned to persecution, particularly for technical deficiencies"). *See also id.* (statement of Sen. Abraham) (emphasizing the need for close congressional "attention to how the provision is interpreted" to ensure that the exceptions "provide

sufficient protection to aliens with bona fide claims of asylum").

The statutory exceptions have been given further content through regulations. The regulations define the terms "changed circumstances" and "extraordinary circumstances" and provide a non-exclusive list of circumstances that may excuse an untimely filing. 8 C.F.R. 208.4(a)(4), (5) (reprinted at App. 74a-78a). The regulations state that the term "extraordinary circumstances" shall refer to "events or factors directly related to the failure to meet the 1-year deadline . . . as long as the alien filed the application within a reasonable period given those circumstances." § 208.4(a)(5). Of particular relevance here, "serious illness or mental or physical disability, including any effects of persecution or violent harm suffered in the past," may qualify as an extraordinary circumstance. § 208.4(a)(5)(i).

2. The Jurisdictional Restrictions. The courts of appeals may review claims concerning the asylum filing deadlines, but only to the extent that petitioners are raising constitutional claims or questions of law. That limitation results from the interaction of a 1996 jurisdiction-*stripping* provision and a 2005 jurisdiction-*restoring* provision. *See* Illegal Immigration Reform and Immigrant Responsibility Act of 1996 ("IIRIRA"), Pub. L. No. 104-208, Div. C, § 604(a), 110 Stat. 3009-690; REAL ID Act of 2005, Pub. L. No. 109-13, Div. B, 106(a)(1)(A)(iii), 119 Stat. 310.

In 1996, Congress enacted a series of jurisdictional bars that cover a range of immigration decisions and claims. *See I.N.S. v. St. Cyr*, 533 U.S. 289, 311 (2001) (discussing bar applicable to removal orders based on criminal convictions); *Zadvydas v. Davis*, 533 U.S. 678, 688 (2001) (discussing bar on review of certain discretionary determinations).

The specific jurisdictional bar at issue here is located at 8 U.S.C. 1158(a)(3). It provides that the courts may not "review" claims relating to the asylum filing deadline. Under this bar, the courts of appeals are thus precluded from reviewing all claims (factual, discretionary and legal) relating to whether the applicant satisfied one of the statutory exceptions for late-filed asylum applications.

In 2005, however, Congress partially restored review when it enacted 8 U.S.C. 1252(a)(2)(D). Section 1252(a)(2)(D) is a generally applicable provision that applies to all of the jurisdictional bars (with exceptions immaterial here) in the Immigration and Nationality Act (INA). It provides that the courts of appeals may exercise jurisdiction over "constitutional claims" and "questions of law" and may do so notwithstanding the INA's existing jurisdictional restrictions (including the bar on reviewing claims related to the asylum filing deadline).

The impetus for Section 1252(a)(2)(D) was this Court's 2001 decision in *St. Cyr*, 533 U.S. 289, which interpreted the 1996 jurisdictional bar applicable to aliens with criminal convictions. The Court held

that although the bar eliminated the courts of appeals' petition-for-review jurisdiction over St. Cyr's legal claim, it did not eliminate district court habeas review (because it did not specifically mention the repeal of habeas corpus pursuant to 28 U.S.C. 2241). *Id.* at 314. And because the bar did not eliminate habeas corpus as a jurisdictional safety valve, it did not trigger the "substantial constitutional questions" that would have resulted from the complete elimination of review in any court by any means over legal claims. *Id.* at 300. But the Court also made clear that Congress remained free to enact a substitute for habeas *provided* it was "neither inadequate nor ineffective" in scope. *Id.* at 314 n.38 (citation and internal quotation marks omitted); *see also id.* at 305.

Congress took up the Court's invitation in 2005 and generally eliminated district court habeas review over removal orders, *see, e.g.*, 8 U.S.C. 1252(a)(5), but simultaneously enacted Section 1252(a)(2)(D) to restore the courts of appeals' petition-for-review jurisdiction over constitutional claims and questions of law. By enacting Section 1252(a)(2)(D), Congress thus avoided the constitutional problems that would have been raised by the absence of any forum to raise legal claims. *See* H.R. Rep. No. 109-72, 175 (2005) (Joint House-Senate Conf. Rep.) (expressly referencing *St. Cyr* and acknowledging on several occasions Congress' understanding that it cannot eliminate all review in any forum over legal claims).

In short, as the courts of appeals have uniformly recognized, the jurisdictional question presented in asylum filing cases is whether applicants are raising constitutional claims or questions of law. If they are raising such claims, then the courts of appeals have jurisdiction to review those claims, notwithstanding the jurisdictional bar set forth in 8 U.S.C. 1158(a)(3). The controversy has centered on what types of claims constitute "questions of law" for purposes of Section 1252(a)(2)(D).

More particularly, the courts of appeals uniformly agree that they may review constitutional claims and what they view as *pure* questions of law. Similarly, the courts of appeals uniformly agree that they may not review discretionary claims or pure factual claims – what this Court has called "basic," "primary" or "historical" facts. *Townsend v. Sain*, 372 U.S. 293, 309 n.6 (1963), *overruled on other grounds by Keeney v. Tamayo-Reyes*, 504 U.S. 1 (1992). The disagreement concerns whether the courts of appeals may review a claim, like Mr. Khan's, where the underlying facts are accepted and the petitioner is arguing only that, on those facts, he satisfied one of the statutory exceptions – what this Court has variously described as a "mixed" question of law and fact or one involving the "application" of law to fact. *See, e.g., Ornelas v. United States*, 517 U.S. 690, 696 (1996); *Thompson v. Keohane*, 516 U.S. 99, 112-13 (1995).

B. Petitioner's Administrative Proceedings.

1. The lead petitioner in this case, Abdul H. Khan, is a native of Pakistan who last came to the United States in 1998 with his wife and two children, who were then one and four years old.[2] In 2003, Mr. Khan affirmatively applied for asylum before an asylum officer. 8 U.S.C. 1158; 8 C.F.R. 1208.3, 1208.9. The application was referred to an immigration judge and Mr. Khan was placed in removal proceedings, charged with being out of status. He conceded removability on the basis of his expired visa but renewed his asylum application under 8 U.S.C. 1158. He also applied for other forms of relief, including withholding of removal under 8 U.S.C. 1231(b)(3).

Before the immigration judge, Mr. Khan testified that he feared returning to Pakistan, where he had previously been a member of the Mohajir Quami Movement (MQM), a political party representing the interests of mohajirs (Pakistanis who emigrated from India in 1947, and their direct descendants). App. 39a. Mr. Khan stated that he left the MQM after the MQM kidnapped his brother for disobeying orders by the party leaders. App. 39a-40a. MQM members subsequently threatened Mr.

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[2] Although Mr. Khan's wife and children are parties to the proceedings in this Court, and were parties in the court of appeals, he is the lead petitioner and their claims are derivative of his claim. For simplicity, therefore, this petition refers to only one petitioner, Mr. Khan.

Khan's family, and hijacked his car when he was driving with his wife and daughters "as retribution for his refusal to donate" to the party. App. 41a-42a. Mr. Khan came to the United States in 1998 to avoid the MQM, but returned shortly thereafter when his daughter fell ill. App. 42a. On his return to Pakistan, MQM members kidnapped and beat him, and threatened him with severe consequences, showing him severed fingers, among other things. In response, he fled the country with his family. App. 42a-43a.

2. The immigration judge concluded that Mr. Khan was statutorily ineligible for asylum, finding that he had not timely filed his application and had not demonstrated "extraordinary circumstances" justifying the late filing. App. 49a-51a. Mr. Khan argued that he satisfied the extraordinary circumstances exception based upon the post-traumatic symptoms he experienced upon his arrival in the United States. He testified that he was "upset, afraid, and depressed" upon arrival and that he feared "the United States would disclose information about him to the Pakistani government" that would endanger members of his family remaining in Pakistan. App. 49a. His wife testified that he had been "in a constant state of fear" before they left Pakistan and that he remained very anxious and depressed once they arrived in the United States. App. 44a. She said that although he was able to work as a taxi driver, he often remained at home and refused to talk about what had happened in Pakistan. App. 45a.

Petitioner's friend, Mohammed Khan (no relation to petitioner), testified that Mr. Khan's mental condition was not good when he arrived in the United States and that it "worsened" in the months after his arrival. App. 46a. He stated that Mr. Khan was "stressed and unable to make decisions" and that he "chose not to associate himself with any other Pakistanis in the U.S., even though he had been 'very sociable' in Pakistan." *Id.*

The immigration judge did not dispute that Mr. Khan suffered from depression when he arrived in the United States. The judge noted, however, that Mr. Khan was able to "work as a cab driver, rent an apartment, support his family, and function without any difficulties." App. 50a. The immigration judge thus concluded that his "state of depression when he arrived [did not] prevent[] him from filing for asylum within 'a reasonable period of time' after the one-year time limit." App. 50a-51a (citing regulations). Consequently, the immigration judge found that Mr. Khan did not satisfy the extraordinary circumstances exception. *Id.*

The immigration judge also denied relief under the Convention Against Torture, finding that Mr. Khan failed to establish that he would likely be tortured if removed to Pakistan. App. 68a. The judge further held that Mr. Khan was ineligible for withholding of removal, concluding that he failed to

establish that he was persecuted on account of his political opinion. App. 64a-66a.[3]

3. The Board of Immigration Appeals (Board or BIA) affirmed in a short per curiam opinion on the basis of the immigration judge's decision. App. 26a-29a. The Board also denied petitioner's motion to reopen, which contained additional medical evidence of his psychiatric disorder. App. 30a-34a. Although the medical examinations submitted by Mr. Khan reported post-traumatic symptoms of "depression, nightmares, anxiety, anger, and frustration," as well as "problems with concentration and stress," the Board denied the motion to reopen, finding that the examinations did not present any new, material evidence that was not before the immigration judge. App. 32a, 34a

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[3] Like asylum, withholding requires aliens to show that they will be persecuted on one of the five specified grounds, but there is no filing deadline and it is mandatory for those who qualify (unlike asylum, which can be denied as a matter of discretion even to those who meet the statutory requirements). *See* 8 U.S.C. 1231(b)(3); *I.N.S. v. Aguirre-Aguirre*, 526 U.S. 415, 419-20 (1999). Withholding applicants, however, must meet a far higher burden of proof than asylum applicants – a "more likely than not" standard, rather than the "well-founded fear" standard. *See* 8 U.S.C. 1231(b)(3); *I.N.S. v. Abudu*, 485 U.S. 94, 99 n.3 (1988) (noting that "it is easier to prove well-founded fear of persecution than clear probability of persecution" required for withholding); *Cardoza-Fonseca*, 480 U.S. at 449-50 (stating that the well-founded fear standard permits a grant of asylum to "one who fails to satisfy the strict [withholding] standard").

C. The Seventh Circuit's Decision.

1. The court of appeals denied Mr. Khan's withholding and CAT claims, as well as his motion to reopen, and those merits rulings are not at issue in this petition. App. 21a-22a, 24a-25a.[4] The court of appeals also dismissed Mr. Khan's asylum claim, finding that it lacked jurisdiction to review whether he satisfied the statutory exceptions for late-filed applications. Accordingly, the Seventh Circuit did not reach the merits of whether Mr. Khan had demonstrated changed or extraordinary circumstances (or the ultimate merits of his asylum claim). App. 15a-17a.

2. Mr. Khan does not challenge the underlying, historical facts found by the immigration judge. Nor does he challenge any ultimate discretionary authority an immigration judge may possess to find an asylum application untimely even where the statutory exceptions are satisfied. Rather, he challenges only whether, on the facts found by the immigration judge, he satisfied the statutory exceptions for late-filed applications – a "mixed" question of law and fact or one involving the "application" of law to fact. The Seventh Circuit nonetheless concluded that it lacked jurisdiction because, in its view, Mr. Khan had not raised

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[4] The Seventh Circuit reached the merits of the motion to reopen without citing its precedent decision in *Kucana*, which held that motions to reopen are unreviewable discretionary decisions. *See Kucana v. Mukasey*, 533 F.3d 534 (7th Cir. 2008), *cert. granted* (U.S. Apr. 27, 2009) (No. 08-911).

"questions of law" within the meaning of 8 U.S.C. 1252(a)(2)(D). The court of appeals rested that holding on three principal conclusions.

First, the court of appeals held that, in general, Section 1252(a)(2)(D)'s reference to "questions of law" was not intended to cover "mixed questions of law and fact." App. 11a-13a. The court further held that the absence of all review over mixed questions of law and fact raised no constitutional concerns under the Suspension Clause. The Seventh Circuit acknowledged this Court's *St. Cyr* decision, but read the decision as ensuring review only over questions of statutory construction, and not the application of law to fact. App. 13a-14a.

Second, the court of appeals concluded that Mr. Khan's claim was unreviewable because it raised a "discretionary issue." App. 11a, 16a-17a. The court explained that, in its view, the fact that the asylum-filing provision (8 U.S.C. 1158(a)(2)(D)) uses the term "to the satisfaction of" the Attorney General was a strong indication that decisions under it are "'inherently discretionary' and not reviewable." App. 11a (quoting *Vasile v. Gonzales*, 417 F.3d 766, 768 (7th Cir. 2005)).[5]

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[5] The Seventh Circuit also seemed to suggest (at App. 11a) that Mr. Khan's claim was discretionary because the statute provides that an untimely application for asylum "*may* be considered" if the applicant demonstrates changed or extraordinary circumstances. 8 U.S.C. 1158(a)(2)(D) (emphasis added). In this case, however, the immigration judge held that

Third, the court of appeals held that Mr. Khan's claim was not only discretionary but also "factual." App. 16a. In the Seventh Circuit's view, an asylum seeker who claims that his facts satisfy the governing legal standards is simply raising a question regarding the sufficiency of the evidence. App. 15a n.3.

The Seventh Circuit recognized that its holding was in conflict with the Ninth Circuit's jurisdictional position. It stated, however, that it was "not persuaded" by the Ninth Circuit's reasoning. App. 11a-12a n.2.

3. On April 1, 2009, the court of appeals denied rehearing en banc. App. 1a-2a. This petition followed.

Mr. Khan had not met the statutory eligibility standards for filing a late application (*i.e.*, the changed or extraordinary circumstances criteria). Thus, this case does not raise the question of whether the term "may" in the statute provides immigration judges with discretion to deny an application as untimely even where the applicant has demonstrated changed or extraordinary circumstances. And because the immigration judge did not reach the merits of the asylum application, the case also does not involve the agency's discretion to deny an asylum application even where the alien establishes a well-founded fear of persecution.

REASONS FOR GRANTING THE WRIT

This Court's review is warranted because of the issue's enormous practical importance to asylum seekers; because eleven circuits have addressed the issue and are divided in result and analysis; and because the Seventh Circuit's decision cannot be squared with the relevant statutory text and legislative history, or this Court's habeas decisions in *St. Cyr* and *Boumediene v. Bush*, 128 S. Ct. 2229 (2008).

Moreover, the Seventh Circuit's conclusion in this case rests on the same basic jurisdictional reasoning that has led to circuit conflicts in a number of other substantive immigration areas. Thus, the jurisdictional issue in this case has broad significance beyond the asylum context. *See Zhang v. Gonzales*, 457 F.3d 172, 180-81 (2d Cir. 2006) (Calabresi, J., concurring) (noting the need for this Court's guidance in immigration cases on how to differentiate unreviewable claims from those that involve "applications of contoured statutory language to a given set of facts").

This case presents the Court with an ideal vehicle to resolve the jurisdictional conflict at issue here. The Seventh Circuit squarely addressed the issue in a comprehensive opinion and there is no obstacle that will prevent the Court from reaching the issue.

I. THE SEVENTH CIRCUIT ERRED ON A JURISDICTIONAL ISSUE THAT HAS DIVIDED THE COURTS OF APPEALS.

A. The Courts Of Appeals Are Divided Over Their Jurisdiction To Review The Statutory Exceptions To The Asylum Filing Deadline.

1. Mr. Khan raises a claim involving the application of law to fact (*i.e.*, a mixed question of law and fact): whether, on the facts of his case, he satisfied one of the statutory exceptions to the filing deadline. With the exception of the D.C. Circuit, every circuit has addressed whether they may review that question. They are divided in a 1-9-1 split. The Ninth Circuit reviews whether asylum seekers have, on the facts of their case, satisfied the statutory exceptions to the deadline; nine circuits (including the Seventh) refuse to review such claims; and the Second Circuit has taken a middle approach.

In *Ramadan v. Gonzales*, 479 F.3d 646 (per curiam), *reh'g en banc denied*, 504 F.3d 973 (9th Cir. 2007), the Ninth Circuit squarely held that it may review whether asylum applicants have, on the facts of their case, satisfied one of the statutory exceptions excusing the filing deadline. And, since *Ramadan*, the Ninth Circuit has consistently reaffirmed and applied that jurisdictional ruling. *See, e.g., Dhital v. Mukasey*, 532 F.3d 1044, 1049-50 (9th Cir. 2008) (per curiam); *Husyev v. Mukasey*, 528 F.3d 1172, 1178-81 (9th Cir. 2008); *Fakhry v. Mukasey*, 524 F.3d 1057, 1062-64 (9th Cir. 2008).

In direct contrast, the First, Third, Fourth, Fifth, Sixth, Seventh, Eighth, Tenth and Eleventh Circuits have held that they may not review such claims. *Hana v. Gonzales*, 503 F.3d 39, 42 (1st Cir. 2007); *Sukwanputra v. Gonzales*, 434 F.3d 627, 635 (3d Cir. 2006); *Gomis v. Holder*, 571 F.3d 353 (4th Cir. 2009), *petition for cert. filed* (U.S. Aug. 11, 2009) (No. 09-194); *Niang v. Gonzales*, 492 F.3d 505, 510 n.5 (4th Cir. 2007); *Zhu v. Gonzales*, 493 F.3d 588, 596 (5th Cir. 2007); *Almuhtaseb v. Gonzales*, 453 F.3d 743, 748 (6th Cir. 2006); App. 3a (decision in this case); *Vasile v. Gonzales*, 417 F.3d 766, 768 (7th Cir. 2005); *Ignatova v. Gonzales*, 430 F.3d 1209, 1214 (8th Cir. 2005); *Ferry v. Gonzales*, 457 F.3d 1117, 1130 (10th Cir. 2006); *Chacon-Botero v. U.S. Att'y Gen.*, 427 F.3d 954, 957 (11th Cir. 2005) (per curiam).

The Second Circuit has been less categorical. It has held that it may generally review the application of law to fact (mixed questions of law and fact) under 8 U.S.C. 1252(a)(2)(D). *Xiao Ji Chen v. U.S. Dep't of Justice*, 471 F.3d 315, 329 (2d Cir. 2006). But it has also stated that, in reviewing the asylum filing exceptions, the court must examine the "precise arguments" advanced by petitioners to determine whether they have raised a reviewable question of law. *Chen*, 471 F.3d at 330; *Hongsheng Leng v. Mukasey*, 528 F.3d 135, 141 (2d Cir. 2008) (per curiam) ("[l]ooking to the 'precise arguments of the petition'" to determine whether petitioner's challenge to the agency's changed and extraordinary

circumstances determination raises a reviewable question of law) (quoting *Chen*).

There is thus a direct and acknowledged conflict among the courts of appeals on an issue that has arisen in hundreds of cases over the last few years. In the Ninth Circuit, asylum seekers may obtain review of whether they satisfied one of the statutory exceptions for late-filed applications; in the Second Circuit review is a possibility, based on a case-by-case assessment; in the other nine circuits review is unavailable and asylum seekers are deported based solely on the administrative agency's determination that they failed to satisfy the statutory standards.

The split is also entrenched. As the above citations indicate, the lead published case in every circuit (with the exception of the Fourth) dates back at least two years; moreover, each of these circuits has issued multiple decisions over the years reaffirming its position. In fact, the circuits have all issued *at least* one decision in the last six months adhering to their now-settled position.[6] At this

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[6] *See, e.g.*, *Usman v. Holder*, 566 F.3d 262, 268 (1st Cir. May 22, 2009); *Baig v. Holder*, No. 08-4498, 2009 WL 1788612, at *1 (2d Cir. June 24, 2009) (unpublished summary order); *Sutiowijono v. Att'y Gen.*, No. 08-3188, 2009 WL 1459680, at *1 (3d Cir. May 27, 2009) (unpublished per curiam); *Gomis v. Holder*, 571 F.3d 353 (4th Cir. 2009), *petition for cert. filed* (U.S. Aug. 11, 2009) (No. 09-194); *Singh v. Holder*, No. 08-60289, 2009 WL 1345946, at *1 (5th Cir. May 13, 2009) (unpublished per curiam); *Perez-Deleon v. Holder*, No. 08-3494, 2009 WL 1474717, at *4 (6th Cir. May 27, 2009) (unpublished); *Novary v.*

point, the courts of appeals are largely issuing short, unpublished decisions based on their lead decisions. There is thus no realistic prospect that the issue will be resolved through further litigation in the courts of appeals.

2. Moreover, the courts of appeals are divided not only in result, but also in analysis. *First*, the courts of appeals are deeply divided on the threshold question of whether, as a general matter, the term "questions of law" in Section 1252(a)(2)(D) encompasses the application of law to fact, or is instead limited to pure questions of law. Six circuits (the Second, Third, Fourth, Eighth, Ninth, and Eleventh) have correctly held that the application of law to fact falls within the term "questions of law" and is thus reviewable under Section 1252(a)(2)(D). *See Ramadan*, 479 F.3d at 650; *Chen*, 471 F.3d at 324-30; *Toussaint v. Att'y Gen.*, 455 F.3d 409, 412 n.3 (3d Cir. 2006); *Jean v. Gonzales*, 435 F.3d 475, 482 (4th Cir. 2006); *Nguyen v. Mukasey*, 522 F.3d 853, 854-55 (8th Cir. 2008) (per curiam); *Jean-Pierre v. Att'y Gen.*, 500 F.3d 1315, 1322 (11th Cir. 2007).

In contrast, three circuits (the Sixth, Seventh, and Tenth) have taken a more narrow view of

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Holder, 313 F. App'x 869, 872 (7th Cir. Mar. 3, 2009); *Lybesha v. Holder*, 569 F.3d 877, 881 (8th Cir. June 26, 2009); *Tuiwainikai v. Holder*, No. 05-73295, 2009 WL 1370541, at *1-2 (9th Cir. May 18, 2009) (unpublished mem.); *Sinaga v. Holder*, No. 08-9542, 2009 WL 806752, at *2 (10th Cir. Mar. 30, 2009) (unpublished); *Diego Pedro v. U.S. Att'y Gen.*, No. 08-15978, 2009 WL 1101373, at *2 (11th Cir. Apr. 24, 2009) (unpublished per curiam).

Section 1252(a)(2)(D) and limited the term "questions of law" to "pure" legal claims or narrow questions of "statutory construction." *See Almuhtaseb v. Gonzales*, 453 F.3d 743, 748 (6th Cir. 2006) (limiting review under Section 1252(a)(2)(D) to "constitutional claims or matters of statutory construction"); App. 13a-15a (decision in this case) (stating that Section 1252(a)(2)(D) does not cover "mixed" questions); *Cevilla v. Gonzales*, 446 F.3d 658, 661 (7th Cir. 2006); *Diallo v. Gonzales*, 447 F.3d 1274, 1282 (10th Cir. 2006) ("in addition to constitutional claims, the REAL ID Act grants us jurisdiction to review a 'narrow category of issues regarding statutory construction'" under Section 1252(a)(2)(D)) (citation omitted).[7]

Second, the courts of appeals are also sharply divided on how to identify a reviewable mixed question of law and fact. Thus, even among those circuits that agree that a mixed question is generally reviewable under Section 1252(a)(2)(D), there is sharp disagreement on whether particular claims present such reviewable mixed questions (as opposed to pure factual or discretionary claims).

Indeed, the eleven circuits to address the jurisdictional question at issue here have adopted no fewer than five different analytical positions: (1) the Ninth Circuit in *Ramadan*, 479 F.3d 646, has held

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[7] The First and Fifth Circuits have not yet weighed in on whether the application of law to fact is generally reviewable under Section 1252(a)(2)(D).

that the type of claim presented by Mr. Khan is reviewable as a mixed question of law and fact; (2) some courts (the First, Fifth, and Sixth) have held that it is an unreviewable *factual* claim;[8] (3) some courts (the Third and Tenth) have held that it is an unreviewable *discretionary* claim;[9] (4) some (the Fourth, Seventh, and Eighth) have concluded that the claim is unreviewable because it is *both* factual and discretionary;[10] and (5) the Second Circuit in *Chen*, 471 F.3d at 329, has stated that it will proceed on a case-by-case basis.[11]

In short, the courts of appeals have reached conflicting results on the basis of widely divergent analytical approaches. Moreover, these analytical differences have now been entrenched for several years.

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[8] *See Mehilli v. Gonzales*, 433 F.3d 86, 93 (1st Cir. 2005); *Zhu v. Gonzales*, 493 F.3d 588, 596 & n.31 (5th Cir. 2007); *Arif v. Mukasey*, 509 F.3d 677, 680 (5th Cir. 2007); *Almuhtaseb v. Gonzales*, 453 F.3d 743, 748 (6th Cir. 2006).

[9] *See Sukwanputra v. Gonzales*, 434 F.3d 627, 635 (3d Cir. 2006); *Ferry v. Gonzales*, 457 F.3d 1117, 1130 (10th Cir. 2006).

[10] *See* App. 14a (decision in this case); *Vasile v. Gonzales*, 417 F.3d 766, 768 (7th Cir. 2005); *Gomis v. Holder*, 571 F.3d 353 (4th Cir. 2009), *petition for cert. filed* (Aug. 11, 2009 (No. 09-194); *Lybesha v. Holder*, 569 F.3d 877, 881 (8th Cir. 2009); *Ignatova v. Gonzales*, 430 F.3d 1209, 1214 (8th Cir. 2005).

[11] The Eleventh Circuit has not provided any rationale. *Chacon-Botero v. U.S. Att'y Gen.*, 427 F.3d 954, 957 (11th Cir. 2005) (per curiam).

3. The conflicting jurisdictional positions and analytical approaches of the courts of appeals have broad implications beyond asylum, and have led to jurisdictional circuit splits in a variety of other substantive immigration areas. As in the asylum filing context, the courts of appeals are divided on three basic issues: (a) whether the term "questions of law" in Section 1252(a)(2)(D) encompasses both pure legal claims and mixed questions of law and fact; (b) the proper analytical framework for distinguishing between pure factual claims and mixed questions of law and fact; (c) the proper analytical framework for differentiating between discretionary and non-discretionary claims.

(a) The division between the courts of appeals over whether Section 1252(a)(2)(D) encompasses mixed questions of law and fact has created splits in contexts other than asylum. For example, an alien's statutory eligibility for a waiver of removal generates significant immigration litigation, especially given the frequency with which Congress amends the waiver provisions. *See, e.g.*, *St. Cyr*, 533 U.S. at 314-26 (resolving dispute over retroactive application of the 1996 amendments to the Section 212(c) waiver, similar to the current "cancellation" waiver). Given the fact that the courts of appeals have taken divergent positions on the scope of Section 1252(a)(2)(D), this waiver litigation has now generated jurisdictional conflicts.

The Seventh Circuit, for example, has held that it has limited review over claims relating to

certain waivers in light of its position that Section 1252(a)(2)(D) encompasses only "pure" questions of law. Thus, in a case involving the legal eligibility standards for cancellation of removal, the Seventh Circuit found that Section 1252(a)(2)(D) did not encompass review "of the *application* of the 'continuous physical presence' standard to the facts of the case." *Cevilla*, 446 F.3d at 661 (emphasis in original).

The Fourth Circuit has taken the opposite position. In *Jean*, 435 F.3d at 482, for instance, the Fourth Circuit held that it could review whether the alien in that case had satisfied the statutory eligibility criteria for cancellation of removal, stating that a "determination involving the application of law to factual findings . . . presents a reviewable decision" under the REAL ID Act. *Cf. Pinos-Gonzalez v. Mukasey*, 519 F.3d 436, 439 (8th Cir. 2008) (finding jurisdiction to "review the nondiscretionary determinations underlying a denial of an application for cancellation of removal, such as the predicate legal question whether the IJ properly applied the law to the facts in determining an individual's eligibility") (internal quotation marks and citation omitted).

(b) The courts of appeals are similarly split on how to distinguish a mixed question of law and fact from a purely factual claim. In *Hamid v. Gonzales*, for instance, the Seventh Circuit held that it lacked jurisdiction to review whether, on the facts of the case, petitioner satisfied the legal standard for relief

under the Convention Against Torture (CAT). 417 F.3d 642, 647 (7th Cir. 2005). *See also, e.g.*, *Lovan v. Holder*, --- F.3d ---, 2009 WL 2341822, at *7 (8th Cir. July 31, 2009) (holding that application of the CAT standard to undisputed facts is "nothing more than a challenge to the agency's factual determinations"); *Singh v. U.S. Att'y Gen.*, 561 F.3d 1275, 1280 (11th Cir. 2009) ("we may not review the administrative fact findings of the IJ or the BIA as to . . . the likelihood that the alien will be tortured if returned to the country in question").

In contrast, the Third Circuit views such claims as reviewable mixed questions of law and fact under Section 1252(a)(2)(D), because they involve the agency's application of the CAT legal standard to undisputed facts. *See Toussaint*, 455 F.3d at 412 n.3 ("The question here involves not disputed facts but whether the facts, even when accepted as true, sufficiently demonstrate that it is more likely than not that he will be subject to persecution or torture upon removal to Haiti."); *Awuku v. Att'y Gen.*, No. 08-4778, 2009 WL 1741500, at *1-2 (3d Cir. June 22, 2009) (unpublished) (citing *Toussaint* and stating that the government "is wrong in its repeated assertion that '[t]his Court lacks jurisdiction over any challenge to the finding that [Awuku] failed to establish eligibility for CAT protection,'" rejecting the argument that such a claim involves only a "'factual determination'") (quoting the government's brief).

(c) The courts of appeals are also divided in various contexts on how to distinguish between

discretionary and non-discretionary claims. For example, the courts of appeals disagree on whether the "particularly serious crime" determination governing eligibility for withholding of removal is discretionary and therefore unreviewable. *Compare, e.g., Matsuk v. INS*, 247 F.3d 999, 1002 (9th Cir. 2001) (holding that the "particularly serious crime" determination is discretionary and thus unreviewable), *and Lovan,* 2009 WL 2341822, at *6 (same), *with Alaka v. Att'y Gen.*, 456 F.3d 88, 100-02 (3d Cir. 2006) (holding that the "particularly serious crime" determination is not discretionary and can be reviewed), *and Nethagani v. Mukasey*, 532 F.3d 150, 154-55 (2d Cir. 2008) (same).

The courts are likewise divided on whether the phrase "extreme cruelty" in 8 U.S.C. 1229b(b)(2) is discretionary and therefore unreviewable,[12] and on the nature of visa revocation determinations governed by 8 U.S.C. 1155.[13]

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[12] *Compare, e.g., Stepanovic v. Filip*, 554 F.3d 673, 680 (7th Cir. 2009) (holding that the phrase "extreme cruelty" is inherently discretionary and unreviewable because it requires "a judgment call"), *and Perales-Cumpean v. Gonzales*, 429 F.3d 977, 982 (10th Cir. 2005) (same), *with Hernandez v. Ashcroft*, 345 F.3d 824, 833-34 (9th Cir. 2003) (holding that extreme cruelty is not discretionary but instead involves the "application of law to factual determinations").

[13] *Compare ANA Intern., Inc. v. Way*, 393 F.3d 886, 893-94 (9th Cir. 2004) (holding that visa revocations are not "purely subjective" because good and sufficient cause is a "meaningful standard"), *with Jilin Pharmaceutical USA, Inc. v. Gonzales*, 447 F.3d 196, 203-04 (3d Cir. 2006) (holding that because the

Thus, the conflicting results and analytical approaches taken by the courts of appeals in the asylum context have broad significance, providing an additional reason for this court to ensure uniformity. Indeed, the jurisdictional issues that arise in the asylum filing context cut across a wide swath of immigration law.

B. The Seventh Circuit's Ruling Is Incorrect.

The Seventh Circuit's view that Section 1252(a)(2)(D) encompasses only pure questions of law is incorrect as a matter of statutory interpretation and constitutional mandate. The reference to "questions of law" in Section 1252(a)(2)(D) applies to both pure legal claims as well as the application of law to fact. Moreover, the application of the statutory filing exceptions to the underlying facts of a case raises a mixed question of law and fact, and not an unreviewable factual claim. The statutory filing exceptions are also not discretionary.

1. Six of the nine circuits to address the issue have correctly held that the term "questions of law" in Section 1252(a)(2)(D) encompasses the application of law to established facts. Indeed, the 2005 REAL

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statute states that the Attorney General "may" revoke a visa "at any time" the decision is discretionary), *and El-Khader v. Monica*, 366 F.3d 562, 567 (7th Cir. 2004) (finding that "the discretionary nature of the decision is apparent from the plain language of the statute").

ID Act was not intended to eliminate any review previously available in habeas. The Conference Report specifically states that the "purpose of [new Section 1252(a)(2)(D)] is to permit judicial review over those issues that were historically reviewable on habeas." H.R. Rep. No. 109-72, 175 (2005). In fact, the Report expressly contrasts the REAL ID Act provisions with the 1996 jurisdiction-stripping amendments and emphasizes that the Act was not intended to "eliminate judicial review, but simply restores such review to its former settled forum prior to 1996." *Id.* *See Chen*, 471 F.3d at 326-27 ("We construe . . . the REAL ID Act . . . to encompass the same types of issues that courts traditionally exercised in habeas review. . . ."); *Ramadan*, 479 F.3d at 653-54 (same); *Kamara v. Att'y Gen.*, 420 F.3d 202, 211 (3d Cir. 2005) (finding that scope of review under REAL ID Act "mirrors" scope of habeas review).

Habeas review has traditionally included claims involving both the proper interpretation of statutes *and* their application. In *St. Cyr*, this Court reviewed the history of habeas law and found that there was review of both the "application [and] interpretation of statutes." 533 U.S. at 302. More recently, the Court stated emphatically that it viewed as "uncontroversial . . . that the privilege of habeas corpus entitles the prisoner to a meaningful opportunity to demonstrate that he is being held pursuant to 'the erroneous *application* or interpretation' of relevant law." *Boumediene*, 128 S.

Ct. at 2266 (emphasis added) (quoting *St. Cyr*, 533 U.S. at 302).

Further, in both *Boumediene* and *St. Cyr*, the Court stressed that habeas review has been at its most robust in cases involving executive detention (as opposed to the criminal context where there has been prior judicial review). *Boumediene*, 128 S. Ct. at 2266-69; *St. Cyr*, 533 U.S. at 301-03.

Following this Court's historical analysis, the courts of appeals have likewise noted that habeas review has always encompassed claims involving the application of law to fact. *See Ramadan*, 479 F.3d at 652-54 (relying on history of habeas law to conclude that "the phrase 'questions of law' as it is used in . . . the Real ID Act includes review of the application of statutes and regulations to undisputed historical facts"); *Chen*, 471 F.3d at 326-27 (finding that the "application" of statutes and regulations was traditionally reviewable in habeas); *Kamara*, 420 F.3d at 213-15 (same).

Notwithstanding this history, the Seventh Circuit in this case relied on the statement in the REAL ID Act's Conference Report that the "purpose of [Section 1252(a)(2)(D)] . . . is to permit judicial review over those issues that were historically reviewable on habeas – constitutional and statutory-construction questions, not discretionary or factual questions." App. 13a (quoting Report). But that passage is not an exhaustive recitation of *all* legal claims that were reviewable in habeas. The Report is simply distinguishing legal claims from "factual"

and "discretionary" claims. If the passage were read to be exhaustive, then the REAL ID Act would preclude review even over *pure* questions of law regarding the proper interpretation of *regulations*. That would directly contradict this Court's precedent and render the statute unconstitutional. *See St. Cyr*, 533 U.S. at 307 (citing *United States ex rel. Accardi v. Shaughnessy*, 347 U.S. 260 (1954), for the proposition that habeas review encompasses claims involving the proper interpretation and application of regulations). *See also Ramadan*, 479 F.3d at 653-54; *Chen*, 471 F.3d at 327-30.[14]

In sum, given the constitutional concerns that would be triggered, and Congress' clear intent to preserve the traditional scope of habeas review, there is no basis for construing the reference to

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[14] In its discussion of legislative history, the Seventh Circuit acknowledged that the term "pure" had originally modified the term "questions of law" in an earlier version of the bill but was later deleted. App. 13a. As a result, the provision Congress ultimately enacted as 8 U.S.C. 1252(a)(2)(D) applies, by its terms, to all "questions of law." The Seventh Circuit dismissed the deletion's significance, however, citing to the Conference Report's statement that the qualifier "pure" was deleted from the final bill because it was viewed as superfluous. App. 13a. But, as the Second and Ninth Circuits have explained, the deletion of the term "pure" simply reinforced the Conference Report's observation that courts could review only the "legal elements" of "mixed questions of law and fact." H.R. Rep. No. 109-72, 175 (2005); *Chen*, 471 F.3d at 325-26 (noting the Conference Report's explanation for the deletion of the word "pure" before "questions of law" but rejecting the contention that Section 1252(a)(2)(D) does not encompass the application of law to fact); *Ramadan*, 479 F.3d at 653-54.

"questions of law" in Section 1252(a)(2)(D) to exclude claims involving the application of law to fact. *See St. Cyr*, 533 U.S. at 299-300 (finding it "fairly possible" to construe the 1996 jurisdictional provisions to provide review over the alien's retroactivity claim, emphasizing that this interpretation avoided the "serious" Suspension Clause issues that would have been triggered by precluding all review over a claim that was traditionally cognizable in habeas); *Ramadan*, 479 F.3d at 652-54 (construing Section 1252(a)(2)(D) to cover claims involving the application of law to fact, stating that "a narrower interpretation would pose a serious Suspension Clause issue"); *Chen*, 471 F.3d at 326-27 (same); *see also* Gerald L. Neuman, *On the Adequacy of Direct Review After the REAL ID Act of 2005*, 51 N.Y.L. SCH. L. REV. 133, 139-41 (2006) (to avoid constitutional concerns, the REAL ID Act should be construed to preserve review over claims involving the "application" of legal standards).

2. Furthermore, the application of the asylum filing exceptions to the underlying facts of a case raises a reviewable mixed question of law and fact, and not a factual claim. A mixed question of law and fact is one where:

> the historical facts are admitted or established, the rule of law is undisputed, and the issue is whether the facts satisfy the statutory standard, or to put it another way, whether the

> rule of law as applied to the established facts is or is not violated.

Pullman-Standard v. Swint, 456 U.S. 273, 289 n.19 (1982). *See Ornelas v. United States*, 517 U.S. 690, 696 (1996) (describing the determination of "whether [the] historical facts . . . amount to reasonable suspicion or to probable cause" as "a mixed question of law and fact"); *Thompson v. Keohane*, 516 U.S. 99, 112-13 (1995) ("application of the controlling legal standard to the historical facts . . . presents a 'mixed question of law and fact'"); *Townsend*, 372 U.S. at 309 n.6 (distinguishing issues of fact, which "refer to what are termed basic, primary, or historical facts: facts in the sense of a recital of external events and the credibility of their narrators," from "mixed questions of fact and law, which require the application of a legal standard to the historical-fact determinations") (citation and internal quotation marks omitted).

Significantly, with the exception of the Ninth Circuit in *Ramadan,* 479 F.3d at 648, the courts of appeals have ignored this Court's decisions differentiating between historical facts and mixed questions of law and fact. *See, e.g.*, App. 3a (decision in this case); *Zhu v. Gonzales*, 493 F.3d 588, 596 & n.31 (5th Cir. 2007); *Almuhtaseb v. Gonzales*, 453 F.3d 743, 748 (6th Cir. 2006).

In this case, the immigration judge made a determination that the established facts (including Mr. Khan's post-traumatic symptoms) did not constitute "extraordinary circumstances." The judge

thus applied the statutory standards to the historical facts of the case. That is a mixed question of law and fact. *Ornelas*, 517 U.S. at 696-97.[15]

Review of the filing exceptions is essential to ensure that those provisions are interpreted in a manner consistent with congressional intent. As this Court has noted, judicial scrutiny of an agency's *application* of a legal standard is critical for effective review of the legal standard itself, particularly in contexts where, as here, a substantive standard is given concrete meaning through case-by-case adjudication. Without such review, an agency could effectively eviscerate a statutory standard by consistently announcing the correct legal rule but de facto applying a standard that is more stringent than the one formally announced. *See, e.g.*, *Thompson*, 516 U.S. at 115 (emphasizing "the law declaration aspect" of reviewing the application of law to fact); *Ornelas*, 517 U.S. at 697 (explaining that "the legal

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[15] The Seventh Circuit noted that the *immigration judge* in this case made factual findings on a number of issues. The court thus stated that this case did not involve the application of the law to "undisputed" facts. The relevant question, however, is whether petitioner challenged those underlying facts in the *court of appeals*, or instead, accepted the agency's factual determinations and argued only that, on those facts, he satisfied the legal standards. Insofar as the Seventh Circuit was suggesting that this case did not present a mixed question of law and fact because petitioner raised factual issues before the *immigration judge*, the court of appeals' erroneous understanding of what constitutes a mixed question just reinforces the degree to which there is significant analytical confusion surrounding the jurisdictional issues here.

rules for probable cause and reasonable suspicion acquire content only through application" and that "[i]ndependent review is . . . necessary if appellate courts are to maintain control of, and to clarify, the legal principles").

3. Finally, the asylum filing exceptions are not discretionary. As the Ninth Circuit noted in *Ramadan,* 479 F.3d at 655-56, the phrase "to the satisfaction" could not have been intended to signal that the Attorney General has unreviewable discretion because that would render those words redundant in other contexts. Congress included the phrase "to the satisfaction" in other provisions of the INA where it *also* expressly stated that the "Attorney General has sole discretion." *See Ramadan*, 479 F.3d at 655-56 (citing as examples 8 U.S.C. 1182(h)(1)(A) and 8 U.S.C. 1182(a)(9)(B)(v)). Thus, the words "to the satisfaction of the Attorney General" were not intended to vest the Attorney General with unreviewable discretion over the "changed" or "extraordinary" circumstances determination, but rather provide an objective standard of proof.

Indeed, the relevant regulations and the agency's own training manual show that the phrase designates an objective standard of proof. *See* Asylum Officer Basic Training Course – One-Year Filing Deadline 21 (Mar. 23, 2009), *available at* http://www.uscis.gov/files/article/One-Year-Filing-Deadline.pdf ("The standard of proof to establish changed or extraordinary circumstances is proof to *the satisfaction of the Attorney General.* This is a

lower standard of proof than the 'clear and convincing' standard that is required to establish that the applicant timely filed.") (emphasis in original). The controlling regulations also make clear that the words "to the satisfaction of the Attorney General" should be understood as an objective *standard of proof*. *See* 8 C.F.R. 1208.4(a)(2); 1208.4(a)(5) (formerly at 208.4). Accordingly, the changed and extraordinary circumstances exceptions are not discretionary.

Moreover, the application of the statutory filing exceptions to the facts of a case is not the kind of determination that is inherently discretionary. *See Ramadan,* 479 F.3d at 656 (review of the statutory filing exceptions does not call for a discretionary "subjective" determination). As this Court has noted, "if the word 'discretion' means anything in a statutory or administrative grant of power, it means that the recipient must exercise his authority according to his own understanding and conscience." *United States ex rel. Accardi v. Shaughnessy*, 347 U.S. 260, 266-67 (1954). *See also, e.g., St. Cyr*, 533 U.S. at 307-08 (describing discretionary decisions as "a matter of grace") (quoting *Jay v. Boyd*, 351 U.S. 345, 353-54 (1956)); *cf. Franklin v. Massachusetts*, 505 U.S. 788, 817 (1992) (Stevens, J., concurring) (concluding that the Secretary of Commerce's conduct of the census is not committed to agency discretion within the meaning of the APA because "[t]here is no indication that Congress intended the Secretary's own mental

processes, rather than other more objective factors, to provide the standard").

When the BIA determines that an alien has demonstrated changed or extraordinary circumstances it does not simply exercise its conscience or permit filing as an act of grace. Rather, it applies a statutory standard, fleshed out by agency regulations. The circuits that have held that the application of these standards is discretionary have done so in conclusory opinions that do not address the Ninth Circuit's analysis of the statutory structure or this Court's decisions regarding the nature of discretion. *See, e.g.*, *Sukwanputra*, 434 F.3d at 635; *Vasile*, 417 F.3d at 768; *Ignatova*, 430 F.3d at 1214; *Ferry*, 457 F.3d at 1130.

* * *

In short, Section 1252(a)(2)(D) generally covers the application of law to fact, as six circuits have properly concluded. The Seventh Circuit also erred in finding that the type of claim raised by Mr. Khan is discretionary and factual, rather than one involving the application of law to fact.

II. THIS CASE PRESENTS AN IDEAL VEHICLE TO RESOLVE THE IMPORTANT JURISDICTIONAL ISSUE PRESENTED HERE.

According to a computerized search, there have been more than 1,000 cases citing to Section 1252(a)(2)(D) since its enactment in 2005. Hundreds of these cases involve the asylum filing deadlines. Given the overall number of decisions involving Section 1252(a)(2)(D), and the enormous stakes at issue in asylum cases, this Court's review is warranted to ensure uniformity. Moreover, this case is a suitable vehicle to resolve the conflict; the jurisdictional issue was outcome-determinative and was squarely addressed by the Seventh Circuit. Nor is there any impediment that would prevent the Court from reaching the issue.

In sum, there is an entrenched circuit split on the question of the courts of appeals' jurisdiction to review the statutory exceptions to the asylum filing deadline, and Mr. Khan's case will permit the court to fully resolve it. This Court's review is thus warranted. An asylum applicant's opportunity to avoid persecution should not depend on the circuit in which he happens to find himself. That is especially true where the issue dividing the circuits is one involving the jurisdiction of the federal courts.

CONCLUSION

The petition for writ of certiorari should be granted.

Respectfully submitted,

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