No. 15-1266

In the Supreme Court of the United States

LUIS GUTIERREZ-ROSTRAN, PETITIONER

v.

LORETTA E. LYNCH, ATTORNEY GENERAL

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

BRIEF FOR THE RESPONDENT IN OPPOSITION

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QUESTION PRESENTED

Whether the court of appeals correctly held that it lacks jurisdiction to review the Board of Immigration Appeals' conclusion that petitioner failed to establish, "to the satisfaction of the Attorney General," "changed circumstances" excusing the untimely filing of his asylum application under 8 U.S.C. 1158(a)(2)(D).

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-8a) is reported at 810 F.3d 497. The decisions of the Board of Immigration Appeals (Pet. App. 9a-11a) and immigration judge (Pet. App. 12a-28a) are unreported.

JURISDICTION

The judgment of the court of appeals was entered on January 13, 2016. A petition for a writ of certiorari was filed on April 8, 2016. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. a. The Immigration and Nationality Act (INA), 8 U.S.C. 1101 *et seq.*, provides that the Secretary of Homeland Security and the Attorney General may, in their discretion, grant asylum to an alien who demonstrates that he is a "refugee" within the meaning of the INA, 8 U.S.C. 1158(b)(1)(A). As applicable here,

the INA defines a "refugee" as an alien who is unwilling or unable to return to his country of origin "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." 8 U.S.C. 1101(a)(42)(A). The applicant bears the burden of demonstrating a well-founded fear of persecution or of past persecution on account of a protected ground. 8 U.S.C. 1158(b)(1)(B)(i); 8 C.F.R. 1208.13(a), 1240.8(d). Once an alien has established his eligibility, the decision whether to grant or deny asylum is left to the discretion of the Attorney General or the Secretary of Homeland Security. 8 U.S.C. 1158(b)(1)(A); *INS* v. *Cardoza-Fonseca*, 480 U.S. 421, 423 (1987).

b. An alien who wishes to be granted asylum must file his application within one year of arriving in the United States. 8 U.S.C. 1158(a)(2)(B). The applicant bears the burden of demonstrating, "by clear and convincing evidence," that his application for asylum was filed within one year of his arrival. *Ibid.*; 8 C.F.R. 1208.4(a)(2)(A).

An alien who fails to meet that requirement "may be considered" for asylum if he demonstrates "to the satisfaction of the Attorney General" or the Secretary of Homeland Security either the existence of "changed circumstances which materially affect the applicant's eligibility for asylum" or "extraordinary circumstances" that excuse his failure to file the application within the one-year period. 8 U.S.C. 1158(a)(2)(B) and (D). In addition to showing changed or extraordinary circumstances, the applicant must show that he filed his asylum application within a reasonable period of time given the existence of those circumstances. 8 C.F.R. 1208.4(a)(4)(ii) and (5).

The Attorney General is responsible for adjudicating asylum applications filed by aliens in removal proceedings. 8 U.S.C. 1158(d)(1); 8 C.F.R. 1208.2. The Attorney General has defined the term "changed circumstances" to include "[c]hanges in conditions in the applicant's country of nationality" and "[c]hanges in [his] circumstances that materially affect [his] eligibility for asylum, including changes in applicable U.S. law and activities [he] becomes involved in outside the country of feared persecution that place [him] at risk." 8 C.F.R. 1208.4(a)(4)(i)(A) and (B). And the Attorney General has defined "extraordinary circumstances" as personal circumstances "directly related to the failure to meet the 1-year deadline" that "were not intentionally created by the alien through his or her own action or inaction"; such circumstances include "[s]erious illness or mental or physical disability," "[l]egal disability," "[i]neffective assistance of counsel," and "death or serious illness or incapacity of the applicant's legal representative" or immediate family member. 8 C.F.R. 1208.4(a)(5).

c. An applicant who is ineligible for asylum because of an untimely filed application remains eligible for withholding of removal, see 8 U.S.C. 1231(b)(3)(A), and protection under the regulations implementing the U.S. obligations under the Convention Against Torture and Other Cruel, Inhuman, or Degrading Treatment or Punishment (CAT), *adopted* Dec. 10, 1984, S. Treaty Doc. No. 20, 100th Cong., 2d Sess. (1988), 1465 U.N.T.S. 85. See 8 C.F.R. 1208.13(c)(1), 1208.16(c).[1]

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[1] As used in this brief, "withholding of removal" refers to the statutory withholding under Section 1231(b)(3), and not withholding of removal pursuant to the regulations implementing the CAT.

Withholding of removal is available if the alien demonstrates that his "life or freedom would be threatened" in the country of removal "because of the alien's race, religion, nationality, membership in a particular social group, or political opinion." 8 U.S.C. 1231(b)(3)(A). To establish eligibility for withholding of removal, an alien must prove a "clear probability of persecution" upon removal—a higher standard than that required to establish asylum eligibility. *Cardoza-Fonseca*, 480 U.S. at 430. Persecution must be at the hands of the government or by an entity that the government is unwilling or unable to control. *In re W-G-R-*, 26 I. & N. Dec. 208, 224 n.8 (B.I.A. 2014). An alien is not eligible for withholding of removal if he "could avoid a future threat to his or her life or freedom by relocating to another part of the proposed country of removal and, under all the circumstances, it would be reasonable to expect the applicant to do so." 8 C.F.R. 1208.16(b)(2).

In addition, an alien who demonstrates that he would more likely than not be tortured if removed to a particular country may obtain CAT protection. To qualify for CAT protection, the acts alleged to constitute torture must be inflicted "by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity." 8 C.F.R. 1208.18(a)(1); see, *e.g.*, *Lopez-Soto* v. *Ashcroft*, 383 F.3d 228, 239-240 (4th Cir. 2004).

d. Under the INA, "[n]o court shall have jurisdiction to review any determination of the Attorney General" regarding the timeliness of an asylum application, including a determination whether the alien has demonstrated to the satisfaction of the Attorney General that there may be changed circumstances war-

ranting consideration of an untimely filed application. 8 U.S.C. 1158(a)(3).

In 2005, Congress amended the INA's judicial-review provision, adding subparagraph (D):

> Nothing in subparagraph (B) or (C), or in any other provision of this chapter (other than this section) [that] limits or eliminates judicial review, shall be construed as precluding review of constitutional claims or questions of law raised upon a petition for review filed with an appropriate court of appeals in accordance with this section.

8 U.S.C. 1252(a)(2)(D).

2. a. Petitioner is a native and citizen of Nicaragua who illegally entered the United States without inspection in 2006. Pet. App. 1a, 12a. In 2010, petitioner was convicted of public intoxication and driving under the influence. *Id.* at 1a. On November 15, 2010, he was placed in removal proceedings and charged with being removable as an alien present in the United States without having been admitted or paroled. *Id.* at 12a-13a; see 8 U.S.C. 1182(a)(6)(A)(i). On April 30, 2013, petitioner admitted that he was removable as charged. Pet. App. 13a.

On June 12, 2013, petitioner filed an application for asylum, withholding of removal, and CAT protection. Pet. App. 13a.

b. Following a hearing, the immigration judge (IJ) denied petitioner's applications. Pet. App. 12a-28a. The IJ determined that petitioner's asylum application was time-barred under 8 U.S.C. 1158(a)(2)(B), because petitioner had waited six and a half years after entering the United States to file it. Pet. App. 22a-23a. The IJ also determined that petitioner had failed to establish the existence of changed circum-

stances (the only exception on which petitioner relied) that would justify excusing the delay pursuant to 8 U.S.C. 1158(a)(2)(D). Pet. App. 24a. The IJ explained that petitioner "cites increased political violence in Nicaragua," including in particular against members of an opposition political party (the PLI) with which petitioner and his family are publicly affiliated. *Id.* at 23a. But the IJ noted that petitioner "also testified that violence against PLI members in Nicaragua has been an ongoing problem since the 2006 elections," in which the Sandinista National Liberation Front (FSLN) took power, and that this violence "was the reason he fled the country" in the first place. *Ibid.* The IJ found that petitioner "could not explain why he did not file for asylum when he first arrived in the United States in 2006." *Id.* at 17a.

The IJ further found that petitioner's evidence did not "support a conclusion that violence has now increased or that his family is facing an increasing risk." Pet. App. 24a. The IJ noted that petitioner's uncle was "a well-known PLI member and former elected official," and had "lived in Nicaragua for years after [petitioner] fled without facing threats or harm." *Ibid.* The IJ further noted that petitioner's "parents and sisters have remained in Nicaragua without incident," and that "his two brothers, who also fled Nicaragua, have recently returned to Nicaragua to visit family without incident." *Ibid.* Petitioner had further testified that his cousin had been murdered by members of the ruling party because he was a PLI member, but the IJ found that there was "insufficient evidence to corroborate the circumstances" of the cousin's death. *Ibid.*

The IJ next denied on the merits petitioner's claim for withholding of removal. Pet. App. 24a-26a. The IJ reiterated that petitioner's uncle, "a former PLI elected official," has remained safely in Nicaragua, and that his brothers recently returned without incident. *Id.* at 25a-26a. The IJ noted that petitioner's cousin had recently been murdered, and that petitioner's friend was murdered as well. *Id.* at 25a. But the IJ found "no evidence to corroborate [petitioner's] belief" that they "were killed by the Sandinista youth for their political beliefs." *Ibid.*

The IJ denied CAT protection on the ground that petitioner had not shown that it was more likely than not that he would be tortured. Pet. App. 26a-27a.

3. The Board of Immigration Appeals (BIA) dismissed petitioner's appeal. Pet. App. 9a-11a. The BIA "adopt[ed] and affirm[ed]" the IJ's decision. *Id.* at 10a. The BIA found "speculative" petitioner's claim that the murder of his cousin was politically motivated. *Ibid.* The BIA also found that petitioner had not shown that the increased power of the FSLN was "material to his claim where he was not harmed or personally threatened on account of his political activities, and his brothers, also supporters of the [PLI], have been able to return to Nicaragua for visits without incident." *Ibid.*

The BIA also agreed with the IJ, "for the reasons stated in his decision," that petitioner had failed to carry his burden to support his applications for withholding of removal and CAT protection. Pet. App. 10a-11a.

4. The court of appeals dismissed in part and granted in part the petition for review, remanding for further proceedings. Pet. App. 1a-8a. First, the court

dismissed for lack of jurisdiction petitioner's challenge to the BIA's determination that he had failed to show a material change in circumstances to allow for consideration of his otherwise untimely asylum application. *Id.* at 2a. The court stated that, to prevail, petitioner "would have to show that the [IJ] or [BIA] had committed a legal error," but that "he hasn't done that." *Ibid.* (citing 8 U.S.C. 1252(a)(2)(D)). Rather, the court explained, petitioner "argue[d] only that violence toward persons such as him has increased in Nicaragua in recent years, thus justifying his belated application." *Ibid.* Relying on circuit precedent, the court rejected that argument, holding that "issues of changed or extraordinary circumstances are questions of fact that lie outside the realm of § 1252(a)(2)(D)." *Ibid.* (quoting *Aimin Yang* v. *Holder*, 760 F.3d 660, 665 (7th Cir. 2014)).

The court of appeals next granted the petition for review of the BIA's denial of petitioner's application for withholding of removal, set aside that portion of the BIA's decision, and remanded to the BIA for further proceedings. Pet. App. 8a. The court found "too cursory" the BIA's treatment of petitioner's cousin's murder, noting that the IJ had found petitioner's testimony credible and that another witness had corroborated his account by testifying "without contradiction that Sandinistas had threatened and then killed the cousin and friend." *Id.* at 5a-6a.

ARGUMENT

1. Petitioner seeks review (Pet. i) of the question whether a court of appeals "has jurisdiction to hear a claim that the [BIA] erred in its interpretation of the law concerning the filing deadlines for asylum" in Section 1158(a)(2). That question is not presented

here. The court correctly recognized that it would have jurisdiction to review questions of law pursuant to 8 U.S.C. 1252(a)(2)(D), but it concluded (correctly) that petitioner raised no such question. See Pet. App. 2a. Petitioner elsewhere quotes (Pet. 4-5) the court as holding that "issues of changed or extraordinary circumstances are *mixed* questions of *law and* fact that lie outside the realm of § 1252(a)(2)(D)*'s grant of jurisdiction*." (emphasis added). But that quotation is inaccurate; the italicized words do not appear in the court's opinion. Pet. App. 2a; 810 F.3d at 499 (decision below).

Petitioner is similarly mistaken in asserting (Pet. 5) that "[i]n the case below the facts were undisputed, and the only question was one of law." The key factual question here was disputed: Petitioner "argue[d] only that violence toward persons such as him has increased in Nicaragua in recent years, thus justifying his belated application," but the Department of Homeland Security—and the BIA—disagreed. Pet. App. 2a. Whether such an uptick has occurred is a factual question, not a legal one. Petitioner has never disputed that the BIA articulated the correct legal standard. See *ibid.* The only question presented in this petition, therefore, is whether the BIA's resolution of the factual dispute here is subject to judicial review.[2]

2. The court of appeals correctly held that it lacked jurisdiction to review the BIA's determination that petitioner failed to demonstrate to its satisfaction the existence of changed circumstances that would warrant consideration of his late-filed asylum application.

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[2] Petitioner also asserts (Pet. 5-7) that the BIA erred by failing to consider the merits of his asylum claim, but it obviously does not need to reach the merits of a claim that is untimely.

All but one of the courts of appeals that have considered the issue have reached the same result as the decision below. Although the Ninth Circuit has held that 8 U.S.C. 1158(a)(3) does not bar judicial review of the Attorney General's determination that an asylum claim was untimely in certain circumstances, this case would not be reviewable even in the Ninth Circuit. This Court has denied certiorari petitions raising the question presented on a number of occasions. See, *e.g.*, *Hernandez* v. *Holder*, 132 S. Ct. 92 (2011) (No. 10-1113); *Khan* v. *Holder*, 558 U.S. 1110 (2010) (No. 09-229); *Gomis* v. *Holder*, 558 U.S. 1110 (2010) (No. 09-194); *Eman* v. *Holder*, 558 U.S. 817 (2009) (No. 08-1317); *Barry* v. *Holder*, 558 U.S. 816 (2009) (No. 08-1216); *Viracacha* v. *Mukasey*, 555 U.S. 969 (2008) (No. 07-1363); *Kourouma* v. *Mukasey*, 552 U.S. 1313 (2008) (No. 07-7726); *Lopez-Cancinos* v. *Gonzales*, 550 U.S. 917 (2007) (No. 06-740). It should do so here as well.

Indeed, this would be a poor vehicle for review, because petitioner may still obtain protection from removal (in the form of withholding of removal) on remand.

a. The court of appeals correctly determined that it lacked jurisdiction over the BIA's resolution of the factual dispute here. The ultimate question whether petitioner demonstrated to the satisfaction of the Attorney General the existence of changed circumstances that warrant consideration of an untimely claim for asylum is committed to the Attorney General's discretion based on her own assessment of the circumstances. The INA provides that the Attorney General "may" consider an untimely asylum application if an alien demonstrates changed circumstances "to the satisfaction of the Attorney General." 8 U.S.C.

1158(a)(2)(D). Congress's use of the word "may" "expressly recognizes substantial discretion." *Haig* v. *Agee*, 453 U.S. 280, 294 n.26 (1981). And the phrase "to the satisfaction of the Attorney General" demonstrates Congress's intent that the Attorney General's assessment "entails an exercise of discretion," *Sukwanputra* v. *Gonzales*, 434 F.3d 627, 635 (3d Cir. 2006), in deciding whether to forgive the alien's default. Cf. *Webster* v. *Doe*, 486 U.S. 592, 600 (1988).

In light of the nature of the determination committed to the Attorney General, Congress expressly barred judicial review of such a determination when it enacted the Illegal Immigration Reform and Immigrant Responsibility Act of 1996, Pub. L. No. 104-208, Div. C, 110 Stat. 3009-546. Under 8 U.S.C. 1158(a)(3), "[n]o court shall have jurisdiction to review any determination" regarding the application of the one-year filing deadline for asylum claims, including the determination that a particular asylum applicant has not "demonstrate[d] to the satisfaction of the Attorney General * * * the existence of changed circumstances [that] materially affect the applicant's eligibility for asylum." 8 U.S.C. 1158(a)(2)(D). In his petition for review, petitioner challenged a determination that he had failed to demonstrate changed circumstances sufficiently to forgive his untimely filing. Judicial review of his challenge is therefore barred by 8 U.S.C. 1158(a)(3).

Petitioner contends (Pet. 7-8) that judicial review of the rejection of his asylum claim as untimely should have been available, however, because this case falls within 8 U.S.C. 1252(a)(2)(D), enacted in 2005 as part of the REAL ID Act, Pub. L. No. 109-13, Div. B, 119 Stat. 302, that allows for judicial review of "questions

of law." The structure of Section 1158(a)(2) and (3) demonstrates, however, that Congress did not regard a factbound and discretionary determination by the Attorney General under Section 1158(a)(2)—that an alien had not shown to the Attorney General's satisfaction that there were circumstances that warranted forgiving his procedural default and consideration of his untimely application—to present matters of law of a sort appropriate for judicial review. The enactment of Section 1252(a)(2)(D) in 2005 did not fundamentally alter that judgment of Congress concerning the nature of the Attorney General's determinations about untimely asylum applications, and the court of appeals therefore correctly held that petitioner's challenge to the BIA's factbound determination did not raise a "question[] of law." Pet. App. 2a.

Petitioner here has not advanced any argument that the BIA erred in construing the term "changed circumstances." See Pet. App. 2a. Instead, he appears to take issue with the BIA's determination that he failed to adduce facts sufficient to show a change in circumstances that materially affects his asylum application. See *id.* at 10a (BIA's finding that petitioner had failed to carry his burden). But whether that is correct is not a question of law; it is a factual determination involving judgment and discretion. See *Bin Jing Chen* v. *Holder*, 776 F.3d 597, 601 (8th Cir. 2015) (it "amount[s] to a quarrel with the IJ's and BIA's discretionary factual determination") (brackets and citation omitted). If petitioner's factbound challenge to such a determination by the Attorney General raised a "question[] of law," then any error might be a question of law, thereby rendering the jurisdictional bar in Section 1158(a)(3) meaningless. See, *e.g.*, *Higu-*

it v. *Gonzales*, 433 F.3d 417, 420 (4th Cir.) (Courts "are not free to convert every immigration case into a question of law, and thereby undermine Congress's decision to grant limited jurisdiction over matters committed in the first instance to the sound discretion of the Executive."), cert. denied, 548 U.S. 906 (2006).

Indeed, a challenge to such a determination by the Attorney General is precisely the type of claim over which Congress intended to withhold jurisdiction when it enacted Section 1252(a)(2)(D). Congress added the exception for "constitutional claims or questions of law" in response to concerns this Court raised about the reviewability of removal orders in *INS* v. *St. Cyr*, 533 U.S. 289 (2001). In *St. Cyr*, the alien's habeas petition "raise[d] a pure question of law": whether, "as a matter of statutory interpretation," the BIA erred in determining that he was not eligible for relief. *Id.* at 298. The alien did not challenge the BIA's factfinding, nor did he "contend that he would have any right to have an unfavorable exercise of the Attorney General's discretion reviewed in a judicial forum." *Ibid.* *St. Cyr* distinguished those types of claims from a pure legal claim such as a statutory-interpretation issue, and stated only that precluding judicial review of the latter would raise constitutional questions. *Ibid.* (alien "d[id] not dispute any of the facts that establish his deportability or the conclusion that he is deportable").

The Conference Report accompanying the REAL ID Act makes clear that a claim with both factual and legal elements (a "mixed question of law and fact") is not freely reviewable under Section 1252(a)(2)(D). H.R. Conf. Rep. No. 72, 109th Cong., 1st Sess. 175 (2005). Instead, the Report explained that when a

court is presented with such a claim, it "should not review any factual elements," such as "questions that courts would review under the 'substantial evidence'" standard. *Id.* at 175-176.

In sum, reading "questions of law" in Section 1252(a)(2)(D) to encompass determinations such as those at issue here would have the opposite effect of what Congress intended when it committed particular determinations to the judgment and discretion of the Attorney General. See, *e.g.*, *Reno* v. *American-Arab Anti-Discrimination Comm.*, 525 U.S. 471, 486-487 (1999). Because petitioner brought a factbound challenge to the agency's factfinding and discretionary judgment, his petition for review did not raise a "question[] of law" under Section 1252(a)(2)D), and the court of appeals therefore correctly determined that it lacked jurisdiction to review it.

b. Consistent with the Seventh Circuit's ruling in this case, the First, Second, Third, Fourth, Fifth, Sixth, Eighth, Tenth, and Eleventh Circuits have held that a challenge to the BIA's determination that an alien failed to demonstrate changed circumstances warranting consideration of an untimely asylum application normally does not raise a "question[] of law" within the meaning of 8 U.S.C. 1252(a)(2)(D). See, *e.g.*, *Juarez Chilel* v. *Holder*, 779 F.3d 850, 854 (8th Cir. 2015); *Mulyani* v. *Holder*, 771 F.3d 190, 197 (4th Cir. 2014); *Usman* v. *Holder*, 566 F.3d 262, 267 (1st Cir. 2009); *Zhu* v. *Gonzales*, 493 F.3d 588, 596 n.31 (5th Cir. 2007); *Xiao Ji Chen* v. *United States Dep't of Justice*, 471 F.3d 315, 330-332 (2d Cir. 2006); *Ferry* v. *Gonzales*, 457 F.3d 1117, 1130 (10th Cir. 2006); *Almuhtaseb* v. *Gonzales*, 453 F.3d 743, 748-749 (6th Cir. 2006); *Sukwanputra*, 434 F.3d at 635; *Chacon-Botero*

v. *U.S. Att'y Gen.*, 427 F.3d 954, 957 (11th Cir. 2005) (per curiam). Those courts have explained that a challenge to the BIA's determination that an alien did not establish changed circumstances "is merely an objection to the IJ's factual findings and the balancing of factors in which discretion was exercised," not an argument that raises a "question[] of law" under Section 1252(a)(2)(D). *Xiao Ji Chen*, 471 F.3d at 332.

The Ninth Circuit has held that an alien's challenge to the BIA's determination that he has not established changed circumstances may in some circumstances raise a "question[] of law" under 8 U.S.C. 1252(a)(2)(D). See *Ramadan* v. *Gonzales*, 479 F.3d 646, 649-656 (2007) (per curiam). The Ninth Circuit stated in *Ramadan* that the term "questions of law" in Section 1252(a)(2)(D) "extends to questions involving the application of statutes or regulations to undisputed facts, sometimes referred to as mixed questions of fact and law." *Id.* at 650.

The limited disagreement between the Ninth Circuit and the other ten circuits that review removal orders does not warrant this Court's attention at this time or in this case. A court of appeals would lack jurisdiction over petitioner's challenge even under the Ninth Circuit's view because petitioner's claim of changed circumstances is *not* based on "undisputed facts." To the contrary, as noted above (see pp. 8-9, *supra*), petitioner apparently disagrees with the BIA's determination that he failed to show that the relevant conditions in Nicaragua have materially worsened and that he faces a materially greater risk of persecution than he did six years earlier when he initially fled Nicaragua to avoid potential persecution. Moreover, this Court has repeatedly denied review in cases rais-

ing the same question presented. See p. 10, *supra* (collecting cases). There is no reason for a different result here.

Contrary to petitioner's assertion (Pet. 10), the Sixth and Eleventh Circuits both follow the majority rule. *Almuhtaseb*, 453 F.3d at 748-749; *Chacon-Botero*, 427 F.3d at 957; *Mendoza* v. *U.S. Att'y Gen.*, 327 F.3d 1283, 1287 (11th Cir. 2003); see *Khozhaynova* v. *Holder*, 641 F.3d 187, 192 (6th Cir. 2011) (refusing to adopt the Ninth Circuit's position); *Oloan* v. *U.S. Att'y Gen.*, No. 08-11168, 2009 WL 179613, at *2 (11th Cir. Jan. 27, 2009) (same).[3]

Petitioner's reliance (Pet. 10) on the Sixth Circuit's decision in *Mandebvu* v. *Holder*, 755 F.3d 417 (2014), is misplaced. *Mandebvu* recognized that courts *lack* jurisdiction when the petitioner "ask[s] the court to reweigh the evidence in the petitioner's favor." *Id.* at 425-426 (citing *Khozhaynova*, 641 F.3d at 191). The court held in *Mandebvu* that this barrier did not apply where the petitioner instead pressed a pure question of law: whether, "in order to excuse a delay in filing beyond the one-year deadline," an applicant must "demonstrate that he would not have been eligible for asylum had he applied before the change in country conditions." *Id.* at 426. Here, by contrast, petitioner presses no question of statutory interpretation. See Pet. App. 2a.

c. Finally, this case would be a poor vehicle for review in any event because, on remand, petitioner still may obtain withholding of removal. See Pet. App. 2a-

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[3] *Jean-Pierre* v. *U.S. Attorney General*, 500 F.3d 1315 (11th Cir. 2007), did not address the timeliness of asylum applications or changed circumstances; it addressed whether a particular fact pattern constitutes torture. *Id.* at 1322.

8a. The fact that petitioner may still obtain withholding of removal to Nicaragua—notwithstanding that his asylum claim is time barred—also refutes his assertion (Pet. 8-9) that the time bar on asylum applications "can result in the United States deporting a person to a country w[h]ere they can be persecuted or killed." Withholding of removal prevents an alien from being removed to a country where it is more likely than not that he or she will be persecuted. See *INS* v. *Cardoza-Fonseca*, 480 U.S. 421, 449-450 (1987). Unlike asylum, withholding of removal is available without regard to any time limitation. *Ibid.*

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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