No. 15-1232

In the Supreme Court of the United States

RUFINO ANTONIO ESTRADA-MARTINEZ, 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

IAN HEATH GERSHENGORN
Acting Solicitor General
Counsel of Record
BENJAMIN C. MIZER
Principal Deputy Assistant Attorney General
DONALD E. KEENER
ALISON R. DRUCKER
Attorneys
Department of Justice
Washington, D.C. 20530-0001
SupremeCtBriefs@usdoj.gov
(202) 514-2217

QUESTION PRESENTED

Petitioner unlawfully reentered the United States after being removed because he had committed an aggravated felony, namely, aggravated criminal sexual abuse in violation of 720 Ill. Comp. Stat. 5/12-16(d) (1992). The question presented is whether the court of appeals has jurisdiction to review the Board of Immigration Appeals' weighing of the relevant factors in concluding that petitioner is ineligible for withholding of removal because he had committed a "particularly serious crime," 8 U.S.C. 1231(b)(3)(B)(ii).

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-23a) is reported at 809 F.3d 886. The decisions of the Board of Immigration Appeals (Pet. App. 24a-36a) and the immigration judge (Pet. App. 37a-45a) are unreported.

JURISDICTION

The judgment of the court of appeals was entered on December 31, 2015. The petition for a writ of certiorari was filed on March 30, 2016. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. Under the Immigration and Nationality Act (INA), 8 U.S.C. 1101 *et seq.*, Congress has imposed several express limits on the scope of judicial review of final orders of removal. See, *e.g., Reno* v. *American-Arab Anti-Discrimination Comm.*, 525 U.S. 471, 486-

487 (1999). First, the jurisdictional bar in 8 U.S.C. 1252(a)(2)(C), based on the commission of specified crimes, provides:

> Notwithstanding any other provision of law (statutory or nonstatutory), including section 2241 of title 28, or any other habeas corpus provision, and sections 1361 and 1651 of such title, and except as provided in subparagraph (D), no court shall have jurisdiction to review any final order of removal against an alien who is removable by reason of having committed a criminal offense covered in section 1182(a)(2) or 1227(a)(2)(A)(iii), (B), (C), or (D) of this title, or any offense covered by section 1227(a)(2)(A)(ii) of this title for which both predicate offenses are, without regard to their date of commission, otherwise covered by section 1227(a)(2)(A)(i) of this title.

8 U.S.C. 1252(a)(2)(C). The enumerated offenses include any aggravated felony. 8 U.S.C. 1227(a)(2)(A)(iii). The INA defines "aggravated felony" to include "sexual abuse of a minor," 8 U.S.C. 1101(a)(43)(A), and to include unlawfully reentering the United States following deportation on the basis of a prior offense that was itself an aggravated felony, 8 U.S.C. 1101(a)(43)(O). See 8 U.S.C. 1326.

Second, the discretionary-decision bar in 8 U.S.C. 1252(a)(2)(B) provides:

> Notwithstanding any other provision of law (statutory or nonstatutory), including section 2241 of title 28, or any other habeas corpus provision, and sections 1361 and 1651 of such title, and except as provided in subparagraph (D), and regardless of whether the judgment, decision, or action is made

> in removal proceedings, no court shall have jurisdiction to review—
>
> > (i) any judgment regarding the granting of relief under section 1182(h), 1182(i), 1229b, 1229c, or 1255 of this title, or
> >
> > (ii) any other decision or action of the Attorney General or the Secretary of Homeland Security the authority for which is specified under this subchapter to be in the discretion of the Attorney General or the Secretary of Homeland Security, other than the granting of relief under section 1158(a) of this title.

8 U.S.C. 1252(a)(2)(B). "[T]his subchapter" encompasses 8 U.S.C. 1151 through 1381. 8 U.S.C. 1252(a)(2)(B)(ii). Petitioner's case does not involve the granting of relief under 8 U.S.C. 1158(a).

Subparagraph (D) carves out an exception to both the criminal-jurisdiction and discretionary-decision bars. It provides that Subparagraphs (B) and (C) do not preclude judicial review of "constitutional claims or questions of law" raised in a petition for review of a final order of removal filed in a court of appeals. 8 U.S.C. 1252(a)(2)(D). Petitioner's underlying claims do not include any constitutional question or question of law.

2. Petitioner is a native and citizen of Honduras. Pet. App. 37a. In 1994, he unlawfully entered the United States without inspection. Administrative Record (A.R.) 318. In 1995, he applied for asylum based on allegations that police in Honduras "detained and tortured him" following his leadership of a "peasant land takeover." Pet. App. 1a, 4a. U.S. Citizenship and Immigration Services, the relevant component of

the Department of Homeland Security (DHS), granted petitioner asylum in 1995. *Id.* at 4a.

On August 15, 1996, petitioner was convicted of aggravated criminal sexual abuse in violation of 720 Ill. Comp. Stat. 5/12-16(d) (1992). Pet. App. 41a-42a; Pet. 4; A.R. 318. That provision makes it a felony to commit "an act of sexual penetration or sexual conduct with a victim who was at least 13 years of age but under 17 years of age and the accused was at least 5 years older than the victim." 720 Ill. Comp. Stat. 5/12-16(d) (1992). It is a defense to conviction if the accused "reasonably believed the [victim] to be 17 years of age or over." *Id.* at 5/12-17(b). Aggravated criminal sexual abuse is punishable by up to seven years of imprisonment, *id.* at 5/12-16(g); see 38 Ill. Comp. Stat. Ann. ¶ 1005-8-1(5) (West Supp. 1992), and it requires registration as a sex offender, 1992 Ill. Legis. Serv. 2313-2314 (West).

The indictment alleged that petitioner "fondled [the victim's] vagina with his hand for the purpose of sexual gratification or arousal," and that the abuse continued from November 1, 1995, through April 24, 1996. A.R. 240 (indictment). The indictment does not specify the precise age of the victim. *Ibid.* Petitioner was 33 years old at the time. Pet. App. 5a. Petitioner was sentenced to four years of probation and was required to register as a sex offender for ten years. *Ibid.*

In March 2001, DHS initiated removal proceedings against petitioner, charging him with being removable under 8 U.S.C. 1227(a)(2)(A)(iii) because he had been convicted of an aggravated felony. See A.R. 318. Through counsel, petitioner conceded that he was removable as an aggravated felon, but he moved to

adjust his status to that of a lawful permanent resident and applied for a waiver of inadmissibility, which may be granted "for humanitarian purposes, to assure family unity, or when it is otherwise in the public interest," 8 U.S.C. 1159(c). A.R. 313-315. DHS denied the application based on the severity of petitioner's offense, noting that petitioner was "twice the age of the victim." A.R. 315.

Petitioner thereafter failed to appear for a hearing before an immigration judge (IJ). A.R. 321, 324. On December 21, 2006, the IJ entered a final order of removal *in absentia*. Pet. App. 38a. Petitioner moved to reopen on the grounds that his failure to appear should be excused. A.R. 325. The IJ denied that motion. Pet. App. 38a; see A.R. 337-339 (decision). On June 28, 2007, petitioner was removed to Honduras. Pet. App. 38a.

3. In July 2007, one week after being removed from the United States, petitioner illegally reentered the United States without inspection. Pet. App. 38a; A.R. 197. In 2013, DHS arrested petitioner and reinstated the final order of removal under which he had been previously removed. Pet. App. 6a. When a final order of removal is reinstated, removal proceedings are "not subject to being reopened or reviewed," the alien is "not eligible and may not apply for any relief" under the INA, and the alien "shall be removed under the prior order at any time." 8 U.S.C. 1231(a)(5).

Notwithstanding that general rule, the INA provides that DHS "may not remove an alien to a country if the Attorney General decides that the alien's life or freedom would be threatened in that country 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); see 8 C.F.R. 1241.8(e), 1208.31(e). This is known as "withholding of removal." An alien similarly may obtain withholding of removal under 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).

Withholding of removal is unavailable under both Section 1231(b) and the CAT regulations, however, if the Attorney General determines that the alien, "having been convicted by a final judgment of a particularly serious crime is a danger to the community of the United States." 8 U.S.C. 1231(b)(3)(B)(ii); 8 C.F.R. 1208.16(d)(2); see 8 C.F.R. 1208.31(a) and (e). Congress has provided that an alien who has been sentenced to at least 5 years of imprisonment for an aggravated felony "shall be considered to have committed a particularly serious crime," but that *per se* rule "shall not preclude the Attorney General from determining that, notwithstanding the length of sentence imposed, an alien has been convicted of a particularly serious crime." 8 U.S.C. 1231(b)(3)(B)(ii).

"An alien who has been convicted of a particularly serious crime shall be considered to constitute a danger to the community." 8 C.F.R. 1208.16(d)(2). Thus, "once an alien is found to have been convicted of a particularly serious crime, there is no need for a separate determination whether he is a danger to the community." Pet. App. 26a; see *In re N-A-M-*, 24 I. & N. Dec. 336 (B.I.A. 2007), aff'd, *N-A-M* v. *Holder*, 587 F.3d 1052 (10th Cir. 2009) (per curiam), cert. denied, 562 U.S. 1141 (2011).

Finally, if an alien is ineligible for withholding of removal under the CAT because he committed a particularly serious crime, he may still obtain "deferral of removal" to a particular country if it is "more likely than not" that he would be tortured there. 8 C.F.R. 1208.17(a). Accordingly, if an alien's final order of removal has been reinstated and the Attorney General determines that he or she has been convicted of a particularly serious crime, that alien is ineligible for any kind of relief or protection for removal other than deferral of removal under the CAT.

4. The IJ granted petitioner's application for withholding of removal to Honduras, under both Section 1231(b)(3) and the CAT. Pet. App. 37a-45a. First, the IJ found that petitioner was not ineligible for withholding of removal because his conviction for aggravated criminal sexual abuse was not for a particularly serious crime. *Id.* at 43a. The IJ recognized that petitioner's conviction was for an aggravated felony and that he was 33 years old at the time, while the victim apparently was 16. *Id.* at 42a-43a. But the IJ credited petitioner's testimony that it was "an ongoing consensual relationship" and that, "in his mind," "he believed she was 18"; the IJ also found "a significance" that the victim was 16, not "13 or 14 or 15." *Id.* at 43a. Second, the IJ found that, if petitioner returns to Honduras, it is "more likely than not" that he will be persecuted and tortured. *Id.* at 44a.

The Board of Immigration Appeals (BIA) sustained DHS's appeal, denying petitioner's applications for withholding and deferral of removal. Pet. App. 24a-36a. First, the BIA concluded that petitioner was ineligible for withholding of removal because his conviction for aggravated criminal sexual abuse was for a

particularly serious crime. *Id.* at 25a-31a. The BIA found that "the nature of his offense, the length of his probation," "the requirement that he register as a sex offender, and the underlying circumstances of his offense," established that petitioner had been convicted of such a crime. *Id.* at 30a. The BIA found the IJ clearly erred in crediting petitioner's claim that he "did not know" his victim was a minor, as it was an affirmative defense to conviction if he "reasonably believed" the victim was an adult. *Id.* at 30a-31a. The BIA also "d[id] not weigh his crime less seriously because it was committed against a 16-year-old and not a 13-year-old." *Id.* at 30a. The BIA explained that "[h]is victim could not legally consent to engaging in sexual activity with the applicant" and "was a member of a class of minors that are given special protection under the laws as vulnerable victims," and that "[t]here is an inherent risk of exploitation, if not coercion, when an adult solicits a minor to engage in sexual activity." *Ibid.*

Second, the BIA concluded that petitioner's application for deferral of removal under the CAT should be denied because it was "not persuaded" he would be tortured if returned to Honduras. Pet. App. 36a. The BIA recognized that petitioner "was tortured over 20 years ago for his leadership of a land invasion," but it found clearly erroneous the IJ's determination that petitioner was subsequently tortured after escaping his village. *Id.* at 32a-34a. The BIA explained that petitioner "was able to safely relocate within Honduras" in 1993 shortly after the land takeover; "that he was not harmed by the landowner upon his return to Honduras in 2007 despite the alleged threat in 2006"; that, although he was mistreated at the time because

of his conviction for sexually assaulting a minor, "he was not tortured when he was in the custody of Honduran authorities in 2007"; "that other participants in the land invasion live in Honduras and are not being tortured for their participation"; and "that his family remained in Honduras after he departed in 1994 and was not harmed despite his leadership of the land invasion." *Id.* at 32a, 35a-36a.

5. Petitioner filed a petition for review, and the court of appeals dismissed in part, granted in part, and remanded for further proceedings. Pet. App. 1a-22a. First, the court dismissed for lack of jurisdiction petitioner's claims that the BIA had erred in denying him withholding of removal. The government had argued that the criminal-jurisdiction bar to jurisdiction applied, 8 U.S.C. 1252(a)(2)(C), because petitioner was removable by reason of having committed an aggravated felony. See Pet. App. 10a; Gov't C.A. Br. 24. Following circuit precedent, the court instead concluded that the discretionary-decision bar, 8 U.S.C. 1252(a)(2)(B), applied to the BIA's determination that an alien is ineligible for withholding of removal for having committed a particularly serious crime. Pet. App. 10a; see *Tunis* v. *Gonzales*, 447 F.3d 547, 549 (7th Cir. 2006); *Petrov* v. *Gonzales*, 464 F.3d 800, 802 (7th Cir. 2006). The court further determined that it was not a constitutional question or question of law under Section 1252(a)(2)(D) whether the BIA "incorrectly weighed the relevant factors" in determining whether petitioner's offense was for a particularly serious crime. Pet. App. 13a. The court therefore held that this question was beyond its jurisdiction. *Ibid.*

Second, relying on circuit precedent, the court of appeals exercised jurisdiction over petitioner's deferral of removal claim. Pet. App. 8a (citing *Lenjinac* v. *Holder*, 780 F.3d 852, 855 (7th Cir. 2015)). The court granted the petition for review in part, holding that the BIA had incorrectly applied the clear error standard in reversing the IJ's determination that it was more likely than not that petitioner would be tortured if returned to Honduras. *Id.* at 17a. "[T]he Board, rather than reviewing the judge's findings of fact for clear error as required by regulation, instead reweighed the evidence to come to a conclusion different from the judge's." *Id.* at 20a. The court remanded for further proceedings. *Id.* at 21a-22a.

Judge Manion concurred. Pet. App. 23a. He wrote separately to note that the BIA may need to remand to the IJ to assess "whether the precise threat to [petitioner] still exists." *Ibid.*

ARGUMENT

The court of appeals correctly determined that it lacked jurisdiction to review the BIA's denial of petitioner's claim for withholding of removal, although it reached that result through erroneous reasoning. Petitioner argues, and the government agrees, that the court erred in holding that the discretionary-decision bar at 8 U.S.C. 1252(a)(2)(B)(ii) precludes judicial review of the BIA's weighing of the relevant factors in determining that a conviction is for a particularly serious crime. The court was ultimately correct to conclude that it lacked jurisdiction, however, because the criminal-jurisdiction bar in 8 U.S.C. 1252(a)(2)(C) independently precludes review: Petitioner is removable—and indeed was previously removed from the United States—because he committed

an aggravated felony, and his unlawful reentry into this country following his removal is itself an aggravated felony.

Petitioner seeks review (Pet. i) of the court of appeals' interpretation of Section 1252(a)(2)(B)(ii), but resolution of that question would not alter the judgment below: However Section 1252(a)(2)(B)(ii) is interpreted, the court would lack jurisdiction to review the BIA's denial of his claim for withholding of removal. No further review is warranted.

1. The court of appeals' rationale was incorrect, but it correctly concluded that it lacked jurisdiction to review the BIA's denial of his application for withholding of removal.

a. The court of appeals erred in reasoning that the discretionary-decision bar in Section 1252(a)(2)(B)(ii) applies to the Attorney General's determination of whether an alien is ineligible for withholding of removal because he committed a particularly serious crime. Section 1252(a)(2)(B)(ii) only bars review of decisions that are "specified" by certain sections of the INA "to be in the discretion of the Attorney General." 8 U.S.C. 1252(a)(2)(B)(ii). In *Kucana* v. *Holder*, 558 U.S. 233 (2010), this Court held that an agency cannot make its authority discretionary (and therefore unreviewable) through regulations because Section 1252(a)(2)(B) depends on statutory provisions—not agency measures—to define its scope. See *id.* at 245-247. Congress must "specif[y]" that the decision is discretionary, 8 U.S.C. 1252(a)(2)(B)(ii), and thus Section 1252(a)(2)(B)(ii) applies "only when Congress itself set out the Attorney General's discretionary authority in the statute." *Kucana*, 558 U.S. at 247. "'Specified' is not synonymous with 'implied' or 'antic-

ipated,'" but rather means "'to name or state explicitly in detail.'" *Id.* at 243 n.10 (quoting *Webster's New Collegiate Dictionary* 1116 (1974)).

Here, several factors indicate that Congress has not "specified" that the determination of whether an alien has committed a particularly serious crime is to be in the Attorney General's discretion. First, Congress did not use textual cues specifically indicating the conferral of discretion, such as providing that the Attorney General (or the Secretary of Homeland Security) "may" decide whether an offense is particularly serious; providing that an offense qualifies only if the Attorney General "deems" it to be particularly serious; or stating expressly that the decision rests "in [her] discretion." See, *e.g.*, 8 U.S.C. 1157(c) ("may, in the Attorney General's discretion"); 8 U.S.C. 1155 ("may, at any time, for what he deems to be good and sufficient cause"); cf. *Webster* v. *Doe*, 486 U.S. 592, 600 (1988). Congress instead used directive language in Section 1231(b)(3)(B)(ii), providing that an alien is ineligible for withholding of removal if the Attorney General "decides" that he or she has been "convicted by a final judgment of a particularly serious crime." 8 U.S.C. 1231(b)(3)(B)(ii). This language thus fairly implies or anticipates that the Attorney General must weigh discretionary factors in making the "particularly serious crime" determination, but it does not "specify" that the decision is ultimately to be in her broad discretion.

Second, Congress did not make withholding of removal itself a form of relief entrusted to executive discretion. Cf. 8 U.S.C. 1229b ("The Attorney General may cancel removal" for certain aliens.). Instead, withholding is "a mandatory prohibition against re-

moval when certain facts are present." *Alaka* v. *Attorney Gen. of U.S.*, 456 F.3d 88, 100 (3d Cir. 2006); see *INS* v. *Aguirre-Aguirre*, 526 U.S. 415, 424-425 (1999). The INA provides that "the Attorney General *may not* remove an alien to a country if the Attorney General decides that the alien's life or freedom would be threatened." 8 U.S.C. 1231(b)(3)(A) (emphasis added). And the regulations implementing the CAT similarly provide that an application for withholding of removal "shall be granted" if eligibility is established. 8 C.F.R. 1208.16(d). Particularly when coupled with the absence of a "may" or similar language specifying that application of the "particularly serious crime" exception rests in the Attorney General's discretion, Section 1231(b)(3)(B) as a whole "mandates a particular outcome once a determination has been made," and thus is "more like 'shall' than 'may.'" *Alaka*, 456 F.3d at 99.

In initially holding that Section 1252(a)(2)(B)(ii) generally precludes review of "particularly serious crime" determinations, the Seventh Circuit skipped any analysis of whether discretion is "specified" by the INA—the analysis *Kucana* makes clear is essential. See *Tunis* v. *Gonzales*, 447 F.3d 547, 549 (2006). Rather, the court relied on Ninth Circuit decisions from before *Kucana*—that have now been overruled—to conclude, without further analysis, that Section 1252(a)(2)(B)(ii) shielded "particularly serious crime" determinations from judicial review. See *ibid.*; see also *Solis* v. *Mukasey*, 515 F.3d 832, 835 (8th Cir. 2008) (holding that Section 1252(a)(2)(B)(ii) applied, without any discussion of whether discretion was "specified" by statute). That analysis cannot survive *Kucana*.

b. The court of appeals' conclusion that it lacks jurisdiction to review the BIA's denial of petitioner's applications for withholding of removal is ultimately correct, however, because the criminal-jurisdiction bar in Section 1252(a)(2)(C) independently precludes review of the denial of petitioner's applications. That provision prohibits courts of appeals from reviewing "any final order of removal against an alien who is removable by reason of having committed" certain offenses, including any aggravated felony, 8 U.S.C. 1252(a)(2)(C); see 8 U.S.C. 1227(a)(2)(A)(iii), except to the extent the alien raises a constitutional question or question of law, see 8 U.S.C. 1252(a)(2)(D).

Every court of appeals that has squarely decided the question has held that Section 1252(a)(2)(C) precludes judicial review of a factual challenge to a BIA decision to deny withholding of removal based on a determination that the alien has committed a particularly serious crime, where the alien is removable by reason of having committed an aggravated felony or other covered offense. See *Ortiz-Franco* v. *Holder*, 782 F.3d 81, 90 (2d Cir. 2015), cert. denied, 136 S. Ct. 894 (2016); *Pechenkov* v. *Holder*, 705 F.3d 444, 448 (9th Cir. 2012) ("If an IJ determines that an aggravated felony constitutes a 'particularly serious crime,' and denies withholding of removal under the CAT on the basis of the conviction, § 1252(a)(2)(C) bars our review of the denial of withholding."); *Vong Xiong* v. *Gonzales*, 484 F.3d 530, 534 (8th Cir. 2007); *Ilchuk* v. *Attorney Gen. of the U.S.*, 434 F.3d 618, 624 (3d Cir. 2006) ("We have no jurisdiction to opine as to whether, as a factual matter, Petitioner is likely to be persecuted upon his return to the Ukraine."); see also *Alaka*, 456 F.3d at 102 ("It is uncontested that the jurisdiction-

stripping language of § 1252(a)(2)(C) applies" where an alien is removable by reason of having committed a crime of moral turpitude.).[1]

The bar to judicial review in Section 1252(a)(2)(C) applies here. Petitioner was found removable—and ultimately removed—because, as he conceded, he was convicted of an aggravated felony: aggravated criminal sexual abuse in violation of 720 Ill. Comp. Stat. 5/12-16(d) (1992). A.R. 313-315. Petitioner has since unlawfully reentered the country, such that his prior final order of removal has been reinstated. Moreover, an unlawful reentry following removal for an aggravated felony is itself an aggravated felony. 8 U.S.C. 1101(a)(43)(O). And the savings clause in Section 1252(a)(2)(D) allowing judicial review in limited circumstances does not apply here. Petitioner does not press a constitutional question or question of law; he "argues that the [BIA]'s decision incorrectly weighed the relevant factors." Pet. App. 13a. Accordingly, even though the court of appeals relied upon the wrong provision, it correctly concluded that it lacked jurisdiction to review petitioner's factual challenges to the BIA's denial of his applications for withholding of removal.

2. The courts of appeals are divided on whether the discretionary-decision bar in Section 1252(a)(2)(B)(ii) generally precludes review of the BIA's determination

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[1] Reviewing prior circuit precedent, the Seventh Circuit below appeared to conclude that it remains an open question whether Section 1252(a)(2)(C) precludes review of a "particularly serious crime" determination. See Pet. App. 10a (discussing *Petrov* v. *Gonzales*, 464 F.3d 800, 801-802 (7th Cir. 2006), and *Ali* v. *Achim*, 468 F.3d 462, 470 (7th Cir. 2006), cert. dismissed, 552 U.S. 1085 (2007)).

that an alien is ineligible for withholding of removal because he has committed a particularly serious crime. Most of the circuits that have addressed the question hold that Section 1252(a)(2)(B)(ii) does not apply to such determinations. *Delgado* v. *Holder*, 648 F.3d 1095, 1100 (9th Cir. 2011) (en banc); *Nethagani* v. *Mukasey*, 532 F.3d 150 (2d Cir. 2008); *Alaka*, 456 F.3d at 95. The Sixth Circuit has held that Section 1252(a)(2)(B)(ii) does not apply when the Attorney General makes the similar "determin[ation]" that an alien is ineligible for asylum because he "committed a serious non-political crime," 8 U.S.C. 1158(b)(2)(A). *Berhane* v. *Holder*, 606 F.3d 819 (6th Cir. 2010). By contrast, the Seventh and Eighth Circuits have held that Section 1252(a)(2)(B)(ii) precludes review of "particularly serious crime" determinations, unless the alien raises a constitutional question or question of law. See Pet. App. 10a; *Solis*, 515 F.3d at 835.[2]

This Court's review is not warranted in this case or at this time, however. First, this case would be a poor vehicle for deciding whether Section 1252(a)(2)(B)(ii) precludes review of the BIA's denial of petitioner's applications for withholding of removal because, as set forth above, the judgment would be the same regardless of how it is resolved: Section 1252(a)(2)(C) independently precludes review because petitioner is removable by reason of having committed an aggravated

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[2] In addition, two circuits have addressed this issue in unpublished non-precedential opinions. See *Diaz* v. *Holder*, 501 Fed. Appx. 734, 738 n.2 (10th Cir. 2012) (relying on *Kucana* to conclude that "particularly serious crime" determinations are not specified to be in the Attorney General's discretion); *Cadet* v. *U.S. Att'y Gen.*, 598 Fed. Appx. 746, 747 (11th Cir. 2015) (per curiam) (concluding without discussion that they are so specified).

felony. Either way, the court of appeals would lack jurisdiction to review the petitioner's factual challenges to the BIA's denial of his applications for withholding of removal.

Second, review at this time would be premature. The two circuits with binding circuit precedent holding that Section 1252(a)(2)(B)(ii) generally bars review of "particularly serious crime" determinations adopted that position before *Kucana*, and did so without analyzing whether discretion is "specified" by the statute. See *Solis*, 515 F.3d at 835; *Tunis*, 447 F.3d at 549. Neither court has reevaluated the validity of those precedents in light of *Kucana*. Indeed, in the decision below, the court simply viewed itself as bound by its prior circuit precedent. Pet. App. 8a ("[W]e follow this circuit's precedents."); see *id.* at 9a-10a. Petitioner did not seek en banc review.

En banc review could resolve the circuit conflict here. For example, the Ninth Circuit initially held that Section 1252(a)(2)(B)(ii) precluded review. See *Matsuk* v. *INS*, 247 F.3d 999 (2001). But after this Court decided *Kucana*, the Ninth Circuit granted en banc review and relied on *Kucana* to overrule *Matsuk*, thereby joining the majority of circuits and the government in concluding that Section 1252(a)(2)(B)(ii) does not preclude review of "particularly serious crime" determinations. *Delgado*, 648 F.3d at 1100. Accordingly, the circuit conflict here could dissipate without this Court's intervention.

Third, as this case illustrates, the issue petitioner identifies has limited importance. In the many cases —including this one—in which the "particularly serious crime" is an aggravated felony or a crime of moral turpitude, it will be immaterial whether Section

1252(a)(2)(B)(ii) applies because the criminal-jurisdiction bar in Section 1252(a)(2)(C) also will preclude review. Furthermore, regardless of whether an alien has committed an aggravated felony or a particularly serious crime, he may still obtain deferral of removal under the CAT, thereby providing some concrete relief. Indeed, in this very case, petitioner could still obtain deferral of removal to Honduras on remand, notwithstanding that he unlawfully reentered the United States after being removed for committing aggravated criminal sexual abuse. The possibility that petitioner could still obtain deferral of removal on remand further undercuts both the practical importance of the question presented and any need for review at this time.

3. Relying on circuit precedent, the court of appeals exercised jurisdiction over (and vacated) the BIA's denial of petitioner's application for deferral of removal, notwithstanding the criminal-jurisdiction bar in Section 1252(a)(2)(C). Pet. App. 8a-9a. The court's underlying rationale was that Section 1252(a)(2)(C) applies only to a "final order of removal" and that, unlike withholding of removal, "deferral of removal is not a final remedy." *Ibid.* The courts of appeals are divided as to whether that is the correct interpretation of Section 1252(a)(2)(C). See *ibid.* (collecting cases). The government disagrees with the court of appeals' conclusion that Section 1252(a)(2)(C) does not apply to review of the BIA's denial of an application for deferral of removal, but the government has not filed a conditional cross-petition for a writ of certiorari seeking review of the court's decision here. As a result, the deferral question is not properly before this Court. This Court also recently denied a petition for a

writ of certiorari in a case presenting the deferral of removal question. See *Ortiz-Franco* v. *Lynch*, 136 S. Ct. 894 (2016) (No. 15-362).

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

IAN HEATH GERSHENGORN
Acting Solicitor General
BENJAMIN C. MIZER
Principal Deputy Assistant Attorney General
DONALD E. KEENER
ALISON R. DRUCKER
Attorneys

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