No. 15-1232

IN THE

Supreme Court of the United States

RUFINO ANTONIO ESTRADA-MARTINEZ,
Petitioner,

v.

LORETTA E. LYNCH, ATTORNEY GENERAL OF THE UNITED STATES,
Respondent.

On Petition for a Writ of Certiorari
to the United States Court of Appeals
for the Seventh Circuit

REPLY BRIEF FOR PETITIONER

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REPLY BRIEF FOR PETITIONER

The Government has conceded nearly every relevant point in Mr. Estrada's petition. In particular, the Government admits that the Seventh Circuit erred in its decision below, and the Government further admits that there is a circuit split on the question presented by Mr. Estrada's petition. Opp. 10–13, 15–16 & n.2. Rather than support review, however, the Government stubbornly opposes in the hope that this Court will turn a blind eye to a pressing legal issue. The Government asks this Court to ignore the erroneous decision below. The Government asks this Court to ignore the erroneous governing law in at least three federal circuits. And the Government asks this Court to ignore Mr. Estrada's legal rights, which the Government admits the Seventh Circuit failed to adjudicate properly. None of the Government's reasons for denying review withstands scrutiny, especially here, where the Government has already confessed error in the judgment below.

First, the Government relies on 8 U.S.C. § 1252(a)(2)(C), as a purported alternative basis for upholding the decision below. Opp. 14–15. According to the Government, Mr. Estrada's conviction for an "aggravated felony" triggers the jurisdictional bar in subsection 1252(a)(2)(C), so a remand to the Seventh Circuit would be of little use. Opp. 14. But the Government admits that the Seventh Circuit explicitly *declined* to examine whether that subsection applies; as the Government explains, "it remains an open question whether [subs]ection 1252(a)(2)(C) precludes review of a 'particularly serious crime' determination [in the

Seventh Circuit]." Opp. 9, 15 n.1. That is, the Government would have this Court ignore an admittedly erroneous ruling on the speculation that the Seventh Circuit *might* rule for the Government on a different issue on remand. But, in doing so, it ignores multiple reasons why subsection 1252(a)(2)(C) does not in fact apply here.

Second, the Government argues that the circuit split will somehow take care of itself, in the light of *Kucana v. Holder*, 558 U.S. 233 (2010). Opp. 17. But as Mr. Estrada's petition pointed out—and the Government failed to address—Mr. Estrada already briefed the Seventh Circuit on *Kucana*, and yet the Seventh Circuit ruled incorrectly anyway. Pet. 27 n.4. Moreover, both the Seventh and Eleventh Circuits have repeatedly applied subsection 1252(a)(2)(B)(ii) to particularly serious crime determinations, including as recently as *this year*. *Camelien v. U.S. Att'y Gen.*, 636 F. App'x 498, 501 (11th Cir. 2016); *see also, e.g.*, *Teneng v. Holder*, 602 F. App'x 340, 346 (7th Cir. 2015); *Cadet v. U.S. Att'y Gen.*, 598 F. App'x 746, 747 (11th Cir. 2015). And the Government acknowledges that the Eighth Circuit, too, is in error. Opp. 16; *see Lovan v. Holder*, 574 F.3d 990, 998 (8th Cir. 2009); *Solis v. Mukasey*, 515 F.3d 832, 835 (8th Cir. 2008). That is, multiple circuits are continually issuing decisions that the Government admits are erroneous, yet the Government wants this Court to let them pass.

Third, the Government argues that the question presented will not arise often because most "particularly serious crime" determinations supposedly arise out of aggravated felony convictions, where, according to the Government, review would

be barred by subsection 1252(a)(2)(C). Opp. 17–18. As an initial matter, this argument is flawed because it merely piggybacks on the Government's already-flawed argument that subsection 1252(a)(2)(C) always bars review of "particularly serious crime" determinations that include an aggravated felony. But even if the Government were correct that, in some cases, subsection 1252(a)(2)(C) would apply to bar jurisdiction, a great many cases do not even arguably involve aggravated felonies—as the citations in Mr. Estrada's petition already established.

Given the Government's confession of error, this Court should grant review on the important legal question whether federal courts have jurisdiction to review "particularly serious crime" determinations. If necessary, the Court should appoint an *amicus curiae* to defend the decision below. In the alternative, the Court should grant, vacate, and remand to the Seventh Circuit to reconsider its decision in the light of the Government's new position. *See, e.g.*, *Villarreal v. United States*, 134 S. Ct. 1939 (2014) (mem.) ("Judgment vacated, and case remanded . . . in light of the position asserted by the Solicitor General."); *Nunez v. United States*, 554 U.S. 911 (2008) (mem.) (same).

I. THE SEVENTH CIRCUIT LEFT OPEN THE QUESTION WHETHER SUBSECTION 1252(a)(2)(C) APPLIES TO "PARTICULARLY SERIOUS CRIME" DETERMINATIONS.

The Government erroneously argues that, because Mr. Estrada supposedly committed an aggravated felony, 8 U.S.C. § 1252(a)(2)(C) strips jurisdiction from federal courts and so the Seventh Circuit came

to the right conclusion for the wrong reason. Opp. 15. But the Government's argument makes no sense in the light of its admission that the Seventh Circuit *declined* to make any holding with respect to subsection 1252(a)(2)(C), even though that was the *only* jurisdictional argument that the Government raised below. Opp. 9; Pet. App. 10a. In other words, the Seventh Circuit *sua sponte* applied subsection 1252(a)(2)(B)(ii), in conceded conflict with four other courts of appeals, Pet. App. 9a n.2, rather than address the Government's actual argument on jurisdiction. That the Seventh Circuit went so far out of its way to *avoid* the subsection 1252(a)(2)(C) question is strong evidence that it is not the open-and-shut case that the Government would have this Court believe. Indeed, the Government itself acknowledges that the Seventh Circuit "appeared to conclude that it remains an open question whether [subs]ection 1252(a)(2)(C) precludes review of a 'particularly serious crime' determination." Opp. 15 n.1.

In fact, subsection 1252(a)(2)(C) does *not* apply to Mr. Estrada. Subsection 1252(a)(2)(C) bars review of "final order[s] of removal" against aliens "removable by reason of having committed" an aggravated felony. 8 U.S.C. § 1252(a)(2)(C). But here, the BIA did not deny Mr. Estrada's application for withholding of removal on the basis of his having committed an "aggravated felony." Pet. App. 25a–31a. Instead, the BIA denied his application on the (erroneous) basis that he committed a "particularly serious crime." *Id.* This distinction is critical. Subsection 1252(a)(2)(C) explicitly points to certain categories of crimes as bases for limiting jurisdiction, including, for

example, aggravated felonies, controlled substance convictions, and crimes of moral turpitude. But it does *not* list "particularly serious crimes" as a basis for stripping jurisdiction. *See generally* 8 U.S.C. § 1252(a)(2)(C). That Congress chose not to include "particularly serious crimes" in a subsection that incorporates several other categories strongly suggests that Congress did *not* mean for subsection 1252(a)(2)(C) to bar review of particularly serious crime determinations. This lack of reference to "particularly serious crimes" helps to explain, in part, why the Seventh Circuit decided that the "plain language" of subsection 1252(a)(2)(B)(ii) applied, rather than subsection 1252(a)(2)(C). Pet. App. 10a. Of course, the Seventh Circuit should not have applied either subsection, but it is telling that the court chose not even to analyze the subsection upon which the Government now relies.

And even if subsection 1252(a)(2)(C) could bar jurisdiction over *some* "particularly serious crime" determinations, it does not apply here. Mr. Estrada challenges a BIA decision on withholding of removal, arising out of a "reinstatement order," which "is a new, final, purely administrative order that reinstates, but is *separate* from, the original deportation order." *Tilley v. Chertoff*, 144 F. App'x 536, 539 (6th Cir. 2005) (emphasis added). The BIA made no decisions related to an aggravated felony, made no decisions affirming, denying, or in any way modifying the original order of removal based on Mr. Estrada's conviction, and did not even examine his reinstatement order. *See generally* Pet. App. 25a–31a. And the reinstatement order itself was based on Mr. Estrada's reentry after removal, not on an

aggravated felony conviction. A.R. 377. There is no way to understand the BIA's challenged decision as an order based on Mr. Estrada's having "committed" an aggravated felony. 8 U.S.C. § 1252(a)(2)(C). Moreover, it is not clear that Mr. Estrada's conviction should be treated as an aggravated felony, since he pled guilty months before Congress amended the definition of "aggravated felony" to encompass such conduct. *See* The Illegal Immigration Reform and Immigrant Responsibility Act, Division C of Pub. L. 104-208, 110 Stat. 3009–546, § 321(a) (Sept. 30, 1996).[1] These additional factors also help to explain why the Seventh Circuit declined to apply subsection 1252(a)(2)(C).

To be sure, the Government cites a few courts that have applied subsection 1252(a)(2)(C) to "particularly serious crime" determinations, but the opinions spent little time on the issue, and their procedural backgrounds are very different from that here. Opp. 14–15 (citing four circuits). For instance, in one of the Government's cited cases, it was "undisputed" that subsection 1252(a)(2)(C) applied—that is, there was no argument on the question. *Alaka v. U.S. Att'y Gen.*, 456 F.3d 88, 102 (3d Cir. 2006). In two other cases, the courts provided little explanation for their decisions. *See Vong Xiong v. Gonzalez*, 484 F.3d 530, 534 (8th Cir. 2007); *Ilchuck v. U.S. Att'y Gen.*, 434 F.3d 618, 624 (3d Cir. 2006). And in one of

[1] The Government also suggests that Mr. Estrada committed an aggravated felony by reentering the country illegally, Opp. 10–11, 15, but the Government cites no support in the record for this proposition because there is none; Mr. Estrada was not convicted of illegal reentry, *see generally* 8 U.S.C. § 1326.

the Government's cited authorities, the Ninth Circuit recognized exceptions to the application of subsection 1252(a)(2)(C) (albeit, they would not apply here). *See Pechenkov v. Holder*, 705 F.3d 444, 448 (9th Cir. 2012) (recognizing exception to jurisdiction stripping provision where BIA made removal decision "on the merits"). Moreover, none of these decisions involved withholding-only proceedings arising out of a reinstatement order.

Regardless, this Court need not delve into the merits of the potential subsection 1252(a)(2)(C) issue. The Seventh Circuit declined to resolve that issue, and until the Seventh Circuit's ruling on subsection 1252(a)(2)(B)(ii) is reviewed, no court could reach the subsection 1252(a)(2)(C) question anyway. Indeed, the certiorari stage of a petition that does not yet even present the subsection 1252(a)(2)(C) issue is not the place for this Court to consider a legal question that is important in its own right. Yet this is exactly what the Government would have this Court do. The Government admits that the Seventh Circuit is wrong on subsection 1252(a)(2)(B)(ii), but rather than have this Court examine that issue, the Government wants this Court to deny review based on a wholly separate issue that the Seventh Circuit never addressed—indeed, *declined* to address. However, Mr. Estrada deserves the opportunity to make his viable arguments. At the moment, the only thing preventing him from doing so is the decision of the Seventh Circuit that the Government concedes is erroneous. This Court should grant review on the question presented to address that impediment; it should not let a concededly erroneous decision serve as a barrier to reaching subsequent legal arguments.

II. THERE IS AN ENTRENCHED SPLIT AMONG THE COURTS OF APPEALS ON THE QUESTION PRESENTED.

The Government admits that there is a 5–3 split among the courts of appeals on whether subsection 1252(a)(2)(B)(ii) bars a federal court from examining a "particularly serious crime" determination. Opp. 15–16 & n.2. But the Government attempts to downplay the scope of the circuit split by suggesting that the courts of appeals might converge on a common rule in the light of *Kucana*. Opp. 17. The Government's argument would be wrong in any case, but it is particularly misplaced here because the Government is asking this Court to ignore concededly erroneous decisions. Contrary to the Government's assertions, both the Seventh and Eleventh Circuits have repeatedly applied subsection 1252(a)(2)(B)(ii) to "particularly serious crime" determinations, even in the wake of *Kucana*. And the Government provides no persuasive reason to expect that the Eighth Circuit will change course, either.

In this very case, the Seventh Circuit was unmoved by arguments based on *Kucana*, as Mr. Estrada already noted in his petition but the Government failed to address. Pet. 27 n.4; Reply Br. for Pet'r at 1–2, *Estrada-Martinez v. Lynch*, No. 15-1139 (7th Cir. May 7, 2015) ("The Supreme Court, in *Kucana* . . ., held that [subsection] 1252(a)(2)(B)(ii) bars judicial review 'only when Congress itself set out the Attorney General's discretionary authority in the statute.'" (quoting *Kucana*, 558 U.S. at 234)). Nor is the decision below the only recent Seventh Circuit decision to bar jurisdiction over "particularly

serious crime" determinations. *See, e.g.*, *Teneng*, 602 F. App'x at 346. If the Seventh Circuit had any intention of altering its rule in the wake of *Kucana*, it would have at least suggested as much by now.

Similarly, the Government fails to show why the rules of the Eighth and Eleventh Circuits should be wished away. The Eleventh Circuit, in particular, has repeatedly and recently applied the rule that the Government concedes is erroneous. *Camelien*, 636 F. App'x at 501 (11th Cir. 2016); *Cadet*, 598 F. App'x at 747 (11th Cir. 2015). The Government's only response is that any of these courts might reverse themselves on *en banc* review. Of course, courts always *might* reverse themselves on *en banc* review, but here the Government's suggestion is pure speculation, rebutted by the repeated decisions of multiple circuits. Speculation that courts might change their rules is particularly inappropriate here, where the Government admits that these courts are *wrong*. It is one thing for the Government to contest a petition for certiorari because it believes the decision below is correct; it is something else entirely when the Government merely hopes that, someday, the circuit courts might change their minds.

III. THE QUESTION WHETHER COURTS HAVE JURISDICTION TO REVIEW "PARTICULARLY SERIOUS CRIME" DETERMINATIONS IS RECURRING AND IMPORTANT TO NUMEROUS IMMIGRANTS, INCLUDING MR. ESTRADA.

The Government appears to concede that the adjudication of "particularly serious crime" determinations is a critical issue for numerous immigrants. The Government nevertheless argues that the question presented is not important

because, in the Government's view, "many" immigrants found to have committed a "particularly serious crime" are guilty of aggravated felonies. Opp. 17. According to the Government, subsection 1252(a)(2)(C) will then strip federal courts of jurisdiction even if subsection 1252(a)(2)(B)(ii) does not. But the Government's attempt to downplay the significance of the question presented relies on faulty assumptions.

As an initial matter, the Government's argument depends on its specious assertion that subsection 1252(a)(2)(C) unquestionably strips federal courts of jurisdiction over "particularly serious crime" determinations. But this bootstrapping is unavailing. Yet again, the Government asks the Court to deny a worthy petition—on an issue that the Government admits the Seventh Circuit got wrong—on the basis of a separate legal issue that has yet to be decided in the majority of federal circuit courts.

Moreover, the Government is simply wrong when it implies that the vast majority of cases involving "particularly serious crime" determinations also involve aggravated felonies. The cases cited in Mr. Estrada's petition belie this assumption. The petition cites numerous cases where the BIA concluded a crime was "particularly serious" even if not an aggravated felony, ranging from reckless endangerment to prostitution to mistreating a poodle. *Nethagani v. Mukasey*, 532 F.3d 150, 152 (2d Cir. 2008) (reckless endangerment); *Yuan v. U.S. Att'y Gen.*, 487 F. App'x 511, 514 (11th Cir. 2012)

(prostitution); *Madrid v. Holder*, 541 F. App'x 789, 791 (9th Cir. 2013) (harming a poodle).[2] And one need not look hard to find more such cases, even beyond those already cited in the petition. *See, e.g.*, *Arbid v. Holder*, 700 F.3d 379, 384 (9th Cir. 2012); *Popal v. Gonzales*, 416 F.3d 249, 251 (3d Cir. 2005). That such common crimes repeatedly implicate the BIA's "particularly serious crime" determinations is all the more reason to grant Mr. Estrada's petition.

Finally, the Government halfheartedly—and misguidedly—suggests that, because the Seventh Circuit partially remanded to the BIA to reevaluate Mr. Estrada's deferral of removal claim, the "practical" importance of this case is diminished. Opp. 18. As already explained in the petition, deferral of removal is a wholly distinct and inferior form of relief to withholding. Pet. 26–29. Even assuming the BIA *grants* deferral of removal on remand—which is not a certainty, since deferral has narrower parameters than withholding—Mr. Estrada would be subject to a constant fear of his relief being cancelled. *See* 8 C.F.R. § 1208.17(d)(1) (providing for cancellation of remedy at "*any time* while deferral of removal is in effect" (emphasis added)). Deferral of removal is, quite simply, no substitute for withholding of removal, the relief that

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[2] *See also, e.g.*, *Delgado v. Holder*, 648 F.3d 1095, 1114 n.13 (9th Cir. 2011); *Yousefi v. U.S. I.N.S.*, 260 F.3d 318, 329 (4th Cir. 2001); *Jara-Arellano v. Holder*, 567 F. App'x 544, 545 (9th Cir. 2014); *Wolfgramm v. Mukasey*, 277 F. App'x 676, 677 (9th Cir. 2008).

was denied to Mr. Estrada on a theory that the Government concedes was erroneous.

And the Government has not even attempted to argue that the BIA's underlying decision was defensible. Nowhere does the Government contest the findings of the Immigration Judge that Mr. Estrada was unaware of the victim's age; his sentence was lenient, including no jail time; his testimony that he believed her to be an adult was reasonable and credible; the relationship was ongoing and consensual; and the victim was on the higher end of the age range. Nor does the Government contest the Seventh Circuit's view that the BIA's logic was "not compelling." Pet. App. 12a n.3. Given the strong likelihood that the BIA erred, it is hard to imagine a decision with more "practical" importance than the Seventh Circuit's refusal to review that error.

CONCLUSION

The Court should grant the petition for a writ of certiorari, or, in the alternative, grant, vacate, and remand to the Seventh Circuit for further proceedings in the light of the Government's confession of error.

Respectfully submitted,

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