No. 15-1266

In the
Supreme Court of the United States

LUIS GUTIERREZ-ROSTRAN,
Petitioner,

v.

LORETTA E. LYNCH,
Attorney General of the United States,
Respondent.

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

REPLY BRIEF IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI

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I. The Attorney General concedes there is an important circuit split

In her Brief in Opposition, the Attorney General concedes that the circuit courts are divided on whether they have jurisdiction to review the Agency's refusal to hear a belated asylum claim. Brief in Opp. at 15-16. She disputes the number of circuits on each side[1] but not the existence of the split, and she does not question the statement by the Seventh Circuit that:

> We are aware that some circuits have concluded that these issues are reviewable mixed questions of law and fact, [b]ut others agree with us. We are not inclined to change our approach and thus conclude that we have no jurisdiction to address Yang's arguments based on changed or extraordinary circumstances.

Aimin Yang v. Holder, 760 F.3d 660, 665 (7th Cir. 2014) (internal citations omitted).

The Attorney General also effectively concedes that this is an important recurring issue that needs to be addressed. She notes that there have been at least eight prior petitions for certiorari filed on this very issue, Brief in Opp. at 10, and does not dispute that an

[1]See Section III.C, *infra* at 9-10.

alien's eligibility to file a belated petition for asylum because of recently changed conditions in the alien's homeland is a critically important issue.

II. This case presents a good vehicle for resolving that split

Most of the Attorney General's brief does not actually address the reasons for granting certiorari. The first 15 pages read more like a brief on the merits, discussing the facts and background of the case and arguing that the Court should uphold the Seventh Circuit's decision that it lacked jurisdiction to hear the appeal. Not until the very end does she assert her one reason why she thinks certiorari should not be granted. She claims that this case is a poor vehicle for resolving the circuit split over whether circuit courts have jurisdiction to review the Agency's refusal to hear a belated asylum claim, because Mr. Gutierrez might in the future receive a lesser form of temporary relief called "withholding of removal." Brief in Opp. at 16-17. Her argument is without merit.

First, it is speculative. The Attorney General does not argue that the case is or will become moot. She does not assert that Mr. Gutierrez has in fact been granted withholding of removal, is imminently likely to be awarded such relief, or even has a plausible chance of getting it. She only says he may get such relief, but concedes that withholding has already been denied once. Brief in Opp. at 5-6.

Second, withholding of removal is more difficult to obtain than asylum. To establish a basis for asylum, Mr. Gutierrez would only need to prove "a well

founded fear" of being persecuted if he were returned to Nicaragua. 8 U.S.C. § 1158(b)(1)(B). To establish eligibility for withholding he will need to meet a significantly higher burden of proof -- establishing a clear probability that it is more likely than not that he will be persecuted. *See INS v. Cardoza-Fonseca,* 480 U.S. 421, 430 (1987). The Attorney General concedes this point. Brief in Opp. at 2-4. Therefore, as was said in the Petition, "the time bar on asylum applications can result in the United States deporting a person to a country where they can be persecuted or killed," Pet. at 8-9, because the applicant may have enough evidence to establish his well founded fear, but not enough to meet the significantly higher burden of proving that persecution is more likely then not.

Third, withholding of removal is an inadequate alternative to a grant of asylum, so even if Mr. Gutierrez eventually were granted withholding of removal, it would not moot his claim that he was wrongfully denied consideration of his petition for asylum. The Seventh Circuit has noted several important differences between the two forms of relief:

> One difference between asylum and withholding of removal is that holders of asylum are entitled to remain in the United States until conditions in their home countries improve or the risk of persecution otherwise declines. Withholding of removal, by contrast, confers not a privilege to remain in the United States, but only an immunity against removal to a particular country. 8 C.F.R § 1208.16(f). An alien still may be removed to any other nation on the list in 8 U.S.C. § 1231(b) that is

> willing to accept him. Another difference is that persons who have been granted asylum may leave the United States and return, while withholding of removal does not permit reentry into this country. An alien subject to a withholding of removal order who leaves the United States will not be allowed back. 8 C.F.R. § 1241.7. Yet another difference is that aliens in asylum status eventually may become permanent residents. 8 C.F.R. § 209.2.[2] Withholding of removal confers no such opportunity. There are more differences, but these three are enough to show that asylum status is more valuable to an alien than withholding of removal.

Viracacha v. Mukasey 518 F3d 511, 514 (7th Cir. 2007).

Fourth, the clarity of the record and the lack of ambiguity about the basis for the Seventh Circuit's decision to refuse jurisdiction on the asylum claim while at the same time remanding on the withholding claim, make this an ideal vehicle for resolving the jurisdictional issue. The Seventh Circuit was very thorough in its review of the withholding claim and articulated well that there were serious errors at the Agency level. When the Seventh Circuit reviewed the findings made by the IJ and the BIA in the context of the withholding claim, they found that the Agency erred as a matter of law. The Seventh Circuit stated

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[2] From permanent residence they may then process to citizenship. 8 U.S.C. § 1427.

"Admissible, pertinent, credible evidence can't just be ignored, as the immigration court and the Board did in this case; reasonable grounds must exist, and be articulated, to justify rejection of such evidence," citing to *Lian v. Aschcroft,* 379 F.3d 457, 461-62 (7th Cir. 2004). Pet. App. 6a. The Seventh Circuit would therefore have had to remand on the asylum claim also, if it had assumed jurisdiction, because the evidence presented on the withholding claim is the same as the evidence supporting the belated asylum application. That makes this case a good one for review because a favorable ruling by this Court on the merits would have a significant impact on the petitioner.

III. The other assertions in the Attorney General's brief are either irrelevant or misstatements

The Attorney General mounts several divergent attacks on Mr. Gutierrez's petition. She rephrases the question presented, she notes errors in a quotation, and she disagrees with the phrasing or interpretation of other circuit cases. None of these attacks relate to the actual basis of his petition for certiorari, that there is a split among the circuits on an important issue of federal law.

A. The Attorney General claims "[t]he only question presented in this petition, therefore, is whether the BIA's resolution of the factual dispute here is subject to judicial review." Brief in Opp. at 9. She follows this sentence with a footnote that contradicts her proposition. The footnote concedes that "Petitioner also asserts that the BIA erred by failing

to consider the merits of his asylum claim." Brief in Opp. at 9, n2. She then goes on to concede the only relevant fact in Petitioner's question presented, which was that the Agency did not reach the merits of the asylum claim. The Agency's position is that despite the plain wording of 8 U.S.C. §1158 (a)(2)(D) it did not need to reach the merits of a claim that is untimely. *Id.*

The Petition clearly sets out that the question presented is a legal one -- whether a Court of Appeals has jurisdiction to hear a claim that the Board of Immigration Appeals erred in its interpretation of the law concerning the filing deadlines for asylum in 8 U.S.C. §1158 (a)(2)(D). The Attorney General cites to the Seventh Circuit's decision in this case to argue that Petitioner "argued only that violence toward persons such as him has increased in Nicaragua in recent years, thus justifying his belated application," but then concedes in her footnote that the statement is inaccurate. Brief in Opp. at 9 n2. In the footnote, the Attorney General concedes that Petitioner also asserts that the BIA erred by failing to consider the merits of his asylum claim. *Id.* Petitioner has consistently argued to the Seventh Circuit and to this Court that the Seventh Circuit did have jurisdiction because the "question of law" was whether the Agency erred in its interpretation of 8 U.S.C. §1158 (a)(2)(D), in failing to first make a finding as to whether Mr. Gutierrez had established the elements of an asylum claim and then in failing to address whether the changed country conditions materially affected Mr. Gutierrez's asylum claim. There has never been a factual issue with Petitioner's question of law

pursuant to the Real ID Act because the government has always taken the position that the Agency did not need to reach the merits of a claim that is untimely. Brief in Opp. at 9, n.2.

While conceding and then summarily dismissing Mr. Gutierrez's "question of law" in a footnote, the Attorney General then created her own question solely concerning the facts of Mr. Gutierrez's claim -- whether he presented enough evidence to support his reasonable fear of persecution -- and then argued these facts are in dispute. Brief in Opp. at 9. But even on her issue, the facts are not in dispute. The Seventh Circuit stated that in "this case, the only evidence [wa]s presented by the alien—and the immigration judge appears to have deemed that evidence credible." *Gutierrez-Rostran v. Lynch*, 810 F.3d at 500; App. 7a. Indeed, the government presented no witnesses at all. 810 F.3d at 499-500; App. 6a-7a. Therefore, even if the question were as the Attorney General characterizes, the facts necessary to resolve this case would still be undisputed. The focus would then shift back to the split among the circuits as to whether they have jurisdiction under the REAL ID Act to review the Agency's denial. In sum, the question presented by the Attorney General is whether Mr. Gutierrez's evidence, under the minimal burden of proof needed in asylum cases, met the legal standard for filing a belated petition. This is the exact mixed question of law and fact that some circuits say is reviewable and some say is not. This is the same question that Attorney General conceded in her footnote that the Agency never considered.

The attempt by the Attorney General to rephrase the issue more favorably to the government is common advocacy, but not relevant to the fact that there is a circuit split on the very question she tries to rephrase, namely whether the proper interpretation of changed circumstances is merely a factual issue as the Seventh Circuit held, or, when the facts are undisputed, a reviewable question of of law, under the REAL ID Act. Her argument goes to the merits of whether Mr. Gutierrez's position will prevail, not to whether it is an important issue that the Supreme Court should or should not consider.

B. The Attorney General correctly notes that there is an error in the Petition at 4-5. The quote erroneously stated that the Seventh Circuit referred to issues of changed circumstances as "mixed questions of law and fact" in *Gutierrez-Rostran v. Lynch*, 810 F.3d 497 (7th Cir. 2016). Brief in Opp. at 8-9. The sentence she refers to was intended to convey in concise form that the Seventh Circuit was adhering to its previous decision in *Aimin Yang v. Holder*, 760 F.3d 660, 665 (7th Cir. 2014) that changed circumstances were questions of fact and not, as some other circuits have said, mixed questions of law and fact. It was the Seventh Circuit's position in this case, that issues of changed or extraordinary circumstances are always questions of fact, that led to the circuit court refusing to review Mr. Gutierrez's claim that the Agency had made an error of statutory interpretation when it decided it did not have to consider the merits of his asylum claim before dismissing it as time-barred

C. The Attorney General disputes how many opinions and from which circuits fall on either side of the split. She asserts that the split is 10 to 1, with only the Ninth Circuit disagreeing with the Seventh Circuit. She is wrong for three reasons. First she forgets that despite her attempt to summarily dismiss Mr. Gutierrez's arguments, Mr. Gutierrez did in fact present an issue of statutory interpretation which the Seventh Circuit found they did not have jurisdiction to review because "issues of changed or extraordinary circumstances are questions of fact that lie outside the realm of §1252(a)(2)(D). Issues of statutory interpretation are generally considered questions of law. Second, she argues that the Sixth Circuit falls on the "nonreviewable" side by citing older cases such as *Almuhtaseb v. Gonzales,* 453 F.3d 743 (6th Cir. 2006) rather than more recent opinions such as *Mandebvu v. Holder,* 755 F.3d 417, 425-26 (6th Cir. 2014). *Mandebvu* held that courts have jurisdiction to review applications that were denied for untimeliness if the appeal does not require the court to revisit the evidence submitted in support of their claim but rather asks if the IJ correctly applied the facts to the legal standard of changed circumstances. Third, she ignores cases from other circuits that have found jurisdiction to review similar issues as questions of law under the REAL ID Act. See *Lumataw v. Holder,* 582 F.3d 78 (1st Cir. 2009) (accepting jurisdiction and reviewing claims under 8 U.S.C. 1158 (a)(2)(D)); *Jean-Pierre v. United States AG*, 500 F.3d 1315, 1322 (11th Cir. 2007) (agreeing with the Ninth Circuit that "we have jurisdiction [under the REAL ID Act] to review Jean-Pierre's claim in so far as he challenges the application of an undisputed fact pattern to a legal

standard"); *Diallo v. Gonzales*, 447 F.3d 1274, 1282 (2006) ("we agree with the Second and Ninth circuits that … the REAL ID Act grants us jurisdiction to review a 'narrow category of issues regrading statutory construction'").

With that being said, the Attorney General's argument as to the size of the split is irrelevant to the issue of whether this Court should grant certiorari. Even if the split were 10 to 1, the circuits would still be divided. Arbitrariness would still exist as to which asylum applicants receive the protection of judicial review. Had Mr. Gutierrez filed his asylum claim in California, the Ninth Circuit would have reviewed the Agency's failure to consider the merits of his asylum claim as an issue of law, but because he lived in Indiana, the Seventh Circuit refused to review it, calling it an issue of fact.

IV. Conclusion

This is a significant issue of federal law upon which the circuits are divided, are aware of the division, and are refusing to resolve it. The Petition for a Writ of Certiorari should be granted.

Respectfully submitted,

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