No. 18-827

In the Supreme Court of the United States

AMIR FRANCIS SHABO,

Petitioner,

v.

WILLIAM P. BARR, Attorney General,

Respondent.

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

REPLY BRIEF FOR PETITIONER

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REPLY BRIEF FOR PETITIONER

The government acknowledges that "there is a conflict among the courts of appeals as to whether jurisdiction exists to review factual challenges * * * to the denial of a request for deferral of removal under the CAT." BIO 8. Moreover, the government agrees that "[t]his is a recurring question of substantial importance that will warrant this Court's review in an appropriate case." *Ibid.*

The government opposes certiorari by contending that, even if the court of appeals had jurisdiction, the government might still prevail on the factual question regarding whether petitioner has demonstrated that his torture in Iraq would be at the consent or acquiescence of a public official. See BIO 14-16. This contention is doubly wrong. First, because it is an issue subsequent to the question presented, it is not a basis to deny review. Second, petitioner likely would prevail on his underlying claim. Indeed, another, identically-situated immigrant recently won on this claim before the BIA.

The government also observes that, in pressing his claim in the court of appeals, petitioner attempted to frame his challenge as a legal one. See BIO 16-18. Of course petitioner took that approach: the court of appeals had previously held, in a published decision, that it lacked jurisdiction to review factual challenges. The court of appeals, however, recognized that the substance of petitioner's argument was a challenge to the BIA's factual findings, and thus it dismissed the petition for review for lack of jurisdiction. See Pet. App. 7a. Because the question present-

ed was the sole basis of decision below, it is preserved for review.

The government's opposition is conspicuous insofar as it focuses most substantially on the underlying merits of the interpretative question. See BIO 8-14. The government's arguments on this score are no reason to deny certiorari. Whatever the correct answer, the Court should bring uniformity to an important question of statutory construction.

In any event, petitioner is very likely to prevail as to the question presented. This Court presumes that Congress intends for judicial review of agency action. That presumption should apply with special force here, where the administrative agency is tasked with making literal life-and-death decisions. And the government's arguments on the merits disregard two substantial points we raised in the petition. The government repeatedly asserts that appellate courts have jurisdiction solely to resolve "final orders of removal." But FARRA § 2242(d) supplies appellate courts jurisdiction over CAT deferral decisions. Additionally, the government's construction would render 8 U.S.C. § 1252(a)(4) superfluous. The government fails to address either crucial point.

The stakes of this case are substantial. Petitioner has resided in the United States for 34 years. He seeks relief from deportation to Iraq, where he faces a likelihood of torture or death because he is a Chaldean Christian. Indeed, petitioner's father died in the custody of the Iraqi government. Pet. 8. This Court should resolve whether the court of appeals has jurisdiction to review petitioner's fact-based challenge to the single-judge BIA decision. Further review is warranted.

A. This case is an appropriate vehicle to resolve the question presented.

The government argues that "petitioner fails to demonstrate that the result in this case would be any different if the court of appeals had reviewed a fact-based challenge to the agency's decision." BIO 14. That argument is both irrelevant and wrong.

1. The government's argument is irrelevant because it addresses an issue subsequent to the question presented here. The Court ordinarily does not "decide in the first instance issues not decided below." *Zivotofsky* v. *Clinton*, 566 U.S. 189, 201 (2012). The Court routinely grants certiorari to resolve important questions that controlled the lower court's decision, notwithstanding a respondent's assertion that, on remand, it may prevail for a different reason. See, *e.g.*, *Dep't of Transp.* v. *Ass'n of Am. R.R.s*, 135 S. Ct. 1225, 1234 (2015) (leaving for remand alternative grounds); *Fitzgerald* v. *Barnstable Sch. Comm.*, 555 U.S. 246, 260 (2009) (same).

2. In any event, the government's contention is wrong. The government asserts that petitioner has not shown a basis on which a reasonable factfinder could conclude that the Iraqi government has consented to or acquiesced in the torture of Chaldean Christians. BIO 14-15. That is deeply mistaken.

To begin with, the petition identified several pieces of evidence in the administrative record confirming this point—and the government disregards all of it.

- **2017 U.S. Commission on International Religious Freedom Annual Report**, which notes that the Iraqi Christian community's

doubt of "the Iraqi government's willingness and capability to protect them from ISIS" because "religious freedom and human rights are [not] priorities for the Iraqi government" and that the Iraqi government has not been able to control the Popular Mobilization Forces militia, which is "under the authority of the Ministry of the Interior," from committing human rights violations. Pet. 12. See also A.R. 67-73.

- **A 2017 letter from 86 members of the Michigan House of Representatives**, who wrote that Iraqi Christians are "the subject of genocide in Iraq," where the government has not proved "willing and able to protect religious minorities." Pet. 13. See also A.R. 81.
- **A 2017 declaration from Minority Rights Group International Executive Director Mark Lattimer**, who recognized that the PMF militia has "been recognized officially by the Iraqi Government but face[s] numerous credible allegations of enforced disappearances, torture and killing of civilians"—and that "[t]he climate of impunity in Iraq means that perpetrators of violence, whether acting as individuals or in association with armed groups, are rarely held accountable." Pet. 14. See also A.R. 94-97.
- **A 2017 *amicus* brief from the Chaldean Community Foundation**, which observed that an Iraqi government official "declared that Iraqi Christians were infidels and called

for jihad against them." Pet. 14-15. See also A.R. 99-152.

- **A 2017 declaration from International Refugee Assistance Project Director Rebecca Heller**, who stated that "militias that the Iraqi government has re-armed * * * continue to commit additional human rights abuses, particularly against religious minorities * * * and U.S.-affiliated Iraqis." Pet. 15-16. See also A.R. 154-168.

There is far more evidence in the record supporting petitioner's factual argument. *E.g.*, A.R. 70 (noting "the inability of [the Iraqi] government to control the PMF" militia, which is under the authority of the Iraqi government, "from committing [] human rights violations"); A.R. 158 ("The State Department's 2016 Human Rights Report stated that there are documented reports of the PMF 'killing, torturing, kidnapping, and extorting civilians'" and that "'impunity' is the norm.").

Against all of this, the government points solely to the *2015 Religious Freedom Report* from the State Department. BIO 15. The government's complete reliance on this Report is flawed.

First, the *2015 Religious Freedom Report* predates all of the evidence, from 2017, we just analyzed. What is relevant is the situation in Iraq *now*, as circumstances may change.

Second, the Report does not respond to *any* of the specific contentions we just recited. In particular, the Report does not contradict the evidence demonstrating that government-backed militias are prosecuting Chaldean Christians in Iraq. See A.R. 67-73, 154-

168. To the contrary, the Report indicates that "the Council of Ministers announced the PMF was an official body reporting to the prime minister." A.R. 24. And this PMF militia was directly linked to killing and torturing on religious grounds. A.R. 22. The Reports thus directly confirms petitioner's leading argument—that militia, either sponsored by or acquiesced to by the Iraqi government, commit the persecutions at issue.

Third, the Report is filled with several additional statements supporting petitioner's argument:

- It noted that "[i]nternational human rights groups said the government failed to investigate and prosecute ethno-sectarian crimes, including those carried out by armed groups in areas liberated from [ISIL]." A.R. 15.
- It observed that "Christian * * * leaders continued to report harassment and abuses" by Kurdistani government officials. *Ibid*.
- It reported that "minority groups, whatever their religious adherence, said they experienced violence and harassment" and that the government had "limited capacity" to register those internally displaced due to sectarian violence. A.R. 16-17.
- The Report stated that "[o]fficial investigations of abuses by government forces, armed groups, and terrorist organizations continued to be infrequent, and the outcomes of investigations which did occur continued to be unpublished, unknown, or incomplete." A.R. 24.

- It confirmed that attacks against Christians "appeared to be part of a systematic campaign to suppress, permanently expel, or eradicate" Christians in their historic homelands. A.R. 32.
- It also detailed that "armed groups * * * prevented local police from entering the city[] and then bombed" civilian homes—and that the Iraqi government "did not comment on this incident." A.R. 34.

We identified this material in the petition. Pet. 17 n.1. But, while relying solely on the Report, the government disregards all of the evidence that cuts against its preferred conclusion. Resolving these factual issues is precisely the task for the court of appeals on remand.

The likelihood of petitioner prevailing is confirmed by the BIA's grant of relief to a similarly-situated Iraqi Chaldean Christian. As we said earlier (Pet. 29-30), the BIA found that materially the same record as that present here "attests to recent changes in Iraq, suggesting that the respondent and other Chaldean Christians may now be targeted on their return by paramilitary groups operating *under the nominal or actual control of the Iraqi government*." Order at 1, *In re Kiriakoza*, No. A030 869 417 (BIA May 31, 2018) (emphasis added). Thus, while the government queries whether petitioner can show that his likely torture in Iraq would be at the consent or acquiescence of a government official, the BIA itself has already made that factual finding. It is the hallmark of arbitrary decision-making that identically situated individuals are treated differently by the administrative agency.

The government tries to distinguish *Kiriakoza* on the basis that the BIA did not discuss the *2015 Religious Freedom Report*. BIO 16 n.5. But, for reasons we have explained, the Report is not nearly as probative as the government maintains. In particular, the Report does not negate the specific findings about militias operating at the nominal or actual control of the Iraqi government—the specific conclusion on which *Kiriakoza* rested. And, in all events, the Report certainly existed at the time of the BIA's 2018 decision in *Kiriakoza*, yet the BIA granted relief all the same.

Petitioner's claim is substantial. It is certainly weighty enough to warrant consideration on remand if, as we maintain, the court of appeals erred in concluding that it lacked jurisdiction to review it.

B. The question presented is properly preserved for this Court's review.

The government suggests that petitioner's failure to request that the court below overturn its earlier decision in *Ventura-Reyes* v. *Lynch*, 797 F.3d 348 (6th Cir. 2015), is an obstacle to review. See BIO 16-18. It is not.

The Court's "traditional rule" "precludes a grant of certiorari only when the question presented was not pressed or passed upon below." *United States* v. *Williams*, 504 U.S. 36, 41 (1992) (internal quotations omitted). "[T]his rule operates," the Court observed, "in the disjunctive, permitting review of an issue not pressed so long as it has been passed upon." *Ibid.* This rule is longstanding and oft applied. See, *e.g.*, *Citizens United* v. *FEC*, 558 U.S. 310, 330 (2010) ("Our practice 'permit[s] review of an issue not

pressed [below] so long as it has been passed upon.'"); *Lebron* v. *Nat'l R.R. Passenger Corp.*, 513 U.S. 374, 379 (1995) (same).

The lower court certainly "passed upon" the question presented. The court held that it "lack[ed] jurisdiction" to review the Board's "case-dispositive determination," since it was a question of fact. Pet. App. 8a. That lack of jurisdiction, the court observed, was fatal to the "entire petition." *Ibid.* That is, the court of appeals "lack[ed] jurisdiction to review the factual question of whether Shabo established a prima facie case for relief under the Convention Against Torture." *Ibid*. For that reason, the court of appeals dismissed the "petition as unreviewable." *Ibid*.

To be sure, in recognition that circuit precedent barred him from raising factual challenges to the BIA decision, petitioner attempted to frame his challenge as a legal one. See BIO 16-17. But a litigant's effort to argue around circuit precedent—rather than expressly calling for its overturning—is appropriate. This strategy "does not suggest a waiver; it merely reflects counsel's sound assessment that the argument would be futile." *MedImmune, Inc.* v. *Genentech, Inc.*, 549 U.S. 118, 125 (2007). When, as here, a court of appeals rejects a party's effort to sidestep its precedent, the rule on which the lower court rested its decision is ripe for this Court's review.

The government contends that, because petitioner did not press this argument below, "the court of appeals did not discuss the relevant decisions from the Ninth or Seventh Circuits." BIO 17. But the Sixth Circuit already did so in *Ventura-Reyes*, 797 F.3d at 357-58. There, the court of appeals expressly considered—and disagreed with—the "the Ninth Cir-

cuit's 'on-the-merits' exception" (*ibid.*) as well as the Seventh Circuit's approach, which understands deferral of removal to be similar to "an injunction" (*id.* at 358).

The government appears to criticize petitioners for not raising this precise question in a petition for rehearing *en banc*. BIO 17. That is immaterial; a rehearing petition is not a prerequisite to this Court's review at all. And given the breadth of the split, only this Court can bring uniformity to an important question of immigration law.

C. The government's arguments on the merits are premature and unpersuasive.

It is telling that the government leads with the merits (BIO 8-14)—not with the factors most relevant to the Court's consideration of whether to grant review.

The government oft recognizes the elementary point that this Court's review is needed to resolve important circuit splits on questions of statutory interpretation—even when the government maintains that the court of appeals properly decided the issue. In *Lamar, Archer & Cofrin, LLP* v. *Appling*, No. 16-1215, the government urged the Court to grant certiorari, notwithstanding the government's contention that the court of appeals' decision was correct. See U.S. Cert. *Amicus* Br. 8. While the lower court's decision was "correct[]," the government contended that review was "warranted" in light of the "circuit conflict" over the "important and recurring" question of statutory interpretation. *Ibid*. The same principle applies here: certiorari is warranted regardless whether the decision below is correct.

In any event, petitioner is very likely to prevail on the question presented.

First, the government does not address the "strong presumption that Congress intends judicial review of administrative action." *Bowen* v. *Mich. Acad. of Family Physicians*, 476 U.S. 667, 670 (1986). See also *Mach Mining, LLC* v. *EEOC*, 135 S. Ct. 1645, 1651 (2015) ("[T]his Court applies a 'strong presumption' favoring judicial review of administrative action."). The "Court assumes that 'Congress legislates with knowledge of'" this presumption, and "[i]t therefore takes 'clear and convincing evidence' to dislodge the presumption." *Kucana* v. *Holder*, 558 U.S. 233, 252 (2010) (quoting *McNary* v. *Haitian Refugee Ctr., Inc.*, 498 U.S. 479, 496 (1991), and *Reno* v. *Catholic Soc. Servs., Inc.*, 509 U.S. 43, 63-64 (1993)).

Second, the administrative decision on the CAT deferral (or withholding) claim is separate from the underlying order of removal—and thus it is outside the scope of Section 1252(a)(C)(2). See *Wanjiru* v. *Holder*, 705 F.3d 258, 264 (2013). The government's sole response is that the deferral claim must be the "final order[] of removal" because of the scope of appellate review supplied by 8 U.S.C. § 1101(a)(47). BIO 12.[1]

That is wrong for reasons we explained (Pet. 25), and to which the government does not respond. Section 2242(d) of FARRA supplies a separate basis of

[1] The relevant question is not whether the order on CAT deferral is "final." It is whether the deferral order is itself the "final order of removal" to which Section 1252(a)(2)(C) attaches. It is not. Rather, it is related to that order.

jurisdiction apart from Section 1101(a)(47). FARRA provides that a "claim[] raised under the [CAT] or [FARRA]" is reviewable "as part of the review of a final order of removal." FARRA § 2242(d) (codified as note to 8 U.S.C. § 1231). This supplies jurisdiction along *with* the "final order of removal"—and not as the "final order of removal" itself.

Third, the distinction between Sections 1252(a)(4) and 1252(a)(5) further confirms our construction. See Pet. 26. Section 1252(a)(4) provides for appellate review for "any cause or claim under the [CAT]." 8 U.S.C. § 1252(a)(4). This is different from "an order of removal," which Congress addressed separately in 8 U.S.C. § 1252(a)(5).

The government's response repeats its last argument—that "Section 1252 confers jurisdiction on the courts of appeals solely to review a 'final order of removal.'" BIO 13. But, once again, the government disregards FARRA § 2242(d). As we just explained, that provision demonstrates that review of the CAT deferral claim is *part of* review of the order of removal—but it is not the order of removal itself.

We explained in the petition why the government's argument would render 8 U.S.C. § 1252(a)(4) superfluous. See Pet. 26. As the government sees it, this provision does nothing at all, because 8 U.S.C. § 1252(a)(5) would lead to the same result. The Court normally does not endorse a construction that renders an entire statutory provision meaningless. The government has chosen not to respond to our argument.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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