No. _____

In the Supreme Court of the United States

AMIR FRANCIS SHABO,

Petitioner,

v.

MATTHEW G. WHITAKER, Acting Attorney General,

Respondent.

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

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Because of the United States' inviolable obligation not to deport individuals to countries in which they are likely to be subject to torture, individuals who are statutorily ineligible for asylum may request withholding (or deferral) of removal. Such relief is, as courts repeatedly note, a fundamental bulwark to ensure that the government's decision to deport an individual does not result in torture or death.

The courts of appeals have deeply and intractably divided as to whether 8 U.S.C. § 1252(a)(2)(C) divests them of jurisdiction to review factual findings underlying the administrative agency's decision to deny a request for withholding (or deferral) of removal relief. The United States has expressly acknowledged the conflict among the circuits, and it has previously acquiesced to certiorari on this question. This case, unlike those before it, cleanly presents the question for review.

The question presented is:

Whether, notwithstanding Section 1252(a)(2)(C), the courts of appeals possess jurisdiction to review factual findings underlying denials of withholding (and deferral) of removal relief.

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PETITION FOR A WRIT OF CERTIORARI

Amir Francis Shabo respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Sixth Circuit in this case.

OPINIONS BELOW

The court of appeals' opinion (App., *infra*, 1a-8a) is published at 892 F.3d 237. The decisions and orders of the Board of Immigration Appeals (App., *infra*, 9a-23a) and the decision and order of the immigration judge (A.R. 201-202) are unreported.

JURISDICTION

The judgment of the court of appeals was entered on June 11, 2018. The order denying rehearing en banc was entered on July 31, 2018. Justice Kagan granted an application extending the time for the filing of this petition until December 28, 2018. This Court's jurisdiction is invoked under 28 U.S.C. § 1254(1).

STATUTORY, TREATY, AND REGULATORY PROVISIONS INVOLVED

8 U.S.C. § 1252(a)(2)(C) states:

> 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.

Article 3 of the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (CAT), Dec. 10, 1984, S. Treaty Doc. No. 100-20 (1988), 1465 U.N.T.S. 85, sets forth:

> No State Party shall expel, return ("refouler") or extradite a person to another State where there are substantial grounds for believing that he would be in danger of being subjected to torture.

The Foreign Affairs Reform and Restructuring Act of 1998 (FARRA), Pub. L. No. 105-277, div. G, § 2242(a), 112 Stat. 2681, 2681-822, establishes:

> It shall be the policy of the United States not to expel, extradite, or otherwise effect the involuntary return of any person to a country in which there are substantial grounds for believing the person would be in danger of being subjected to torture, regardless of whether the person is physically present in the United States.

8 C.F.R. § 208.17(a) provides:

> An alien who: has been ordered removed; has been found under § 208.16(c)(3) to be entitled to protection under the Convention Against Torture; and is subject to the provisions for mandatory denial of withholding of removal under § 208.16(d)(2) or (d)(3), shall be grant-

ed deferral of removal to the country where he or she is more likely than not to be tortured.

STATEMENT

Pursuant to both federal and international law, the United States may not return individuals to countries where they are likely to be tortured. Those who are ineligible for asylum assert this right via a claim for withholding (or deferral) of removal. When the administrative agency—the Board of Immigration Appeals—resolves this sort of claim, the stakes are monumental. An erroneous denial of a withholding claim may result in the individual's death. See, *e.g.*, Maria Sacchetti & Carolyn Van Houten, *Death Is Waiting for Him*, Wash. Post (Dec. 6, 2018) (recounting the circumstances of Santos Chirino, who, after having been denied relief from removal, was murdered in Honduras).

The courts of appeals have deeply and intractably divided over a fundamental question—whether they possess jurisdiction to review factual findings underlying denials of withholding (or deferral) relief. Some courts hold that 8 U.S.C. § 1252(a)(2)(C) divests them of such jurisdiction to review the administrative agency's factual findings. Two circuits disagree.

The United States has repeatedly acknowledged this circuit conflict—and the need for its resolution. In 2015, the United States explained that this is "a recurring question of substantial importance on which there is a direct conflict among the courts of appeals." U.S. Br. at 9-10, *Ortiz-Franco* v. *Lynch*, No.

15-362, 2015 WL 7774500 (2015) (U.S. *Ortiz-Franco* Br.).

And in 2017, the United States confirmed that there is a "conflict among the courts of appeals as to whether jurisdiction exists to review factual challenges brought by a criminal alien to the denial of a request for deferral of removal under the CAT." U.S. Br. at 7-8, *Granados* v. *Sessions*, No. 16-1095, 2017 WL 1967440 (2017) (U.S. *Granados* Br.). Per the government, "[t]his is a recurring question of substantial importance that will warrant this Court's review in an appropriate case." *Id.* at 8.

This is an appropriate vehicle to review and resolve this question. The question presented here controlled the court of appeals' disposition of petitioner's request for judicial review. Believing it lacked jurisdiction, the court dismissed the petition. If, however, the lower court has jurisdiction, there is substantial reason to believe that petitioner would prevail. The agency's cursory decision failed to grapple with any of the substantial evidence petitioner presented. What is more, an identically-situated individual *did* prevail on his claim. Whether or not the court of appeals has jurisdiction to correct the administrative agency's errors thus makes a world of difference in this case.

The Court should grant review.

A. Statutory background.

1. The Convention Against Torture (CAT) provides that "[n]o State Party shall expel, return ('refouler') or extradite a person to another State where there are substantial grounds for believing that he would be in danger of being subjected to torture."

CAT art. 3, S. Treaty Doc. No. 100-20 (1988), 1465 U.N.T.S. 85.

Congress codified the CAT domestically in 1998 via the Foreign Affairs Reform and Restructuring Act of 1998, known as FARRA, which is codified as a note to 8 U.S.C. § 1231. See Pub. L. No. 105-277, div. G, § 2242, 112 Stat. 2681, 2681-822.

FARRA provides:

> It shall be the policy of the United States not to expel, extradite, or otherwise effect the involuntary return of *any* person to a country in which there are substantial grounds for believing the person would be in danger of being subjected to torture, regardless of whether the person is physically present in the United States.

FARRA § 2242(a) (emphasis added).

Typically, individuals convicted of certain criminal offenses are ineligible for immigration relief, including cancellation of removal and asylum. See, *e.g.*, 8 U.S.C. § 1229b(a) (a person convicted of an aggravated felony may not seek "[c]ancellation of removal"); *id.* § 1158(b)(2)(A)(ii) (foreclosing asylum for any individual who, "having been convicted by a final judgment of a particularly serious crime, constitutes a danger to the community").

But, pursuant to CAT obligations, FARRA expressly applies to "any" person. FARRA § 2242(a). This reflects a policy judgment to protect *all* people from the horrors of torture, regardless of whether they have a criminal history. See *Moncrieffe* v. *Holder*, 569 U.S. 184, 187 n.1 (2013) (pursuant to the

CAT, "the Attorney General has no discretion to deny relief to a noncitizen who establishes his eligibility"); *Edu* v. *Holder*, 624 F.3d 1137, 1145 (9th Cir. 2010) ("[I]n adopting [CAT] regulations, the agencies themselves recognized that even those who assisted in Nazi persecutions, or engaged in genocide, or pose a danger to our own security are not excluded from the protections of CAT.") (citing *Regulations Concerning the Convention Against Torture*, 64 Fed. Reg. 8478, 8478-8479 (Feb. 19, 1999)).

The Department of Justice promulgated regulations that established procedures for otherwise-removable noncitizens to raise a CAT claim. See 64 Fed. Reg. 8478. Under these regulations, an otherwise-removable noncitizen is entitled to CAT protection if he or she can prove "that it is more likely than not that he or she would be tortured if removed to the proposed country of removal." 8 C.F.R. § 1208.16 (c)(2)-(3). The regulations define "[t]orture" as "any act by which severe pain or suffering, whether physical or mental, is intentionally 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." *Id.* § 1208.18(a)(1).

A noncitizen meeting the burden of proof for CAT protection is entitled to mandatory relief from deportation—either in the form of "withholding of removal" or in the form of "deferral of removal." 8 C.F.R. § 1208.16(c)(4). Withholding of removal—which is unavailable to noncitizens who have committed "particularly serious crime[s]" (see *id.* § 1208.16(d)(2))—provides more comprehensive protections than deferral of removal. *Wanjiru* v. *Holder*, 705 F.3d 258, 263-264 (7th Cir. 2013) (citing *Fact Sheet: Asylum and*

Withholding of Removal Relief, Convention Against Torture Protections, U.S. Dep't of Justice, Exec. Office for Immigration Review (Jan. 15, 2009)). Individuals who are ineligible for withholding of removal are entitled to "deferral of removal." 8 C.F.R. § 1208.17(a).

2. Individuals may appeal the denial of CAT relief to the courts of appeals.

The Immigration and Nationality Act (INA) provides that a noncitizen may seek review of a "final order of removal" via a petition for review in the courts of appeals. 8 U.S.C. § 1252(a)(1). Generally, such a petition provides courts of appeals jurisdiction over both factual and legal issues. *Id.* § 1252(b)(4). FARRA authorizes review of CAT claims "as part of the review of a final order of removal." FARRA § 2242(d).

The INA contains certain jurisdictional bars. One of these bars, the "criminal bar," provides that "no court shall have jurisdiction to review any final order of removal against an alien who is removable by reason of having committed [a listed] criminal offense." 8 U.S.C. § 1252(a)(2)(C). Section 1252(a)(2)(D), however, restores jurisdiction over "constitutional claims [and] questions of law." *Id.* § 1252(a)(2)(D).

This case concerns whether Section 1252(a)(2)(C) applies to appellate review of the denial of a request for CAT withholding and deferral relief. If it does, then noncitizens with a qualifying conviction may not challenge factual determinations underlying the denial of a request for withholding or deferral of removal. If it does not apply to a request for withholding (or deferral) of removal, courts of appeals may

review the agency's factual findings pursuant to 8 U.S.C. § 1252(b)(4).

B. Factual background.

In 1981, petitioner left his home country of Iraq at age 13, after his family was forced out of their home and threatened with death. A.R. 45, 49. In 1984, the United Nations recognized petitioner as stateless. A.R. 187. That same year, petitioner was granted refugee status by the United States government; he entered the United States one year later and became a lawful permanent resident. A.R. 45, 187.

Petitioner—a Chaldean Christian (A.R. 45, 187, 227)—and his family visited Iraq in 1989. A.R. 49, 226. Iraqi government officials requested that petitioner and his brother enlist to fight for the Iraqi government. A.R. 226-227. When petitioner and his brother refused, the Iraqi government took petitioner's father's passport so that his father could not leave the country. *Ibid.* The Iraqi government detained petitioner's father, who died in their custody. A.R. 49.

In 1992, upon returning to the United States, petitioner was convicted of a drug offense and sentenced to five to 20 years' imprisonment. A.R. 234, 237. Petitioner was paroled after serving five years, having received favorable reports from his probation officer. A.R. 185, 187.

Because an immigration judge determined that petitioner's conviction rendered him statutorily ineligible for withholding of deportation, the judge ordered his removal to Iraq in 1997. A.R. 201-202, 204-

230. The Board of Immigration Appeals dismissed petitioner's appeal in 1998. App., *infra*, 12a-15a.

The Iraqi government, however, was not issuing travel papers at that time. App., *infra*, 2a. As a result, petitioner worked and resided in the United States for many years—along with his wife and two children, who are all United States citizens. *Ibid.*; A.R. 46-48.

Last year, the Iraqi government began accepting Iraqi-American deportees. A.R. 144-151. Contemporaneously, the United States removed Iraq from the list of nations subject to the President's travel ban. A.R. 132-142. After this policy change, U.S. Immigration and Customs Enforcement conducted a sweep in June 2017, arresting and detaining a "large number of Iraqis—primarily Chaldean Iraqis—for deportation." A.R. 106. See also A.R. 144.

Petitioner was one of the individuals detained. He submitted an emergency motion to reopen his case and defer his removal. A.R. 39-42. In so doing, he cited materially changed conditions in Iraq, appending ten exhibits illustrating those changed conditions. A.R. 39-168. The government replied in opposition, appending a single State Department report. A.R. 8-36. The Board of Immigration Appeals denied petitioner's motion (App., *infra*, 9a-11a); petitioner is now facing deportation to Iraq.

C. Proceedings below.

1. In 1997, prior to the adoption of FARRA, petitioner appeared for deportation hearings before an immigration judge (IJ). A.R. 204-230. Petitioner recounted to the IJ that the Iraqi government confiscated his father's passport when his family visited

Iraq in 1989, after petitioner and his brother refused to enlist to fight for the Iraqi government. A.R. 226-227. Petitioner also told the IJ that his father died shortly thereafter in Iraq, while in the custody of Iraqi officials. A.R. 49, 227. Moreover, petitioner expressed concern that he would face persecution and harm in Iraq as a Chaldean Christian. A.R. 227.

The IJ "underst[ood] it's a harsh country" but nonetheless "order[ed] [petitioner] deported to Iraq" "in the absence of any other country" willing to accept him. A.R. 228. The IJ suggested that "maybe this man"—referring to petitioner's then-counsel—"will be able to help you find a [different] country that will take you." A.R. 229. At the same time, the IJ expressed, "from my perspective, it's only proper that a native and citizen of [a] country be returned to that country." *Ibid.*

In a per curiam opinion, the Board of Immigration Appeals dismissed petitioner's appeal in 1998. App., *infra*, 12a-15a. The per curiam opinion held that petitioner was statutorily ineligible for any form of relief due to his drug conviction. *Ibid.*

Board Member Rosenberg concurred in part and dissented in part. App., *infra*, 16a-23a. She "believe[d] that [petitioner] has set forth a colorable claim that he will be tortured and possibly killed if he is forcibly returned to Iraq." App., *infra*, 16a. She "regard[ed] the majority's decision to dispose of [petitioner's] appeal * * * by merely including a footnote advising him that he 'would be eligible to file a claim'" with a different government entity as "improper and erroneous." App., *infra*, 18a. "The Board's refusal to address the merits" of petitioner's claim, she asserted, "inexplicably ignores our own authority

and our obligation * * * to ensure compliance with this nation's international treaty obligations and with internationally recognized human rights norms." *Ibid.*

Board Member Rosenberg concluded, "[w]hen, as here, a respondent raises a colorable claim to protection under a treaty to which the United States is a party *and* is obligated to act, *and* the Board has discretion and authority to act, dismissal of the respondent's claim by ordering him deported to Iraq, the country in which he claims he will be tortured, is inappropriate." App., *infra*, 23a. She noted that "the prohibition set forth in Article 3 of the Convention Against Torture is absolute." App., *infra*, 17a.

2. In 2017, when Iraq began accepting Iraqi-American deportees from the United States, petitioner filed an emergency motion to reopen his case based on changed conditions in Iraq. In support of that motion (A.R. 39-42), petitioner appended ten relevant exhibits amounting to approximately 120 pages of factual support (A.R. 43-168). A number of the exhibits, moreover, cited to many dozens of outside sources and reports containing additional information. *E.g.*, A.R. 154-167.

Petitioner's exhibits included:

- **Petitioner's Form I-589** (A.R. 45-56), which stated that petitioner's family was threatened with death when they lived in Iraq and that they were forced to leave their home. A.R. 49. Petitioner expressed his concern that Christians were facing persecution and religious genocide in Iraq (*ibid.*) and stated that it is more likely than not that any Christian returning to Iraq from the United

States will be tortured and potentially killed in Iraq. *Ibid.* Moreover, petitioner notified the government that his father had been detained by, and died in the custody of, the Iraqi government during the last time petitioner was in Iraq. *Ibid.*

- **The Board of Immigration Appeals' 1998 order** (App., *infra*, 12a-23a), which included Board Member Rosenberg's partial dissent, expressing that petitioner had "set forth a colorable claim that he will be tortured and possibly killed if he is forcibly returned to Iraq." App., *infra*, 16a.

- **The 2017 U.S. Commission on International Religious Freedom Annual Report** (A.R. 67-73), which highlighted that the Islamic State of Iraq and the Levant (ISIL) "ruthlessly target[s] anyone who [does] not espouse its extremist Islamist ideology, including members of the Christian" community. A.R. 67. The Commission noted the Iraqi Christian community's doubt of "the Iraqi government's willingness and capability to protect them from ISIS or to treat them equally and justly," in part because "religious freedom and human rights are [not] priorities for the Iraqi government." A.R. 68. The Iraqi government, the Commission continued, has been unable "to control [the Popular Mobilization Forces, or PMF, militia]"—a militia "under the authority of the Ministry of the Interior"—"from committing [numerous] human rights violations." A.R. 69-70. The Commission's report also noted that the PMF militia has, on numerous occasions, "escaped prosecution" by the government for these violations. A.R. 70.

- **The U.S. Department of State's 2017 Iraq Travel Warning** (A.R. 75-76), which cautions Americans against traveling to Iraq, citing the threats of "improvised explosive devices," "terrorist and insurgent groups," and "[a]nti-U.S. sectarian militias" that threaten individuals associated with the United States. A.R. 75.

- **A letter from six members of Congress to White House Chief of Staff John Kelly** (A.R. 78-79), which observes "the horrors perpetrated against the Catholic Chaldean population in Iraq." A.R. 78. "High-level officials from both parties agree that genocide is being committed against Christians in Iraq," the members of Congress observed, citing former Secretary of State John Kerry and Vice President Mike Pence as examples. *Ibid.*

- **A letter from 86 members of the Michigan House of Representatives** (A.R. 81-87), which expressed their "grave concern that Christians, specifically Christian Chaldeans, will be removed from the United States to face persecution and death * * * in Iraq." A.R. 81. "[T]he situation in Iraq," the members continued, "poses the most serious of dangers to the Chaldean people." *Ibid.* The members wrote that these Christians "are the subject of genocide in Iraq," where the government has not proved "willing and able to protect religious minorities." *Ibid.*

- **A declaration from Michigan lawyer Russell Abrutyn** (A.R. 89-92), which detailed the "overwhelming evidence of the brutal harm inflicted on Christians in Iraq by militias, terrorists, and others." A.R. 89. Abrutyn quoted a Sixth Circuit

opinion, which states that someone's "status as a Christian alone" entitles him to relief from deportation to Iraq, given that "there is a 'clear probability' that he would be subject to future persecution if returned to contemporary Iraq." A.R. 90 (quoting *Yousif* v. *Lynch*, 796 F.3d 622, 628 (6th Cir. 2015)).

- **A declaration from Minority Rights Group International Executive Director Mark Lattimer** (A.R. 94-97), which observed that "Iraqi Christians * * * were particularly singled out for attack." A.R. 95. Lattimer cited statistics showing that the Christian community in Iraq, estimated at 1.4 million prior to 2003, had dropped to 350 thousand as of 2014. *Ibid.* Lattimer agreed with the U.S. Commission on International Religious Freedom 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." A.R. 97. Moreover, Lattimer's declaration found 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." *Ibid.*

- **An amicus brief from the Chaldean Community Foundation** (A.R. 99-152), which describes "unlawful killings," "torture and other cruel punishments," "arbitrary arrest," and "wide-scale government corruption." A.R. 109. "Beset by corruption, the Iraqi government has remained powerless over increasing terrorist activity," the Foundation stated. A.R. 108. These violations, the Foundation noted, "have been perpetrated by

groups including ISIL[] [and] Iraqi government security and law enforcement personnel." A.R. 109. Indeed, the Foundation highlighted that one government official "declared that Iraqi Christians were infidels and called for jihad against them." A.R. 110. The Foundation submitted, "[i]f a government official incites the persecution of Christians *today*, it surely puts in doubt the willingness of the Iraqi government to provide religious minorities with reasonable security." *Ibid.* This is especially troubling, the Foundation asserted, because Chaldeans "are at particular and heightened risk of violence." A.R. 111. Chaldean Americans have been "captured and shot dead in cold blood" in an effort to "systematically and deliberately carry[] out a program of ethnic cleansing," the Foundation stated. A.R. 112. The Foundation concluded that "removing [Chaldean Christians] to Iraq, and into a cauldron of violence and terror, would be unconscionable, and for many, invite their deaths." A.R. 113.

- **A declaration from International Refugee Assistance Project Director Rebecca Heller** (A.R. 154-168), which noted that the "militias that the Iraqi government has re-armed * * * continue to commit additional human rights abuses, particularly against religious minorities * * * and U.S.-affiliated Iraqis." A.R. 154. Heller expressed the professional opinion that the "removal of any Iraqi from the United States to the country of Iraq, especially those with ties to the U.S. and/or religious minorities, would put the individual at high risk of persecution or torture." A.R. 155. Heller's declaration stated that "the central government

> in Baghdad no longer has control over significant parts of Iraq's territory." *Ibid.* Iraqi-government-allied organizations, Heller continued, "are trained by Iran, a US-designated state sponsor of terror, and essentially operate as proxies for the Iranian government." A.R. 157. That the "Iraqi government has allowed these militias" to operate, according to Heller, "has led to significant human rights violations and violations of International Humanitarian Law" and has contributed to "a systematic pattern of violations." A.R. 158. These same militias, Heller asserted, engage in "rampant human rights abuses and war crimes in conquered areas that they have recaptured from Iraq." A.R. 157. Heller further observed that ISIL "paint[s] the Arabic letter 'n' on Christian homes," targeting these individuals to convert, pay a *jizya* tax, or otherwise be "killed, raped, or enslaved." A.R. 161. The Heller declaration observed even greater risks for those "who have U.S. family or employment ties" and those who "ha[ve] been in the U.S. for a long period of time." A.R. 164, 166. Heller concluded that "[f]or Iraqi-Americans, there is no area of relocation that would be safe for them in Iraq." A.R. 167.

The government opposed petitioner's motion to reopen, arguing that "the rise of ISIS" "does not" "constitute[] a material change in country conditions." A.R. 11-12. The government further suggested that the Iraqi government would not turn a blind eye to petitioner's threatened harm, even if the rise of ISIL did constitute a material change. See *ibid.* In support of its opposition, the government cited a single State Department report. A.R. 13 (citing A.R. 15-

36). The government underscored the report's observations that the Iraqi government "did not generally interfere with religious observance," that the Chaldean Christian faith is "recognized by law" and officially protected by the Iraqi constitution, and that Iraqi security officers "increased protection to Christian churches" during Christian holidays. *Ibid.*[1] The government did not argue that there was any legal obstacle to reopening. See A.R. 9-13.

In a cursory order, the Board of Immigration Appeals denied the motion to reopen. App., *infra*, 9a-11a. In the main, it concluded that petitioner could not demonstrate that the changed-country-conditions exception applied, as petitioner did not "present[]

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[1] This report in fact contained substantial evidence *supporting* petitioner. It noted that "[i]nternational human rights groups said that 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. The report 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. What is more, the report 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.

sufficient evidence that the Iraqi authorities are unable or unwilling to protect him." App., *infra*, 10a. That was so, according to the Board, because "the Iraqi government * * * actively combat[s]" ISIL. *Ibid.* In the alternative, the Board asserted that the changed-country-conditions exception does not apply to applications under the Convention Against Torture. See App., *infra*, 9a-10a.[2]

3. The Sixth Circuit dismissed a subsequent petition for review for lack of jurisdiction. App., *infra*, 1a-8a.

The court of appeals explained that, "[t]o have his case reopened, [petitioner] first needed to show an exception to the time limit on filing motions to reopen—in this case, the changed-country-conditions exception—and then, second, he needed to establish a prima facie case for relief." App., *infra*, 4a. The court recognized that, because the "application of the changed-country-conditions exception is potentially a question of law," it would likely have jurisdiction to review petitioner's contention that the BIA misstated the governing law. App., *infra*, 5a.

Instead, the court focused solely on the second issue. For petitioner to prevail, the lower court observed, petitioner must "show[] a probability of future torture." App., *infra*, 6a. But the court held that, in light of past precedent, it is "bound to conclude

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[2] The Board asserted that "a motion to reopen to seek United Nations Convention Against Torture relief does not fall within an exception to the motion time limit." App., *infra*, 10a. As we will explain, this assertion is blatantly wrong. Indeed, the government did not defend this reasoning on appeal, and the court of appeals did not rest its decision on this assertion.

that [it] lack[s] jurisdiction to review whether [petitioner] established a prima facie case for relief under the Convention Against Torture." App., *infra*, 7a. In so holding, the court relied on its prior decisions in *Tran* v. *Gonzales*, 447 F.3d 937, 943 (6th Cir. 2006), and *Ventura-Reyes* v. *Lynch*, 797 F.3d 348, 356 (6th Cir. 2015). See App., *infra*, 3a-4a, 7a.

In sum, the court's "inability to review the BIA's determination regarding [petitioner's] eligibility for relief under the Convention Against Torture render[ed] the changed-country-conditions-exception issue moot." App., *infra*, 7a. The court therefore dismissed the petition for one reason only: its conclusion that it lacks "jurisdiction to review the factual question of whether [petitioner] established a prima facie case for relief under the Convention Against Torture." App., *infra*, 8a.

REASONS FOR GRANTING THE PETITION

In December 2015 and again in May 2017, the United States acknowledged to this Court that "there is a conflict among the courts of appeals as to whether jurisdiction exists to review factual challenges brought by a criminal alien to the denial of a request for deferral of removal under the CAT, notwithstanding 8 U.S.C. 1252(a)(2)(C)." U.S. *Granados* Br. at 7-8. The United States likewise recognized that "[t]his is a recurring question of substantial importance that will warrant this Court's review in an appropriate case." *Id*. at 8. This is an appropriate case to review and resolve this question.

A. The lower courts are intractably divided over the question presented.

As the United States has previously represented to this Court, there is an eight-to-two "circuit split" (U.S. *Ortiz-Franco* Br. at 9, 15, 16), which is "entrenched and has existed for more than [eight] years." *Id.* at 15. Yet more recently, the United States confirmed the "conflict among the courts of appeals" on this question. U.S. *Granados* Br. at 7-8.

"The Ninth Circuit [has] declined to consider its rule en banc," and "the Seventh Circuit [has] confirmed that the analysis set forth in *Wanjiru* constitutes binding circuit precedent." U.S. *Ortiz-Franco* Br. at 15. Likewise, "at least five of the circuits in the majority have expressly declined to revisit their precedents based on the reasoning adopted by the Seventh or Ninth Circuit." *Id.* at 15-16 & n.5. See also *Morris* v. *Sessions*, 891 F.3d 42, 48 (1st Cir. 2018) ("[A]lthough some other circuits have adopted the government's position that the jurisdictional bar does apply to orders denying claims for deferral of removal, other circuits have rejected it.").

As the United States has previously said, there is "no realistic prospect that the circuit split will be resolved without this Court's intervention." U.S. *Ortiz-Franco* Br. at 16.

In *Wanjiru* v. *Holder*, 705 F.3d 258 (7th Cir. 2013), the **Seventh Circuit** held that the denial of CAT deferral is not a "final order of removal" within the meaning of Section 1252(a)(2)(C). *Id.* at 264. In its view, "[a] deferral of removal is like an injunction: for the time being, it prevents the government from removing the person in question, but it can be revis-

ited if circumstances change." *Ibid.* The court confirmed in *Lenjinac* v. *Holder*, 780 F.3d 852, 855 (7th Cir. 2015), that *Wanjiru* "conclusively held that deferral of removal is not a final remedy and therefore [that] the INA does not bar judicial review."[3]

The **Ninth Circuit** used different reasoning to reach the same conclusion in *Lemus-Galvan* v. *Mukasey*, 518 F.3d 1081 (9th Cir. 2008), overruled in part on other grounds by *Maldonado* v. *Lynch*, 786 F.3d 1155 (9th Cir. 2015). The court held that, because CAT deferral is available to all noncitizens, regardless of whether they have a criminal history, the denial of CAT deferral is a decision "on the merits" of the CAT claim—and not, as Section 1252(a)(2)(C) requires, a decision "on the basis of [a criminal] conviction." *Lemus-Galvan*, 518 F.3d at 1083-1084. Thus, in the Ninth Circuit, a noncitizen with an enumerated criminal conviction may raise factual challenges to the denial of CAT relief.[4]

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[3] The Seventh Circuit, applying *Wanjiru*, regularly adjudicates cases involving factual challenges. See, *e.g.*, *Teneng* v. *Holder*, 602 F. App'x 340, 347 (7th Cir. 2015); *Bitsin* v. *Holder*, 719 F.3d 619, 630-631 (7th Cir. 2013).

[4] Likewise, the Ninth Circuit regularly adjudicates such challenges, applying *Lemus-Galvan*. See, *e.g.*, *Vinh Tan Nguyen* v. *Holder*, 763 F.3d 1022, 1029 (9th Cir. 2014); *Edu* v. *Holder*, 624 F.3d 1137, 1141-1142 (9th Cir. 2010); *Eneh* v. *Holder*, 601 F.3d 943, 946 (9th Cir. 2010). See also *Muyingo* v. *Holder*, 540 F. App'x 571, 571-572 (9th Cir. 2013) (reviewing motion to reopen to determine whether the petitioner "present[ed] the material evidence of changed circumstances * * * that was required to qualify for the regulatory exception to the time and numerical limits for filing motions to reopen").

The **First**, **Second**, **Third**, **Fourth**, **Fifth**, **Sixth**, **Eighth**, and **Eleventh Circuits** have all held that Section 1252(a)(2)(C) divests the courts of jurisdiction to adjudicate factual challenges to the denial of deferral of removal under the CAT. See, *e.g.*, *Ortiz-Franco* v. *Holder*, 782 F.3d 81, 88 (2d Cir. 2015); *Cole* v. *United States Attorney Gen.*, 712 F.3d 517, 524, 532 (11th Cir. 2013); *Escudero-Arciniega* v. *Holder*, 702 F.3d 781, 785 (5th Cir. 2012); *Turkson* v. *Holder*, 667 F.3d 523, 526-527 (4th Cir. 2012); *Pieschacon-Villegas* v. *Attorney Gen. of U.S.*, 671 F.3d 303, 309-310 (3d Cir. 2011); *Lovan* v. *Holder*, 574 F.3d 990, 998 (8th Cir. 2009); *Gourdet* v. *Holder*, 587 F.3d 1, 5 (1st Cir. 2009); *Tran* v. *Gonzales*, 447 F.3d 937, 943 (6th Cir. 2006). See also *Medrano-Olivas* v. *Holder*, 590 F. App'x 770, 772 (10th Cir. 2014) (unpublished disposition following majority view).

B. The question presented is vitally important.

The United States agrees that this issue is "a recurring question of substantial importance." U.S. *Ortiz-Franco* Br. at 9. This "frequently litigated" (*id.* at 15) question will continue to produce conflicting outcomes on identical facts without this Court's intervention. See also U.S. *Granados* Br. at 8 ("This is a recurring question of substantial importance that will warrant this Court's review in an appropriate case.").

As the only form of relief available to *all* noncitizens, CAT deferral provides a vital lifeline to immigrants with criminal pasts who have a well-founded fear of torture. And judicial review matters a great deal. Courts in the Seventh and Ninth Circuits regularly remand these cases for further review, acting as

a vital check in ensuring that the United States is not shipping away these individuals to their imminent harm or death. See, *e.g.*, *Wanjiru*, 705 F.3d at 267 (remanding after concluding that a foreign sect "will probably murder Wanjiru with the acquiescence of Kenyan government officials, if he is returned"); *Vinh Tan Nguyen*, 763 F.3d at 1032 (remanding because "the record compels the conclusion that * * * Nguyen is likely to be arrested, detained and tortured in Vietnam").

Assessing the appropriate degree of judicial review over administrative agency action is in all cases important. Here, where the subject matter is life-and-death, ensuring that the courts exercise appropriate judicial review of agency action is of the utmost importance. It is intolerable that the scope of judicial review presently differs drastically based on mere geography.

C. The decision below is wrong.

Certiorari is additionally warranted because the decision below is wrong. Indeed, "this Court applies a 'strong presumption' favoring judicial review of administrative action." *Mach Mining, LLC* v. *EEOC*, 135 S. Ct. 1645, 1651 (2015). Judicial review is available even where a statute "plausibly can be read as imposing an absolute bar to judicial review." *Lindahl* v. *Office of Pers. Mgmt.*, 470 U.S. 768, 779 (1985). That is to say, "if a provision can reasonably be read to permit judicial review, it should be." *Cuozzo Speed Techs., LLC* v. *Lee*, 136 S. Ct. 2131, 2150 (2016) (Alito, J., concurring in part and dissenting in part) (summarizing the case law). Judicial review "enforces the limits that *Congress* has imposed on

the agency's power. It thus serves to buttress, not 'undercut,' Congress's objectives." *Id.* at 2151.

1. At the outset, the notion that Congress purposefully stripped the courts of appeals of jurisdiction over this particular agency action is nothing short of perverse. Withholding (and deferral) of removal is the fundamental safeguard to ensure that the United States does not remove an individual to a country where he or she is likely to be tortured or killed. In this circumstance, an agency is making life-or-death decisions. To be sure, the jurisdiction-stripping provisions indicate Congress's intent to streamline the normal deportation process for certain noncitizens with criminal histories. But there is *no* indication that Congress sought to water down the crucial protections that *all* individuals—including those with criminal histories—have against removal to a country where torture or death is likely. To the contrary, Congress has made clear that "[a] conviction of an aggravated felony has no effect on CAT eligibility." *Moncrieffe* v. *Holder*, 569 U.S. 184, 187 n.1 (2013).

What is more, CAT withholding (and deferral) relief is *principally* used by those with criminal histories, as it is those histories that render them ineligible for an asylum claim. If Congress had actually intended to strip the courts of appeals of jurisdiction over such momentous agency action, surely it would have said so with far more clarity.

To the contrary, for two distinct reasons, Section 1252(a)(2)(C) may plausibly be read as conferring judicial review over the administrative agency action at issue here. That compels the conclusion that jurisdiction exists over the question here.

2. Section 1252(a)(2)(C) governs "any final order of removal." When a court of appeals reviews the Board's denial of a CAT request for deferral of removal, it is not reviewing the "final order of removal" itself. Section 1252(a)(2)(C) is thus inapplicable.

As the Seventh Circuit explained, "[a] deferral of removal is like an injunction: for the time being, it prevents the government from removing the person in question, but it can be revisited if circumstances change." *Wanjiru*, 705 F.3d at 264. Because "Section 1252(a)(2)(C) addresses only judicial review of final orders of removal," it does not apply in these circumstances. *Ibid*. See also *Issaq* v. *Holder*, 617 F.3d 962, 970 (7th Cir. 2010) (jurisdictional bar does not apply to CAT deferral because deferral of removal is an "inherently non-final remedy").

Section 2242(d) of FARRA, moreover, confirms that an order granting or denying CAT relief is distinct from a "final order of removal." FARRA provides jurisdiction over an appeal of a request for CAT relief; it states 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) (emphasis added). This establishes that the CAT claim is *not* the "final order of removal" itself.

The REAL ID Act of 2005 further demonstrates that a denial of a request for deferral of removal is distinct from the final order of removal itself. See Pub. L. No. 109-13, div. B, § 106(a)(1)(A)(iii), 119 Stat. 231, 310. The REAL ID Act revised the jurisdictional rules established in 8 U.S.C. § 1252 to eliminate habeas review of certain types of claims under the INA. The Act was passed in response to *INS* v. *St. Cyr*, 533 U.S. 289 (2001), where the Court held

that certain jurisdiction-stripping provisions did not apply to habeas review.

As relevant, Section 1252(a)(5) eliminated habeas review of "order[s] of removal":

> [A] petition for review filed with an appropriate court of appeals in accordance with this section shall be the sole and exclusive means for judicial review *of an order of removal*.

8 U.S.C. § 1252(a)(5) (emphasis added). And Section 1252(a)(4) eliminated habeas review of CAT claims:

> [A] petition for review filed with an appropriate court of appeals in accordance with this section shall be the sole and exclusive means for judicial review of *any cause or claim under the [CAT]*.

Id. § 1252(a)(4) (emphasis added).

Read together, these provisions establish that "an order of removal" is distinct from "any cause or claim under the" CAT. If it were otherwise, Section 1252(a)(4) would be superfluous. See *Corley* v. *United States*, 556 U.S. 303, 314 (2009) ("[A] statute should be construed so that effect is given to all its provisions, so that no part will be inoperative or superfluous, void or insignificant.").

If anything, Section 1252(a)(4) *expands* jurisdiction to provide for review over the sort of factual claim at issue here. It provides appellate jurisdiction over "*any* cause or claim." 8 U.S.C. § 1252(a)(4) (emphasis added). That language plainly encompasses a factual challenge to the Board's decision.

3. A CAT deferral claim is additionally not subject to Section 1252(a)(2)(C) because a noncitizen denied CAT relief on the merits is not "removable *by reason of*" a criminal offense. See *Lemus-Galvan*, 518 F.3d at 1083 (emphasis added).

In *Lemus-Galvan*, the Ninth Circuit held that, because CAT deferral is available to all noncitizens, regardless of whether they have a criminal history, the denial of CAT deferral is always a decision "on the merits" of the CAT claim—and not, as Section 1252(a)(2)(C) requires, a decision "on the basis of [a criminal] conviction." 518 F.3d at 1083-1084. As the court explained (*id.* at 1083), the criminal bar applies only to noncitizens found to be removable "by reason of having committed a [listed] criminal offense." 8 U.S.C. § 1252(a)(2)(C).

CAT deferral, on the other hand, is available whether or not the noncitizen seeking relief has a criminal history: "[E]ven if an alien has been convicted of a 'particularly serious crime,' and is ineligible for withholding of removal under the CAT, an IJ is required to grant deferral of removal." *Lemus-Galvan*, 518 F.3d at 1083. Thus, a denial of deferral is always made "on the merits": on the basis that the noncitizen failed to prove "that it is more likely than not that he or she would be tortured." 8 C.F.R. § 1208.16(c)(2)-(3). *That* determination is entirely independent of any criminal history and therefore not subject to Section 1252's jurisdictional bar.

D. The petition provides a suitable vehicle for review.

The disposition in the court of appeals turned solely on the question presented here. And if the

court of appeals has jurisdiction to review the agency action, there is a substantial probability that the court below would reverse the agency's determination. This is therefore a suitable vehicle to resolve the question that the United States admits needs to be decided.

1. The decision below turned wholly on the court of appeals' resolution to the question presented. Because petitioner is "removable by reason of his committing a crime covered by [Section] 1252(a)(2)(C)," the court held that it could "review his 'claims only insofar as they raise constitutional issues or questions of law.'" App., *infra*, 5a (quoting *Ventura-Reyes*, 797 F.3d at 356). That was so even though what petitioner requests is withholding of removal. See *ibid.* Since petitioner's "entire petition depend[ed] on" a factual question, the court concluded that it lacked jurisdiction. App., *infra*, 8a.

While this case arose in the motion-to-reopen context, that was irrelevant to the lower court's holding. The court of appeals relied expressly (App., *infra*, 3a-4a) on *Ventura-Reyes* v. *Lynch*, 797 F.3d 348, 358 (6th Cir. 2015). That is the same authority on which the government has previously acknowledged the circuit split. U.S. *Granados* Br. at 9. It also relied (App., *infra*, 4a, 7a) on *Tran* v. *Gonzales*, 447 F.3d 937, 943 (6th Cir. 2006), which likewise was decided outside the reopening context.

Indeed, the court of appeals has subsequently applied its decision in this case outside the context of reopening, to the generic circumstance where an individual seeks review of the denial of his claim for withholding of removal. See *Saleh* v. *Sessions*, 2018 WL 5304812, at *5 (6th Cir. 2018). This case cleanly

presents the question at issue—whether Section 1252(a)(2)(C) applies to denials of a request for withholding (or deferral) of removal.

2. This case is also an attractive vehicle because the court of appeals would likely reverse the BIA's factual finding if it had jurisdiction to review it. Indeed, if the court below has jurisdiction to review petitioner's factual claim, it is improbable that it would affirm the agency's *ipse dixit* that petitioner "has not presented sufficient evidence" regarding the likelihood of his torture. App., *infra*, 10a.

Petitioner presented approximately 120 pages of substantial, citation-heavy factual evidence to the contrary. See *supra*, pp. 11-16; A.R. 43-168. But the agency did not address any of it.

In fact, in another case submitted on materially identical evidence, the government "move[d] for a remand to the BIA for further consideration" given the strength of the record. Order at 1, *Kiriakoza* v. *Sessions*, No. 17-3907 (Dkt. No. 34-2) (6th Cir. Mar. 20, 2018). "The Attorney General maintain[ed] that a remand [would] permit the BIA to discuss more fully the sufficiency of the evidence submitted by the petitioner." *Ibid.* The government also suggested that "a remand [would] permit the BIA to respond to the argument that it has decided similar cases inconsistently." *Id.* at 2.

On remand, the Board found that the very same evidence that it considered in the first instance—and the very same exhibits, in relevant part, that petitioner submitted 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). It thus granted the motion to reopen. *Ibid.*

In short, a similarly-situated individual who presented materially identical evidence *has* prevailed on his request to reopen. Whether or not the court of appeals has jurisdiction to review the factual finding at issue thus has enormous practical bearing.

3. The agency's putative alternative basis for denying petitioner's claim is no obstacle to review. In a single sentence of its decision, the BIA asserted that "a motion to reopen to seek United Nations Convention Against Torture relief does not fall within an exception to the motion time limit." App., *infra*, 10a. That contention is obviously wrong, the government did not defend it below, and the court of appeals expressly did not rest on this legal assertion.

First, the agency's assertion—that an immigrant may not seek to reopen the denial of CAT withholding of relief—is plainly wrong. The governing regulation expressly provides that the "time * * * limitation[] * * * shall not apply to a motion to reopen proceedings" when one seeks "[t]o apply or reapply for asylum or withholding of deportation based on changed circumstances arising in the country * * * to which deportation has been ordered," in circumstances where the "evidence is material and was not available and could not have been discovered or presented at the previous hearing." 8 C.F.R. § 1003.2 (c)(3). Indeed, this regulation follows directly from the requirements of 8 U.S.C. § 1229a(c)(7)(C)(ii).

In view of the clarity of the regulation and statute, the courts of appeals all agree that changed country conditions may provide an exception to the usual time limitation on a motion to reopen the denial of a request for withholding (or deferral) of removal. See, *e.g.*, *Agonafer* v. *Sessions*, 859 F.3d 1198, 1204-1205 (9th Cir. 2017) ("The changed country conditions exception * * * applies to motions to reopen to assert CAT claims."); *Bamaca-Cifuentes* v. *Attorney Gen. U.S.*, 870 F.3d 108, 111 (3d Cir. 2017).

Lest there be any doubt, on remand in *In re Kiriakoza*, the Board concluded that "the respondent has established materially changed country conditions in Iraq. 8 C.F.R. § 1003.2(c)(3)(ii)." Order at 1, *In re Kiriakoza*, No. A030 869 417. For this reason, the agency "grant[ed] the motion to reopen." *Ibid.* There is clearly no *legal* barrier to relief in these circumstances.

Second, given the clarity of the governing regulation, it is no surprise that the government neither advocated for—nor defended—this reasoning below.

Before the agency, the government affirmatively acknowledged that "Section 240(c)(7)(C)(ii) of the [INA] provides an exception to [the] ninety-day deadline where the motion is to apply for asylum or withholding and is based on changed country conditions." A.R. 10. The government's argument was that petitioner failed to meet his *factual* burden—not that there was any legal basis precluding his claim. A.R. 11-13.

Before the court of appeals, the government offered no direct support for the agency's wayward assertion regarding the supposed unavailability of re-

opening. Instead, the government focused principally on its assertion that petitioner failed, factually, to support his argument for withholding of removal. See U.S. C.A. Br. 14-25 (Dkt. No. 24).

Third, the court of appeals expressly did not adopt this holding as a basis for its decision. App., *infra*, 5a. It rested solely on circuit precedent holding that appellate courts lack jurisdiction to review the "factual determination" that petitioner "failed to establish a prima facie case of his likely torture." *Ibid.* Once this Court corrects the court of appeals' error with respect to jurisdiction, the lower court may then proceed to consider the balance of issues implicated.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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APPENDICES

APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

AMIR FRANCIS SHABO,
Petitioner,

v.

JEFFERSON B. SESSIONS, III,
Attorney General,
Respondent.

No. 17-3881

On Petition for Review from the Board of Immigration Appeals; No. A 026 808 024

Decided and Filed: June 11, 2018

Before: MOORE, THAPAR, and BUSH, Circuit Judges.

OPINION

JOHN K. BUSH, Circuit Judge. Amir Francis Shabo seeks to reopen his 1998 Board of Immigration Appeals ("BIA") proceeding that ordered his removal to Iraq. He wants that removal withheld and seeks relief under the Convention Against Torture. He alleges that, as a Chaldean Christian, he faces likely torture in Iraq.

Because of Shabo's prior criminal conviction and the operation of 8 U.S.C. § 1252(a)(2)(C) and (D), we lack jurisdiction to review the factual questions in

his petition. Even if we were to agree with Shabo's position on the reviewable question of law he presents—whether the changed-country-condition exception applies—we would lack jurisdiction to review the factual issue of whether Shabo established a prima facie case for relief. Therefore, under 8 U.S.C. § 1252(a)(2)(C) and the Article III doctrine of mootness, we dismiss his petition as unreviewable.

I

Shabo immigrated to the United States from Iraq in 1985. In 1992, at the age of twenty-five, he was convicted of an aggravated felony: possession with the intent to deliver 50 to 225 grams of cocaine. He was sentenced to 60 to 240 months of imprisonment. After 60 months he was paroled to immigration authorities, and an immigration judge ordered his removal to Iraq based on his being convicted of an aggravated felony and of a crime relating to a controlled substance. The BIA denied his appeal. But because the Iraqi government was not then issuing travel papers, Shabo remained in the United States. He has been here ever since.

Iraq began issuing travel papers last year. Shabo anticipated that he would soon be detained, so he moved to reopen his 1998 BIA proceedings to seek protection under the Convention Against Torture. He anticipated correctly and has since been detained. Critically, he concedes that he is deportable under what is now 8 U.S.C. § 1227(a)(2)(A)(iii) and (B)(i). He argues for an exception to the ninety-day time limit on moving to reopen his case, which has long since passed, contending that the circumstances in Iraq have changed considerably since 1997, when the immigration judge originally ordered his removal.

After examining Shabo's motion, the BIA held that it was untimely and that the changed-country-conditions exception does not apply to applications under the Convention Against Torture. In the alternative the BIA held that, even if the exception did apply, Shabo had not presented sufficient evidence that he was "more likely than not" to be subject to torture in Iraq with the government's acquiescence. The BIA also declined to reopen his case sua sponte. Shabo petitions us for review of the BIA's opinion.[1]

II

Our limited jurisdiction over removal orders decides Shabo's petition. 8 U.S.C. § 1252(a)(2)(C) states that "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) . . . ." 8 U.S.C. § 1252(a)(2)(C). Subsection (D) of this same statute articulates an exception: "Nothing in subparagraph [(C)] . . . 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." *Id.* § 1252(a)(2)(D). In other words, if an alien is removable by reason of having committed a crime covered by § 1252(a)(2)(C), we may review his "claims only insofar as they raise constitutional issues or questions of law." *Ventura-Reyes v. Lynch*, 797 F.3d 348, 356 (6th Cir. 2015). Questions of law include, for example, "whether the BIA used the correct standard

[1] Shabo does not challenge the BIA's declining to reopen his case sua sponte.

in reviewing the IJ's decision and whether it assigned him the correct burden of proof." *Tran v. Gonzales*, 447 F.3d 937, 943 (6th Cir. 2006). "The same is true for matters involving the BIA's construction of a particular statute." *Arestov v. Holder*, 489 F. App'x 911, 916 (6th Cir. 2012) (citing *Almuhtaseb v. Gonzales*, 453 F.3d 743, 748 (6th Cir. 2006)). But "whether the BIA correctly considered, interpreted, and weighed the evidence presented" is not a constitutional issue or question of law. *Arestov*, 489 F. App'x at 916 (quoting *Tran*, 447 F.3d at 943). Such a question is instead factual. Factual errors can qualify as legal errors when "important facts have been *totally overlooked* and others have been *seriously mischaracterized*." *Ventura-Reyes*, 797 F.3d at 360. If a criminal alien like Shabo does raise a question of law or a constitutional issue, we review that claim de novo. *Id.* at 358.

The BIA made a final determination not to reopen Shabo's case to allow him to present an application under the Convention Against Torture. To have his case reopened, Shabo first needed to show an exception to the time limit on filing motions to reopen—in this case, the changed-country-conditions exception—and then, second, he needed to establish a prima facie case for relief. The BIA held that Shabo's motion was untimely and that the changed-country-conditions exception does not apply to applications under the Convention Against Torture. The BIA also held in the alternative that, even if the exception did apply, Shabo had not presented sufficient evidence to establish a prima facie case that he was "more likely than not" to be subject to torture in Iraq by the government or at least with the government's acquiescence.

Shabo is removable by reason of his committing a crime covered by § 1252(a)(2)(C). So we may review his "claims only insofar as they raise constitutional issues or questions of law." *Id.* at 356. The application of the changed-country-conditions exception is potentially a question of law that we could review. But the BIA's alternative holding that Shabo failed to establish a prima facie case of his likely torture is a factual determination that we lack jurisdiction to review. This renders the changed-country-conditions-exception issue moot. So we are bound by statute to decline to review Shabo's petition. A review of our precedent supports our conclusion here.

In *Pepaj v. Mukasey*, a petitioner sought our review of a BIA order dismissing her appeal of an immigration judge's order denying her motion to reopen. *Pepaj v. Mukasey*, 509 F.3d 725, 726–28 (6th Cir. 2008). The petitioner asserted that she was "eligible for withholding under [the Convention Against Torture]" because of a change in circumstances. *Id.* at 727. The BIA dismissed her appeal, finding that she had not met the changed-country-conditions exception to move to reopen her case more than ninety days after the final decision. *Id.* We held that, under § 1252, we lacked jurisdiction to review the BIA's determination because the petitioner had "raised only a question of fact regarding her claim of changed country conditions." *Id.* at 728 (citing *Almuhtaseb*, 453 F.3d at 747). Similarly, in *Arestov*, we cited *Pepaj* to hold again that § 1252 withdrew our jurisdiction to review the BIA's denying a petitioner's motion to reopen because the petitioner's claims regarding

changed country conditions involved a factual determination. *Arestov*, 489 F. App'x at 919–20.[2]

As an initial matter, *Pepaj* and *Arestov* demonstrate that we treat denials of motions to reopen as "final orders of removal" when evaluating our own jurisdiction. *See also Giova v. Rosenberg*, 379 U.S. 18 (1964) (reversing the Ninth Circuit's decision that it lacked jurisdiction to review a denial of a motion to reopen and remanding with instructions to review the petition); *Jahjaga v. Attorney Gen. of U.S.*, 512 F.3d 80, 82 (3d Cir. 2008) ("The denial of a motion to reopen is itself a final order of removal."); *Mayard v. INS*, 129 F.3d 438, 439 (8th Cir. 1997) (explaining that the denial of a motion to reopen qualifies as a "final order of exclusion or deportation"). Unlike in *Pepaj* and *Arestov*, however, Shabo's claim for relief does not turn on the factual issue of whether conditions in his country of removal have changed. But his claim does turn on the factual issue of whether he has shown a probability of future torture. *Chege v. Lynch,* 636 F. App'x 682, 685 (6th Cir. 2016) ("Whether an applicant for withholding of removal under the Convention has shown a probability of future torture is a factual determination."); *Bushati v. Gonzales*, 214 F. App'x 556, 559 (6th Cir. 2007) ("The

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[2] In an order from January of this year, we addressed an appeal by an Iraqi petitioner who, like Shabo, had been convicted of a criminal offense covered by 8 U.S.C. § 1252(a)(2)(C) and whose motion to reopen had been denied by the BIA. We held that we lacked jurisdiction to review whether the petitioner had established a prima facie case for relief under the Convention Against Torture because the petitioner's arguments "concern the weight the BIA gave to his evidence, not the standard applied by the BIA." *Al-Sarih v. Sessions*, No. 17-3996, at 2 (6th Cir. Jan. 31, 2018) (order).

issue of whether substantial evidence supports the immigration judge's finding that [Petitioner] did not establish that he would likely be subject to torture . . . is clearly a factual determination."). In other words, we are being asked to determine whether the BIA "correctly considered, interpreted, and weighed the evidence presented" by Shabo of his likelihood of torture. *See Arestov*, 489 F. App'x at 916 (quoting *Tran*, 447 F.3d at 943). So this is a factual question. And in light of our application of § 1252 to motions to reopen in *Pepaj* and *Arestov*, we are bound to conclude that we lack jurisdiction to review whether Shabo established a prima facie case for relief under the Convention Against Torture. *See Pepaj*, 509 F.3d at 728 (citing *Almuhtaseb*, 453 F.3d at 747–48); *Arestov*, 489 F. App'x at 919–20.

Our inability to review the BIA's determination regarding Shabo's eligibility for relief under the Convention Against Torture renders the changed-country-conditions-exception issue moot; regardless of our conclusion as to the first question, the result in this matter is the same. *See generally Aetna Life Ins. Co. of Hartford, Conn. v. Haworth*, 300 U.S. 227, 239–41 (1937) (discussing cases and controversies); *McPherson v. Mich. High Sch. Athletic Ass'n, Inc.*, 119 F.3d 453, 458 (6th Cir. 1997) (en banc) (discussing mootness); 13B Charles Alan Wright, Arthur R. Miller & Edward H. Cooper, Federal Practice & Procedure § 3533 (3d ed. 2008) ("The central question [of mootness] nonetheless is constant—whether decision of a once living dispute continues to be justified by a sufficient prospect that the decision will have an impact on the parties."). That is, even if we were to hold that the BIA erred at step one when it concluded that the changed-country-conditions exception does

not apply to applications under the Convention Against Torture, we would still lack jurisdiction to review the BIA's case-dispositive determination at step two that Shabo failed to establish a prima facie case for relief. We must therefore decline to review the question whether the BIA's changed-country-conditions determination was erroneous.[3]

III

In light of the foregoing, we must deny Shabo's petition for review. We lack jurisdiction to review the factual question of whether Shabo established a prima facie case for relief under the Convention Against Torture. Because his entire petition depends on that claim, we must **DISMISS** his petition as unreviewable.

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[3] One potential legal issue arguably remains. Shabo does cursorily allege that the BIA's *1998* decision affirming the immigration judge's ordering his removal denied him due process. But Shabo never petitioned for review of that decision. Instead, Shabo now petitions us for review of the BIA's *2017* decision denying his motion to reopen. So our review is limited to that decision. *See Stone v. INS*, 514 U.S. 386, 405 (1995) (explaining that the time limit on an alien's petitioning for review is "mandatory and jurisdictional").

APPENDIX B

U.S. Department of Justice
Executive Office for Immigration Review
Falls Church, Virginia 22041

Decision of the Board of Immigration Appeals

File: A026 808 024 – Jackson, MI

Date: AUG 09 2017

In re: Amir Francis SHABO

IN DEPORTATION PROCEEDINGS

MOTION

APPLICATION: Reopening

The Board entered the final administrative decision on July 15, 1998, when we dismissed the respondent's appeal of the Immigration Judge's decision ordering the respondent deported to Iraq in connection with his aggravated felony controlled substance-related conviction. Nearly 2 decades later, the respondent seeks reopening. The Department of Homeland Security ("DHS") opposes the motion, which will be denied, as the respondent has not demonstrated that an exception to the 90-day time limit applies. *See* 8 C.F.R. § 1003.2(c)(2).

To the extent that the respondent is seeking to apply for asylum and withholding of deportation, the motion is denied, as we will not revisit our finding that his aggravated felony conviction renders him statutorily ineligible for these forms of relief. *See INS v. Wang,* 450 U.S. 139, 141 (1981) (discussing motions to reopen); *Matter of Cerna,* 20 I&N Dec. 399, 402 (BIA 1991).

Further, a motion to reopen to seek United Nations Convention Against Torture relief does not fall within an exception to the motion time limit. *See* 8 C.F.R. § 1003.2(c)(3). Regardless, the respondent has not presented sufficient evidence that he is more likely than not to be subjected to torture "inflicted by or at the instigation of or with the acquiescence, including the concept of willful blindness, of a public official or other person acting in an official capacity." 8 C.F.R. § 1208.16(c)(2). While the evidence attached to the motion indicates that the Islamic State targets Chaldean Christians—among other minority ethnic and religious groups—the Iraqi government and the Kurdish Peshmerga actively combat the terrorist organization (Respondent's Mot. tabs, 3-4; DHS Opp'n., attachment). *See Mullai v. Ashcroft,* 38 F.3d 635, 639 (6th Cir. 2004) (recognizing that while sometimes problematic, State Department reports on country conditions are generally the best source of information); *Mecca v. Holder,* 604 F. App'x. 465 (6th Cir. 2015) (same); 8 C.F.R. § 1003.1(d)(3)(iv). Overall, the respondent has not presented sufficient evidence that the Iraqi authorities are unable or unwilling to protect him from the alleged threat. *See Zhang v. Mukasey,* 543 F.3d 851, 854-55 (6th Cir. 2008) (recognizing that failure to establish prima facie eligibility for relief is grounds for denying motion to reopen); *Matter of Coelho,* 20 I&N Dec. 464 (BIA 1992) (alien must satisfy heavy burden of establishing that if the proceedings were reopened the new evidence would likely change the result in the case).

Finally, the respondent has not demonstrated an extraordinary situation warranting sua sponte reopening. *Matter of G-D-,* 22 I&N Dec. 1132, 1133-34 (BIA 1999). Accordingly, the motion will be denied.

ORDER: The motion is denied.

FURTHER ORDER: The request for a stay is denied as moot.

FOR THE BOARD

APPENDIX C

U.S. Department of Justice
Executive Office for Immigration Review
Falls Church, Virginia 22041

Decision of the Board of Immigration Appeals

File: A026 808 024 – Jackson

Date: JUL 15 1998

In re: AMIR FRANCIS SHABO

IN DEPORTATION PROCEEDINGS

APPEAL

CHARGE:

Order:
Sec. 241(a)(2)(A)(iii), I&N Act
[8 U.S.C. § 1251(a)(2)(A)(iii)] -
Convicted of aggravated felony

Sec. 241(a)(2)(B)(i), I&N Act
[8 U.S.C. § 1251(a)(2)(B)(i)] -
Convicted controlled substance violation

ORDER:

PER CURIAM. In a decision dated August 7, 1997, an Immigration Judge found the respondent deportable as charged and ineligible for any relief from deportation, and ordered him deported to Iraq. The respondent appeals from this decision. The Immigration and Naturalization Service has filed a brief in opposition to the respondent's appeal. The appeal will be dismissed.

The record reflects and the respondent conceded at his hearing that he was convicted of possession

with intent to deliver 50 to 225 grams of the controlled substance cocaine, and that he is deportable as an alien convicted of a violation of a law relating to a controlled substance under section 241(a)(B)(i) of the Immigration and Nationality Act, and as an alien convicted of an aggravated felony under section 241(a)(2)(A)(iii) of the Act. The respondent was sentenced to imprisonment for a period of 5 to 20 years. The respondent's crime falls within the definition of aggravated felony under section 101(a)(43)(B) of the Act.

We therefore find that the respondent is statutorily ineligible for any form of relief from deportation due to his conviction as an aggravated felon. See section 440(d) of the Antiterrorism and Effective Death Penalty Act of 1996, Pub. L. No. 104-132, 110 Stat. 1214 ("AEDPA"); Matter of Soriano, Interim Decision 3289 (A.G., Feb. 21, 1997); Matter of O-T-M-T-, Interim Decision 3300 (BIA 1996); Matter of Yeung, Interim Decision 3297 (BIA 1996); 8 C.F.R. § 208.14(d)(4).[1]

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[1] Although the respondent is barred from relief under section 243(h) of the Act, he may nevertheless be eligible for protection under Article 3 of the United Nations Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, opened for signature Feb. 4, 1985, G.A. Res. 39/46, 39 U.N. GAOR Supp. No. 51, at 197, U.N. Doc. A/RES/39/708 (1984), reprinted in 23 I.L.M. 1027 (1984), modified in 24 I.L.M. 535 (1985) ("Torture Convention"). The respondent would be eligible to file a claim before the Immigration and Nationality Service, which has acknowledged its obligation to comply with the Torture Convention. Memorandum, Compliance with Article 3 of the Convention Against Torture in the cases of remova-

We are not persuaded by the respondent's argument on appeal that section 440(d) of AEDPA, which amended section 212(c) of the Immigration and Nationality Act, does not apply to his case because his Order to Show Cause was issued on April 18, 1994, before the enactment of AEDPA. We note that in Matter of Soriano, supra, the Attorney General decided that the amendments to section 212(c) made by section 440(d) of AEDPA apply to proceedings in which the application for relief under section 212(c) was pending when AEDPA was signed into law, even though the conduct which rendered the respondent deportable occurred before AEDPA became law. We also note that the amendment under AEDPA provides that section 212(c) relief shall not be available to aliens who are deportable by reason of having committed certain specified criminal offenses, including aggravated felonies. As discussed above, the respondent has been convicted of an aggravated felony. Consequently, the respondent is not eligible for this form of relief, and we must, therefore, dismiss his appeal.

The respondent further argues that if his ability to apply for a waiver of inadmissibility under section 212(c) were repealed by the enactment of section 304(b) of the Illegal Immigration Responsibility Act of 1996, Division C of Pub. L. No. 104-208, 110 Stat. 3009-546 ("IIRIRA"), this would be an unconstitutional ex post facto application of the law. Deportation proceedings are civil proceedings which are not considered punishment or a criminal process and,

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ble aliens, dated May 14, 1997, at 2 (reprinted in 75 Interpreter Releases, No. 10, (Mar. 16, 1998), App. I, at 375).

therefore, the ex post facto clause is not implicated. Moreover, we cannot rule on the constitutionality of laws enacted by Congress. See Matter of C-, 20 I&N Dec. 529 (BIA 1992).

Accordingly, the appeal is dismissed.

FOR THE BOARD

CONCURRING/DISSENTING OPINION:
Lory D. Rosenberg, Board Member

I respectfully concur in part and dissent in part. Although I acknowledge that the respondent is statutorily ineligible for relief from deportation owing to his conviction for an aggravated felony resulting in a sentence of imprisonment of 5 years or more, I do not agree with the majority's disposition of his claim under Article 3 of the Convention Against Torture (Convention Against Torture or Article 3). For the reasons set forth below, I believe that the Board should accept jurisdiction over the respondent's Article 3 claim, remand the record to the Immigration and Naturalization Service for adjudication according to its existing procedures—with the recommendation that the Service stay his deportation to Iraq—and reserve review of the decision made by the Service.

The United States' obligation under the Article 3, which provides that "[n]o State Party shall expel, return (refouler) or extradite a person to another State where there are substantial grounds for believing that he would be in danger of being subjected to torture," has been advocated by the respondent and is undisputed by the Service. I believe that the respondent has set forth a colorable claim that he will be tortured and possibly killed if he is forcibly returned to Iraq.

Although the respondent is statutorily ineligible for withholding of deportation under section 243(h) of the Act, Article 3 of the Convention Against Torture is not limited to individuals who meet the "refugee" definition articulated in the Protocol and in section 101(a)(42) of the Act, and does not require an indi-

vidual to demonstrate that he or she would be tortured on account of a particular belief or immutable characteristic. It does not contain an exclusionary clause applicable to a respondent who has been convicted of a particularly serious crime equivalent to that set forth in Article 33(2) of the Refugee Protocol, as enacted in United States law through section 243(h)(2)(B) of the Act, and does not preclude protection from nonrefoulement because of any particular trait or past action, such having been a persecutor or torturer of others, having committed a 'serious nonpolitical crime,' or being considered a threat to United States security. Cf. Sections 243(h)(2), 208(d) of the Act. Accordingly, whereas the protection afforded under the Protocol and the Act is limited, the prohibition set forth in Article 3 of the Convention Against Torture is absolute.[1]

In its announcement of regulations implementing the Illegal Immigration Reform and Immigrant Responsibility Act (Pub. L. No. 104-207, 110 Stat. 3009, Oct. 1, 1996) ("IIRIRA"), the Service included commentary recognizing that Article 3 "has been in effect since November 1994. . . . [and] the Attorney General has sufficient administrative authority to ensure that the United States observes the limitations on removal required by this provision." Rules

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[1] See Elisa C. Massimino, *Relief from Deportation Under Article 3 of the United Nations Convention Against Torture*, 1997-98 Annual Handbook: Advanced Topics, American Immigration Lawyers Association, at 472 (stating "[i]f there are substantial grounds for believing that an individual would be in danger of being subjected to torture if returned, the State may not, under any circumstances, return him or her") (emphasis added).

and Regulations, 62 Fed. Reg. 10,316 (Mar. 6, 1997). In addition, the Service has announced its intent to "carry out the non-refoulement provision of the Torture Convention through its existing administrative authority," 62 Fed. Reg. 10,316, by granting stays of deportation "where appropriate." Letter of INS Commissioner Doris Meissner to Lawyer's Committee for Human Rights, dated Feb. 7, 1997, cited in Massimino, supra, at 476 n.19.

We are presented with an extremely serious claim for protection brought pursuant to an international treaty under which the United States currently is obligated. Thus, I regard the majority's decision to dispose of the respondent's appeal on this ground by merely including a footnote advising him that he "would be eligible to file a claim" under Article 3 before the Service, leaving the Board's order of deportation to Iraq undisturbed, as improper and erroneous. The Board's refusal to address the merits of the respondent's Article 3 claim inexplicably ignores our own authority and our obligation as the quasi-judicial, precedent-setting body acting on behalf of the Attorney General—a component of the Executive Branch of the United States government—to ensure compliance with this nation's international treaty obligations and with internationally recognized human rights norms.

As a component of the Executive Branch of the United States government, this Board is required to ensure compliance with the nation's undisputed obligations under international law. The momentary absence of specific regulations empowering the Board to exercise jurisdiction over Article 3 claims—

particularly with regard to granting torture victims a permanent remedy or an affirmative status—is not a reason to shrink from our existing regulatory authority, or to ignore the mandates imposed by international law.[2] Rather, it requires us to devise a way within our existing authority, if possible, to respond to such claims in compliance with the United States' undisputed obligations under Article 3.

We have discretion and authority under 8 C.F.R. § 3.1(d) to take action that is "appropriate and necessary," to address these claims, at least in part. Deportation or removal proceedings before the Immigration Judges and the Board are an obvious forum for implementation of our obligation under Article 3.[3]

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[2] As one Member of this Board has observed, in comments regarding the impact of the Refugee Convention and Protocol on our laws concerning refugees, "the forces which impel persons to seek refuge may be so overwhelming that the 'normal' immigration laws cannot be applied in their usual manner." Matter of Pula, 19 I&N Dec. 467, 476 (BIA 1987) (Heilman, concurring and dissenting).

[3] Initially, the Senate stated that the reference to "competent authorities" in Article 3 referred to "the competent administrative authorities who make the determination whether to extradite, expel, or return," and recommended including in the ratification document a declaration that "the phrase, 'competent authorities,' as used in Article 3 of the Convention, refers to the Secretary of State in extradition cases and to the Attorney General in deportation cases." Report of the Committee on Foreign Relations, S. Exec. Rep. No. 30, 101st Cong., 2d Sess. 1 (1990) ("Senate Report"), at 17 (emphasis added). This declaration later was omitted, with the explanation that "Although it remains true that the competent authorities referred to in Article 3 would be the Secretary of State in extradition cases and the Attorney General in deportation cases, it is not necessary to in-

I consider it well within the province of the Immigration Judges and the Board to conduct the fact-finding necessary to adjudicate the existence of a prima facie Article 3 claim, and, at a minimum, to refer meritorious claims to the Service. See 8 C.F.R. § 3.1(d); Kristen B. Rosati, *The United Nations Convention Against Torture: A Viable Alternative for Asylum Seekers*, 74 Interpreter Releases 1773, 1781 (1997) ("*A Viable Alternative*").

Under its current administrative scheme, claims for relief under the Torture Convention are reviewed by the Service's Office of General Counsel. To raise a claim under the existing procedure, an alien seeking relief, or his or her counsel, should write to the INS district counsel with jurisdiction over the individual. A copy also should be sent to the General Counsel of the INS in Washington, D.C. The claimant should submit a detailed statement concerning why he or she will be tortured upon return, and should provide any corroborating evidence demonstrating that he or she has been tortured or will be tortured, including documentation from human rights organizations. In addition, an explanation of the procedural posture of the case also should be provided. See Kristen B. Rosati, *The United Nations Convention Against Torture: A Detailed Examination of the Convention as an Alternative for Asylum Seekers*, 97-12 Immigration Briefings, 5 (1997) ("*Detailed Examination*").

The Service has asserted that "for the present," it "intends to continue to carry out the non-refoulement

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clude this declaration in the formal instrument of ratification." Id. at 37 (emphasis added).

provision of the Torture Convention through its existing administrative authority rather than by promulgating regulations." 62 Fed. Reg. 10,316. If the Service determines that a claimant may be eligible for relief under Article 3, it will agree to a stay of removal. However, no final relief will be provided until formal regulations are promulgated. See Rosati, *Detailed Examination*, supra, at 5.

Consequently, I believe it appropriate for an Immigration Judge or the Board to grant a continuance or to hold the case in abeyance, respectively, pending a remand to the Service with instructions to adjudicate the alien's Article 3 claim. Moreover, I consider it within the Board's "appropriate and necessary" authority that has been delegated to us by the Attorney General to review the Service's decision whether or not to stay deportation or removal.

In essence, a claim under the Convention Against Torture, is much like a claim for withholding of deportation or removal fashioned in conformity with Article 33 of the Convention. The prohibited conduct—be it persecution or torture—must be assessed; the assessment is made based on the consideration of evidence pertaining to the individual's personal circumstances and the treatment he or she has experienced or fears, considered in light of reports of other governmental agencies, such as the Department of State and other international authorities; the assessment must distinguish treatment or conduct that is not subject to protection under the terms of the provision, such as that imposed by a state for legitimate reasons; and an ultimate determination

must be made whether or not to afford protection under Article 3.

The Immigration Judges and the Board are uniquely qualified to conduct such evidentiary hearings and render such determinations. The Board has been the administrative body that has considered and reviewed withholding of deportation applications historically. We have exercised this jurisdiction to review and determine such claims both before and since enactment of the Refugee Act of 1980. We have reviewed the determinations of officials of the Service, prior to the existence of the Executive Office for Immigration Review in 1983, and the determinations made by Immigration Judges, after 1983. See e.g., Matter of Janus and Janek, 12 I&N Dec. 866 (BIA 1968); see also sections 208 and 243(h) of the Act, as amended by the IIRIRA. Together with the Immigration Judges, we have continued to exercise jurisdiction over both asylum and withholding of deportation applications, notwithstanding the recent development of a corps of asylum officers within the Service. See. e.g., 8 C.F.R. §§ 208.1; 208.2; 208.4(b)(4); 208.14; see also 8 C.F.R. §§ 242.11(c), 240.49(c).

The fact that the Service already may be engaging in such adjudications does not relieve us of our responsibility to review such claims within the existing scope of our regulatory authority. Notably, in the absence of additional regulations or legislation creating a specific remedy or form of relief apart from that existing in the present statute, the Service has no more authority than we do to take action to prevent the deportation—or refoulement—of a victim of torture. The Service acknowledges that it is doing no

more than granting stays of deportation in cases it finds to be meritorious. Likewise, we may decline to issue an order of deportation pending consideration of the respondent's claim under Article 3, or condition such an order so that deportation is not authorized to a country in which the respondent would face torture. Furthermore, the fact that the Service may be the party that physically executes the deportation order that we issue does not favor leaving the ultimate nonrefoulement decision to the Service, either today, or at some later time when regulations are promulgated or Congress enacts more specific implementing legislation.

When, as here, a respondent raises a colorable claim to protection under a treaty to which the United States is a party and is obligated to act, and the Board has discretion and authority to act, dismissal of the respondent's claim by ordering him deported to Iraq, the country in which he claims he will be tortured, is inappropriate. Neither the question of the enforceability of the respondent's claim in the federal courts, nor the fact that the Service may have acknowledged some obligation or responsibility to adhere to the terms of the treaty in question, relieves us of our responsibility to address the case before us. The Board is obligated to endeavor to uphold the law of the land to the extent of our authority to do so. Accordingly, I believe that, at a minimum, the Board should accept jurisdiction over the respondent's Article 3 claim, remand the record to the Service for adjudication according to its existing procedures with the recommendation that the Service stay his deportation to Iran, and reserve review of the decision made by the Service.