No. 07-1363

IN THE

Supreme Court of the United States

ARMANDO JIMÉNEZ VIRACACHA, IRMA YOLANDA JIMÉNEZ, ELIANA MARITZA JIMÉNEZ, ANDRES FELIPE JIMÉNEZ, MARIA PAULA JIMÉNEZ,

Petitioners,

—v.—

MICHAEL B. MUKASEY, UNITED STATES ATTORNEY GENERAL,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

REPLY TO BRIEF IN OPPOSITION

LEE GELERNT
STEVEN R. SHAPIRO
American Civil Liberties Union Foundation
125 Broad Street, 18th Floor
New York, New York 10004
(212) 549-2500

CHARLES ROTH
Counsel of Record
National Immigrant Justice Center
208 South LaSalle Street
Suite 1818
Chicago, Illinois 60604
(312) 660-1613

Attorneys for Petitioners

(*Counsel continued on inside cover*)

LUCAS GUTTENTAG
JENNIFER CHANG NEWELL
American Civil Liberties
Union Foundation
39 Drumm Street
San Francisco, California 94111
(415) 343-0770

LOUIS S. CHRONOWSKI, JR.
STEPHEN J. BROWN
Seyfarth Shaw LLP
131 South Dearborn
Suite 2400
Chicago, Illinois 60603
(312) 460-5804

Attorneys for Petitioners

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INTRODUCTION

The government does not argue that the questions presented in the Petition are unworthy of this Court's attention, and indeed, concedes that the Petition presents a "recurring" jurisdictional issue on which there is "disagreement" in the courts of appeals. Brief in Opposition ("BIO") 10. The government contends, however, that this case presents a poor vehicle for resolving the questions. That is incorrect.

I. THE JURISDICTIONAL ISSUE PRESENTED IN THE PETITION INVOLVES A MATURE AND DEEP SPLIT.

In light of the government's concession that the jurisdictional issue raised in the Petition involves a recurring issue on which the courts of appeals are divided, petitioner makes only the following brief points regarding the pressing need for review.

First, the Second Circuit in *Liu v. INS*, 508 F.3d 716 (2d Cir. 2007), did not take "issue with the Ninth Circuit's approach." BIO 11 n.5. *Liu* merely states that pure "factual determinations" are unreviewable, a proposition with which the Ninth Circuit agrees. 508 F.3d at 721 n.3. *See* Pet. 14-16 and n.8.[1]

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1 In addition, *Xiao Ji Chen v. U.S. Dep't of Justice*, 471 F.3d 315, 324-30 (2d Cir. 2006), did not categorically hold that all claims related to the asylum filing exceptions were unreviewable (BIO 11 n.5), but only that courts must examine each claim

Second, the government is incorrect that the significance of the jurisdictional issue in this case is limited to the asylum filing context. BIO 12 n.7. Section 1252(a)(2)(D) is a *generally-applicable* jurisdictional provision. Thus, the disagreement in the courts of appeals over the statute's proper interpretation has broad significance in the immigration area that goes well beyond asylum. *See* Pet. 23-26. Indeed, in this case, the Seventh Circuit held broadly that the term "questions of law" in Section 1252(a)(2)(D) is limited to "pure" legal claims, and expressly relied on a prior Seventh Circuit decision involving an alien's statutory eligibility for a humanitarian waiver. App. 6a-8a (citing *Cevilla v. Gonzales,* 446 F.3d 658 (7th Cir. 2006)).

II. THIS CASE PRESENTS AN IDEAL VEHICLE TO ADDRESS THE SCOPE OF SECTION 1252(a)(2)(D).

The threshold question dividing the courts of appeals is whether Section 1252(a)(2)(D) is limited to "pure" questions of law. The Seventh Circuit's decision squarely addressed that issue. The Seventh Circuit also squarely addressed the constitutionality of limiting review to pure questions of law. This case, therefore, presents a particularly good vehicle for resolving the conflict in the courts of appeals over the meaning of "questions of law" in Section 1252(a)(2)(D).

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individually to determine whether it raises a question of law. Pet. 15.

The government contends, however, that the Court should deny review because (1) the Seventh Circuit's jurisdictional ruling was correct, (2) petitioner would in any event have lost on the merits, and (3) the Seventh Circuit "lacked jurisdiction on the separate ground that the BIA's decision was non-final." BIO 10. Each of these contentions is unpersuasive.

A. The Seventh Circuit Erred In Dismissing Petitioner's Claims.

The government's contention (at 16-21) that the Seventh Circuit's ruling was correct is not a reason to deny review in a case involving an entrenched circuit split. In any event, as discussed in the Petition, the Seventh Circuit's ruling was not correct. Four points are particularly significant.

1. The government's contention that Section 1252(a)(2)(D) encompasses only "pure" questions of law fails to rebut the two most critical points about the statute. Pet. 26-28. First, the government does not dispute that Section 1252(a)(2)(D) was intended to preserve the scope of review previously available in habeas. Equally as significant, the government does not contend that habeas review has traditionally been limited to an artificial set of "pure" legal claims. In light of the government's failure to take issue with either of these two points, it cannot maintain that the Seventh Circuit was correct in limiting Section 1252(a)(2)(D) to "pure" legal claims.

2. The government's constitutional analysis is similarly flawed.[2] Like the Seventh Circuit, the government fails to address the Suspension Clause, the history of immigration habeas review or this Court's observation in *INS v. St. Cyr*, 533 U.S. 289, 302 (2001), that habeas jurisdiction in the executive detention context has always included review of the "application" of statutes. Nor does the government address *Boumediene v. Bush*, 128 S.Ct. 2229, 2266 (2008), where the Court emphatically reaffirmed *St. Cyr*, stating that it viewed as "uncontroversial . . . that the privilege of habeas corpus entitles the prisoner to a meaningful opportunity to demonstrate that he is being held pursuant to 'the erroneous *application* or interpretation' of relevant law" (emphasis added) (quoting *St. Cyr*).

3. The government contends (at 19) that petitioner's claims involve unreviewable *discretionary* determinations, noting that the statute says only that the Attorney General "may" excuse a late-filed application if the alien demonstrates changed or extraordinary circumstances. But

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[2] Contrary to the government's argument (at 21 n.10), petitioner did not waive the constitutional question. The court of appeals decided the issue, petitioner made it a question presented, and petitioner also expressly stated in the Petition that the court of appeals was wrong as a matter of statutory construction and "constitutional mandate." Pet. 26. In this case, moreover, the statutory and constitutional analyses overlap because Congress intended for the statute to preserve all review required by the Suspension Clause. *Cf. INS v. St. Cyr*, 533 U.S. 289 (2001).

petitioner does not challenge any ultimate discretionary authority the Attorney General may possess, but rather, whether he satisfied the threshold statutory eligibility criteria (*i.e.*, the changed or extraordinary circumstances criteria).

The fact that a statute may vest the ultimate decision in the discretion of the Attorney General does not mean that the threshold statutory eligibility criteria are likewise discretionary and unreviewable. *St. Cyr*, 533 at 307-08 (noting in the waiver context the distinction between statutory eligibility criteria and the ultimate discretionary determination). And as explained in the Petition, the changed or extraordinary circumstances statutory eligibility criteria are not discretionary. Pet. 29-30.

4. Finally, the government argues that petitioner's claim is too "fact-bound" to raise a question of law. BIO 17. But a claim involving the application of law to fact will always be tied to the particular facts of a case; if it were not, then it would be more akin to a pure question of law.

As this Court has explained, there is an analytical difference between a pure factual claim and one involving the application of law to fact. A pure fact involves an inquiry into questions that can be determined without reference to the legal standards at issue. *See Thompson v. Keohane,* 516 U.S. 99, 111-12 (1995) (stating that the underlying primary facts involve the "what happened" of a particular issue); *Townsend v. Sain*, 372 U.S. 293, 309 n.6 (1963) (stating that "[b]y 'issues of fact' we

mean to refer to what are termed basic, primary, or historical facts: facts 'in the sense of a recital of external events and the credibility of their narrators'") (internal citations omitted), *overruled on other grounds by Keeney v. Tamayo-Reyes*, 504 U.S. 1 (1992).

In contrast, the Court has stated that a claim involving the application of law to fact is one where "the historical facts are admitted or established, the rule of law is undisputed, and the issue is whether the facts satisfy the statutory standard." *Pullman-Standard v. Swint*, 456 U.S. 273, 289 n.19 (1982). As the Court has further stressed, it is only by reviewing the application of law to concrete factual settings that legal rules can ordinarily take shape. *See Thompson*, 516 U.S. at 115 (emphasizing "the law declaration aspect" of reviewing the application of law to fact); *Ornelas v. United States*, 517 U.S. 690, 697 (1996) (explaining that "the legal rules for probable cause and reasonable suspicion acquire content only through application" and that "[i]ndependent review is . . . necessary if appellate courts are to maintain control of, and to clarify, the legal principles").

In short, a claim involving the application of law to fact will always be "fact-bound," but that does not mean it involves a challenge to the underlying descriptive facts. Insofar as the courts of appeals are generally struggling in the immigration context to differentiate between descriptive facts, on the one hand, and the application of the governing legal

standards to those facts, on the other, that is all the more reason for this Court to grant review.

B. Petitioner Will Prevail On The Merits.

This Court routinely reviews jurisdictional issues without taking a position on the merits, especially where, as here, the court of appeals did not reach the merits. In any event, petitioner's claim is meritorious.

There is no question that petitioner satisfies the standard for asylum, since he already was awarded withholding, which requires aliens to satisfy a higher burden. Pet. 8. Petitioner will likewise be able to demonstrate changed or extraordinary circumstances excusing the late filing.

Petitioner delayed filing because there was an ongoing peace process in Colombia and he did not want to prematurely file his application. When the peace process stalled, he promptly filed his asylum application. The IJ acknowledged that the civil war in Colombia had "intensified" and that there was a change in the Colombian administration, but concluded that the situation was essentially the same because it was still the "guerrillas" fighting against the "government." App. 19a. But that incorrectly assumes that a "material" change (as that term is used in the statute) requires a qualitative change in the situation, such as a change in the parties or structure of the conflict.

As the Ninth Circuit recently explained, Congress was not seeking to encourage aliens to file

within one year even if their asylum claims had not yet matured. *Fakhry v. Mukasey*, 524 F.3d 1057 (9th Cir. 2008). Thus, in *Fakhry*, the Ninth Circuit remanded to the BIA, noting that the alien had understandably waited to file until the peace process in Senegal had failed. The Court stressed that the "resumption of fighting . . . could constitute changed circumstances," explaining that "a likely purpose of the [asylum] exception [is] to excuse late applications when an alien previously had a weak or nonexistent case for asylum." *Id.* at 1063-64.

As in *Fakhry*, petitioner has a strong merits claim. More pertinently, petitioner's merits claim illustrates precisely why there must be jurisdiction. In the absence of judicial review, the BIA will have the final and unreviewable word on fleshing out the meaning of numerous statutory provisions, including the provisions governing asylum filings.[3]

C. The Finality Issue Decided By The Court Of Appeals Is Not A Basis On Which To Deny Review.

The Seventh Circuit's finality ruling does not raise a substantial question on the facts of this case. In any event, if the Court were to conclude that the

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[3] The government suggests that petitioner would not prevail under the "substantial evidence" test. BIO 22. That is incorrect. In any event, the government does not explain why the Court would employ that test if it ultimately concluded that petitioner has raised a question of *law*.

finality issue is substantial, then the Court should grant review on that issue as well.[4]

1. The Seventh Circuit's finality ruling was correct. That is true as a general matter and on the particular facts of this case.

a. Under 8 U.S.C. 1101(a)(47)(A), an "order of deportation" is a determination "concluding that the alien is *deportable* or ordering deportation" (emphasis added). Thus, as the government recognizes (BIO 15), the "court of appeals correctly determined that the BIA had entered an 'order of removal' because it adopted the IJ's finding that petitioners were removable" (*i.e.*, that petitioners remained in the United States beyond the authorized time). Section 1101(a)(47)(B), in turn, provides that an order of deportation becomes "final" upon a determination by the BIA "affirming" the order of

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[4] The government appears to suggest that if the Court grants the Petition, it *must* also grant review on the finality issue because it would otherwise lack jurisdiction to decide the questions in the Petition. BIO at 12-16. There is nothing, however, preventing the Court from taking only certain questions, even where the remaining issues are jurisdictional and were fully decided by the court of appeals. *See, e.g., Tenet v. Doe*, 544 U.S. 1, 6 n.4 (noting that questions presented did not include jurisdictional issue decided by the court of appeals and district court). The two cases cited by the government (at 13) – *Nixon v. Fitzgerald*, 457 U.S. 731, 742-43 & n.23 (1982), and *United States v. Nixon*, 418 U.S. 683, 690 (1974) – are inapposite because both involved whether the Court could reach the *merits* without first determining jurisdiction. Here, petitioner is not raising a merits issue in this Court.

deportation (or when the time for appealing to the BIA elapses).

Thus, under the statute's plain terms, the order became "final" – and reviewable – once the BIA affirmed the IJ's determination that petitioner was removable. *See, e.g., Lolong v. Gonzales*, 484 F.3d 1173, 1178 (9th Cir. 2007) (en banc) (collecting cases). Accordingly, the Seventh Circuit correctly ruled that it had jurisdiction to review the order.

Moreover, even assuming that the statute would have allowed the court of appeals, for prudential reasons, to *decline* to exercise jurisdiction over the final order, the Seventh Circuit properly recognized that such concerns did not weigh in favor of delaying review for a routine background check. As the courts of appeals have recognized, delaying review to await the outcome of *ancillary* matters makes little sense. *See, e.g., Saldarriaga v. Gonzales*, 402 F.3d 461, 465 n.2 (4th Cir. 2005) (agreeing with "sister circuits" that a BIA order remanding the case for "subsidiary determinations" is "immediately appealable"). In any event, the court of appeals' decision to engage in review does not raise a *jurisdictional* problem under the statute.

Notwithstanding the statute, the government stresses that, under the regulations, the BIA cannot affirm or grant withholding in the absence of a background check. BIO 14 (discussing 8 C.F.R. 1003.1(d)(6)). But those regulations nowhere provide that an alien cannot appeal the BIA's adverse rulings to the court of appeals, but only that a grant of

withholding will not be affirmed until the background checks are completed.[5]

b. In any event, on the particular facts of this case, the government's position is insubstantial. First, the government does not dispute that the background check conducted after the remand was successfully completed approximately six months before the Seventh Circuit ultimately ruled in this case. Pet. 10 n.5. At bottom, then, the government is arguing that petitioner should have gone through the formality of filing yet another appeal to the BIA on the asylum issue, after which he could then have filed in the court of appeals. That elevates form over substance.

The government also ignores that, in this case, the IJ had already received the (successful) results of the background checks prior to granting withholding in the first instance. *See* Addendum A (excerpts from administrative record). The checks performed after

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[5] The government cites *Vakker v. Attorney General*, 519 F.3d 143 (3d Cir. 2008), petition for cert. pending, No. 08-5 (filed June 12, 2008) (BIO waived). Yet, in direct contrast to its position here, the government argued in *Vakker* that the alien *could* and should immediately seek judicial review of that part of the BIA decision decided adversely to him, even though the BIA remanded for background checks on withholding. Moreover, the statements in *Vakker* were dicta because the alien there *received* review.

the remand were thus the *second* background checks in the case.[6]

Petitioner was not required to delay seeking judicial review on his asylum claim until the completion of these updated background checks. Indeed, if aliens could be prevented from seeking review whenever the BIA remanded for additional background checks, they could be prevented from ever reaching the court of appeals.[7]

In short, although the Seventh Circuit did not hinge its decision on these facts, this Court can decide the issue as narrowly as it chooses. For present purposes, the critical point is that there is virtually no likelihood that on the facts of this case the removal order was not final.

2. Alternatively, the Court can re-write the questions in the Petition and add the government's Question 1 regarding finality. Indeed, the logic of

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[6] Unlike this case, there is no suggestion in the Third Circuit's *Vakker* decision that the alien in that case had already successfully completed the background checks at the initial immigration judge hearing.

[7] Under 8 C.F.R. 1003.1(d)(6)(i)(B), the BIA may remand to the IJ for updated checks and routinely does so because background checks require regular updating. But if the mere updating of background checks could foreclose judicial review, the alien could find himself in an endless loop: each time the alien appealed to the BIA, his case would be remanded for routine updating, and he might never be able to seek judicial review. Not surprisingly, therefore, the regulations nowhere provide that judicial review is foreclosed in cases where there is simply a remand for updated background checks.

the government's position does not support denying the Petition altogether. Rather, given the government's view that the finality question is "substantial" (BIO 16), and its acknowledgment that there is a split on the scope of Section 1252(a)(2)(D) (BIO 10), the government should presumably welcome this Court's resolution of both sets of questions. That is particularly so given that the government continues to press its finality arguments in the courts of appeals.

Moreover, if the Court grants review, it may decide the issues in any order it chooses. *Ruhrgas AG v. Marathon Oil Co.*, 526 U.S. 574, 584 (1999) (deciding personal jurisdiction before subject matter jurisdiction, emphasizing that the Court has flexibility in the "sequencing of jurisdictional issues").

CONCLUSION

The Court should grant review limited to the questions presented in the Petition, or alternatively, on the questions in the Petition and Respondent's Question 1.

Respectfully submitted,

LEE GELERNT
STEVEN R. SHAPIRO
American Civil Liberties Union Foundation
125 Broad Street, 18th Floor
New York, New York 10004
(212) 549-2500

LUCAS GUTTENTAG
JENNIFER CHANG NEWELL
American Civil Liberties Union Foundation
39 Drumm Street
San Francisco, California 94111
(415) 343- 0770

CHARLES ROTH
Counsel of Record
National Immigrant Justice Center
208 South LaSalle Street, Suite 1818
Chicago, IL 60604
(312) 660-1613

LOUIS S. CHRONOWSKI, JR.
STEPHEN J. BROWN
Seyfarth Shaw LLP
131 South Dearborn, Suite 2400
Chicago, IL 60603
(312) 460-5804

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