No. _____ 07-1363 APR 28 2008

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

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

The Attorney General may consider untimely asylum applications if the applicant demonstrates to his satisfaction either "the existence of changed circumstances which materially affect the applicant's eligibility for asylum or extraordinary circumstances relating to the delay in filing an application . . . ." *See* 8 U.S.C. 1158(a)(2)(D). The courts of appeals uniformly agree that review of the Attorney General's timeliness determinations is limited to "constitutional claims" and "questions of law" pursuant to 8 U.S.C. 1252(a)(2)(D). But they are deeply divided over the meaning of the term "questions of law" – a disagreement that not only determines whether hundreds of asylum appeals will be dismissed on jurisdictional grounds each year, but the federal courts' jurisdiction over numerous other immigration issues where jurisdiction is governed by Section 1252(a)(2)(D). The questions presented are:

1. Whether the Seventh Circuit erred in dismissing petitioner's claims regarding the statutory exceptions for late-filed asylum applications on the ground that 8 U.S.C. 1252(a)(2)(D) does not cover claims involving the "application of law to fact."

2. Whether the Constitution guarantees review in some court by some means over petitioner's claims regarding the asylum filing exceptions.

PARTIES TO THE PROCEEDING

Petitioners are Armando Jiménez Viracacha; Irma Yolanda Jiménez; Eliana Maritza Jiménez; Andres Felipe Jiménez; and Maria Paula Jiménez. Petitioners were also petitioners in the court of appeals, but were respondents before the Immigration Court and Board of Immigration Appeals.

Respondent, who was also the respondent in the court of appeals, is Michael B. Mukasey, Attorney General of the United States.

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PETITION FOR A WRIT OF CERTIORARI

Petitioners Armando Jiménez Viracacha, Irma Yolanda Jiménez, Eliana Maritza Jiménez, Andres Felipe Jiménez, and Maria Paula Jiménez respectfully petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the Seventh Circuit in this case.

OPINIONS BELOW

The opinion of the court of appeals (App. 1a)[1] is reported at 518 F.3d 511. There were no district court proceedings. The decision and order of the immigration judge (App. 11a), and the decision of the Board of Immigration Appeals (App. 28a), are unreported.

JURISDICTION

The judgment of the court of appeals was entered on March 3, 2008. The jurisdiction of this Court is invoked under

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Reprinted in an appendix to this petition (App. 33a) are pertinent portions of the Suspension of Habeas Corpus Clause of the Constitution, Art. I, § 9, Cl. 2; and 8 U.S.C. 1158(a)(2), 1158(a)(3), 1158(a)(2)(D), 1252(a)(2)(D).

STATEMENT

A. Statutory Background.

1. Congress enacted the Refugee Act of 1980 to bring this country into compliance with its obligations under the United Nations Convention

[1] "App." refers to the appendix attached to this petition.

Relating to the Status of Refugees. *See I.N.S. v. Cardoza-Fonseca*, 480 U.S. 421, 424 (1987). To qualify for asylum, applicants must show that they cannot return to their home countries because of persecution or a well-founded fear of persecution on account of race, religion, nationality, membership in a particular social group, or political opinion. *Id.* at 423; 8 U.S.C. 1158(b)(1)(A); 8 U.S.C. 1101(a)(42)(A). Where the applicant meets these statutory prerequisites, the Attorney General has discretion to grant asylum. *Cardoza-Fonseca*, 480 U.S. at 423.

In 1996, Congress enacted an asylum filing deadline. Under the new restriction, applicants may not apply for asylum unless they can demonstrate by clear and convincing evidence that they filed their application within one year after their arrival in the United States. 8 U.S.C. 1158(a)(2)(b).

In response to significant controversy over the proposed deadline, Congress also simultaneously enacted two statutory exceptions in the 1996 legislation. Under these exceptions, untimely asylum applications may be considered where the alien can demonstrate to "the satisfaction of the Attorney General the existence of either changed circumstances which materially affect the applicant's eligibility for asylum or extraordinary circumstances relating to the delay in filing an application within the [one-year] period specified." 8 U.S.C. 1158(a)(2)(D). *See also* 142 Cong. Rec. S11838, S11840 (Sept. 30, 1996) (statement of Sen. Hatch) (explaining the "changed" and "extraordinary" exceptions were added out of the "concern" that asylum remain "available for those with legitimate claims").

Congress recognized that there would often be legitimate reasons for an alien's failure to apply for asylum within one year of arrival in the United States and that these exceptions were thus critically important given the life and death stakes at issue. *See* 142 Cong. Rec. S11491 (Sept. 27, 1996) (statement of Sen. Hatch) (emphasizing that "the two exceptions" are intended to "provide adequate protections to those with legitimate claims of asylum"). Among the various examples cited by Congress were aliens who legitimately failed to apply within one year but subsequently obtained "more information about likely retribution [they] might face if [they] returned home," 142 Cong. Rec. S11838, S11840 (Sept. 30, 1996) (statement of Sen. Hatch), or who learned their "home government may have stepped up its persecution of people of [their] religious faith or political beliefs," 142 Cong. Rec. S11491 (Sept. 27, 1996) (statement of Sen. Hatch), or were delayed because there was a "temporary unavailability of professional assistance." 142 Cong. Rec. S4730, S4748-49 (May 6, 1996).

Congress made clear that these exceptions were to be given a liberal interpretation to ensure that no alien with a genuine claim for asylum would be turned away for failing to apply within the one-year deadline. 142 Cong. Rec. S11838, S11839-40 (statement of Sen. Hatch) (stating that the "important exceptions" are meant to "ensur[e] that those with legitimate claims of asylum are not returned to persecution, particularly for technical deficiencies"). *See also id.* (statement of Sen. Abraham) (explaining that the changed circumstances provision covers "a broad range of circumstances," and emphasizing the need for close

congressional "attention to how the provision is interpreted" to ensure that the exceptions "provide sufficient protection to aliens with bona fide claims of asylum").

2. Under the general judicial review procedures of the INA, 8 U.S.C. 1252 *et seq.*, asylum applicants may file a "petition for review" in the court of appeals. Judicial review of the one-year deadline or statutory exceptions for late-filed applications is barred under Section 1158(a)(3), except insofar as the applicant is raising "constitutional claims" or "questions of law" pursuant to Section 1252(a)(2)(D). That limitation on review arises from the interaction of two sets of jurisdictional amendments to the INA (in 1996 and 2005), and this Court's intervening decision in *INS v. St. Cyr*, 533 U.S. 289 (2001), which interpreted the 1996 amendments and triggered the passage of the 2005 amendments.

a. In 1996, as part of the comprehensive Illegal Immigration Reform and Immigrant Responsibility Act ("IIRIRA"), Congress passed a series of jurisdictional provisions that now permeate the INA. These provisions include limitations on review for aliens with certain types of criminal convictions (8 U.S.C. 1252(a)(2)(C)), for aliens raising certain types of discretionary claims (8 U.S.C. 1252(a)(2)(B)), and numerous other restrictions.

Of particular relevance here, as part of these 1996 amendments Congress also enacted a specific provision governing asylum filings, which bars "review" where asylum applicants challenge the determination that they failed to file within the one-year deadline or failed to satisfy one of the statutory

exceptions for late-filed applications. 8 U.S.C. 1158(a)(3).

In 2001, in *St. Cyr*, this Court addressed the 1996 jurisdictional amendments, and specifically the provision barring review for aliens removable on the basis of certain crimes (8 U.S.C. 1252(a)(2)(C)). The Court reached four principal conclusions relevant here.

First, the Court concluded that the 1996 jurisdictional restrictions generally barred direct review in the court of appeals by petition for review of claims regarding eligibility for discretionary relief. *St. Cyr*, 533 U.S. at 311-12; *see also Calcano-Martinez v. INS*, 533 U.S. 348 (2001) (companion case to *St. Cyr*). *Second*, the Court concluded that the preclusion of all review by any means over petitioners' claim would trigger "substantial constitutional questions" under the Suspension Clause. *Id.* at 300. *Third*, the Court held that the 1996 provision did not bar the alien's right to district court habeas corpus review under 28 U.S.C. 2241, relying heavily on the cannon of constitutional avoidance and the longstanding rule that habeas review may only be repealed by an explicit directive in the statute's text. *Id.* at 299, 312-13. *Finally*, the Court made clear that the Suspension Clause protected the substance of review, and not the form of review. Congress was thus permitted to provide a substitute for habeas corpus under 28 U.S.C. 2241 *provided* that it is "neither inadequate nor ineffective." *Id.* at 314, n.38. In particular, the Court stated that Congress could place review back into the court of appeals by petition for review as long as the petition for review procedure afforded a

level of review commensurate with that afforded in habeas. *See id; see also id.* at 305.

b. In 2005, Congress took up the Court's invitation in *St. Cyr* and enacted the REAL ID Act. REAL ID Act of 2005, Pub. L. No. 109-13, Div. B, 106(a)(1)(A)(iii), 119 Stat. 310. As noted in the Joint House-Senate Conference Report, the REAL ID Act had twin goals. The first was to eliminate habeas review over challenges to removal orders and channel such review back to the courts of appeals by petition for review. Doing so, in Congress' view, would eliminate the delays inherent in providing a double layer of review (habeas review followed by an appeal to the circuits). Congress also believed that placing all review of removal orders back into the courts of appeals would eliminate the perceived anomaly created by the 1996 amendments, in which certain aliens sought review directly in the courts of appeals, while other aliens – those subject to a jurisdictional bar in the courts of appeals – obtained review by commencing actions in district court. Accordingly, Congress enacted several provisions that expressly eliminated habeas review over removal orders. *See, e.g.*, 8 U.S.C. 1252(a)(5); 1252(b)(9).[2]

The second goal of the Real ID Act was to ensure that the *scope* of review of removal orders

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[2] Although the REAL ID Act generally repealed habeas review over challenges to final removal orders, it made clear that it did not eliminate habeas review over all immigration decisions, such as detention challenges. *See, e.g., Hernandez v. Gonzales*, 424 F.3d 42, 42 (1st Cir. 2005). *See also* H.R. Rep. No. 109-72, at 175 (2005) (Conf. Rep.) (noting that the Act "would not preclude habeas review over challenges to detention that are independent of challenges to removal orders").

provided in the courts of appeals reached those claims traditionally reviewable in habeas, thus ensuring an adequate substitute for habeas. Indeed, the Conference Report expressly cites the Court's *St. Cyr* decision and acknowledges on several occasions Congress' understanding that it cannot eliminate habeas review without providing a commensurate substitute. H.R. Rep. No. 109-72, 175 (2005) (Conf. Rep.).

To accomplish this second goal, Congress chose not to try and amend each of the individual 1996 jurisdiction-stripping provisions. Rather, Congress enacted a generally-applicable jurisdictional trump card – 8 U.S.C. 1252(a)(2)(D). As previously noted, Section 1252(a)(2)(D) provides the courts of appeals with jurisdiction over "constitutional claims" and "questions of law" and does so *notwithstanding* the existing jurisdictional bars in the INA (with exceptions not relevant here).

Thus, in light of Section 1252(a)(2)(D), there is now no dispute that the courts of appeals may review claims by petition for review that previously would have been barred under the 1996 jurisdiction-stripping provisions – including claims that an asylum applicant satisfied one of the statutory exceptions for late-filed applications. Rather, the dispute concerns the *scope* of review, and in particular, the types of claims that fall within the meaning of "questions of law" in Section 1252(a)(2)(D).

B. Petitioner's Administrative Proceedings.

1. The lead petitioner in this case, Armando Jiménez Viracacha, is a native of Colombia who came to the United States in 1998, on a six-month tourist

visa. His wife and three children, also natives of Colombia, arrived in this country two years later, in 2000.[3]

In 2002, petitioner affirmatively applied for asylum before an asylum officer. 8 U.S.C. 1158; 8 C.F.R. 1208.3, 1208.9. The application was denied based on untimeliness and petitioner was subsequently placed in removal proceedings, charged with being out of status. He conceded removability on the basis of his expired visa and applied for withholding of removal under 8 U.S.C. 1253(h) and also renewed his asylum application under 8 U.S.C. 1158.

Like asylum, withholding requires aliens to show that they will be persecuted on one of the specified grounds, but applicants must meet a higher burden of proof and establish that "it is more likely than not" that they will be subject to persecution. *See INS v. Aguirre-Aguirre*, 526 US 415, 419 (1999); 8 U.S.C. 1253(h). If the applicant meets this higher burden, the Attorney General *must* withhold deportation. *Cardoza-Fonseca*, 480 U.S. at 423; 8 U.S.C. 1253(h)(1). And, importantly, withholding has no filing deadline.

2. The immigration judge granted petitioner withholding of removal, finding that he would be persecuted on account of his political association. Specifically, the immigration judge noted that petitioner "was shot at by members of the FARC"

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[3] Although Mr. Jiménez's wife and children are parties to the proceedings in this Court, and were parties in the Court of Appeals, he was the lead petitioner. For simplicity, this petition refers to only one petitioner, Mr. Jiménez.

[Revolutionary Armed Forces of Colombia] and "received numerous threats from FARC members . . . because of his political activism." App. 22a. The IJ concluded that if petitioner "returned and continued to campaign against the FARC," his activism "would likely engender the same response of threats," and there existed a "realistic likelihood that he will be mistreated because of his political opinion." *Id.*

Given that petitioner satisfied the higher burden imposed on withholding applicants, he necessarily would have qualified for asylum had he been permitted to apply. The immigration judge, however, concluded that he was statutorily ineligible for asylum, finding that he had not filed his application within one year of his arrival in the United States and that he had not demonstrated sufficiently "changed" or "extraordinary" circumstances to justify the late filing. App. 20a.

Petitioner's principal contention was that he satisfied the changed circumstances exception because conditions had dramatically and materially changed in Colombia given the breakdown of the peace process between the FARC and the Colombian government. The immigration judge did not dispute that there had been "many significant developments in Colombia" between petitioner's arrival in the United States and 2002, when he filed his application. App. 19a. The immigration judge concluded, however, that the relevant question under the statute was whether those developments "changed the circumstances in such a way as to cause a new situation to exist, one that hadn't existed during the period in which respondent was obligated to file . . . ." *Id.* As to that question, the immigration judge found that although the civil war

in Colombia had "intensified" over the years, the "nature of the conflict" was "essentially" the same because it was still a conflict between the FARC and the Colombian government. App. 19a-20a. Consequently, the immigration judge concluded that petitioner did not satisfy the "changed" circumstances exception.

The immigration judge also rejected petitioner's claim that he satisfied the "extraordinary circumstances" exception. App. 18a-19a.[4]

3. The Board of Immigration appeals ("BIA" or "Board") affirmed the asylum ruling on the basis of the immigration judge's decision, finding that petitioner had not satisfied either of the statutory exceptions for missing the deadline. App. 29a ("we adopt and affirm the decision of the Immigration Judge"). The government did not appeal the grant of withholding.

C. The Seventh Circuit's Decision.

The court of appeals dismissed the petition for review for lack of jurisdiction. Accordingly, it did not reach the merits of whether petitioner had satisfied one of the statutory exceptions for late-filed asylum applications. App. 6a, 10a.[5]

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[4] As the court of appeals explained, asylum affords significant benefits that are not available to aliens who are granted withholding, including freedom of travel, legal permanent residence, and eventual citizenship. App. 5a. Thus, the grant of withholding did not afford petitioner and his family full relief.

[5] Before turning to the central jurisdictional question in the case, the court of appeals concluded that it was not deprived of jurisdiction simply because the Board had remanded the case to the IJ for a background check regarding the withholding grant.

The Seventh Circuit began by noting that 8 U.S.C. 1158(a)(3), enacted in 1996, prohibited review of the filing exceptions, but acknowledged that the REAL ID Act had now restored its jurisdiction over these determinations to review "constitutional claims" or "questions of law." App. 6a (citing 8 U.S.C. 1252(a)(2)(D)). The court nonetheless concluded that petitioner's claims were unreviewable under Section 1252(a)(2)(D).

The court of appeals recognized that petitioner was not seeking judicial review of historical, descriptive facts, such as when particular events occurred in Colombia. Rather, the court noted that petitioner was challenging the Board's determination that he failed to satisfy the statutory exceptions and was thus raising a claim involving the "application of law to fact." App. 6a. The court nonetheless concluded that it lacked jurisdiction, citing the Seventh Circuit's prior decision in *Cevilla v. Gonzales*, 446 F.3d 658 (7th Cir. 2006), *reh'g en banc denied*, which held in another context that Section 1252(a)(2)(D)'s reference to "questions of law" encompassed only "pure" legal issues.

Elaborating on *Cevilla*, the court of appeals stated that Section 1252(a)(2)(D)'s reference to "questions of law" encompassed only those "situations in which a case comes out one way if the Constitution or statute means one thing, and the other way if it means something different." App. 7a. Thus, because the court found that the Board had correctly "stated" the legal standards governing the statutory exceptions for late filings, it held that its

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App. 3a-5a; *see also* App. 3a (noting that background checks were successfully completed before the Seventh Circuit's decision on asylum).

jurisdiction was at an end and that it could not review whether the Board failed to correctly *apply* the legal standards to the facts of the case. App. 6a.

The court also concluded that the complete preclusion of review over petitioner's claims raised no constitutional concerns, relying on the fact that no court has ever questioned the constitutionality of Section 701(a)(2) of the Administrative Procedure Act, which bars review of decisions "committed to agency discretion by law." 5 U.S.C. 701(a)(2). The opinion did not mention this Court's *St. Cyr* decision, the Suspension Clause, or the significant body of immigration habeas law relied upon by the Court in *St. Cyr*.

The Seventh Circuit recognized that its holding was in direct conflict with the Ninth Circuit's position, *see* App. 7a-8a, but found the Ninth Circuit's reasoning unpersuasive. App. 9a (stating that the Ninth Circuit's decision "does not persuade us"). The court also stated that although the Second Circuit had taken a position similar to the Ninth Circuit's, that court had now retreated from its earlier view. App. 7a. As discussed below, however, the Seventh Circuit's characterization of the Second Circuit's position is incorrect, as was its statement that at least seven other circuits "read § 1252(a)(2)(D) as limited to pure questions of law." App. 9a.

REASONS FOR GRANTING THE WRIT

The jurisdictional issue presented by this case is of great practical importance for the adjudication of asylum claims and for the jurisdiction of the federal courts with regard to review of immigration decisions. Eleven circuits have addressed the issue

and are divided. That division is mature and entrenched, and will not benefit from further litigation in the circuits. Moreover, the jurisdictional provision at issue here – 8 U.S.C. 1252(a)(2)(D) – is one of general applicability and affects numerous immigration issues beyond asylum. Because the courts of appeals have taken widely divergent analytical approaches in assessing the scope of Section 1252(a)(2)(D), the number of issues affected, and the level of confusion, will likely only increase. Finally, the Seventh Circuit's decision is wrong and cannot be squared with Section 1252(a)(2)(D)'s text and legislative history or this Court's Suspension Clause analysis in *St. Cyr*.

I. THIS CASE INVOLVES AN ENTRENCHED CIRCUIT SPLIT ON A JURISDICTIONAL ISSUE OF BROAD SIGNIFICANCE.

A. The Courts Of Appeals Are Divided Over Their Jurisdiction To Review Determinations Regarding The Statutory Exceptions To The One-Year Asylum Filing Deadline.

Every circuit (other than the D.C. Circuit) has addressed the extent to which the courts of appeals have jurisdiction to review claims regarding the statutory exceptions to the one-year filing deadline. They are divided, both in result and analysis. The Ninth Circuit has held that it may review whether applicants have satisfied the statutory filing exceptions. The Second Circuit has taken a less categorical but similar position to the Ninth Circuit's. The other nine circuits to address the issue (including the Seventh Circuit) have disagreed about

the meaning of Section 1252(a)(2)(D) in significant respects and have restricted review of the one-year deadline to a narrow subset of legal claims based on divergent and conflicting grounds.

1. Ninth and Second Circuits. The Ninth Circuit, in *Ramadan v. Gonzales,* 479 F.3d 646 (per curiam), *reh'g en banc denied*, 504 F.3d 973 (9th Cir. 2007), has squarely held that the term "questions of law" in Section 1252(a)(2)(D) encompasses claims involving the "application of law to fact" and is not limited to pure questions of law. Accordingly, in the Ninth Circuit, asylum applicants may challenge whether, on the facts of their case, they satisfied the statutory exceptions for late-filed applications – *i.e.*, whether the "changed" or "extraordinary" circumstances exceptions were correctly *applied* to their case. 479 F.3d at 648.[6]

In reaching that conclusion, the Ninth Circuit emphasized that Section 1252(a)(2)(D) did not permit it to review pure historical, descriptive facts. But, as *Ramadan* explained, claims involving the application of law to fact do not require a reviewing court to disturb the historical facts found by the immigration judge or Board. *Ramadan*, 479 F.3d at 657. The Ninth Circuit also acknowledged that Section 1252(a)(2)(D) did not permit it to review pure discretionary claims, but rejected the government's

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[6] In *Ramadan* the Ninth Circuit originally dismissed the petitioner's claims for lack of jurisdiction on the ground that Section 1252(a)(2)(D) was limited to constitutional claims and questions of statutory construction. *See Ramadan v. Gonzales*, 427 F.3d 1218 (9th Cir. 2006). On rehearing, and after fuller briefing and argument, the court revised its decision, adopting its current position. *Ramadan v. Gonzales*, 479 F.3d 646 (per curiam) (revising prior decision), *reh'g en banc denied*, 504 F.3d 973 (9th Cir. 2007).

contention that the statutory standards governing late-filed asylum applications were discretionary. *Id.* at 654-56.

The Second Circuit has likewise squarely rejected the position that Section 1252(a)(2)(D) is limited to reviewing "pure" errors of law and has held that it may review claims involving the "application of law to fact." *Xiao Ji Chen v. U.S. Dep't of Justice*, 471 F.3d 315, 324-30 (2d Cir. 2006).[7] The Second Circuit has also acknowledged that it may not review pure factual findings or discretionary claims. *Id.* But, unlike the Ninth Circuit, the Second Circuit in *Chen* did not attempt to define the precise line between reviewable and unreviewable claims, and instead held that a reviewing court should carefully examine the particular type of claim raised in each case to determine whether the asylum applicant was raising a question of law within the meaning of Section 1252(a)(2)(D). *Chen*, 471 F.3d at 330. In adopting that case-by-case approach, the Second Circuit left no doubt, however, that it was not confining review under Section 1252(a)(2)(D) solely to those instances where the Board *misstated* the governing legal standard.[8]

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[7] Like the Ninth Circuit, the Second Circuit in *Chen* initially concluded that Section 1252(a)(2)(D) was limited to pure claims of statutory construction, *Xiao Ji Chen v. U.S. Dep't of Justice*, 434 F.3d 144 (2d Cir. 2006), but on rehearing adopted its current position. *See Xiao Ji Chen v. U.S. Dep't of Justice*, 471 F.3d 315, 324-30 (2d Cir. 2006) (revising prior decision).

[8] The court of appeals in this case incorrectly stated that the Second Circuit recently retreated from *Chen* in *Liu v. I.N.S.*, 508 F.3d 716 (2d Cir. 2007). But *Liu* specifically applied the analytical framework in *Chen*. *Id.* at 720-21. More fundamentally, the applicant in *Liu* did not contend that the

2. The Seventh Circuit. In direct contrast to the Ninth and Second Circuits, the Seventh Circuit has taken the position that Section 1252(a)(2)(D) applies only to "pure" questions of law and, on that basis, dismissed petitioner's claims, which it characterized as involving only the "application of law to fact." App. 6a. In particular, the Seventh Circuit stressed that, in its view, the Board and immigration judge had both "stated with precision the rules for exceptions to the one-year deadline," and that petitioner was thus arguing only that he satisfied the filing exceptions on the facts of his case. *Id.* Accordingly, the court held that there was no "legal mistake" for it to review within the meaning of Section 1252(a)(2)(D) and that petitioner's jurisdictional position "boils down to the contention that every error an agency can make is in the end one of law." App. 6a (internal quotation marks omitted).

3. The Other Eight Circuits. The other eight circuits that have addressed whether the filing exceptions are reviewable have also substantially limited review, but have done so on the basis of a variety of analytical approaches. The cases fall into three basic categories.

The *first* category consists of those courts that have concluded that Section 1252(a)(2)(D) *does* authorize review of the application of law to fact, but have nonetheless held that their jurisdiction to review the filing exceptions is limited. Some of these circuits have reasoned that the filing exceptions are *discretionary*, and thus unreviewable for that reason.

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statutory exceptions had been improperly applied to him, but argued only that he filed within the one-year deadline, a pure *factual* claim. *Id.* at 721.

The other circuits in this category have not provided a specific reason for concluding that the filing exceptions are largely unreviewable.

The *second* category consists of those courts that have not taken a position generally on the scope of Section 1252(a)(2)(D). These circuits, however, have concluded that the application of the asylum filing exceptions raises predominately unreviewable *factual* issues.

The *third* category consists of the two circuits that have agreed with the Seventh Circuit that Section 1252(a)(2)(D) is limited to "pure" questions of law. These two circuits have also concluded that the application of the filing exceptions to particular cases raises unreviewable *discretionary* and/or *factual* claims.

(a) The first category consists of the Third, Fourth, Eighth and Eleventh Circuits. All four circuits have concluded that Section 1252(a)(2)(D) is *not* limited to pure questions of law. Like the Second and Ninth Circuits, these courts have specifically held that Section 1252(a)(2)(D) encompasses claims involving the application of law to fact. *See Toussaint v. Attorney General*, 455 F.3d 409, 412 n.3 (3d Cir. 2006) (concluding, that "we have jurisdiction to review the BIA's application of law to the facts of this case"); *Jean v. Gonzales*, 435 F.3d 475, 482 (4th Cir. 2006) (concluding that a "determination involving the application of law to factual findings ... presents a reviewable decision" under the REAL ID Act); *Nguyen v. Mukasey*, --- F.3d --- , 2008 WL 1700199, at *1 (8th Cir. Apr. 14, 2008) (per curiam) (concluding that "whether the IJ properly applied the law to the facts" is a reviewable "legal question");

Jean-Pierre v. Attorney General, 500 F.3d 1315, 1322 (11th Cir. 2007) (concluding that it could review "the application of an undisputed fact pattern to a legal standard").[9]

The Third and Eighth Circuits have nonetheless concluded that asylum applicants may generally not challenge whether they satisfied the filing deadline exceptions because those exceptions are "discretionary" in nature. *See Sukwanputra v. Gonzales*, 434 F.3d 627, 635 (3d Cir. 2006) (concluding that the Attorney General's determination "entails an exercise of discretion" and is thus unreviewable); *Ignatova v. Gonzales*, 430 F.3d 1209, 1214 (8th Cir. 2005) (concluding that "the decision whether such [extraordinary] circumstances exist is a discretionary judgment"); *Jallow v. Gonzales*, 472 F.3d 569, 571 (8th Cir. 2007) (concluding that changed or extraordinary circumstances exception is "committed to the discretion of the Attorney General" and thus unreviewable).

The Fourth and Eleventh Circuits have also concluded that review of the filing exceptions is generally precluded, but, unlike the Third and Eighth Circuits, have not provided a specific basis for that conclusion. In particular, they have not stated whether they believe that the application of the filing exceptions to the facts of a given case is a predominately factual or discretionary issue. *See,*

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[9] *See also, e.g., Kamara v. Attorney General*, 420 F.3d 202, 211 (3d Cir. 2005) (holding that Section 1252(a)(2)(D) encompasses "issues of application of law to fact"); *Pinos-Gonzalez v. Mukasey*, 519 F.3d 436, 439 (8th Cir. 2008) (characterizing as a "legal question whether the IJ properly applied the law to the facts") (internal quotation marks and citation omitted).

e.g., *Niang v. Gonzales*, 492 F.3d 505, 510 n.5 (4th Cir. 2007) (finding, without explanation, no review of asylum filing exceptions); *Chacon-Botero v. Gonzales*, 427 F.3d 954, 956-57 (11th Cir. 2005) (concluding, without explanation, that the "timeliness of an asylum application is not a constitutional claim or question of law covered by the Real ID Act's changes"); *Romero v. Attorney General*, No. 07-11916, 2007 WL 4105363, at **2 (11th Cir. Nov. 20, 2007) (conclusorily rejecting contention that the Court may review claims where the applicant is not "questioning the BIA's findings of fact" but rather "challenging the legal conclusion that those facts do not constitute changed or extraordinary circumstances").

(b) The First and Fifth Circuits fall into the second category. Neither circuit has ruled specifically on the scope of Section 1252(a)(2)(D), and in particular, whether they believe the term "questions of law" encompasses the application of law to fact. *See, e.g.*, *Enwonwu v. Gonzales*, 438 F.3d 22, 33 (1st Cir. 2006) (noting that its precedent has left open the question whether the "application of legal principles to undisputed facts" constitutes a question of law).

These circuits have concluded, however, that the asylum filing exceptions are generally unreviewable, reasoning that claims involving the application of the filing exceptions to a particular applicant's case will generally raise only unreviewable *factual* claims. *Zhu v. Gonzales*, 493 F.3d 588, 596 & n.31 (5th Cir. 2007) (expressly disagreeing with the Ninth Circuit's conclusion in *Ramadan* that it may review "mixed" questions of law and fact, holding that it lacks "jurisdiction to

review timeliness determinations that are based on an assessment of the facts and circumstances of a particular case"); *Arif v. Mukasey*, 509 F.3d 677, 680 (5th Cir. 2007); *Mehilli v. Gonzales*, 433 F.3d 86, 93 (1st Cir. 2005) ("BIA findings as to timeliness and changed circumstances are usually factual determinations"); *Hana v. Gonzales*, 503 F.3d 39, 42-43 (1st Cir. 2007) (concluding that alien's claim that his depression and nervous breakdown amounted to "extraordinary circumstances" excusing his late filing did not constitute a question of law and was therefore unreviewable).

The First and Fifth Circuits thus appear to take the position that, for purposes of Section 1252(a)(2)(D), there is no significant difference between a case in which the applicant challenges a pure descriptive factual finding and a case where the applicant contends that, on the facts of his case, he satisfied one of the statutory exceptions to the filing deadline (as petitioner claims here). *Compare Ramadan*, 479 F.3d at 648 (defining the application of law to facts as those situations "in which the historical facts are admitted or established, the rule of law is undisputed, and the issue is whether the facts satisfy the statutory standard") (*quoting Pullman-Standard v. Swint*, 456 U.S. 273, 289 n.19 (1982)).

(c) Only the Sixth and Tenth Circuits have agreed with the Seventh Circuit that Section 1252(a)(2)(D) is limited to constitutional claims and "pure" questions of law. *See Almuhtaseb v. Gonzales*, 453 F.3d 743, 748 (6th Cir. 2006) (limiting review under Section 1252(a)(2)(D) to "constitutional claims or matters of statutory construction"); *Shkulaku-Purballori v. Mukasey*, 514 F.3d 499 (6th Cir. 2007)

(same); *Diallo v. Gonzales*, 447 F.3d 1274, 1282 (10th Cir. 2006) ("in addition to constitutional claims, the REAL ID Act grants us jurisdiction to review a 'narrow category of issues regarding statutory construction'") (citation omitted); *Lorenzo v. Mukasey*, 508 F.3d 1278, 1282 (10th Cir. 2007) (same).[10]

The Sixth and Tenth Circuits have further held that the asylum filing exceptions are *discretionary* and thus unreviewable for that reason as well. *See Taghzout v. Gonzales*, Nos. 05-3667, 05-4335, 2007 WL 738634, at **5 (6th Cir. Mar. 12, 2007) (concluding that whether a petitioner's facts amounted to extraordinary circumstances is a "discretionary ruling"); *Ferry v. Gonzales*, 457 F.3d 1117, 1130 (10th Cir. 2006) (argument that applicant's circumstances "qualified as either a

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[10] These circuits have cited the Conference Report's statement that the "purpose of [Section 1252(a)(2)(D)] . . . is to permit judicial review over those issues that were historically reviewable on habeas – constitutional and statutory-construction questions, not discretionary or factual questions." H.R. Rep. No. 109-72, 175 (2005). *See, e.g., Almuhtaseb*, 453 F.3d at 747-48 (discussing Conference Report); *Diallo*, 447 F.2d at 1282 (same). But that passage is not an exhaustive recitation of *all* legal claims that were reviewable in habeas. The Report is simply distinguishing legal claims from "factual" and "discretionary" claims. If the passage were read to be exhaustive, then the REAL ID Act would preclude review over *pure* questions of law regarding the proper interpretation of *regulations*. That would directly contradict this Court's precedent and render the statute unconstitutional. *See St. Cyr*, 533 U.S. at 307 (citing *United States ex rel. Accardi v. Shaughnessy*, 347 U.S. 260 (1954), for the proposition that habeas review encompasses claim involving proper application of regulations). *See Ramadan*, 479 F.3d at 653-54; *Chen*, 471 F.3d at 327-30.

changed or extraordinary circumstance . . . is a challenge to an exercise of discretion that remains outside our scope of review"). In addition, the Sixth Circuit has also suggested that the application of the filing exceptions to a given case raises unreviewable *factual* issues. *See Almuhtaseb*, 453 F.3d at 748.

4. The divergent views of the courts of appeals cannot be reconciled and there is little likelihood that the disagreements will resolve themselves through further lower court litigation. Each circuit has issued multiple jurisdictional decisions on this issue over the span of a three year period. Nor can there be any question about the importance of the issue given the stakes for asylum applicants and the hundreds of cases in which the issue arises each year.[11]

In short, the jurisdictional split over review of the one-year filing deadline exceptions for asylum applications is independently sufficient to warrant this Court's review. But, as discussed below, the disagreement over the scope of Section 1252(a)(2)(D) is not limited to the asylum context.

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[11] The importance of the issue is not lessened by the fact that withholding has no application deadline. As discussed above, *supra* note 4, and as the court of appeals recognized in this case, App. 5a, the differences between asylum and withholding are significant. Moreover, because withholding has a much higher burden, some aliens would qualify for asylum if permitted to apply but are not able to satisfy the more rigorous withholding standard. The fact that petitioner in this case was able to satisfy the withholding standard means that he would satisfy the asylum standard if allowed to apply.

B. The Conflicting Positions Taken By the Courts Of Appeals On The Scope Of Section 1252(a)(2)(D) Have Broad Implications Beyond Asylum.

Since the enactment of the REAL ID Act, a computerized Westlaw search indicates that the courts of appeals have issued approximately 900 decisions citing to 8 U.S.C. 1252(a)(2)(D). Of these, more than 400 have involved issues other than asylum.

The fact that Section 1252(a)(2)(D) is cited so frequently and broadly is not surprising. Congress enacted dozens of jurisdiction-stripping provisions in 1996. With exceptions immaterial here, each one of these jurisdictional provisions has now been trumped by Section 1252(a)(2)(D). Thus, every time a court of appeals encounters one of the 1996 jurisdiction-stripping provisions, it must determine whether its review has been restored by Section 1252(a)(2)(D), which in turn requires the court to determine the scope of Section 1252(a)(2)(D). Predictably, therefore, the courts of appeals have reached conflicting jurisdictional results in areas outside the asylum context.

For example, an alien's statutory eligibility for a "waiver" of removal generates significant immigration litigation, especially given the frequency with which Congress amends the waiver provisions. *See, e.g., St. Cyr*, 533 U.S. at 314-26 (resolving dispute over retroactive application of the 1996 amendments to the Section 212(c) waiver, now called "cancellation of removal"). Given the fact that the courts of appeals have taken divergent positions

on the scope of Section 1252(a)(2)(D), this waiver litigation has now generated jurisdictional conflicts.

The Seventh Circuit, for example, has held that it has limited review over claims relating to certain waivers in light of its position that Section 1252(a)(2)(D) encompasses only "pure" questions of law. Thus, in a case involving the legal eligibility standards for a cancellation of removal waiver, the Seventh Circuit found that Section 1252(a)(2)(D) did not encompass review "of the *application* of the 'continuous physical presence' standard to the facts of the case." *Cevilla v. Gonzales*, 446 F.3d 658, 661 (7th Cir. 2006) (emphasis in original), *reh'g en banc denied.*

The Fourth Circuit has taken the opposite position. In *Jean*, 435 F.3d at 482, for instance, the Fourth Circuit held that it could review whether the alien in that case had satisfied the statutory eligibility criteria for cancellation of removal, stating that a "determination involving the application of law to factual findings . . . presents a reviewable decision" under the REAL ID Act. *Cf. Pinos-Gonzalez v. Mukasey,* 519 F.3d 436, 439 (8th Cir. 2008) (finding jurisdiction to "review the nondiscretionary determinations underlying a denial of an application for cancellation of removal, such as the predicate legal question whether the IJ properly applied the law to the facts in determining an individual's eligibility.") (internal quotation marks and citation omitted).

Convention Against Torture ("CAT") claims provide a further example of issues impacted by the disagreement over the scope of Section 1252(a)(2)(D). The Seventh Circuit, for instance, has held that

whether a petitioner's evidence of torture satisfies the CAT "more likely than not" legal standard "does not depend upon any constitutional issue or question of law." *Hamid v. Gonzales*, 417 F.3d 642, 647 (7th Cir. 2005).

In contrast, the Third and Ninth Circuits – both of which have held that questions involving the application of law to fact constitute "questions of law" under Section 1252(a)(2)(D) – have exercised review over the application of the CAT "more likely than not" standard to undisputed facts. *See, e.g.*, *Arteaga v. Mukasey*, 511 F.3d 940, 948-49 (9th Cir. 2007) ("Weighing the evidence, the IJ and the BIA agreed that Arteaga did not meet his burden of showing that more likely than not he would be tortured at the hands of the El Salvadoran government if removed. The evidence in the record does not compel a contrary result."); *Toussaint v. Attorney General*, 455 F.3d 409 (3d Cir. 2006) (concluding, in withholding of removal and CAT case, that "we have jurisdiction to review the BIA's application of law to the facts of this case"); *DeAlmeida v. Attorney General*, No. 05-3453, 2007 WL 2050870, at **2, (3d Cir. June 18, 2007) (reviewing and affirming the BIA's conclusion that "undisputed facts in the record did not satisfy the standard for CAT relief," because petitioner had failed to establish a likelihood that he would be imprisoned or tortured); *Badewa v. Attorney General*, No. 06-2858, 2007 WL 3193841 (3d Cir. Oct. 30, 2007), at **4 (reviewing whether the BIA erred in finding that alien "failed to demonstrate that it is more likely than not that the Nigerian government will detain and torture him if he returns"). *See also, e.g.*, *Jean-Pierre v. Attorney General*, 500 F.3d 1315,

1322 (11th Cir. 2007) (concluding that the court had jurisdiction under Section 1252(a)(2)(D) to review noncitizen's CAT claim "in so far as he challenges the application of an undisputed fact pattern to a legal standard").[12]

Thus, the jurisdictional disagreement in the courts of appeals over the scope of Section 1252(a)(2)(D) has broad significance that goes well beyond the asylum context. And, as in the asylum context, the disagreement in these other areas is unlikely to resolve itself. This Court's review is warranted to resolve the disagreement.

II. THE SEVENTH CIRCUIT'S JURISDICTIONAL HOLDING IS INCORRECT.

The court of appeals' view that Section 1252(a)(2)(D) encompasses only "pure" questions of law is incorrect as a matter of statutory interpretation and constitutional mandate. In particular, the court of appeals erred in finding that it could not review whether the asylum filing exceptions were properly applied to petitioner's case.

1. The REAL ID Act was not intended to eliminate any review previously available in habeas. The Conference Report specifically states that the "purpose of [new Section 1252(a)(2)(D)] is to permit judicial review over those issues that were historically reviewable on habeas." H.R. Rep. No. 109-72, 175 (2005). Indeed, the Report expressly

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[12] These cases are consistent with pre-REAL ID Act decisions holding that habeas review encompassed claims involving the application of the CAT "more likely than not" standard to the facts of a given case. *See, e.g.*, *Wang v. Ashcroft*, 320 F.3d 130, 142-43 (2d Cir. 2003); *Ogbudimkpa v. Ashcroft*, 342 F.3d 207, 222 (3d Cir. 2003).

contrasts the REAL ID Act provisions with the 1996 jurisdiction-stripping amendments and emphasizes that the Act was not intended to "eliminate judicial review, but simply restores such review to its former settled forum prior to 1996." *Id.* *See Chen*, 471 F.3d at 326-27 ("We construe . . . the REAL ID Act . . . to encompass the same types of issues that courts traditionally exercised in habeas review"); *Ramadan*, 479 F.3d at 653-54 (same); *Kamara v. Attorney General*, 420 F.3d 202, 211, 213-15 (3d Cir. 2005) (finding that scope of review under REAL ID Act "mirrors" scope of habeas review).

Because habeas review has traditionally included claims involving both the proper "interpretation" of statutes *and* their "application" (*St. Cyr*, 533 U.S. at 302), Section 1252(a)(2)(D) must be construed to encompass the application of law to fact. *See Ramadan*, 479 F.3d at 652-54 (relying on legislative history and traditional habeas law to conclude that "the phrase 'questions of law' as it is used in . . . the Real ID Act includes review of the application of statutes and regulations to undisputed historical facts"); *Chen*, 471 F.3d at 326-27 (finding that the "application" of statutes and regulations was traditionally reviewable in habeas); *Kamara*, 420 F.3d at 213-15 (3d Cir. 2005) (same).

Given the Suspension Clause and Congress' clear intent to preserve the scope of habeas review, there was no basis for the court of appeals to narrowly construe the reference to "questions of law" in Section 1252(a)(2)(D) to exclude claims involving the application of law to fact. *See St. Cyr*, 533 U.S. at 299-300 (finding it "fairly possible" to construe the 1996 jurisdictional provisions to provide review over the alien's retroactivity claim, emphasizing that this

interpretation avoided the "serious" Suspension Clause issues that would have been triggered by precluding all review over a claim that was traditionally cognizable in habeas); *Ramadan*, 479 F.3d at 652-54 (construing Section 1252(a)(2)(D) to cover claims involving the application of law to fact, stating that "a narrower interpretation would pose a serious Suspension Clause issue"); *Chen*, 471 F.3d at 326-27 (same); *see also* Gerald L. Neuman, *On the Adequacy of Direct Review After the REAL ID Act of 2005*, 51 N.Y.L. SCH. L. REV. 133, 139-42 (2006) (to avoid constitutional concerns, the REAL ID Act should be construed to preserve review over claims involving the "application" of legal standards).

In holding that Section 1252(a)(2)(D) applies only to pure questions of law, the Seventh Circuit failed to acknowledge this relevant legislative history, or cite to this Court's decision in *St. Cyr* or the voluminous body of immigration habeas law discussed in *St. Cyr*. In particular, the court of appeals failed to explain whether it believed that habeas review did not traditionally cover claims involving the application of law to fact, or alternatively, that it did not believe that the Real ID Act was intended to preserve review over the types of claims traditionally reviewable in habeas.[13]

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[13] The other circuits that have limited Section 1252(a)(2)(D) to pure questions of law – the Sixth and Tenth Circuits – have been even more cryptic in their analysis. In fact, those circuits relied heavily on the initial decisions issued by the Second Circuit in *Chen* and the Ninth Circuit in *Ramadan*, yet both of those courts, as noted, withdrew their initial decisions on rehearing. *See, e.g., Almuhtaseb*, 453 F.3d at 747-48 (relying on now-withdrawn decisions in *Ramadan* and *Chen*); *Ferry*, 457 F.3d at 1130 (relying on now-withdrawn decision in *Ramadan*).

2. The asylum filing exceptions are also not discretionary, as some courts of appeals have held. *See, e.g.*, *Ferry*, 457 F.3d 1117. The phrase "to the satisfaction" could not have been intended to signal that the Attorney General has unreviewable discretion because that would render those words redundant. Congress included the phrase "to the satisfaction" in other provisions where it also expressly stated that the "Attorney General has sole discretion." *See Ramadan*, 479 F.3d at 655-56 (citing as examples 8 U.S.C. 1182(h)(1)(A) and 8 U.S.C. 1182(a)(9)(B)(v)). Thus, the words "to the satisfaction of the Attorney General" were not intended to vest the Attorney General with unreviewable discretion over the "changed" or "extraordinary" circumstances determination, but rather, to provide an objective standard of proof.[14]

These circuits have declined to revise their own rulings in light of the amended decisions from the Second and Ninth Circuits.

In particular, these courts have relied upon the discussions in the now-withdrawn *Chen* and *Ramadan* decisions regarding the portion of Joint House-Senate Conference Report which noted that the qualifier "pure" was deleted from the final bill because it was viewed as "superfluous". *See, e.g.*, *Almuhtaseb*, 453 F.3d at 747-48 (citing *Chen*'s discussion of the Conference Report). But as the Second and Ninth Circuits subsequently held in their amended decisions, that deletion simply reinforced the Conference Report's observation that courts could review only the "legal elements" of "mixed questions of law and fact." H.R. Rep. No. 109-72, at 175 (2005); *Chen*, 471 F.3d at 325-26 (noting the Conference Report's explanation for the deletion of the word "pure" before "questions of law" but rejecting contention that Section 1252(a)(2)(D) does not encompass the application of law to fact); *Ramadan*, 479 F.3d at 653-54 (same).

[14] Indeed, the relevant regulations and the agency's own training manual show that the phrase designates an objective

Accordingly, the changed and extraordinary circumstances exceptions are not discretionary and may be reviewed under Section 1252(a)(2)(D).

* * * *

The court of appeals erred in holding that it could not review whether the asylum filing exceptions were properly applied to petitioner. Judicial scrutiny of an agency's *application* of a legal standard is critical for effective review of the legal standard itself, particularly in contexts where, as here, a substantive standard is given concrete meaning through case-by-case adjudication. Without such review, an agency could effectively eviscerate a statutory standard by consistently announcing the correct legal rule but de facto applying a standard that is more stringent than the one formally announced.

This case presents an ideal vehicle for resolving the deeply entrenched circuit split at issue here. The Seventh Circuit expressly decided this case on the basis of Section 1252(a)(2)(D). Thus this case will not only allow the Court to resolve the specific disagreement among the courts of appeals regarding their jurisdiction to review the asylum

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standard of proof. *See* Asylum Officer Basic Training Course - One-Year Filing Deadline (Nov. 30, 2001), App. 41a ("The standard of proof to establish changed or extraordinary circumstances is proof to *the satisfaction of the Attorney General.* This is a reasonableness test, i.e., it must be reasonable for the asylum officer, immigration judge, or BIA to conclude that a changed or extraordinary circumstance exists."). The controlling regulations also make clear that the words "to the satisfaction of the Attorney General" should be understood as an objective *standard of proof. See* 8 C.F.R. 1208.4(a)(2); 1208.4(a)(5) (formerly at 208.4).

filing exceptions, but also to provide essential guidance on the broader question of the proper scope of Section 1252(a)(2)(D).

CONCLUSION

The petition for writ of certiorari should be granted.

Respectfully submitted,

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