No. _____

IN THE

Supreme Court of the United States

MACKENTOCH SAINTHA,

Petitioner,

—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 FOURTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

PROSKAUER ROSE LLP
JOHN R. INGRASSIA
1001 Pennsylvania Ave., N.W.
Suite 400 South
Washington, DC 20004
(202) 416-6800

LEE GELERNT
Counsel of Record
STEVEN R. SHAPIRO
AMERICAN CIVIL LIBERTIES UNION FOUNDATION
125 Broad Street, 18th Floor
New York, New York 10004
(212) 549-2500

LUCAS GUTTENTAG
JENNIFER CHANGSHA CHANG
AMERICAN CIVIL LIBERTIES UNION FOUNDATION
39 Drumm Street
San Francisco, California 94111
(415) 343-0770

QUESTIONS PRESENTED

Section 1252(a)(2)(D) of Title 8 gives the courts of appeals jurisdiction to review immigration removal orders where aliens raise "constitutional claims" or "questions of law." The Fourth Circuit in this case dismissed petitioner's torture claims for lack of jurisdiction on the ground that they raised only factual questions. The court did so notwithstanding that petitioner did not challenge the underlying descriptive facts of his case, but rather the *application* of the governing legal standards to those facts. The Fourth Circuit's decision adds to the already considerable division in the courts of appeals regarding the meaning of the term "questions of law" in Section 1252(a)(2)(D). In particular, the courts of appeals are deeply divided over whether "questions of law" encompasses not only "pure" legal questions but also the application of law to fact, and if so, how to properly distinguish between unreviewable factual claims and those involving the application of law to fact. The questions presented are:

1. Whether, in light of 8 U.S.C. 1252(a)(2)(D), the Fourth Circuit erred in dismissing petitioner's claims, where petitioner did not challenge the underlying facts found by the immigration judge and instead challenged only the *application* of the governing legal standards to those facts.

2. Whether, consistent with the Suspension Clause and this Court's decisions in *INS v. St. Cyr*, 533 U.S. 289 (2001), and *Boumediene v. Bush*, 128 S. Ct. 2229 (2008), Congress may repeal all judicial review by any means over a claim involving the application of law to fact.

PARTIES TO THE PROCEEDING

Petitioner is Mackentoch Saintha. Petitioner was also petitioner in the court of appeals, but was respondent in 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

Petitioner Mackentoch Saintha respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Fourth Circuit in this case.

OPINIONS BELOW

The opinion of the court of appeals (App. 1a)[1] is reported at 516 F.3d 243. There were no district court proceedings. The decision and order of the immigration judge (App. 40a), and the decision of the Board of Immigration Appeals (App. 26a), are unreported.

JURISDICTION

The judgment of the court of appeals was entered on February 14, 2008. App. 1a. Rehearing *en banc* was denied on April 14, 2008. App. 54a. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

CONSTITUTIONAL, STATUTORY AND REGULATORY PROVISIONS INVOLVED

Reprinted in an appendix to this petition (App. 51a) are pertinent portions of the Suspension of Habeas Corpus Clause of the Constitution, Art. I, 9, Cl. 2; 8 U.S.C. 1252(a)(2)(C), 1252(a)(2)(D); and 8 C.F.R. 208.18(a)(1), 208.18(a)(7).

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

STATEMENT

Petitioner alleges that he may not be deported to Haiti because he will be tortured by his family's political enemies and the Haitian government will acquiesce in that torture. The immigration judge ("IJ") agreed, but the Board of Immigration Appeals ("Board" or "BIA") reversed, concluding that although petitioner would likely be tortured, he had not satisfied the regulatory "acquiescence" requirement. The Fourth Circuit declined to review the Board's acquiescence ruling and dismissed for lack of jurisdiction, holding that petitioner had not raised a question of law within the meaning of 8 U.S.C. 1252(a)(2)(D).

A. Statutory Background.

1. On April 18, 1988, the United States signed the United Nations Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment ("CAT"). Under CAT Article 3, States Parties to the Convention cannot "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."

To implement CAT, Congress passed The Foreign Affairs Reform and Restructuring Act of 1998 ("FARRA"). Section 2242(b) of FARRA gave the Attorney General authority to promulgate implementing regulations relating to CAT Article 3.

Under the regulations, aliens have the burden to establish that it is "more likely than not" they will be tortured if removed to a particular country. 8 C.F.R. 208.16(c)(2). The regulations define "torture" as:

> any act by which severe pain or suffering, whether physical or mental, is intentionally inflicted on a person for such purposes as obtaining from him or her or a third person information or a confession, punishing him or her for an act he or she or a third person has committed or is suspected of having committed, or intimidating or coercing him or her or a third person, or for any reason based on discrimination of any kind, when such pain or suffering is 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.

8 C.F.R. 208.18(a)(1) (emphasis added). The regulations further define the term acquiescence: a public official "acquiesces" to torture when, "prior to the activity constituting torture," the official is aware of "such activity and thereafter breach[es] his or her legal responsibility to intervene to prevent such activity." 8 C.F.R. 208.18(a)(7).

The BIA has interpreted the "acquiescence" regulation to require that officials "willfully accept" the act of torture. *See Matter of S-V-*, 22 I&N Dec. 1306, 1312 (BIA 2000). The courts of appeals,

however, have overwhelmingly rejected that interpretation and have adopted a "willful blindness" standard. *See, e.g.*, *Lopez-Soto v. Ashcroft*, 383 F.3d 228, 240-41 (4th Cir. 2004). Because this case arose in Virginia, the BIA was bound by Fourth Circuit precedent and thus purported to apply the "willful blindness" standard.

Finally, and importantly, CAT is a mandatory form of relief. There is no discretion to deny relief where the alien satisfies the legal requirements for CAT relief. 8 C.F.R. 208.16(c)(4); *Ogbudimkpa v. Ashcroft*, 342 F.3d 207, 212 (3d Cir. 2003).

2. Under the general judicial review procedures of the Immigration and Nationality Act ("INA"), 8 U.S.C. 1252 *et seq.*, applicants seeking protection from torture under CAT and FARRA may file a "petition for review" of their removal orders in the court of appeals. *See* 8 U.S.C. 1252(a)(1); *see also* 8 U.S.C. 1252(a)(4) (specifically providing for petition-for-review jurisdiction over CAT claims). However, if (as in this case) the applicant is removable on the basis of a criminal offense listed in 8 U.S.C. 1252(a)(2)(C), judicial review is barred, except insofar as the applicant is raising "constitutional claims" or "questions of law" pursuant to Section 1252(a)(2)(D). That limitation on review is the result of 1996 and 2005 amendments to the INA.

a. In 1996, Congress passed a series of jurisdictional provisions, including the limitation on review for aliens with certain types of criminal convictions. *See* 8 U.S.C. 1252(a)(2)(C). In 2001, in

INS v. St. Cyr, 533 U.S. 289 (2001), this Court addressed the provision barring review for aliens removable on the basis of criminal offenses and reached four principal conclusions relevant here.

First, the Court concluded that the 1996 jurisdictional restrictions generally barred direct review in the courts 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 the alien's claim would trigger "substantial constitutional questions" under the Suspension Clause. *St. Cyr*, 533 U.S. 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 canon 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 once again make the courts of appeals the primary forum for review as long as the petition for review procedure in the court of appeals afforded review

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

Thus, in light of the 1996 jurisdictional restrictions and this Court's decision in *St. Cyr*, aliens removable on the basis of criminal convictions listed in 8 U.S.C. 1252(a)(2)(C) were precluded from raising CAT claims in the courts of appeals by petition for review, but could raise those claims in a district court habeas action under 28 U.S.C. 2241. *See, e.g., Wang v. Ashcroft*, 320 F.3d 130, 142 (2d Cir. 2003).

Importantly, in these habeas CAT cases, courts concluded that the *scope* of review included both constitutional and non-constitutional legal claims, including the application of law to fact. *See, e.g., id.* (relying on *St. Cyr* and finding habeas review over CAT claim, explaining that petitioner "does not merely contest the immigration court's factual determinations – he challenges its application of the facts to FARRA and the regulations adopted pursuant to FARRA"); *Ogbudimkpa v. Ashcroft*, 342 F.3d 207, 222 (3d Cir. 2003) (finding habeas review of CAT claim, where petitioner "does not dispute the factual findings of the IJ" but "argues that the IJ wrongly applied the standard for relief set forth in FARRA and its implementing regulations to the facts of his case"); *Singh v. Ashcroft*, 351 F.3d 435, 442 (9th Cir. 2003) (holding that habeas jurisdiction was available over Singh's CAT claim "even if that claim does not raise a purely legal question of statutory interpretation") (internal quotation marks omitted).

b. In 2005, Congress enacted the REAL ID Act in response to *St. Cyr*. 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 dual objectives. H.R. Rep. No. 109-72 (2005). The first was to largely 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)(4); 1252(a)(5); 1252(b)(9). *See also* H.R. Rep. No. 109-72 at 175.

The second goal of the Real ID Act was to ensure that the *scope* of review of removal orders provided in the courts of appeals encompassed those claims traditionally reviewable in habeas, thus ensuring an adequate substitute for habeas. Indeed, the Conference Report expressly cites to *St. Cyr* and repeatedly acknowledges Congress' understanding that it cannot eliminate habeas review without

providing a commensurate substitute. H.R. Rep. No. 109-72 at 175.

To accomplish this second goal, Congress enacted a generally applicable jurisdictional provision – 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).[2]

Thus, in light of Section 1252(a)(2)(D), there is 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 CAT claims raised by aliens with criminal convictions. Rather, the disagreement among the courts of appeals concerns the *scope* of review, and in particular, the types of claims that fall within the term "questions of law" in Section 1252(a)(2)(D).

B. Petitioner's Administrative Proceedings.

1. The petitioner in this case, Mackentoch Saintha, is a 27-year-old native of Haiti. In 1994, at the age of 13, petitioner fled Haiti with his family to escape political violence due to his stepfather's

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[2] Although 8 U.S.C. 1252(a)(4) specifically provides that CAT claims may be reviewed in the courts of appeals, it does not define the *scope* of review. Thus, the courts of appeals must still look to Section 1252(a)(2)(D) for the proper scope of review for CAT claims.

activities as a member of a pro-Aristide political party that opposed the former Jean-Claude "Baby Doc" Duvalier regime. App. 5a n.3; 44a-45a. The United States admitted petitioner as a refugee pursuant to 8 U.S.C. 1157 and, one year later, he adjusted to lawful permanent resident status. App. 29a-30a.

Between 1998-2000, while petitioner was a teenager, he was convicted of several minor offenses (such as petty larceny and trespassing). Seeking to get his son back on track, his stepfather barred him from his parents' home. Petitioner, however, returned to his family's house with an unwelcome friend and his stepfather called the police to "teach him a lesson." J.A. 41-42.[3] Petitioner was charged and subsequently convicted under Virginia law of the robbery and larceny of his parents' home, for which he served approximately five years in prison. App. 4a.

2. In 2006, at the conclusion of petitioner's sentence, the government commenced removal proceedings against him based on the robbery of his parents' home. Petitioner conceded he was removable as an "aggravated felon" under 8 U.S.C. 1227(a)(2)(A)(iii), but requested deferral of removal under the CAT. *See* 8 C.F.R. 208.16(c); 208.18(a). In support of his request for CAT relief, petitioner argued that, as a criminal deportee from the United States, he would automatically be placed in prison

[3] "J.A." refers to the Joint Appendix in the Fourth Circuit.

upon his return to Haiti and that he would be especially vulnerable to torture inside Haiti's notorious prisons because of his family's well-known political ties. Petitioner further argued that his family's political ties would also place him at substantial risk of being tortured once he was released from prison.

On April 10, 2006, the immigration judge granted CAT relief, concluding that it was more likely than not that petitioner would be tortured in Haiti because of his stepfather's political associations. App. 47a-49a (finding "a probability that the respondent would be tortured upon return to Haiti by his stepfather's political opponents or individuals associated with such political opponents").[4]

Among other things, the IJ noted that when petitioner's stepfather returned briefly to Haiti in 2003, he was forced to go into hiding from his political opponents and ultimately had to flee within ten days of his arrival. The IJ further noted that the family's "political opponents" killed petitioner's 82-year-old grandmother by burning her alive, "apparently because they could not capture" the stepfather himself. App. 45a. The IJ similarly noted that one of petitioner's cousins in Haiti was killed around the same time as petitioner's grandmother

[4] Petitioner has lived with his stepfather since the age of four and, in Haiti, is considered to be part of his stepfather's family, thereby placing him at risk from his stepfather's political opponents. App. 44a; J.A. 221.

and that the family believes that this was also done by their political opponents. App. 45a.[5]

Finally, the IJ held that petitioner satisfied the "acquiescence" requirement for a CAT claim. App. 48a-49a. The IJ's conclusion that petitioner satisfied the legal standard for acquiescence was based, among other things, on the fact that, as "a criminal deportee, the government of Haiti would be well-aware of the respondent's return and most likely of his potential vulnerability as the child of a Haitian refugee residing in the United States." App. 48a. The IJ further found that the "current Haitian government is incredibly corrupt and makes virtually no effort to protect the human rights of its citizens regardless of political background," and, in particular, "the Haitian government makes little or no effort to protect the rights of criminal deportees returned from the United States." App. 48a. The IJ concluded that "[u]nder these circumstances" the Haitian government "would be aware of the potential torture of [petitioner] and would be 'willfully blind' to its occurrence." App. 48a.

3. On November 16, 2006, the BIA reversed. Notably, the BIA agreed with the IJ that petitioner would more likely than not be tortured if returned to Haiti. App. 35a ("[W]e conclude that it is . . . more

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[5] The record before the IJ contains evidence of other gruesome acts of political violence against political allies of the stepfather committed after petitioner's family left Haiti, including a woman who was hacked to death with a machete. *See* JA 40; App. 6a.

likely than not that [petitioner's] stepfather's enemies would seek to torture the [petitioner]."). Like the IJ, the BIA pointed to the brutal killing of petitioner's grandmother and the fact that petitioner's stepfather "was forced to go into hiding within 10 days of his arrival to avoid being attacked on account of his past political activities." App. 34a & n.3 (noting that when petitioner's stepfather "could not be located, his foes targeted [petitioner's] grandmother instead, burning her alive"). The BIA also noted record evidence on Haiti's "continued practice of jailing the government's political opponents," and "the past abuses suffered by [petitioner], as well as his other family members." App. 34a & n.3.

The BIA further agreed that the Haitian government would be aware of petitioner's return to Haiti. App. 35a ("[W]e find that there does exist a clear probability that both the Haitian government and [the stepfather's] enemies would have the ability to learn of the respondent's return."). The BIA found that petitioner's "risk of being identified by his stepfather's political enemies is further heightened due to the fact that the only way he can secure his release from prison is with the assistance of a family member, and the only family member still living in Haiti is one of [petitioner's stepfather's] sisters." App. 34a. *See also* App. 34a (noting record evidence that petitioner "is recognizable" and would require "assistance in settling back into Haitian society"). The BIA nonetheless denied petitioner's CAT claim on the ground that petitioner had failed to satisfy the

requirement that the Haitian government "acquiesce" in his likely torture. App. 36a-37a.

Critically, in reaching that conclusion, the BIA did not take issue with the IJ's underlying factual findings. Indeed, the BIA stated at the outset of its opinion that it found "no clear error in the Immigration Judge's findings of fact" and credited "the testimony of both the [petitioner] and his father." App. 29a n.1. Moreover, the BIA specifically acknowledged that "Haiti is rife with political violence," governmental corruption, and other abuses, but ruled that "these problems do not show that the Haitian government would likely remain willfully blind to the [petitioner's] risk of torture and therefore breach any legal responsibility that it may have to prevent it." App. 37a. *See also* App. 37a-38a ("Based upon the record before us, it seems just as likely that the [petitioner's] family would be able to manipulate the system in order to either expedite his release from prison or insure that he is not tortured.").

C. The Fourth Circuit's Decision.

The court of appeals dismissed petitioner's CAT claim for lack of jurisdiction, without reaching the merits of whether petitioner satisfied the acquiescence requirement under the regulations. According to the court of appeals, petitioner was raising only unreviewable "factual" claims, not

"questions of law" under Section 1252(a)(2)(D). App. 9a-17a.[6]

The Fourth Circuit began by noting that 8 U.S.C. 1252(a)(2)(C) prohibited review of final orders of removal against aliens (like petitioner) with aggravated felony convictions, but acknowledged that the REAL ID Act had restored its jurisdiction over these determinations to review "constitutional claims" and "questions of law" under Section 1252(a)(2)(D). App. 10a. The Fourth Circuit further noted that the courts of appeals were divided on whether the term "questions of law" was limited to pure legal claims or also encompassed claims involving the application of law to fact. App. 12a n.4. But the court concluded that, in this case, it need not resolve that question because it viewed petitioner's claims as purely factual. *See* App. 13a-15a. *But see id.* (failing to note the Fourth Circuit's prior decision in *Jean v. Gonzales*, 435 F.3d 475, 482 (4th Cir. 2006), holding that claims involving the "application of law to fact" are reviewable under Section 1252(a)(2)(D)). The court thus concluded that even if "questions of law" encompassed the application of law to fact, petitioner's challenge to the BIA's

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[6] Petitioner also argued that he was improperly denied adjustment of status and a Section 209(c) (8 U.S.C. 1159(c)) waiver of inadmissibility. The Fourth Circuit rejected that claim on the merits and petitioner is not pursuing it in this Court.

acquiescence ruling fell outside the scope of Section 1252(a)(2)(D). App. 14a-15a.

In reaching that conclusion, the court of appeals adopted a novel bright-line jurisdictional test. According to the Fourth Circuit, "the appropriate analytical framework" consisted of first deciding which standard of review it would use if the court had jurisdiction, and if the "substantial evidence" test were the proper standard of review, then the claim would be deemed unreviewable because the substantial evidence standard is reserved for factual claims. App. 13a-15a. Based on that analysis, the court concluded that petitioner raised only a factual claim: "Because we review determinations regarding governmental acquiescence for substantial evidence, and because we only apply that standard to factual determinations, the BIA's CAT determination here is properly characterized as factual, not legal, in nature." App. 14a-15a.

Finally, the court of appeals cited to the REAL ID Act's legislative history in support of its analytical approach. In particular, the court noted that the Joint House-Senate Conference Report stated that unreviewable factual claims under Section 1252(a)(2)(D) "include those questions that courts would review under the substantial evidence" standard. App. 13a (internal punctuation omitted).

On April 14, 2008, the Fourth Circuit denied rehearing *en banc*. App. 54a. This petition followed.

REASONS FOR GRANTING THE WRIT

Review is warranted because the courts of appeals are sharply divided over the scope of the term "questions of law" in 8 U.S.C. 1252(a)(2)(D). Moreover, the circuit split has broad practical significance because Section 1252(a)(2)(D) is at issue in hundreds of immigration cases each year, in a variety of contexts, including in CAT cases where the issues are of life and death importance. Indeed, since the enactment of the REAL ID Act, a Westlaw search indicates that the courts of appeals have issued approximately 1000 decisions citing to 8 U.S.C. 1252(a)(2)(D). Nor is it likely that the disagreement among the courts of appeals will resolve itself through further litigation given how intractable the division has proven. Finally, the Fourth Circuit's decision is wrong.

I. THIS CASE INVOLVES AN ENTRENCHED CIRCUIT SPLIT ON A JURISDICTIONAL ISSUE OF FAR-REACHING IMPORTANCE.

Petitioner in this case did not challenge the underlying facts found by the IJ (and accepted by the BIA), but rather whether those facts satisfied the governing legal standards. This Court has frequently referred to such a claim as one involving the "application" of law to fact. *Thompson v. Keohane*, 516 U.S. 99, 112 (1995).

The Court has stated that a pure fact – variously referred to as an "historical," "descriptive"

or "primary" fact – involves an inquiry into questions that can be determined without reference to the legal standards at issue. As the Court phrased it in *Thompson*, the underlying primary facts involve the "what happened" of a particular issue. 516 U.S. at 112. *See also 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). *See also Scott v. Harris*, 127 S. Ct. 1769, 1776 n.8 (2007).

As the Court has further explained, 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").

Notwithstanding this analytical framework, the courts of appeals have struggled in the immigration context to define whether particular claims are factual or legal for purposes of exercising jurisdiction under Section 1252(a)(2)(D). *Cf. Thompson*, 516 U.S. at 110-11 (noting that the line between law and fact is "sometimes slippery"); *Pullman-Standard*, 456 U.S. at 288 (characterizing the distinction between fact and law as "vexing").

A. The Courts Of Appeals Are Divided Over The Scope of Section 1252(a)(2)(D).

1. The courts of appeals have fallen into three basic categories. The *first* category is comprised of the Sixth, Seventh and Tenth Circuits. Each of those circuits has understood the term "questions of law" narrowly to encompass only what they perceive as "pure" questions of law. Accordingly, they have routinely dismissed claims that other circuits have reviewed. *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); *Jimenez Viracacha* v. *Mukasey*, 518 F.3d 511 (7th Cir. 2008), *pet. for certiorari filed*, No. 07-1363 (April 28, 2008) (holding that Section 1252(a)(2)(D) does not encompass claims involving the "application of law to fact"); *Cevilla v. Gonzales*, 446 F.3d 658, 661 (7th Cir.

2006), *reh'g en banc denied* (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).

The *second* category consists of two circuits (the First and Fifth) that have likewise severely limited the scope of "questions of law." But, unlike the Sixth, Seventh and Tenth Circuits, they have done so without categorically limiting "questions of law" to so-called "pure" questions of law. Instead, they have routinely found jurisdiction lacking on the ground that the particular claim in the case is, in their view, more factual than legal, and thus, outside the scope of Section 1252(a)(2)(D). *See, e.g., Zhu v. Gonzales*, 493 F.3d 588 (5th Cir. 2007); *Arif v. Mukasey*, 509 F.3d 677, 680 (5th Cir. 2007); *Hana v. Gonzales*, 503 F.3d 39, 42-43 (1st Cir. 2007); *cf. Mehilli v. Gonzales*, 433 F.3d 86, 93 (1st Cir. 2005).

The *third* category consists of five circuits (the Second, Third, Eighth, Ninth and Eleventh) which have explicitly held that "questions of law" in Section 1252(a)(2)(D) covers both "pure" questions of law as well as the "application of law to fact." These courts have further held that the "application of law to fact" should be understood to preclude review only of the type of claim denominated by this Court as a "primary," "descriptive" or "historical" fact. *Thompson*, 516 U.S. at 112.

Thus, these circuits have consistently reviewed claims that other circuits have deemed to fall outside the scope of Section 1252(a)(2)(D). *See, e.g.*, *Xiao Ji Chen v. U.S. Dep't of Justice*, 471 F.3d 315, 324-30 (2d Cir. 2006) (rejecting view that Section 1252(a)(2)(D) is limited to "pure" claims); *Toussaint v. Attorney General*, 455 F.3d 409, 412 n.3 (3d Cir. 2006) (concluding that under Section 1252(a)(2)(D) "we have jurisdiction to review the BIA's application of law to the facts of this case"); *Nguyen v. Mukasey*, 522 F.3d 853, 855 (8th Cir. 2008) (per curiam) (concluding that "whether the IJ properly applied the law to the facts" is a reviewable "legal question"); *Ramadan v. Gonzales,* 479 F.3d 646 (per curiam), *reh'g en banc denied*, 504 F.3d 973 (9th Cir. 2007) (finding jurisdiction to review claims involving the "application of law to fact" and rejecting view that Section 1252(a)(2)(D) is limited to "pure" questions of law); *Jean-Pierre v. U.S. 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" under Section 1252(a)(2)(D)).

The Fourth Circuit's ruling deepens this already entrenched division. Like the First and Fifth Circuits, the Fourth Circuit appears hesitant to pronounce categorically whether "questions of law" should be understood to cover only "pure" legal claims (as opposed to questions involving the "application of law to fact"). *Compare* App. 12a n.4 (decision in this case declining to make a categorical statement), *with Jean v. Gonzales*, 435 F.3d 475, 482

(4th Cir. 2006) (holding that a "determination involving the application of law to factual findings . . . presents a reviewable decision" under the REAL ID Act). But, whatever the label used to characterize the type of claim, the Fourth Circuit's ruling adds to the confusion over the types of claims that may be reviewed in cases where the alien does not purport to challenge the underlying primary facts. Thus, although the Fourth Circuit has not specifically adopted all of the reasoning of circuits like the Sixth, Seventh, and Tenth (*i.e.*, that Section 1252(a)(2)(D) is limited to legal claims perceived as "pure"), it has reached the same erroneous jurisdictional outcome.

2. This disagreement over the meaning of Section 1252(a)(2)(D) has significant practical consequences. Section 1252(a)(2)(D) affects countless areas of immigration, including eligibility for humanitarian waivers, asylum, and CAT. The division among the courts of appeals has thus had a substantial impact on immigration law since the enactment of the REAL ID Act in 2005.

In the CAT context, for example, some courts of appeals, like the Fourth Circuit in this case, have refused to review claims on the ground that they are perceived as too "factual," without examining the precise type of claim presented by the alien. The Seventh Circuit, for instance, has held broadly that whether an alien has satisfied 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, other circuits have more closely examined the precise type of claim advanced by the petitioner and have reviewed CAT claims where the alien has not challenged the underlying primary facts. In *Pierre v. Gonzales*, 502 F.3d 109, 121 (2d Cir. 2007), for example, the Second Circuit explained that factual findings involve such issues as "the prevailing conditions in Haiti" and whether the alien will have "access to medicine." The Second Circuit made clear that it could not review such determinations, but that it does "review, *de novo*, the agency's application of the definition of torture to its factual findings about what is likely to happen." *Id.* *See also Wang*, 320 F.3d at 142-43 (pre-REAL ID Act case) (noting "alien does not merely contest the immigration court's factual determinations – he challenges its application of the facts to FARRA and the regulations adopted pursuant to FARRA.").

Similarly, in *Toussaint v. Attorney General*, 455 F.3d 409, 412 n.3 (3d Cir. 2006), in exercising jurisdiction, the Third Circuit stated that the "question here involves not disputed facts but whether the facts, even when accepted as true, sufficiently demonstrate that it is more likely than not that [the alien] will be subject to persecution or torture upon removal to Haiti." *Id.* (concluding that the court had "jurisdiction to review the BIA's application of law to the facts of this case"). *See DeAlmeida v. Attorney General*, 240 Fed. Appx. 963, 965 (3d Cir. 2007) (unpublished) (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*, 252 Fed. Appx. 473, 478 (3d Cir. 2007) (unpublished) (reviewing whether the BIA erred in finding that the alien "failed to demonstrate that it is more likely than not that the Nigerian government will detain and torture him if he returns").

The Ninth and Eleventh Circuits have likewise carefully distinguished between the underlying historical facts and the application of the governing legal standards to those facts, and have accordingly reviewed "application" questions in the CAT context. *See, e.g., Arteaga v. Mukasey*, 511 F.3d 940, 949 (9th Cir. 2007) (exercising jurisdiction over alien's CAT claim, concluding that "the evidence in the record does not compel a contrary result" where "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"); *Singh*, 351 F.3d at 442 (pre-REAL ID Act case) (finding jurisdiction where alien "challenged the BIA's application of the Convention and FARRA to the facts of his case"); *Jean-Pierre v. Attorney General*, 500 F.3d 1315, 1322 (11th Cir. 2007) ("The necessary conclusion we draw from our precedent and from the language found in the REAL ID Act is that we have jurisdiction to review Jean-Pierre's claim in so far as he challenges the application of an undisputed fact pattern to a legal standard.").

In the asylum context, the courts of appeals have also sharply disagreed over their jurisdiction. In particular, the circuits are squarely in conflict over their jurisdiction to review whether aliens have satisfied one of the statutory exceptions for late-filed asylum applications. In the Ninth Circuit, such claims can be reviewed under Section 1252(a)(2)(D). *See Ramadan*, 479 F.3d at 657 ("[T]he factual basis of Ramadan's petition is undisputed; we only review whether the IJ appropriately determined that the facts did not constitute 'changed circumstances' as defined by immigration law."). *See also Fakhry v. Mukasey*, 524 F.3d 1057 (9th Cir. 2008).

In other circuits, however, the courts of appeals routinely deny jurisdiction on the ground that the claim is too factual in nature or not a pure legal claim. In *Jimenez*, 518 F.3d 511, for example, the Seventh Circuit expressly disagreed with the Ninth Circuit's decision in *Ramadan* and held that Section 1252(a)(2)(D) encompasses only "pure" questions of law and, on that basis, dismissed the alien's claim that he had satisfied one of the statutory exceptions for late-filed asylum applications. The court stressed that it may not review the "application of law to fact," *i.e.*, whether the alien's facts satisfy the governing legal standards.

In *Nakimbugwe v. Gonzales*, 475 F.3d 281, 284 n.1 (5th Cir. 2007), the Fifth Circuit likewise refused to review whether the alien had satisfied a statutory exception for late-filed asylum applications,

reasoning that "many determinations of timeliness are based on an IJ's assessment of facts and circumstances that affected the applicant's filing, and even after the passage of the Real ID Act, such rulings are clearly unreviewable by this Court." *Id.* (declining to review alien's claim that extraordinary circumstances excused late filing); *see also Zhu v. Gonzales*, 493 F.3d 588, 596 n.31 (5th Cir. 2007) (following *Nakimbugw*). *See also Arif v. Mukasey*, 509 F.3d 677, 680 (5th Cir. 2007).

The Fifth Circuit (like other circuits) has thus declined to review claims when it perceives the question to be heavily fact-dependent, regardless of whether the underlying descriptive facts are in dispute. *See Nakimbugwe*, 475 F.3d at 596 n.31 (declining to review claim because it was too dependent on an "assessment of facts and circumstances"). Yet, as this Court has explained, questions involving the application of law to fact are necessarily fact-bound, and thus, will always involve an *assessment* of facts and circumstances. *See, e.g., Ornelas,* 517 U.S. at 697. Indeed, if such questions were not tied to the facts of the case, they would present something more akin to pure questions of law. But, as the Second, Third, Eighth, Ninth, and Eleventh Circuits have held, Section 1252(a)(2)(D) is not limited to claims perceived as presenting "pure" legal questions.

The First and Fourth Circuits have followed the Fifth Circuit and have likewise refused to review "application" claims in asylum cases where those

claims were perceived as too factual. *See Niang v. Gonzales*, 492 F.3d 505, 510 n.5 (4th Cir. 2007) (finding, without explanation, no review of asylum filing exceptions); *Mehilli v. Gonzales*, 433 F.3d 86, 93 (1st Cir. 2005) (stating that the "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 same division among the courts of appeals also exists in the context of humanitarian waivers. In *Cevilla*, 446 F.3d 658, a case involving the statutory eligibility standards for obtaining a waiver of removal, 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." *Id.* at 661 (emphasis in original). Accordingly, it dismissed the alien's claim, emphasizing that Section 1252(a)(2)(D) applies only to "pure" questions of law. *Id.*

In direct contrast, the Eighth Circuit has concluded that it has jurisdiction to "review . . . the predicate legal question whether the IJ properly applied the law to the facts in determining an individual's eligibility" for a waiver. *Pinos-Gonzalez v. Mukasey*, 519 F.3d 436, 439 (8th Cir. 2008) (internal quotation marks and citation omitted).

In short, the courts of appeals are divided and have been for a number of years. The circuit split impacts hundreds of cases each year in a wide array of contexts. Moreover, as discussed below, the confusion is likely to become even greater in light of two recent BIA decisions.

B. The BIA's Recent Precedent Decisions Will Increase The Confusion Over Section 1252(a)(2)(D)'s Scope.

Significantly, the Fourth Circuit decision is also inconsistent with two recent decisions from the BIA. In *Matter of V-K-*, 24 I & N Dec. 500 (BIA May 8, 2008), the BIA squarely held that aliens do *not* raise factual claims where they challenge whether the IJ properly applied the CAT legal standards to the facts of their case. The BIA explained that while it reviewed the underlying facts for clear error, it reviewed *de novo* mixed questions of law and fact regarding the application of the CAT standard. Indeed, the BIA stated that it would "appear essential to the performance of our appellate function . . . that we possess the authority to review de novo findings deemed by an Immigration Judge to satisfy an ultimate statutory standard." *Id.* at 502.

In a companion case, *Matter of A-S-B-*, 24 I & N Dec. 493 (BIA May 8, 2008), the BIA came to the same conclusion in the context of asylum. There, the BIA stated that "[t]he question whether these uncontested facts were sufficient to establish a well-founded fear of persecution . . . was a legal

determination that was not subject to the clearly erroneous standard of review." *Matter of A-S-B-*, 24 I & N Dec. at 497.

The Fourth Circuit's ruling that petitioner raised only a factual claim is squarely at odds with these two BIA decisions. Moreover, the Fourth Circuit's ruling not only is inconsistent with this BIA precedent, but it created an untenable whipsawing effect on petitioner. Although the IJ granted petitioner CAT relief, the BIA reversed while stating expressly that it was not disturbing the IJ's factual findings. App. 29a n.1. Yet, when petitioner sought review in the court of appeals, the claim was suddenly deemed to be factual.[7]

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[7] The BIA decision in this case did not hinge on the "more likely than not" prong of the CAT standard, but rather, whether the circumstances of petitioner's case amounted to acquiescence. In any event, if the government were to argue that the "more likely than not" determination is a factual determination, the BIA would have had to accept the IJ's findings in this case (and indeed, the BIA stated that it *was* adopting the IJ's factual findings). *See* 8 C.F.R. 1003.1(d)(i). And if it is a legal issue before the Board (as the BIA in *Matter of V-K-* stated), then it would be reviewable as a legal issue in the court of appeals under Section 1252(a)(2)(D). *Matter of V-K-* at 501 ("[W]e do not consider a prediction of the probability of future torture to be a ruling of 'fact.'"); *id.* ("we conclude that an Immigration Judge's prediction or finding regarding the likelihood that an alien will be tortured may be reviewed de novo").

In short, if the claim was legal before the BIA, it should have remained a legal claim before the court of appeals. And, of course, had the claim been factual before the BIA, petitioner would have prevailed because the BIA did not remotely suggest that any of the IJ's rulings were clearly erroneous.

* * *

The Fourth Circuit's decision in this case conflicts with the rulings and analysis of other circuits and with BIA precedent. 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. Indeed, each circuit has issued multiple jurisdictional decisions on this issue over a three-year period. The BIA's recent decisions in *Matter of V-K-* and *Matter of A-S-B-* have only created more confusion.

II. THE FOURTH CIRCUIT'S HOLDING IS INCORRECT.

The court of appeals' holding that petitioner did not raise a question of law within the meaning of Section 1252(a)(2)(D) is incorrect. Under this Court's precedents (as well as the BIA's recent case law), petitioner raised a question of law because he was not challenging the underlying factual determinations of the IJ, but rather the application of the governing legal standards to those facts. *See* Point 1, *infra*.

Nor is there any doubt that Congress intended to ensure review of the application of law to fact. The text of Section 1252(a)(2)(D), and the legislative history of the REAL ID Act, demonstrate that Congress did not intend to eliminate review over claims involving the application of legal standards to the underlying facts of a case. Moreover, under the Suspension Clause, there constitutionally must be review over the application of law to fact, as the Court in *Boumediene* made clear. *See* Point 2, *infra*.

1. As discussed above, this Court's cases have explained the difference between the underlying primary facts of a case and the application of the governing legal standards to those adjudicated or unchallenged facts. *See*, *e.g.*, *Ornelas*, 517 U.S. at 697. In this case, the Fourth Circuit erred by failing to distinguish between the primary underlying facts (which petitioner does not challenge) and the application of those facts to the legal standards governing CAT claims.

In particular, petitioner accepts the IJ's findings regarding the Haitian government's likely acquiescence (which the BIA also accepted, App. 29a-30a n.1): that the Haitian government would be "well-aware" of petitioner's return; that "torture exists in Haiti by both government forces and forces the government fails to control;" that "the Haitian government makes little or no effort to protect the rights of criminal deportees returned from the United States;" that members of the security forces violate prohibitions against torture; that there were

politically motivated killings and disappearances and other "surges of political violence;" that police "committed killings, disappearances and human rights violations;" that prisons in Haiti have insufficient facilities with deteriorated conditions; and finally, that petitioner would be "significantly more vulnerable than the 'generic criminal deportee'" due to his "connection to his politically prominent stepfather" and his status as the "child of a Haitian refugee residing in the United States." App. 46a-48a.

Petitioner's claim is that, on these adjudicated facts, he satisfied the acquiescence requirement. Indeed, if these facts do not satisfy the acquiescence ("willful blindness") standard, then the BIA will be able to effectively eviscerate the acquiescence standard by, *de facto*, forcing individuals to show government "consent." Yet the regulations expressly distinguish between "consent" and "acquiescence." *See* 8 C.F.R. 208.16(a)(7). In short, petitioner has raised a classic "application" claim.

Significantly, under the Fourth Circuit's analytical framework – which links the jurisdictional inquiry to the standard of review – the court never even examined the precise nature of petitioner's claim. Instead, the court of appeals purported to look to whether CAT acquiescence issues have *generally* been reviewed for substantial evidence. Yet whether such claims are properly deemed factual (and thus potentially subject to the substantial evidence test) turns on the *specific* type of error that the BIA is alleged to have made.

Notably, the Fourth Circuit's novel analytical approach of linking the Section 1252(a)(2)(D) jurisdictional inquiry to the proper standard of review has not been adopted by any other circuit. Moreover, the Fourth Circuit's assumption that claims involving the application of law to fact cannot be reviewed under the substantial evidence test is flatly inconsistent with the Ninth Circuit's position, which uses the substantial evidence test to review the application of law to fact. *See Ramadan* 479 F.3d at 657-58 (finding jurisdiction over "application" claim and stating that record did "not compel" a different result, which is the standard formulation for the substantial evidence test); *Apriyanto v. Gonzales*, 245 Fed. Appx. 646 (9th Cir. 2007) (unpublished) (stating that "[s]ubstantial evidence supports the IJ's denial of Apriyanto's asylum claim because Apriyanto failed to show changed or extraordinary circumstances to excuse the untimely filing of his asylum application"); *cf. Wang*, 320 F.3d at 142-43 (finding that alien raised a CAT claim involving "an application of facts to law" but reserving whether the proper standard of review was "substantial evidence" or "*de novo*" review).[8]

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[8] In determining that petitioner's claim was factual, the court in this case looked to three cryptic Fourth Circuit decisions that likewise failed to elaborate on the precise nature of the claim raised by the aliens in those cases. App. 14a-15a (citing *Dankam v. Gonzales*, 495 F.3d 113, 124 (4th Cir. 2007); *Haoua v. Gonzales*, 472 F.3d 227, 232-33 (4th Cir. 2007); *Dragenice v. Gonzales*, 470 F.3d 183, 185 (4th Cir. 2006)). In none of those cases did the alien raise a claim identical to the one petitioner raises here. *See Dankam*, 495 F.3d at 120-21 (challenging only factual credibility findings); *Haoua*, 472 F.3d at 233 (noting that alien waived

In sum, petitioner's claims are not factual. Rather, they raise "application of law" questions, which are reviewable, and constitutionally must be reviewable, under Section 1252(a)(2)(D).

2. 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 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 to restore "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 the scope of review under REAL ID Act "mirrors" scope of habeas review).[9]

CAT acquiescence challenge); *Dragenice*, 470 F.3d at 187 (reviewing challenge to whether alien was a U.S. national).

[9] Nor, in fact, is petitioner aware of the government taking the position that the scope of review under the REAL ID Act is narrower than that previously available in habeas (or constitutionally could be narrower).

Habeas review has traditionally included claims involving both the proper interpretation of statutes *and* their application. In *St. Cyr*, this Court reviewed the history of habeas law in the immigration area and found that there was review of both the "interpretation and application of statutes." 533 U.S. at 302. More recently, the Court stated emphatically 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." *Boumediene v. Bush*, 128 S.Ct. 2229, 2266 (2008) (emphasis added) (quoting *St. Cyr*, 533 U.S. at 302); *see also id.* at 2274 ("MCA § 7 thus effects an unconstitutional suspension of the writ.").

Further, in both *Boumediene* and *St. Cyr*, the Court stressed that habeas review has been at its most robust in cases involving executive detention (as opposed to the criminal context where there has been prior judicial review). *Boumediene*, 128 S. Ct. at 2266-69; *St. Cyr*, 533 U.S. at 301-03.

Following this Court's historical analysis, the courts of appeals have likewise noted that habeas review has always encompassed claims involving the application of law to fact. *See Ramadan*, 479 F.3d at 652-54 (relying on history of 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).[10]

Given the Suspension Clause and Congress' clear intent to preserve the scope of habeas review, there is no basis 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 avoid the "serious" Suspension Clause issues that would have been triggered by precluding

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[10] Some courts have cited the statement in the REAL ID Act's Conference Report 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.3d 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 even 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 claims involving the proper interpretation and application of regulations). *See Ramadan*, 479 F.3d at 653-54; *Chen*, 471 F.3d at 327-30.

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). Because petitioner does not challenge the primary facts found by the IJ, but rather, raises a claim involving the application of law to fact, the Fourth Circuit erred in finding his claims unreviewable under Section 1252(a)(2)(D).

* * * *

Judicial scrutiny of an agency's *application* of a legal standard is critical for effective review of the legal standard itself. *See Ornelas,* 517 U.S. at 696. Without such review, an agency could effectively change a legal standard by consistently announcing the correct legal rule but *de facto* applying a standard that is more stringent than the one formally announced. Indeed, that is precisely what happened in this case and is happening routinely in CAT cases, as the BIA summarily denies torture claims (even when the claim is granted by the immigration judge). The Court's review is warranted to provide guidance to the courts of appeals on the

scope of their jurisdiction under Section 1252(a)(2)(D). Not only is there an entrenched and deep circuit split, but the issue is one of broad practical importance.

This case, moreover, is a particularly good vehicle to address the scope of Section 1252(a)(2)(D). Unlike other cases, the BIA in this case stated expressly that it accepted all of the IJ's factual findings. Accordingly, this case squarely presents the Court with the jurisdictional issue on which the courts of appeals are divided – the extent to which the term "questions of law" covers challenges in which the alien accepts the underlying primary facts of the case and argues instead that, on those facts, he satisfied the governing legal standard.

CONCLUSION

The petition for writ of certiorari should be granted.

Respectfully submitted,

PROSKAUER ROSE LLP
JOHN R. INGRASSIA
1001 Pennsylvania Ave., N.W.
Suite 400 South
Washington, DC 20004
(202) 416-6800

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

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

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