No. _____

IN THE

Supreme Court of the United States

FRANCOISE ANATE GOMIS,

Petitioner,

—v.—

ERIC H. HOLDER, JR.,
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

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QUESTION PRESENTED

In the immigration field, Congress has enacted a series of jurisdictional provisions that generally permit the courts to review "questions of law" pursuant to 8 U.S.C. 1252(a)(2)(D), but bar review of most discretionary claims and certain factual findings. The courts of appeals sharply disagree, however, about how to differentiate "questions of law" from unreviewable factual and discretionary claims. The disagreement has led to jurisdictional conflicts in a number of substantive immigration areas. This case arises in the asylum context, where the conflict is especially entrenched and has proven outcome-determinative in hundreds of cases over the past few years. In particular, this case involves the extent to which the courts may review whether aliens have satisfied one of the statutory exceptions permitting the agency to consider a late-filed asylum application. The question presented is:

Did the Fourth Circuit err in holding that petitioner had not presented a question of law within the meaning of 8 U.S.C. 1252(a)(2)(D), where she challenged only the application of the statutory eligibility standards to the facts of her case, and not the underlying facts themselves or any ultimate discretionary authority the agency may possess to deny a late-filed asylum application.

PARTIES TO THE PROCEEDING

Petitioner is Francoise Anate Gomis. Petitioner was also petitioner in the court of appeals, but was respondent before the Immigration Court and Board of Immigration Appeals.

Respondent is the Attorney General of the United States, Eric H. Holder, Jr.

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PETITION FOR A WRIT OF CERTIORARI

Petitioner Francoise Anate Gomis 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 as *Gomis v. Holder*, 571 F.3d 353 (4th Cir. 2009). There were no district court proceedings. The decision and order of the immigration judge (App. 33a), and the decisions of the Board of Immigration Appeals (App. 28a, 49a), are unreported.

JURISDICTION

The judgment of the court of appeals was entered on July 6, 2009. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Reprinted in an appendix to this petition (App. 52a) 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), 1252(a)(2)(B), 1252(a)(2)(D).

INTRODUCTION

Petitioner Francoise Anate Gomis is a 31 year-old woman from Senegal who applied for asylum

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

because she fears that she will be forced – like her sister – to undergo Female Genital Mutilation if she is deported. As one court has described it, Female Genital Mutilation (FGM) is:

> a horrifically brutal procedure in which some or all of the exterior female genitalia is removed. It is usually performed without anesthesia and using unsterile and rudimentary instruments such as razor blades, knives, or broken glass. Because of its profound traumatic effects-including severe pain, shock, urine retention, hemorrhage and infection (potentially leading to death), sexual dysfunction, and infertility-FGM has been roundly condemned by the international community.

Agbor v. Gonzales, 487 F.3d 499, 501 n.2 (7th Cir. 2007) (internal quotation marks omitted).

The immigration judge in Ms. Gomis' case found her testimony credible. The immigration judge also noted the possibility that Ms. Gomis would be subjected to FGM if returned to Senegal. The judge nonetheless denied her asylum application on the ground that it was untimely. The judge recognized that untimely applications can be considered where the applicant demonstrates the existence of "changed" or "extraordinary" circumstances. The judge further acknowledged that there had been post-deadline events in Ms. Gomis' case (including the FGM of her sister). The immigration judge held,

however, that these events did not satisfy the statutory exceptions for late-filed applications – a ruling the Board of Immigration Appeals affirmed in a one-paragraph discussion.

On appeal, the Fourth Circuit did not reach the merits of whether Ms. Gomis satisfied the statutory exceptions for late-filed applications (much less the merits of her asylum claim). Instead, it held that it lacked jurisdiction to review whether Ms. Gomis satisfied one of the statutory exceptions on the facts of her case (*i.e.*, to apply the statutory standards to the historical facts of her case). App. 13a.

The Fourth Circuit's jurisdictional ruling deepens an already-entrenched circuit split on a recurring issue of immense practical importance in the asylum area. App. 12a-13a (acknowledging circuit split on whether the courts of appeals have jurisdiction to review the exceptions to the asylum filing deadline). Congress understood that there would be occasions when asylum seekers legitimately should be excused from the filing deadline and accordingly enacted statutory exceptions to provide the agency with authority to consider late-filed applications. But, in the absence of judicial review, the statutory exceptions have been given an improperly narrow reading by immigration judges and the BIA, in violation of congressional intent.

This case is an ideal vehicle to resolve the conflict. The Fourth Circuit squarely addressed the question, there is no impediment that would prevent

this Court from reaching the issue, and the jurisdictional ruling was outcome-determinative. This case also offers the Court an especially good opportunity to provide jurisdictional guidance beyond the specific issue presented by Ms. Gomis' case. *See Zhang v. Gonzales*, 457 F.3d 172, 180-81 (2d Cir. 2006) (Calabresi, J., *concurring*) (noting the need for this Court's guidance in immigration cases on how to differentiate unreviewable claims from those that involve the "applications of contoured statutory language to a particular set of facts").

STATEMENT

A. Statutory Background.

1. The Filing Deadline Provisions. 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. *I.N.S. v. Cardoza-Fonseca*, 480 U.S. 421, 423 (1987); 8 U.S.C. 1158(b)(1)(A); 8 U.S.C. 1101(a)(42)(A). The "well-founded fear" standard does not require asylum applicants to demonstrate that persecution is a certainty, or even that it is more likely than not to occur. *See, e.g.*, *Cardoza-Fonseca*, 480 U.S. at 449-50; *I.N.S. v. Abudu*, 485 U.S. 94, 99 n.3 (1988). Rather, an applicant may establish a well-founded fear even if she "only has a 10% chance" of being persecuted. *Cardoza-Fonseca*, 480 U.S. at 440.

In 1996, for the first time, Congress enacted a filing deadline, requiring asylum seekers to file within one year of arrival in the United States or within a reasonable period of losing lawful status in the United States. 8 U.S.C. 1158(a)(2)(B); 8 U.S.C. 1158(a)(2)(D); 8 C.F.R. 208.4(a)(5)(iv). But, in response to significant controversy over the proposed deadline, Congress also simultaneously enacted two statutory exceptions in the 1996 legislation, for *changed* or *extraordinary* circumstances:

> An application for asylum of an alien may be considered, notwithstanding subparagraphs (B) and (C), if the alien demonstrates to the satisfaction of the Attorney General 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 within the period specified in subparagraph (B).

8 U.S.C. 1158(a)(2)(D). *See* 142 Cong. Rec. S11838-01, S11840 (Sept. 30, 1996) (statement of Sen. Hatch) (explaining that 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 submit a timely application and that these exceptions were thus critically important given the life and death

stakes at issue. *See* 142 Cong. Rec. S11491-02, 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. S11838-01, 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. S11491-02, S11491 (Sept. 27, 1996) (statement of Sen. Hatch).

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 deadline. 142 Cong. Rec. S11838-01, 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").

The statutory exceptions have been given further content through regulations. The regulations define the terms "changed circumstances" and "extraordinary circumstances" and provide a non-exclusive list of circumstances that may excuse an untimely filing. 8 C.F.R. 208.4(a)(4), (5) (reprinted at App. 55a-59a).

2. The Jurisdictional Restrictions. The courts of appeals may review claims concerning the asylum filing deadlines, but only to the extent that petitioners are raising constitutional claims or questions of law. That limitation results from the interaction of a 1996 jurisdiction-*stripping* provision and a 2005 jurisdiction-*restoring* provision. *See* Illegal Immigration Reform and Immigrant Responsibility Act of 1996 ("IIRIRA"), Pub. L. No. 104-208, Div. C, § 604(a), 110 Stat. 3009-690; REAL ID Act of 2005, Pub. L. No. 109-13, Div. B, 106(a)(1)(A)(iii), 119 Stat. 310.

In 1996, Congress enacted a series of jurisdictional bars that cover a range of immigration decisions and claims. *See I.N.S. v. St. Cyr*, 533 U.S. 289, 311 (2001) (discussing bar applicable to removal orders based on criminal convictions); *Zadvydas v. Davis*, 533 U.S. 678, 688 (2001) (discussing bar on review of certain discretionary determinations).

The specific jurisdictional bar at issue here is located at 8 U.S.C. 1158(a)(3). It provides that the courts may not "review" claims relating to the asylum filing deadline. Under this bar, the courts of appeals are thus precluded from reviewing all claims

(factual, discretionary and legal) relating to whether the applicant satisfied one of the statutory exceptions for late-filed asylum applications.

In 2005, however, Congress partially restored review when it enacted 8 U.S.C. 1252(a)(2)(D). Section 1252(a)(2)(D) is a generally applicable provision that applies to all of the jurisdictional bars (with exceptions immaterial here) in the Immigration and Nationality Act (INA). It provides that the courts of appeals may exercise jurisdiction over "constitutional claims" and "questions of law" and may do so notwithstanding the INA's existing jurisdictional restrictions (including the bar on reviewing claims related to the asylum filing deadline).

The impetus for Section 1252(a)(2)(D) was this Court's 2001 decision in *St. Cyr*, 533 U.S. 289, which interpreted the 1996 jurisdictional bar applicable to aliens with criminal convictions. The Court held that although the bar eliminated the court of appeals' petition-for-review jurisdiction over St. Cyr's legal claim, it did not eliminate district court habeas review (because it did not specifically mention the repeal of habeas corpus pursuant to 28 U.S.C. 2241). *Id.* at 314. And because the bar did not eliminate habeas corpus as a jurisdictional safety valve, it did not trigger the "substantial constitutional questions" that would have resulted from the complete elimination of review in any court by any means over legal claims. *Id.* at 300. But the Court also made clear that Congress remained free to enact a

substitute for habeas *provided* it was "neither inadequate nor ineffective" in scope. *Id.* at 314 n.38 (citation and internal quotation marks omitted); *see also id.* at 305.

Congress took up the Court's invitation in 2005 and generally eliminated district court habeas review over removal orders, *see, e.g.*, 8 U.S.C. 1252(a)(5), but simultaneously enacted Section 1252(a)(2)(D) to restore the courts of appeals' petition-for-review jurisdiction over constitutional claims and questions of law. By enacting Section 1252(a)(2)(D), Congress thus avoided the constitutional problems that would have been raised by the absence of any forum to raise legal claims. *See* H.R. Rep. No. 109-72, 175 (2005) (Joint House-Senate Conf. Rep.) (expressly referencing *St. Cyr* and acknowledging on several occasions Congress' understanding that it cannot eliminate all review in any forum over legal claims).

In short, as the courts of appeals have uniformly recognized, the jurisdictional question presented in asylum filing cases is whether applicants are raising constitutional claims or questions of law. If they are raising such claims, then the courts of appeals have jurisdiction to review those claims, notwithstanding the jurisdictional bar set forth in 8 U.S.C. 1158(a)(3). The controversy has centered on what types of claims constitute "questions of law" for purposes of Section 1252(a)(2)(D).

More particularly, the courts of appeals uniformly agree that they may review constitutional claims and what they view as *pure* questions of law. Similarly, the courts of appeals uniformly agree that they may not review discretionary claims or pure factual claims – what this Court has called "basic," "primary" or "historical" facts. *Townsend v. Sain*, 372 U.S. 293, 309 n.6 (1963), *overruled on other grounds by Keeney v. Tamayo-Reyes*, 504 U.S. 1 (1992). The disagreement concerns whether the courts of appeals may review a claim, like Ms. Gomis', where the underlying facts are accepted and the petitioner is arguing only that, on those facts, she satisfied one of the statutory exceptions – what this Court has variously described as a "mixed" question of law and fact or one involving the "application" of law to fact. *See, e.g., Ornelas v. United States*, 517 U.S. 690, 696 (1996); *Thompson v. Keohane*, 516 U.S. 99, 112-13 (1995).

B. Petitioner's Administrative Proceedings.

1. Ms. Gomis came to the United States from Senegal on a visa in 2001, when she was 22 years old. App. 3a, 43a. She worked as a domestic servant, until her lawful status expired in 2003. App. 37a, 43a. In 2005, petitioner affirmatively applied for asylum before an asylum officer, 8 U.S.C. 1158; 8 C.F.R. 1208.3, 1208.9, arguing that she would be persecuted if returned to Senegal. App. 3a. The application was referred to an immigration judge and Ms. Gomis was placed in removal proceedings, charged with being out of status. *Id.*

Ms. Gomis conceded that she was removable based on her expired visa, but renewed her asylum application under 8 U.S.C. 1158. She also applied for other forms of relief based on her fear of returning to Senegal, including withholding of removal under 8 U.S.C. 1231(b)(3).

Ms. Gomis testified that she believed her family and the ethnic group to which they belong would force her to undergo Female Genital Mutilation. App. 38a. Among other things, she noted that both of her father's wives had been subjected to FGM, *id.*, and that her ethnic group believed in the practice of FGM. App. 36a, 38a. Most importantly, Ms. Gomis noted that, in 1999, her parents had arranged a marriage for her with a man in his sixties, and pulled her out of school so that she could undergo FGM and prepare for the marriage. App. 36a. In light of her parents' decision to subject her to FGM, Ms. Gomis went into hiding and, with the help of an uncle who lived in France, eventually obtained a passport and visa to come to the United States. App. 36a-37a.

While Ms. Gomis was in the United States, her uncle made significant efforts to change her parents' minds about forcing her to undergo FGM, traveling to Senegal to discuss the issue with them. App. 37a. Those efforts failed to persuade petitioner's parents to abandon the practice of FGM and, in February 2005, petitioner's parents forced her younger sister (then 15 years old) to undergo FGM against her will. App. 37a-38a; App 4a-5a.

According to medical records, the FGM of petitioner's sister led to "adverse health effects," including loss of blood, infection, and psychological trauma. App. 37a. Her brother went to the police to file a complaint on behalf of their sister, but when he did so, the police told him to return home. App 5a. In June 2005, shortly after learning of her sister's FGM, Ms. Gomis applied for asylum. App. 38a.

The immigration judge found Ms. Gomis "genuinely credible," App. 42a, and stated that she faced "perhaps what even amount[s] to a reasonable possibility" of being subjected to FGM. App. 45a. The immigration judge nonetheless held that petitioner was statutorily ineligible for asylum because her application was untimely. App. 43a-44a.

Ms. Gomis conceded that her application was untimely, but argued that she satisfied the statutory exceptions for late-filed applications. Among other things, she testified that she did not apply for asylum after her lawful status expired in 2003 because she believed her uncle would be able to persuade her parents to stop insisting that she undergo FGM, allowing her to return to Senegal. App. 37a-38a. When she learned that her parents had forced her sister to undergo FGM, however, "she knew that her parents would not change their minds" and she prepared and submitted her asylum application within a few months. App. 38a.

The immigration judge rejected Ms. Gomis' argument, notwithstanding that her sister had been subjected to FGM, the police's failure to respond to a

complaint made by Ms. Gomis' brother, and Senegal's failure to crack down significantly on the practice of FGM. According to the immigration judge, the circumcision of Ms. Gomis' sister merely "confirm[ed] the preexistent risk of persecution [petitioner] claims she had when she arrived" in the United States. App. 44a. The judge thus concluded that Ms. Gomis had not demonstrated changed or extraordinary circumstances. *Compare Fakhry v. Mukasey*, 524 F.3d 1057, 1063 (9th Cir. 2008) (reversing BIA and explaining that "there can be 'changed circumstances' . . . even if the alien always meant to apply for asylum and always feared persecution" of the same sort); *id.* at 1063-64 (stressing that an asylum seeker should not be penalized for applying only after "changed circumstances . . . made her application much stronger" since it would make little sense to interpret the statute to provide a disincentive for aliens to wait to apply until they were certain they would need asylum).

The immigration judge also denied Ms. Gomis' application for withholding of removal under 8 U.S.C. 1231(b)(3). App. 46a. Like asylum, withholding requires aliens to show that they will be persecuted on one of the five specified grounds, but there is no filing deadline and it is mandatory for those who qualify (unlike asylum, which can be denied as a matter of discretion even to those who meet the statutory requirements). *See* 8 U.S.C. 1231(b)(3); *I.N.S. v. Aguirre-Aguirre*, 526 U.S. 415, 419 (1999).

Critically, however, withholding applicants must meet a far higher burden of proof than asylum applicants – a "more likely than not" standard, rather than the "well-founded fear" standard. *See* 8 U.S.C. 1231(b)(3); *I.N.S. v. Abudu*, 485 U.S. 94, 99 n.3 (1988) (noting that "it is easier to prove well-founded fear of persecution than clear probability of persecution" required for withholding); *Cardoza-Fonseca*, 480 U.S. at 449-50 (stating that the well-founded fear standard permits a grant of asylum to "one who fails to satisfy the strict [withholding] standard").

Applying that heightened standard, the immigration judge concluded that Ms. Gomis had not demonstrated that her chance of being subjected to FGM was "more likely than not" and denied withholding. App. 46a. The judge recognized that Ms. Gomis' sister had been forced to undergo FGM and did not provide any particular reason why Ms. Gomis would be spared that fate. The judge nonetheless concluded – on the basis of general statistics about Senegal – that Ms. Gomis would probably not be subjected to FGM, despite her parents' intentions and the particular evidence about her ethnic group. App. 45a-46a (citing State Department Report stating that FGM is generally practiced "as a puberty initiation rite," "hardly practiced at all" in urban areas, and that "the government has actually prosecuted people for FGM"); *id.* (reasoning that because Ms. Gomis "lived in Dakar" and is "well past the age of puberty," she is less likely to be subjected to FGM). The immigration

judge thus found that she did not meet the strict burden of proof for withholding and denied that relief.

2. The BIA affirmed in a brief per curiam opinion on the basis of the immigration judge's decision. App. 28a-32a. The Board acknowledged that petitioner "may have a subjectively genuine fear of FGM if she is returned to Senegal," but found no error in the immigration judge's decision. App. 30a-31a. In particular, the Board agreed with the immigration judge that the FGM performed on petitioner's sister did not constitute changed circumstances to excuse untimely filing "inasmuch as the entire reason [petitioner] claims to have left Senegal in 2001 was to avoid the threat of FGM." App. 30a.

C. The Fourth Circuit's Decision.

The court of appeals dismissed Ms. Gomis' asylum claim for lack of jurisdiction. App. 10a-13a.[2]

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[2] In the Fourth Circuit, Ms. Gomis asserted generally that the court had jurisdiction, but did not brief the jurisdictional issues. The Fourth Circuit nonetheless addressed the jurisdictional issues. *See, e.g.*, *Verizon Communications, Inc. v. F.C.C.*, 535 U.S. 467, 530-31 (2002) (noting that "[a]ny issue pressed or passed upon below by a federal court is subject to this Court's broad discretion over the questions it chooses to take on certiorari") (internal quotation marks omitted); *United States v. Williams*, 504 U.S. 36, 41 (1992); *Virginia Bankshares, Inc. v. Sandberg*, 501 U.S. 1083, 1099 n.8 (1991).

The court also denied Ms. Gomis' withholding claim on the merits. App. 21a.

1. The Fourth Circuit noted that under 8 U.S.C. 1158(a)(3) it was barred from reviewing the asylum filing exceptions, but also recognized that 8 U.S.C. 1252(a)(2)(D) restored its jurisdiction to review constitutional claims and "questions of law." App. 11a-12a. But the court adopted the government's position that a claim challenging the application of the statutory exceptions to the historical facts of a case raised only unreviewable questions. App. 12a. The Court thus dismissed Ms. Gomis' asylum claim on the ground that it challenged only a "*discretionary determination* based on factual circumstances." App. 12a (emphasis by the Fourth Circuit).

Importantly, the Fourth Circuit did not suggest that Ms. Gomis was challenging the underlying historical facts found by the immigration judge or any ultimate discretionary authority the judge may have possessed to deny her application had she satisfied one of the threshold statutory exceptions for filing a late application. Rather, as the court of appeals recognized, she was challenging only whether, on the facts of her case, she satisfied the statutory criteria allowing the agency to consider a late-filed application – *i.*e., whether she

demonstrated changed or extraordinary circumstances. App 10a-11a.[3]

The court of appeals acknowledged that the Ninth Circuit had reached the opposite position and had held that whether an asylum seeker has satisfied one of the statutory filing exceptions is a "mixed question of law and fact" that is reviewable as a question of law under Section 1252(a)(2)(D). App. 13a. But the Fourth Circuit rejected the Ninth Circuit's position. Instead, it joined those courts that have held that, notwithstanding the 2005 enactment of 8 U.S.C. 1252(a)(2)(D), they "continue to lack jurisdiction over the determination whether the alien demonstrated changed or extraordinary circumstances that would excuse an untimely filing." App. 12a.

2. The court of appeals affirmed the denial of petitioner's withholding claim on the merits. App. 21a. The court found that the evidence did not compel the conclusion that Ms. Gomis would "more likely than not" be subjected to FGM if returned to

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[3] Thus, this case does not present the question of whether the agency has discretion to deny an application as untimely even where the applicant demonstrates the existence of changed or extraordinary circumstances. *See* 8 U.S.C. 1158(a)(2)(D) (stating that the agency "may" consider a late-filed application in cases where the applicant demonstrates changed or extraordinary circumstances). And because the immigration judge did not reach the merits of the asylum application, the case also does not involve the agency's discretion to deny an asylum application even where the alien established a well-founded fear of persecution.

Senegal. Like the immigration judge, the Fourth Circuit stated that FGM was less common in urban areas and among adult women. App. 16a-17a. The court of appeals also stated that Senegal had enacted laws criminalizing the practice of FGM. App. 17a. Accordingly, although the court acknowledged that "there is evidence in the record that tends to support Gomis' claim" that she will be subjected to FGM, it concluded that "[t]he weight of the record evidence, including her age, her education, and the decreased incidence of FGM in Senegal, specifically Dakar" supported the agency's finding. App 17a.

3. Judge Gregory concurred, without comment, in the court's jurisdictional asylum holding, but dissented from the conclusion that Ms. Gomis had not met her burden for withholding of removal. App. 22a. Judge Gregory argued that the immigration judge, the BIA and the court improperly credited general statements in a country report over specific, credible evidence about Ms. Gomis' individual risk of FGM. App. 22a-24a ("Like the IJ and the BIA before it, the majority incorrectly focuses on general statistics without applying the relevant information specific to Gomis' situation."). Judge Gregory noted that FGM was still practiced by Ms. Gomis' ethnic group and family, citing a recent letter from Ms. Gomis' father stating:

> Francoise, I will advise you [in] this last letter very seriously. . . . I am ashamed and humiliated because of what you did to me an [sic] the entire Gomis family.

> You know the gravity on [sic] what you've caused. I guarantee you that you'll not get [sic] from this situation. I think all means will be necessary to bring you back in Senegal, and I mean it. You'll be circumcised and sent into marriage before my death. I will never forgive you, if you don't return to Dakar for the circumcision.

App. 26a. Judge Gregory noted that the "majority seems to accept the IJ's and the BIA's assertion that Gomis' age will save her" despite the "many letters" from her family "indicating that they continued to insist that she be circumcised." App. 24a. In light of this evidence about Ms. Gomis' particular circumstances, Judge Gregory viewed the likelihood of Ms. Gomis being forced to undergo FGM as well over the 50 percent necessary for withholding, and more like "100" percent. App. 22a, 27a. He concluded that to "deny her withholding of removal and send her back to Senegal, to virtually certain circumcision, would be a great miscarriage of justice." App. 27a.

REASONS FOR GRANTING THE WRIT

The Court's review is warranted because of the jurisdictional issue's practical importance to asylum seekers; because eleven circuits have addressed the issue and are divided in result and analysis; and because the Fourth Circuit's decision was erroneous.

Moreover, this case presents the Court with an ideal vehicle to resolve the jurisdictional question presented here, and there is no obstacle that will prevent the Court from reaching the issue. This case also provides the Court with an especially good vehicle to offer guidance on the proper analytical framework for resolving the many other jurisdictional conflicts that currently exist in the immigration area.

I. THE FOURTH CIRCUIT ERRED ON A JURISDICTIONAL ISSUE THAT HAS DIVIDED THE COURTS OF APPEALS.

A. The Courts Of Appeals Are Divided Over Their Jurisdiction To Review The Statutory Exceptions To The Asylum Filing Deadline.

1. Ms. Gomis raises a claim involving the application of law to fact (*i.e.*, a mixed question of law and fact): whether, on the facts of her case, she satisfied one of the statutory exceptions to the filing deadline. With the exception of the D.C. Circuit, every circuit has addressed whether they may review that question. They are divided in a 1-9-1 split. The Ninth Circuit reviews whether asylum seekers have, on the facts of their case, satisfied the statutory exceptions to the deadline; nine circuits (including the Fourth) refuse to review such claims; and the Second Circuit has taken a middle approach.

In *Ramadan v. Gonzales,* 479 F.3d 646 (per curiam), *reh'g en banc denied*, 504 F.3d 973 (9th Cir.

2007), the Ninth Circuit squarely held that it may review whether asylum applicants have, on the facts of their case, satisfied one of the statutory exceptions excusing the filing deadline. And, since *Ramadan*, the Ninth Circuit has consistently reaffirmed and applied that jurisdictional ruling. *See, e.g.*, *Dhital v. Mukasey*, 532 F.3d 1044, 1049-50 (9th Cir. 2008) (per curiam); *Husyev v. Mukasey*, 528 F.3d 1172, 1178-81 (9th Cir. 2008); *Fakhry v. Mukasey*, 524 F.3d 1057, 1062-64 (9th Cir. 2008).

In direct contrast, the First, Third, Fourth, Fifth, Sixth, Seventh, Eighth, Tenth and Eleventh Circuits have held that they may not review such claims. *Hana v. Gonzales*, 503 F.3d 39, 42 (1st Cir. 2007); *Sukwanputra v. Gonzales*, 434 F.3d 627, 635 (3d Cir. 2006); App. 13a (decision in this case); *Zhu v. Gonzales*, 493 F.3d 588, 596 (5th Cir. 2007); *Almuhtaseb v. Gonzales*, 453 F.3d 743, 748 (6th Cir. 2006); *Vasile v. Gonzales*, 417 F.3d 766, 768 (7th Cir. 2005); *Ignatova v. Gonzales*, 430 F.3d 1209, 1214 (8th Cir. 2005); *Ferry v. Gonzales*, 457 F.3d 1117, 1130 (10th Cir. 2006); *Chacon-Botero v. U.S. Att'y Gen.*, 427 F.3d 954, 957 (11th Cir. 2005) (per curiam).

The Second Circuit has been less categorical. It has held that it may generally review the application of law to fact (mixed questions of law and fact) under 8 U.S.C. 1252(a)(2)(D). *Xiao Ji Chen v. U.S. Dep't of Justice*, 471 F.3d 315, 329 (2d Cir. 2006). But it has also stated that, in reviewing the asylum filing exceptions, the court must examine the "precise arguments" advanced by petitioners to

determine whether they have raised a reviewable question of law. *Chen*, 471 F.3d at 330; *Hongsheng Leng v. Mukasey*, 528 F.3d 135, 141 (2d Cir. 2008) (per curiam) ("looking to the 'precise arguments of the petition'" to determine whether petitioner's challenge to the agency's changed and extraordinary circumstances determination raises a reviewable question of law) (quoting *Chen*).

There is thus a direct and acknowledged conflict among the courts of appeals on an issue that has arisen in hundreds of cases over the last few years. In the Ninth Circuit, asylum seekers may obtain review of whether they satisfied one of the statutory exceptions for late-filed applications; in the Second Circuit review is a possibility, based on a case-by-case assessment; in the other nine circuits review is unavailable and asylum seekers are deported based solely on the administrative agency's determination that they failed to satisfy the statutory standards.

The split is also entrenched. As the above citations indicate, the lead case in every circuit (other than the Fourth) dates back at least two years. Moreover, each of these other ten circuits has issued multiple decisions over the years reaffirming its position; in fact, every circuit has issued *at least* one decision in the last six months adhering to its now-settled position.[4] At this point, the courts of

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[4] *See, e.g.*, *Usman v. Holder*, 566 F.3d 262, 268 (1st Cir. May 22, 2009); *Baig v. Holder*, No. 08-4498-ag, 2009 WL 1788612, at *1 (2d Cir. June 24, 2009) (unpublished summary order);

appeals are largely issuing short, unpublished decisions based on their lead decisions. There is thus no realistic prospect that the issue will be resolved through further litigation in the courts of appeals.

2. Moreover, the courts of appeals are divided not only in result, but also in analysis. *First*, the courts of appeals are deeply divided on the threshold question of whether, as a general matter, the term "questions of law" in Section 1252(a)(2)(D) encompasses the application of law to fact, or is instead limited to pure questions of law. Six circuits (the Second, Third, Fourth, Eighth, Ninth, and Eleventh) have held that the application of law to fact falls within the term "questions of law" and is reviewable under Section 1252(a)(2)(D). *See Ramadan*, 479 F.3d at 650; *Chen*, 471 F.3d at 324-30; *Toussaint v. Att'y Gen.*, 455 F.3d 409, 412 n.3 (3d Cir. 2006); *Jean v. Gonzales*, 435 F.3d 475, 482 (4th Cir. 2006); *Nguyen v. Mukasey*, 522 F.3d 853, 854-55

Sutiowijono v. Att'y Gen., No. 08-3188, 2009 WL 1459680, at *1 (3d Cir. May 27, 2009) (unpublished per curiam); App. 13a (decision in this case; July 9, 2009); *Singh v. Holder*, No. 08-60289, 2009 WL 1345946, at *1 (5th Cir. May 13, 2009) (unpublished per curiam); *Perez-Deleon v. Holder*, No. 08-3494, 2009 WL 1474717, at *4 (6th Cir. May 27, 2009) (unpublished); *Novary v. Holder*, 313 F. App'x 869, 872 (7th Cir. Mar. 3, 2009); *Lybesha v. Holder*, 569 F.3d 877, 881 (8th Cir. June 26, 2009); *Tuiwainikai v. Holder*, No. 05-73295, 2009 WL 1370541, at *1-2 (9th Cir. May 18, 2009) (unpublished mem.); *Sinaga v. Holder*, No. 08-9542, 2009 WL 806752, at *2 (10th Cir. Mar. 30, 2009) (unpublished); *Diego Pedro v. U.S. Att'y Gen.*, No. 08-15978, 2009 WL 1101373, at *2 (11th Cir. Apr. 24, 2009) (unpublished per curiam).

(8th Cir. 2008) (per curiam); *Jean-Pierre v. Att'y Gen.*, 500 F.3d 1315, 1322 (11th Cir. 2007).

In contrast, three circuits (the Sixth, Seventh, and Tenth) have taken a more narrow view of Section 1252(a)(2)(D) and limited the term "questions of law" to "pure" legal claims or narrow questions of "statutory construction." *See Khan v. Filip*, 554 F.3d 681, 687-88 (7th Cir. 2009) (stating that Section 1252(a)(2)(D) does not cover "mixed" questions); *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"); *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'" under Section 1252(a)(2)(D)) (citation omitted).[5]

Second, the courts of appeals are also sharply divided on how to identify a reviewable mixed question of law and fact. Thus, even among those circuits that agree that a mixed question is generally reviewable under Section 1252(a)(2)(D), there is sharp disagreement on whether particular claims present such reviewable mixed questions (as opposed to pure factual or discretionary claims).

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[5] The First and Fifth Circuits have not yet weighed in on whether the application of law to fact is generally reviewable under Section 1252(a)(2)(D).

Indeed, the eleven circuits to address the jurisdictional question at issue here have adopted no fewer than five different analytical positions: (1) the Ninth Circuit in *Ramadan*, 479 F.3d 646, has held that the type of claim presented by Ms. Gomis is reviewable as a mixed question of law and fact; (2) some courts (the First, Fifth, and Sixth) have held that it is an unreviewable *factual* claim;[6] (3) some courts (the Third and Tenth) have held that it is an unreviewable *discretionary* claim;[7] (4) some (the Fourth, Seventh, and Eighth) have concluded that the claim is unreviewable because it is *both* factual and discretionary;[8] and (5) the Second Circuit in *Chen,* 471 F.3d at 329, has stated that it will proceed on a case-by-case basis.[9]

In short, the courts of appeals have reached conflicting results on the basis of widely divergent

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[6] *See Zhu v. Gonzales*, 493 F.3d 588, 596 & n.31 (5th Cir. 2007); *Arif v. Mukasey*, 509 F.3d 677, 680 (5th Cir. 2007); *Mehilli v. Gonzales*, 433 F.3d 86, 93 (1st Cir. 2005); *Almuhtaseb v. Gonzales*, 453 F.3d 743, 748 (6th Cir. 2006).

[7] *See Sukwanputra v. Gonzales*, 434 F.3d 627, 635 (3d Cir. 2006); *Ferry v. Gonzales*, 457 F.3d 1117, 1130 (10th Cir. 2006).

[8] *See* App. 13a (decision in this case); *Niang v. Gonzales*, 492 F.3d 505, 510 n.5 (4th Cir. 2007); *Vasile v. Gonzales*, 417 F.3d 766, 768 (7th Cir. 2005); *Khan v. Filip*, 554 F.3d 681, 689 (7th Cir. 2009); *Lybesha v. Holder*, 569 F.3d 877, 881 (8th Cir. 2009); *Ignatova v. Gonzales*, 430 F.3d 1209, 1214 (8th Cir. 2005).

[9] The Eleventh Circuit has not provided any rationale. *Chacon-Botero v. U.S. Att'y Gen.*, 427 F.3d 954, 957 (11th Cir. 2005) (per curiam).

analytical approaches. Moreover, these analytical differences have now been entrenched for several years.

3. These same analytical differences have led to circuit splits in a variety of other substantive immigration areas. As in the asylum filing context, the courts are divided on how to differentiate reviewable mixed questions of law and fact from unreviewable factual and discretionary claims.

In *Hamid v. Gonzales*, for example, the Seventh Circuit held that it lacked jurisdiction to review whether, on the facts of the case, petitioner satisfied the legal standard for relief under the Covention Against Torture (CAT). 417 F.3d 642, 647 (7th Cir. 2005). *See also, e.g.*, *Lovan*, 2009 WL 2341822, at *7 (holding that application of the CAT standard to undisputed facts is "nothing more than a challenge to the agency's factual determinations"); *Singh v. U.S. Att'y Gen.*, 561 F.3d 1275, 1280 (11th Cir. 2009) ("we may not review the administrative fact findings of the IJ or the BIA as to . . . the likelihood that the alien will be tortured if returned to the country in question").

In contrast, the Third Circuit views such claims as reviewable mixed questions of law and fact under Section 1252(a)(2)(D), because they involve the agency's application of the CAT legal standard to undisputed facts. *See Toussaint v. Att'y Gen.*, 455 F.3d 409, 412 n.3 (3d Cir. 2006) ("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 she will be subject to persecution or torture upon removal to Haiti"); *Awuku v. Att'y Gen.*, No. 08-4778, 2009 WL 1741500 at *1-2 (3d Cir. June 22, 2009) (unpublished) (citing *Toussaint* and stating that the government "is wrong in its repeated assertion that '[t]his Court lacks jurisdiction over any challenge to the finding that [Awuku] failed to establish eligibility for CAT protection,'" rejecting the argument that such a claim involves only a "'factual determination'") (quoting the government's brief).

The courts of appeals are likewise divided in various contexts on how to distinguish between discretionary and non-discretionary claims. For example, the courts of appeals disagree on whether the "particularly serious crime" determination governing eligibility for withholding of removal is discretionary and therefore unreviewable. *Compare, e.g.*, *Matsuk v. INS*, 247 F.3d 999, 1002 (9th Cir. 2001) (holding that the "particularly serious crime" determination is discretionary and thus unreviewable), *and Lovan v. Holder*, --- F.3d ---, 2009 WL 2341822, at *6 (8th Cir. Jul. 31, 2009) (same), *with Alaka v. Att'y Gen.*, 456 F.3d 88, 100-02 (3d Cir. 2006) (holding that the "particularly serious crime" determination is not discretionary and can be reviewed), *and Nethagani v. Mukasey*, 532 F.3d 150, 154-55 (2d Cir. 2008) (same).

The courts are also divided on whether the phrase "extreme cruelty" in 8 U.S.C. 1229b(b)(2) is

discretionary and therefore unreviewable,[10] and on the nature of visa revocation determinations governed by 8 U.S.C. 1155.[11]

Thus, the conflicting results and analytical approaches taken by the courts of appeals in the asylum context have broad significance, providing an additional reason for this court to provide guidance and uniformity. Indeed, the jurisdictional issues that arise in the asylum filing context cut across a wide swath of immigration law.

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[10] *Compare, e.g.*, *Stepanovic v. Filip*, 554 F.3d 673, 680 (7th Cir. 2009) (holding that the phrase "extreme cruelty" is inherently discretionary and unreviewable because it requires "a judgment call"), *and Perales-Cumpean v. Gonzales*, 429 F.3d 977, 982 (10th Cir. 2005) (same), *with Hernandez v. Ashcroft*, 345 F.3d 824, 833-34 (9th Cir. 2003) (holding that extreme cruelty is not discretionary but instead involves "application of law to factual determinations").

[11] *Compare ANA Intern., Inc. v. Way*, 393 F.3d 886, 893-94 (9th Cir. 2004) (holding that visa revocations are not "purely subjective" because good and sufficient cause is a "meaningful standard"), *with Jilin Pharmaceutical USA, Inc. v. Gonzales*, 447 F.3d 196, 203-04 (3d Cir. 2006) (holding that because the statute states that the Attorney General "may" revoke a visa "at any time" the decision is discretionary), *and El-Khader v. Monica*, 366 F.3d 562, 567 (7th Cir. 2004) (finding that "the discretionary nature of the decision is apparent from the plain language of the statute").

B. The Fourth Circuit's Jurisdictional Ruling Is Incorrect.

The Fourth Circuit's view that Ms. Gomis' claim is discretionary and factual, rather than a reviewable mixed question of law and fact, is wrong and cannot be squared with 8 U.S.C. 1252(a)(2)(D) or this Court's decisions. The reference to "questions of law" in Section 1252(a)(2)(D) applies to both pure legal claims as well as the application of law to fact. Moreover, the application of the statutory filing exceptions to the underlying facts of a case raises a mixed question of law and fact, and not an unreviewable factual claim. Finally, the statutory filing exceptions are not discretionary.

1. Six of the nine circuits to address the issue have correctly held that the term "questions of law" in Section 1252(a)(2)(D) encompasses the application of law to established facts. *See supra* Section I.B.2. Indeed, the 2005 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). In fact, 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 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. Att'y Gen.*, 420 F.3d 202, 211 (3d Cir. 2005) (finding that scope of review under REAL ID Act "mirrors" scope of habeas review).

And, as this Court has noted, habeas review has traditionally included claims involving both the proper "interpretation" of statutes *and* their "application." *See St. Cyr*, 533 U.S. at 302; *Boumediene v. Bush,* 128 S.Ct. 2229, 2266 (2008) (quoting *St. Cyr* for the proposition that traditional habeas review in the executive detention context covered the "application" of the laws). Section 1252(a)(2)(D) must therefore 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 211 (same).

Given the constitutional concerns that would be triggered, and Congress' clear intent to preserve the traditional scope of habeas review, there is no basis for construing 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, 139-41 (2006) (to avoid constitutional concerns, the REAL ID Act should be construed to preserve review over claims involving the "application" of legal standards).

2. Furthermore, the application of the asylum filing exceptions to the underlying facts of a case raises a reviewable mixed question of law and fact, and not a factual claim. A mixed question of law and 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, or to put it another way, whether the rule of law as applied to the established facts is or is not violated.

Pullman-Standard v. Swint, 456 U.S. 273, 289 n.19 (1982). *See also Ornelas v. United States*, 517 U.S. 690, 696 (1996) (describing the determination of "whether [the] historical facts . . . amount to reasonable suspicion or to probable cause" as "a mixed question of law and fact"); *Thompson v. Keohane*, 516 U.S. 99, 112-13 (1995) ("application of the controlling legal standard to the historical facts . . . presents a 'mixed question of law and fact'"); *Townsend*, 372 U.S. at 309 n.6 (distinguishing issues of fact, which "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," from "mixed questions of fact and law, which require the application of a legal standard to the historical-fact determinations") (citation and internal quotation marks omitted).

Significantly, with the exception of the Ninth Circuit in *Ramadan,* 479 F.3d at 648, the courts of appeals have ignored this Court's decisions differentiating between historical facts and mixed questions of law and fact. *See, e.g., Zhu v. Gonzales*, 493 F.3d 588, 596 & n.31 (5th Cir. 2007); *Almuhtaseb v. Gonzales*, 453 F.3d 743, 748 (6th Cir. 2006).

In this case, the immigration judge made a determination that the facts (including Ms. Gomis' sister's forcible circumcision) did not constitute "changed circumstances" material to her application for asylum. The judge thus applied the statutory standards to the historical facts of the case. That is

a mixed question of law and fact. *Ornelas*, 517 U.S. at 696-97.

Review of the filing exceptions is essential to ensure that those provisions are interpreted in a manner consistent with congressional intent. As this Court has noted, 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. *See, e.g.*, *Thompson*, 516 U.S. at 115 (emphasizing "the law declaration aspect" of reviewing the application of law to fact); *Ornelas*, 517 U.S. at 697 (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").

3. Finally, the asylum filing exceptions are not discretionary. As the Ninth Circuit noted in *Ramadan,* 479 F.3d at 655-56, 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 in other contexts. Congress included the phrase "to the satisfaction" in other provisions of the

INA 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.

Indeed, the relevant regulations and the agency's own training manual show that the phrase designates an objective standard of proof. *See* Asylum Officer Basic Training Course – One-Year Filing Deadline (Mar. 23, 2009), *available at* http://www.uscis.gov/files/article/One-Year-Filing-Deadline.pdf ("The standard of proof to establish changed or extraordinary circumstances is proof to the satisfaction of the Attorney General. This is a lower standard of proof than the 'clear and convincing' standard that is required to establish that the applicant timely filed"). 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). Accordingly, the changed and extraordinary circumstances exceptions are not discretionary.

Moreover, the application of the statutory filing exceptions to the facts of a case is not the kind of determination that is inherently discretionary. *See Ramadan,* 479 F.3d at 656 (review of the

statutory filing exceptions does not call for a discretionary "subjective" determination). As this Court has noted, "if the word 'discretion' means anything in a statutory or administrative grant of power, it means that the recipient must exercise his authority according to his own understanding and conscience." *United States ex rel. Accardi v. Shaughnessy*, 347 U.S. 260, 266-67 (1954). *See also, e.g.*, *St. Cyr*, 533 U.S. at 307-08 (describing discretionary decisions as "a matter of grace") (quoting *Jay v. Boyd*, 351 U.S. 345, 353-54 (1956)); *cf. Franklin v. Massachusetts*, 505 U.S. 788, 817 (1992) (Stevens, J., concurring) (concluding that the Secretary of Commerce's conduct of the census is not committed to agency discretion within the meaning of the APA because "[t]here is no indication that Congress intended the Secretary's own mental processes, rather than other more objective factors, to provide the standard").

When the BIA determines that an alien has demonstrated changed or extraordinary circumstances it does not simply exercise its conscience or permit filing as an act of grace. Rather, it applies a statutory standard, fleshed out by agency regulations. The circuits that have held that the application of these standards is discretionary have done so in conclusory opinions that do not address the Ninth Circuit's analysis of the statutory structure or this Court's decisions regarding the nature of discretion. *See, e.g.*, *Sukwanputra*, 434 F.3d at 635; *Vasile*, 417 F.3d at

768; *Ignatova*, 430 F.3d at 1214; *Ferry*, 457 F.3d at 1130.

In sum, Section 1252(a)(2)(D) covers the application of law to fact, as six circuits have properly concluded. Furthermore, the Fourth Circuit erred in this case in finding that Ms. Gomis' claim was discretionary and factual, rather than one involving the application of law to fact.

II. THIS CASE PRESENTS AN IDEAL VEHICLE TO RESOLVE THE IMPORTANT JURISDICTIONAL ISSUE PRESENTED HERE.

According to a computerized search, there have been more than 1,000 cases citing to Section 1252(a)(2)(D) since its enactment in 2005. Hundreds of these cases involve the asylum filing deadlines. Given the overall number of decisions involving Section 1252(a)(2)(D), and the momentous stakes at issue in asylum cases, this Court's review is warranted to ensure uniformity.

Ms. Gomis' case squarely presents the issue on which the circuits are in conflict. As noted, the Fourth Circuit did not suggest that Ms. Gomis was challenging the underlying factual findings in her case or any ultimate discretionary authority the immigration judge may have possessed to deny the application had Ms. Gomis satisfied one of the statutory exceptions. Rather, the court of appeals noted that Ms. Gomis was challenging only the application of the statutory exceptions to the facts of

her case – whether on the facts of her case she "demonstrated changed or extraordinary circumstances that would excuse an untimely filing." App. 12a. Thus, as the Fourth Circuit acknowledged, Ms. Gomis' claim would have been reviewable in the Ninth Circuit. App. 13a.

Moreover the jurisdictional issue was outcome-determinative and the issue was squarely addressed by the Fourth Circuit. App. 12a. Nor is there any impediment that would prevent the Court from reaching the issue. And Ms. Gomis' case starkly illustrates the importance of the jurisdictional question, since she would almost assuredly have received asylum had she been permitted to apply. App. 17a (majority opinion) (acknowledging that there is evidence tending to support Ms. Gomis' claim that she will be subjected to FGM but it does not compel the conclusion that it is "more likely than not" to occur); *see Cardoza-Fonseca*, 480 U.S. at 440 (stating that an asylum applicant may establish a well-founded fear even if she "only has a 10% chance" of being persecuted).

In sum, there is an entrenched circuit split on the question of the courts of appeals' jurisdiction to review the statutory exceptions to the asylum filing deadline, and Ms. Gomis' case will permit the court to fully resolve it. This Court's review is thus warranted. An asylum applicant's opportunity to avoid persecution (including being forced to undergo something as horrific as FGM) should not depend on the circuit in which they happen to find themselves.

That is especially true where the issue dividing the circuits is one involving the jurisdiction of the federal courts.

CONCLUSION

The petition for writ of certiorari should be granted.

Respectfully submitted,

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August 2009

No. _____

IN THE

Supreme Court of the United States

FRANCOISE ANATE GOMIS,

Petitioner,

—v.—

ERIC H. HOLDER, JR.,
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

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QUESTION PRESENTED

In the immigration field, Congress has enacted a series of jurisdictional provisions that generally permit the courts to review "questions of law" pursuant to 8 U.S.C. 1252(a)(2)(D), but bar review of most discretionary claims and certain factual findings. The courts of appeals sharply disagree, however, about how to differentiate "questions of law" from unreviewable factual and discretionary claims. The disagreement has led to jurisdictional conflicts in a number of substantive immigration areas. This case arises in the asylum context, where the conflict is especially entrenched and has proven outcome-determinative in hundreds of cases over the past few years. In particular, this case involves the extent to which the courts may review whether aliens have satisfied one of the statutory exceptions permitting the agency to consider a late-filed asylum application. The question presented is:

Did the Fourth Circuit err in holding that petitioner had not presented a question of law within the meaning of 8 U.S.C. 1252(a)(2)(D), where she challenged only the application of the statutory eligibility standards to the facts of her case, and not the underlying facts themselves or any ultimate discretionary authority the agency may possess to deny a late-filed asylum application.

PARTIES TO THE PROCEEDING

Petitioner is Francoise Anate Gomis. Petitioner was also petitioner in the court of appeals, but was respondent before the Immigration Court and Board of Immigration Appeals.

Respondent is the Attorney General of the United States, Eric H. Holder, Jr.

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PETITION FOR A WRIT OF CERTIORARI

Petitioner Francoise Anate Gomis 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 as *Gomis v. Holder*, 571 F.3d 353 (4th Cir. 2009). There were no district court proceedings. The decision and order of the immigration judge (App. 33a), and the decisions of the Board of Immigration Appeals (App. 28a, 49a), are unreported.

JURISDICTION

The judgment of the court of appeals was entered on July 6, 2009. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Reprinted in an appendix to this petition (App. 52a) 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), 1252(a)(2)(B), 1252(a)(2)(D).

INTRODUCTION

Petitioner Francoise Anate Gomis is a 31 year-old woman from Senegal who applied for asylum

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

because she fears that she will be forced – like her sister – to undergo Female Genital Mutilation if she is deported. As one court has described it, Female Genital Mutilation (FGM) is:

> a horrifically brutal procedure in which some or all of the exterior female genitalia is removed. It is usually performed without anesthesia and using unsterile and rudimentary instruments such as razor blades, knives, or broken glass. Because of its profound traumatic effects-including severe pain, shock, urine retention, hemorrhage and infection (potentially leading to death), sexual dysfunction, and infertility-FGM has been roundly condemned by the international community.

Agbor v. Gonzales, 487 F.3d 499, 501 n.2 (7th Cir. 2007) (internal quotation marks omitted).

The immigration judge in Ms. Gomis' case found her testimony credible. The immigration judge also noted the possibility that Ms. Gomis would be subjected to FGM if returned to Senegal. The judge nonetheless denied her asylum application on the ground that it was untimely. The judge recognized that untimely applications can be considered where the applicant demonstrates the existence of "changed" or "extraordinary" circumstances. The judge further acknowledged that there had been post-deadline events in Ms. Gomis' case (including the FGM of her sister). The immigration judge held,

however, that these events did not satisfy the statutory exceptions for late-filed applications – a ruling the Board of Immigration Appeals affirmed in a one-paragraph discussion.

On appeal, the Fourth Circuit did not reach the merits of whether Ms. Gomis satisfied the statutory exceptions for late-filed applications (much less the merits of her asylum claim). Instead, it held that it lacked jurisdiction to review whether Ms. Gomis satisfied one of the statutory exceptions on the facts of her case (*i.e.*, to apply the statutory standards to the historical facts of her case). App. 13a.

The Fourth Circuit's jurisdictional ruling deepens an already-entrenched circuit split on a recurring issue of immense practical importance in the asylum area. App. 12a-13a (acknowledging circuit split on whether the courts of appeals have jurisdiction to review the exceptions to the asylum filing deadline). Congress understood that there would be occasions when asylum seekers legitimately should be excused from the filing deadline and accordingly enacted statutory exceptions to provide the agency with authority to consider late-filed applications. But, in the absence of judicial review, the statutory exceptions have been given an improperly narrow reading by immigration judges and the BIA, in violation of congressional intent.

This case is an ideal vehicle to resolve the conflict. The Fourth Circuit squarely addressed the question, there is no impediment that would prevent

this Court from reaching the issue, and the jurisdictional ruling was outcome-determinative. This case also offers the Court an especially good opportunity to provide jurisdictional guidance beyond the specific issue presented by Ms. Gomis' case. *See Zhang v. Gonzales*, 457 F.3d 172, 180-81 (2d Cir. 2006) (Calabresi, J., *concurring*) (noting the need for this Court's guidance in immigration cases on how to differentiate unreviewable claims from those that involve the "applications of contoured statutory language to a particular set of facts").

STATEMENT

A. Statutory Background.

1. The Filing Deadline Provisions. 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. *I.N.S. v. Cardoza-Fonseca*, 480 U.S. 421, 423 (1987); 8 U.S.C. 1158(b)(1)(A); 8 U.S.C. 1101(a)(42)(A). The "well-founded fear" standard does not require asylum applicants to demonstrate that persecution is a certainty, or even that it is more likely than not to occur. *See, e.g.*, *Cardoza-Fonseca*, 480 U.S. at 449-50; *I.N.S. v. Abudu*, 485 U.S. 94, 99 n.3 (1988). Rather, an applicant may establish a well-founded fear even if she "only has a 10% chance" of being persecuted. *Cardoza-Fonseca*, 480 U.S. at 440.

In 1996, for the first time, Congress enacted a filing deadline, requiring asylum seekers to file within one year of arrival in the United States or within a reasonable period of losing lawful status in the United States. 8 U.S.C. 1158(a)(2)(B); 8 U.S.C. 1158(a)(2)(D); 8 C.F.R. 208.4(a)(5)(iv). But, in response to significant controversy over the proposed deadline, Congress also simultaneously enacted two statutory exceptions in the 1996 legislation, for *changed* or *extraordinary* circumstances:

> An application for asylum of an alien may be considered, notwithstanding subparagraphs (B) and (C), if the alien demonstrates to the satisfaction of the Attorney General 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 within the period specified in subparagraph (B).

8 U.S.C. 1158(a)(2)(D). *See* 142 Cong. Rec. S11838-01, S11840 (Sept. 30, 1996) (statement of Sen. Hatch) (explaining that 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 submit a timely application and that these exceptions were thus critically important given the life and death

stakes at issue. *See* 142 Cong. Rec. S11491-02, 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. S11838-01, 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. S11491-02, S11491 (Sept. 27, 1996) (statement of Sen. Hatch).

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 deadline. 142 Cong. Rec. S11838-01, 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").

The statutory exceptions have been given further content through regulations. The regulations define the terms "changed circumstances" and "extraordinary circumstances" and provide a non-exclusive list of circumstances that may excuse an untimely filing. 8 C.F.R. 208.4(a)(4), (5) (reprinted at App. 55a-59a).

2. The Jurisdictional Restrictions. The courts of appeals may review claims concerning the asylum filing deadlines, but only to the extent that petitioners are raising constitutional claims or questions of law. That limitation results from the interaction of a 1996 jurisdiction-*stripping* provision and a 2005 jurisdiction-*restoring* provision. *See* Illegal Immigration Reform and Immigrant Responsibility Act of 1996 ("IIRIRA"), Pub. L. No. 104-208, Div. C, § 604(a), 110 Stat. 3009-690; REAL ID Act of 2005, Pub. L. No. 109-13, Div. B, 106(a)(1)(A)(iii), 119 Stat. 310.

In 1996, Congress enacted a series of jurisdictional bars that cover a range of immigration decisions and claims. *See I.N.S. v. St. Cyr*, 533 U.S. 289, 311 (2001) (discussing bar applicable to removal orders based on criminal convictions); *Zadvydas v. Davis*, 533 U.S. 678, 688 (2001) (discussing bar on review of certain discretionary determinations).

The specific jurisdictional bar at issue here is located at 8 U.S.C. 1158(a)(3). It provides that the courts may not "review" claims relating to the asylum filing deadline. Under this bar, the courts of appeals are thus precluded from reviewing all claims

(factual, discretionary and legal) relating to whether the applicant satisfied one of the statutory exceptions for late-filed asylum applications.

In 2005, however, Congress partially restored review when it enacted 8 U.S.C. 1252(a)(2)(D). Section 1252(a)(2)(D) is a generally applicable provision that applies to all of the jurisdictional bars (with exceptions immaterial here) in the Immigration and Nationality Act (INA). It provides that the courts of appeals may exercise jurisdiction over "constitutional claims" and "questions of law" and may do so notwithstanding the INA's existing jurisdictional restrictions (including the bar on reviewing claims related to the asylum filing deadline).

The impetus for Section 1252(a)(2)(D) was this Court's 2001 decision in *St. Cyr*, 533 U.S. 289, which interpreted the 1996 jurisdictional bar applicable to aliens with criminal convictions. The Court held that although the bar eliminated the court of appeals' petition-for-review jurisdiction over St. Cyr's legal claim, it did not eliminate district court habeas review (because it did not specifically mention the repeal of habeas corpus pursuant to 28 U.S.C. 2241). *Id.* at 314. And because the bar did not eliminate habeas corpus as a jurisdictional safety valve, it did not trigger the "substantial constitutional questions" that would have resulted from the complete elimination of review in any court by any means over legal claims. *Id.* at 300. But the Court also made clear that Congress remained free to enact a

substitute for habeas *provided* it was "neither inadequate nor ineffective" in scope. *Id.* at 314 n.38 (citation and internal quotation marks omitted); *see also id.* at 305.

Congress took up the Court's invitation in 2005 and generally eliminated district court habeas review over removal orders, *see*, *e.g.*, 8 U.S.C. 1252(a)(5), but simultaneously enacted Section 1252(a)(2)(D) to restore the courts of appeals' petition-for-review jurisdiction over constitutional claims and questions of law. By enacting Section 1252(a)(2)(D), Congress thus avoided the constitutional problems that would have been raised by the absence of any forum to raise legal claims. *See* H.R. Rep. No. 109-72, 175 (2005) (Joint House-Senate Conf. Rep.) (expressly referencing *St. Cyr* and acknowledging on several occasions Congress' understanding that it cannot eliminate all review in any forum over legal claims).

In short, as the courts of appeals have uniformly recognized, the jurisdictional question presented in asylum filing cases is whether applicants are raising constitutional claims or questions of law. If they are raising such claims, then the courts of appeals have jurisdiction to review those claims, notwithstanding the jurisdictional bar set forth in 8 U.S.C. 1158(a)(3). The controversy has centered on what types of claims constitute "questions of law" for purposes of Section 1252(a)(2)(D).

More particularly, the courts of appeals uniformly agree that they may review constitutional claims and what they view as *pure* questions of law. Similarly, the courts of appeals uniformly agree that they may not review discretionary claims or pure factual claims – what this Court has called "basic," "primary" or "historical" facts. *Townsend v. Sain*, 372 U.S. 293, 309 n.6 (1963), *overruled on other grounds by Keeney v. Tamayo-Reyes*, 504 U.S. 1 (1992). The disagreement concerns whether the courts of appeals may review a claim, like Ms. Gomis', where the underlying facts are accepted and the petitioner is arguing only that, on those facts, she satisfied one of the statutory exceptions – what this Court has variously described as a "mixed" question of law and fact or one involving the "application" of law to fact. *See, e.g., Ornelas v. United States*, 517 U.S. 690, 696 (1996); *Thompson v. Keohane*, 516 U.S. 99, 112-13 (1995).

B. Petitioner's Administrative Proceedings.

1. Ms. Gomis came to the United States from Senegal on a visa in 2001, when she was 22 years old. App. 3a, 43a. She worked as a domestic servant, until her lawful status expired in 2003. App. 37a, 43a. In 2005, petitioner affirmatively applied for asylum before an asylum officer, 8 U.S.C. 1158; 8 C.F.R. 1208.3, 1208.9, arguing that she would be persecuted if returned to Senegal. App. 3a. The application was referred to an immigration judge and Ms. Gomis was placed in removal proceedings, charged with being out of status. *Id.*

Ms. Gomis conceded that she was removable based on her expired visa, but renewed her asylum application under 8 U.S.C. 1158. She also applied for other forms of relief based on her fear of returning to Senegal, including withholding of removal under 8 U.S.C. 1231(b)(3).

Ms. Gomis testified that she believed her family and the ethnic group to which they belong would force her to undergo Female Genital Mutilation. App. 38a. Among other things, she noted that both of her father's wives had been subjected to FGM, *id.*, and that her ethnic group believed in the practice of FGM. App. 36a, 38a. Most importantly, Ms. Gomis noted that, in 1999, her parents had arranged a marriage for her with a man in his sixties, and pulled her out of school so that she could undergo FGM and prepare for the marriage. App. 36a. In light of her parents' decision to subject her to FGM, Ms. Gomis went into hiding and, with the help of an uncle who lived in France, eventually obtained a passport and visa to come to the United States. App. 36a-37a.

While Ms. Gomis was in the United States, her uncle made significant efforts to change her parents' minds about forcing her to undergo FGM, traveling to Senegal to discuss the issue with them. App. 37a. Those efforts failed to persuade petitioner's parents to abandon the practice of FGM and, in February 2005, petitioner's parents forced her younger sister (then 15 years old) to undergo FGM against her will. App. 37a-38a; App 4a-5a.

According to medical records, the FGM of petitioner's sister led to "adverse health effects," including loss of blood, infection, and psychological trauma. App. 37a. Her brother went to the police to file a complaint on behalf of their sister, but when he did so, the police told him to return home. App 5a. In June 2005, shortly after learning of her sister's FGM, Ms. Gomis applied for asylum. App. 38a.

The immigration judge found Ms. Gomis "genuinely credible," App. 42a, and stated that she faced "perhaps what even amount[s] to a reasonable possibility" of being subjected to FGM. App. 45a. The immigration judge nonetheless held that petitioner was statutorily ineligible for asylum because her application was untimely. App. 43a-44a.

Ms. Gomis conceded that her application was untimely, but argued that she satisfied the statutory exceptions for late-filed applications. Among other things, she testified that she did not apply for asylum after her lawful status expired in 2003 because she believed her uncle would be able to persuade her parents to stop insisting that she undergo FGM, allowing her to return to Senegal. App. 37a-38a. When she learned that her parents had forced her sister to undergo FGM, however, "she knew that her parents would not change their minds" and she prepared and submitted her asylum application within a few months. App. 38a.

The immigration judge rejected Ms. Gomis' argument, notwithstanding that her sister had been subjected to FGM, the police's failure to respond to a

complaint made by Ms. Gomis' brother, and Senegal's failure to crack down significantly on the practice of FGM. According to the immigration judge, the circumcision of Ms. Gomis' sister merely "confirm[ed] the preexistent risk of persecution [petitioner] claims she had when she arrived" in the United States. App. 44a. The judge thus concluded that Ms. Gomis had not demonstrated changed or extraordinary circumstances. *Compare Fakhry v. Mukasey*, 524 F.3d 1057, 1063 (9th Cir. 2008) (reversing BIA and explaining that "there can be 'changed circumstances' . . . even if the alien always meant to apply for asylum and always feared persecution" of the same sort); *id.* at 1063-64 (stressing that an asylum seeker should not be penalized for applying only after "changed circumstances . . . made her application much stronger" since it would make little sense to interpret the statute to provide a disincentive for aliens to wait to apply until they were certain they would need asylum).

The immigration judge also denied Ms. Gomis' application for withholding of removal under 8 U.S.C. 1231(b)(3). App. 46a. Like asylum, withholding requires aliens to show that they will be persecuted on one of the five specified grounds, but there is no filing deadline and it is mandatory for those who qualify (unlike asylum, which can be denied as a matter of discretion even to those who meet the statutory requirements). *See* 8 U.S.C. 1231(b)(3); *I.N.S. v. Aguirre-Aguirre*, 526 U.S. 415, 419 (1999).

Critically, however, withholding applicants must meet a far higher burden of proof than asylum applicants – a "more likely than not" standard, rather than the "well-founded fear" standard. *See* 8 U.S.C. 1231(b)(3); *I.N.S. v. Abudu*, 485 U.S. 94, 99 n.3 (1988) (noting that "it is easier to prove well-founded fear of persecution than clear probability of persecution" required for withholding); *Cardoza-Fonseca*, 480 U.S. at 449-50 (stating that the well-founded fear standard permits a grant of asylum to "one who fails to satisfy the strict [withholding] standard").

Applying that heightened standard, the immigration judge concluded that Ms. Gomis had not demonstrated that her chance of being subjected to FGM was "more likely than not" and denied withholding. App. 46a. The judge recognized that Ms. Gomis' sister had been forced to undergo FGM and did not provide any particular reason why Ms. Gomis would be spared that fate. The judge nonetheless concluded – on the basis of general statistics about Senegal – that Ms. Gomis would probably not be subjected to FGM, despite her parents' intentions and the particular evidence about her ethnic group. App. 45a-46a (citing State Department Report stating that FGM is generally practiced "as a puberty initiation rite," "hardly practiced at all" in urban areas, and that "the government has actually prosecuted people for FGM"); *id.* (reasoning that because Ms. Gomis "lived in Dakar" and is "well past the age of puberty," she is less likely to be subjected to FGM). The immigration

judge thus found that she did not meet the strict burden of proof for withholding and denied that relief.

2. The BIA affirmed in a brief per curiam opinion on the basis of the immigration judge's decision. App. 28a-32a. The Board acknowledged that petitioner "may have a subjectively genuine fear of FGM if she is returned to Senegal," but found no error in the immigration judge's decision. App. 30a-31a. In particular, the Board agreed with the immigration judge that the FGM performed on petitioner's sister did not constitute changed circumstances to excuse untimely filing "inasmuch as the entire reason [petitioner] claims to have left Senegal in 2001 was to avoid the threat of FGM." App. 30a.

C. The Fourth Circuit's Decision.

The court of appeals dismissed Ms. Gomis' asylum claim for lack of jurisdiction. App. 10a-13a.[2]

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[2] In the Fourth Circuit, Ms. Gomis asserted generally that the court had jurisdiction, but did not brief the jurisdictional issues. The Fourth Circuit nonetheless addressed the jurisdictional issues. *See, e.g.*, *Verizon Communications, Inc. v. F.C.C.*, 535 U.S. 467, 530-31 (2002) (noting that "[a]ny issue pressed or passed upon below by a federal court is subject to this Court's broad discretion over the questions it chooses to take on certiorari") (internal quotation marks omitted); *United States v. Williams*, 504 U.S. 36, 41 (1992); *Virginia Bankshares, Inc. v. Sandberg*, 501 U.S. 1083, 1099 n.8 (1991).

The court also denied Ms. Gomis' withholding claim on the merits. App. 21a.

1. The Fourth Circuit noted that under 8 U.S.C. 1158(a)(3) it was barred from reviewing the asylum filing exceptions, but also recognized that 8 U.S.C. 1252(a)(2)(D) restored its jurisdiction to review constitutional claims and "questions of law." App. 11a-12a. But the court adopted the government's position that a claim challenging the application of the statutory exceptions to the historical facts of a case raised only unreviewable questions. App. 12a. The Court thus dismissed Ms. Gomis' asylum claim on the ground that it challenged only a "*discretionary determination* based on factual circumstances." App. 12a (emphasis by the Fourth Circuit).

Importantly, the Fourth Circuit did not suggest that Ms. Gomis was challenging the underlying historical facts found by the immigration judge or any ultimate discretionary authority the judge may have possessed to deny her application had she satisfied one of the threshold statutory exceptions for filing a late application. Rather, as the court of appeals recognized, she was challenging only whether, on the facts of her case, she satisfied the statutory criteria allowing the agency to consider a late-filed application – *i.*e., whether she

demonstrated changed or extraordinary circumstances. App 10a-11a.[3]

The court of appeals acknowledged that the Ninth Circuit had reached the opposite position and had held that whether an asylum seeker has satisfied one of the statutory filing exceptions is a "mixed question of law and fact" that is reviewable as a question of law under Section 1252(a)(2)(D). App. 13a. But the Fourth Circuit rejected the Ninth Circuit's position. Instead, it joined those courts that have held that, notwithstanding the 2005 enactment of 8 U.S.C. 1252(a)(2)(D), they "continue to lack jurisdiction over the determination whether the alien demonstrated changed or extraordinary circumstances that would excuse an untimely filing." App. 12a.

2. The court of appeals affirmed the denial of petitioner's withholding claim on the merits. App. 21a. The court found that the evidence did not compel the conclusion that Ms. Gomis would "more likely than not" be subjected to FGM if returned to

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[3] Thus, this case does not present the question of whether the agency has discretion to deny an application as untimely even where the applicant demonstrates the existence of changed or extraordinary circumstances. *See* 8 U.S.C. 1158(a)(2)(D) (stating that the agency "may" consider a late-filed application in cases where the applicant demonstrates changed or extraordinary circumstances). And because the immigration judge did not reach the merits of the asylum application, the case also does not involve the agency's discretion to deny an asylum application even where the alien established a well-founded fear of persecution.

Senegal. Like the immigration judge, the Fourth Circuit stated that FGM was less common in urban areas and among adult women. App. 16a-17a. The court of appeals also stated that Senegal had enacted laws criminalizing the practice of FGM. App. 17a. Accordingly, although the court acknowledged that "there is evidence in the record that tends to support Gomis' claim" that she will be subjected to FGM, it concluded that "[t]he weight of the record evidence, including her age, her education, and the decreased incidence of FGM in Senegal, specifically Dakar" supported the agency's finding. App 17a.

3. Judge Gregory concurred, without comment, in the court's jurisdictional asylum holding, but dissented from the conclusion that Ms. Gomis had not met her burden for withholding of removal. App. 22a. Judge Gregory argued that the immigration judge, the BIA and the court improperly credited general statements in a country report over specific, credible evidence about Ms. Gomis' individual risk of FGM. App. 22a-24a ("Like the IJ and the BIA before it, the majority incorrectly focuses on general statistics without applying the relevant information specific to Gomis' situation."). Judge Gregory noted that FGM was still practiced by Ms. Gomis' ethnic group and family, citing a recent letter from Ms. Gomis' father stating:

> Francoise, I will advise you [in] this last letter very seriously. . . . I am ashamed and humiliated because of what you did to me an [sic] the entire Gomis family.

> You know the gravity on [sic] what you've caused. I guarantee you that you'll not get [sic] from this situation. I think all means will be necessary to bring you back in Senegal, and I mean it. You'll be circumcised and sent into marriage before my death. I will never forgive you, if you don't return to Dakar for the circumcision.

App. 26a. Judge Gregory noted that the "majority seems to accept the IJ's and the BIA's assertion that Gomis' age will save her" despite the "many letters" from her family "indicating that they continued to insist that she be circumcised." App. 24a. In light of this evidence about Ms. Gomis' particular circumstances, Judge Gregory viewed the likelihood of Ms. Gomis being forced to undergo FGM as well over the 50 percent necessary for withholding, and more like "100" percent. App. 22a, 27a. He concluded that to "deny her withholding of removal and send her back to Senegal, to virtually certain circumcision, would be a great miscarriage of justice." App. 27a.

REASONS FOR GRANTING THE WRIT

The Court's review is warranted because of the jurisdictional issue's practical importance to asylum seekers; because eleven circuits have addressed the issue and are divided in result and analysis; and because the Fourth Circuit's decision was erroneous.

Moreover, this case presents the Court with an ideal vehicle to resolve the jurisdictional question presented here, and there is no obstacle that will prevent the Court from reaching the issue. This case also provides the Court with an especially good vehicle to offer guidance on the proper analytical framework for resolving the many other jurisdictional conflicts that currently exist in the immigration area.

I. THE FOURTH CIRCUIT ERRED ON A JURISDICTIONAL ISSUE THAT HAS DIVIDED THE COURTS OF APPEALS.

A. The Courts Of Appeals Are Divided Over Their Jurisdiction To Review The Statutory Exceptions To The Asylum Filing Deadline.

1. Ms. Gomis raises a claim involving the application of law to fact (*i.e.*, a mixed question of law and fact): whether, on the facts of her case, she satisfied one of the statutory exceptions to the filing deadline. With the exception of the D.C. Circuit, every circuit has addressed whether they may review that question. They are divided in a 1-9-1 split. The Ninth Circuit reviews whether asylum seekers have, on the facts of their case, satisfied the statutory exceptions to the deadline; nine circuits (including the Fourth) refuse to review such claims; and the Second Circuit has taken a middle approach.

In *Ramadan v. Gonzales,* 479 F.3d 646 (per curiam), *reh'g en banc denied*, 504 F.3d 973 (9th Cir.

2007), the Ninth Circuit squarely held that it may review whether asylum applicants have, on the facts of their case, satisfied one of the statutory exceptions excusing the filing deadline. And, since *Ramadan*, the Ninth Circuit has consistently reaffirmed and applied that jurisdictional ruling. *See, e.g., Dhital v. Mukasey*, 532 F.3d 1044, 1049-50 (9th Cir. 2008) (per curiam); *Husyev v. Mukasey*, 528 F.3d 1172, 1178-81 (9th Cir. 2008); *Fakhry v. Mukasey*, 524 F.3d 1057, 1062-64 (9th Cir. 2008).

In direct contrast, the First, Third, Fourth, Fifth, Sixth, Seventh, Eighth, Tenth and Eleventh Circuits have held that they may not review such claims. *Hana v. Gonzales*, 503 F.3d 39, 42 (1st Cir. 2007); *Sukwanputra v. Gonzales*, 434 F.3d 627, 635 (3d Cir. 2006); App. 13a (decision in this case); *Zhu v. Gonzales*, 493 F.3d 588, 596 (5th Cir. 2007); *Almuhtaseb v. Gonzales*, 453 F.3d 743, 748 (6th Cir. 2006); *Vasile v. Gonzales*, 417 F.3d 766, 768 (7th Cir. 2005); *Ignatova v. Gonzales*, 430 F.3d 1209, 1214 (8th Cir. 2005); *Ferry v. Gonzales*, 457 F.3d 1117, 1130 (10th Cir. 2006); *Chacon-Botero v. U.S. Att'y Gen.*, 427 F.3d 954, 957 (11th Cir. 2005) (per curiam).

The Second Circuit has been less categorical. It has held that it may generally review the application of law to fact (mixed questions of law and fact) under 8 U.S.C. 1252(a)(2)(D). *Xiao Ji Chen v. U.S. Dep't of Justice*, 471 F.3d 315, 329 (2d Cir. 2006). But it has also stated that, in reviewing the asylum filing exceptions, the court must examine the "precise arguments" advanced by petitioners to

determine whether they have raised a reviewable question of law. *Chen*, 471 F.3d at 330; *Hongsheng Leng v. Mukasey*, 528 F.3d 135, 141 (2d Cir. 2008) (per curiam) ("looking to the 'precise arguments of the petition'" to determine whether petitioner's challenge to the agency's changed and extraordinary circumstances determination raises a reviewable question of law) (quoting *Chen*).

There is thus a direct and acknowledged conflict among the courts of appeals on an issue that has arisen in hundreds of cases over the last few years. In the Ninth Circuit, asylum seekers may obtain review of whether they satisfied one of the statutory exceptions for late-filed applications; in the Second Circuit review is a possibility, based on a case-by-case assessment; in the other nine circuits review is unavailable and asylum seekers are deported based solely on the administrative agency's determination that they failed to satisfy the statutory standards.

The split is also entrenched. As the above citations indicate, the lead case in every circuit (other than the Fourth) dates back at least two years. Moreover, each of these other ten circuits has issued multiple decisions over the years reaffirming its position; in fact, every circuit has issued *at least* one decision in the last six months adhering to its now-settled position.[4] At this point, the courts of

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[4] *See, e.g., Usman v. Holder*, 566 F.3d 262, 268 (1st Cir. May 22, 2009); *Baig v. Holder*, No. 08-4498-ag, 2009 WL 1788612, at *1 (2d Cir. June 24, 2009) (unpublished summary order);

appeals are largely issuing short, unpublished decisions based on their lead decisions. There is thus no realistic prospect that the issue will be resolved through further litigation in the courts of appeals.

2. Moreover, the courts of appeals are divided not only in result, but also in analysis. *First*, the courts of appeals are deeply divided on the threshold question of whether, as a general matter, the term "questions of law" in Section 1252(a)(2)(D) encompasses the application of law to fact, or is instead limited to pure questions of law. Six circuits (the Second, Third, Fourth, Eighth, Ninth, and Eleventh) have held that the application of law to fact falls within the term "questions of law" and is reviewable under Section 1252(a)(2)(D). *See Ramadan*, 479 F.3d at 650; *Chen*, 471 F.3d at 324-30; *Toussaint v. Att'y Gen.*, 455 F.3d 409, 412 n.3 (3d Cir. 2006); *Jean v. Gonzales*, 435 F.3d 475, 482 (4th Cir. 2006); *Nguyen v. Mukasey*, 522 F.3d 853, 854-55

Sutiowijono v. Att'y Gen., No. 08-3188, 2009 WL 1459680, at *1 (3d Cir. May 27, 2009) (unpublished per curiam); App. 13a (decision in this case; July 9, 2009); *Singh v. Holder*, No. 08-60289, 2009 WL 1345946, at *1 (5th Cir. May 13, 2009) (unpublished per curiam); *Perez-Deleon v. Holder*, No. 08-3494, 2009 WL 1474717, at *4 (6th Cir. May 27, 2009) (unpublished); *Novary v. Holder*, 313 F. App'x 869, 872 (7th Cir. Mar. 3, 2009); *Lybesha v. Holder*, 569 F.3d 877, 881 (8th Cir. June 26, 2009); *Tuiwainikai v. Holder*, No. 05-73295, 2009 WL 1370541, at *1-2 (9th Cir. May 18, 2009) (unpublished mem.); *Sinaga v. Holder*, No. 08-9542, 2009 WL 806752, at *2 (10th Cir. Mar. 30, 2009) (unpublished); *Diego Pedro v. U.S. Att'y Gen.*, No. 08-15978, 2009 WL 1101373, at *2 (11th Cir. Apr. 24, 2009) (unpublished per curiam).

(8th Cir. 2008) (per curiam); *Jean-Pierre v. Att'y Gen.*, 500 F.3d 1315, 1322 (11th Cir. 2007).

In contrast, three circuits (the Sixth, Seventh, and Tenth) have taken a more narrow view of Section 1252(a)(2)(D) and limited the term "questions of law" to "pure" legal claims or narrow questions of "statutory construction." *See Khan v. Filip*, 554 F.3d 681, 687-88 (7th Cir. 2009) (stating that Section 1252(a)(2)(D) does not cover "mixed" questions); *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"); *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'" under Section 1252(a)(2)(D)) (citation omitted).[5]

Second, the courts of appeals are also sharply divided on how to identify a reviewable mixed question of law and fact. Thus, even among those circuits that agree that a mixed question is generally reviewable under Section 1252(a)(2)(D), there is sharp disagreement on whether particular claims present such reviewable mixed questions (as opposed to pure factual or discretionary claims).

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[5] The First and Fifth Circuits have not yet weighed in on whether the application of law to fact is generally reviewable under Section 1252(a)(2)(D).

Indeed, the eleven circuits to address the jurisdictional question at issue here have adopted no fewer than five different analytical positions: (1) the Ninth Circuit in *Ramadan*, 479 F.3d 646, has held that the type of claim presented by Ms. Gomis is reviewable as a mixed question of law and fact; (2) some courts (the First, Fifth, and Sixth) have held that it is an unreviewable *factual* claim;[6] (3) some courts (the Third and Tenth) have held that it is an unreviewable *discretionary* claim;[7] (4) some (the Fourth, Seventh, and Eighth) have concluded that the claim is unreviewable because it is *both* factual and discretionary;[8] and (5) the Second Circuit in *Chen,* 471 F.3d at 329, has stated that it will proceed on a case-by-case basis.[9]

In short, the courts of appeals have reached conflicting results on the basis of widely divergent

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[6] *See Zhu v. Gonzales*, 493 F.3d 588, 596 & n.31 (5th Cir. 2007); *Arif v. Mukasey*, 509 F.3d 677, 680 (5th Cir. 2007); *Mehilli v. Gonzales*, 433 F.3d 86, 93 (1st Cir. 2005); *Almuhtaseb v. Gonzales*, 453 F.3d 743, 748 (6th Cir. 2006).

[7] *See Sukwanputra v. Gonzales*, 434 F.3d 627, 635 (3d Cir. 2006); *Ferry v. Gonzales*, 457 F.3d 1117, 1130 (10th Cir. 2006).

[8] *See* App. 13a (decision in this case); *Niang v. Gonzales*, 492 F.3d 505, 510 n.5 (4th Cir. 2007); *Vasile v. Gonzales*, 417 F.3d 766, 768 (7th Cir. 2005); *Khan v. Filip*, 554 F.3d 681, 689 (7th Cir. 2009); *Lybesha v. Holder*, 569 F.3d 877, 881 (8th Cir. 2009); *Ignatova v. Gonzales*, 430 F.3d 1209, 1214 (8th Cir. 2005).

[9] The Eleventh Circuit has not provided any rationale. *Chacon-Botero v. U.S. Att'y Gen.*, 427 F.3d 954, 957 (11th Cir. 2005) (per curiam).

analytical approaches. Moreover, these analytical differences have now been entrenched for several years.

3. These same analytical differences have led to circuit splits in a variety of other substantive immigration areas. As in the asylum filing context, the courts are divided on how to differentiate reviewable mixed questions of law and fact from unreviewable factual and discretionary claims.

In *Hamid v. Gonzales*, for example, the Seventh Circuit held that it lacked jurisdiction to review whether, on the facts of the case, petitioner satisfied the legal standard for relief under the Covention Against Torture (CAT). 417 F.3d 642, 647 (7th Cir. 2005). *See also, e.g.*, *Lovan*, 2009 WL 2341822, at *7 (holding that application of the CAT standard to undisputed facts is "nothing more than a challenge to the agency's factual determinations"); *Singh v. U.S. Att'y Gen.*, 561 F.3d 1275, 1280 (11th Cir. 2009) ("we may not review the administrative fact findings of the IJ or the BIA as to . . . the likelihood that the alien will be tortured if returned to the country in question").

In contrast, the Third Circuit views such claims as reviewable mixed questions of law and fact under Section 1252(a)(2)(D), because they involve the agency's application of the CAT legal standard to undisputed facts. *See Toussaint v. Att'y Gen.*, 455 F.3d 409, 412 n.3 (3d Cir. 2006) ("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 she will be subject to persecution or torture upon removal to Haiti"); *Awuku v. Att'y Gen.*, No. 08-4778, 2009 WL 1741500 at *1-2 (3d Cir. June 22, 2009) (unpublished) (citing *Toussaint* and stating that the government "is wrong in its repeated assertion that '[t]his Court lacks jurisdiction over any challenge to the finding that [Awuku] failed to establish eligibility for CAT protection,'" rejecting the argument that such a claim involves only a "'factual determination'") (quoting the government's brief).

The courts of appeals are likewise divided in various contexts on how to distinguish between discretionary and non-discretionary claims. For example, the courts of appeals disagree on whether the "particularly serious crime" determination governing eligibility for withholding of removal is discretionary and therefore unreviewable. *Compare, e.g.*, *Matsuk v. INS*, 247 F.3d 999, 1002 (9th Cir. 2001) (holding that the "particularly serious crime" determination is discretionary and thus unreviewable), *and Lovan v. Holder*, --- F.3d ---, 2009 WL 2341822, at *6 (8th Cir. Jul. 31, 2009) (same), *with Alaka v. Att'y Gen.*, 456 F.3d 88, 100-02 (3d Cir. 2006) (holding that the "particularly serious crime" determination is not discretionary and can be reviewed), *and Nethagani v. Mukasey*, 532 F.3d 150, 154-55 (2d Cir. 2008) (same).

The courts are also divided on whether the phrase "extreme cruelty" in 8 U.S.C. 1229b(b)(2) is

discretionary and therefore unreviewable,[10] and on the nature of visa revocation determinations governed by 8 U.S.C. 1155.[11]

Thus, the conflicting results and analytical approaches taken by the courts of appeals in the asylum context have broad significance, providing an additional reason for this court to provide guidance and uniformity. Indeed, the jurisdictional issues that arise in the asylum filing context cut across a wide swath of immigration law.

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[10] *Compare, e.g.*, *Stepanovic v. Filip*, 554 F.3d 673, 680 (7th Cir. 2009) (holding that the phrase "extreme cruelty" is inherently discretionary and unreviewable because it requires "a judgment call"), *and Perales-Cumpean v. Gonzales*, 429 F.3d 977, 982 (10th Cir. 2005) (same), *with Hernandez v. Ashcroft*, 345 F.3d 824, 833-34 (9th Cir. 2003) (holding that extreme cruelty is not discretionary but instead involves "application of law to factual determinations").

[11] *Compare ANA Intern., Inc. v. Way*, 393 F.3d 886, 893-94 (9th Cir. 2004) (holding that visa revocations are not "purely subjective" because good and sufficient cause is a "meaningful standard"), *with Jilin Pharmaceutical USA, Inc. v. Gonzales*, 447 F.3d 196, 203-04 (3d Cir. 2006) (holding that because the statute states that the Attorney General "may" revoke a visa "at any time" the decision is discretionary), *and El-Khader v. Monica*, 366 F.3d 562, 567 (7th Cir. 2004) (finding that "the discretionary nature of the decision is apparent from the plain language of the statute").

B. The Fourth Circuit's Jurisdictional Ruling Is Incorrect.

The Fourth Circuit's view that Ms. Gomis' claim is discretionary and factual, rather than a reviewable mixed question of law and fact, is wrong and cannot be squared with 8 U.S.C. 1252(a)(2)(D) or this Court's decisions. The reference to "questions of law" in Section 1252(a)(2)(D) applies to both pure legal claims as well as the application of law to fact. Moreover, the application of the statutory filing exceptions to the underlying facts of a case raises a mixed question of law and fact, and not an unreviewable factual claim. Finally, the statutory filing exceptions are not discretionary.

1. Six of the nine circuits to address the issue have correctly held that the term "questions of law" in Section 1252(a)(2)(D) encompasses the application of law to established facts. *See supra* Section I.B.2. Indeed, the 2005 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). In fact, 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 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. Att'y Gen.*, 420 F.3d 202, 211 (3d Cir. 2005) (finding that scope of review under REAL ID Act "mirrors" scope of habeas review).

And, as this Court has noted, habeas review has traditionally included claims involving both the proper "interpretation" of statutes *and* their "application." *See St. Cyr*, 533 U.S. at 302; *Boumediene v. Bush,* 128 S.Ct. 2229, 2266 (2008) (quoting *St. Cyr* for the proposition that traditional habeas review in the executive detention context covered the "application" of the laws). Section 1252(a)(2)(D) must therefore 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 211 (same).

Given the constitutional concerns that would be triggered, and Congress' clear intent to preserve the traditional scope of habeas review, there is no basis for construing 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, 139-41 (2006) (to avoid constitutional concerns, the REAL ID Act should be construed to preserve review over claims involving the "application" of legal standards).

2. Furthermore, the application of the asylum filing exceptions to the underlying facts of a case raises a reviewable mixed question of law and fact, and not a factual claim. A mixed question of law and 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, or to put it another way, whether the rule of law as applied to the established facts is or is not violated.

Pullman-Standard v. Swint, 456 U.S. 273, 289 n.19 (1982). *See also Ornelas v. United States*, 517 U.S. 690, 696 (1996) (describing the determination of "whether [the] historical facts . . . amount to reasonable suspicion or to probable cause" as "a mixed question of law and fact"); *Thompson v. Keohane*, 516 U.S. 99, 112-13 (1995) ("application of the controlling legal standard to the historical facts . . . presents a 'mixed question of law and fact'"); *Townsend*, 372 U.S. at 309 n.6 (distinguishing issues of fact, which "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," from "mixed questions of fact and law, which require the application of a legal standard to the historical-fact determinations") (citation and internal quotation marks omitted).

Significantly, with the exception of the Ninth Circuit in *Ramadan,* 479 F.3d at 648, the courts of appeals have ignored this Court's decisions differentiating between historical facts and mixed questions of law and fact. *See, e.g., Zhu v. Gonzales*, 493 F.3d 588, 596 & n.31 (5th Cir. 2007); *Almuhtaseb v. Gonzales*, 453 F.3d 743, 748 (6th Cir. 2006).

In this case, the immigration judge made a determination that the facts (including Ms. Gomis' sister's forcible circumcision) did not constitute "changed circumstances" material to her application for asylum. The judge thus applied the statutory standards to the historical facts of the case. That is

a mixed question of law and fact. *Ornelas*, 517 U.S. at 696-97.

Review of the filing exceptions is essential to ensure that those provisions are interpreted in a manner consistent with congressional intent. As this Court has noted, 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. *See, e.g.*, *Thompson*, 516 U.S. at 115 (emphasizing "the law declaration aspect" of reviewing the application of law to fact); *Ornelas*, 517 U.S. at 697 (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").

3. Finally, the asylum filing exceptions are not discretionary. As the Ninth Circuit noted in *Ramadan,* 479 F.3d at 655-56, 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 in other contexts. Congress included the phrase "to the satisfaction" in other provisions of the

INA 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.

Indeed, the relevant regulations and the agency's own training manual show that the phrase designates an objective standard of proof. *See* Asylum Officer Basic Training Course – One-Year Filing Deadline (Mar. 23, 2009), *available at* http://www.uscis.gov/files/article/One-Year-Filing-Deadline.pdf ("The standard of proof to establish changed or extraordinary circumstances is proof to the satisfaction of the Attorney General. This is a lower standard of proof than the 'clear and convincing' standard that is required to establish that the applicant timely filed"). 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). Accordingly, the changed and extraordinary circumstances exceptions are not discretionary.

Moreover, the application of the statutory filing exceptions to the facts of a case is not the kind of determination that is inherently discretionary. *See Ramadan,* 479 F.3d at 656 (review of the

statutory filing exceptions does not call for a discretionary "subjective" determination). As this Court has noted, "if the word 'discretion' means anything in a statutory or administrative grant of power, it means that the recipient must exercise his authority according to his own understanding and conscience." *United States ex rel. Accardi v. Shaughnessy*, 347 U.S. 260, 266-67 (1954). *See also, e.g.*, *St. Cyr*, 533 U.S. at 307-08 (describing discretionary decisions as "a matter of grace") (quoting *Jay v. Boyd*, 351 U.S. 345, 353-54 (1956)); *cf. Franklin v. Massachusetts*, 505 U.S. 788, 817 (1992) (Stevens, J., concurring) (concluding that the Secretary of Commerce's conduct of the census is not committed to agency discretion within the meaning of the APA because "[t]here is no indication that Congress intended the Secretary's own mental processes, rather than other more objective factors, to provide the standard").

When the BIA determines that an alien has demonstrated changed or extraordinary circumstances it does not simply exercise its conscience or permit filing as an act of grace. Rather, it applies a statutory standard, fleshed out by agency regulations. The circuits that have held that the application of these standards is discretionary have done so in conclusory opinions that do not address the Ninth Circuit's analysis of the statutory structure or this Court's decisions regarding the nature of discretion. *See, e.g.*, *Sukwanputra*, 434 F.3d at 635; *Vasile*, 417 F.3d at

768; *Ignatova*, 430 F.3d at 1214; *Ferry*, 457 F.3d at 1130.

In sum, Section 1252(a)(2)(D) covers the application of law to fact, as six circuits have properly concluded. Furthermore, the Fourth Circuit erred in this case in finding that Ms. Gomis' claim was discretionary and factual, rather than one involving the application of law to fact.

II. THIS CASE PRESENTS AN IDEAL VEHICLE TO RESOLVE THE IMPORTANT JURISDICTIONAL ISSUE PRESENTED HERE.

According to a computerized search, there have been more than 1,000 cases citing to Section 1252(a)(2)(D) since its enactment in 2005. Hundreds of these cases involve the asylum filing deadlines. Given the overall number of decisions involving Section 1252(a)(2)(D), and the momentous stakes at issue in asylum cases, this Court's review is warranted to ensure uniformity.

Ms. Gomis' case squarely presents the issue on which the circuits are in conflict. As noted, the Fourth Circuit did not suggest that Ms. Gomis was challenging the underlying factual findings in her case or any ultimate discretionary authority the immigration judge may have possessed to deny the application had Ms. Gomis satisfied one of the statutory exceptions. Rather, the court of appeals noted that Ms. Gomis was challenging only the application of the statutory exceptions to the facts of

her case – whether on the facts of her case she "demonstrated changed or extraordinary circumstances that would excuse an untimely filing." App. 12a. Thus, as the Fourth Circuit acknowledged, Ms. Gomis' claim would have been reviewable in the Ninth Circuit. App. 13a.

Moreover the jurisdictional issue was outcome-determinative and the issue was squarely addressed by the Fourth Circuit. App. 12a. Nor is there any impediment that would prevent the Court from reaching the issue. And Ms. Gomis' case starkly illustrates the importance of the jurisdictional question, since she would almost assuredly have received asylum had she been permitted to apply. App. 17a (majority opinion) (acknowledging that there is evidence tending to support Ms. Gomis' claim that she will be subjected to FGM but it does not compel the conclusion that it is "more likely than not" to occur); *see Cardoza-Fonseca*, 480 U.S. at 440 (stating that an asylum applicant may establish a well-founded fear even if she "only has a 10% chance" of being persecuted).

In sum, there is an entrenched circuit split on the question of the courts of appeals' jurisdiction to review the statutory exceptions to the asylum filing deadline, and Ms. Gomis' case will permit the court to fully resolve it. This Court's review is thus warranted. An asylum applicant's opportunity to avoid persecution (including being forced to undergo something as horrific as FGM) should not depend on the circuit in which they happen to find themselves.

That is especially true where the issue dividing the circuits is one involving the jurisdiction of the federal courts.

CONCLUSION

The petition for writ of certiorari should be granted.

Respectfully submitted,

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