No. 08-71

In the Supreme Court of the United States

MACKENTOCH SAINTHA, PETITIONER

v.

MICHAEL B. MUKASEY, ATTORNEY GENERAL

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

BRIEF FOR THE RESPONDENT IN OPPOSITION

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QUESTION PRESENTED

Whether the court of appeals correctly held that it lacked jurisdiction to review the Board of Immigration Appeals' ruling that petitioner failed to establish that, if he were returned to Haiti, the Haitian government would acquiesce in the commission of acts against him that constitute torture.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-25a) is reported at 516 F.3d 243. The decisions of the Board of Immigration Appeals (Pet. App. 26a-39a) and the immigration judge (Pet. App. 40a-50a) are unreported.

JURISDICTION

The judgment of the court of appeals was entered on February 14, 2008. A petition for rehearing was denied on April 14, 2008 (Pet. App. 54a). The petition for a writ of certiorari was filed on July 11, 2008. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. a. A person who is present in the United States and fears torture if removed to a certain country may obtain protection under the United Nations Convention

Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (CAT), *adopted* Dec. 10, 1984, S. Treaty Doc. No. 20, 100th Cong., 2d Sess. (1988), 1465 U.N.T.S. 85. The CAT has been implemented through regulations of the Department of Justice. See Foreign Affairs Reform and Restructuring Act of 1998, Pub. L. No. 105-277, Div. G, § 2242, 112 Stat. 2681-822 (codified at 8 U.S.C. 1231 note); see also 8 C.F.R. 1208.16-1208.18.

To obtain protection under the CAT, an alien must demonstrate that it is more likely than not that he would be tortured in the country of removal. 8 C.F.R. 1208.16(c)(3). Torture "is an extreme form of cruel and inhuman treatment" that "does not include lesser forms of cruel, inhuman or degrading treatment or punishment that do not amount to torture." 8 C.F.R. 1208.18(a)(1), (2). Conduct constitutes torture only if it is "specifically intended to inflict severe physical or mental pain or suffering." 8 C.F.R. 1208.18(a)(5). Pain and suffering "inherent in or incidental to lawful sanctions" or resulting from law enforcement authorized by law are not torture. 8 C.F.R. 1208.18(a)(3).

Importantly, to qualify for CAT protection, the acts alleged to constitute torture must be inflicted "by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity." 8 C.F.R. 1208.18(a)(1). "Acquiescence of a public official requires that the public official, prior to the activity constituting torture, have awareness of such activity and thereafter breach his or her legal responsibility to intervene to prevent such activity." 8 C.F.R. 1208.18(a)(7); see, *e.g.*, *Lopez-Soto* v. *Ashcroft*, 383 F.3d 228, 234 (4th Cir. 2004).

Two forms of protection are available under the CAT: withholding of removal and deferral of removal. An alien who has committed an aggravated felony and has been sentenced to at least five years of imprisonment is ineligible for withholding of removal under the CAT. See 8 U.S.C. 1231(b)(3)(B); 8 C.F.R. 1208.16(c)(4) and (d)(2). Such a person may nevertheless obtain deferral of removal to a particular country if the government determines that he is more likely than not to be tortured by the government or with government acquiescence in that country. 8 C.F.R. 1208.16(c)(4) and 1208.17(a).

b. Under the Immigration and Nationality Act (INA), 8 U.S.C. 1101 *et seq.*, "no court shall have jurisdiction to review any final order of removal against an alien who is removable by reason of having committed a criminal offense covered in section * * * 1227(a)(2)(A)(iii)," *i.e.*, an aggravated felony. 8 U.S.C. 1252(a)(2)(C). In 2005, Congress amended the INA to include the following provision:

> Nothing in subparagraph (B) or (C), or in any other provision of this Chapter (other than this section) which limits or eliminates judicial review, shall be construed as precluding review of constitutional claims or questions of law raised upon a petition for review filed with an appropriate court of appeals in accordance with this section.

8 U.S.C. 1252(a)(2)(D), as added by the REAL ID Act of 2005, Pub. L. No. 109-13, Div. B, § 106(a)(1)(A)(iii), 119 Stat. 310.

2. Petitioner is a native and citizen of Haiti who was admitted to the United States as a refugee in 1994 and became a lawful permanent resident in 1995. Pet. App.

4a. In 2001, after having been convicted multiple times of larceny, petitioner was convicted of robbery and sentenced to fifteen years of imprisonment. *Id.* at 4a, 30a. When he was released from prison after serving five years of his sentence, United States Immigration and Customs Enforcement charged him with being removable from the United States because his robbery offense is an aggravated felony. *Id.* at 4a; see 8 U.S.C. 1227(a)(2)(A)(iii) ("Any alien who is convicted of an aggravated felony at any time after admission is deportable.").

Petitioner conceded that he is removable because he was convicted of an aggravated felony, but he sought deferral of removal under the CAT. Pet. App. 41a. He claimed he would be tortured if returned to Haiti because his stepfather had been involved in the political party Organisation Populaire de Bon-Repos (OPB), a party formed to oppose Jean-Claude Duvalier, the ruler of Haiti from 1971 to 1986, and his supporters, including General Raoul Cedras, who was the leader of the Haitian government when OPB was founded. *Id.* at 5a.[1]

Petitioner's stepfather had testified that his sister had been beaten and killed because of her affiliation with OPB in 1988. Pet. App. 5a. He also testified that, when he returned to Haiti in 2003, he was forced into hiding due to threats from political opponents, who killed petitioner's maternal grandmother because they could not find him. *Id.* at 45a. And he and petitioner

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[1] Petitioner also sought a waiver of inadmissibility under 8 U.S.C. 1159(c) in order to again adjust his status to that of a lawful permanent resident under 8 U.S.C. 1159(a). Pet. App. 40a-41a. The immigration judge (*id.* at 41a), Board of Immigration Appeals (*id.* at 31a-32a), and court of appeals (*id.* at 18a-25a) all rejected that argument, and petitioner does not renew it before this Court.

testified that one of petitioner's cousins had been killed around the same time, and they believed she was killed by opponents of the OPB. *Ibid.*

An immigration judge (IJ) determined that petitioner was removable as charged but granted his application for deferral of removal under the CAT. Pet. App. 40a-50a. The IJ found the testimony of petitioner and his stepfather credible, *id.* at 47a, and concluded that there was "a probability that [petitioner] would be tortured upon return to Haiti by his stepfather's political opponents," *id.* at 47a-48a.

The IJ then determined that torture would likely occur with government acquiescence because "the government of Haiti would be aware of the potential torture of [petitioner] and would be 'willfully blind' to its occurrence." Pet. App. 48a-49a. The IJ explained that the "the government of Haiti would be well-aware of [petitioner's] return" because he is a criminal deportee, and "the Haitian government makes little or no effort to protect the rights of criminal deportees." *Id.* at 48a.

3. The Board of Immigration Appeals (BIA) reversed the IJ's determination that petitioner was entitled to deferral of removal under the CAT. Pet. App. 28a-39a. The BIA observed that, to obtain CAT deferral, an alien must show that it is more likely than not that he would be tortured "by a public official, or at the instigation or with the acquiescence of such an individual." *Id.* at 32a (citing 8 C.F.R. 1206.16(c) and 1208.18(a)). The BIA noted that "it is not enough for an alien to string together a chain of speculative events"; rather, the alien "must show that it is more likely than not that each event will take place upon his removal." *Ibid.* Reviewing all of the evidence in the record, the BIA agreed with the IJ that it is more likely than not

"that his stepfather's enemies would seek to torture [petitioner]" if he were returned to Haiti. *Id.* at 32a, 35a.

The BIA disagreed with the IJ, however, that petitioner had established that the Haitian government would acquiescence in that torture. Pet. App. 36a-38a. Petitioner argued that either he would be tortured in a Haitian prison because he is a criminal deportee or that he would be released from prison and his stepfather's enemies would torture him. Pet. BIA Br. 10-15. The BIA "consider[ed] the record in its totality" and concluded that "there is insufficient evidence * * * to conclude that it is more likely than not that the Haitian government would acquiesce in [petitioner's] torture." Pet. App. 37a. The BIA explained that although "Haiti's past is rife with political violence" and "governmental corruption" continues to exist, "these problems do not show that the Haitian government would likely remain willfully blind to [petitioner's] risk of torture." *Ibid.* The BIA stated that, "on the record before [it]," it is "just as likely that [petitioner's] family would be able to manipulate the system in order to either expedite his release from prison or insure that he is not tortured." *Id.* at 37a-38a.

One Board member concurred, noting that "[t]he continued presence of [petitioner's stepfather's] sister in Haiti substantially undercuts the claim that the stepfather's enemies would seek to torture [petitioner] today." Pet. App. 38a-39a.

4. The court of appeals dismissed the petition for review for lack of jurisdiction. Pet. App. 1a-25a. The court observed that it generally "do[es] not have jurisdiction to review final orders of removal against aliens charged with removability by reason of having committed aggravated felonies" under 8 U.S.C. 1252(a)(2)(C).

Pet. App. 10a. Because petitioner conceded that he is removable because he committed an aggravated felony, the court explained, it lacked jurisdiction to review his claim unless the claim raised a "constitutional claim[] or question[] of law." *Ibid.* (quoting 8 U.S.C. 1252(a)(2)(D)).

The court considered the nature of petitioner's particular claim and determined that it did not raise a "constitutional claim[] or question[] of law." Pet. App. 10a-17a. The court noted that petitioner's argument on appeal was that "the BIA erred in finding insufficient evidence to conclude that the Haitian government would likely acquiesce in his torture." *Id.* at 9a. The court determined that that contention did not raise a "question[] of law," reasoning that, because in the absence of the statutory bar in Section 1252(a)(2)(C) such a claim normally would be reviewed under the "substantial evidence" standard, it is "necessarily factual in nature." *Id.* at 14a-15a. In the court's view, Congress did not intend the courts of appeals to review an alien's fact-specific disagreement with the BIA. *Id.* at 13a-14a, 16a. Petitioner's invitation to "reweigh the evidence," the court concluded, is "precisely the type of factual re-hashing [the court] must not do." *Id.* at 17a.

In any event, the court concluded that even if it had jurisdiction to review petitioner's claim, that claim "would likely fail because there exists substantial evidence to support the BIA's determination." Pet. App. 17a n.7. The court explained that petitioner "failed to make the requisite showing that the Haitian government was aware of, let alone willfully blind to, the violence suffered by his family members and his stepfather's political allies." *Ibid.*

5. The court of appeals denied petitioner's petition for rehearing or rehearing en banc, with no judge calling for a vote on the petition. Pet. App. 54a.

ARGUMENT

Petitioner contends (Pet. 29-37) that the court of appeals erred in concluding that it lacked jurisdiction to review his fact-bound claim that he had not shown that the government of Haiti would acquiesce in his torture. In petitioner's view (Pet. 30), any challenge to "the application of law to fact" raises a "question[] of law" within the meaning of 8 U.S.C. 1252(a)(2)(D). Petitioner is mistaken. Further, contrary to petitioner's contention (Pet. 16-29), the decision below does not conflict with any decision of this Court or any other court of appeals. In any event, review is not warranted because petitioner would not prevail on his CAT claim even if the federal courts had jurisdiction to review it. This Court has recently denied review on a similar fact-bound question in *Rangolan* v. *Mukasey*, 128 S. Ct. 2934 (2008) (No. 07-1169), and the same result should obtain here.

1. The court of appeals correctly determined that it lacked jurisdiction to consider petitioner's claim. As the court explained, under 8 U.S.C. 1252(a)(2)(C), a court lacks jurisdiction to review an order of removal of an alien who is removable by reason of having been convicted of certain criminal offenses, including aggravated felony offenses. Pet. App. 10a; see, *e.g.*, *Mbea* v. *Gonzales*, 482 F.3d 276, 278 n.1 (4th Cir. 2007). Petitioner has conceded that he is removable because he committed an aggravated felony. Pet. App. 30a, 40a-41a. Section 1252(a)(2)(C) thus generally bars federal-court review of petitioner's removal order.

The exception for "questions of law" contained in 8 U.S.C. 1252(a)(2)(D) does not apply here. The BIA's decision to deny CAT protection because petitioner failed to adduce sufficient evidence to meet his burden is a fact-based determination that does not turn on a "question[] of law." See Pet. App. 9a, 11a-12a, 16a. In reversing the IJ's finding that petitioner would be tortured with government acquiescence if returned to Haiti, the BIA "consider[ed] the record in its totality" and concluded as a factual matter that "there is insufficient evidence * * * to conclude that it is more likely than not that the Haitian government would acquiesce in [petitioner's] torture." *Id.* at 37a.

The BIA explained that the evidence petitioner provided was insufficient to meet his burden under a well-settled, uncontested legal standard. Pet. App. 37a-38a. And the BIA repeatedly noted that the reason petitioner's claim failed was that he failed to present key evidence in support of his claim. See, *e.g.*, *id.* at 32a ("it is not enough for an alien to string together a chain of speculative events"); *id.* at 37a ("there is insufficient evidence" to support petitioner's claim); *ibid.* (claim fails on "the record before us"). Petitioner seeks to have a federal court give more weight to his evidence than the agency did, and that type of claim falls outside the INA's limited exception for legal and constitutional questions. *E.g.*, *Torres de la Cruz* v. *Maurer*, 483 F.3d 1013, 1019 n.5 (10th Cir. 2007); see Pet. App. 17a ("reweigh[ing] the evidence" is "precisely the type of factual re-hashing [the court] must not do" under the REAL ID Act).

The REAL ID Act and its legislative history make clear that Congress intended to preclude review of both agency findings of historical facts and agency determinations that result from the agency's weighing and eval-

uation of the evidence in determining whether the alien has met his evidentiary burden. See, *e.g.*, H.R. Conf. Rep. No. 72, 109th Cong., 1st Sess. 175 (2005) ("When a court is presented with a mixed question of law and fact, the court should analyze it to the extent there are legal elements, but should not review any factual elements."); *id.* at 175-176 ("Factual questions include those questions that courts would review under the 'substantial evidence' * * * standard."). As the court of appeals has observed, courts "are not free to convert every immigration case into a question of law, and thereby undermine Congress's decision to grant limited jurisdiction over matters committed in the first instance to the sound discretion of the Executive." *Higuit* v. *Gonzales*, 433 F.3d 417, 420 (4th Cir.), cert. denied, 548 U.S. 906 (2006) (cited at Pet. App. 17a). The court of appeals therefore correctly concluded that it lacked jurisdiction over petitioner's claim.[2]

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[2] Petitioner lists (Pet. i), as a question presented, whether "Congress may repeal judicial review by any means over a claim involving the application of law to fact," consistent with the Suspension Clause, U.S. Const. Art. I, § 9. Petitioner never raised that contention in the court of appeals. He addressed the jurisdictional issue only in his reply brief, and the discussion in that brief contained no mention of any constitutional claim. Pet. C.A. Reply Br. 3-12. Because petitioner's claim was not pressed or passed on below, it should not be considered by this Court. *E.g.*, *United States* v. *Williams*, 504 U.S. 36, 41 (1992).

In any event, petitioner's claim lacks merit, because this Court did not hold in either *INS* v. *St. Cyr*, 533 U.S. 289 (2001), or *Boumediene* v. *Bush*, 128 S. Ct. 2229 (2008), that the Constitution requires judicial review of an alien's claim if it involves the application of law to fact. *Boumediene* addressed judicial review under a materially different statutory regime in the unique context of the wartime detention of enemy combatants, *id.* at 2272-2273, not judicial review of removal orders under 8 U.S.C. 1252. Although the *St. Cyr* Court suggested that "detentions based on errors of law, including the erroneous application or

Petitioner contends (Pet. 29-30) that any challenge by an alien to any application of law to undisputed facts raises a "question[] of law." Whatever the merits of that contention, it is not presented here, as the court of appeals concluded. Pet. App. 12a n.4; p. 13, *infra*. The question whether petitioner has established as a matter of fact that it is more likely than not that he would be tortured with the acquiescence of the Haitian government is not undisputed. The BIA concluded that petitioner had not adduced sufficient evidence to support such a finding, and petitioner disputed that determination on judicial review.

2. Petitioner contends (Pet. 13-16) that the courts of appeals disagree on whether an argument that the BIA erred in weighing the evidence regarding government acquiescence raises a question of law under 8 U.S.C. 1252(a)(2)(D). Petitioner is mistaken. Like the court below, several courts of appeals have concluded that an alien's challenge to the agency's determination that he has not set forth sufficient facts to demonstrate CAT eligibility does not raise a "question[] of law." See, *e.g.*, *Hanan* v. *Gonzales*, 449 F.3d 834, 837 (8th Cir. 2006) (no judicial review of claim that alien was improperly denied CAT relief because "[t]hese are challenges to factual determinations"); *Boakai* v. *Gonzales*, 447 F.3d 1, 5 (1st Cir. 2006) (no judicial review of claim "that the BIA was wrong in rejecting the CAT claim"); *Hamid* v. *Gonzales*, 417 F.3d 642, 647-648 (7th Cir. 2005) (no judicial review of question whether the agency "correctly considered, interpreted, and weighed the evidence presented" in de-

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interpretation of statutes," were historically cognizable on habeas, 533 U.S. at 302, the Court did not clarify what it meant by the term "application," and that language played no part the Court's analysis, which focused on "pure questions of law," *id.* at 305.

termining the likelihood of torture, which is an unreviewable "factual" question). Just as in those cases, petitioner's claim here that he likely would be tortured in Haiti with government acquiescence is a fact-bound determination, not a question of law.

Although petitioner cites (Pet. 22-23) several cases in which courts of appeals have found "questions of law" in the context of CAT determinations, none of those courts considered a claim like petitioner's, *i.e.*, that the agency merely erred in its assessment of the evidence regarding government acquiescence. In *Toussaint* v. *Attorney General of the United States*, 455 F.3d 409, 412 n.3, 415-416 (3d Cir. 2006); *Jean-Pierre* v. *United States Attorney General*, 500 F.3d 1315, 1322 (11th Cir. 2007); and *Pierre* v. *Gonzales*, 502 F.3d 109, 113-114 (2d Cir. 2007), the courts of appeals concluded that the question whether a particular course of conduct amounts to "torture" under the CAT is a reviewable legal question. This case does not involve a dispute about the legal definition of "torture." Petitioner also cites (Pet. 23) *Arteaga* v. *Mukasey*, 511 F.3d 940 (9th Cir. 2007), but that case did not address the scope of the phrase "question[] of law" in 8 U.S.C. 1252(a)(2)(D). Indeed, the court did not even mention Section 1252(a)(2)(D), because it relied on previous precedent to hold that 8 U.S.C. 1252(a)(2)(C) does not bar review of an aggravated felon's CAT claim when the IJ denies CAT relief on the merits. *Id.* at 942 n.1.

The pre-REAL ID Act cases petitioner cites (Pet. 6, 13)—*Singh* v. *Ashcroft*, 351 F.3d 435 (9th Cir. 2003); *Wang* v. *Ashcroft*, 320 F.3d 130 (2d Cir. 2003); and *Ogbudimkpa* v. *Ashcroft*, 342 F.3d 207 (3d Cir. 2003)—are inapposite because they do not address the scope of judicial review allowed by 8 U.S.C. 1252(a)(2)(D). Petitioner

also cites (Pet. 22-23) two unpublished court of appeals decisions, but those decisions do not establish binding precedent and thus could not give rise to the type of disagreement in the circuits that could warrant this Court's review. See Sup. Ct. R. 10.

Petitioner cites various cases (Pet. 18-21, 24-26) addressing whether *other* types of claims (*i.e.*, claims other than a claim that the BIA erred in its factual finding that the alien had not shown a likelihood of torture with government acquiescence) raise "questions of law" within the meaning of 8 U.S.C. 1252(a)(2)(D). Those cases, however, do not shed light on whether petitioner's claim raises a "question[] of law," because, as numerous courts have recognized, that inquiry depends on the particular type of claim at issue. See, *e.g.*, *Almuhtaseb* v. *Gonzales*, 453 F.3d 743, 748 n.3 (6th Cir. 2006) ("emphasiz[ing] that a particularized inquiry into the nature of a petitioner's claim is necessary to determine whether [the court] ha[s] jurisdiction"). Certiorari is not warranted where, as here, the courts have come to the same conclusion when considering the same types of claims. There is, therefore, no split in the circuits that warrants this Court's review.

Indeed, to the extent that petitioner seeks review on the abstract question whether "questions of law" includes "the application of law to fact" (Pet. 30), it is worth noting—as petitioner concedes (Pet. 14, 20-21)—that the court of appeals expressly refused to weigh in on that issue. Pet. App. 12a n.4 ("We need not resolve" whether "questions of law are limited to questions of statutory interpretation or also include mixed questions of law and fact.").

Petitioner also contends (Pet. 27-28) that review is warranted because the decision below is inconsistent

with two recent decisions of the BIA. That is incorrect. Neither BIA decision considered the scope of the exception for "questions of law" contained in 8 U.S.C. 1252(a)(2)(D). That statutory provision governs judicial review of BIA decisions, and thus does not apply in the BIA proceedings themselves. Instead, the BIA decisions addressed the scope of the BIA's review of IJ decisions under 8 C.F.R. 1003.1(d)(3). That regulation directs the BIA to review "[f]acts determined by the immigration judge, including findings as to the credibility of testimony," under the "clearly erroneous" standard. 8 C.F.R. 1003.1(d)(3)(i). The regulation also states that the BIA shall review "questions of law, discretion, and judgment and all other issues * * * *de novo*." 8 C.F.R. 1003.1(d)(3)(ii).

In *In re V-K-*, 24 I. & N. Dec. 500 (2008), the BIA held that the question whether an alien had established a likelihood of torture was to be reviewed *de novo*, because it was not the type of credibility determination or finding of historical fact that was entrusted by the regulation to the IJ and reviewed only for clear error. *Id.* at 501. The court did not hold that such a question is a "question[] of law"; rather, it characterized such a question as a question of "judgment." *Ibid.* The BIA applied the same principle in *In re A-S-B-*, 24 I. & N. Dec. 493 (2008), and held that an IJ's determination that an alien established a well-founded fear of persecution was not the sort of finding of fact reviewable only for clear error within the meaning of the regulation. *Id.* at 497-498. Again, the BIA was construing only the scope of the Attorney General's own regulation, and it simply distinguished historical facts and credibility determinations from "all other issues" (8 C.F.R. 1003.1(d)(3)(ii)), which the regulation directs the BIA to review *de novo*.

24 I. & N. Dec. 497-498. These two decisions, therefore, do not establish any conflict in authority with the decision below.[3]

3. Even if the court of appeals erred in finding that it lacked jurisdiction to review petitioner's claim, further review would not be warranted because petitioner would not succeed on his challenge to the agency's denial of CAT deferral. As the BIA correctly found, petitioner's evidence of Haiti's violent political past and the continued existence of government corruption is insufficient to meet his burden of showing that the Haitian government would acquiesce in his torture. Pet. App. 37a. In the BIA's view, the record evidence reveals that "it seems just as likely that [petitioner's] family would be able to manipulate the system" to protect him from torture, particularly because petitioner's stepfather's sister still lives in Haiti. *Id.* at 37a-38a.

If the court of appeals had jurisdiction to review petitioner's claim, it would do so under the deferential "sub-

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[3] Petitioner argues (Pet. 28) that the court of appeals' decision "created an untenable whipsawing effect" on him because the BIA upheld the IJ's finding that the testimony presented was credible, yet concluded that he had failed to meet his burden of establishing that he would be tortured with government acquiescence. That is incorrect. The BIA simply concluded that, although the evidence petitioner presented was credible, he did not provide enough evidence to meet his burden. Pet. App. 32a ("it is not enough for an alien to string together a chain of speculative events"); *id.* at 37a ("there is insufficient evidence * * * to conclude that it is more likely than not that the Haitian government would acquiesce in [petitioner's] torture). Moreover, it is not anomalous that the BIA reviewed petitioner's claim *de novo*, while the court of appeals lacked jurisdiction to review it, because 8 C.F.R. 1003.1(d)(3) was intended to authorize broad agency review, *e.g.*, *A-S-B-*, 24 I. & N. Dec. at 496, while the REAL ID Act was intended to authorize only a narrow form of judicial review, see pp. 9-10, *supra*.

stantial evidence" standard, *INS* v. *Elias-Zacarias*, 502 U.S. 478, 481 (1992), under which the agency's factual determinations are "conclusive unless any reasonable adjudicator would be compelled to conclude to the contrary," 8 U.S.C. 1252(b)(4)(B). The court of appeals has already concluded that petitioner likely cannot prevail under that standard. The court stated that petitioner's claim "would likely fail because there exists substantial evidence to support the BIA's determination," concluding that petitioner "failed to make the requisite showing that the Haitian government was aware of, let alone willfully blind to, the violence suffered by his family members and his stepfather's political allies." Pet. App. 17a n.7. In light of the deficiencies in petitioner's evidence noted by both the BIA and the court of appeals, the record plainly does not compel a finding that it is more likely than not that petitioner would be tortured with government acquiescence if returned to Haiti. Further review of the decision below is therefore unwarranted for this additional reason as well.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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