No. 10-1113

In the Supreme Court of the United States

JOHN FREDY OSPINA HERNANDEZ AND PAULA ANDREA VELEZ YEPEZ, PETITIONERS

v.

ERIC H. HOLDER, JR., ATTORNEY GENERAL

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH 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' conclusion that petitioner failed to establish, "to the satisfaction of the Attorney General," "changed circumstances" to excuse the untimely filing of his asylum application under 8 U.S.C. 1158(a)(2)(D).

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-7a) is not published in the *Federal Reporter* but is reprinted in 404 Fed. Appx. 387. The decisions of the Board of Immigration Appeals (Pet. App. 8a-16a) and the immigration judge (Pet. App. 17a-29a) are unreported.

JURISDICTION

The judgment of the court of appeals was entered on December 7, 2010. The petition for a writ of certiorari was filed on March 7, 2011. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. a. The Immigration and Nationality Act (INA), 8 U.S.C. 1101 *et seq.*, provides that the Secretary of

Homeland Security and the Attorney General may, in their discretion, grant asylum to an alien who demonstrates that he is a "refugee" within the meaning of the INA. 8 U.S.C. 1158(b)(1)(A). The INA defines a "refugee" as an alien who is unwilling or unable to return to his country of origin "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." 8 U.S.C. 1101(a)(42)(A). The applicant bears the burden of demonstrating that he is eligible for asylum. 8 U.S.C. 1158(b)(1)(B)(i); 8 C.F.R. 1208.13(a), 1240.8(d). Once an alien has established asylum eligibility, the decision whether to grant or deny asylum is left to the discretion of the Attorney General or the Secretary of Homeland Security. 8 U.S.C. 1158(b)(1)(A).

b. An alien who wishes to be granted asylum must file his application within one year of arriving in the United States. 8 U.S.C. 1158(a)(2)(B). The applicant bears the burden of demonstrating, "by clear and convincing evidence," that his application for asylum was filed within one year of his entry into the United States. *Ibid.*; 8 C.F.R. 1208.4(a)(2)(A).

An alien who fails to meet that requirement "may be considered" for asylum if he demonstrates "to the satisfaction of the Attorney General" or the Secretary of Homeland Security either the existence of "changed circumstances" that materially affect his eligibility for asylum or "extraordinary circumstances" that excuse his failure to file the application within the one-year period. 8 U.S.C. 1158(a)(2)(B) and (D). In addition to showing changed or extraordinary circumstances, the applicant must show that he filed his asylum application within a

reasonable period of time given the existence of those circumstances. 8 C.F.R. 1208.4(a)(4)(ii) and (5).

The Attorney General, who is responsible for adjudicating asylum applications filed by aliens in removal proceedings, 8 U.S.C. 1158(d)(1), has defined the term "changed circumstances" to include "[c]hanges in conditions in the applicant's country of nationality" and "[c]hanges in the applicant's circumstances that materially affect the applicant's eligibility for asylum, including changes in applicable U.S. law and activities the applicant becomes involved in outside the country of feared persecution that place the applicant at risk." 8 C.F.R. 1208.4(a)(4)(i)(A) and (B). The Attorney General has defined "extraordinary circumstances" as personal circumstances "directly related to the failure to meet the 1-year deadline" that "were not intentionally created by the alien through his or her own action or inaction"; such circumstances include "[s]erious illness or mental or physical disability," "[l]egal disability," "death or serious illness or incapacity of the applicant's legal representative or a member of the applicant's immediate family," and "[i]neffective assistance of counsel." 8 C.F.R. 1208.4(a)(5).

c. An applicant who is ineligible for asylum because of an untimely filed application remains eligible for withholding of removal, see 8 U.S.C. 1231(b)(3)(A), and protection under the 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. See 8 C.F.R. 1208.13(c)(1), 1208.16(c).

Withholding of removal is available if the alien demonstrates that his "life or freedom would be threatened" in the country of removal "because of the alien's race,

religion, nationality, membership in a particular social group, or political opinion." 8 U.S.C. 1231(b)(3)(A). To establish eligibility for withholding of removal, an alien must prove a "clear probability of persecution" upon removal—a higher standard than that required to establish asylum eligibility. *INS* v. *Cardoza-Fonseca*, 480 U.S. 421, 430 (1987). Persecution must be at the hands of the government or by an entity that the government is unwilling or unable to control. *In re Pierre*, 15 I. & N. Dec. 461, 462 (B.I.A. 1975). An alien is not eligible for withholding of removal if he "could avoid a future threat to his or her life or freedom by relocating to another part of the proposed country of removal and, under all the circumstances, it would be reasonable to expect the applicant to do so." 8 C.F.R. 1208.16(b)(2).

In addition, an alien who demonstrates that he would more likely than not be tortured if removed to a particular country may obtain CAT protection. 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); see, *e.g.*, *Lopez-Soto* v. *Ashcroft*, 383 F.3d 228, 239-240 (4th Cir. 2004).

d. Under the INA, "[n]o court shall have jurisdiction to review any determination of the Attorney General" regarding the timeliness of an asylum application, including a determination whether the alien has demonstrated to the satisfaction of the Attorney General that there are changed or extraordinary circumstances warranting consideration of an untimely filed application. 8 U.S.C. 1158(a)(3).

In 2005, Congress amended one subsection of the judicial review provision of the INA, 8 U.S.C. 1252(a)(2), to add 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. a. Lead petitioner John Fredy Ospina Hernandez (petitioner) is a native and citizen of Colombia. Pet. App. 2a. In April 1999, petitioner was admitted to the United States on a visitor's visa authorizing him to stay for six months.[1] *Id.* at 11a, 20a. Petitioner did not timely depart in October 1999, but rather remained in the United States after his lawful status expired. *Id.* at 20a. In February 2004, U.S. Immigration and Customs Enforcement issued a Notice to Appear charging petitioner with being removable based on the overstay of his nonimmigrant visa, pursuant to 8 U.S.C. 1227(a)(1)(B). Administrative Record (A.R.) 623-624.

b. Appearing before an Immigration Judge (IJ), petitioner admitted the allegations contained in the Notice to Appear and conceded that he was removable as

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[1] Petitioner's wife, a co-petitioner, also entered the United States on a six-month visitor's visa in 1999. Her claims for relief are entirely derivative of petitioner's, Pet. App. 11a, and thus this brief does not separately address her circumstances.

charged. Pet. App. 18a; A.R. 322. Accordingly, the IJ found petitioner removable. *Ibid.*

The IJ addressed petitioner's application for asylum, withholding of removal under the INA, and CAT protection, which he had filed previously in March 2003. A.R. 300-318; Pet. App. 18a-28a.[2] The IJ determined that petitioner's asylum application was time-barred under 8 U.S.C. 1158(a)(2)(B), because petitioner had waited nearly four years after entering the United States to file it. Pet. App. 25a-26a. The IJ also determined that petitioner had failed to establish the existence of changed circumstances (the sole exception on which petitioner relied) that would justify excusing the delay pursuant to 8 U.S.C. 1158(a)(2)(D), noting that the "record reveals that he came here already convinced that he was in danger in Colombia and by his own testimony, he came here seeking safety because of his weariness of the violence and injustice in Colombia." Pet. App. 26a.

The IJ next denied on the merits petitioner's claim for withholding of removal under the INA. The IJ first noted that petitioner made no showing of past persecution. Pet. App. 27a. The IJ then determined that petitioner showed no clear probability of future persecution based on his membership in a particular social group consisting of educators/coaches or based on his support of Colombia's Liberal Party. *Id.* at 27a-28a. The IJ explained that petitioner "has not convinced the Court that he was engaged in political activity of sufficient prominence that those activities would have sufficiently outraged his antagonists, that he would even now be re-

[2] The reproduction of the IJ's decision in the appendix to the petition for a writ of certiorari is incomplete. Where omitted material is relevant, this brief cites to the complete version in the Administrative Record.

membered and sought out as a result of those activities. His political activities ended in terms of campaigns approximately six years ago. He has been out of the rural area of particular risk apparently since November 1997." *Ibid.* The IJ further determined that "the level of risk is greatly reduced in the city environment," and noted that "[j]ust as [petitioner] has no protected right to engage in a particular profession or occupation, he also has no protected right to live or work in a particular area." *Id.* at 28a.

The IJ also denied CAT protection because, *inter alia*, petitioner had not indicated that he fears harm at the hands of the government or government-sponsored individuals. A.R. 316.

3. The Board of Immigration Appeals (Board) dismissed petitioner's appeal. Pet. App. 8a-16a. The Board agreed with the IJ that petitioner had failed to establish changed circumstances that would excuse the untimely filing of his asylum application under 8 U.S.C. 1158(a)(2)(B). Pet. App. 12a. The Board stated that petitioner's claim of worsening conditions in Colombia amounted to no more than the absence of improving conditions—*i.e.*, the same conditions he had asserted as the reason for his failure to return when his visitor's visa expired in October 1999. *Ibid.*

The Board also agreed with the IJ's conclusion on the merits that petitioner had failed to show a clear probability that he would face persecution in Colombia on account of a protected ground, as required for withholding of removal under the INA. Pet. App. 13a-14a. The Board held that petitioner's "coaching does not place him within a particular social group" and that "[e]ven if [petitioner's] employment as a sports coach placed him within the class of individuals considered

educators, [petitioner's] employment is not based on a common, immutable characteristic, nor is it visible to society at large." *Id.* at 13a (citation omitted). Relying on the testimony of petitioner's own expert, the Board further found that any threat allegedly present in rural areas "would be greatly diminished if [petitioner] lived in a more urban environment in Colombia." *Id.* at 14a. The Board also rejected petitioner's claim based on his political support of Liberal Party candidates, citing the lack of evidence of targeted persecution of such candidates or their supporters. *Ibid.*[3]

4. In an unpublished opinion, the court of appeals dismissed in part and denied in part the petition for review. Pet. App. 1a-7a. The court dismissed for lack of jurisdiction petitioner's challenge to the Board's determination that his asylum application was time-barred and that petitioner had not established the requisite changed circumstances to excuse that statutory bar. *Id.* at 3a. Relying on its precedent in *Mendoza* v. *United States Attorney General*, 327 F.3d 1283, 1287 (11th Cir. 2003), the court of appeals explained that 8 U.S.C. 1158(a)(3) divests it of jurisdiction to review such determinations. Pet. App. 3a.

The court of appeals also denied on the merits petitioner's challenge to the Board's rejection of his claim for withholding of removal under the INA. Pet. App. 3a-7a. The court affirmed the Board's determination that educators (including sports coaches) did not constitute a particular social group, explaining that "[b]ecause [p]etitioner could change jobs, his position as a sports coach is not an immutable characteristic that is funda-

[3] Because petitioner did not meaningfully contest the IJ's denial of CAT protection, the Board deemed any challenge to that denial waived. Pet. App. 11a n.1.

mental to his identity." *Id.* at 6a. The court further held that petitioner had "demonstrated no objectively reasonable fear of being singled out for future persecution because of his political opinion." *Ibid.* The court noted that petitioner had never been targeted in the past; that he had not occupied any significant post in the Liberal Party or otherwise achieved notoriety that would outlast his decade-long absence; that he had established no pattern or practice of persecution against Liberal Party supporters; and that he could avoid any future threat by relocating to a less rural area of Colombia. *Id.* at 6a-7a.[4]

ARGUMENT

Petitioner contends (Pet. 17-22) that the court of appeals erred in holding that it lacked jurisdiction to review the Board's determination that he failed to demonstrate to its satisfaction the existence of changed circumstances that would warrant consideration of his late-filed asylum application. The court of appeals' decision is correct, and all but one of the courts of appeals that have considered the issue have reached the same result as the decision below. Although the Ninth Circuit has held that 8 U.S.C. 1158(a)(3) does not bar judicial review of the Attorney General's determination that an asylum claim was untimely in certain circumstances, this case would not be reviewable even in the Ninth Circuit. And in any event, this Court has denied certiorari petitions raising the question presented on a number of occasions. See, *e.g.*, *Khan* v. *Holder*, 130 S. Ct. 1049 (2010) (No. 09-229); *Gomis* v. *Holder*, 130 S. Ct. 1048 (2010)

[4] Because petitioner raised no challenge to the IJ's denial of CAT protection, the court of appeals deemed that claim abandoned. Pet. App. 2a n.1.

(No. 09-194); *Eman* v. *Holder*, 130 S. Ct. 62 (2009) (No. 08-1317); *Barry* v. *Holder*, 130 S. Ct. 56 (2009) (No. 08-1216); *Viracacha* v. *Mukasey*, 129 S. Ct. 451 (2008) (No. 07-1363); *Kourouma* v. *Mukasey*, 552 U.S. 1313 (2008) (No. 07-7726); *Lopez-Cancinos* v. *Gonzales*, 550 U.S. 917 (2007) (No. 06-740). No different disposition is warranted here.

In any event, resolution of the jurisdictional question in petitioner's favor would not change the ultimate outcome. Petitioner could not show that the Board erred in finding that "changed circumstances" had not been demonstrated to its satisfaction. Moreover, both the IJ and the Board fully considered petitioner's claim for withholding of removal on the merits and rejected it as both legally and factually deficient. The court of appeals correctly sustained that ruling, and petitioner has not sought review on the withholding claim in this Court. The same findings that required denial of petitioner's withholding claims would also require denial of his asylum claim.

1. The court of appeals correctly determined that it lacked jurisdiction over petitioner's factbound claim. The ultimate question whether petitioner demonstrated to the satisfaction of the Attorney General the existence of changed circumstances that warrant consideration of an untimely claim for asylum relief is committed to the Attorney General's discretion based on his own assessment of the circumstances. The INA provides that the Attorney General "may" consider an untimely asylum application if an alien demonstrates changed circumstances "to the satisfaction of the Attorney General." 8 U.S.C. 1158(a)(2)(D). Congress's use of the word "may" "expressly recognizes substantial discretion," *Haig* v. *Agee*, 453 U.S. 280, 294 n.26 (1981) (citation

omitted), and the phrase "to the satisfaction of the Attorney General" demonstrates Congress's intent that the Attorney General's assessment "entails an exercise of discretion," *Sukwanputra* v. *Gonzales*, 434 F.3d 627, 635 (3d Cir. 2006), in deciding whether to forgive the alien's default. Cf. *Webster* v. *Doe*, 486 U.S. 592, 600 (1988).

In light of the nature of the determination committed to the Attorney General, Congress expressly barred judicial review of such a determination when it enacted the Illegal Immigration Reform and Immigrant Responsibility Act of 1996, Pub. L. No. 104-208, Div. C, 110 Stat. 3009-546. Under 8 U.S.C. 1158(a)(3), "[n]o court shall have jurisdiction to review any determination" regarding the application of the one-year filing deadline for asylum claims, including the determination that a particular asylum applicant has not "demonstrate[d] to the satisfaction of the Attorney General * * * the existence of changed circumstances [that] materially affect the applicant's eligibility for asylum." 8 U.S.C. 1158(a)(2)(D). As petitioner acknowledges (Pet. 16, 17), his petition for review challenged a determination that he had failed to demonstrate changed circumstances sufficiently to forgive that untimely filing. Judicial review of petitioner's challenge is therefore barred by 8 U.S.C. 1158(a)(3).[5]

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[5] As noted above (pp. 3-4, *supra*), an alien is not without an avenue for relief when the Attorney General determines that the alien has not demonstrated to his satisfaction the existence of circumstances excusing compliance with the one-year deadline for filing an application for the discretionary relief of asylum. The alien remains eligible for mandatory withholding of removal under 8 U.S.C. 1231. But in this case the IJ and the Board rejected that claim; the court of appeals sustained

Petitioner contends (Pet. 18, 20-21) that judicial review of the rejection of his asylum claim as untimely should have been available, however, because this case falls within the provision in 8 U.S.C. 1252(a)(2)(D), enacted in 2005 as part of the REAL ID Act, that allows for judicial review of "questions of law." The structure of Sections 1158(a)(2) and (3) demonstrate, however, that Congress did not regard a factbound and discretionary determination by the Attorney General under Section 1158(a)(2)—that an alien had not shown to the Attorney General's satisfaction that there were circumstances that warranted forgiving his procedural default and consideration of his untimely application—to present matters of law of a sort appropriate for judicial review. The enactment of Section 1252(a)(2)(D) in 2005 did not fundamentally alter that judgment of Congress concerning the nature of the Attorney General's determinations about untimely asylum applications, and the court of appeals therefore correctly held that petitioner's challenge to the Board's factbound determination did not raise a "question[] of law."

In this case, the applicable principles are undisputed. Even assuming that the Attorney General's application of those principles in the course of a determination under 8 U.S.C. 1158(a)(2) might be reviewable in some circumstances, petitioner here has not advanced any argument that the Board erred in construing the term "changed circumstances." Instead, petitioner takes issue with the Board's determination that he failed to adduce facts sufficient to show a change in conditions material to his asylum application. Compare Pet. App. 12a

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that determination; and petitioner has not sought review of the court of appeals' ruling in this Court.

(Board's finding that petitioner's "claim of worsening conditions was in fact the absence of improving conditions") with Pet. 14 (noting expert's testimony that political violence in Colombia has worsened and poses a "greater risk" now). That is not a legal determination, but rather is a factual determination involving judgment and discretion. If petitioner's factbound challenge to such a determination by the Attorney General raised a "question[] of law," then any error might be a question of law, thereby rendering the jurisdictional bar in Section 1158(a)(3) meaningless. See, *e.g.*, *Higuit* v. *Gonzales*, 433 F.3d 417, 420 (4th Cir.) (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."), cert. denied, 548 U.S. 906 (2006).

Indeed, a challenge to such a determination by the Attorney General is precisely the type of claim over which Congress intended to withhold jurisdiction when it enacted 8 U.S.C. 1252(a)(2)(D). Congress added the exception for "constitutional claims or questions of law" in response to concerns this Court raised about the reviewability of removal orders in *INS* v. *St. Cyr*, 533 U.S. 289 (2001). In *St. Cyr*, the alien's habeas petition "raise[d] a pure question of law": whether, "as a matter of statutory interpretation," the Board erred in determining that he was not eligible for relief. *Id*. at 298. The alien did not challenge the Board's factfinding, nor did he "contend that he would have any right to have an unfavorable exercise of the Attorney General's discretion reviewed in a judicial forum." *Ibid*. *St. Cyr* distinguished those types of claims from a pure legal claim such as a statutory-interpretation issue, and stated only

that precluding judicial review of the latter would raise constitutional questions. *Ibid.* (alien "d[id] not dispute any of the facts that establish his deportability or the conclusion that he is deportable").

The Conference Report accompanying the REAL ID Act confirms that Congress did not intend the courts of appeals to review the application of undisputed rules of law to the facts of particular cases. The Report made clear that a claim with both factual and legal elements (a "mixed question of law and fact") is not freely reviewable under Section 1252(a)(2)(D). H.R. Conf. Rep. No. 72, 109th Cong., 1st Sess. 175 (2005). Instead, the Report explained that when a court is presented with such a claim, it "should not review any factual elements," such as "questions that courts would review under the 'substantial evidence'" standard. *Id.* at 175-176.

In sum, reading "questions of law" in 8 U.S.C. 1252(a)(2)(D) to encompass determinations such as those at issue here would have the opposite effect of what Congress intended when it committed particular determinations to the judgment and discretion of the Attorney General. See, *e.g.*, *Reno* v. *American-Arab Anti-Discrimination Comm.*, 525 U.S. 471, 486-487 (1999). Because petitioner brought a factbound challenge to factfinding and a discretionary judgment call by the agency, his petition for review did not raise a "question[] of law" under 8 U.S.C. 1252(a)(2)(D), and the court of appeals therefore correctly determined that it lacked jurisdiction to consider it.

2. Consistent with the Eleventh Circuit's ruling in this case, the First, Second, Third, Fourth, Fifth, Sixth, Seventh, Eighth, and Tenth Circuits have held that a challenge to the Board's determination that an alien failed to demonstrate changed or extraordinary circum-

stances warranting consideration of an untimely asylum application normally does not raise a "question[] of law" within the meaning of 8 U.S.C. 1252(a)(2)(D). See, *e.g.*, *Gomis* v. *Holder*, 571 F.3d 353, 358-359 (4th Cir. 2009) (changed or extraordinary circumstances), cert. denied, 130 S. Ct. 1048 (2010); *Usman* v. *Holder*, 566 F.3d 262, 267 (1st Cir. 2009) (changed or extraordinary circumstances); *Khan* v. *Filip*, 554 F.3d 681, 687-690 (7th Cir. 2009) (extraordinary circumstances), cert. denied, 130 S. Ct. 1049 (2010); *Zhu* v. *Gonzales*, 493 F.3d 588, 596 n.31 (5th Cir. 2007) (extraordinary circumstances); *Chen* v. *United States Dep't of Justice*, 471 F.3d 315, 330-332 (2d Cir. 2006) (changed or extraordinary circumstances); *Ferry* v. *Gonzales*, 457 F.3d 1117, 1130 (10th Cir. 2006) (changed or extraordinary circumstances); *Almuhtaseb* v. *Gonzales*, 453 F.3d 743, 748-749 (6th Cir. 2006) (changed circumstances); *Sukwanputra*, 434 F.3d at 635 (changed or extraordinary circumstances); *Ignatova* v. *Gonzales*, 430 F.3d 1209, 1214 (8th Cir. 2005) (extraordinary circumstances).[6] Those courts have explained that a challenge to the Board's determination that an alien did not establish changed or extraordinary circumstances "is merely an objection to the IJ's factual findings and the balancing of factors in which discretion was exercised," not an argument that raises a "question[] of

[6] Although the decision below cites *Mendoza* v. *United States Attorney General*, 327 F.3d 1283, 1287 (11th Cir. 2003), which predates the REAL ID Act's restoration of courts' jurisdiction to review constitutional claims and questions of law, the Eleventh Circuit has since adhered to its precedent that 8 U.S.C. 1158(a)(3) "divests our Court of jurisdiction to review a decision regarding whether an alien complied with the one-year time limit or established [changed] circumstances that would excuse his untimely filing." *Chacon-Botero* v. *United States Att'y Gen.*, 427 F.3d 954, 957 (2005); see also *Delgado* v. *United States Att'y Gen.*, 487 F.3d 855, 860 (2007) (same).

law" under 8 U.S.C. 1252(a)(2)(D). *Chen*, 471 F.3d at 332.

The Ninth Circuit has held that an alien's challenge to the Board's determination that he has not established changed circumstances may in some circumstances raise a "question[] of law" under 8 U.S.C. 1252(a)(2)(D). See *Ramadan* v. *Gonzales*, 479 F.3d 646, 649-656 (2007). In the Ninth Circuit's view, the term "questions of law" in 8 U.S.C. 1252(a)(2)(D) "extends to questions involving the application of statutes or regulations to undisputed facts, sometimes referred to as mixed questions of fact and law." *Ramadan*, 479 F.3d at 650.[7]

That limited disagreement among the courts of appeals does not warrant this Court's attention at this time or in this case. A court of appeals likely lacks jurisdiction over petitioner's challenge even under the Ninth Circuit's view because petitioner's claim of changed circumstances is not based on "undisputed facts." To the contrary, as noted above (pp. 12-13, *supra*), petitioner disagrees (as he must) with the Board's determination that the relevant conditions in Colombia have not in fact worsened and that he does not in fact face a greater risk of persecution now than when his visa expired. See Pet. 14; Pet. App. 12a. Moreover, this Court has recently and repeatedly denied review in cases raising the same question presented. See pp. 9-10, *supra* (collecting cases). There is no reason for a different result here.

3. Even if the court of appeals had jurisdiction to consider the question, petitioner could not show either

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[7] Petitioner contends (Pet. 20-21) that the decision below also conflicts with the Fifth Circuit's decision in *Nakimbugwe* v. *Gonzales*, 475 F.3d 281 (2007). It does not. The court there was asked to rule on the interpretation of a federal regulation as to whether a mailing date constitutes a filing date—a quintessential "question of law." *Id.* at 284.

that the Board erred in failing to consider his untimely asylum application or that he is entitled to asylum relief on the merits.

a. Petitioner provides no basis to believe that a court of appeals would depart from the Board's fact-intensive and discretionary determination that he had failed to establish "changed circumstances" in Colombia "to the satisfaction of the Attorney General." 8 U.S.C. 1158(a)(2)(D). Petitioner's dispute with the factbound determinations of the IJ and Board that conditions in Colombia had not in fact worsened in the relevant sense is not the type of dispute that lends itself to reversal under an appropriately deferential standard of appellate review. See pp. 12-16, *supra*.

b. In any event, the now-final findings made below in the context of petitioner's claim for withholding of removal are almost certainly fatal to petitioner's asylum claim on the merits. Under the applicable regulations, an asylum applicant does not have a well-founded fear of future persecution if he could avoid persecution by relocating within his home country and if it is reasonable to expect him to do so. 8 C.F.R. 1208.13(b)(2)(ii). Because petitioner has not alleged "persecution [that] is by a government or is government-sponsored," he bears the burden of proving that relocation would not be reasonable. 8 C.F.R. 1208.13(b)(3)(i); *In re D-I-M-*, 24 I. & N. Dec. 448, 450 (B.I.A. 2008). Petitioner cannot satisfy that standard. As both the IJ and the Board concluded, petitioner need not return to the rural mountainous area of Colombia where he would be most likely to have contact with the guerrillas or paramilitary groups that petitioner allegedly fears might persecute him. Pet. App. 14a, 28a. Both the IJ and Board further noted that petitioner's own expert witness indicated that any threat

claimed by the petitioner would be "greatly diminished" if he lived in a more urban environment in Colombia. *Ibid*. And the court of appeals relied on those very findings in affirming the denial of withholding relief. *Id.* at 6a-7a.

Moreover, an applicant for asylum, like an applicant for withholding of removal, must show that any persecution would be on account of a protected ground, namely, "race, religion, nationality, membership in a particular social group, or political opinion." 8 U.S.C. 1101(a)(42)(A); see 8 U.S.C. 1231(b)(3)(A) (withholding of removal). Although the standards for asylum and withholding differ in terms of the probability of persecution required, they are the same in that both require this nexus to a protected ground. See, *e.g.*, *INS* v. *Stevic*, 467 U.S. 407, 429-430 (1984). The Board, as affirmed by the court of appeals, held that petitioner's employment as a sports coach did not put him in a "particular social group," and that he failed to demonstrate any objectively reasonable basis for persecution based on "political opinion." Pet. App. 6a, 13a-14a. Petitioner does not challenge those holdings, which would preclude his asylum claim, before this Court.

For those additional reasons, further review in this case is particularly unwarranted.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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