No. 13-323

In the Supreme Court of the United States

JOSE ALBERTO PEREZ-GUERRERO, PETITIONER

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

The Immigration and Nationality Act, 8 U.S.C. 1101 *et seq.*, provides that "no court shall have jurisdiction to review any final order of removal against an alien who is removable" because he committed certain specified criminal offenses. 8 U.S.C. 1252(a)(2)(C). The question presented is whether this jurisdictional bar would have precluded consideration of a factual challenge to the denial of petitioner's application for deferral of removal under the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, *adopted* Dec. 10, 1984, 1465 U.N.T.S. 85, S. Treaty Doc. No. 20, 100th Cong., 2d Sess. (1988), had petitioner asserted such a challenge.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1–30) is reported at 717 F.3d 1224. The decisions of the Board of Immigration Appeals (Pet. App. 31-37) and the immigration judge (Pet. App. 38-131) are unreported.

JURISDICTION

The judgment of the court of appeals was entered on June 12, 2013. The petition for a writ of certiorari was filed on September 10, 2013. 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 an alien convicted of "a crime involving moral turpitude" shall be

removed from the United States. 8 U.S.C. 1182(a)(2)(A)(i)(I).

Under specified circumstances, however, an alien who demonstrates that he would more likely than not be tortured if removed to a particular country may obtain withholding or deferral of removal under the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (CAT), *adopted* Dec. 10, 1984, 1465 U.N.T.S. 85, S. Treaty Doc. No. 20, 100th Cong., 2d Sess. (1988).[1] 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).

b. The INA provides for court of appeals review of "a final order of removal" under specified circumstances. 8 U.S.C. 1252(a)(1). In 1996, Congress amended the INA to expedite the removal of criminal and other illegal aliens from the United States. See

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[1] Article 3 of the CAT provides that "[n]o State Party shall expel, return * * * or extradite a person to another State where there are substantial grounds for believing that he would be in danger of being subjected to torture." 1465 U.N.T.S. 114. Congress directed that regulations be promulgated to implement that obligation. See Foreign Affairs Reform and Restructuring Act of 1998 (1998 Act), Pub. L. No. 105-277, Div. G, § 2242(b), 112 Stat. 2681-822. At the same time, Congress provided that nothing in its implementation of the CAT "shall be construed as providing any court jurisdiction to consider or review claims raised under the [CAT] * * * except as part of the review of a final order of removal pursuant to [8 U.S.C. 1252]." 1998 Act § 2242(d), 112 Stat. 2681-822. The regulations implementing Article 3 of the CAT in the immigration context appear primarily at 8 C.F.R. 208.16-208.18 and 1208.16-1208.18.

Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (IIRIRA), Pub. L. No. 104-208, Div. C, 110 Stat. 3009-546. Among other changes, Congress provided that "administrative findings of fact are conclusive unless any reasonable adjudicator would be compelled to conclude to the contrary." 8 U.S.C. 1252(b)(4)(B).

Congress also limited judicial review of removal orders entered against certain categories of aliens. Specifically, as relevant here, Congress provided that "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" specified sections of the INA. IIRIRA § 306(a)(2), 110 Stat. 3009-607 to 3009-608; see 8 U.S.C. 1252(a)(2)(C). The statute was amended in 2005 to create an exception permitting judicial review of "constitutional claims or questions of law," but otherwise preserving the jurisdictional limitation. REAL ID Act of 2005, Pub. L. No. 109-13, Div. B, § 106(a)(1)(A), 119 Stat. 310; see 8 U.S.C. 1252(a)(2)(C) and (D).

2. Petitioner, a citizen of Mexico, previously worked as department chief of investigation for that country's Federal Agency of Investigation-INTERPOL Mexico (AFI). Pet. App. 53-54. In that capacity, he "was responsible for locating fugitives outside of Mexico for extradition" to that country and for finding fugitives from other countries who were hiding in Mexico. *Id.* at 54. Petitioner secured the position with the help of Jose Antonio Quito Lopez, whom petitioner knew had connections to Mexico's drug cartels. See *id.* at 54-55.

During his time at AFI, petitioner "became aware" of the connections between a number of government

officials and the cartels. Pet. App. 104-105. He also personally transported money from Lopez to a corrupt official at AFI "with the knowledge that the money was tied to the cartels." *Id.* at 105; see *id.* at 115 n.15 (noting that petitioner transported "drug-money on at least two occasions"). Petitioner "never reported the ongoing incidents of corruption—corruption he not only witnessed but helped facilitate." *Id.* at 105.

In 2007, petitioner left AFI for a position at the United States embassy in Mexico City as a Foreign Service National Criminal Investigator. Pet. App. 56. In that position, "he was responsible for assisting U.S. Marshal[s] in locating fugitives from the United States within Mexican territory, making arrangements for extradition or deportation of foreign national fugitives and facilitating communication among Mexican authorities." *Id.* at 56-67. When petitioner applied for the job, he underwent an extensive background check, but he "did not disclose his multiple connections to corrupt Mexican officials or his transport of drug money on more than one occasion." *Id.* at 105; see *id.* at 101 n.8.

In November 2007, petitioner met with a cartel representative (whom he knew as "Mr. Nineteen") after Lopez put the two in touch. Pet. App. 57-58, 93. At the meeting, petitioner told Mr. Nineteen that the U.S. Marshals were tracking Craig Petties, an American fugitive then in Mexico. *Id.* at 57, 58. Petties, "a notorious drug lord," was on the "United States Marshals Service 15 Most Wanted List" at the time. *Id.* at 102 n.9. He had been "indicted in 2002 on charges of running a massive drug operation in Memphis." *Ibid.* The indictment of Petties "also include[d] several

counts relating to the unsolved murder of four potential witnesses said to possess incriminating information regarding Mr. Petties[']s drug activities." *Ibid.* While a fugitive in Mexico, Petties worked with a cartel to smuggle drugs into the United States. *Ibid.*; see *id.* at 102 n.10.

Petitioner provided Mr. Nineteen with "critical information related to a covert U.S. Marshal's operation" intended to "effectuate an arrest warrant against Mr. Petties." Pet. App. 100. The information petitioner provided to the cartel "allowed Mr. Petties to evade authorities at least from the fall of 2007 until 2008, during which time Mr. Petties was able to continue assisting the Beltran Leyva Cartel with smuggling and distributing illegal drugs in the United States and Mexico." *Id.* at 102 n.10. (Petties was finally arrested in 2008. *Id.* at 102 n.9.) Mr. Nineteen paid petitioner $30,000 for the information. *Id.* at 58.

United States law enforcement officials subsequently induced petitioner to fly to the United States (under the pretense that he would receive professional training), and he was arrested upon his arrival. Pet. App. 3. He then cooperated with American and Mexican officials, providing "information about corrupt officials in Mexico who cooperated with the drug cartels." *Ibid.* Based in part on that information, 45 people were arrested, including several high-ranking Mexican law enforcement officials. *Ibid.* Although officials promised petitioner that his identity as an informant would remain confidential, the information leaked and was published. *Ibid.*

3. Petitioner pleaded guilty to one count of bribery in violation of 18 U.S.C. 201(b)(2)(C) and one count of obstruction of justice in violation of 18 U.S.C. 1503.

Pet. App. 3. He was sentenced to a term of 24 months of imprisonment. *Ibid.* As part of his guilty plea, petitioner agreed that he would be removed to Mexico after completing his sentence and that he would not oppose removal "on any grounds other than that he faced death or injury in Mexico as a result of the cooperation he provided to the United States and Mexican governments." *Id.* at 3-4.

4. As petitioner neared the end of his sentence, the Department of Homeland Security placed him in removal proceedings on charges that he was removable because he is an alien convicted of a crime involving moral turpitude, 8 U.S.C. 1182(a)(2)(A)(i)(I), and is an alien without a valid visa or entry document, 8 U.S.C. 1182(a)(7)(A)(i)(I). Pet. App. 4. Petitioner conceded that he was removable, but, as relevant here, sought withholding or deferral of removal under the CAT. *Ibid.*

a. The immigration judge denied petitioner's request for protection from removal under the CAT. Pet. App. 88-106, 124-130.

i. The immigration judge first denied petitioner's request for withholding of removal under the CAT. Pet. App. 88-106. The judge explained that this form of protection is unavailable for an alien who has been convicted of "a particularly serious crime." Pet. App. 89; see 8 C.F.R. 1208.16(d)(2); see also 8 U.S.C. 1231(b)(3)(B)(ii). She further explained that an "aggravated felony" with a sentence of at least five years is automatically considered a "particularly serious crime" but that offenses leading to shorter sentences can qualify as well, depending on the facts and circumstances. Pet. App. 89; see 8 U.S.C. 1231(b)(3)(B).

The immigration judge determined that petitioner's conviction for obstruction of justice was an aggravated felony, but observed that he was sentenced to a term of only two years imprisonment. Pet. App. 89. The judge nonetheless concluded that petitioner's offense was "particularly serious" because of his "egregious breach of the public trust for monetary gain." *Id.* at 91.

The immigration judge noted that petitioner had compromised a sensitive covert operation for money and that, as a result of his actions, a fugitive had been able "to evade authorities [and] * * * perpetuate[] the continued smuggling and distribution of drugs to the United States, Mexico, and elsewhere." Pet. App. 100. The judge found that the gravity of petitioner's offense was

> compounded by the fact that he knowingly and intentionally encouraged violent and dangerous drug cartels and their affiliates to infiltrate the U.S. Embassy—an institution of integrity designed to provide a sanctuary from the powerful influence of criminal elements such as Mexican drug cartels and dedicated to maintaining the security and protection of the people of the United States and Mexico.

Id. at 102-103.

For these reasons, the immigration judge thus concluded that petitioner's offense was "particularly serious" and that he was thus ineligible for withholding of removal under the CAT. Pet. App. 106.

ii. The immigration judge also declined petitioner's request for deferral of removal under the CAT. Pet. App. 124-130. She explained that deferral is available even when an alien has been convicted of a "particu-

larly serious crime." *Id.* at 124 (citing 8 C.F.R. 1208.17(a)). To qualify for this form of protection from removal, petitioner was required to demonstrate "that it is 'more likely than not' that he will be tortured if removed to Mexico." *Ibid.* (quoting 8 C.F.R. 1208.16(c)(2)). Petitioner was further required to show that it was "more likely than not" that any torture would be perpetrated "by a public official acting in his official capacity or at the instigation or with the acquiescence of such an official." *Id.* at 125.

Petitioner contended that "he will be tortured in Mexico by violent Mexican drug cartels and/or corrupt government officials associated with the cartels for his whistle blowing activities." Pet. App. 125. The immigration judge found that petitioner had failed to make the required showing for two independent reasons. *Id.* at 125-130.

The immigration judge first determined that petitioner had failed to establish that it was more likely than not that he would be tortured if he returned to Mexico. Pet. App. 125. The immigration judge acknowledged that petitioner feared that he would be harmed in Mexico and that his wife had received second-hand warnings while she was there. *Id.* at 125-126. The immigration judge noted, however, that petitioner had not received any direct threats and that petitioner's wife had not been harmed even though, after petitioner's name leaked, she continued to work at a Mexican law enforcement agency where corrupt officials were exposed due to petitioner's cooperation. *Id.* at 126.

The immigration judge also found that, even if petitioner could prove that he would likely experience torture in Mexico, he failed to prove that it would occur

with the consent or acquiescence of the Mexican government. Pet. App. 126-130. The immigration judge explained that "[a]cquiescence of a public official requires that the official have awareness of the activity constituting torture prior to its commission and thereafter breach his or her legal responsibility to intervene to prevent such activity." *Id.* at 127 (citing 8 C.F.R. 1208.18(a)(7)). The immigration judge acknowledged that petitioner had demonstrated that there was widespread cartel-related corruption in Mexico, but explained that "the only officials who would presumably want revenge for [petitioner's] whistleblowing activities" were those who had been removed and prosecuted. *Ibid.* Accordingly, petitioner's "own cooperation and the efforts of Mexican authorities acting on the valuable information provided by [petitioner] undercuts government acquiescence." *Id.* at 127-128.

In addition, the immigration judge observed that there was "no evidence to suggest that torture with the consent or acquiescence of public officials is a uniform policy or practice within Mexico." Pet. App. 128. Indeed, the judge noted that Mexican law prohibits torture and that the Mexican government "has taken significant measures to uphold the integrity" of that prohibition. *Ibid.* In addition, the immigration judge noted that the Mexican government "is actively engaged in a 'war' with the drug cartels," had established a new "better-trained and better-funded" national police force as part of that effort, and was "work[ing] closely with the [United States]" on anti-drug trafficking matters. *Id.* at 128-129.

In sum, the immigration judge found that petitioner's own evidence about Mexico "attests to the fact

that although individual members of the government may be corrupted by the cartels, the Mexican government has taken significant steps to remove these officials from power, prosecute them for their crimes, and remove the blight of the powerful influence of drug cartels on Mexican society." Pet. App. 129. Accordingly, petitioner failed to demonstrate that "Mexican officials would acquiesce to his torture while acting in their official capacity." *Id.* at 130.

b. The Board of Immigration Appeals (BIA or Board), reviewing the immigration judge's findings of fact under the "clearly erroneous" standard, see Pet. App. 31 (citing 8 C.F.R. 1003.1(d)(3)(i)), dismissed petitioner's appeal, *id.* at 31-37. The Board agreed with the immigration judge's determination that petitioner's offense was "particularly serious" and that he was therefore ineligible for withholding of removal under the CAT. *Id.* at 32-33. The Board concluded that petitioner "violated the trust of the United States government and his actions endangered the Mexican community by aiding the actions of the drug cartels terrorizing the country." *Id.* at 33.

The Board also concluded that petitioner failed to establish his entitlement to deferral of removal under the CAT because he had not shown that it was more likely than not that he would be tortured or killed if removed to Mexico. Pet. App. 34-36. The Board acknowledged that "[i]t is clear from the record that [petitioner] will face danger in Mexico," but explained that petitioner "has not received any direct threats and the record does not contain specifics" regarding any threats against his family. *Id.* at 34-35.

The Board also found no clear error in the immigration judge's determination that petitioner had

failed to establish that the Mexican government would acquiesce in harm to him. Pet. App. 35. It noted that the corrupt government officials who might want revenge had for the most part been removed from office and that the Mexican government was aggressively combating the drug cartels and corruption within the government. *Id.* at 35-36.

5. The court of appeals denied petitioner's petition for review. Pet. App. 1-30. The court observed that the INA provides that "no court shall have jurisdiction to review any final order of removal against an alien who is removable by reason of having committed a [specified] criminal offense," *id.* at 12 (quoting 8 U.S.C. 1252(a)(2)(C)), except to the extent that the petition for review raises "constitutional claims or questions of law," *ibid.* (quoting 8 U.S.C. 1252(a)(2)(D)).

Under the latter provision, the court of appeals explained, it retained "jurisdiction to review [the petition for review] 'in so far as he challenges the application of an undisputed fact pattern to a legal standard.'" Pet. App. 13 (quoting *Jean-Pierre* v. *United States Att'y Gen.*, 500 F.3d 1315, 1322 (11th Cir. 2007)). In particular, the court stated that it had "jurisdiction to review the legal questions '[w]hether a particular fact pattern amounts to [the legal definition of] torture and whether the Board 'failed to give reasoned consideration to [petitioner's] claims.'" *Ibid.* (first and second set of brackets in original) (quoting *Jean-Pierre*, 500 F.3d at 1322, 1326). The requirement that the Board give "reasoned consideration" to petitioner's claim in this case, the court explained, derived from a regulation providing that, "[i]n assessing whether it is more likely than not that an

applicant would be tortured in the proposed country of removal, all evidence relevant to the possibility of future torture shall be considered." *Id.* at 15 (quoting 8 C.F.R. 208.16(c)(3)); see 8 C.F.R. 1208.16(c)(3) (same).

The court of appeals noted that just before oral argument petitioner had submitted a response to a government supplemental-authority letter in which he "suggest[ed] for the first time that the jurisdictional bar of [S]ection 1252(a)(2)(C) does not apply to his petition" because "he is not removable 'by reason of' his criminal conviction." Pet. App. 13 (quoting 8 U.S.C. 1252(a)(2)(C)). The court, however, explained that petitioner "had already conceded" in his response to an earlier motion to dismiss filed by the government that Section 1252(a)(2)(C) "applied to his petition," and that "he conceded that point again at oral argument," *i.e.*, after his letter. *Ibid.* In any event, the court noted that it had "already held that the finding of the Board that a petitioner seeking deferral of removal under the [CAT] failed to meet his burden of establishing that it was more likely than not that he would be tortured is an unreviewable fact finding under [S]ection 1252(a)(2)(C)." *Id.* at 13-14 (citing *Cole* v. *United States Att'y Gen.*, 712 F.3d 517, 532-533 (11th Cir.), cert. denied, 134 S. Ct. 158 (2013), and *Singh* v. *United States Att'y Gen.*, 561 F.3d 1275, 1280-1281 (11th Cir. 2009) (per curiam)).

At the same time, as required by circuit precedent applying 8 C.F.R. 208.16(c)(3) (quoted above), the court of appeals did review the Board's decision to determine whether the Board gave reasoned consideration to petitioner's contention "that he was likely to endure severe pain or suffering in Mexico." Pet. App.

14. The court concluded that the Board fulfilled that obligation and thus did not commit an error of law as petitioner had contended. *Id.* at 16-18. In particular, the court concluded that the Board "considered all of the evidence relevant to [petitioner's] argument that he would be tortured or killed in Mexico" but explained that petitioner "has not received any threats and that the record did not contain evidence of any specific threats that were directed at his family." *Id.* at 17. In sum, the court of appeals determined that the Board "reasonably found that [petitioner] faces some danger, but that this risk of danger is not so great that he is likely to be tortured." *Ibid.* Based on that determination, the court found it unnecessary to address the Board's independent finding that petitioner had failed to demonstrate that "Mexican officials would consent to or acquiesce in [petitioner's] torture." *Id.* at 18; see *id.* at 14.

6. Before briefing on the merits, the court of appeals had denied petitioner's application for a stay of removal. See 1/19/2012 Order. This Office has been informed by the Department of Homeland Security that petitioner was removed to Mexico in January 2012. See also Pet. 5.

ARGUMENT

The court of appeals correctly determined that it lacked jurisdiction to review any factual challenges to the denial of petitioner's request for deferral of removal under the CAT. While that interpretation of the jurisdictional provisions of the Immigration and Nationality Act, 8 U.S.C. 1101 *et seq.*, conflicts with one adopted by the Ninth Circuit, this petition for a writ of certiorari presents an inappropriate vehicle for considering the question. Petitioner belatedly and

inadequately asserted the jurisdictional argument he now advances, and the court of appeals therefore did not address any contrary authority. Moreover, petitioner several times expressly disavowed any factual challenge to the BIA's rejection of his request for deferral of removal, and the court of appeals fully addressed the only relevant claim that petitioner did advance below, namely that the BIA had not given reasoned consideration to all the evidence relevant to his CAT claim. Finally, petitioner fails to demonstrate that any reasonable adjudicator would have been compelled to find in his favor if he had asserted a factual claim below and the court of appeals had considered such a claim. Further review is not warranted.

1. a. The court of appeals correctly concluded (Pet. App. 12-13) that 8 U.S.C. 1252(a)(2)(C) bars judicial review of finding of fact in a case such as this. Accordingly, the court would not have had jurisdiction over a sufficiency-of-the-evidence claim had petitioner advanced one below. The INA provides that "[n]otwithstanding any other provision of law, * * * no court shall have jurisdiction to review any final order of removal against an alien who is removable by reason of having committed a [specified] criminal offense." 8 U.S.C. 1252(a)(2)(C). This categorical jurisdictional prohibition is subject to only one exception, which allows review of "constitutional claims or questions of law." 8 U.S.C. 1252(a)(2)(D).

This provision would not have permitted the court of appeals to review "factual issues" (Pet. 9) regarding petitioner's claim. Petitioner is an (1) an "alien," who was (2) "removable," (3) "by reason of having committed a criminal offense covered in" one of the specified

grounds for removal. 8 U.S.C. 1252(a)(2)(C). The court of appeals was therefore without jurisdiction to review his final order of removal, except to the extent he asserted legal claims. *Ibid.*; see 8 U.S.C. 1252(a)(2)(D).

The large majority of courts of appeals have applied Section 1252(a)(2)(C) in this straightforward fashion. See *Cole* v. *United States Att'y Gen.*, 712 F.3d 517, 532-533 (11th Cir.), cert. denied, 134 S. Ct. 158 (2013); *Escudero-Arciniega* v. *Holder*, 702 F.3d 781, 785 (5th Cir. 2012); *Cherichel* v. *Holder*, 591 F.3d 1002, 1017 (8th Cir.), cert. denied, 131 S. Ct. 74 (2010); *Gourdet* v. *Holder*, 587 F.3d 1, 5 (1st Cir. 2009); *Saintha* v. *Mukasey*, 516 F.3d 243, 248 (4th Cir.), cert. denied, 555 U.S. 1031 (2008); *Ilchuk* v. *Attorney Gen.*, 434 F.3d 618, 624 (3d Cir. 2006).

b. The Ninth Circuit, on the other hand, has read an "on the merits" requirement into this jurisdiction-precluding provision. See generally *Pechenkov* v. *Holder*, 705 F.3d 444, 449-452 (2012) (Graber, J., concurring) (explaining the development of this "additional, sometimes confusing, exception" in that circuit). The Ninth Circuit applies this exception in circumstances where relief from removal is denied "on the merits" of an alien's claim for relief (such as under the CAT), as opposed to being denied because he is ineligible for that form of relief due to his criminal conviction. See *id.* at 450-451; see also *Alphonsus* v. *Holder*, 705 F.3d 1031, 1036-1037, reh'g en banc denied (2013); *Lemus-Galvan* v. *Mukasey,* 518 F.3d 1081, 1083-1084 (2008); *Morales* v. *Gonzales*, 478 F.3d 972, 980 (2007); *Unuakhaulu* v. *Gonzales*, 416 F.3d 931, 933-935 (2005).

The Ninth Circuit's approach is incorrect. That court's rule implicitly and erroneously assumes that the denial of CAT protection "on the merits" is somehow not a part of a "final order of removal" rendered unreviewable by Section 1252(a)(2)(C). An order of removal is defined as "the order of the * * * administrative officer to whom the Attorney General has delegated the responsibility for determining whether an alien is [removable], concluding that the alien is [removable] or ordering [removal]." 8 U.S.C. 1101(a)(47)(A). This Court has held that, for purposes of judicial review, the term "final order of removal" includes all administrative determinations regarding relief or protection from removal. See *Foti* v. *INS*, 375 U.S. 217, 232 (1963) (stating that applications for relief adjudicated in immigration proceedings fall within the ambit of the term "final order of deportation"); *id.* at 229 ("[I]t seems rather clear that all determinations made during and incident to the administrative proceeding conducted by a special inquiry officer, and reviewable together by the Board of Immigration Appeals, such as orders denying voluntary departure * * * and orders denying the withholding of deportation * * * , are likewise included within the ambit of the exclusive jurisdiction of the Courts of Appeals."); see also *INS* v. *Chadha*, 462 U.S. 919, 938 (1983) ("[T]he term 'final orders' in [the INA jurisdictional statute] 'includes all matters on which the validity of the final order is contingent, rather than only those determinations actually made at the hearing.'") (citation omitted); *Cheng Fan Kwok* v. *INS*, 392 U.S. 206, 216 (1968).

Under Section 1252(a)(2)(C), "the only relevant question is whether an [immigration judge] has made

a finding of *removability* because of a relevant conviction." *Pechenkov*, 705 F.3d at 451 (Graber, J., concurring). That leads to "a straightforward inquiry: Was the alien charged with removability because of a relevant crime, and did the [immigration judge] correctly sustain that charge?" *Ibid.* "If so, [a court of appeals] lack[s] jurisdiction over all questions not covered by [Section] 1252(a)(2)(D)." *Id.* at 451-452.

c. As petitioner observes (Pet. 10), the Seventh Circuit has stated that courts retain jurisdiction to review factual claims associated with denials of deferral of removal, but that court's reasons (which are different from the Ninth Circuit's) fare no better. In *Issaq* v. *Holder*, 617 F.3d 962 (2010), the Seventh Circuit stated in dictum that because *deferral* of removal is an "inherently non-final remedy," Section 1252(a)(2)(C) "(which speaks only of a final order) appears to be inapplicable." *Id.* at 969-970. That statement was unnecessary to the court's decision in *Issaq* because the alien in that case had not sought deferral of removal under the CAT. See *id.* at 970; see also *id.* at 970-971 (Ripple, J., concurring) (criticizing majority for discussing this question, which was "not squarely presented in the case" and, "therefore, need not be decided at this time").

Subsequently, in *Wanjiru* v. *Holder*, 705 F.3d 258 (2013), the Seventh Circuit stated:

> A deferral of removal is like an injunction: for the time being, it prevents the government from removing the person in question, but it can be revisited if circumstances change. * * * That is why such an order can be final enough to permit judicial review, but at the same time not be the kind of "final" order covered by § 1252(a)(2)(C).

Id. at 264-265 (internal citations omitted). The Seventh Circuit acknowledged that this analysis was not "necessary" to its determination that it had jurisdiction in *Wanjiru* because, as the government had conceded, the criminal conviction of the alien did not trigger the jurisdictional bar. See *id.* at 262-263.

The Seventh Circuit's analysis fails adequately to recognize that the court's jurisdiction under 8 U.S.C. 1252(a)(1) is limited in the first place to "final orders of removal," a term that has been interpreted by this Court to include all rulings on relief and protection from removal, as described above and reflected in the definition of "order of [removal]" in 8 U.S.C. 1101(a)(47). See pp. 15-16, *supra*. The Seventh Circuit's analysis also fails to recognize that although a *grant* of deferral of removal is inherently non-final, the agency's *denial* of deferral relief—the matter before the court—is absolutely final.

3. Although there is a conflict between the Ninth Circuit (and statements in dicta from the Seventh Circuit) and the majority of courts of appeals, this petition presents an inappropriate vehicle for resolving it. Before the court of appeals, petitioner affirmatively disavowed the availability of the sort of judicial review he now advocates, and the court fully addressed on the merits the only claims he actually asserted. Moreover, petitioner fails to demonstrate that the kind of fact-based review he now seeks would have led to a different result.

a. After petitioner filed his petition for review in the court of appeals, the government filed a motion to dismiss the petition for lack of jurisdiction because petitioner was removable as an alien convicted of a crime involving moral turpitude. See Respondent's

Mot'n to Dismiss and Opp'n to Petitioner's Emergency Mot. to Stay Removal 2, 3-4 (citing 8 U.S.C. 1252(a)(2)(C)). In response, petitioner stated categorically that he did "*not* seek review of the BIA's factual findings." Petitioner's Resp. in Opp'n to Mot. to Dismiss 4 (Feb. 1, 2012) (emphasis added). Instead, petitioner insisted he was raising only questions of law. *Id.* at 4-8. He identified his legal claims as involving (1) the BIA's asserted "fail[ure] to evaluate all the factors regarding [petitioner's] claim that it is more likely than not that he will be tortured upon removal, as is required by [8] C.F.R. § 1208.16(c)(3)," and (2) the BIA's asserted "err[or] in failing to consider dispositive issues and to explain [its] reasoning as to those issues." *Id.* at 4. He asserted no claim that the Board's decision was not supported by substantial evidence, nor did he contend that the court of appeals would have jurisdiction over such a claim.

The court of appeals referred the government's motion to dismiss to the merits panel. See 7/06/2012 Order. In petitioner's opening brief, he assured the court that "[j]urisdiction is proper here as [petitioner] seeks review of questions of law and constitutional matters within the purview of this Court." Pet. C.A. Br. xi (citing 8 U.S.C. 1252(a)(2)(D)). In particular, he contended that "the BIA failed to apply the proper rule of law in reaching its decision on his CAT claim, which constitutes legal error well within the jurisdiction of this court." *Id.* at xi-xii. As in his opposition to the government's motion to dismiss, petitioner contended that the BIA had committed legal error by failing to "examine all of the evidence before it and give a reasoned explanation of its decision in light of that

evidence." *Id.* at 23 (citing 8 C.F.R. 1208.16(c)(3)); see also, *e.g.*, *id.* at 19-20, 24, 26, 27, 29, 37.

After the government's merits brief as respondent reasserted that the court of appeals lacked jurisdiction to review the BIA's factual determinations, see Gov't C.A. Br. 29-31, petitioner again insisted that he was asking the court of appeals only to determine whether the "agency correctly applied the proper rule of law," see Pet. C.A. Reply Br. 1-2.

Just before argument, the government submitted a letter pursuant to Rule 28(j) of the Federal Rules of Appellate Procedure regarding a new Eleventh Circuit decision holding that 8 U.S.C. 1252(a)(2)(C) and (D) "restricted the Court's review of [an alien's] [CAT] claim to legal or constitutional questions." Letter from Dana M. Camillari, Trial Att'y, DOJ Civil Div., to Hon John Ley, Clerk 1 (Mar. 22, 2013); see *Cole*, *supra*.

In response, petitioner again stated that he was pursuing legal claims. Letter from Aaron K. Block, Counsel for Petitioner, to Hon. John Ley, Clerk 1 (Mar. 25, 2013). He said he was arguing "that the BIA failed to meet its fundamental legal obligation to consider the entire record under 8 C.F.R. § 1208.16(c)(3) and [the court of appeals'] case law, as opposed to arguing that the BIA adhered to the legal standard but simply weighed the evidence differently than [p]etitioner would have preferred." *Ibid.* In the same letter, petitioner went on to state that "[t]his area of the law is evolving and unsettled" and that Section 1252(a)(2)(C) did not apply to review of petitioner's deferral of removal claim, citing authority from the Ninth and Seventh Circuits. *Id.* at 1-2 (citing *Lemus-Galvan*, 518 F.3d at 1084, and *Wanjiru*, 705 F.3d at

264-265). Even when making that assertion, however, petitioner did not contend he was actually seeking substantial-evidence review of the BIA's factual determinations, and he did not set out any argument based on the record that any reasonable fact-finder would have been compelled to find that it was more likely than not that he would be tortured if returned to Mexico. See 8 U.S.C. 1252(b)(4)(B).

As the court of appeals noted, petitioner's supplemental letter was the "first time" that petitioner had ever argued that the jurisdictional bar in 8 U.S.C. 1252(a)(2)(C) did not apply to review of his deferral-of-removal claim. Pet. App. 13. Indeed, the court noted, petitioner "had already conceded in his response to the motion to dismiss of the Attorney General that [S]ection 1252(a)(2)(C) applied to his petition." *Ibid.* The court further observed that petitioner had "conceded that point again at oral argument," *ibid.*, *i.e.*, *after* his supplemental letter.

It was only after noting petitioner's tardy and halting assertion concerning the application of Section 1252(a)(2)(C) that the court of appeals went on to state briefly that "we have already held that the finding of the Board that a petitioner seeking deferral of removal under the [CAT] failed to meet his burden of establishing that it was more likely than not that he would be tortured is an unreviewable fact finding under [S]ection 1252(a)(2)(C)." Pet. App. 13. The court then addressed on the merits the only relevant claim that petitioner had repeatedly said he was asserting, *i.e.*, whether the Board "gave reasoned consideration to [petitioner's] argument that he was likely to endure severe pain or suffering in Mexico." *Id.* at 14; see *id.* at 14-18.

In light of petitioner's failure adequately to contend below that Section 1252(a)(2)(C) categorically did not apply to his challenge to the BIA's denial of deferral of removal—as well as petitioner's failure to seek substantial-evidence review of the Board's determination that he had not shown it was more likely than not that he would be tortured in Mexico with the acquiescence of Mexican officials—the court of appeals did not engage with (or even cite) relevant decisions from the Ninth or Seventh Circuits. Moreover, to the extent petitioner believed that the Eleventh Circuit should have overruled its prior precedent on point in light of the authority from those other courts, he should have filed a petition for rehearing en banc to ask it do so. Finally, petitioner below affirmatively disavowed any request for fact-based review of the kind he now asserts that Section 1252(a)(2)(C) should be construed to permit. For these reasons, this case would be a poor vehicle for addressing the jurisdictional question.

b. Petitioner also fails to demonstrate that the result in this case would be any different if (1) the court of appeals had determined that Section 1252(a)(2)(C) did not apply to his challenge to the BIA's denial of deferral of removal, and (2) he had actually asserted a fact-based challenge to the BIA's decision. As noted above, the court of appeals did review the BIA's rejection of petitioner's request for deferral of removal en route to determining that the BIA "gave reasoned consideration to [petitioner's] argument that he is likely to be tortured or killed." Pet. App. 18; see *id.* at 14-18; see also *id.* at 15 (characterizing this as a legal claim).

To be sure, the court of appeals noted that this review was not the same as "review for whether sufficient evidence supports the decision of the Board." Pet. App. 16. But petitioner nevertheless fails to demonstrate he would have prevailed had he asserted such a sufficiency-of-the-evidence claim, given how deferential such review is. In particular, the Board acknowledged that petitioner would face "some danger in Mexico," but the court of appeals explained that the Board "reasonably" determined that petitioner had failed to show it was more likely than not that he would be tortured, given that he had "not received any direct threats and that the record did not contain evidence of any specific threats that were directed at his family." *Id.* at 17. Petitioner makes no effort in the certiorari petition to demonstrate, on the basis of an assessment of the record, that any reasonable finder of fact would have been compelled to find to the contrary—*i.e.*, that it was more likely than not that he would be tortured if returned to Mexico. See 8 U.S.C. 1252(b)(4)(B); *INS* v. *Elias-Zacarias*, 502 U.S. 478, 481 & n.1 (1992). Indeed, in his passing reference to substantial-evidence review of factual issues (see Pet. 13, 14), petitioner does not even acknowledge that very deferential standard of review, which he would have to satisfy.

The court of appeals found it unnecessary to address petitioner's further contention that "the Board failed to give reasoned consideration to his argument that Mexican officials would consent to or acquiesce in his torture." Pet. App. 18. Petitioner likewise would be unable to demonstrate that BIA lacked substantial evidence for its rejection of his claim on this alternative basis. Accordingly, even if petitioner had carried

his burden of demonstrating that it was more likely than not that he would be harmed by the cartels in Mexico, he failed to make the required showing that any reasonable adjudicator would be compelled to find that any such abuse would take place with the acquiescence of the Mexican government. Indeed, as the immigration judge found, many of the corrupt officials identified with petitioner's assistance had been removed from office or prosecuted, and the Mexican government is committed to combatting both the cartels and cartel-related corruption. See pp. 8-9, *supra*.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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