No. 07-1169

In the Supreme Court of the United States

PAUL ANTHONY RANGOLAN, 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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QUESTIONS PRESENTED

1. Whether the court of appeals erred in denying petitioner's motion for a stay of removal.

2. Whether the court of appeals erred in holding that it lacked jurisdiction to review the Board of Immigration Appeals' denial of petitioner's request for deferral of removal under the Convention Against Torture.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1-2) is unreported. The opinions of the Board of Immigration Appeals (Pet. App. 3-6) and the immigration judge (Pet. App. 7-16) are unreported.

JURISDICTION

The judgment of the court of appeals was entered on October 23, 2007. A petition for rehearing was denied on November 21, 2007 (Pet. App. 17). On February 13, 2008, the Chief Justice extended the time within which to file a petition for a writ of certiorari to and including March 11, 2008, and the petition was filed on that date. Petitioner improperly invokes this Court's jurisdiction under 8 U.S.C. 1252(a)(1), but this Court's jurisdiction is properly invoked under 28 U.S.C. 1254(1).

STATEMENT

1. In 1996, Congress amended the Immigration and Nationality Act (INA), 8 U.S.C. 1101 *et seq.*, to expedite the removal of criminal and other illegal aliens from the United States. See Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (IIRIRA), Pub. L. No. 104-208, Div. C, 110 Stat. 3009-546. Four amendments to the INA are particularly relevant here.

First, Congress streamlined the removal of aliens who illegally reenter the United States after being deported or removed by authorizing the reinstatement of an earlier removal order without the need for additional administrative proceedings. See IIRIRA § 305(a)(3), 110 Stat. 3009-599 (codified at 8 U.S.C. 1231(a)(5)). As a result, when an alien who has previously been removed or who departed voluntarily under an order of removal illegally reenters the United States, the Department of Homeland Security (DHS) may simply execute the prior order again. See *Fernandez-Vargas* v. *Gonzales*, 548 U.S. 30 (2006).

Second, Congress eliminated the provision of the INA that automatically stayed the enforcement of a removal order upon the filing of a petition for review in a court of appeals, providing instead that the court may issue a discretionary stay of removal during the pendency of a judicial review proceeding on a case-by-case basis. See IIRIRA § 306(a)(2), 110 Stat. 3009-608 (codified at 8 U.S.C. 1252(b)(3)(B)). Congress also ensured that, if an alien is removed while his petition for review is pending, removal from the United States does not divest the court of jurisdiction it otherwise possesses. IIRIRA § 306(b), 110 Stat. 3009-612 (repealing 8 U.S.C. 1105a(c) (1994)); see, *e.g.*, *Ngarurih* v. *Ashcroft*, 371 F.3d 182, 192 (4th Cir. 2004); see also *Stone* v. *INS*,

514 U.S. 386, 398-399 (1995) (discussing pre-IIRIRA INA provisions governing stays and barring judicial review once an alien has been deported).

Third, Congress provided a statutory standard for when the federal courts may enjoin execution of removal orders. The INA now provides that "no court shall enjoin the removal of any alien pursuant to a final order under [8 U.S.C. 1252] unless the alien shows by clear and convincing evidence that the entry or execution of such order is prohibited as a matter of law." 8 U.S.C. 1252(f)(2).

Finally, Congress restricted federal-court review of final orders of removal entered against criminal aliens. The INA now provides, in pertinent part:

> [N]o 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 [1182(a)(2) or 1227(a)(2)(A)(iii), (B), (C), or (D)].

8 U.S.C. 1252(a)(2)(C).[1] In 2005, Congress qualified this jurisdictional bar by providing:

> 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.

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[1] All references to 8 U.S.C. 1252(a)(2)(C) and (D) are to the 2005 Supplement.

2. Petitioner, a native and citizen of Jamaica, was admitted to the United States in 1987 as a lawful permanent resident. A.R. 2, 299-301, 470-471. He has a lengthy criminal history in the United States. He was arrested in 1987 for theft; in 1994 for unlawful entry, assault with a dangerous weapon, and theft; and in 1995 for receiving stolen property; and a warrant was issued for his arrest for retail theft in 2001. A.R. 231, 298-299. Petitioner also frequently used aliases and changed his vehicle registration to evade law enforcement authorities. Pet. App. 14; A.R. 232.

Petitioner also was convicted of two federal crimes. In March 1990, he was convicted of embezzlement by a bank employee, in violation of 18 U.S.C. 656, and was sentenced to five years of probation. A.R. 296-297. In February 1997, he was convicted of conspiracy to file false tax returns, in violation of 18 U.S.C. 286, and was sentenced to one year and one day of imprisonment and two years of supervised release. A.R. 293, 296-298.

Petitioner was placed in removal proceedings in 1998 and charged with being removable pursuant to 8 U.S.C. 1227(a)(2)(A)(ii) for committing two crimes of moral turpitude and pursuant to 8 U.S.C. 1227(a)(2)(A)(iii) for committing an aggravated felony. A.R. 293; Gov't C.A. Mot. to Dismiss 2-3. An immigration judge (IJ) found petitioner removable as charged, and petitioner was removed from the United States in January 1999 and was informed that he could not apply for readmission to the United States without the Attorney General's approval. A.R. 293-294.

Two months later, petitioner illegally reentered the United States. A.R. 196, 239, 294. Petitioner continued to engage in criminal activity. In 2003, he regularly purchased large quantities of marijuana, which he provided

to guests at his home. A.R. 229, 294. In June 2004, agents of Immigration and Customs Enforcement (ICE) in the Department of Homeland Security who were executing a search warrant at petitioner's residence discovered approximately one kilogram of marijuana, a .45 caliber semi-automatic pistol, a shotgun, assault rifles, three handguns, and approximately $4,280 in cash. Pet. App. 14; A.R. 294-295. Petitioner pleaded guilty to using, carrying, and possessing a firearm during a drug trafficking offense, in violation of 18 U.S.C. 924(c)(1)(A), and to illegal reentry following removal, in violation of 8 U.S.C. 1326(a) and (b)(2), and was sentenced to twenty-seven months of imprisonment. A.R. 235, 293-294.

ICE determined that petitioner was subject to removal through reinstatement of his prior removal order. See 8 U.S.C. 1231(a)(5). Petitioner sought relief from removal in the form of withholding of removal under 8 U.S.C. 1231 or withholding or deferral of removal under the United Nations Convention Against Torture and Other Cruel and Degrading Treatment or Punishment (CAT), Dec. 10, 1984, 1465 U.N.T.S. 85. A.R. 451-455. Petitioner contended that he would be persecuted and/or tortured on account of his sexual orientation and his HIV-positive status if removed to Jamaica. Pet. App. 3-4. Because petitioner asserted a fear of persecution and torture in Jamaica, his case was referred to an IJ. A.R. 451-452; see 8 C.F.R. 1238.1(f)(3).

3. Before the IJ, petitioner conceded that he was ineligible for asylum because he had been convicted of an aggravated felony. Pet. App. 8; see 8 U.S.C. 1158(b)(2)(A)(ii) and (B)(i). The IJ denied withholding of removal under 8 U.S.C. 1231 and the CAT, but granted deferral of removal under the CAT. Pet. App.

7-16. The IJ first found that petitioner is ineligible for withholding of removal under both 8 U.S.C. 1231 and the CAT because he had been convicted of a particularly serious crime (his drug trafficking offense) and his prior crimes and his large firearms collection make him a danger to the community. Pet. App. 13-14; see 8 U.S.C. 1231(b)(3)(B); 8 C.F.R. 1208.16(d)(2).

The IJ then determined that petitioner is eligible for deferral of removal under the CAT. Pet. App. 14-16; see 8 C.F.R. 1208.17. The IJ found that petitioner is a homosexual; that petitioner was previously "chased and beaten by an antihomosexual mob" in Jamaica; that Jamaican law criminalizes "any kind of physical intimacy between men in public or in private"; and that there is "physical abuse of prisoners by guards" in Jamaican prisons. Pet. App. 15-16. The IJ then concluded that, if petitioner was returned to Jamaica, "it would be more likely than not based upon his history * * * that he would commit homosexual acts and would be subject to imprisonment for th[ose] act[s] and tortured." *Id.* at 16.

4. The Board of Immigration Appeals (BIA) vacated the IJ's grant of deferral of removal under the CAT and ordered petitioner removed to Jamaica. Pet. App. 3-6. It found that the IJ's conclusion that petitioner would be tortured if removed to Jamaica "is based on a series of unsupported suppositions" and that "the record does not establish that it is more likely than not that any torture [petitioner] may suffer in Jamaica would be by or at the acquiescence of the government." *Id.* at 4. The BIA acknowledged that Jamaican law does "prohibit[] acts of physical intimacy between men," but it determined that because "there is little evidence" regarding "the extent to which this law is enforced," the IJ erred in concluding

that petitioner would likely be arrested and prosecuted for being a homosexual. *Id.* at 4-5.

Further, the BIA found that "the record does not establish that it is more likely than not that, if arrested and imprisoned, [petitioner] would be tortured *by or at the acquiescence of* the Jamaican government," Pet. App. 5 (emphasis added), a necessary showing for CAT protection. The BIA noted that Jamaican law prohibits torture; that the Jamaican government "ha[s] made efforts to remove abusive guards and improve prison procedures"; that the Jamaican government has "generally cooperated with human rights and other groups who monitored the prisons"; that the Jamaican government has investigated and prosecuted incidents of violence against homosexuals; and that the Jamaican government is "working to reduce the stigma of HIV/AIDS." *Id.* at 5-6. Accordingly, the BIA found that the IJ erred in finding government acquiescence because the Jamaican government has not "instigated or been willfully blind to the violence aimed at homosexuals." *Id.* at 6.

5. Petitioner filed a petition for review in the court of appeals and sought a stay of removal while his petition was pending. The government moved to dismiss the petition for review under 8 U.S.C. 1252(a)(2)(C) because petitioner is removable by reason of his aggravated felony conviction. See Gov't C.A. Mot. to Dismiss 5-7; see also 8 U.S.C. 1227(a)(2)(A)(iii). The government acknowledged that, notwithstanding the jurisdictional bar in 8 U.S.C. 1252(a)(2)(C) to review of removal orders entered against aggravated felons, the court of appeals had jurisdiction to consider "constitutional claims or questions of law" under 8 U.S.C. 1252(a)(2)(D). But the government explained that petitioner's fact-bound challenge to the BIA's denial of deferral of removal under

the CAT did not present any such questions. Gov't C.A. Mot. to Dismiss 8. The government also opposed the motion for a stay, arguing that petitioner did not qualify under either the standard set forth in 8 U.S.C. 1252(f)(2) or under the traditional standard for preliminary injunctive relief. *Id.* at 8-16.

The court of appeals granted the government's motion to dismiss and denied petitioner's motion for a stay in a brief, unpublished order. Pet. App. 1-2. Judge Gregory noted his dissent from the order. *Ibid.* A petition for rehearing was denied by the same vote, and rehearing en banc was denied because no poll of the judges was requested. *Id.* at 17.

6. Petitioner applied to the Chief Justice for a stay of removal pending the resolution of his certiorari petition and the Chief Justice denied the application. No. 07A430 (Dec. 14, 2007). Petitioner re-filed the stay application with Justice Kennedy, who referred it to the Court, and the Court denied the application on February 19, 2008.

ARGUMENT

Petitioner contends (Pet. 10-19) that the court of appeals erred in denying his application for a stay of removal and dismissing his petition for review. The court of appeals correctly denied petitioner's stay request, because petitioner could not satisfy either the 8 U.S.C. 1252(f)(2) standard or the traditional standard for granting a preliminary injunction, which in turn has been applied to the granting of a stay. The court of appeals also correctly dismissed the petition for review, because petitioner's fact-bound claim does not raise a "question[] of law" over which the court of appeals retained jurisdiction under 8 U.S.C. 1252(a)(2)(D). The

court of appeals' brief, unpublished order does not conflict with any decision of this Court or any other court of appeals. Moreover, because the unpublished order does not establish circuit precedent, it would not in any event give rise to the sort of conflict between precedential decisions of courts of appeals that would warrant this Court's review. And the fact that the court of appeals did not set forth its reasoning in its order makes this case a particularly inappropriate candidate to review the questions presented. Accordingly, the petition should be denied. Indeed, the Chief Justice and then the full Court have already denied petitioner's application for a stay of removal, which raised the same arguments. There is no reason for a different disposition of the certiorari petition itself.

1. Petitioner first contends (Pet. 10-12) that review is warranted because the courts of appeals disagree about the standard for determining when to issue a stay of removal pending resolution of a petition for review. Although petitioner is correct that the courts of appeals have disagreed about the appropriate standard, this case is not a suitable vehicle for resolving that disagreement, because the court of appeals did not expressly choose between the two possible standards in this case and because petitioner is not entitled to a stay under either standard.

a. There is disagreement in the courts of appeals regarding which standard governs a request for a stay of removal pending the resolution of a petition for review. In opposing petitioner's stay in the Fourth Circuit, the government contended that the applicable standard is contained in 8 U.S.C. 1252(f)(2), which states that "no court shall enjoin the removal of any alien * * * unless the alien shows by clear and convincing

evidence that the entry or execution of such order is prohibited as a matter of law." See, *e.g.*, Gov't C.A. Mot. to Dismiss 9.[2] The Eleventh Circuit agreed with that position in *Weng* v. *United States Attorney General*, 287 F.3d 1335, 1337-1340 (2002) (per curiam). In contrast, a number of courts of appeals have held that the Section 1252(f)(2) standard does not apply to requests for temporary stays of removal pending appellate review. See *Tesfamichael* v. *Gonzales*, 411 F.3d 169, 171-176 (5th Cir. 2005), cert. denied, 128 S. Ct. 353 (2007); *Hor* v. *Gonzales*, 400 F.3d 482, 483-485 (7th Cir. 2005); *Douglas* v. *Ashcroft*, 374 F.3d 230, 233-234 (3d Cir. 2004); *Arevalo* v. *Ashcroft*, 344 F.3d 1, 8-9 (1st Cir. 2003); *Mohammed* v. *Reno*, 309 F.3d 95, 98-99 (2d Cir. 2002); *Bejjani* v. *INS*, 271 F.3d 670, 687-688 (6th Cir. 2001), abrogated on other grounds by *Fernandez-Vargas* v. *Gonzales*, 548 U.S. 30 (2006); *Andreiu* v. *Ashcroft*, 253 F.3d 477, 480-482 (9th Cir. 2001) (en banc).[3] Those courts evaluate stay requests under the traditional standard for granting preliminary injunctive relief, which considers the

[2] The government has pointed out that an "injunction" "command[s] or prevent[s] an action," *Black's Law Dictionary* 788 (7th ed. 1999), and granting a stay of removal prevents removal of the alien from the United States. See also *Weng* v. *United States Att'y Gen.*, 287 F.3d 1335, 1337-1338 (11th Cir. 2002) (per curiam) (discussing definition of "stay" as "a kind of injunction") (quoting *Black's Law Dictionary* 529 (6th ed. 1990)). Further, application of Section 1252(f)(2) to stays of removal is consistent with Congress's purpose in enacting IIRIRA, which was to ensure prompt removal of illegal aliens from the United States. See, *e.g.*, *Weng*, 287 F.3d at 1340 n.10 (quoting *Reno* v. *American-Arab Anti-Discrimination Comm.*, 525 U.S. 471, 481-482, 486 (1999)); S. Rep. No. 249, 104th Cong., 2d Sess. 7 (1996).

[3] Petitioner includes (Pet. 11) the Tenth Circuit's decision in *Lim* v. *Ashcroft*, 375 F.3d 1011, 1012 (2004), but the Tenth Circuit in that case did not explicitly address the issue of whether Section 1252(f)(2) applies to stays pending appeal.

applicant's likelihood of success on the merits; whether irreparable harm would occur if a stay is not granted; whether that potential harm outweighs the harm to the government if a stay is not granted; and whether granting a stay would serve the public interest. See, *e.g.*, *Tesfamichael*, 411 F.3d at 172.

b. This case would be a poor vehicle for resolving that disagreement because the Fourth Circuit has not taken a position on which standard applies, and it did not do so in this case. Before the court of appeals, petitioner acknowledged that the Fourth Circuit "has not yet squarely resolved this issue in a published decision." Appl. C.A. Pet. for Reh'g En Banc 13. In its order denying petitioner's stay motion, the court of appeals simply stated that "[t]he motion for stay of deportation is denied," without stating what standard it used. Pet. App. 1. The court likely believed that it did not need to resolve that question because, as the government explained, petitioner could not prevail under either the Section 1252(f)(2) standard or the traditional injunctive relief standard. See Gov't Mot. to Dismiss 9-16.

Petitioner points to nothing in the court of appeals' order that indicates it actually applied the Section 1252(f)(2) standard; instead, he simply assumes it must have done so because, in his view, he would satisfy the more lenient standard. Pet. 8-9. Because the Fourth Circuit did not adopt the Section 1252(f)(2) standard in this case, much less do so in a published decision that would create circuit precedent on the issue, this case is not a suitable vehicle for resolving the question of the appropriate standard.

c. Review is also unwarranted because, as explained in the government's opposition to the stay application (at 13-15), petitioner could not prevail under either the Sec-

tion 1252(f)(2) standard or the traditional injunctive relief standard. See *Kenyeres* v. *Ashcroft*, 538 U.S. 1301, 1305-1306 (2003) (Kennedy, J., in chambers) (noting the disagreement in the circuits but concluding that it would not be appropriate to review the issue in that case because "[a]pplicant is unlikely to prevail in his request for a stay under either of the standards adopted by the Courts of Appeals"). Petitioner has never attempted to satisfy the Section 1252(f)(2) standard by providing clear and convincing evidence that his removal is "prohibited as a matter of law," and he cannot do so. 8 U.S.C. 1252(f)(2); see Gov't C.A. Mot. to Dismiss 9-11. Petitioner instead contends, in cursory fashion, that he merits a stay of removal under the more lenient injunctive relief standard because the IJ found that he would be tortured if removed to Jamaica. Pet. 9.

Petitioner cannot satisfy the traditional standard for injunctive relief. He did not show a likelihood of ultimate success on the merits of his CAT claim, because the BIA correctly reversed the IJ's finding that petitioner met his burden of demonstrating a likelihood of torture with government acquiescence. Pet. App. 4-6. As the BIA explained, petitioner did not establish a basis for concluding that Jamaica's laws prohibiting physical intimacy were routinely enforced, and thus petitioner did not establish that it was more likely than not that he would be arrested and prosecuted, much less tortured, under those laws. *Ibid.* (citing *In re M-B-A-*, 23 I. & N. Dec. 474 (B.I.A. 2002)). Further, as the BIA noted, petitioner did not show that any harms that might befall him would be with government acquiescence, particularly because the Jamaican government has prosecuted those who commit violence against homosexuals and has taken steps to curtail violence by prison guards. *Id.* at 4, 6.

Petitioner has made no attempt to explain why the court of appeals would overturn the BIA's conclusions.

Further, petitioner has not demonstrated under the traditional standard that the balance of the equities and the public interest warranted a stay. Although petitioner claims he will be tortured if removed to Jamaica (Pet. 9), the BIA rejected that claim. Pet. App. 4-6. Moreover, even if petitioner were to be removed from the United States prior to the adjudication of his petition, he could continue to pursue his petition from abroad. See, *e.g.*, *Obale* v. *Attorney Gen.*, 453 F.3d 151, 160 n.9 (3d Cir. 2006). And there would be harm to the government, and the public interest, in staying the order of removal. Petitioner has been found removable, and as this Court has noted, the government has a "weighty" interest in efficient administration of the immigration laws. *Landon* v. *Plasencia*, 459 U.S. 21, 34 (1982). A stay of removal would also harm the government and the public interest by requiring additional expenditures of public funds for detention of the alien (or, if he is released, for monitoring his whereabouts). See *Sofinet* v. *INS*, 188 F.3d 703, 708 (7th Cir. 1999). That harm would be particularly pronounced here, as petitioner has an extensive history of criminal activity in the United States. Pet. App. 13-14; see pp. 4-5, *supra*. Petitioner therefore does not merit a stay of removal even under the traditional injunctive relief test.

Regardless of which standard the court of appeals used, its decision was correct. This case therefore is not an appropriate vehicle for deciding whether the Section 1252(f)(2) standard applies to a motion to stay removal pending resolution of a petition for review.

2. Petitioner also contends (Pet. 12-19) that the court of appeals erred in concluding that it lacked jurisdiction

to review his fact-bound claim that he would be tortured with government acquiescence if returned to Jamaica. In petitioner's view, any challenge to "the application of law to facts" raises a "question[] of law" within the meaning of 8 U.S.C. 1252(a)(2)(D). Pet. 12-13. Petitioner is mistaken. Further, the decision below does not conflict with any decision of this Court or any other court of appeals, and review is not warranted because petitioner would not prevail on his CAT claim even if the federal courts had jurisdiction to review it. Moreover, the court of appeals' brief, unpublished decision would not be an appropriate vehicle for resolving the question presented, because the court did not provide an explanation for why it dismissed the petition for review.

a. The court of appeals correctly determined that it did not have jurisdiction to review petitioner's claim. Under 8 U.S.C. 1252(a)(2)(C), a court lacks jurisdiction to review an order of removal for an alien who is removable by reason of having been convicted of certain criminal offenses, including aggravated felony offenses. See, *e.g.*, *Mbea* v. *Gonzales*, 482 F.3d 276, 278 n.1 (4th Cir. 2007). Petitioner was found removable and was removed due to, *inter alia*, an aggravated felony. See A.R. 293; see also p. 4, *supra*. After petitioner illegally reentered the United States, DHS determined that petitioner was subject to removal through reinstatement of the prior order of removal. See 8 U.S.C. 1231(a)(5); see also p. 5, *supra*. 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 was a fact-based determination. See Pet. App. 4-6. In reversing the IJ's finding that petitioner would be tortured if returned to Ja-

maica, the BIA ruled that the IJ's determination was "based on a series of unsupported suppositions" and was not supported by the record evidence. *Id.* at 4. The BIA recounted how the evidence petitioner provided was insufficient to meet his burden under a well-settled, uncontested legal standard. *Id.* at 5-6. 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 4 ("the *record does not establish* that it is more likely than not that any torture [petitioner] may suffer in Jamaica would be by or at the acquiescence of the government") (emphasis added); *id.* at 4-5 ("there is *little evidence*" regarding "the extent to which [laws prohibiting homosexuality] [are] enforced") (emphasis added); *id.* at 5 ("the *record does not establish* that it is more likely than not that, if arrested and imprisoned, [petitioner] would be tortured by or at the acquiescence of the Jamaican government") (emphasis added).

Although petitioner now denies that he is seeking judicial review of the BIA's factual findings, his petition urges exactly that. See Pet. 17-18 (arguing that the BIA erred in finding no likelihood that petitioner would be tortured in Jamaica with government acquiescence in light of petitioner's "voluminous evidence" to the contrary). 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. See, *e.g.*, *Torres de la Cruz* v. *Maurer*, 483 F.3d 1013, 1019 n.5 (10th Cir. 2007) ("'Questions of law' pertain to 'those issues that were historically reviewable on habeas—constitutional and statutory-construction questions, not dis-

cretionary or factual questions.'" (quoting H.R. Conf. Rep. No. 72, 109th Cong., 1st Sess. 175 (2005)).

Petitioner's contention (Pet. 12-13) that any application of law to undisputed facts raises a "question[] of law" is mistaken. 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 evaluation of the evidence in determining whether the alien has met his evidentiary burden. See, *e.g.*, H.R. Conf. Rep. No. 72, *supra*, at 175 ("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."). Under petitioner's view, the courts of appeals could review all agency determinations in cases in which the historical facts are undisputed. That approach would make the term "questions of law" lose all meaning and would seriously undermine Congress's goal of limiting judicial review of agency removal determinations.

Petitioner's contention (Pet. 17) that he raises a legal claim by arguing that the BIA "committed clear legal error by applying an incorrect standard of review" of the IJ's decision does not merit review. As an initial matter, this claim is not properly before the Court, because petitioner did not raise it in the court of appeals until his petition for rehearing en banc, and the court of appeals never addressed the claim. See, *e.g.*, *United States* v. *Williams*, 504 U.S. 36, 41 (1992); *Joseph* v. *Blair*, 488 F.2d 403, 404 (4th Cir. 1973) (per curiam), cert. denied, 416 U.S. 955 (1974).

In any event, the claim lacks merit. The brief filed by the government with the BIA specifically stated that the applicable standard of review was the "clearly erroneous" standard, see Gov't BIA Br. 2 (quoting 8 C.F.R. 1003.1(e)(6)(v)), and contended that the IJ's determination that it was more likely than not that petitioner would be tortured was clearly erroneous, *ibid.* Nor did the BIA purport to apply *de novo* review in its decision. Rather, the BIA simply found that the evidence was manifestly insufficient to support the IJ's findings, Pet. App. 4-6, as it was entitled to do under clear-error review. See, *e.g.*, *Belortaja* v. *Gonzales*, 484 F.3d 619, 624 (2d Cir. 2007). For example, the BIA found "little evidence" (Pet. App. 4-5) that Jamaica's law prohibiting homosexual conduct is enforced, and it relied on the BIA's decision in *In re M-B-A-*, 23 I. & N. Dec. 474, 475-480 (2002), which had found a similar flaw in a torture claim because it was based on "conjecture" and a "chain of assumptions," *id.* at 478-479. In any event, absent a firm basis for concluding that the BIA failed to apply the clear-error standard, its decision is entitled to a presumption of regularity. See, *e.g.*, *Kamara* v. *Attorney Gen.*, 420 F.3d 202, 212 (3d Cir. 2005).[4]

[4] Petitioner also contends (Pet. 18-19) that he was denied due process because the BIA determined that he did not adduce sufficient evidence to support his CAT claim. That claim is not properly before the Court, because petitioner did not raise any due process claim before the BIA or the court of appeals, and neither addressed such a claim. See, *e.g.*, *Williams*, 504 U.S. at 41. Moreover, petitioner's claim amounts to a disagreement with the BIA's weighing of the evidence in his particular case, and such a claim does not warrant this Court's review. In any event, the argument lacks merit, because although the Due Process Clause entitled petitioner to a "fair [removal] hearing," *Tun* v. *Gonzales*, 485 F.3d 1014, 1025 (8th Cir. 2007), petitioner received the process he was due: he had a hearing before an IJ, who permitted him to present evidence and arguments. The BIA reviewed the evidence

b. Petitioner contends (Pet. 13-16) that the courts of appeals disagree on whether a claim like his 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 determining 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 Jamaica with government acquiescence is a fact-bound determination, not a question of law.

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petitioner presented and determined that, on the record he developed, petitioner did not meet his burden of demonstrating that it was more likely than not that he would be tortured by or with the acquiescence of the Jamaican government. Pet. App. 4-6.

Petitioner does not dispute that he received the process he was due; instead, he claims an entitlement to a certain outcome, apparently because different aliens seeking different forms of relief on different records received relief from removal. See Pet. 9, 18-19. That is not a due process claim, for due process guarantees that a certain process be followed, not that a certain outcome be reached. *E.g.*, *In re Real Estate Title & Settlement Servs. Antitrust Litig.*, 869 F.2d 760, 768 (3d Cir.), cert. denied, 493 U.S. 821 (1989).

Petitioner cites (Pet. 15-16) two cases in which courts of appeals have found "questions of law" in the context of CAT determinations. Neither of those courts considered a claim like petitioner's, *i.e.*, that the agency merely erred in its assessment of the evidence. In *Toussaint* v. *Attorney General*, 455 F.3d 409, 412 n.3, 415-416 (3d Cir. 2006), and *Jean-Pierre* v. *Attorney General*, 500 F.3d 1315, 1322 (11th 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. In contrast to those cases, here there is no argument about what constitutes torture as a legal matter; instead, petitioner simply contends that the evidence shows a likelihood that he would be subjected to torture.[5] This case thus does not implicate any conflict in the circuits that would warrant review.

c. 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

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[5] Petitioner also cites (Pet. 14) *Chen* v. *Department of Justice*, 471 F.3d 315 (2d Cir. 2006), for the proposition that a CAT claim like his is reviewable, but that case is wholly inapposite. It addressed a challenge to an IJ's determination that the alien did not demonstrate changed or extraordinary circumstances to excuse an untimely asylum application, not a CAT claim. *Id.* at 330. The court's dicta noted that it had found a CAT claim reviewable on habeas corpus in a case decided prior to the REAL ID Act, which concentrated review in the courts of appeals under the jurisdictional limitations in 8 U.S.C. 1252(a)(2), see 471 F.3d at 331 n.10, and therefore says nothing about whether certain CAT claims are reviewable after the REAL ID Act.

The other pre-REAL ID Act cases petitioner cites (Pet. 13)—*Singh* v. *Ashcroft*, 351 F.3d 435 (9th Cir. 2003), and *Ogbudimkpa* v. *Ashcroft*, 342 F.3d 207 (3d Cir. 2003)—are similarly inapposite because they do not address the scope of judicial review allowed by 8 U.S.C. 1252(a)(2)(D). See, *e.g.*, *Kamara*, 420 F.3d at 209 (recognizing that the REAL ID Act "radically overhauled" the relevant "jurisdictional framework").

not succeed on his challenge to the agency's denial of CAT deferral. As the BIA correctly found, petitioner's claim was "based on a series of unsupported suppositions," and thus he could not meet his burden of showing that it was likely that Jamaica's laws prohibiting intimacy between men would be enforced, that he would be imprisoned, that he would be tortured while in prison, or that if he did experience torture it would occur with government acquiescence. Pet. App. 4-6. If the court of appeals had jurisdiction to review petitioner's claim, it would do so under the "substantial evidence" standard, *INS* v. *Elias-Zacarias*, 502 U.S. 478, 481 (1992), and the agency's factual determinations would be "conclusive unless any reasonable adjudicator would be compelled to conclude to the contrary," 8 U.S.C. 1252(b)(4)(B). In light of the deficiencies in petitioner's evidence noted by the BIA, 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 Jamaica. Further review of petitioner's fact-bound claim is therefore unwarranted.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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