No. 06-740

In the Supreme Court of the United States

YUMAN LOPEZ-CANCINOS AND YOCARI CASTILLO DE LOPEZ, PETITIONERS

v.

ALBERTO R. GONZALES, ATTORNEY GENERAL

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

BRIEF FOR THE RESPONDENT IN OPPOSITION

PAUL D. CLEMENT
Solicitor General
Counsel of Record
PETER D. KEISLER
Assistant Attorney General
DONALD E. KEENER
BRIAN S. BEIER
Attorneys
Department of Justice
Washington, D.C. 20530-0001
(202) 514-2217

QUESTIONS PRESENTED

1. Whether the court of appeals had jurisdiction to review the conclusion of the Board of Immigration Appeals (BIA) that petitioner failed to demonstrate exceptional circumstances justifying his failure to file a timely application for asylum.

2. Whether the court of appeals had jurisdiction to review the conclusion of the BIA that petitioner was ineligible to seek voluntary departure because he had given false testimony for the purpose of obtaining an immigration benefit.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases:

Statutes and regulations:

Statutes and regulations—Continued: Page

In the Supreme Court of the United States

No. 06-740

YUMAN LOPEZ-CANCINOS AND YOCARI CASTILLO DE LOPEZ, PETITIONERS

v.

ALBERTO R. GONZALES, ATTORNEY GENERAL

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

BRIEF FOR THE RESPONDENT IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 2a-3a) is not published in the *Federal Reporter* but is reprinted in 186 Fed. Appx. 721. The decisions of the Board of Immigration Appeals (Pet. App. 6a-15a) and the immigration judge (Pet. App. 16a-33a, 34a-35a) are unreported.

JURISDICTION

The judgment of the court of appeals was entered on June 2, 2006. A petition for rehearing was denied on August 25, 2006 (Pet. App. 1a). The petition for a writ of certiorari was filed on November 21, 2006. 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 application for asylum generally must be filed within one year of the date of an alien's arrival in the United States. 8 U.S.C. 1158(a)(2)(B). An application for asylum filed beyond the one-year period nonetheless may be considered "if the alien demonstrates to the satisfaction of the Attorney General either the existence of changed circumstances which materially affect the applicant's eligibility for asylum or extraordinary circumstances relating to the delay in filing an application within [one year]." 8 U.S.C. 1158(a)(2)(D). The pertinent regulations set forth that, for an alien to demonstrate "extraordinary circumstances" excusing the failure to file an application for asylum within the one-year period, the alien must "file[] the application within a reasonable period given those circumstances." 8 C.F.R. 1208.4(a)(5).

b. The INA provides that an alien may be granted voluntary departure in lieu of being removed at the close of removal proceedings. 8 U.S.C. 1229c(b)(1). To be eligible for voluntary departure, an alien must meet certain statutory conditions, including that the "alien is, and has been, a person of good moral character for at least 5 years immediately preceding the alien's application for voluntary departure." 8 U.S.C. 1229c(b)(1)(B). The INA prescribes that "[n]o person shall be regarded as, or found to be, a person of good moral character who," *inter alia*, "has given false testimony for the purpose of obtaining any benefits under this chapter." 8 U.S.C. 1101(f)(6).

c. The INA generally forecloses judicial review of the "denial of a request for an order of voluntary depar-

ture." 8 U.S.C. 1229c(f). The INA also generally forecloses judicial review of "any determination of the Attorney General" concerning whether an alien has demonstrated "to the satisfaction of the Attorney General * * * the existence of * * * extraordinary circumstances relating to the delay in filing an application" for asylum within the one-year period. 8 U.S.C. 1158(a)(2)(D) and (3). Those limitations, however, do not preclude judicial review "of constitutional claims or questions of law raised upon a petition for review filed with an appropriate court of appeals." REAL ID Act of 2005 (REAL ID Act), Pub. L. No. 109-13, Div. B, § 106(a)(1)(A)(iii), 119 Stat. 310 (to be codified at 8 U.S.C. 1252(a)(2)(D)).

2. Petitioner Lopez-Cancinos, a native of Guatemala, entered the United States illegally in May 1997.[1] In October 2000, petitioner filed an application for asylum. Petitioner was subsequently charged with being removable as an alien present in the United States without being admitted or paroled. Pet. App. 17a, 20a.

a. In his removal proceedings, petitioner conceded removability but sought, *inter alia*, asylum and voluntary departure. With respect to his application for asy-

[1] Petitioner Castillo de Lopez is the wife of petitioner Lopez-Cancinos. She filed a claim for asylum on her own behalf. The immigration judge denied her asylum claim but granted her voluntary departure. Pet. App. 34a-55a. The Board of Immigration Appeals sustained the immigration judge's decision regarding Castillo de Lopez, *id.* at 7a, 13a-15a, and the court of appeals affirmed, *id.* at 3a. The questions presented in the certiorari petition pertain only to the claims of her husband, Lopez-Cancinos. See Pet. i, 13, 14, 22-24 & n.8. Castillo de Lopez's interest in the petition apparently is a request for a derivative grant of asylum or withholding of removal if her husband is awarded relief. Accordingly, references to "petitioner" in this brief are to petitioner Lopez-Cancinos.

lum, petitioner argued that extraordinary circumstances excused his failure to seek asylum within one year of arriving in the United States. In particular, petitioner contended that he had relied on an individual who presented himself as an attorney to file an application for asylum on petitioner's behalf, but that an application was never in fact filed. Petitioner claimed that he learned that an application had not been filed only after the one-year period had elapsed, and that he subsequently filed an application. Pet. App. 24a-25a. Petitioner also argued that he suffered from post-traumatic stress disorder resulting from persecution that he had suffered in Guatemala based on suspicions that he was an anti-government guerilla, and that his disorder contributed to the delay in his seeking asylum. *Id.* at 10a-11a, 22a-24a.

During the hearing, petitioner testified falsely that he had not returned to Guatemala since his arrival in the United States. Pet. App. 8a. Several months after the hearing, petitioner submitted an affidavit to the immigration judge (IJ) admitting that he had given false testimony at his removal hearing, and that he had in fact returned to Guatemala to obtain an identification document. *Id.* at 26a. Petitioner stated that he had given false testimony at the hearing because he was concerned that no one would believe that he would return to Guatemala in light of his contention—related to his claim for asylum—that he feared persecution in Guatemala. *Id.* at 26a-27a; see *id.* at 8a.

b. The IJ denied petitioner's applications for asylum and voluntary departure. Pet. App. 33a. The IJ concluded that petitioner had failed to demonstrate extraordinary circumstances excusing his failure to file an asylum application within one year of his arrival in the

United States. *Id.* at 29a. The IJ explained that petitioner was required by the applicable regulations to file his application within a "reasonable period" of becoming aware that the individual who presented himself as an attorney had failed to file an asylum application on petitioner's behalf. *Ibid.*; see 8 C.F.R. 1208.4(a)(5). The IJ determined that petitioner had failed to satisfy that standard, explaining that petitioner "was aware that there was a problem with his asylum application in 1998," but that he nonetheless failed to file an application or hire a new attorney until 2000. Pet. App. 29a. The IJ rejected petitioner's application for withholding of removal under 8 U.S.C. 1231(b)(3) on the merits, concluding that he had not carried his burden of demonstrating that it was more likely than not that he would suffer persecution if he was returned to Guatemala. *Id.* at 32a.

The IJ also denied petitioner's application for voluntary departure. Pet. App. 32a. The IJ observed that petitioner had given false testimony concerning whether he had returned to Guatemala, and that his "stated purpose for committing this perjury was the fact that he thought it would be detrimental to his asylum claim if the Court knew he had returned to Guatemala a few months after his first entry into the United States." *Ibid.* In that light, the IJ concluded, petitioner had given false testimony for the purpose of obtaining a benefit under the INA, and petitioner therefore could not establish eligibility for voluntary departure as a person of good moral character. *Ibid.*; see 8 U.S.C. 1101(f)(6), 1229c(b)(1)(B).

c. The Board of Immigration Appeals (BIA) affirmed in relevant part. Pet. App. 6a-15a. The BIA held that petitioner failed to demonstrate extraordinary circum-

stances excusing his failure to seek asylum within the one-year period. The BIA explained that, "[a]lthough [petitioner's] misplaced trust in an apparently dishonest attorney or imposter * * * may be an 'extraordinary circumstance[],'" petitioner had "waited 2 years after discovering the fraud before he properly filed an asylum application." *Id.* at 7a-8a. "Given this delay," the BIA determined, petitioner "did not hasten to file an asylum application within a 'reasonable period' after discovering the fraud." *Id.* at 8a (quoting 8 C.F.R. 1208.4(a)(5)). The BIA affirmed the IJ's denial of petitioner's related request for withholding of removal, finding that the harms he had suffered in the past did not rise to the level of "persecution," and that in any event there was sufficient evidence of a fundamental change in circumstances in Guatemala to rebut any presumption of future persecution in Guatemala that would arise from a finding of past persecution. *Id.* at 11a-12a.

The BIA also affirmed the IJ's denial of voluntary departure. The BIA agreed with the IJ that petitioner is ineligible for voluntary departure because he "has given false testimony for a benefit under the Act and therefore cannot establish good moral character." Pet. App. 12a.

3. The court of appeals affirmed in an unpublished, per curiam opinion. Pet. App. 2a-3a. The court concluded that it lacked jurisdiction to review the denial of petitioner's claims for asylum and voluntary departure, explaining that the petition for review "raises no cognizable constitutional claims or questions of law." *Id.* at 3a (citing 8 U.S.C. 1252(a)(2)(D) and *Ramadan* v. *Gonzales*, 427 F.3d 1218, 1221 (9th Cir. 2005), opinion withdrawn on reh'g, No. 03-74351, 2007 WL 528715 (9th Cir. Feb. 22, 2007)). But the court affirmed on the merits the

BIA's rejection of petitioner's request for withholding of removal on the ground that substantial evidence supported the conclusion that changed country conditions in Guatemala rebutted any presumption that he would be persecuted in that country. *Id.* at 3a. Petitioner does not seek review of the latter ruling in this Court.

ARGUMENT

The unpublished order of the court of appeals does not warrant review by this Court.

1. a. Petitioner contends (Pet. 22-23) that the court of appeals had jurisdiction to review his contention that his post-traumatic stress disorder presented an extraordinary circumstance excusing his delay in filing an asylum application. See 8 C.F.R. 1208.4(a)(5)(i). The BIA held that petitioner failed to establish extraordinary circumstances because he failed to file his asylum application within a "reasonable period" after discovering that the individual who petitioner believed was an attorney had failed to file an asylum application on petitioner's behalf. Pet. App. 7a-8a; see 8 C.F.R. 1208.4(a)(5). The court of appeals concluded that it lacked jurisdiction to review the denial of petitioner's claim for asylum, explaining that petitioner had failed to raise any "cognizable constitutional claims or questions of law." Pet. App. 3a; see REAL ID Act § 106(a)(1)(A)(iii) (to be codified at 8 U.S.C. 1252(a)(2)(D)).

Petitioner argues (Pet. 22) that the IJ and BIA were required to consider his contention that his post-traumatic stress disorder was an extraordinary circumstance contributing to the delay in filing an asylum application; that the IJ and BIA failed to consider that claim; and that the IJ's and BIA's failure to consider that claim raised a "question[] of law" for purposes of

judicial review in the court of appeals under REAL ID Act § 106(a)(1)(A)(iii) (to be codified at 8 U.S.C. 1252(a)(2)(D)). Petitioner's argument lacks merit and does not warrant review.

Petitioner does not identify or explain the "question of law" that, in his view, was raised by the agency's alleged failure to consider his claim concerning post-traumatic stress disorder. The normal presumption, in any event, is that an agency has considered all relevant evidence in the record. See, *e.g.*, *Larita-Martinez* v. *INS*, 220 F.3d 1092, 1095 (9th Cir. 2000). Petitioner identifies no reason that the normal presumption should not apply in this case, including with respect to his claim that post-traumatic stress disorder contributed to his delay in seeking asylum. Indeed, the IJ extensively reviewed the evidence in the record that petitioner suffered from post-traumatic stress disorder. Pet. App. 17a-19a. Moreover, the IJ observed that "extraordinary circumstances" justifying a failure to file an asylum application within the one-year period include "serious illness or mental or physical disability of significant duration," and that "[s]uch circumstances shall excuse the failure to file within the one-year deadline so long as the alien filed the application within a reasonable period given those circumstances." Pet. App. 28a (citing 8 C.F.R. 208.4(a)(5)).

Accordingly, the IJ and BIA are presumed to have considered petitioner's claim that his mental condition contributed to his delay in seeking asylum, even if the IJ and BIA did not separately set forth an explicit statement to that effect in the course of explaining their conclusion that petitioner had failed to file his asylum application within a reasonable period. There thus is no warrant for reviewing petitioner's claim that the IJ and BIA

failed to consider his contention and that their failure to do so raised a "question of law" for purposes of judicial review.[2]

b. In concluding that it lacked jurisdiction to review the agency's denial of petitioner's application for asylum on grounds of untimeliness, the court of appeals cited its decision in *Ramadan* v. *Gonzales*, 427 F.3d 1218, 1221 (9th Cir. 2005), opinion withdrawn on reh'g, No. 03-74351, 2007 WL 528715 (9th Cir. Feb. 22, 2007). See Pet. App. 3a. At the time of the court of appeals' opinion in this case, the Ninth Circuit had issued its initial decision in *Ramadan*, which held that the phrase "questions of law" for purposes of judicial review under REAL ID Act § 106(a)(1)(A)(iii) (to be codified at 8 U.S.C. 1252(a)(2)(D)) refers to claims "regarding statutory construction." *Ramadan*, 427 F.3d at 1222. The Ninth Circuit had thus held that the phrase "questions of law" did not encompass the issue of whether an alien demonstrated "changed circumstances" so as to excuse the failure to timely file an application with one year of arriving in the United States. *Ibid.* The Ninth Circuit subsequently granted a petition for rehearing in

---

[2] In the court of appeals, moreover, petitioner did not specifically argue that the alleged failure of the IJ and BIA to consider his contention concerning post-traumatic stress disorder raised a "question[] of law" within the meaning of REAL ID Act § 106(a)(1)(A)(iii) (to be codified at 8 U.S.C. 1252(a)(2)(D)). Rather, petitioner argued that the alleged failure of the IJ and BIA to consider his contention amounted to a violation of his due process rights and that he therefore raised a reviewable "constitutional claim[]" within the meaning of REAL ID Act § 106(a)(1)(A)(iii) (to be codified at 8 U.S.C. 1252(a)(2)(D)). See Pet. C.A. Br. 27-34. Petitioner does not raise the latter issue in this Court. See Pet. 22-23 n.8. The precise issue now raised by petitioner therefore was not pressed in the court of appeals, which further counsels against granting review. See *United States* v. *Williams*, 504 U.S. 36, 41 (1992).

Ramadan, and upon rehearing, issued a new opinion concluding that the term "questions of law" "extends to questions involving the application of statutes or regulations to undisputed facts." *Ramadan*, 2007 WL 528715, at *3. The court thus held, contrary to its initial opinion in the case, that it had jurisdiction to review whether the undisputed facts amounted to "changed circumstances." *Id.* at *3, *8-*9.[3]

Although the court of appeals below relied on the court's initial opinion in *Ramadan* in concluding that it lacked jurisdiction to review the denial of petitioner's application for asylum, and although the court of appeals subsequently revised its opinion in *Ramadan*, there appears to be no reason to grant the petition, vacate the judgment below, and remand the case to permit the court of appeals to consider petitioner's contention under the court's revised decision in *Ramadan*. By the time petitioner moved for rehearing and rehearing en banc below, the court of appeals had already granted rehearing in *Ramadan*; indeed, petitioner's petition for rehearing below specifically noted that the court of appeals had granted rehearing in *Ramadan*. See Pet. for Reh'g 1 & n.1. The court of appeals nonetheless denied rehearing in petitioner's case without holding the case

---

[3] The court rejected the government's argument that the existence of "changed circumstances" is a determination within the discretion of the Attorney General and therefore does not present a question of law for purposes of judicial review. See 8 U.S.C. 1158(a)(2)(D) (requiring alien to "demonstrate[] *to the satisfaction of the Attorney General* * * * the existence of changed circumstances which materially affect the applicant's eligibility for asylum") (emphasis added). The government is currently considering whether to seek further review in *Ramadan* in this Court.

for resolution of the proceedings on rehearing in *Ramadan*.

Accordingly, the court of appeals presumably determined that its conclusion that it lacked jurisdiction to review the denial of petitioner's application for asylum would be unaffected by the court's grant of rehearing in *Ramadan* or by the ultimate resolution of that case on rehearing. And this case would not in any event be an appropriate one in which to consider the issue, for the reasons stated above. If, however, this Court nonetheless concludes that the court of appeals should explicitly consider whether its revised approach in *Ramadan* would bear on that court's resolution of this case, this Court may wish to consider granting the petition, vacating the judgment below, and remanding the case to the court of appeals to permit the court to undertake that inquiry.

2. Petitioner contends (Pet. 23) that the court of appeals had jurisdiction to review the conclusion of the BIA that he is ineligible to receive voluntary departure. That claim lacks merit and does not warrant review.

The BIA determined that petitioner's false statement concerning whether he had returned to Guatemala rendered him ineligible for voluntary departure. See Pet. App. 12a. In particular, the BIA held that the false statement was made "for the purpose of obtaining [a] benefit[] under this chapter," 8 U.S.C. 1101(f)(6), and that petitioner thus could not demonstrate good moral character for purposes of establishing his eligibility for voluntary departure, see 8 U.S.C. 1229c(b)(1). Petitioner argued in the court of appeals that his false statement had not been made for the purpose of obtaining a benefit under the Act, but instead had been made "to avoid wrongful denial of a benefit," *i.e.*, asylum. Pet.

C.A. Br. 58; see *id.* at 13 ("He thought that if he told people of his foray back into Guatemala, they would discredit his entire claim [for asylum].").

The question whether petitioner's false statement was made for the purpose of obtaining an immigration benefit is not a "question[] of law" for purposes of judicial review under REAL ID Act § 106(a)(1)(A)(iii) (to be codified at 8 U.S.C. 1252(a)(2)(D)). As this Court has explained, the question whether an alien made a false statement for the purpose of obtaining immigration benefits entails assessment of whether the alien acted with "the subjective intent of thereby obtaining immigration or naturalization benefits," which constitutes a "question of fact" rather than a "question of law." *Kungys* v. *United States*, 485 U.S. 759, 782 (1988). Moreover, petitioner, by his own admission, made the false statement because of a concern that a truthful answer would have adversely affected his claim for asylum. See Pet. App. 32a ("His stated purpose for committing this perjury was the fact that he thought it would be detrimental to his asylum claim if the Court knew that he had returned to Guatemala a few months after his first entry into the United States."). In that context, the court of appeals correctly concluded that it lacked jurisdiction to review the BIA's conclusion that petitioner is ineligible for voluntary departure. See 8 U.S.C. 1229c(f). Petitioner identifies no court of appeals that has reached a contrary conclusion in comparable circumstances.[4]

---

[4] There is no warrant for reviewing petitioner's abstract arguments (Pet. 16-22) on the scope of the phrase "questions of law" in REAL ID Act § 106(a)(1)(A)(iii) (to be codified at 8 U.S.C. 1252(a)(2)(D)). Whatever may be the scope of that phrase in the abstract, the specific questions raised by the petition concern the court of appeals' conclusion that it lacked jurisdiction to review the denial of petitioner's applica-

CONCLUSION

The petition for a writ of certiorari should be denied. In the alternative, the Court may wish to consider granting the petition, vacating the judgment of the court of appeals, and remanding the case to permit the court of appeals to consider whether the court, under its revised decision on rehearing in *Ramadan* v. *Gonzales*, No. 03-74351, 2007 WL 528715 (9th Cir. Feb. 22, 2007), has jurisdiction to review petitioner's claim that the BIA erred in denying his asylum application on grounds of untimeliness.

Respectfully submitted.

PAUL D. CLEMENT
Solicitor General

PETER D. KEISLER
Assistant Attorney General

DONALD E. KEENER
BRIAN S. BEIER
Attorneys

MARCH 2007

---

tions for asylum and voluntary departure. See Pet. 22-23. Those issues, for the reasons explained, do not merit this Court's review.