No. 14-1495

In the Supreme Court of the United States

ALVARO ADAME, PETITIONER

v.

LORETTA E. LYNCH, ATTORNEY GENERAL

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

BRIEF FOR THE RESPONDENT IN OPPOSITION

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QUESTION PRESENTED

Whether 8 U.S.C. 1252(a)(2)(D), which provides that courts of appeals may review "constitutional claims or questions of law raised upon a petition for review" of an otherwise unreviewable order by the Board of Immigration Appeals, permits review of mixed questions of law and fact.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-10a) is reported at 762 F.3d 667. The decisions of the Board of Immigration Appeals (Pet. App. 11a-13a) and the immigration judge (Pet. App. 14a-23a) are unreported.

JURISDICTION

The judgment of the court of appeals was entered on August 12, 2014. A petition for rehearing was denied on January 22, 2015 (Pet. App. 24a-28a). On April 12, 2015, Justice Kagan extended the time within which to file a petition for a writ of certiorari to and including June 21, 2015, and the petition was filed on June 19, 2015. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. Under Section 1229b of the Immigration and Nationality Act (INA), 8 U.S.C. 1101 *et seq.*, the Attorney General, in her discretion, may cancel the removal of an alien who is found to be removable. 8 U.S.C. 1229b. To obtain cancellation of removal, the alien bears the burden of proving both that he is statutorily eligible for such relief and that he warrants a favorable exercise of discretion. 8 U.S.C. 1229a(c)(4)(A)(i) and (ii); see 8 C.F.R. 1240.8(d).

To demonstrate that he is eligible for cancellation of removal, an alien who is not a lawful permanent resident must establish (i) that he has been physically present in the United States for a continuous period of at least ten years; (ii) that he has been a person of good moral character during that period; (iii) that he has not been convicted of certain listed crimes; and (iv) "that removal would result in exceptional and extremely unusual hardship to the alien's spouse, parent, or child, who is a citizen of the United States or an alien lawfully admitted for permanent residence." 8 U.S.C. 1229b(b)(1).

Under the INA's administrative scheme, an immigration judge first rules on an application for cancellation of removal as part of determining whether an alien will be removed from the United States. See 8 C.F.R. 1003.10(b). An alien may appeal an adverse decision to the Board of Immigration Appeals (Board), to which the Attorney General has delegated the authority to consider appeals from decisions of immigration judges under the INA. 8 C.F.R. 1003.1(a)(1), 1003.10(c). The Board's decision is subject to judicial review under statutorily prescribed standards and limitations. 8 U.S.C. 1252(a)(1).

In the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (IIRIRA), Pub. L. No. 104-208, Div. C, 110 Stat. 3009-546, Congress sought to expedite the removal of aliens who are unlawfully present in the United States. The statute limits the scope of judicial review of the Attorney General's decisions concerning cancellation of removal and other discretionary determinations. As relevant here, Section 1252(a)(2)(B) of Title 8 provides that "no court shall have jurisdiction to review * * * (i) any judgment regarding the granting of relief under section * * * 1229b * * * of this title, or (ii) any other decision or action of the Attorney General * * * the authority for which is specified under this subchapter to be in the discretion of the Attorney General." The phrase "this subchapter" in clause (ii) refers to 8 U.S.C. 1151-1381. See *Kucana* v. *Holder*, 558 U.S. 233, 239 n.3 (2010).

In the REAL ID Act of 2005, Pub. L. No. 109-13, Div. B, § 106(a)(1)(A)(iii), 119 Stat. 310, Congress amended Section 1252(a)(2) by adding a proviso in Subsection (D). That proviso states that "[n]othing 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." 8 U.S.C. 1252(a)(2)(D).

2. a. Petitioner is a citizen of Mexico. He alleges that he entered the United States, without being inspected or admitted, in 1997. Pet. App. 2a, 14a. The Milwaukee Sheriff's Office arrested him on a drug charge in 2009 and referred him to the Department of Homeland Security (DHS). *Id.* at 2a, 14a-15a; Certified Administrative Record (A.R.) 168. On March 3,

2009, DHS served petitioner with a notice to appear, charging him with being removable under 8 U.S.C. 1182(a)(6)(A)(i), as "an alien present in the United States without being admitted or paroled." A.R. 301; see Pet. App. 15a.

Petitioner, through counsel, admitted the factual allegations against him and conceded that he was removable as charged. Pet. App. 2a, 15a. In an effort to obtain relief from removal, he filed an application for cancellation of removal under Section 1229b(b). *Id.* at 2a-3a; see A.R. 225-287. In his application, petitioner alleged that he entered the United States in April 1997, at least ten years before he was served the notice to appear on March 3, 2009 (the relevant date for the continuous-presence requirement, see 8 U.S.C. 1229b(d)(1)(A)), and that the other eligibility requirements for cancellation of removal were met, see 8 U.S.C. 1229b(b)(1)(B)-(D). Pet. App. 18a-19a; A.R. 225, 227-228.

At a hearing, an immigration judge received petitioner's testimony and reviewed various documents that petitioner had submitted. See Pet. App. 3a, 15a-16a; see also A.R. 169-221. When the judge asked if petitioner had any documentation establishing the earliest date of his residence in the United States, petitioner's counsel responded that his earliest evidence was a citation petitioner received in Kansas for traffic violations in 2001, four years after he claimed to have entered the United States. Pet. App. 3a, 18a; A.R. 112-113.

b. The immigration judge issued an oral decision denying petitioner's application for cancellation of removal and ordering him removed to Mexico. Pet. App. 14a-23a. As relevant here, the immigration

judge concluded that petitioner had not met his burden of proving his continuous presence in the United States for the ten-year period before the notice to appear was issued on March 3, 2009. Although petitioner had testified that he entered the United States in 1997, the immigration judge observed that, despite "a continuance of more than two years, [petitioner] did not present any evidence to support" that testimony. *Id.* at 18a. The immigration judge explained that the earliest documentary evidence that petitioner had submitted did not establish that he had been present in the United States for the full ten years. *Ibid.*[1]

The immigration judge further determined that he would "not accept [petitioner's] testimony at face value." Pet. App. 18a. He explained that petitioner had "initially claimed that he had only been arrested once or twice for a drinking problem," but that petitioner, when confronted with "a rather extensive rap sheet," had "recalled numerous other arrests in the United States." *Ibid.* "Thus," the judge concluded, "[petitioner's] testimony, standing alone, is insufficient to establish physical presence for the 10-year period prior to service of the Notice to Appear." *Ibid.*

The immigration judge also determined that petitioner did not meet the second and fourth eligibility requirements for cancellation of removal. The judge found that petitioner had "failed to show that he is a person of good moral character" and had not demonstrated that his children "would suffer exceptional and extremely unusual hardships if [he] were forced to depart." Pet. App. 18a-22a.

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[1] Petitioner also submitted an affidavit from a person who had been his landlord for periods since 2005 that stated that petitioner had been present in the United States since 2000. See A.R. 274.

3. Petitioner appealed the immigration judge's ruling to the Board. The Board dismissed the appeal, affirming the immigration judge's determination that petitioner had failed to "establish the 10 years of continuous physical presence necessary for cancellation of removal eligibility." Pet. App. 12a. The Board explained that although petitioner "bore the burden of establishing his continuous presence in the United States since March 3, 1999," the only evidence that he "submitted to demonstrate [his] presence prior to 2001 was [his] own testimony." *Ibid.* Petitioner, the Board continued, had failed to submit letters from the cousins with whom he purportedly lived during the relevant time period or other corroborating evidence to establish his presence in the United States from March 1999 until June 2001. *Id.* at 12a-13a. The Board added that the "earliest piece of corroborative evidence submitted consists of a traffic ticket dated June 15, 2001," but that the address provided on the citation "conflicts with the * * * address history" petitioner provided on his application for cancellation of removal. *Id.* at 12a n.1. The Board "agree[d] [with the immigration judge] that the testimonial evidence alone was insufficient to meet [petitioner's] burden of proof." *Id.* at 13a.

The Board also rejected petitioner's contention that the immigration judge was required to warn him that his testimony "might not be sufficient to meet his burden." Pet. App. 13a. The Board explained that petitioner had failed to cite any authority to support that contention, and, in any event, the record demonstrated that petitioner was advised at an initial hearing that he was required "to present proof showing that [he has] lived" in the United States, and that

"just saying [he has] been here for 12 years doesn't qualify [him]" for relief. *Ibid.* (citation omitted).

Accordingly, the Board determined that petitioner "did not establish the necessary 10 years of continuous physical presence." Pet. App. 13a. Because that ruling sufficed to establish that petitioner was ineligible for cancellation of removal, the Board did not reach the immigration judge's other grounds for determining that petitioner was ineligible for cancellation of removal. *Ibid.*

4. a. Petitioner sought judicial review of the Board's decision in the United States Court of Appeals for the Seventh Circuit. Petitioner argued, as relevant here, that "the Board erred by upholding the [immigration judge's] determination that [petitioner's] testimony lacked credibility and by requiring [him] to provide corroborating evidence when it was not readily available." Pet. C.A. Br. 10 (emphasis omitted); see *id.* at 10-16. Petitioner claimed that the asserted failure by the Board and the immigration judge "to provide any clear explanation as to why or how [he] lacked credibility * * * clearly denied a fair opportunity to be heard and his statutory rights were prejudiced as a result." *Id.* at 14-15. Accordingly, petitioner argued, he was denied due process. Petitioner also objected to the immigration judge's denial of his request for a continuance, *id.* at 17-18, and contested the immigration judge's conclusions on the second and fourth eligibility factors that the Board did not reach, *id.* at 18-25.

The government argued that review of the Board's denial of petitioner's request for cancellation of removal was foreclosed by Section 1252(a)(2)(B)(i), as construed by the Seventh Circuit in *Cevilla* v. *Gonza-*

les, 446 F.3d 658 (2006). Gov't C.A. Br. 2-3. The government acknowledged that the court of appeals retained jurisdiction to review constitutional claims and questions of law under the proviso in Section 1252(a)(2)(D), but argued that petitioner had "no constitutionally protected interest in the purely discretionary relief of cancellation of removal," and had otherwise "fail[ed] to assert a colorable legal question." *Id.* at 3. Petitioner's argument, the government contended, "is nothing more than a challenge to the [agency's] determination of questions of fact and credibility dressed as a legal question." *Id.* at 15-16, 20 (citation and internal quotation marks omitted; brackets in original); see *id.* at 21 ("[T]he agency simply weighed the evidence provided, both testimonial and documentary, and determined that [petitioner] failed to sustain his burden of establishing the requisite ten years of continuous physical presence.").

b. The court of appeals dismissed the petition. Pet. App. 1a-10a.

The court of appeals explained that although Section 1252(a)(2)(B) generally deprives the court of jurisdiction to review "the denial of discretionary relief in immigration proceedings," the proviso in Section 1252(a)(2)(D) preserves jurisdiction "if the petition for review presents a constitutional claim or question of law." Pet. App. 4a. The court accordingly addressed petitioner's constitutional claim on the merits, concluding that "the [immigration judge's] decision to deny cancellation of removal did not violate any rights protected by the Fifth Amendment's Due Process clause." *Id.* at 5a.

The court of appeals then held that it lacked jurisdiction to consider petitioner's argument that "the

[immigration judge] incorrectly applied the law to the facts by requiring additional evidence that he had been in the United States for ten years of continuous residence when that evidence was not reasonably available." Pet. App. 6a; see *id.* at 6a-8a. The court explained that under its precedent, Section 1252(a)(2)(D) does not preserve jurisdiction over challenges that the Board misapplied the law to the facts. *Id.* at 8a. Rather, the court explained, it has construed that section to apply only to "constitutional claims and questions of statutory construction." *Ibid.* The court noted that other circuits had taken a broader view, holding that Section 1252(a)(2)(D) "extends to 'questions involving the application of statutes or regulations to undisputed facts, sometimes referred to as mixed questions of fact and law.'" *Id.* at 6a (quoting *Ramadan* v. *Gonzales*, 479 F.3d 646, 650 (9th Cir. 2007) (per curiam)); see *id.* at 6a-7a.

Finally, the court of appeals rejected petitioner's argument "that the [immigration judge] erred by refusing to grant him a continuance to seek additional documentary evidence rather than ordering him removed." Pet. App. 9a.[2] The court explained that "[petitioner] and his counsel knew for two years that he would have to prove ten years' residence," and that "there is nothing in the record to show that [petitioner] made a diligent effort (or any effort)" to "obtain

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[2] The court of appeals also held that it lacked jurisdiction to consider petitioner's challenges to rulings of the immigration judge that had not been addressed by the Board, Pet. App. 9a, and it rejected his objection that the Board had "offer[ed] no new or additional analysis in its order affirming the [immigration judge's] conclusion," explaining that "the Board is under no obligation to provide 'extra' analysis," *id.* at 8a.

evidence from his alleged employer or the relatives he says he lived with" between 1999 and 2001. *Id.* at 10a. The court therefore concluded that the immigration judge had not failed to follow Board precedent concerning continuances. *Ibid.*

5. Petitioner sought rehearing en banc on the question whether Section 1252(a)(2)(D)'s preservation of judicial review for "questions of law" encompasses mixed questions of law and fact. See Pet. for Reh'g 1-2, 6-11. In response, the government explained that the panel had correctly construed Section 1252(a)(2)(D) and therefore that rehearing was unwarranted. See Gov't Opp. to Pet. for Reh'g 1-2, 6-13.

The government also made clear, however, that it "believe[d] that, as an original matter, the panel did have jurisdiction to consider [p]etitioner's challenge to the Board's finding that he did not meet the continuous-presence requirement" because "challenges to a Board determination that an alien was not continuously present in this country do not fall within the scope of Section 1252(a)(2)(B)(i) to begin with, and thus no question under Section 1252(a)(2)(D) arises." Gov't Opp. to Pet. for Reh'g 5; see *id.* at 13-15. In the government's view, Section 1252(a)(2)(B)(i) applies only to the Board's determinations of a discretionary nature, not to determinations of a nondiscretionary nature, such as the historical fact of whether an alien has been present in the United States for a requisite period. That "long-standing" government position, it explained, had been adopted by "every other court of appeals to have addressed the scope of Section 1252(a)(2)(B)(i)," *id.* at 14, but the Seventh Circuit had concluded otherwise in *Cevilla*, *supra*. The government argued that rehearing on the scope of Section

1252(a)(2)(B)(i) was unwarranted in this case because petitioner had "not sought en banc review on that issue," *id.* at 5, but informed the court that it "would support rehearing en banc on the scope of Section 1252(a)(2)(B)(i) in an appropriate case" to seek to conform Seventh Circuit precedent to that of other circuits, *id.* at 14.

The court of appeals denied rehearing en banc after no judge requested a vote. Pet. App. 24a-25a. Judge Hamilton filed a statement concurring in the denial of rehearing. *Id.* at 25a-28a. He saw "good reason for th[e] court to reconsider [its] approach to § 1252(a)(2)(D)." *Id.* at 27a. But he explained that he had "not called for a vote to rehear this case en banc" because there is "no reasonable prospect of changing the outcome of [petitioner's] petition for judicial review." *Id.* at 27a-28a. The basis for the Board's decision, Judge Hamilton explained, was that "the immigration judge * * * simply did not believe [petitioner's] uncorroborated and inconsistent testimony." *Id.* at 28a. "Even if we adopted a broader view of our power under § 1252(a)(2)(D)," he continued, "we could not review what would amount to a purely factual issue—the credibility of [petitioner's] testimony—that is clearly beyond the scope of our jurisdiction." *Ibid.*

ARGUMENT

Petitioner argues (Pet. 9-22) that this Court's review is warranted to consider whether Section 1252(a)(2)(D)'s preservation of judicial review over "questions of law" extends to mixed questions of law and fact. The Seventh Circuit's interpretation of that phrase to encompass only pure questions of law, however, follows from its plain text and basic purpose. And although petitioner is correct that some disa-

greement exists among the circuits over what qualifies as "questions of law" under the proviso of Section 1252(a)(2)(D), this case would be an unsuitable vehicle to resolve any such disagreement. As Judge Hamilton explained in concurring in the denial of rehearing en banc, petitioner raises only a "purely factual issue": He challenges the immigration judge's decision not to credit petitioner's "uncorroborated and inconsistent testimony" that he had resided in the United States since 1997. Pet. App. 28a. Under the view of any circuit, that resolution of a disputed factual issue is not reviewable.

This case would not be an appropriate vehicle to address the scope of Section 1252(a)(2)(D)'s preservation of jurisdiction for another reason as well. As the government stated in its brief opposing rehearing en banc, the Seventh Circuit panel, bound by circuit precedent, erroneously concluded that petitioner's challenge falls within the threshold jurisdictional bar of Section 1252(a)(2)(B)(i), which then led the panel to determine whether judicial review was preserved by Section 1252(a)(2)(D). Petitioner did not, however, seek en banc review on that predicate jurisdictional issue, nor has he sought review of that issue in this Court. The government indicated in its opposition to the petition for rehearing that it would support rehearing en banc in the Seventh Circuit on that question in an appropriate case in order to bring Seventh Circuit precedent in line with the precedent of other circuits. Gov't Opp. to Pet. for Reh'g 14. But that antecedent question makes it unlikely that this Court would reach the question presented by petitioner if it were to grant review. Accordingly, further review is unwarranted.

1. Petitioner seeks judicial review of the immigration judge's determination that, in light of inconsistencies in other aspects of petitioner's testimony, petitioner's uncorroborated testimony was insufficient to establish that he had been present in the United States continuously for more than ten years. Pet. App. 6a. Petitioner contends that Section 1252(a)(2)(D) preserves judicial review over his claim because his challenge raises a "question[] of law" within the meaning of that provision. That contention lacks merit.

a. Section 1252(a)(2)(B)(i) bars judicial review of "any judgment regarding the granting of relief under section * * * 1229b." Petitioner does not dispute the facial applicability of that section to his challenge to the Board's denial of his request for cancellation of removal. Notwithstanding Section 1252(a)(2)(B)(i), however, Section 1252(a)(2)(D) preserves judicial review for "constitutional claims or questions of law." Petitioner contends that his challenge to the immigration judge's refusal to credit his uncorroborated and inconsistent testimony constitutes a "question[] of law" within the meaning of that section.

The Seventh Circuit has correctly concluded that the phrase "questions of law" refers only to "pure" questions of law, such as questions of statutory interpretation, not to mixed questions of law and fact. Pet. App. 8a; see *Cevilla* v. *Gonzales*, 446 F.3d 658, 661 (7th Cir. 2006); see also *Viracacha* v. *Mukasey*, 518 F.3d 511, 514-515 (7th Cir.), cert. denied, 555 U.S. 969 (2008); *Leguizamo-Medina* v. *Gonzales*, 493 F.3d 772, 773-774 (7th Cir. 2007). That interpretation is "consonant with the ordinary meaning of 'questions of law,'" which typically refers to questions of legal interpreta-

tion, not questions about the application of a legal standard to case-specific facts. *Cevilla*, 446 F.3d at 661. It also comports with the basic purpose of IIRIRA and the REAL ID Act to limit judicial review of the classes of orders specified in Section 1252(a)(2)(B)(i). "Because no administrative case can be decided without applying some law to some facts," it would seriously undercut that basic purpose to permit judicial review of the Board's routine application of a general legal standard to a particular sets of facts. *Viracacha*, 518 F.3d at 515 (Easterbrook, J.).

That interpretation also follows from the origin of Section 1252(a)(2)(D). Congress added Section 1252(a)(2)(D) in response to concerns that this Court raised about the reviewability of removal orders in its 2001 decision in *INS* v. *St. Cyr*, 533 U.S. 289. *St. Cyr* construed provisions of IIRIRA and the Antiterrorism and Effective Death Penalty Act of 1996, Pub. L. No. 104-132, 110 Stat. 1214, to permit review in habeas corpus of "pure questions of law"—in that case, the question whether IIRIRA's prohibition on discretionary relief applied retroactively. 533 U.S. at 298-314; see *id.* at 314 n.38 ("[T]his case raises only a pure question of law as to respondent's statutory eligibility for discretionary relief."). The Court explained that the historical scope of habeas corpus included "pure questions of law like the one raised" in the case, *id.* at 305, and that "[a] construction of the amendments at issue that would entirely preclude review of a pure question of law by any court would give rise to substantial constitutional questions," *id.* at 300.

Congress added Section 1252(a)(2)(D) in 2005 in the REAL ID Act. See § 106(a)(1)(A)(iii), 119 Stat. 310. The Conference Report on the bill discussed the

holding of *St. Cyr* and explained that "[t]he purpose of [Section 1252(a)(2)(D)] is to permit judicial review over those issues that were historically reviewable on habeas—constitutional and statutory-construction questions, not discretionary or factual questions." H.R. Rep. No. 72, 109th Cong., 1st Sess. 175 (2005) (REAL ID Act Conference Report); see *id.* at 173-176. Explaining why the phrase "pure question of law," which had been used in an earlier version of the bill, had been modified, the Conference Report stated that "a 'question of law' is a question regarding the construction of a statute," and the "word 'pure' adds no meaning." *Id.* at 175. The report added that "[w]hen 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." *Ibid.*

That drafting history confirms what is evident from the plain text of Section 1252(a)(2)(D): that Congress meant to ensure judicial review of constitutional questions and purely legal questions, but to leave unaffected general prohibitions on review of the Attorney General's application of legal standards to facts of particular cases. Of course, the line between pure questions of law and mixed questions is not always easily discerned (just like the line between purely factual questions and mixed questions). In particular, the question of the applicability of a particular legal provision to a commonly recurring factual circumstance might sometimes give rise to a question of law. For example, although the question whether the exigent-circumstances exception to the Fourth Amendment's warrant requirement applies to a given constellation of facts would typically be viewed as a

mixed question of law and fact, the more general question whether that exception can apply after the police create the exigency through a knock-and-announce procedure, see *Kentucky* v. *King*, 131 S. Ct. 1849 (2011), could naturally be viewed as a pure question of law. So too here: Questions that ask how particular provisions of the INA apply to general classes of cases might give rise to questions of statutory construction. But that does not mean that any challenge to the Attorney General's application of a statutory standard to a case-specific set of facts falls within Section 1252(a)(2)(D)'s proviso—a view that would render the INA's limitations on judicial review ineffectual.

Petitioner suggests (Pet. 15-16) that this Court has construed statutes authorizing review of legal questions to encompass mixed questions of law and fact, citing *Bogardus* v. *Commissioner*, 302 U.S. 34 (1937), and *Pullman-Standard* v. *Swint*, 456 U.S. 273 (1982). *Bogardus*, a tax case, did not involve the interpretation of a phrase such as "questions of law" in a jurisdictional statute. The Court merely concluded that mixed questions are not excluded from judicial review by the principle that "determinations of fact for ordinary administrative purposes are not subject to review" so long as "the evidence was legally sufficient to sustain them and there was no irregularity in the proceedings." *Phillips* v. *Commissioner*, 283 U.S. 589, 600 (1931) (cited at *Helvering* v. *Rankin*, 295 U.S. 123, 131 (1935)); see *Bogardus*, 302 U.S. at 38-39 (citing *Rankin*, 295 U.S. at 131). And in the cited passage in *Swint*, the Court simply noted a conflict among the courts of appeals over whether the clearly-erroneous appellate standard of review applies to mixed questions, and observed that *Bogardus* and other tax deci-

sions offered some support "for the proposition that conclusions on mixed questions of law and fact are independently reviewable by an appellate court," while noting two decisions casting doubt on that view. 456 U.S. at 287, 289 n.19. Those discussions offer scant support for petitioner's construction of "questions of law" in Section 1252(a)(2)(D), a statutory provision with its own context, history, and purpose.

Petitioner also contends (Pet. 17-22) that in *St. Cyr*, *supra*, this Court determined that the historical scope of habeas corpus included challenges to executive detention raising mixed questions—even though *St. Cyr* itself concerned only a "pure question of law," 533 U.S. at 298—and that therefore construing Section 1252(a)(2)(D) to encompass such challenges is necessary to avoid a serious Suspension Clause question. Petitioner relies (Pet. 18) on *St. Cyr*'s statement that at the Founding, habeas jurisdiction included challenges to executive detention "based on errors of law, including the erroneous *application* or interpretation of statutes." 533 U.S. at 302 (emphasis added). But the Court's reference to the "application" of a statute is best read to refer to questions about the applicability of a statute to general classes of cases (see pp. 15-16, *supra*). Indeed, *St. Cyr* itself involved the question whether a provision of IIRIRA applied to aliens who pleaded guilty to criminal offenses before IIRIRA's enactment—a question that involves the "application" of a statutory provision to a general class of aliens—and yet the Court characterized that question as "a matter of statutory interpretation" and a "pure question of law." 533 U.S. at 298; see *id.* at 314-326. The Court's single reference to applications of law could not reasonably be taken as concluding

that immigration statutes foreclosing the review of case-specific mixed questions of law and fact are constitutionally suspect.

b. Under the foregoing interpretation of Section 1252(a)(2)(D)'s proviso—or even under a broader interpretation in which Section 1252(a)(2)(D) encompasses mixed questions of law and fact—petitioner does not seek judicial review of a "question of law." Petitioner challenges the immigration judge's conclusion that he failed to carry his burden to establish ten years of continuous physical presence in the United States—in particular, that he failed to establish that he entered the country on or before March 3, 1999. Pet. App. 12a; see 8 U.S.C. 1229a(c)(4)(A)(i) (placing burden of proof on alien). Petitioner argued below that the immigration judge "erred in deeming that [petitioner] lacked credibility, and thereby requiring [petitioner] to provide corroborating evidence to establish 10 years of physical presence in the United States," which petitioner claimed was not reasonably available. Pet. C.A. Br. 9-10; see Pet. App. 6a.[3] That argument raises no question of statutory construction or any other comparable legal issue.

Nor does petitioner's challenge even raise a mixed question of law and fact that might encompass "legal elements" amenable to review, REAL ID Act Conference Report 175, or that would be reviewable under the broader interpretation of Section 1252(a)(2)(D)

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[3] Petitioner suggests (Pet. 6-7) that he presented corroborating evidence of his claim of ten years' presence. But as the court of appeals explained, "the earliest documentary evidence of his presence in the United States was [a] 2001 traffic ticket." Pet. App. 3a. That does not establish that petitioner was present in the United States on or before March 3, 1999.

that petitioner advances. As petitioner acknowledges, a mixed question of law and fact is one "in which the historical facts are admitted or established, the rule of law is undisputed, and the issue is whether the facts satisfy the statutory standard." *Swint*, 456 U.S. at 289 n.19; accord Pet. 2 ("the application of law to undisputed fact"). Here, however, the opposite is true: The dispute is exclusively over an historical fact—whether petitioner entered the country on or before March 3, 1999—whereas there is no dispute that, if petitioner's factual claim were correct, he would satisfy the continuous-presence eligibility requirement. The Board merely held that his testimony and documentary evidence did not meet his burden to establish that fact.

Of course, whether petitioner met his evidentiary burden could itself be characterized as the application of a legal standard to a set of facts. But if even that sort of question were understood to be a "question of law," then Section 1252(a)(2)(B)(i)'s general bar to judicial review would be "erased from the statute books," because "the proviso in subsection (D) [would] cover[] every case," even those raising classically factual challenges. *Viracacha*, 518 F.3d at 514. And that result would also directly contravene Congress's understanding that unreviewable "[f]actual questions include those questions that courts would review under the 'substantial evidence' * * * standard, reversing only when a reasonable factfinder would be compelled to conclude that the decision below was erroneous." REAL ID Act Conference Report 175-176.

Judge Hamilton was thus correct in his concurrence in the denial of rehearing en banc that petitioner's challenge to the removal order raises a "purely

factual issue," Pet. App. 28a, not any question about the interpretation of a statute or even the application of a statute to undisputed or established facts. See Gov't C.A. Br. 15-16 ("[Petitioner's] claim is nothing more than a challenge to the [Board's] determination of questions of fact and credibility dressed as a legal question.") (citation and internal quotation marks omitted); see also *id.* at 20.[4] As such, the challenge does not fall within the proviso of Section 1252(a)(2)(D), even if that section were interpreted to permit aliens to present mixed questions. And for that reason, petitioner could not obtain relief in this case, even if the Court were to resolve the question presented in his favor.

Petitioner suggests (Pet. 14) that the Second and Eighth Circuits have found claims similar to his claim to fall within Section 1252(a)(2)(D)'s proviso. That argument rests on a misunderstanding of the cited cases, which in fact support the government's interpretation of Section 1252(a)(2)(D). In *Hernandez* v.

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[4] Petitioner contends (Pet. 7, 8 n.3) that the panel concluded that his challenge raised a mixed question of law and fact. In the cited statement, however, the panel recognized only that petitioner had characterized his challenge as a mixed question of law and fact. See Pet. App. 6a. Because the court of appeals concluded that mixed questions are not subject to judicial review under Seventh Circuit precedent, *id.* at 8a, the court had no need to decide whether petitioner raised a mixed question or a purely factual question. Moreover, elsewhere in the opinion, the panel explained that the immigration judge "found [petitioner's] testimony not credible," *id.* at 9a—a classic factual determination. And in any event, had the panel overlooked that petitioner raised a "purely factual" challenge to the Board's decision, *id.* at 28a (Hamilton, J., concurring in the denial of rehearing en banc), petitioner still would not be entitled to relief from this Court, no matter how it resolved the question presented.

Holder, 736 F.3d 234 (2d Cir. 2013), the Second Circuit held that the Board's continuous-presence determination does not fall within the jurisdictional bar of Section 1252(a)(2)(B)(i) at all, see *id.* at 236-237—a position with which the government agrees (see pp. 24-26, *infra*), but that has been rejected by the Seventh Circuit and that petitioner has not advanced here. Far from supporting petitioner's argument that his challenge involves a "question[] of law" under Section 1252(a)(2)(D) (a provision not cited in the decision), *Hernandez* expressly characterized the alien's claim as a challenge to a "factual determination." *Id.* at 237. The Eighth Circuit precedent that petitioner cites likewise did not rely on Section 1252(a)(2)(D), but rather on that court's conclusion that Section 1252(a)(2)(B)(i) does not bar review of "nondiscretionary determinations underlying a denial of an application for cancellation of removal"—an interpretation that the Eighth Circuit had adopted before Section 1252(a)(2)(D) was enacted. *Sanchez-Velasco* v. *Holder*, 593 F.3d 733, 735 (2010) (quoting *Pinos-Gonzalez* v. *Mukasey*, 519 F.3d 436, 439 (8th Cir. 2008)); see *Ortiz-Cornejo* v. *Gonzales*, 400 F.3d 610, 612 (8th Cir. Mar. 11, 2005). Accordingly, neither decision supports the view that petitioner's challenge to the immigration judge's factual determination raises a "question of law."

2. Petitioner contends (Pet. 9-15) that this Court's review is necessary to resolve a conflict among the circuits over whether Section 1252(a)(2)(D) encompasses mixed questions of law and fact. As discussed, that question is not properly presented by this case because petitioner raises a "purely factual" challenge to the immigration judge's decision. Pet. App. 28a

(Hamilton, J., concurring in the denial of rehearing en banc). Even under the precedent of those circuits that petitioner claims are favorable to his position, petitioner would not be entitled to judicial review of that challenge.

For example, the Eighth Circuit decision cited by petitioner (Pet. 12) explains that Section 1252(a)(2)(D) does not preserve judicial review for "the [Board's] determination * * * as to what evidence is credible and how much weight to give that evidence." *Nguyen* v. *Mukasey*, 522 F.3d 853, 854 (2008) (per curiam). That would foreclose review of the immigration judge's conclusion here that he did "not accept [petitioner's] testimony at face value" and therefore that petitioner's "testimony, standing alone, is insufficient." Pet. App. 18a. Likewise, the Third and Ninth Circuits have held that review of mixed questions is permitted "only when the underlying facts are undisputed," *Ramadan* v. *Gonzales*, 479 F.3d 646, 653 (9th Cir. 2007) (per curiam); see *id.* at 654, 656-657; see also *Toussaint* v. *Attorney Gen. of the U.S.*, 455 F.3d 409, 412 n.3 (3d Cir. 2006) (quoting *Singh* v. *Gonzales*, 432 F.3d 533, 541 (3d Cir. 2006)); the Second Circuit has held that Section 1252(a)(2)(D) does not encompass challenges to "the correctness of an [immigration judge's] fact-finding," *Chen* v. *United States Dep't of Justice*, 471 F.3d 315, 329 (2006); and the Eleventh Circuit has held that "the REAL ID Act prevents [courts] from reviewing factual determinations made by the [immigration judge or the Board]," *Jean-Pierre* v. *United States Att'y Gen.*, 500 F.3d 1315, 1320 (2007). None of those circuits would conclude that petitioner's challenge to the immigration judge's finding that petitioner had failed to meet his burden of

establishing that he was present in the country on or before March 3, 1999, constitutes a "question of law."[5] Accordingly, whether or not the question presented might warrant this Court's review at some point, this case does not implicate the purported conflict among the circuits.

3. Review of the question presented is unwarranted in this case for an additional reason. As explained above (see pp. 10-11, *supra*), in the government's view, the Seventh Circuit incorrectly held in *Cevilla*, *supra*, that Section 1252(a)(2)(B)(i) bars judicial review of the Board's continuous-presence determination to begin with. Thus, under the government's view, Section 1252(a)(2)(D)'s proviso is simply not relevant to the continuous-presence determination; a court has the power to consider even purely factual challenges to the Board's continuous-presence determination, such as the one that petitioner has presented—albeit under the highly deferential substantial-evidence standard of review applicable to factual determinations, see 8 U.S.C. 1252(b)(4)(B); *INS* v. *Elias-Zacarias*, 502 U.S. 478, 481 & n.1 (1992). In its opposition to the petition for rehearing, the government informed the Seventh Circuit that it would support en banc review of the antecedent Section 1252(a)(2)(B)(i) question in an appropriate case—*i.e.*, one in which the alien seeks

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[5] For the reasons discussed below (see pp. 24-26, *infra*), this aspect of the immigration judge's decision would have been reviewable in other courts of appeals, because those courts do not interpret Section 1252(a)(2)(B)(i) as extending to the non-discretionary determination at issue in this case. Yet those courts would not consider the type of claim raised by petitioner as falling within the scope of the proviso of Section 1252(a)(2)(D) (which applies to other judicial-review provisions in the INA).

review of that question—to argue in favor of bringing Seventh Circuit precedent into conformity with the precedent of every other circuit to consider the question. But that antecedent question, on which petitioner has not sought this Court's review, makes this case a particularly poor vehicle to address the further question that petitioner does present.

a. Section 1252(a)(2)(B)(i) provides that "[n]otwithstanding any other provision of law * * *, no court shall have jurisdiction to review * * * any judgment regarding the granting of relief under section * * * 1229b." In *Cevilla*, the Seventh Circuit interpreted that restriction to extend to all determinations made in conjunction with an application for cancellation of removal under Section 1229b, see 446 F.3d at 661, a position that had not been advanced by the government, see Gov't Br., 2005 WL 3739364 (Sept. 19, 2005), *Cevilla*, *supra* (No. 05-2387). *Cevilla* recognized that three courts of appeals had interpreted the bar as applying only to "rulings that are * * * discretionary in character." 446 F.3d at 661 (citing decisions of Fifth, Sixth, and Ninth Circuits). And the Seventh Circuit acknowledged that "the purpose of [Section 1252(a)(2)(B)(i)] appears to be to place discretionary rulings beyond the power of judicial review." *Ibid.* But the court believed that "the statute itself, read literally, goes further and places all rulings other than those resolving questions of law or constitutional issues beyond the power of judicial review." *Ibid.*

Cevilla's interpretation of Section 1252(a)(2)(B)(i) is incorrect, and it is contrary to the government's longstanding position that determinations related to the granting of relief under Section 1229b that are not discretionary in nature—such as the determination of

the historical fact of whether an alien has been present in the United States continuously for a ten-year period—do not fall within the jurisdictional bar of Section 1252(a)(2)(B)(i). For two principal reasons, Section 1252(a)(2)(B)(i) is best interpreted to reach only discretionary judgments.

First, the phrase "any judgment regarding the granting of relief under section * * * 1229b" is naturally read to include only judgments of a discretionary nature. The term "judgment," when used in the INA to specify a determination or decision of the relevant official (as opposed to the order of a court), refers to a determination of a discretionary nature. See 8 U.S.C. 1103(a)(7), 1226(e), 1252(b)(4)(D), 1537(b)(2)(A).

Second, Congress used very different language in other provisions to express an intent to bar all review of a particular type of order. Section 1252(a)(2)(A), for instance, provides that "no court shall have jurisdiction to review * * * *any individual determination or to entertain any cause or claim arising from or relating to the implementation or operation of* an" expedited order of removal (emphasis added). Likewise, the criminal-alien bar applies to preclude judicial review of "*any final order of removal* against an alien who is removable by reason of having committed" certain enumerated criminal offenses. 8 U.S.C. 1252(a)(2)(C) (emphasis added). Congress would likely have used similarly broad language if it intended Section 1252(a)(2)(B)(i) to foreclose all review of Board orders denying cancellation of removal.

The government's interpretation of Section 1252(a)(2)(B)(i) to apply only to determinations of a discretionary nature is consistent with the decisions of every court of appeals to have addressed the scope of

Section 1252(a)(2)(B)(i) other than the Seventh Circuit. See, *e.g.*, *Sepulveda* v. *Gonzales*, 407 F.3d 59, 62-63 (2d Cir. 2005) (Sotomayor, J.) (citing decisions of the Fifth, Sixth, Eighth, Ninth, and Eleventh Circuits). Accordingly, were the Seventh Circuit to overrule its precedent in *Cevilla*—which the government will urge the en banc court to do in an appropriate case—no disagreement over that question would exist among the circuits.

b. For two reasons, the presence of the antecedent question of Section 1252(a)(2)(B)(i)'s applicability to determinations not of a discretionary nature disfavors review in this case.

First, were review granted, this Court, which is not bound by Seventh Circuit precedent, would likely first decide the antecedent jurisdictional question of the scope of Section 1252(a)(2)(B)(i), and the government would urge the Court to hold that Section 1252(a)(2)(B)(i) does not preclude judicial review here. Cf., *e.g.*, *CIGNA Corp.* v. *Amara*, 131 S. Ct. 1866, 1876 (2011) ("We believe that this preliminary question is closely enough related to the question presented that we shall consider it at the outset."). If the Court agreed with the government's position, it would have no occasion to reach the Section 1252(a)(2)(D) question on which petitioner seeks a writ of certiorari and therefore could not resolve the asserted circuit conflict over that issue. Although a lopsided circuit conflict also exists on the threshold Section 1252(a)(2)(B)(i) question (in that the Seventh Circuit's precedent departs from the precedent of other circuits), the en banc Seventh Circuit should have an initial opportunity to reconsider its precedent in light of the government's position that en banc review

would be warranted on that issue in an appropriate case. Indeed, *Cevilla*'s holding appears to conflict with statements in other decisions of the Seventh Circuit, so there are strong grounds for en banc review. See, *e.g.*, *Nunez-Moron* v. *Holder*, 702 F.3d 353, 358 (2012); *Reyes-Sanchez* v. *Holder*, 646 F.3d 493, 496 (2011).

Second, this case would present a highly artificial context in which to consider the proper construction of the proviso in Section 1252(a)(2)(D). As discussed, in the government's view, the continuous-presence determination at issue here never calls on a court to apply the proviso of Section 1252(a)(2)(D), because that kind of determination does not fall within the jurisdictional bar of Section 1252(a)(2)(B)(i) in the first place. If review were granted in this case, therefore, this Court could be presented with an inaccurate picture of the sort of mixed questions that would be subject to judicial review if petitioner's broad reading of Section 1252(a)(2)(D) were adopted, which the Court may find relevant to understanding Congress's intent in the REAL ID Act. See Pet. 24 (identifying other contexts where the Section 1252(a)(2)(D) is commonly invoked). As explained above (see pp. 15-16, *supra*), what constitutes a mixed question is not always readily discerned, and this Court may determine, for example, that certain questions under the INA that courts have characterized as mixed questions of law and fact are better characterized as pure questions of law or, conversely, as essentially fact-bound issues of the sort that Congress did not intend to be reviewable. It could thus enhance the presentation of arguments if the question of the scope of Section 1252(a)(2)(D) were raised in a statutory context in

which that proviso actually determines the question of jurisdiction.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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