No. 18-827

In the Supreme Court of the United States

AMIR FRANCIS SHABO, PETITIONER

v.

WILLIAM P. BARR, ATTORNEY GENERAL

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

BRIEF FOR THE RESPONDENT IN OPPOSITION

NOEL J. FRANCISCO
Solicitor General
Counsel of Record
JOSEPH H. HUNT
Assistant Attorney General
DONALD E. KEENER
JOHN W. BLAKELEY
ANDREW C. MACLACHLAN
Attorneys

Department of Justice
Washington, D.C. 20530-0001
SupremeCtBriefs@usdoj.gov
(202) 514-2217

QUESTION PRESENTED

The Immigration and Nationality Act, 8 U.S.C. 1101 *et seq.*, provides that "no court shall have jurisdiction to review any final order of removal against an alien who is removable" because he committed certain specified criminal offenses. 8 U.S.C. 1252(a)(2)(C). The question presented is whether that jurisdictional bar precludes review of a factual challenge to the denial of petitioner's application for deferral of removal under regulations implementing the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, *adopted* Dec. 10, 1984, S. Treaty Doc. No. 20, 100th Cong., 2d Sess. 19 (1988), 1465 U.N.T.S. 85.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases:

Cases—Continued: Page

Treaty, statutes, and regulations:

Statutes and regulations—Continued: Page

Statutes and regulations—Continued: Page

In the Supreme Court of the United States

No. 18-827

AMIR FRANCIS SHABO, PETITIONER

v.

WILLIAM P. BARR, ATTORNEY GENERAL

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

BRIEF FOR THE RESPONDENT IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a–8a) is reported at 892 F.3d 237. The decisions of the Board of Immigration Appeals (Pet. App. 9a-11a) and the immigration judge (Pet. App. 12a-23a) are unreported.

JURISDICTION

The judgment of the court of appeals was entered on June 11, 2018. A petition for rehearing was denied on July 31, 2018. On October 16, 2018, Justice Kagan extended the time within which to file a petition for a writ of certiorari to and including December 28, 2018, and the petition was filed on that date. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. a. The Immigration and Nationality Act (INA), 8 U.S.C. 1101 *et seq.*, provides that an alien convicted of an "aggravated felony," 8 U.S.C. 1227(a)(2)(A)(iii), or

convicted of a violation of "any law or regulation of a State * * * relating to a controlled substance," 8 U.S.C. 1227(a)(2)(B)(i), is removable from the United States.

Under specified circumstances, however, such a criminal alien who demonstrates that he would more likely than not be tortured if removed to a particular country may obtain withholding or deferral of removal under the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (CAT), *adopted* Dec. 10, 1984, S. Treaty Doc. No. 20, 100th Cong., 2d Sess. 19 (1988), 1465 U.N.T.S. 85.[1] To qualify for CAT protection, the acts alleged to constitute torture must be inflicted "by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity." 8 C.F.R. 1208.18(a)(1).

b. The INA provides for court of appeals review of "a final order of removal" under specified circumstances. 8 U.S.C. 1252(a)(1). In 1996, Congress amended the INA to expedite the removal of criminal and other illegal aliens from the United States. See Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (IIRIRA), Pub. L. No. 104-208, Div. C, 110 Stat. 3009-546. Specifically, as relevant here, Congress provided that "no court shall have jurisdiction to review any final order of removal against an alien who

---

[1] Article 3 of the CAT provides that "[n]o State Party shall expel, return * * * or extradite a person to another State where there are substantial grounds for believing that he would be in danger of being subjected to torture." 1465 U.N.T.S. 114. Congress directed that regulations be promulgated to implement that obligation. See Foreign Affairs Reform and Restructuring Act of 1998, Pub. L. No. 105-277, Div. G, § 2242(b), 112 Stat. 2681-822. The regulations implementing Article 3 of the CAT in the immigration context appear primarily at 8 C.F.R. 208.16-208.18 and 1208.16-1208.18.

is removable by reason of having committed a criminal offense covered in" specified sections of the INA. § 306(a)(2), 110 Stat. 3009-607 to 3009-608; see 8 U.S.C. 1252(a)(2)(C).

Among other changes, Congress also provided in IIRIRA that, even when judicial review is permitted because the jurisdictional bar in cases involving criminal aliens does not apply, "administrative findings of fact are conclusive unless any reasonable adjudicator would be compelled to conclude to the contrary." 8 U.S.C. 1252(b)(4)(B). It further provided that:

> Judicial review of all questions of law and fact * * * arising from any action taken or proceeding brought to remove an alien from the United States under [Title 8, Chapter 12, Subchapter II of the U.S. Code] shall be available only in judicial review of a final order under this section.

8 U.S.C. 1252(b)(9).

c. Congress has expressly addressed judicial review of CAT claims in two statutes. First, in the Foreign Affairs Reform and Restructuring Act of 1998 (FARRA), Pub. L. No. 105-277, Div. G, § 2242(d), 112 Stat. 2681-822, Congress provided that nothing in that statute's implementation of the CAT "shall be construed as providing any court jurisdiction to consider or review claims raised under the [CAT] * * * except as part of the review of a final order of removal pursuant to [8 U.S.C. 1252]." FARRA § 2242(d), 112 Stat. 2681-822; see 8 U.S.C. 1231 note.

Second, after this Court's decision in *INS* v. *St. Cyr*, 533 U.S. 289 (2001), Congress enacted Section 106 of the REAL ID Act of 2005, Pub. L. No. 109-13, Div. B, 119 Stat. 310, to consolidate all judicial review of re-

moval proceedings in the courts of appeals. That statute also expressly addressed CAT claims, stating that "[n]otwithstanding any other provision of law"—including the statutory provisions authorizing federal habeas corpus review—"a petition for review filed with an appropriate court of appeals in accordance with [8 U.S.C. 1252] shall be the sole and exclusive means for judicial review of any cause or claim under the [CAT], except as provided in [Section 1252(e)]." REAL ID Act § 106(a)(1)(B), 119 Stat. 310; see 8 U.S.C. 1252(a)(4).[2]

d. The REAL ID Act also created an exception to the INA's jurisdictional bars for "constitutional claims or questions of law." § 106(a)(1)(A), 119 Stat. 310; see 8 U.S.C. 1252(a)(2)(D). The Act otherwise preserved the jurisdictional bar applicable to criminal aliens. It further made clear that district courts lack jurisdiction to review removal orders, and it directed that all such cases pending in the district courts at the time of enactment should be transferred to the courts of appeals. REAL ID Act § 106(a)(1)(B), 119 Stat. 310 (8 U.S.C. 1252(a)(5)); see § 106(c), 119 Stat. 311.

2. Petitioner is a citizen of Iraq who was admitted to the United States as a refugee and adjusted his status to that of a lawful permanent resident in 1985. Pet. 8. In 1992 he was convicted in state court of possession with the intent to deliver 50 to 225 grams of cocaine, and was sentenced to 60 to 240 months of imprisonment. Pet. App. 2a.

In 1994, petitioner was charged with being subject to deportation as an alien convicted of an aggravated felony drug trafficking offense under 8 U.S.C. 1251(a)(2)(A)(iii)

---

[2] Section 1252(e) authorizes limited judicial review of administrative determinations made in expedited removal proceedings pursuant to 8 U.S.C. 1225(b). That provision is inapplicable here.

(Supp. IV 1992), and as an alien convicted of a law relating to a controlled substance under 8 U.S.C. 1251(a)(2)(B)(i) (Supp. IV 1992). Pet. App. 12a; see Administrative Record (A.R.) 240-248.[3] Petitioner conceded his deportability on these grounds, but applied for asylum under 8 U.S.C. 1158(a) (1994) and withholding of deportation under 8 U.S.C. 1253(h) (1994).[4] Pet. App. 13a. An immigration judge found petitioner deportable, denied his request for asylum and withholding, and ordered him removed to Iraq. *Id.* at 13a-14a. Specifically, the immigration judge determined that petitioner was barred from asylum because his conviction was for an aggravated felony and barred from withholding because his conviction was for a particularly serious crime. See *ibid.*; see also 8 U.S.C. 1158(d), 1253(h)(2)(B) (1994).

In 1998, the Board of Immigration Appeals (BIA or Board) dismissed petitioner's appeal, agreeing that he was deportable and ineligible for asylum and withholding. Pet. App. 13a. The Board noted that petitioner nonetheless could still file a CAT claim. *Id.* at 13a n.1. Petitioner did not do so.

Although petitioner became subject to a final order of removal in 1998, he could not actually be removed to Iraq "because the Iraqi government was not then issuing travel papers." Pet. App. 2a. As a result, at the time there was not a "significant likelihood of removal in the reasonably foreseeable future," *Zadvydas* v. *Davis*,

---

[3] Comparable grounds for removal remain in the current INA, redesignated to Section 1227. IIRIRA § 305(a)(2), 110 Stat. 3009-598; see 8 U.S.C. 1227(a)(2)(A)(iii) and (B)(i).

[4] A comparable provision for withholding of removal remains in the INA, amended in 1996 into 8 U.S.C. 1231(b)(3). See IIRIRA § 305(a)(3), 110 Stat. 3009-602.

533 U.S. 673, 701 (2001), and petitioner was released on an order of supervision. See 8 U.S.C. 1231(a)(3); 8 C.F.R. 241.5.

3. In 2017, "Iraq began issuing travel papers," and petitioner "anticipated that he would soon be detained" to effectuate his removal. Pet. App. 2a. Petitioner filed an emergency motion with the Board seeking to reopen his proceedings to renew his application for asylum and withholding of removal, and seeking protection under the CAT, based on changed circumstances since 1997. *Ibid.* Petitioner contended that, as a Chaldean Christian, he would be subject to attack by the Islamic State of Iraq and the Levant (ISIS). See *id.* at 9a-10a.

The Board denied the motion to reopen. Pet. App. 9a-11a. First, the Board declined to revisit its prior rulings that petitioner is ineligible for asylum and statutory withholding. *Id.* at 9a. Second, the Board declined to reopen to consider a claim for deferral of removal under the CAT. *Id.* at 10a. The Board determined that such a motion was untimely and did not fall within an exception to the 90-day time limit for moving to reopen, see 8 C.F.R. 1003.2(c)(2); and that in any event petitioner was not eligible for deferral of removal. Pet. App. 10a. To be eligible, an alien must show that he is "more likely than not to be subjected to torture 'inflicted by or at the instigation of or with the acquiescence, including the concept of willful blindness, of a public official or other person acting in an official capacity.'" *Ibid.* (quoting 8 C.F.R. 1208.18(a)(1)); see 8 C.F.R. 1208.16(c)(2). Here, the Board recognized that "the Islamic State targets Chaldean Christians—among other minority ethnic and religious groups." Pet. App. 10a. But the Board found insufficient evidence that any such harm would be

"inflicted by or at the instigation of or with the acquiescence, including the concept of willful blindness, of a public official or other person acting in an official capacity." *Ibid.* (citation omitted). The Board observed that "the Iraqi government and the Kurdish Peshmerga actively combat the terrorist organization." *Ibid.* (citing, *inter alia*, A.R. 15-36 (Bureau of Democracy, Human Rights, and Labor, Dep't of State, *International Religious Freedom Report for 2015: Iraq* (*2015 Religious Freedom Report*), attached to Gov't Reply in Opp. to Mot. to Reopen)).

4. Petitioner filed a petition for review, arguing that the 90-day time limit for a motion to reopen did not apply to CAT protection, and that the Board's assessment of the evidence of government acquiescence was erroneous. See Pet. App. 3a. The court of appeals dismissed for lack of jurisdiction. *Id.* at 1a-8a. The court found that the question whether petitioner "presented sufficient evidence to establish a prima facie case that he was 'more likely than not' to be subject to torture in Iraq by the government or at least with the government's acquiescence" is "a factual question." *Id.* at 4a, 7a. Based on 8 U.S.C. 1252(a)(2)(C), the court held that it "lack[ed] jurisdiction to review the BIA's case-dispositive determination at step two that Shabo failed to establish a prima facie case for relief." Pet. App. 8a. The court found that it need not reach the question of the time limit on a motion to reopen because petitioner would also need to prevail on the underlying factual question, and accordingly dismissed the petition for review. *Ibid.*

A petition for rehearing was denied on July 31, 2018.

ARGUMENT

The court of appeals correctly determined that it lacked jurisdiction to review petitioner's factual challenges to the denial of his request for deferral of removal under regulations implementing the CAT. Petitioner is correct that there is a conflict among the courts of appeals as to whether jurisdiction exists to review factual challenges brought by a criminal alien to the denial of a request for deferral of removal under the CAT, notwithstanding 8 U.S.C. 1252(a)(2)(C). This is a recurring question of substantial importance that will warrant this Court's review in an appropriate case, but this is not an appropriate case. This Court has recently denied several petitions for a writ of certiorari raising the same question. See *Doe* v. *Sessions*, 138 S. Ct. 2624 (2018) (No. 17-8040); *Granados* v. *Sessions*, 137 S. Ct. 2295 (2017) (No. 16-1095); *Ortiz-Franco* v. *Lynch*, 136 S. Ct. 894 (2016) (No. 15-362); *Perez-Guerrero* v. *Holder*, 571 U.S. 1163 (2014) (No. 13-323). The same disposition is appropriate here.

1. a. The court of appeals correctly concluded (Pet. App. 3a-8a) that 8 U.S.C. 1252(a)(2)(C) bars judicial review of findings of fact in a case such as this. Section 1252(a)(2)(C) provides that, "[n]otwithstanding any other provision of law," "no court shall have jurisdiction to review any final order of removal against an alien who is removable by reason of having committed a [specified] criminal offense." *Ibid.* That categorical jurisdictional prohibition is subject to only one exception, which allows review of "constitutional claims or questions of law." 8 U.S.C. 1252(a)(2)(D). The court correctly concluded that petitioner raised no such claims in this case, see Pet. App. 7a, and petitioner does not challenge that conclusion in this Court, see Pet. 27-29.

The court of appeals also correctly concluded, relying on circuit precedent, that Section 1252(a)(2)(C) does not permit review of factual challenges. Pet. App. 3a-7a; see *Ventura-Reyes* v. *Lynch*, 797 F.3d 348, 356-358 (6th Cir. 2015). Petitioner is an (1) an "alien," who was (2) "removable," (3) "by reason of having committed a criminal offense covered" by two of the specified grounds for removal. 8 U.S.C. 1252(a)(2)(C). The court was therefore without jurisdiction to review petitioner's factual contentions regarding his claim for deferral of removal under regulations implementing the CAT.

The large majority of courts of appeals have applied Section 1252(a)(2)(C) in this straightforward manner. See *Ventura-Reyes*, 797 F.3d at 356-358; *Ortiz-Franco* v. *Holder*, 782 F.3d 81, 88-91 (2d Cir. 2015), cert. denied, 136 S. Ct. 894 (2016); *Cole* v. *U.S. Att'y Gen.*, 712 F.3d 517, 532-533 (11th Cir.), cert. denied, 571 U.S. 826 (2013); *Escudero-Arciniega* v. *Holder*, 702 F.3d 781, 785 (5th Cir. 2012) (per curiam); *Cherichel* v. *Holder*, 591 F.3d 1002, 1017 (8th Cir.), cert. denied, 562 U.S. 828 (2010); *Gourdet* v. *Holder*, 587 F.3d 1, 5 (1st Cir. 2009); *Saintha* v. *Mukasey*, 516 F.3d 243, 248 (4th Cir.), cert. denied, 555 U.S. 1031 (2008); *Ilchuk* v. *Attorney Gen.*, 434 F.3d 618, 624 (3d Cir. 2006); see also *Medrano-Olivas* v. *Holder*, 590 Fed. Appx. 770, 772 (10th Cir. 2014).

b. The Ninth Circuit, on the other hand, has read an "on the merits" exception into the jurisdictional bar in Section 1252(a)(2)(C). See *Pechenkov* v. *Holder*, 705 F.3d 444, 449-452 (2012) (Graber, J., concurring) (explaining the development of this "additional, sometimes confusing, exception" in that circuit). The Ninth Circuit applies its exception in circumstances where relief or protection from removal is denied "on the merits" of an alien's claim (such as under the CAT), as opposed to being

denied because the alien is ineligible for that form of relief or protection due to his criminal conviction. See *id.* at 450-451; see also *Alphonsus* v. *Holder*, 705 F.3d 1031, 1036-1037 (9th Cir. 2013); *Lemus-Galvan* v. *Mukasey,* 518 F.3d 1081, 1083-1084 (9th Cir. 2008), overruled in part on other grounds by *Maldonado* v. *Lynch*, 786 F.3d 1155 (9th Cir. 2015) (en banc); *Morales* v. *Gonzales*, 478 F.3d 972, 980 (9th Cir. 2007), abrogated in part on other grounds by *Anaya-Ortiz* v. *Holder*, 594 F.3d 673 (9th Cir. 2010); *Unuakhaulu* v. *Gonzales*, 416 F.3d 931, 933-935 (9th Cir. 2005). Indeed, the Ninth Circuit has extended its "on the merits" reasoning even beyond CAT claims to hold that Section 1252(a)(2)(C) "does not apply to the denial of a procedural motion that rests on a ground independent of the conviction that triggers the bar." *Garcia* v. *Lynch*, 798 F.3d 876, 880-881 (2015). *Garcia*'s rationale has since been invoked to permit judicial review of the Board's denial as untimely of a motion to reopen proceedings filed by an alien convicted of a specified offense under Section 1252(a)(2)(C), because the Board's "denial of [the alien's] motion to reopen did not rely on his conviction of" that offense. *Agonafer* v. *Sessions*, 859 F.3d 1198, 1203 (9th Cir. 2017).

The Ninth Circuit's approach is incorrect. As applied in the context of a claim for deferral of removal under the CAT, that court's rule implicitly and erroneously assumes that the denial of CAT protection "on the merits" is somehow not a part of a "final order of removal" rendered unreviewable by Section 1252(a)(2)(C). An order of removal is defined as "the order of the * * * administrative officer to whom the Attorney General has delegated the responsibility for determining whether an alien is [removable], concluding that the alien is [removable] or ordering [removal]." 8 U.S.C. 1101(a)(47)(A);

see *Foti* v. *INS*, 375 U.S. 217, 220-221, 232 (1963) (review of a final order of removal in the court of appeals encompasses both findings of removability and the denial of any relief from removal); see also *INS* v. *Chadha*, 462 U.S. 919, 938 (1983) ("[T]he term 'final orders' in [the INA jurisdictional statute] 'includes all matters on which the validity of the final order is contingent, rather than only those determinations actually made at the hearing.'") (citation omitted); *Cheng Fan Kwok* v. *INS*, 392 U.S. 206, 216 (1968).

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

c. As petitioner observes (Pet. 20-21), the Seventh Circuit has concluded that a court of appeals has jurisdiction to review factual claims associated with a denial of deferral of removal under regulations implementing the CAT, but that court's reasoning (which is different from the Ninth Circuit's) fares no better. In *Issaq* v. *Holder*, 617 F.3d 962 (2010), the Seventh Circuit stated in dictum that because *deferral* of removal is an "inherently non-final remedy," Section 1252(a)(2)(C) "(which speaks only of a final order) appears to be inapplicable." *Id.* at 970.

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

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

Id. at 264. The Seventh Circuit acknowledged that this analysis was not "necessary" to its determination that it had jurisdiction in *Wanjiru* because, as the government had conceded, the criminal conviction of the alien in that case did not trigger the jurisdictional bar. See *id.* at 262-263. Nonetheless, two years later the Seventh Circuit ruled that in *Wanjiru* it had "conclusively held that deferral of removal is not a final remedy and therefore the INA does not bar judicial review." *Lenjinac* v. *Holder*, 780 F.3d 852, 855 (2015).

The Seventh Circuit's analysis fails adequately to recognize that the court's jurisdiction under 8 U.S.C. 1252(a)(1) is limited in the first place to "final orders of removal," a term defined in 8 U.S.C. 1101(a)(47) and that has been interpreted by this Court in *Foti* to encompass all rulings on relief and protection from removal. See *Ortiz-Franco*, 782 F.3d at 89. The Seventh Circuit's reasoning that the term described in Section 1101(a)(47) has that meaning in Subsection (a)(1) of Section 1252, but a different meaning in Subsection (a)(2) of the same Section, has no basis in the INA. But even if "deferral" is "inherently non-final," *Issaq*, 617 F.3d at 970, the Seventh Circuit's analysis fails to recognize that although a *grant* of deferral of removal is inherently non-final, the agency's denial of deferral protection —the matter before the court—is unquestionably final

and results in an order of removal. See *Ventura-Reyes*, 797 F.3d at 358; *Ortiz-Franco*, 782 F.3d at 90.

d. Petitioner's remaining arguments lack merit. Petitioner contends (Pet. 26) that Sections 1252(a)(4) and (5) should be read together and lead to the conclusion that the phrase "'*any cause or claim under the' CAT*" in Section 1252(a)(4) is distinct from "*an order of removal*" in Section 1252(a)(5) and therefore is free from the jurisdictional rules governing all of Section 1252. Pet. 26 (quoting 8 U.S.C. 1252(a)(4) and (5)). But Section 1252(a)(4)'s text is clearly to the contrary: It is a channeling provision establishing that, notwithstanding any other provision of law, the "sole and exclusive means for judicial review of any cause or claim under the [CAT]" is "a petition for review filed with an appropriate court of appeals in accordance with this section," *i.e.*, Section 1252. 8 U.S.C. 1252(a)(4). Section 1252 confers jurisdiction on the courts of appeals solely to review a "final order of removal," 8 U.S.C. 1252(a)(1), subject to the exceptions and limitations on such review in Section 1252—including Section 1252(a)(2)(C), which prohibits courts from reviewing final orders entered against certain criminal aliens, subject only to the exception for constitutional questions and questions of law. 8 U.S.C. 1252(a)(2)(C) and (D).

No court of appeals appears to have exercised jurisdiction on the basis petitioner suggests over a petition for review filed by an alien with a predicate offense covered by Section 1252(a)(2)(C)—*i.e.*, on the theory that, by virtue of Section 1252(a)(4), the denial of CAT relief may be reviewed in a court of appeals "in accordance with [Section 1252]" without regard to the jurisdictional bar in Section 1252(a)(2)(C). Indeed, several courts of appeals have rejected the argument petitioner raises

here. See *Ortiz-Franco*, 782 F.3d at 88-89; *Lovan* v. *Holder*, 574 F.3d 990, 998 (8th Cir. 2009).

2. Although there is a conflict between the Ninth and Seventh Circuits and the majority of courts of appeals, this is not an appropriate case for this Court's review. This Court has recently denied review in other cases presenting the same question, *Doe*, *supra* (No. 17-8040); *Granados*, *supra* (No. 16-1095); *Ortiz-Franco*, *supra* (No. 15-362); *Perez-Guerrero*, *supra* (No. 13-323), and it should do the same here.

a. First, the court of appeals was correct, making review less critical in this case. As discussed *supra*, the reasoning of the outlier circuits is facially wrong, as is petitioner's reading of Sections 1252(a)(4) and (a)(5). In particular, no court of appeals has accepted petitioner's argument that the court has jurisdiction under Sections 1252(a)(4) and (a)(5) despite Section 1252(a)(2)(C).

b. Second, petitioner fails to demonstrate that the result in this case would be any different if the court of appeals had reviewed a fact-based challenge to the agency's decision, under the substantial evidence standard codified in 8 U.S.C. 1252(b)(4)(B). Cf. *Biestek* v. *Berryhill*, No. 17-1184 (Apr. 1, 2019), slip op. 3 (noting that "the threshold for such evidentiary sufficiency is not high"). Both in the petition for a writ of certiorari (see Pet. 29) and before the Board, petitioner has focused on threats posed by ISIS to Chaldean Christians in Iraq. See Pet. App. 10a. The Board based its decision, however, on the absence of sufficient evidence addressing a further, independent requirement for protection under the CAT, namely, that it was more likely than not that he would be tortured in Iraq "by or at the instigation of or with the consent or acquiescence of a

public official or other person acting in an official capacity." 8 C.F.R. 1208.18(a)(1); see Pet. App. 10a.

Petitioner makes no meaningful effort to demonstrate, on the basis of an assessment of the record evidence, that "any reasonable adjudicator would be compelled to conclude to the contrary," 8 U.S.C. 1252(b)(4)(B); see *INS* v. *Elias-Zacarias*, 502 U.S. 478, 481 & n.1 (1992), notwithstanding record evidence that "the Iraqi government and the Kurdish Peshmerga actively combat the terrorist organization." Pet. App. 10a. In particular, the Board cited (*ibid.*) the *2015 Religious Freedom Report* from the State Department's Bureau of Democracy, Human Rights, and Labor, which was attached to the government's opposition to the motion to reopen. See A.R. 15-36. That Report stated that the Iraqi government "fought numerous battles to regain control of significant terrain lost to [ISIS]"; the government "deploy[ed] police and army personnel to protect religious pilgrimage routes and sites, as well as places of worship," for religious minorities; that, although there was "harassment and restriction from the authorities in some regions," "the government did not generally interfere with religious observances and provided security for places of worship"; that the Chaldean Christian faith is recognized by law and registered with the Iraqi government; that the Iraqi constitution "requires the government to maintain the sanctity of holy shrines and religious sites and guarantee the free practice of rituals"; that the government "reportedly continued its policy of not interfering with Christians' right to observe Easter and Christmas"; and the government "continued to provide increased protection to Christian

churches during these holidays." A.R. 15, 18, 19, 21, 26.[5] That Report provides substantial evidence to support the Board's decision in this case.

c. Third, apparently to avoid the jurisdictional bar to review, petitioner argued in the Sixth Circuit that the issues he presented in his petition for review were *legal* issues—and therefore reviewable in spite of the bar. Before the panel, in response to the government's post-brief motion to dismiss, petitioner asserted that his challenges raised "questions of law as to interpretation of statutes governing reopening of proceedings and application of the correct standards to be used by the BIA in rendering their decisions," and that he raised "due process issues where he has been denied the recognized right to seek protection by pursuing a CAT claim." Pet. C.A. Answer to Mot. to Dismiss at 2. The panel disagreed with regard to the only issue that the court of appeals needed to address, finding that petitioner's argu-

---

[5] Petitioner notes (Pet. 29-30) that the government moved for a remand in *Kiriakoza* v. *Sessions*, No. 17-3907 (6th Cir. Mar. 20, 2018), and that the Board thereafter reopened the case, Order at 1, *In re Kiriakoza*, No. A030 869 417 (B.I.A. May 31, 2018) (*Kiriakoza* Order). But the *2015 Religious Freedom Report* was not part of the administrative record in *Kiriakoza*. See A.R. 1-354, *Kiriakoza*, *supra* (No. 17-3907) (*Kiriakoza* A.R.). The Board did not rely on it in denying the initial motion to reopen (on August 25, 2017), see *id.* at 3-4, or in later reopening after remand (on May 31, 2018), see *Kiriakoza* Order at 1. In its initial decision, the Board in *Kiriakoza* had cited a lack of evidence of "any threat of harm specific to" that alien, *Kiriakoza* A.R. 3, which the Board later revisited. The Board's decision here, by contrast, was based on record evidence (including the *2015 Religious Freedom Report*) that the Iraqi government did not consent or acquiesce to any threat from ISIS. Pet. App. 10a.

ments actually presented questions of fact, without addressing any contrary authority regarding the jurisdictional bar. Pet. App. 7a.

Petitioner then filed a petition for rehearing and rehearing en banc. Petitioner again argued that his underlying claims were actually legal in nature and thus within the court's jurisdiction. See Pet. for Reh'g En Banc 1-6. In addition to the two questions mentioned in the response to the motion to dismiss, *id.* at 2-5, petitioner also asserted that the Board erred legally when it "totally overlooked" and "seriously mischaracterized" evidence by accepting the government position that before ISIS there was no torture of people like petitioner in Iraq, *id.* at 5 (citation and emphasis omitted). But petitioner did not contend that factual determinations were reviewable notwithstanding Section 1252(a)(2)(C). In particular, petitioner did not raise an argument before the en banc court that it should overrule its jurisdictional precedent (or then further argue that the Board's decision was not supported by substantial evidence in the record). Petitioner did cite *Ventura-Reyes*, *supra*, but only for its reasoning distinguishing questions of law from questions of fact, not its holding that questions of fact are not reviewable. *Ibid.* In light of petitioner's failure to argue to the court below that Section 1252(a)(2)(C) categorically did not apply to his challenge to the Board's denial of deferral of removal, the court of appeals did not discuss the relevant decisions from the Ninth or Seventh Circuits. Rather, here, as in *Granados* and *Perez-Guerrero*, petitioner asserts for the first time in this Court that Section 1252(a)(2)(C) does not bar factual challenges to a denial of deferral of removal under the regulations implementing the CAT.

As review was unwarranted in those cases, so too is certiorari unwarranted here.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

NOEL J. FRANCISCO
Solicitor General
JOSEPH H. HUNT
Assistant Attorney General
DONALD E. KEENER
JOHN W. BLAKELEY
ANDREW C. MACLACHLAN
Attorneys

APRIL 2019