No. 16-1095

# In the Supreme Court of the United States

HERSON ROBERTO GRANADOS, PETITIONER

*v.*

JEFFERSON B. SESSIONS III, ATTORNEY GENERAL

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

**BRIEF FOR THE RESPONDENT IN OPPOSITION**

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## QUESTION PRESENTED

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

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## OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-7a) is not published in the *Federal Reporter* but is available at 2017 WL 384298. The decisions of the Board of Immigration Appeals (Pet. App. 8a-11a) and the immigration judge (Pet. App. 12a-33a) are unreported.

## JURISDICTION

The judgment of the court of appeals was entered on January 26, 2017. The petition for a writ of certiorari was filed on March 9, 2017. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

## STATEMENT

1. a. The Immigration and Nationality Act (INA), 8 U.S.C. 1101 *et seq.*, provides that an alien convicted of "a crime involving moral turpitude," 8 U.S.C. 1182(a)(2)(A)(i)(I), shall be removed 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. (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 is removable by reason of having committed a criminal offense covered in" specified sections of the INA. IIRIRA § 306(a)(2), 110 Stat. 3009-607; see 8 U.S.C. 1252(a)(2)(C).

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[1] Article 3 of the CAT provides that "[n]o State Party shall expel, return * * * or extradite a person to another State where there are substantial grounds for believing that he would be in danger of being subjected to torture." S. Treaty Doc. No. 20, at 20, 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.

Among other changes, Congress also provided that "administrative findings of fact are conclusive unless any reasonable adjudicator would be compelled to conclude to the contrary." 8 U.S.C. 1252(b)(4)(B). It further established 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 [8 U.S.C. Ch. 12, Subchap. II] shall be available only in judicial review of a final order under this section.

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

Congress has expressly addressed judicial review of CAT claims in two statutes. In the Foreign Affairs Reform and Restructuring Act of 1998, 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]." Pub. L. No. 105-277, Div. G, § 2242(d), 112 Stat. 2681-822 to 2681-823; see 8 U.S.C. 1231 note.

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 to consolidate all judicial review of removal proceedings in the courts of appeals. Pub. L. No. 109-13, Div. B, 119 Stat. 310-311. That statute 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)]."[2] REAL ID Act § 106(a)(1)(B), 119 Stat. 310; see 8 U.S.C. 1252(a)(4).

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 limitation 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)); § 106(c), 119 Stat. 311.

2. Petitioner is a citizen of El Salvador who entered the United States illegally in 2000. Pet. App. 2a. In 2010, he was convicted in New Jersey state court of robbery under N.J. Stat. Ann. § 2C:15-1 (West 2005), and was sentenced to four years of imprisonment. Pet. App. 2a.

a. The Department of Homeland Security (DHS) initiated removal proceedings, charging petitioner with being removable both as an alien present in the United States without being admitted or paroled, and as an alien convicted of a crime involving moral turpitude under 8 U.S.C. 1182(a)(2)(A)(i)(I). Pet. App. 2a. The immigration judge (IJ) sustained both charges and found petitioner removable. *Ibid.*

Petitioner applied for deferral of removal under the regulations implementing the CAT. Pet. App. 2a.[3] He

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

[3] In his original application, petitioner also sought asylum and withholding of removal under the CAT. See Pet. App. 2a. The IJ held that petitioner was ineligible for those forms of relief because

claimed that if he were returned to El Salvador, he would be tortured by MS-13 gang members, rival gangs, or police. *Id.* at 2a-3a. He claimed that he fled El Salvador after he ceased participating in the gang and received threats of torture and death by MS-13 members, and that if he were removed to El Salvador he would be recognized as a former MS-13 member because of his visible gang tattoos. *Ibid.* Although he began tattooing his body to prove his loyalty to the gang after coming to the United States, he claimed that he thereafter stopped associating with the gang. *Id.* at 3a. While in prison for his robbery conviction, he again associated with MS-13 gang members for his own safety, and obtained more tattoos. *Ibid.* Petitioner testified, however, that he is no longer a member of MS-13. *Ibid.*

b. The IJ denied petitioner's application and ordered him removed to El Salvador. Pet. App. 12a-33a. The IJ held that petitioner was ineligible for deferral of removal because he had failed to establish that it is more likely than not that he would be tortured in El Salvador by the government or with its acquiescence. *Id.* at 23a-33a. The IJ determined that the evidence did not demonstrate a clear probability that petitioner would be tortured by rival gangs or police, but did establish that it is more likely than not that he would be tortured by MS-13 in El Salvador. *Id.* at 28a. Because petitioner failed to establish that public officials in El Salvador would participate, consent or acquiesce in such torture, *id.* at 29a, however, the IJ ruled that petitioner had not

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his robbery conviction constitutes a "particularly serious crime" that categorically bars such relief. *Id.* at 22a; see 8 U.S.C. 1231(b)(3)(B)(ii); 8 C.F.R. 1208.16(d)(2). Petitioner later withdrew those applications and asserted through counsel that he was seeking only deferral of removal under the CAT. Pet. App. 2a & n.1.

established his eligibility for protection from torture, *id.* at 32a.[4]

c. The Board of Immigration Appeals (BIA or Board) dismissed petitioner's appeal. Pet. App. 8a-11a. The Board determined that the dispositive issue regarding deferral of removal was petitioner's failure to demonstrate that the Salvadoran government would inflict, instigate, consent, or acquiesce to torture. *Id.* at 9a-10a. Specifically, the Board agreed with the IJ, stating that the record evidence showed that the "Salvadoran police are aware of gang violence constituting torture and are taking meaningful steps to combat it," and that petitioner failed to provide evidence that it is "the policy or practice of the police to deny protection to former gang members." *Id.* at 10a (citation omitted). The Board stated that evidence of "police targeting of persons with tattoos during patrols or operations does not mean that the police would acquiesce to a gang's targeting of him." *Ibid.*

d. Petitioner filed a petition for review, which the court of appeals dismissed for lack of jurisdiction. Pet. App. 1a-7a. Specifically, petitioner claimed that the BIA entirely failed to consider certain record evidence and "applied an incorrect legal standard for evaluating [his] claims." *Id.* at 5a-6a; see Pet. C.A. Br. 11-12. The court explained, however, that the record shows that the IJ and Board in fact did consider the evidence petitioner alleged the Board overlooked. See Pet. App. 5a-6a. The court stated that "[i]t is therefore apparent that

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[4] The IJ also ruled that petitioner failed to demonstrate that he could not live free of torture in parts of El Salvador, but the specific holding on eligibility that followed was based only on the lack of evidence of government acquiescence. Pet. App. 32a.

[petitioner's] real argument is *not* that relevant evidence was ignored, but rather that the IJ incorrectly weighed evidence in making factual determinations." *Id.* at 5a (quoting *Green* v. *Attorney Gen.*, 694 F.3d 503, 508 (3d Cir. 2012)). "We lack jurisdiction to consider such an argument," the court stated. *Ibid.* The court similarly ruled that it lacked jurisdiction to consider petitioner's argument that the agency had imposed an impermissibly strict standard for evaluating his claims. *Id.* at 6a. The court concluded that it lacked jurisdiction with respect to that claim because petitioner failed to exhaust it before the BIA, and in any event that his claim "amounts to a disagreement with the agency's factual determination," which is unreviewable. *Ibid.*

e. Petitioner had initially sought a stay of removal in the court of appeals. And on April 27, 2016, the court of appeals granted petitioner a stay of removal. See 4/27/16 C.A. Order.

Petitioner later moved to lift the stay, however, and the court did so on October 20, 2016. See 10/20/16 C.A. Order. This Office has been informed by DHS that petitioner was thereafter removed to El Salvador.

**ARGUMENT**

The court of appeals correctly dismissed the petition for review for lack of jurisdiction on the ground that petitioner's purported legal contentions did not, in fact, raise a colorable question of law, and therefore did not fit within the exception in 8 U.S.C. 1252(a)(2)(D) that permits judicial review of such claims in a petition for review of a final order of removal. Pet. App. 4a-6a. The court also correctly stated, citing circuit precedent, that it lacked jurisdiction to review factual claims in this posture. *Ibid.* As petitioner notes (Pet. 2), there is a con-

flict 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 writs of certiorari raising the same question, see *Ortiz-Franco* v. *Lynch*, 136 S. Ct. 894 (2016) (No. 15-362); *Perez-Guerrero* v. *Holder*, 134 S. Ct. 1000 (2014) (No. 13-323), and there is no reason for the outcome of this case to be different. In particular, as in *Perez-Guerrero*, petitioner did not fully preserve in the court of appeals the jurisdictional arguments he now presses in this Court, and he fails to demonstrate that any reasonable adjudicator would have been compelled to find in his favor if he had done so. Further review is not warranted.

1. a. The court of appeals correctly concluded (Pet. App. 4a-6a) that 8 U.S.C. 1252(a)(2)(C) bars judicial review of findings of fact in a case such as this. Accordingly, the court would not have had jurisdiction over a weighing-of-the-evidence claim had petitioner advanced one below. 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.* This categorical jurisdictional prohibition is subject to only one exception, which allows review of "constitutional claims or questions of law." 8 U.S.C. 1252(a)(2)(D). As the court of appeals correctly concluded, petitioner raised no such claim in this case. See Pet. App. 5a-6a.

The court of appeals also correctly stated, relying on circuit precedent, that Section 1252(a)(2)(C) does not permit review of challenges to the IJ's "factual determinations." Pet. App. 5a (quoting *Green* v. *Attorney Gen.*, 694 F.3d 503, 508 (3d Cir. 2012)); see *id.* at 6a. Petitioner is (1) an "alien," who was (2) "removable," (3) "by reason of having committed a criminal offense covered in" one of the specified grounds for removal. 8 U.S.C. 1252(a)(2)(C). The court was therefore without jurisdiction to review petitioner's final order of removal. *Ibid.*

The large majority of courts of appeals have applied Section 1252(a)(2)(C) in this straightforward fashion. See *Ventura-Reyes* v. *Lynch*, 797 F.3d 348, 356-358 (6th Cir. 2015); *Ortiz-Franco* v. *Holder*, 782 F.3d 81, 86-91 (2d Cir. 2015), cert. denied, 136 S. Ct. 894 (2016); *Cole* v. *United States Att'y Gen.*, 712 F.3d 517, 532-533 (11th Cir.), cert. denied, 134 S. Ct. 158 (2013); *Escudero-Arciniega* v. *Holder*, 702 F.3d 781, 785 (5th Cir. 2012) (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" requirement into this jurisdiction-precluding provision. 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 al-

ien's claim for relief (such as under the CAT), as opposed to being denied because he 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); *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). The Ninth Circuit has also extended its "on the merits" reasoning 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).

The Ninth Circuit's approach is incorrect. That court's rule implicitly and erroneously assumes that the denial of CAT protection "on the merits" is somehow not a part of a "final order of removal" rendered unreviewable by Section 1252(a)(2)(C). An order of removal is defined as "the order of the * * * administrative officer to whom the Attorney General has delegated the responsibility for determining whether an alien is [removable], concluding that the alien is [removable] or ordering [removal]." 8 U.S.C. 1101(a)(47)(A); 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 IJ 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. 11-12), the Seventh Circuit has stated that courts retain jurisdiction to review factual claims associated with denials of deferral of removal, 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 264-265. The Seventh Circuit acknowledged that this analysis was not "necessary" to its determination

that it had jurisdiction in *Wanjiru* because, as the government had conceded, the criminal conviction of the alien did not trigger the jurisdictional bar. See *id.* at 262-263. However, 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 a "final order of removal," a term defined in 8 U.S.C. 1101(a)(47), and that has been interpreted by this Court to include all rulings on relief and protection from removal. See *Ortiz-Franco*, 782 F.3d at 89; see also pp. 10-11, *supra*. The Seventh Circuit's reasoning that the term described in 8 U.S.C. 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 relief—the matter before the court—is absolutely final. See *Ortiz-Franco*, 782 F.3d at 90.

d. Petitioner's remaining arguments are novel and lack merit. Petitioner contends that Section 1252(a)(4) and (a)(5) should be read together and lead to the conclusion that "'any cause or claim under the' CAT" is distinct from "'an order of removal,'" and therefore is free from the jurisdictional rules governing all of Section 1252. Pet. 20-22 (quoting 8 U.S.C. 1252(a)(4) and (5)). But Section 1252(a)(4)'s text is clearly to the contrary.

It does not grant jurisdiction; it is a channeling provision that establishes that 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 in turn solely confers jurisdiction on the courts of appeals 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 removal orders entered against many criminal aliens, subject only to the exception for 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). Moreover, several courts of appeals have squarely 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, *Ortiz-Franco*, 136 S. Ct. 894 (2016); *Perez-Guerrero*, 134 S. Ct. 1000 (2014), and it should do the same here. Indeed, this case suffers from essentially the same shortcomings as *Perez-Guerrero*: (1) petitioner did not adequately preserve a factual challenge to his final order of removal; and (2) petitioner has failed to demonstrate that, if judicial review of such a factual challenge were available in this case, it would make any difference to him.

a. First, as in *Perez-Guerrero* (which petitioner overlooks), petitioner did not adequately preserve the jurisdictional argument he presses here. To the contrary, in his merits brief, petitioner affirmatively disavowed that he was seeking the sort of judicial review he now advocates, and the court of appeals fully addressed on the merits the only claims he actually asserted.

When petitioner filed his petition for review in the court of appeals, the government filed a motion to dismiss for lack of jurisdiction under 8 U.S.C. 1252(a)(2)(C) because petitioner was removable as an alien convicted of a crime involving moral turpitude. See Gov't C.A. Mot. to Dismiss for Lack of Jurisdiction & Opp. to Mot. for a Stay of Removal 1-2, 8-11. Petitioner responded that the court had jurisdiction because he would raise "constitutional and/or questions of law." Pet. C.A. Resp. to Gov't Mot. to Dismiss for Lack of Jurisdiction 2. He identified those questions as involving (1) the Board's asserted failure to utilize the correct standard of review regarding willful blindness; (2) the Board's asserted failure to properly apply circuit law regarding the CAT; and (3) the Board's asserted failure to analyze the record evidence or its mischaracterization of that evidence. *Id.* at 2, 4, 6. In addition, petitioner asserted that Section 1252(a)(2)(C) did not apply at all to review of deferral-of-removal claims. *Id.* at 6-8. In that regard, petitioner observed that the court of appeals had held the opposite in a precedential decision, but requested that the court "revisit" that finding in light of the Seventh Circuit's subsequent holding in *Wanjiru*. *Id.* at 8. Although petitioner thus did assert that the jurisdictional limitation in Section 1252(a)(2)(C) against review of questions of fact did not apply at all, he did not assert any claim that he characterized as involving a question of fact, nor any

claim that the agency decision was not supported by substantial evidence. *Id.* at 6-8. The court of appeals referred the government's motion to dismiss to the merits panel. See 2/23/16 Order.[5]

Thereafter, in his merits brief to the court of appeals, petitioner conceded that "[t]his court is restrained in this matter from reviewing or deciding this case on the facts." Pet. C.A. Br. 1; see *ibid.* ("[T]his court is restrained in reviewing the facts."). The brief's jurisdictional statement asserted that judicial review of the case was governed by 8 U.S.C. 1252(a)(1) and (a)(4) and that the court retained jurisdiction under 8 U.S.C. 1252(a)(2)(D) to review constitutional claims and questions of law. Pet. C.A. Br. 4-5. As his response to the motion to dismiss forecasted, the brief asserted that the Board applied an incorrect standard, *id.* at 12-20, and ignored evidence and failed to analyze his torture claim, *id.* at 20-23. And as in his response to the motion to dismiss, petitioner did not contend that he was raising a question of fact, or that any reasonable fact-finder would have been compelled to find on the record that, if he were returned to El Salvador, it was more likely than not that he would be tortured by the government or with its acquiescence. See 8 U.S.C. 1252(b)(4)(B). Instead, petitioner conceded that "this court cannot review facts in this matter." Pet. C.A. Br. 17; see *id.* at 20 ("[T]his court cannot reweigh the facts.").

In its merits brief, the government reasserted that the court of appeals lacked jurisdiction to review the Board's factual determinations, see Gov't C.A. Br. 14-

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[5] Petitioner later filed a second petition for review, No. 16-1736, challenging the Board's decision denying his motion to reopen. The cases were consolidated by the court of appeals, and petitioner later withdrew the second petition. See Pet. App. 4a n.2.

16, and that petitioner's purported legal claims did not fit within the exception in Section 1252(a)(2)(D), *id.* at 16-25. Petitioner filed no reply and the case was submitted without oral argument. See 15-3638 C.A. Docket.

Given petitioner's concessions in his merits brief that the court of appeals lacked jurisdiction to review facts, and his efforts to describe his arguments as questions of law, the court of appeals proceeded to examine (and reject) petitioner's arguments on their own terms: It held that petitioner's claims did not fall within the scope of Section 1252(a)(2)(D)'s exception for questions of law. Pet. App. 4a-6a. The court thus addressed the only relevant claims that petitioner actually asserted, *i.e.*, whether the Board applied an incorrect standard, Pet. C.A. Br. 12-20, or ignored evidence and failed to analyze his torture claim, *id.* at 20-23.

In light of petitioner's failure to argue in his merits brief that Section 1252(a)(2)(C) categorically did not apply to his challenge to the Board's denial of deferral of removal (despite his earlier contention to the contrary in response to the government's motion to dismiss)—as well as petitioner's failure to seek substantial-evidence review of the Board's determination that he had not shown it was more likely than not that he would be tortured in El Salvador with the acquiescence of Salvadoran officials—the court of appeals did not discuss the relevant decisions from the Ninth or Seventh Circuits. Moreover, to the extent petitioner believed that the Third Circuit should have overruled its prior precedent on point in light of the authority from those other courts, he should have raised that argument in his merits briefing, then filed a petition for rehearing en banc to ask the court to do so. Finally, petitioner below failed adequately to press any request for fact-based review

of the kind he now asserts that Section 1252(a)(2)(C) should be construed to permit.

Notably, this Court denied certiorari in *Perez-Guerrero* under similar circumstances. See 134 S. Ct. at 1000. In that case, the alien failed to assert the jurisdictional argument in his merits brief in the court of appeals, but raised it belatedly immediately prior to and at oral argument, and the court of appeals decision actually addressed the argument, albeit briefly. See Br. in Opp. at 20-22, *Perez-Guerrero*, *supra* (No. 13-323). And the alien in *Perez-Guerrero* made no fact-based argument that the Board's decision was not supported by substantial evidence. *Id.* at 22. Here, petitioner initially asserted the jurisdictional argument in response to the government's motion to dismiss. But then he abandoned it in his merits briefing, instead stated that the court of appeals "cannot review facts in this matter," Pet. C.A. Br. 17, and likewise made no fact-based argument under the substantial-evidence standard of review.

b. Second, as in *Perez-Guerrero*, 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. As noted above, the court of appeals did review the Board's rejection of petitioner's request for deferral of removal. Pet. App. 5a (describing the evidence specifically considered by the IJ). The court explained that "the record here shows that the IJ and BIA considered evidence relating to the El Salvadoran government's treatment of [petitioner] and other gang members, yet did not find that the police would consent to or acquiesce in any harm inflicted on [petitioner] or fail to protect him." *Ibid.* "In particular," the court stated, "the IJ considered [petitioner's] testimony and other evidence of the

police's treatment of gang members—including State Department, expert, and media reports—but found that Salvadoran officials were taking meaningful steps to address gang violence." *Ibid.* The court further observed that "the IJ found that [petitioner] had not 'provided evidence that it is in fact the policy or practice of the police to deny protection to *former* gang members,'" that the Board determined the finding was not clearly erroneous, and that petitioner conceded on appeal that "no evidence was presented demonstrating that the Salvadoran police have a policy or practice of acquiescence." *Ibid.* (quoting Pet. C.A. Br. 19). Petitioner makes no effort to demonstrate, on the basis of an assessment of the record, that any reasonable finder of fact would have been compelled to find to the contrary, see 8 U.S.C. 1252(b)(4)(B); *INS* v. *Elias-Zacarias*, 502 U.S. 478, 481 & n.1 (1992)—*i.e.*, that it would have been compelled to find that it was more likely than not that, if returned to El Salvador, he would be tortured by the government or with its acquiescence. Indeed, petitioner's only passing reference to substantial-evidence review of factual issues (Pet. 16) is in a parenthetical describing the holding of another case. This Court's review is better reserved for a case where the factual claim was defined, the record was developed, and the petition demonstrates the claim's possible merit.

**CONCLUSION**

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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