No. 18-1432

In the Supreme Court of the United States

NIDAL KHALID NASRALLAH, PETITIONER

v.

WILLIAM P. BARR, ATTORNEY GENERAL

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH 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 by reason of having committed a" specified "criminal offense." 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 withholding or 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.

ADDITIONAL RELATED PROCEEDING

United States Court of Appeals (11th Cir.):

Nasrallah v. *U.S. Attorney Gen.*, No. 17-13105 (Feb. 14, 2019)

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-11a) is not published in the Federal Reporter but is reprinted at 762 Fed. Appx. 638. The decisions of the Board of Immigration Appeals (Pet. App. 12a-21a) and the immigration judge (Pet. App. 22a-48a) are unreported.

JURISDICTION

The judgment of the court of appeals was entered on February 14, 2019. The petition for a writ of certiorari was filed on May 14, 2019. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Petitioner, a native and citizen of Lebanon, pleaded guilty to receiving stolen property in interstate commerce, in violation of 18 U.S.C. 2315. Pet. App. 2a. The Department of Homeland Security (DHS) initiated removal proceedings. See Pet. App. 3a. As relevant here,

petitioner sought withholding or deferral of removal on the ground that he would be tortured if removed to Lebanon. *Id.* at 3a-4a, 12a-13a. An immigration judge (IJ) determined that petitioner was ineligible for withholding of removal but granted deferral of removal. *Id.* at 34a-47a. The Board of Immigration Appeals (Board or BIA) affirmed the denial of withholding of removal and reversed the grant of deferral of removal. *Id.* at 12a-21a. The court of appeals denied a petition for review in part and dismissed it in part. *Id.* at 1a-11a.

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 committed within five years" of the alien's admission, for which "a sentence of one year or longer may be imposed," is removable from the United States, 8 U.S.C. 1227(a)(2)(A)(i).

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 either 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] For purposes of CAT claims, "[t]orture is defined as any act by which severe

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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." 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.

pain or suffering, whether physical or mental, is intentionally inflicted on a person for" certain specified purposes "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. § 306(a)(2), 110 Stat. 3009-607; 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 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, 112 Stat. 2681-761, 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 [Section 1252]." § 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 (REAL ID Act or Act), Pub. L. No. 109-13, Div. B, 119 Stat. 310, to consolidate all judicial review of removal 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 [Section 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)]." § 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)(iii), 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

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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). That provision is inapplicable here.

cases pending in the district courts at the time of enactment should be transferred to the courts of appeals. § 106(a)(1)(B), 119 Stat. 310; see 8 U.S.C. 1252(a)(5); see also REAL ID Act § 106(c), 119 Stat. 311.

2. Petitioner, a native and citizen of Lebanon, was admitted to the United States as a visitor in 2006 and became a lawful permanent resident in 2007. Pet. App. 2a. In 2013, he pleaded guilty to two felony counts of receiving stolen property in interstate commerce in 2011, in violation of 18 U.S.C. 2315. Pet. App. 3a, 14a. Specifically, petitioner purchased "at least 273 cases of cigarettes, with a total wholesale value of $587,096, in the course of eight separate transactions," believing "that they were obtained from violent thefts in which individuals hijacked trucks and robbed guarded storage facilities." *Id.* at 2a, 4a. The district court sentenced petitioner to 12 months of imprisonment for each count, to be served concurrently. *Id.* at 3a.

DHS subsequently commenced removal proceedings pursuant to 8 U.S.C. 1227(a)(2)(A)(i), which makes aliens convicted of certain crimes "involving moral turpitude" subject to removal. Pet. App. 3a; see pp. 1-2, *supra*.[3] Petitioner contended that he was not removable be-

[3] DHS initially sought to remove petitioner pursuant to 8 U.S.C. 1227(a)(2)(A)(iii), which makes aliens "convicted of an aggravated felony" subject to removal. Pet. App. 3a. That provision initially applied to petitioner because an aggravated felony is defined to include a "theft offense (including receipt of stolen property) * * * for which the term of imprisonment [is] at least one year." 8 U.S.C. 1101(a)(43)(G) (footnote omitted). At petitioner's request, however, the district court reduced his prison sentence from one year to 364 days. Pet. App. 3a. DHS then cancelled the aggravated-felony charge and instead sought to remove petitioner under 8 U.S.C. 1227(a)(2)(A)(i). Pet. App. 3a; see *id.* at 12a.

cause his crimes did not involve moral turpitude and because the statutory term "crime involving moral turpitude" is unconstitutionally vague. Pet. App. 32a. The IJ rejected those claims and found petitioner removable as charged. *Id.* at 31a-34a.

Petitioner also applied for asylum under 8 U.S.C. 1158, and for withholding or deferral of removal under 8 U.S.C. 1231(b)(3) and the CAT. See Pet. App. 12a-13a, 24a. The IJ determined that petitioner was ineligible for asylum or withholding of removal under the statute and the CAT because he had committed a "particularly serious crime," which bars those forms of relief. *Id.* at 40a; see 8 U.S.C. 1158(b)(2)(A)(ii), 1231(b)(3)(B)(ii); 8 C.F.R. 1208.13(c)(2), 1208.16(d)(2). The IJ emphasized that petitioner had engaged in repeated transactions in which he paid nearly $250,000 in cash for apparently stolen property that he believed had been obtained through burglary and robbery. Pet. App. 38a. The IJ added that sales of stolen cigarettes on the black market are often associated with organized crime and terrorism. *Id.* at 39a-40a.[4]

The IJ nevertheless granted deferral of removal under the CAT, which is available for an alien "more likely than not to be tortured" in the country of removal even if the alien committed a particularly serious crime. 8 C.F.R. 1208.17(a); see Pet. App. 41a-46a. The IJ explained that petitioner "claims fear of harm in Lebanon at the hands of" the terrorist organization Hezbollah

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[4] As the IJ explained, petitioner's actual cigarette sales were not affiliated with organized crime or terrorism; rather, they were part of a government sting operation. Pet. App. 38a. That the "criminal enterprise was actually a sting operation," however, did "not change the fact that [petitioner] acted * * * in utter disregard for the laws of the United States and the safety of the community." *Ibid.*

"based on his religious minority status as a Druze and his Western ties." Pet. App. 42a. The IJ recounted an incident in which petitioner allegedly "suffered a severe back injury while being pursued by" Hezbollah militants in Lebanon. *Ibid.* Specifically, petitioner alleged that Hezbollah militants had "spotted" him and another man, "demanded that the[y] approach," and "then fired shots in the air and began pursuing [petitioner] and his acquaintance when the two did not approach." *Ibid.* Fearing that the militants would harm him, petitioner jumped off a cliff and suffered a broken back. *Id.* at 43a. Although petitioner did not "indicate[] whether" the militants "targeted him because he is Druze," the IJ found that his "pain and suffering [rose] to the level of torture." *Ibid.* The IJ further found that the Lebanese government had acquiesced to acts of terrorism by Hezbollah and that internal relocation was not possible for petitioner. *Id.* at 43a-46a. The IJ accordingly granted deferral of petitioner's removal to Lebanon. *Id.* at 47a.

3. Petitioner and DHS both appealed to the Board. Pet. App. 12a-13a. As relevant here, the Board affirmed the IJ's conclusion that petitioner was removable based on his commission of a crime involving moral turpitude and that he was ineligible for asylum or withholding of removal because his crime was particularly serious. *Id.* at 14a-18a. The Board reversed the IJ's grant of deferral of removal under the CAT. *Id.* at 18a-21a. The Board explained that the "record does not support the [IJ]'s finding that [petitioner] was tortured in Lebanon." *Id.* at 19a. Specifically, the Board determined that the "conduct of the militants, which was limited to shouting and firing their guns in the air, does not constitute torture, and the record does not reflect that [petitioner]'s back injury was intentionally inflicted." *Ibid.*

The Board further found that the record "does not support" a finding that "it is more likely than not that [petitioner] would personally be targeted for harm rising to the level of torture if removed to Lebanon." *Id.* at 20a. The Board observed that, apart from the single incident that he described, petitioner "was never threatened or harmed in Lebanon." *Ibid.* The Board added that, while there were "widespread * * * human rights abuses in Lebanon, including crimes against members of the Druze community," such "generalized evidence, without more, is insufficient to demonstrate a clear probability that" petitioner would be "tortured if removed to Lebanon." *Ibid.* "Considering all of the relevant evidence," the Board found that petitioner had "not met his burden to show that it is more likely than not that he would be tortured in Lebanon," as required to obtain deferral of removal under the CAT. *Ibid.*

4. Petitioner filed a petition for review in the court of appeals, which the court denied in part and dismissed in part. Pet. App. 1a-11a. As relevant here, the court denied the petition because it rejected petitioner's contention that his convictions under 18 U.S.C. 2315 were not crimes involving moral turpitude subjecting him to removal. Pet. App. 7a-8a. The court dismissed the petition to the extent that it challenged the Board's determination that petitioner's crimes were particularly serious, thereby rendering him ineligible for asylum or withholding of removal. *Id.* at 8a-10a. The court explained that, under 8 U.S.C. 1252(a)(2)(D), it had jurisdiction to review only "constitutional claims or questions of law" asserted by a criminal alien like petitioner, and that petitioner's challenge to the Board's "particularly serious crime" finding did not fall within that ju-

risdictional grant because reviewing the claim would require the court to "reweigh the factors involved in [a] discretionary determination." Pet. App. 9a.

With respect to petitioner's request for deferral of removal under the CAT, the court of appeals "agree[d] with the BIA's determination" that petitioner had failed "as a matter of law" to show that he had been "tortured in Lebanon." Pet. App. 11a. The court concluded that it lacked jurisdiction to review the Board's finding that petitioner "would not likely be singled out for torture if he was removed" to Lebanon. *Ibid.* The court explained that a "determination about the likelihood of future harm * * * is a finding of fact, not a question of law," and therefore outside its jurisdiction to review "legal and constitutional claims" brought by a criminal alien like petitioner. *Ibid.*; see 8 U.S.C. 1252(a)(2)(C)-(D).

ARGUMENT

The court of appeals correctly determined that it lacked jurisdiction to review factual challenges to the denial of petitioner's requests for withholding and deferral of removal under the CAT. Petitioner is correct that the court's interpretation of the jurisdictional provisions of the INA conflicts with interpretations adopted by the Ninth and Seventh Circuits with regard to deferral of removal—although not with regard to withholding of removal. Petitioner is also correct that the government has previously stated that the question whether a court of appeals has jurisdiction over factual challenges to the denial of a request for deferral of removal under the CAT by a criminal alien like petitioner would be worthy of this Court's review in an appropriate case. This, however, is not such a case. The Court has recently denied multiple petitions that presented the same question but contained defects making them

unsuitable vehicles for this Court's review. See *Shabo* v. *Barr*, 139 S. Ct. 2631 (2019) (No. 18-882); *Doe* v. *Sessions*, 138 S. Ct. 2624 (2018) (No. 17-8040); *Granados* v. *Sessions*, 137 S. Ct. 2295 (2017) (No. 16-1095); *Perez-Guerrero* v. *Holder*, 571 U.S. 1163 (2014) (No. 13-323). The same disposition is warranted here because this case contains similar defects.

1. a. The court of appeals correctly concluded that 8 U.S.C. 1252(a)(2)(C) bars judicial review of findings of fact in a case such as this. Pet. App. 8a-11a. That statute 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." 8 U.S.C. 1252(a)(2)(C). 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 of appeals correctly concluded that petitioner raised no such claims regarding the likelihood of torture in Lebanon, see Pet. App. 9a-11a, and petitioner does not challenge that conclusion in this Court, see Pet. 18-19.

The court of appeals also correctly stated, relying on circuit precedent, that Section 1252(a)(2)(C) does not permit review of factual challenges. See Pet. App. 9a (regarding particularly serious crime determinations, citing *Keungne* v. *U.S. Attorney Gen.*, 561 F.3d 1281, 1283 (11th Cir. 2009) (per curiam)); *id.* at 11a (regarding CAT deferral, citing *Cole* v. *U.S. Attorney Gen.*, 712 F.3d 517, 533 (11th Cir.), cert. denied, 571 U.S. 826 (2013)). Petitioner is (1) an "alien," who was (2) "removable," (3) "by reason of having committed a criminal offense covered" by one of the specified grounds for removal.

8 U.S.C. 1252(a)(2)(C). The statutory bar therefore applies, and the court lacked jurisdiction to review petitioner's factual contentions regarding his claims for withholding or deferral of removal under the CAT.

The large majority of courts of appeals have applied Section 1252(a)(2)(C) in this straightforward manner. See *Ventura-Reyes* v. *Lynch*, 797 F.3d 348, 356-358 (6th Cir. 2015); *Ortiz-Franco* v. *Holder*, 782 F.3d 81, 88-91 (2d Cir. 2015), cert. denied, 136 S. Ct. 894 (2016); *Cole*, 712 F.3d at 532-533; *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. As petitioner observes (Pet. 16), the Ninth Circuit 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, 881 (2015). *Garcia*'s rationale thus 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 an offense specified in 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. 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). But 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]," and denial of protection under the CAT fits squarely within that definition. 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 [Section] 1252(a)(2)(D)." *Id.* at 451-452.

c. As petitioner observes (Pet. 15-16), the Seventh Circuit has concluded that courts of appeals retain jurisdiction to review factual claims associated with denials of deferral of removal under 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 did not trigger the jurisdictional bar. *Id.* at 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) encompasses, and is limited to, a "final order of removal," a term 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. 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. Petitioner's assertion (Pet. 21) that the language of FARRA "establishes that the CAT claim is not the 'final order of removal' itself" is similarly flawed. Indeed, FARRA expressly contemplates that review of any CAT determination will be part of the review of the final order of removal. See FARRA § 2242(d), 112 Stat. 2681-822; pp. 3-4, *supra*. Moreover, 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 would be inherently non-final under its view, the agency's *denial* of deferral of removal—the matter before the court—is unquestionably final. See *Ventura-Reyes*, 797 F.3d at 358; *Ortiz-Franco*, 782 F.3d at 90.

d. Petitioner's remaining arguments that the court below is wrong (Pet. 19-24) lack merit. Petitioner contends (Pet. 20) that the limitation on judicial review in

Section 1252(a)(2)(C) should not be read to "water down" protections from death and torture because Congress did not specifically indicate that the bar to review applies to CAT denials. But that suggestion cannot be squared with the plain language of the statute, which provides 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 [covered] criminal offense," with a single specified exception for constitutional claims or questions of law. 8 U.S.C. 1252(a)(2)(C); see 8 U.S.C. 1252(a)(2)(D). Congress's express specification of that one exception forecloses petitioner's suggestion that Congress impliedly created other exceptions. See *Hillman* v. *Maretta*, 569 U.S. 483, 496 (2013) ("[W]here Congress explicitly enumerates certain exceptions to a general prohibition, additional exceptions are not to be implied, in the absence of evidence of a contrary legislative intent.") (citation omitted).[5]

Petitioner's argument (Pet. 22) that 8 U.S.C. 1252(a)(4) and (a)(5), read together, establish that "an order of removal" is distinct from "any cause or claim under the" CAT, is likewise without merit. 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.

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[5] Petitioner also observes that this Court stated in a footnote that "[a] conviction of an aggravated felony has no effect on CAT eligibility." Pet. 20 (quoting *Moncrieffe* v. *Holder*, 569 U.S. 184, 188 n.1 (2013)). But that statement says nothing about judicial review of CAT claims, which is the question here.

1252(a)(4). And Section 1252(a)(5) confirms that "a petition for review filed with an appropriate court of appeals in accordance with this section shall be the sole and exclusive means for judicial review of an order of removal," with one exception not applicable here. 8 U.S.C. 1252(a)(5). 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). 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 with respect to whether 8 U.S.C. 1252(a)(2)(C) permits judicial review of factual challenges to the denial of a claim for deferral of removal under the CAT, this is not an appropriate case for this Court to address that question. Review is inappropriate here for multiple reasons.

a. As an initial matter, petitioner asks this Court to resolve whether 8 U.S.C. 1252(a)(2)(C) divests courts of jurisdiction "to review factual findings underlying denials of *withholding* (and deferral) of removal relief." Pet. i (emphasis added). But no conflict exists as to whether courts have jurisdiction to review claims for *withholding* of removal. As the court of appeals explained, the BIA's determination that petitioner was ineligible for withholding of removal because he committed a "particularly serious crime," 8 U.S.C. 1231(b)(3)(B)(ii); 8 C.F.R. 1208.16(d)(2), was a "discretionary determination," and a request for an appellate court to "reweigh the factors involved in that discretionary determination does not involve a constitutional claim or a question of law"

within an appellate court's jurisdiction to review. Pet. App. 9a; see 8 U.S.C. 1252(a)(2)(D).

Moreover, the distinctive readings of Section 1252(a)(2)(C) adopted by the Seventh and Ninth Circuits as to the reviewability of claims for *deferral* of removal under the CAT do not apply to claims for *withholding* of removal under the CAT. The Seventh Circuit has explicitly tied its rule to its understanding of deferral of removal as a "unique remedy that requires a distinct jurisdictional analysis," *Moral-Salazar* v. *Holder*, 708 F.3d 957, 962 (2013), because it operates "like an injunction" in that "for the time being, it prevents the government from removing the person in question," *Wanjiru*, 705 F.3d at 264. That reasoning does not apply to withholding of removal, which does not operate in the same way. See, *e.g.*, *Pichimarov* v. *Sessions*, 706 Fed. Appx. 877, 879 (7th Cir. 2017) (rejecting argument "that withholding and deferral of removal are similar forms of relief and should be treated alike").

Likewise, the Ninth Circuit's "on the merits" exception to the jurisdictional limitation on review of claims for deferral of removal under the CAT, see pp. 11-13, *supra*, does not apply to petitioner's claim for withholding of removal. The Ninth Circuit's rule applies only where the alien's claim has been denied for any reason *other than* a covered criminal conviction. See *Pechenkov*, 705 F.3d at 451 (Graber, J., concurring). But here, the Board denied petitioner's application for withholding of removal specifically because he was statutorily ineligible for that protection in light of his conviction for a particularly serious crime. Pet. App. 17a-18a. Because his request for withholding of removal under the CAT was denied on the basis of his prior conviction and not "on the merits" of the CAT claim itself, the Ninth Circuit

(like the court below) would lack jurisdiction to review petitioner's claim for withholding of removal under its own precedent. *Pechenkov*, 705 F.3d at 448-449.

b. Petitioner's request for this Court's review with respect to his claim for deferral of removal also has two significant defects: (1) petitioner failed to assert in the court of appeals the argument he now asks this Court to adopt, and (2) petitioner offers no reason to believe that success on the question presented would produce a different ultimate result in his case. This Court has recently denied multiple petitions that presented the same question but contained defects making this Court's review inappropriate, see *Shabo*, *supra* (No. 18-882); *Doe*, *supra* (No. 17-8040); *Granados*, *supra* (No. 16-1095); *Perez-Guerrero*, *supra* (No. 13-323), and this petition should be denied because it contains similar defects.[6]

i. First, as in *Shabo*, *Doe*, *Granados*, and *Perez-Guerrero*, petitioner asks this Court to grant review on an argument advanced for the first time in his petition for a writ of certiorari. In his court of appeals brief, petitioner stated that he sought "review of questions of law," citing Section 1252(a)(2)(D). Pet. C.A. Br. 1. Petitioner did not make any of the arguments that he now asserts about why the court had jurisdiction to review "factual" challenges to the denial of his CAT claim notwithstanding Section 1252(a)(2)(C). Pet. i, 3-4, 14-24. Indeed, while petitioner asks this Court to resolve a question about the scope of Section 1252(a)(2)(C), see Pet. i, he did not cite that provision once in his brief in the court of appeals. Nor did he cite the Seventh or

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[6] The Court also denied certiorari on this question presented in *Ortiz-Franco* v. *Lynch*, 136 S. Ct. 894 (2016) (No. 15-362), despite the government's position that certiorari was warranted in that case.

Ninth Circuit decisions that form the core of his jurisdictional argument in this Court. See Pet. 21-24. Petitioner also did not contend that the factual challenge he now asserts could succeed under the "substantial evidence" standard that would apply if the court of appeals had jurisdiction to review factual findings. *Kazemzadeh* v. *United States Attorney Gen.*, 577 F.3d 1341, 1350 (11th Cir. 2009); see 8 U.S.C. 1252(b)(4)(B) (providing that BIA "findings of fact are conclusive unless any reasonable adjudicator would be compelled to conclude to the contrary"); *INS* v. *Elias-Zacarias*, 502 U.S. 478, 481 & n.1 (1992) (discussing that standard). The argument petitioner presses in this Court is thus unrecognizable from his submission to the court of appeals.

This Court denied petitions for writs of certiorari in *Shabo*, *Doe*, *Granados*, and *Perez-Guerrero* under similar circumstances. In all four cases, the aliens had failed to assert the jurisdictional argument in merits briefing before the court of appeals. See Br. in Opp. at 16-18, *Shabo*, *supra* (No. 18-827); Br. in Opp. at 18-21, *Doe*, *supra* (No. 17-8040); Br. in Opp. at 14-17, *Granados*, *supra* (No. 16-1095); Br. in Opp. at 20-22, *Perez-Guerrero*, *supra* (No. 13-323). Likewise, none of the aliens in those four cases argued that the Board's decision should be reversed under the deferential review that a court of appeals must afford to agency findings of fact. Br. in Opp. at 17, *Shabo*, *supra* (No. 18-827); Br. in Opp. at 19, *Doe*, *supra* (No. 17-8040); Br. in Opp. at 15, *Granados*, *supra* (No. 16-1095); Br. in Opp. at 22, *Perez-Guerrero*, *supra* (No. 13-323). In keeping with this Court's usual practice not to review arguments advanced by a party "for the first time before this Court," *Lewis* v. *Clarke*, 137 S. Ct. 1285, 1293 n.2 (2017); see, *e.g.*, *Flor-*

ida v. *Harris*, 568 U.S. 237, 249 (2013), review was unwarranted in those cases and is equally unwarranted here.

ii. Second, and also consistent with this Court's disposition of *Shabo*, *Doe*, *Granados*, and *Perez-Guerrero*, this petition should be denied because petitioner fails to demonstrate that the result of his case would be any different if the court of appeals had reviewed a challenge to the Board's factual findings of the kind he now asserts.

As noted above, the court of appeals reviews challenges to BIA factual findings under a "substantial evidence" standard. *Kazemzadeh*, 577 F.3d at 1350; see 8 U.S.C. 1252(b)(4)(B); *Elias-Zacarias*, 502 U.S. at 481 & n.1; Pet. App. 5a-6a. That standard is "highly deferential." *Kazemzadeh*, 577 F.3d at 1351. The court must "view the record evidence in the light most favorable to the agency's decision and draw all reasonable inferences in favor of that decision." *Adefemi* v. *Ashcroft*, 386 F.3d 1022, 1027 (11th Cir. 2004) (en banc), cert. denied, 544 U.S. 1035 (2005). The court may not "'re-weigh the evidence' from scratch." *Mazariegos* v. *Office of the U.S. Attorney Gen.*, 241 F.3d 1320, 1323 (11th Cir. 2001) (citation omitted). To reverse factual findings by the Board, the court "must find that the record not only supports reversal, but compels it." *Mendoza* v. *United States Attorney Gen.*, 327 F.3d 1283, 1287 (11th Cir. 2003). "[T]he mere fact that the record may support a contrary conclusion is not enough to justify a reversal of the administrative findings." *Adefemi*, 386 F.3d at 1027; cf. *Biestek* v. *Berryhill*, 139 S. Ct. 1148, 1154 (2019) (explaining that the "threshold for" an agency factual finding to withstanding substantial-evidence review "is not high").

Here, the Board correctly found that petitioner was not tortured in Lebanon. Pet. App. 19a. The only evidence petitioner introduced to support a claim of torture was his account of suffering a back injury after jumping off a cliff in response to shots fired into the air by Hezbollah militants. See *ibid.* Although such an experience would "undoubtedly [be] traumatizing," *id.* at 10a, the Board correctly concluded that it does not rise to the level of torture, given the "absence of evidence that the militants specifically intended to inflict severe physical or mental pain or suffering on" petitioner, *id.* at 19a.

The Board also found that petitioner had failed to show that it was more likely than not that he would "personally be targeted for harm rising to the level of torture if removed to Lebanon." Pet. App. 20a. The Board observed that, aside from the "single incident" described above, petitioner pointed to nothing other than "generalized evidence" of "civil strife" and "human rights abuses in Lebanon, including crimes against" his religious-minority community. *Ibid.* The Board found that generalized evidence "insufficient to demonstrate a clear probability that [petitioner] would be personally tortured if removed to Lebanon." *Ibid.* Petitioner did not identify in the court of appeals, and has not identified here, any evidence that could support overturning the BIA's factual finding under the highly deferential substantial-evidence standard—that is, any basis for determining that a "reasonable adjudicator would be compelled to conclude to the contrary." 8 U.S.C. 1252(b)(4)(B); see *Elias-Zacarias*, 502 U.S. at 481 & n.1. Petitioner points (Pet. 18-19) to the IJ's finding that he had demonstrated a likelihood of future torture in Lebanon, but

that finding relied in part on the IJ's finding that petitioner had suffered torture in the past, see Pet. App. 46a—a finding that the Board reversed in a decision with which the court of appeals agreed, see *id.* at 10a-11a, 19a. In any event, the court of appeals reviewed "only the [BIA]'s decision," not the IJ's decision. *Id.* at 5a (citation omitted; brackets in original).

In sum, resolving the question presented in petitioner's favor would have no practical effect on the disposition of his claims. Although the government continues to believe that review of the question presented may be warranted in an appropriate future case, the Court should await a case in which the relevant arguments were presented to the court of appeals and in which a decision in favor of the alien could plausibly affect the ultimate result of his or her claims. Because this case does not satisfy either of those conditions, the petition should be denied.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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