No. 18-1432

In the Supreme Court of the United States

NIDAL KHALID NASRALLAH,

Petitioner,

v.

WILLIAM P. BARR, ATTORNEY GENERAL,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit

REPLY BRIEF FOR PETITIONER

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Cases—continued

Statutes and Regulations

REPLY BRIEF FOR PETITIONER

The government acknowledges that the lower "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." BIO 9. The government likewise agrees 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." *Ibid*. In each of *Ortiz-Franco*, *Granados*, and *Shabo*, the government made these same concessions. See Pet. 3-4.

The Court should grant the petition. This is an excellent vehicle to review this question. And, ultimately, the scope of judicial review should be the same, regardless of geography. As Judge Lohier put it, "the state of play today is that noncitizens with criminal convictions who appeal the Government's denial of deferral of removal under the CAT will have access to federal court in a wide geographic swath of the Nation (the Seventh and Ninth Circuits), while similarly situated men and women in other parts of the country * * * will not." *Ortiz-Franco* v. *Holder*, 782 F.3d 81, 93 (2d Cir. 2015) (Lohier, J., concurring). "This is not a sustainable way to administer uniform justice in the area of immigration." *Ibid*.

The government's grounds for opposing certiorari do not withstand scrutiny. While the government contests the scope of the circuit conflict, there is no disputing that the petition squarely raises a question of statutory construction that has divided the circuits. The government admits as much. And, contrary to the government's assertions, this case is an ideal opportunity to resolve the question presented because the

immigration judge and the BIA disagreed about a dispositive question as to the factual record. There can be no better indication that the scope of judicial review over agency actions may alter the outcome of the proceeding. And, while the merits of the jurisdictional question are not now before the Court, petitioner presents the better reading of the statutory text.

A. The circuits are divided.

The government's focus on the aspect of the question presented relating to a noncitizen's request for *withholding* of removal (BIO 16-18) is misguided.

1. Withholding of removal and deferral of removal are closely-related forms of relief from removal. See Pet. 6. Withholding is more protective for individuals, but it is unavailable for those convicted of "a particularly serious crime." 8 C.F.R. § 1208.16(d)(2). Those ineligible for withholding may request deferral, which contains fewer protections. See *id*. § 1208.17(a).

The government acknowledges that there is a circuit conflict with respect to whether 8 U.S.C. 1252(a)(2)(C) applies to petitions for review concerning the BIA's denial of a noncitizen's request for deferral of removal. BIO 9. The government also recognizes that petitioner sought both deferral (and withholding) of removal. BIO 6. While the IJ granted petitioner deferral of removal (Pet. App. 41a-46a; see also BIO 6), the BIA reversed (Pet. App. 18a-21; see also BIO 7-8). Below, the court of appeals concluded that it lacked jurisdiction to review petitioner's factual challenges to the BIA's findings with respect to deferral of removal because "the criminal-alien jurisdiction bar" contained in Section 1252(a)(2)(C) "applies." Pet. App. 11a; see also BIO 9. Finally, the petition squarely asks the Court to address whether Section 1252(a)(2)(C)

applies to a noncitizen's petition for review relating to a denied request for deferral of removal. See Pet. i.

Putting this all together, there is a well-established and long-standing circuit conflict over the question presented as it relates to deferral of removal. The government does not disagree. At bare minimum, the Court should grant review of the petition with respect to deferral of removal.

2. That said, the best course is to also resolve the closely-related issue whether Section 1252(a)(2)(C) applies to a noncitizen's request for *withholding* of removal. Because this is effectively the same question as when it arises in the *deferral* context, this case is an ideal vehicle for review because it allows the Court to assess how Section 1252(a)(2)(C) applies to both forms of relief. See Pet. App. 9a (applying "criminal-alien jurisdictional bar" to petitioner's appeal of the withholding determination). If Section 1252(a)(2)(C) applies differently, this case provides opportunity for the Court to make that distinction.

Deferral of removal applies in circumstances when a noncitizen "has been found * * * to be entitled to protection under the Convention Against Torture," but is subject to "mandatory denial of withholding of removal" that arises from certain criminal histories. 8 C.F.R. § 1208.17(a). Both forms of remedy are temporary, as the government retains authority to "remov[e] an alien to a third country other than the country to which removal has been withheld or deferred." *Id*. § 1208.16(f). The government's attempt (BIO 17) to draw a distinction on this ground is wrong.

What is more, it would be strange if Section 1252(a)(2)(C) applies to withholding of removal but not deferral of removal. An individual convicted of a crime that triggers the criminal-alien bar in Section

1252(a)(2)(C)—but not a crime so serious that it qualifies as a "particularly serious crime" for purposes of rendering the individual ineligible for withholding of removal (see 8 C.F.R. § 1208.16(d)(2))—would not have any judicial review over factual findings underlying the withholding decision. But a similarly situated alien with a *more* serious criminal history would have judicial review.

Section 1252(a)(2)(C) should apply in the same way to denials of a noncitizen's request for withholding and deferral relief. This case provides an opportunity for the Court to resolve these issues conclusively.

B. This is an ideal vehicle.

The government's two vehicle arguments—that the question presented here was not pressed below (BIO 18-20) and that, on remand, the court of appeals could affirm on alternative grounds (BIO 20-22)—are no reason to deny review. Indeed, this case—unlike those previously denied—is a singularly good vehicle for review because, here, the immigration judge *granted* petitioner deferral of removal based on its appraisal of the factual allegations. See Pet. App. 22a-48a. The BIA then reversed those factual findings. *Id.* at 18a-20a. Whether the BIA's reversal is subject to judicial review is a question of considerable practical importance in this case.

1. The government suggests that petitioner's decision not to ask the court of appeals to overturn its earlier decision in *Cole* v. *United States Att'y Gen.*, 712 F.3d 517, 533 (11th Cir. 2013), is an obstacle to review. See BIO 18-20. It is not.

The government has repeatedly recognized that, in *Cole*, the Eleventh Circuit resolved the question presented, holding that Section 1252(a)(2)(C) applies

to requests for deferral and withholding of removal. See Pet. 18 (citing the government's briefs in *Ortiz-Franco*, *Granados*, and *Shabo*). Even now, the government contends that "[t]he court of appeals * * * correctly stated, relying on circuit precedent, that Section 1252(a)(2)(C) does not permit review of factual challenges"—and, for this proposition, the government cites *Cole*. BIO 10. The government thus agrees that, in binding authority, the Eleventh Circuit had already resolved this question.

A litigant need not ask a court of appeals to overturn its precedent—a task that a panel is powerless to accomplish—so as to preserve an argument for review. Rather, the Court's "traditional rule" "precludes a grant of certiorari only when the question presented was not pressed *or* passed upon below." *United States* v. *Williams*, 504 U.S. 36, 41 (1992) (internal quotations omitted) (emphasis added). "[T]his rule operates," the Court observed, "in the disjunctive, permitting review of an issue not pressed so long as it has been passed upon." *Ibid.*; see also *Citizens United* v. *FEC*, 558 U.S. 310, 330 (2010) ("Our practice 'permit[s] review of an issue not pressed [below] so long as it has been passed upon.'"); *Lebron* v. *National R.R. Passenger Corp.*, 513 U.S. 374, 379 (1995) (same).

The lower court certainly "passed upon" the question presented—and the government does not disagree. Citing *Cole*, the court held that it "lack[ed] jurisdiction to review [petitioner's] argument about the likelihood of future harm in Lebanon." Pet. App. 11a.

To be sure, in recognition that circuit precedent barred him from raising factual challenges to the BIA decision, petitioner attempted to frame his challenge as a legal one. See BIO 18. But a litigant's effort to

argue around circuit precedent—rather than expressly call for its overturning—is appropriate. This strategy "does not suggest a waiver; it merely reflects counsel's sound assessment that the argument would be futile." *MedImmune, Inc.* v. *Genentech, Inc.*, 549 U.S. 118, 125 (2007). When, as here, a court rejects a party's effort to sidestep its precedent, the rule on which the lower court rested its decision is ripe for this Court's review.

2. The government's other contention is that, on remand, it might win on the merits of petitioner's appeal. See BIO 20-22.

The government's argument is irrelevant because it addresses an issue subsequent to the question presented. The Court ordinarily does not "decide in the first instance issues not decided below." *Zivotofsky* v. *Clinton*, 566 U.S. 189, 201 (2012) (quoting *National Collegiate Athletic Assn.* v. *Smith*, 525 U.S. 459, 470 (1999)). The Court routinely grants certiorari to resolve important questions that controlled the lower court's decision, notwithstanding a respondent's assertion that, on remand, it may prevail for a different reason. See, *e.g.*, *Department of Transp.* v. *Association of Am. R.R.s*, 135 S. Ct. 1225, 1234 (2015) (leaving alternative grounds for remand); *Fitzgerald* v. *Barnstable Sch. Comm.*, 555 U.S. 246, 260 (2009) (same). The question here is the scope of judicial review—an important question that has split the circuits and that, as the government repeatedly admits, warrants resolution. Whether petitioner ultimately prevails is a matter that the court of appeals will address in the first instance.

The government's contention is also wrong. Reviewing the factual record, the immigration judge con-

cluded that petitioner qualifies for deferral of removal. See Pet. App. 41a-46a. The immigration judge found that petitioner was subject to past torture (*id*. at 42a-44a), and further, that current conditions render him likely subject to torture in Lebanon given his status as a Druze Christian (*id*. at 45a-46a). Reviewing the same record, the BIA came to the opposite factual conclusion. *Id*. at 18a-20a. Because the two agency adjudicators reached opposing views, the government's claim that "resolving the question presented in petitioner's favor would have no practical effect on the disposition of his claims" (BIO 22) is unsupported speculation. The immigration judge's conclusions render petitioner's arguments, at the very least, substantial enough to warrant consideration.

Nor do the government's arguments hold up on deeper examination. A central question is whether the event when Hizbollah militants chased petitioner, leading him to jump off a cliff, constituted past persecution. As a matter of fact, the immigration judge found that Hizbollah's conduct *did* target petitioner—and thus it constituted torture. See Pet. App. 42a-43a. According to the IJ, "it is clear that the shots were fired to at least scare or intimidate [petitioner]." *Id*. at 43a. But the BIA disagreed *factually*—"the fact that the militants fired their guns in the air and not at [petitioner] suggests that they did not intend to physically harm him." *Id*. at 19a.

These are two different factual conclusions, drawn from the same evidentiary record. Per the immigration judge, when Hizbollah fired their guns in the air in the direction of petitioner, that caused "pain and suffering, both physical and mental, intentionally inflicted by Hizballah militants for the purpose of intimidation, coercion, or possible discrimination based on

[petitioner's] religious affiliation." Pet. App. 43a. But the BIA disagreed. *Id*. at 18a-19a. *This* factual question—which turns on the inferences a fact-finder draws from the record evidence—is certainly a significant one warranting review.

And petitioner is very likely to prevail. The immigration judge made these factual findings:

- "Hizballah militants spotted [petitioner] and a friend, demanded that the two men approach the militants, then fired shots into the air and began pursuing [petitioner] and his acquaintance when the two did not approach." Pet. App. 42a.
- "[Petitioner] claims that faced with the option of surrendering to the militants, or jumping off the cliff, [petitioner] felt safer jumping off of the cliff." *Id*. at 43a.
- "[Petitioner's] evidence notes that Hizballah is known to kidnap and harm Lebanese Druze." *Ibid*.
- "[Petitioner] suffered a broken back as a result of the fall. Medical reports corroborate the severity of the injury." *Ibid*.

The BIA disputed *none* of these factual findings. Instead, the BIA reached the factual conclusion that there was no "evidence that the militants specifically intended to inflict severe physical or mental pain or suffering on [petitioner]." Pet. App. 19a. Yet the evidence of intentional infliction of pain or suffering is obvious and clear. While the substantial evidence standard is deferential (see BIO 20), it is not the total abdication of judicial review.

Contrary to the government's suggestion (BIO 22), the court of appeals did not review this factual issue. See Pet. App. 10a-11a. The court held that it lacked jurisdiction to review the agency's factual findings. *Id*. at 11a. It thus accepted as a premise the BIA's factual conclusion that, "[a]lthough the incident was undoubtedly traumatizing for Nasrallah and his friend," "there is no *evidence* that the Hezbollah members 'specifically intended to inflict such severe pain or suffering.'" *Id*. at 10a (emphasis added). Only after the court accepted this factual determination—without independent review—did the court evaluate the legal conclusion that "the BIA found as a matter of law that he had not been tortured in Lebanon." *Id*. at 11a. Indeed, the court of appeals never passed on whether the conduct (all undisputed) of Hizbollah militants shooting while chasing petitioner to a cliff can lead to any conclusion *other* than that Hizbollah intended to inflict mental pain or suffering on petitioner.

Whether the court of appeals may exercise judicial review over this factual question is a matter of substantial practical importance.

C. The question presented warrants review.

The government's arguments on the merits (BIO 8-14) are no reason to deny review. The government oft recognizes that this Court's review is needed to resolve circuit splits on important questions of statutory interpretation—even when the government maintains that the court of appeals properly decided the issue. In *Lamar, Archer & Cofrin, LLP* v. *Appling*, No. 16-1215, the government urged the Court to grant certiorari, notwithstanding the government's contention that the court of appeals' decision was "correct[]." See U.S. Cert. *Amicus* Br. 8. According to the government, review was "warranted" in light of the "circuit conflict"

over the "important and recurring" question of statutory interpretation. *Ibid*. Soo too here.

In any event, petitioner is very likely to prevail on the question presented.

First, the government does not address the "strong presumption that Congress intends judicial review of administrative action." *Bowen* v. *Michigan Acad. of Family Physicians*, 476 U.S. 667, 670 (1986). See also *Mach Mining, LLC* v. *EEOC*, 135 S. Ct. 1645, 1651 (2015) ("[T]his Court applies a 'strong presumption' favoring judicial review of administrative action."). The "Court assumes that 'Congress legislates with knowledge of'" this presumption, and "[i]t therefore takes 'clear and convincing evidence' to dislodge the presumption." *Kucana* v. *Holder*, 558 U.S. 233, 252 (2010).

Second, the administrative decision on the CAT deferral claim is separate from the underlying order of removal—and thus it is outside the scope of Section 1252(a)(2)(C). See *Wanjiru* v. *Holder*, 705 F.3d 258, 264 (2013). See Pet. 21-23.

We demonstrated how the text of FARRA requires this result. It explains that a "claim[] raised under the [CAT] or [FARRA]" is reviewable "as part of the *review* of a final order of removal." FARRA § 2242(d) (emphasis added). That most naturally means that the deferral claim is reviewed at the *same time* as the "final order of removal"—but it is *not* the "final order of removal" itself. If it were, Section 2242(d) would make no sense. While the government mentions FARRA (BIO 14), it makes no substantive response to this argument.

The government retorts that our approach would mean that a "final order of removal" has different

meanings between subsections (a)(1) and (a)(2) of Section 1252. See BIO 14. This contention rests on a faulty premise—that Section 1252(a)(1)'s provision of judicial review over "a final order of removal" is the only basis on which a court of appeals has jurisdiction over a noncitizen's challenge to a deferral decision. That is wrong; as we just explained, FARRA provides a separate basis for jurisdiction apart from Section 1101(a)(47). See FARRA § 2242(d).

The government also asserts that the agency's denial of a request for deferral relief is a "final" decision for purposes of administrative law. BIO 14. That may well be—but being a "final" order does not mean it is a "final order *of removal*," which is the relevant consideration here.

Third, the distinction between Sections 1252(a)(4) and 1252(a)(5) further confirms our construction. See Pet. 22-23. Section 1252(a)(4) provides for appellate review for "any cause or claim under the [CAT]." 8 U.S.C. § 1252(a)(4). This is different from "an order of removal," which Congress addressed separately in 8 U.S.C. § 1252(a)(5).

As the government recognizes, Section 1252(a)(5) provides that "a petition for review filed with an appropriate court of appeals * * * with this section shall be the sole and exclusive means for judicial review of an order of removal." BIO 16 (quoting 8 U.S.C. § 1252(a)(5)). But that is not responsive—it does not answer the question whether an order on a deferral claim is a "final order of removal" as that term is used in Section 1252(a)(2)(C). As we just said, FARRA provides that review of deferral occurs at the same time as the review of the "final order of removal"—but it is

not the final order of removal itself. If it were, for reasons we have described, Section 1252(a)(4) would be superfluous.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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