No. _____

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

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Because of the United States' inviolable obligation not to deport individuals to countries in which they are likely to be subject to torture, individuals who are statutorily ineligible for asylum may request withholding (or deferral) of removal. Such relief is, as courts repeatedly note, a fundamental bulwark to ensure that the government's decision to deport an individual does not result in torture or death.

The courts of appeals have deeply and intractably divided as to whether 8 U.S.C. § 1252(a)(2)(C) divests them of jurisdiction to review factual findings underlying the administrative agency's decision to deny a request for withholding (or deferral) of removal relief. The United States has expressly acknowledged the conflict among the circuits, and it has previously acquiesced to certiorari on this question. This case, unlike those before it, cleanly presents the question for review.

The question presented is:

Whether, notwithstanding Section 1252(a)(2)(C), the courts of appeals possess jurisdiction to review factual findings underlying denials of withholding (and deferral) of removal relief.

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PETITION FOR A WRIT OF CERTIORARI

Nidal Khalid Nasrallah respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Eleventh Circuit in this case.

OPINION AND DECISIONS BELOW

The court of appeals' opinion (App., *infra*, 1a-11a) is unpublished but available at 2019 WL 626456. The decision of the Board of Immigration Appeals (App., *infra*, 12a-21a) and the decision of the immigration judge (*id.* at 22a-48a) are unreported.

JURISDICTION

The judgment of the court of appeals was entered on February 14, 2019. This Court's jurisdiction is invoked under 28 U.S.C. § 1254(1).

STATUTORY, TREATY, AND REGULATORY PROVISIONS INVOLVED

8 U.S.C. § 1252(a)(2)(C) states:

> Notwithstanding any other provision of law (statutory or nonstatutory), including section 2241 of Title 28, or any other habeas corpus provision, and sections 1361 and 1651 of such title, and except as provided in subparagraph (D), 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 section 1182(a)(2) or 1227(a)(2)(A)(iii), (B), (C), or (D) of this title, or any offense covered by section 1227(a)(2)(A)(ii) of this title for which both predicate offenses are, without regard to

> their date of commission, otherwise covered by section 1227(a)(2)(A)(i) of this title.

Article 3 of the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (CAT), Dec. 10, 1984, S. Treaty Doc. No. 100-20 (1988), 1465 U.N.T.S. 85, sets forth:

> No State Party shall expel, return ("refouler") 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.

The Foreign Affairs Reform and Restructuring Act of 1998 (FARRA), Pub. L. No. 105-277, div. G, § 2242(a), 112 Stat. 2681, 2681-822, establishes:

> It shall be the policy of the United States not to expel, extradite, or otherwise effect the involuntary return of any person to a country in which there are substantial grounds for believing the person would be in danger of being subjected to torture, regardless of whether the person is physically present in the United States.

8 C.F.R. § 208.17(a) provides:

> An alien who: has been ordered removed; has been found under § 208.16(c)(3) to be entitled to protection under the Convention Against Torture; and is subject to the provisions for mandatory denial of withholding of removal under § 208.16(d)(2) or (d)(3), shall be granted deferral of removal to the country where he or she is more likely than not to be tortured.

STATEMENT

Pursuant to both federal and international law, the United States may not return individuals to countries where they are likely to be tortured. Those who are ineligible for asylum assert this right via a claim for withholding (or deferral) of removal. When the administrative agency—the Board of Immigration Appeals—resolves this sort of claim, the stakes are monumental. An erroneous denial of a withholding claim may result in the individual's death. See, *e.g.*, Maria Sacchetti & Carolyn Van Houten, *Death Is Waiting for Him*, Wash. Post (Dec. 6, 2018) (recounting the circumstances of Santos Chirino, who, after having been denied relief from removal, was murdered in Honduras).

The courts of appeals have deeply and intractably divided over a fundamental question—whether they possess jurisdiction to review factual findings underlying denials of withholding (or deferral) relief. Some courts hold that 8 U.S.C. § 1252(a)(2)(C) divests them of such jurisdiction to review the administrative agency's factual findings. Other circuits disagree.

The United States has repeatedly acknowledged this circuit conflict—and the need for its resolution. In 2015, the United States explained that this is "a recurring question of substantial importance on which there is a direct conflict among the courts of appeals." U.S. Br. at 9-10, *Ortiz-Franco* v. *Lynch*, No. 15-362, 2015 WL 7774500 (Dec. 2, 2015) (U.S. *Ortiz-Franco* Br.). In 2017, the United States confirmed that there is a "conflict among the courts of appeals as to whether jurisdiction exists to review factual challenges brought by a criminal alien to the denial

of a request for deferral of removal under the CAT." U.S. Br. at 7-8, *Granados* v. *Sessions*, No. 16-1095, 2017 WL 1967440 (May 10, 2017) (U.S. *Granados* Br.). Per the government, "[t]his is a recurring question of substantial importance that will warrant this Court's review in an appropriate case." *Id.* at 8. Yet more recently, the government again acknowledged that this "conflict among the courts of appeals" is a "recurring question of substantial importance that will warrant this Court's review in an appropriate case." U.S. Br. at 8, *Shabo* v. *Barr*, No. 18-827 (Apr. 3, 2019).

This is an appropriate vehicle to review and resolve this question. The decision below turned on the court's application of the jurisdictional bar pursuant to circuit precedent—precedent upon which the government has admitted a circuit split and acquiesced to certiorari.

The Court should grant review.

A. Statutory background.

1. The Convention Against Torture (CAT) provides that "[n]o State Party shall expel, return ('refouler') 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." CAT art. 3, S. Treaty Doc. No. 100-20 (1988), 1465 U.N.T.S. 85.

Congress codified the CAT domestically in 1998 via the Foreign Affairs Reform and Restructuring Act of 1998, known as FARRA, which is codified as a note to 8 U.S.C. § 1231. See Pub. L. No. 105-277, div. G, § 2242, 112 Stat. 2681, 2681-822.

FARRA provides:

> It shall be the policy of the United States not to expel, extradite, or otherwise effect the involuntary return of *any* person to a country in which there are substantial grounds for believing the person would be in danger of being subjected to torture, regardless of whether the person is physically present in the United States.

FARRA § 2242(a) (emphasis added).

Typically, individuals convicted of certain criminal offenses are ineligible for immigration relief, including cancellation of removal and asylum. See, *e.g.*, 8 U.S.C. § 1229b(a) (a person convicted of an aggravated felony may not seek "[c]ancellation of removal"); *id.* § 1158(b)(2)(A)(ii) (foreclosing asylum for any individual who, "having been convicted by a final judgment of a particularly serious crime, constitutes a danger to the community").

But, pursuant to CAT obligations, FARRA expressly applies to "any" person. FARRA § 2242(a). This reflects a policy judgment to protect *all* people from the horrors of torture, regardless of whether they have a criminal history. See *Moncrieffe* v. *Holder*, 569 U.S. 184, 187 n.1 (2013) (pursuant to the CAT, "the Attorney General has no discretion to deny relief to a noncitizen who establishes his eligibility"); *Edu* v. *Holder*, 624 F.3d 1137, 1145 (9th Cir. 2010) ("[I]n adopting [CAT] regulations, the agencies themselves recognized that even those who assisted in Nazi persecutions, or engaged in genocide, or pose a danger to our own security are not excluded from the protections of CAT.") (citing *Regulations Concerning*

the Convention Against Torture, 64 Fed. Reg. 8478, 8478-8479 (Feb. 19, 1999)).

The Department of Justice promulgated regulations that established procedures for otherwise-removable noncitizens to raise a CAT claim. See 64 Fed. Reg. 8478. Under these regulations, an otherwise-removable noncitizen is entitled to CAT protection if he or she can prove "that it is more likely than not that he or she would be tortured if removed to the proposed country of removal." 8 C.F.R. § 1208.16(c)(2)-(3). The regulations define "[t]orture" as "any act by which severe pain or suffering, whether physical or mental, is intentionally 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." *Id.* § 1208.18(a)(1).

A noncitizen meeting the burden of proof for CAT protection is entitled to mandatory relief from deportation—either in the form of "withholding of removal" or in the form of "deferral of removal." 8 C.F.R. § 1208.16(c)(4). Withholding of removal—which is unavailable to noncitizens who have committed "particularly serious crime[s]" (see *id.* § 1208.16(d)(2))—provides more comprehensive protections than deferral of removal. *Wanjiru* v. *Holder*, 705 F.3d 258, 263-264 (7th Cir. 2013) (citing *Fact Sheet: Asylum and Withholding of Removal Relief, Convention Against Torture Protections*, U.S. Dep't of Justice, Exec. Office for Immigration Review (Jan. 15, 2009)). Individuals who are ineligible for withholding of removal are entitled to "deferral of removal." 8 C.F.R. § 1208.17(a).

2. Individuals may appeal the denial of CAT relief to the courts of appeals.

The Immigration and Nationality Act (INA) provides that a noncitizen may seek review of a "final order of removal" via a petition for review in the courts of appeals. 8 U.S.C. § 1252(a)(1). Generally, such a petition provides courts of appeals jurisdiction over both factual and legal issues. *Id.* § 1252(b)(4). FARRA authorizes review of CAT claims "as part of the review of a final order of removal." FARRA § 2242(d).

The INA contains certain jurisdictional bars. One of these bars, the "criminal bar," 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 listed] criminal offense." 8 U.S.C. § 1252(a)(2)(C). Section 1252(a)(2)(D), however, restores jurisdiction over "constitutional claims [and] questions of law." *Id.* § 1252(a)(2)(D).

This case concerns whether Section 1252(a)(2)(C) applies to appellate review of the denial of a request for CAT withholding and deferral relief. If it does, then noncitizens with a qualifying conviction may not challenge factual determinations underlying the denial of a request for withholding or deferral of removal. If it does not apply to a request for withholding (or deferral) of removal, courts of appeals may review the agency's factual findings pursuant to 8 U.S.C. § 1252(b)(4).

B. Factual background.

1. Petitioner grew up in the Chouf area of Lebanon, a mountainous region where the Lebanese Druze are concentrated. A.R. 150. The Druze are a religious minority in Lebanon. A.R. 574.

When petitioner was a child, his parents told him to never go far from home because Hezbollah "might kidnap [him] or take him [away]." A.R. 153-154. According to a 2014 State Department counterterrorism report, Hezbollah is "the most capable and prominent terrorist group in Lebanon," operating as "an armed militia beyond the control of the state and as a powerful political actor that can hobble or topple the government as it sees fit." A.R. 567. Hezbollah "is known to kidnap and harm Lebanese Druze," "call[s] [the Druze] infidels," and is "trying to take control of the [Chouf] area." App., *infra*, 43a; A.R. 420.

In 2005, petitioner and his friend, both teenagers, went for a hike in the mountains. A.R. 155, 420. They came across uniformed Hezbollah soldiers, who were carrying guns. A.R. 420. The terrorists saw the young men and demanded that they "[c]ome here and stop." *Ibid.* Petitioner and his friend—afraid because they "knew that Hezbollah harms Druze and [that they] were in an area where [Hezbollah] knew [they] were Druze"—attempted to leave. *Ibid.* The soldiers began "screaming" at petitioner and his friend "to stop" and "started shooting in the air." A.R. 155, 420. Petitioner and his friend began to run away. *Ibid.* The terrorists, still "shouting," chased them. *Ibid.*

Petitioner and his friend reached the edge of a 40-foot cliff. A.R. 420. With no way out, and with the terrorists "still coming with their guns," petitioner and his friend "did the only thing [they] could." *Ibid.* They jumped. *Ibid.* See also App., *infra*, 43a.

Petitioner broke his back. A.R. 420, 555. He was admitted to a hospital on August 8, 2005. A.R. 554. Given petitioner's severe fracture of his lumbar vertebrae, his doctors informed him that he had a more

than 90 percent chance of never walking again. A.R. 155. Two pins and four screws later, petitioner was discharged from the hospital on December 8, 2005. A.R. 155, 554.[1]

2. In July 2006, petitioner left Lebanon and was admitted to the United States as a temporary visitor. App., *infra*, 13a-14a. The following year, he became a lawful permanent resident of the United States. *Ibid.*

Petitioner was convicted in 2013 of two counts of receiving property stolen in interstate commerce for selling cigarettes that others stole. A.R. 421, 776. The judge postponed petitioner's sentence, which he later served, until petitioner graduated from college. A.R. 165.

Petitioner has had no criminal history apart from the cigarette sales. While in the United States, he has graduated from college with a 3.6 GPA (A.R. 165), worked as the manager of an automotive store (A.R. 533), and clocked extensive community service hours as an active member of the American Druze Society (A.R. 547).

C. Proceedings below.

1. The immigration judge (IJ) granted petitioner deferral of removal. App., *infra*, 22a-48a.[2]

The IJ found petitioner credible. App., *infra*, 41a. She observed that petitioner fears harm in Lebanon

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[1] Petitioner's friend, who broke both of his legs and an arm in the fall, is still "thank[ful]" that "[Hezbollah] didn't catch [them]"—as he put it, he and petitioner would have "disappeared for a long time." A.R. 549.

[2] The IJ denied petitioner's requests for asylum and withholding of removal. App., *infra*, 47a.

"based on his religious minority status as a Druze and his Western ties." *Id.* at 42a.

Considering petitioner's history in Lebanon, the IJ concluded that "there is a clear indication that the Hizballah militants pursued [petitioner] with the intent to harm him and his acquaintance." App., *infra*, 43a. According to the IJ, "[t]he militants initially shot into the air when [petitioner] attempted to flee, and continued firing their weapons as [petitioner] fled." *Ibid.* "Although it is unclear whether the militants were actually firing *at* [petitioner], it is clear that the shots were fired to at least scare or intimidate [petitioner]." *Ibid.*

The IJ, moreover, found that petitioner is "particularly susceptible" to torture because he "has resided in the United State[s] for nearly a decade, and his immediate family resides lawfully in the U.S." App., *infra*, 45a. That threat, the IJ found, is even more pronounced in view of the "worsening state of affairs for the Druze in Lebanon." *Id.* at 46a.

On the question of acquiescence, the IJ determined that—as of 2005, when petitioner's incident with Hezbollah occurred—the Lebanese government acquiesced to harm faced at the hands of Hezbollah. App., *infra*, 44a. The IJ further observed that 2014 and 2015 State Department reports each indicated that "the Lebanese government [has] made no tangible progress toward disbanding and disarming armed militia groups, including Hizballah." *Id.* at 46a.[3]

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[3] The record contains numerous exhibits speaking to the issue of acquiescence. *E.g.*, A.R. 551 (petitioner's relative describing

Surveying and citing to the record, the IJ further concluded that "[petitioner's] relocating within Lebanon would [not] reduce the likelihood of [his] being individually targeted for torture upon his return to Lebanon." App., *infra*, 45a.

At bottom, the IJ concluded:

> Due to [petitioner's] past experience, the civil strife within Lebanon, the destabilization of surrounding countries, and the violent activities of Hizballah and other violent groups[,] [petitioner], as a religious minority with

how he was kidnapped at gunpoint by Hezbollah soldiers, handcuffed, driven away in a trunk, threatened with death, and robbed—and how Lebanese police subsequently offered no assistance and instead "advised [him] to pay [Hezbollah]," or else his "life [would] be in danger"); A.R. 485 ("The political class * * * is intent on limiting itself to containing crisis, preferring to avoid a bloody showdown it knows would be unwinnable."); A.R. 489 ("Since the end of the war, militia leaders placed their people inside the state and thus enjoyed actual control over its institutions. Managers have little power over their subordinates who in reality report to their political patrons."); A.R. 494 & n.41 ("[T]he Syria conflict * * * has also allowed Lebanese actors to turn a blind eye to the home-grown crisis."); A.R. 567 ("Hizballah continued to operate as an armed militia beyond the control of the state and as a powerful political actor that can hobble or topple the government as it sees fit. The government was not able to take significant action to disarm Hizballah or eliminate its safe havens in Lebanon."); A.R. 569 ("The cabinet did not consider legislative initiatives that could potentially threaten Hizballah's operations, as the presence of Hizballah and its political allies in the government make the requisite consensus on such actions impossible."); A.R. 570 ("[T]he Lebanese government * * * does not consider Hizballah a terrorist organization."); A.R. 640 ("Hizballah has participated in the Lebanese Government since 1992."); A.R. 641 ("In negotiations to end the violence, Hizballah gained veto power in the [Lebanese] government.").

> strong western connections, will more likely than not be targeted personally for harm rising to the level of torture if he was removed to Lebanon.

App., *infra*, 46a.

The IJ thus granted petitioner's request for deferral of removal. App., *infra*, 47a. The IJ underscored that petitioner's removal "has been deferred only to Lebanon": petitioner can still "be removed at any time to another country where he is not likely to be tortured." *Ibid.*

2. The government appealed. A.R. 89. In its briefing before the Board, the government represented that petitioner "willingly jumped off a cliff." A.R. 28. It further asserted that petitioner experienced only brief "mental suffering," arising from a "single incident" that "lasted minutes." A.R. 26.

The Board of Immigration Appeals affirmed the IJ's denial of asylum and withholding of removal. App., *infra*, 20a-21a. It vacated, however, the IJ's grant of deferral of removal. *Id.* at 19a-20a.

The Board stated that it could "[]not conclude that [petitioner] was tortured in Lebanon." App., *infra*, 19a. First, the Board asserted that "[t]he conduct of the [Hezbollah] militants[] was limited to shouting and firing their guns in the air." App., *infra*, 19a.[4] Second, the Board expressed its view that "the fact

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[4] Contra A.R. 420 (describing that the terrorists "chased" petitioner and his friend, with guns, to the edge of a 40-foot cliff); App., *infra*, 43a ("[T]here is a clear indication that the Hizballah militants pursued [petitioner] with the intent to harm him and his acquaintance.").

that the militants fired their guns in the air and not at [petitioner] suggests that they did not intend to physically harm him." *Ibid.*[5]

The Board further concluded that "[t]he record also does not support the [IJ's] 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." App., *infra*, 20a. The Board nonetheless observed that the record contains substantial "evidence of widespread civil strife and various human rights abuses in Lebanon, including crimes against members of the Druze community in Hizballah-controlled areas of the country and anti-Western terrorist activity." *Ibid.* (citing more than 200 pages of record evidence: *id.* at 46a; A.R. 428-509, 566-696). Without addressing the specific evidence, the Board dismissed the record as "generalized evidence," "insufficient" to carry petitioner's burden. *Ibid.*[6]

Thus, the Board vacated the IJ's grant of deferral of removal and ordered petitioner removed to Lebanon. App., *infra*, 21a.

3. The Eleventh Circuit denied in part and dismissed in part petitioner's request for review. App., *infra*, 1a-11a.

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[5] Contra App., *infra*, 43a ("Although it is unclear whether the militants were actually firing *at* [petitioner], it is clear that the shots were fired to at least scare or intimidate [petitioner]."); A.R. 549 (petitioner's friend stating that the terrorists "followed [him and petitioner] and kept threatening [to] shoot[]" them).

[6] The Board's decision did not mention the questions of internal relocation or acquiescence, leaving the IJ's conclusions on those issues undisturbed. See App., *infra*, 19a-20a.

The court observed that petitioner "contends that the [Board] erred in determining that he would not likely be singled out for torture if he was removed." App., *infra*, 11a. "A determination about the likelihood of future harm, however, is a finding of fact, not a question of law." *Ibid.* (citing *Cole* v. *United States Attorney Gen.*, 712 F.3d 517 (11th Cir. 2013)). Applying *Cole*, the court held that its review of the Board's CAT determination was "restrict[ed]" to "[petitioner's] legal and constitutional claims." *Ibid.*

The court therefore held that it "lack[ed] jurisdiction to review [petitioner's] argument about the likelihood of future harm in Lebanon" and dismissed the petition for review in part. App., *infra*, 11a.

REASONS FOR GRANTING THE PETITION

The United States has repeatedly acknowledged to this Court that "there is a conflict among the courts of appeals as to whether jurisdiction exists to review factual challenges brought by a criminal alien to the denial of a request for deferral of removal under the CAT, notwithstanding 8 U.S.C. 1252 (a)(2)(C)." U.S. *Granados* Br. at 7-8. The United States likewise recognized that "[t]his is a recurring question of substantial importance that will warrant this Court's review in an appropriate case." *Id.* at 8. See also U.S. *Shabo* Br. at 8. This is an appropriate case to review and resolve this question.

A. The lower courts are intractably divided over the question presented.

As the United States has previously represented to this Court, there is an eight-to-two "circuit split" over the question presented (U.S. *Ortiz-Franco* Br. at 9, 15, 16), which is "entrenched and has existed for

more than [eight] years." *Id.* at 15. Yet more recently, the United States confirmed the "conflict among the courts of appeals" on this question. U.S. *Granados* Br. at 7-8; U.S. *Shabo* Br. at 8.

"The Ninth Circuit [has] declined to consider its rule en banc," and "the Seventh Circuit [has] confirmed that the analysis set forth in *Wanjiru* constitutes binding circuit precedent." U.S. *Ortiz-Franco* Br. at 15. Likewise, "at least five of the circuits in the majority have expressly declined to revisit their precedents based on the reasoning adopted by the Seventh or Ninth Circuit." *Id.* at 15-16 & n.5. See also *Morris* v. *Sessions*, 891 F.3d 42, 48 (1st Cir. 2018) ("[A]lthough some other circuits have adopted the government's position that the jurisdictional bar does apply to orders denying claims for deferral of removal, other circuits have rejected it.").

As the United States has previously said, there is "no realistic prospect that the circuit split will be resolved without this Court's intervention." U.S. *Ortiz-Franco* Br. at 16.

In *Wanjiru* v. *Holder*, 705 F.3d 258 (7th Cir. 2013), the **Seventh Circuit** held that the denial of CAT deferral is not a "final order of removal" within the meaning of Section 1252(a)(2)(C). *Id.* at 264. In its view, "[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." *Ibid.* The court confirmed in *Lenjinac* v. *Holder*, 780 F.3d 852, 855 (7th Cir. 2015), that *Wanjiru* "conclusively held that de-

ferral of removal is not a final remedy and therefore [that] the INA does not bar judicial review."[7]

The **Ninth Circuit** used different reasoning to reach the same conclusion in *Lemus-Galvan* v. *Mukasey*, 518 F.3d 1081 (9th Cir. 2008), overruled in part on other grounds by *Maldonado* v. *Lynch*, 786 F.3d 1155 (9th Cir. 2015). The court held that, because CAT deferral is available to all noncitizens, regardless of whether they have a criminal history, the denial of CAT deferral is a decision "on the merits" of the CAT claim—and not, as Section 1252(a)(2)(C) requires, a decision "on the basis of [a criminal] conviction." *Lemus-Galvan*, 518 F.3d at 1083-1084. Thus, in the Ninth Circuit, a noncitizen with an enumerated criminal conviction may raise factual challenges to the denial of CAT relief.[8]

The **First**, **Second**, **Third**, **Fourth**, **Fifth**, **Sixth**, **Eighth**, and **Eleventh Circuits** have all held that Section 1252(a)(2)(C) divests the courts of jurisdiction to adjudicate factual challenges to the denial of deferral of removal under the CAT. See, *e.g.*, *Ortiz-Franco* v. *Holder*, 782 F.3d 81, 88 (2d Cir. 2015); *Cole* v. *United States Attorney Gen.*, 712 F.3d 517, 524, 532 (11th Cir. 2013); *Escudero-Arciniega* v. *Holder*,

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[7] The Seventh Circuit, applying *Wanjiru*, regularly adjudicates cases involving factual challenges. See, *e.g.*, *Teneng* v. *Holder*, 602 F. App'x 340, 347 (7th Cir. 2015); *Bitsin* v. *Holder*, 719 F.3d 619, 630-631 (7th Cir. 2013).

[8] Likewise, the Ninth Circuit regularly adjudicates such challenges, applying *Lemus-Galvan*. See, *e.g.*, *Vinh Tan Nguyen* v. *Holder*, 763 F.3d 1022, 1029 (9th Cir. 2014); *Edu* v. *Holder*, 624 F.3d 1137, 1141-1142 (9th Cir. 2010); *Eneh* v. *Holder*, 601 F.3d 943, 946 (9th Cir. 2010).

702 F.3d 781, 785 (5th Cir. 2012); *Turkson* v. *Holder*, 667 F.3d 523, 526-527 (4th Cir. 2012); *Pieschacon-Villegas* v. *Attorney Gen. of U.S.*, 671 F.3d 303, 309-310 (3d Cir. 2011); *Lovan* v. *Holder*, 574 F.3d 990, 998 (8th Cir. 2009); *Gourdet* v. *Holder*, 587 F.3d 1, 5 (1st Cir. 2009); *Tran* v. *Gonzales*, 447 F.3d 937, 943 (6th Cir. 2006).

B. This is an attractive vehicle to resolve a vitally important question.

1. The United States agrees that this issue is "a recurring question of substantial importance." U.S. *Ortiz-Franco* Br. at 9. This "frequently litigated" (*id.* at 15) question will continue to produce conflicting outcomes on identical facts without this Court's intervention. See also U.S. *Granados* Br. at 8 ("This is a recurring question of substantial importance that will warrant this Court's review in an appropriate case."); U.S. *Shabo* Br. at 8 (same).

As the only form of relief available to *all* noncitizens, CAT deferral provides a vital lifeline to immigrants with criminal pasts who have a well-founded fear of torture. And judicial review matters a great deal. Courts in the Seventh and Ninth Circuits regularly remand these cases for further review, acting as a vital check in ensuring that the United States is not shipping away these individuals to their imminent harm or death. See, *e.g.*, *Wanjiru*, 705 F.3d at 267 (remanding after concluding that a foreign sect "will probably murder Wanjiru with the acquiescence of Kenyan government officials, if he is returned"); *Vinh Tan Nguyen*, 763 F.3d at 1032 (remanding because "the record compels the conclusion that * * * Nguyen is likely to be arrested, detained and tortured in Vietnam").

Assessing the appropriate degree of judicial review over administrative agency action is in all cases important. Here, where the subject matter is life-or-death, ensuring that the courts exercise appropriate judicial review of agency action is of the utmost importance. It is intolerable that the scope of judicial review presently differs drastically based on mere geography.

2. This is an appropriate vehicle for review. The court of appeals resolved the deferral of removal claim based on its perceived lack of jurisdiction to review the "finding of fact" as to whether petitioner would "likely be singled out for torture if he was removed." App., *infra*, 11a. On that basis, the court dismissed the petition for review in part. *Ibid*.

The court's holding (App., *infra*, 11a) was a straightforward application of *Cole* v. *United States Attorney General*, 712 F.3d 517 (11th Cir. 2013). In *Ortiz-Franco*, *Granados*, and *Shabo*, the government cited *Cole* as representing one side of the "entrenched" "circuit split" over the question presented. U.S. *Ortiz-Franco* Br. at 15 & n.4; U.S. *Granados* Br. at 9; U.S. *Shabo* Br. at 9.

What is more, there is a reasonable prospect that, if the court of appeals had jurisdiction over petitioner's claim, it would reverse. Indeed, the IJ had *granted* petitioner relief. App., *infra*, 41a-47a. The IJ found that petitioner had been subject to past torture specifically because "Hizballah militants pursued [petitioner] with the intent to harm him" and that the terrorists' conduct was designed, at the very least, to "scare or intimidate" petitioner. *Id.* at 43a.

As for the likelihood of future torture, the IJ concluded that, because petitioner "has resided in the United State[s] for nearly a decade, and his immediate family resides lawfully in the U.S.," petitioner is "particularly susceptible" to torture in Lebanon. App., *infra*, 45a. Moreover, evidence "shows a worsening state of affairs for the Druze in Lebanon due to the political instability in the region." *Id.* at 46a. Government reports indicate that "Hizballah retain[s] significant influence over parts of the country, and the Lebanese government [has] made no tangible progress toward disbanding and disarming armed militia groups, including Hizballah." *Ibid.*

The IJ thus concluded that "[d]ue to [petitioner's] past experience, the civil strife within Lebanon, the destabilization of surrounding countries, and the violent activities of Hizballah and other violent groups," petitioner, "as a religious minority with strong western connections, will more likely than not be targeted personally for harm rising to the level of torture if he was removed to Lebanon." App., *infra*, 46a.

Given these factual findings by the IJ below, it is plausible that, on remand, petitioner may convince the court of appeals that the BIA decision overturning deferral of removal was in error.

C. The decision below is wrong.

Certiorari is additionally warranted because the decision below is wrong. Indeed, "this Court applies a 'strong presumption' favoring judicial review of administrative action." *Mach Mining, LLC* v. *EEOC*, 135 S. Ct. 1645, 1651 (2015). Judicial review is available even where a statute "plausibly can be read as imposing an absolute bar to judicial review." *Lin-*

dahl v. *Office of Pers. Mgmt.*, 470 U.S. 768, 779 (1985). That is to say, "[i]f a provision can reasonably be read to permit judicial review, it should be." *Cuozzo Speed Techs., LLC* v. *Lee*, 136 S. Ct. 2131, 2150 (2016) (Alito, J., concurring in part and dissenting in part) (summarizing the case law). Judicial review "enforces the limits that *Congress* has imposed on the agency's power. It thus serves to buttress, not 'undercut,' Congress's objectives." *Id.* at 2151.

1. At the outset, the notion that Congress purposefully stripped the courts of appeals of jurisdiction over this particular agency action is nothing short of perverse. Withholding (and deferral) of removal is the fundamental safeguard to ensure that the United States does not remove an individual to a country where he or she is likely to be tortured or killed. In this circumstance, an agency is making life-or-death decisions. To be sure, the jurisdiction-stripping provisions indicate Congress's intent to streamline the normal deportation process for certain noncitizens with criminal histories. But there is *no* indication that Congress sought to water down the crucial protections that *all* individuals—including those with criminal histories—have against removal to a country where torture or death is likely. To the contrary, Congress has made clear that "[a] conviction of an aggravated felony has no effect on CAT eligibility." *Moncrieffe* v. *Holder*, 569 U.S. 184, 187 n.1 (2013).

What is more, CAT withholding (and deferral) relief is *principally* used by those with criminal histories, as it is those histories that render them ineligible for an asylum claim. If Congress had actually intended to strip the courts of appeals of jurisdiction

over such momentous agency action, surely it would have said so with far more clarity.

To the contrary, for two distinct reasons, Section 1252(a)(2)(C) may plausibly be read as conferring judicial review over the administrative agency action at issue here. That compels the conclusion that jurisdiction exists over the question here.

2. Section 1252(a)(2)(C) governs "any final order of removal." When a court of appeals reviews the Board's denial of a CAT request for deferral of removal, it is not reviewing the "final order of removal" itself. Section 1252(a)(2)(C) is thus inapplicable.

As the Seventh Circuit explained, "[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." *Wanjiru*, 705 F.3d at 264. Because "Section 1252(a)(2)(C) addresses only judicial review of final orders of removal," it does not apply in these circumstances. *Ibid.* See also *Issaq* v. *Holder*, 617 F.3d 962, 970 (7th Cir. 2010) (jurisdictional bar does not apply to CAT deferral because deferral of removal is an "inherently non-final remedy").

Section 2242(d) of FARRA, moreover, confirms that an order granting or denying CAT relief is distinct from a "final order of removal." FARRA provides jurisdiction over an appeal of a request for CAT relief; it states 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). This establishes that the CAT claim is *not* the "final order of removal" itself.

The REAL ID Act of 2005 further demonstrates that a denial of a request for deferral of removal is distinct from the final order of removal itself. See Pub. L. No. 109-13, div. B, § 106(a)(1)(A)(iii), 119 Stat. 231, 310. The REAL ID Act revised the jurisdictional rules established in 8 U.S.C. § 1252 to eliminate habeas review of certain types of claims under the INA. The Act was passed in response to *INS* v. *St. Cyr*, 533 U.S. 289 (2001), where the Court held that certain jurisdiction-stripping provisions did not apply to habeas review.

As relevant, Section 1252(a)(5) eliminated habeas review of "order[s] of removal":

> [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*.

8 U.S.C. § 1252(a)(5) (emphasis added). And Section 1252(a)(4) eliminated habeas review of CAT claims:

> [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 *any cause or claim under the [CAT]*.

Id. § 1252(a)(4) (emphasis added).

Read together, these provisions establish that "an order of removal" is distinct from "any cause or claim under the" CAT. If it were otherwise, Section 1252(a)(4) would be superfluous. See *Corley* v. *United States*, 556 U.S. 303, 314 (2009) ("[A] statute should be construed so that effect is given to all its provi-

sions, so that no part will be inoperative or superfluous, void or insignificant.").

If anything, Section 1252(a)(4) *expands* jurisdiction to provide for review over the sort of factual claim at issue here. It provides appellate jurisdiction over "*any* cause or claim." 8 U.S.C. § 1252(a)(4) (emphasis added). That language plainly encompasses a factual challenge to the Board's decision.

3. A CAT deferral claim is additionally not subject to Section 1252(a)(2)(C) because a noncitizen denied CAT relief on the merits is not "removable *by reason of*" a criminal offense. See *Lemus-Galvan*, 518 F.3d at 1083 (emphasis added).

In *Lemus-Galvan*, the Ninth Circuit held that, because CAT deferral is available to all noncitizens, regardless of whether they have a criminal history, the denial of CAT deferral is always a decision "on the merits" of the CAT claim—and not, as Section 1252(a)(2)(C) requires, a decision "on the basis of [a criminal] conviction." 518 F.3d at 1083-1084. As the court explained (*id.* at 1083), the criminal bar applies only to noncitizens found to be removable "by reason of having committed a [listed] criminal offense." 8 U.S.C. § 1252(a)(2)(C).

CAT deferral, on the other hand, is available whether or not the noncitizen seeking relief has a criminal history: "even if an alien has been convicted of a 'particularly serious crime,' and is ineligible for withholding of removal under the CAT, an IJ is required to grant deferral of removal." *Lemus-Galvan*, 518 F.3d at 1083. Thus, a denial of deferral is always made "on the merits": on the basis that the noncitizen failed to prove "that it is more likely than not

that he or she would be tortured." 8 C.F.R. § 1208.16(c)(2)-(3). *That* determination is entirely independent of any criminal history and therefore not subject to Section 1252's jurisdictional bar.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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MAY 2019