No.

In the Supreme Court of the United States

ALVARO ADAME,

Petitioner,

v.

LORETTA E. LYNCH, ATTORNEY GENERAL,

Respondent.

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

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether, in a case seeking judicial review of the Board of Immigration Appeals' or an immigration judge's disposition of an application for cancellation of removal, a court of appeals has jurisdiction under 8 U.S.C. § 1252(a)(2)(D) to review mixed questions of law and fact?

TABLE OF CONTENTS

Question Presented i
Table of Authorities iii
Opinions Below 1
Jurisdiction 1
Constitutional and Statutory Provisions Involved 1
Statement 2
A. Statutory background 3
B. Proceedings below 6
Reasons for Granting the Petition 9
A. The courts of appeals are in conflict on whether mixed questions of law and fact are reviewable under Section 1252(a)(2)(D) 9
B. Mixed questions of law and fact are reviewable under Section 1252(a)(2)(D) 15
C. The question presented here is a recurring one of great practical importance 22
Conclusion 26
Appendix A – Court of appeals opinion (Aug. 12, 2014) 1a
Appendix B – Board of immigration appeals opinion (May 28, 2013) 11a
Appendix C – Immigration court order (Oct. 6, 2011) 14a
Appendix D – Denial of petition for rehearing en banc (Jan. 22, 2015) 24a

TABLE OF AUTHORITIES

Cases

Aguirre v. *INS*,
79 F.3d 315 (2d Cir. 1996) 25

Almuhtaseb v. *Gonzales*,
453 F.3d 743 (6th Cir. 2006) 10

Bakhtriger v. *Elwood*,
360 F.3d. 414 (3d Cir. 2004) 12

Benslimane v. *Gonzales*,
430 F.3d 828 (7th Cir. 2005) 22, 24

Bogardus v. *Commissioner*,
302 U.S. 34 (1937) 16

Boumediene v. *Bush*,
553 U.S. 723 (2008) 19, 20, 21, 22

Bragdon v. *Abbott*,
524 U.S. 624 (1998) 16

Bridges v. *Wixon*,
326 U.S. 135 (1945) 23

Cadet v. *Bulger*,
377 F.3d 1173 (11th Cir. 2004) 24

Cevilla v. *Gonzales*,
446 F.3d 658 (7th Cir. 2006) 10

Chen v. *U.S. Dep't of Justice*,
434 F.3d 144 (2d Cir. 2006) (*Chen I*) 10, 11

Chen v. *U.S. Dep't of Justice*,
471 F.3d 315 (2d Cir. 2006) (*Chen II*) ..... *passim*

Chin Yow v. *United States*,
208 U.S. 8 (1908) 18

Cases—continued

Cuellar Lopez v. *Gonzales*,
427 F.3d 492 (7th Cir. 2005) 10

Diallo v. *Gonzales*,
447 F.3d 1274 (10th Cir. 2006) 11

Ex parte Drydon,
(1793) 101 Eng. Rep. 235, 236 (K.B.) 21

Fitzgerald v. *Barnstable Sch. Comm.*,
555 U.S. 246 (2009) 25

Garcia Perez v. *Holder*,
380 F. App'x 675 (9th Cir. 2010) 11

Gardener's Case,
(1600) 78 Eng. Rep. 1048 (K.B.) 20, 21

Goldswain's Case,
(1778) 96 Eng. Rep. 711 (K.B.) 21

Richard Good's Case,
(1760) 96 Eng. Rep. 137 (K.B.) 20

Gourdet v. *Holder*,
587 F.3d 1 (1st Cir. 2009) 13

Guzman v. *Att'y Gen.*,
500 F. App'x 130 (3d Cir. 2012) 12

Hernandez v. *Holder*,
736 F.3d 234 (2d Cir. 2013 14

Hetley v. *Boyer*,
(1613) 79 Eng. Rep. 287 (K.B.). 21

Hollingshead's Case,
(1702) 91 Eng. Rep. 307 (K.B.) 21

Huang v. *Holder*,
444 Fed. App'x 824 (5th Cir. 2011) 14

Cases—continued

INS v. *St. Cyr*,
533 U.S. 289 (2001) ..... *passim*

Jean-Pierre v. *U.S. Att'y Gen.*,
500 F.3d 1315 (11th Cir. 2007) 12

Kamara v. *Att'y Gen.*,
420 F.3d 202 (3d Cir. 2005) 12

Kawashima v. *Holder*,
132 S. Ct. 1166 (2012) 17

Khunaverdiants v. *Mukasey*,
548 F.3d 760 (9th Cir. 2008) 24

Kozhaynova v. *Hilder*,
641 F.3d 187 (6th Cir. 2011) 10

Kucana v. *Holder*,
558 U.S. 233 (2010) 17

Lumataw v. *Holder*,
582 F.3d 78 (1st Cir. 2009) 13

Morales-Flores v. *Holder*,
328 F. App'x 987 (6th Cir. 2009) 11

Nguyen v. *Mukasey*,
522 F.3d 853 (8th Cir. 2008) 12

Padilla v. *Kentucky*,
559 U.S. 356 (2010) 22

Pullman-Standard v. *Swint*,
456 U.S. 273 (1982) 15, 16

R. v. *Nathan*,
(1730) 93 Eng. Rep. 97, 914 (K.B.) 21

R. v. *Turlington*,
(1761) 97 Eng. Rep. 741 (K.B.) 21

Cases—continued

R. v. *Young*,
(1808) 103 Eng. Rep. 650 (K.B.) 20

Rais v. *Holder*,
768 F.3d 453 463 ..... 9, 10, 15

Ramadan v. *Gonzales*,
427 F.3d 1218 (9th Cir. 2005)
(*Ramadan I*) 11

Ramadan v. *Gonzales*,
479 F.3d 646 (9th Cir. 2007)
(*Ramadan II*) 8, 11, 19, 24

Ramos v. *Holder*,
660 F.3d 200 (4th Cir. 2011) 13

Richard Good's
Case (1760) 96 Eng. Rep. 137 20

Rosario v. *Holder*,
627 F.3d 58 (2d Cir. 2010) 13

Saintha v. *Mukasey*,
516 F.3d 243 (4th Cir. 2008) 13

Sanchez-Velasco v. *Holder*,
593 F.3d 733 (8th Cir. 2010) 14

Toussaint v. *Att'y Gen.*,
455 F.3d 409 (3d Cir. 2006) 12

United States v. *Jung Ah Lung*,
124 U.S. 621 (1888) 18

United States v. *Wong Kim Ark*,
169 U.S. 649 (1898) 18

Viracacha v. Mukasey,
518 F.3d 511 (7th Cir. 2008) 10

Cases—continued

Ex parte Watkins,
28 U.S. 193 (1830) 21

Woodby v. *INS*,
385 U.S. 276 (1966) 23

Zadvydas v. *Davis*,
533 U.S. 678 (2001) 19

Zhu v. *Gonzales*,
493 F.3d 588 (5th Cir. 2007) 14

Statutes

8 U.S.C. § 1101(a)(47)(B) 3

8 U.S.C. § 1229(a)(1) 3

8 U.S.C. § 1229b 4

8 U.S.C. § 1229b(b)(1) 3, 7

8 U.S.C. § 1252(a)(2)(A) 23

8 U.S.C. § 1252(a)(2)(D) ..... *passim*

8 U.S.C. § 1252(a)(5) 3

28 U.S.C. § 1254(1) 1

REAL ID Act of 2005,
Pub. L. No. 109-13, 119 Stat. 231 ..... *passim*

Miscellaneous

EOIR, U.S. Dep't of Justice, FY2008
Statistics Yearbook (2009) 23

EOIR, U.S. Dep't of Justice, FY2013
Statistics Yearbook A1 (2014) 3, 23

Federal Rule of Civil Procedure 52(a) 16

H.R. Rep. No. 109-72 (2005) ..... *passim*

Miscellaneous—continued

Gerald L. Neuman, *Habeas Corpus, Executive Detention, and the Removal of Aliens*, 98 Colum. L. Rev. 961 (1998) 20

Peter H. Schuck & Theodore Hsien Wang, *Continuity and Change: Patterns of Immigration Litigation in the Courts, 1979-1990*, 45 Stan. L. Rev. 115 (1992) 22

U.S. Const. art. I, § 9, cl. 2 ..... 1, 2, 5

PETITION FOR A WRIT OF CERTIORARI

Petitioner Alvaro Adame respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Seventh Circuit in this case.

OPINIONS BELOW

The decision of the court of appeals (App., *infra*, 1a-10a) is reported at 762 F.3d 667. The decisions of the Board of Immigration Appeals (App., *infra*, 11a-13a) and of the Immigration Judge (App., *infra*, 14a-23a) are unreported.

JURISDICTION

The judgment of the Seventh Circuit was entered on August 12, 2014. Rehearing was denied on January 22, 2015. On April 12, 2015, Justice Kagan extended the time for filing the petition for a writ of certiorari to June 21, 2015. This Court's jurisdiction rests on 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Suspension Clause of the U.S. Constitution, U.S. Const. art. I, § 9, cl. 2, provides:

> The Privilege of the Writ of Habeas Corpus shall not be suspended, unless when in Cases of Rebellion or Invasion the public safety may require it.

8 U.S.C. § 1252(a)(2)(D) provides:

> Nothing in subparagraph (B) or (C), or in any other provision of this chapter (other than this section) which limits or eliminates judicial review, shall be construed as precluding review of constitutional claims or questions

> of law raised upon a petition for review filed with an appropriate court of appeals in accordance with this section.

STATEMENT

This case presents the question whether, when a noncitizen seeks judicial review of an agency's denial of cancellation of removal from the United States, the court may review mixed questions of law and fact—that is, the application of law to undisputed fact. In the decision below, the Seventh Circuit held that it lacks the jurisdiction to consider such mixed questions; it applied its "strict" rule that "excludes from our jurisdiction challenges to an [immigration judge's] application of the law to the facts of a case." App., *infra*, 8a. This Court should review that decision.

As the Seventh Circuit candidly acknowledged and demonstrated below, its rule departs from the approach taken by numerous other courts of appeals, and "[t]he conflict in the circuits on this point is serious one." App., *infra*, 8a. That rule also is wrong, as the Seventh Circuit's express rejection of the thoroughly considered holdings of other courts suggests; the approach taken below departs from the congressional text and purpose, while raising grave constitutional concerns under the Suspension Clause, U.S. Const. art. I, § 9, cl. 2, of just the sort that led this Court to find for judicial review in *Immigration and Naturalization Service* v. *St. Cyr*, 533 U.S. 289 (2001). And the question presented is one of enormous practical importance, arising with great frequency in circumstances where the outcome may determine whether a long-time resident of the United States is permitted to remain in this country with his or her family—as it does in this case. Resolution by

this Court of the conflict at issue here accordingly is warranted.

A. Statutory background

1. The government may initiate removal proceedings against a noncitizen by filing a Notice to Appear with an Immigration Judge (IJ), specifying the grounds alleged for removal. 8 U.S.C. § 1229(a)(1). Noncitizens who are deemed removable may petition for relief, such as asylum or cancellation of removal. See EOIR, U.S. Dep't of Justice, FY2013, Statistics Yearbook A1 (2014). Cancellation of removal, the form of relief at issue in this case, authorizes the Attorney General to cancel removal of a noncitizen who is inadmissible or deportable if various conditions are met, among them that the noncitizen maintained a "physical[] pres[ence] in the United States for a continuous period of not less than ten years immediately preceding the date of such application." 8 U.S.C. § 1229b(b)(1).[1]

Noncitizens determined to be removable by the IJ may appeal the removal order to the Board of Immigration Appeals (BIA). The removal order becomes final upon review by the BIA (or upon expiration of the filing deadline for BIA review). 8 U.S.C. § 1101(a)(47)(B). At that point, the noncitizen may seek judicial review of the removal order by filing a petition for review in the court of appeals for the circuit in which the removal hearing was conducted. 8 U.S.C. § 1252(a)(5).

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[1] The other required conditions considered in this case are that the noncitizen has "good moral character" and that "removal would result in exceptional and extremely unusual hardship to the alien's spouse, parent, or child, who is a citizen of the United States." 8 U.S.C. § 1229b(b)(1).

2. This case concerns the scope of the judicial relief that is available on appeal of a BIA decision under the REAL ID Act of 2005, Pub. L. No. 109-13, 119 Stat. 231, the federal statute that currently governs the removal of noncitizens from the United States.

Under statutes in force prior to 1996, the Attorney General had broad discretion to waive the deportation of noncitizens. See *St. Cyr*, 533 U.S. at 294-295. Noncitizens also had been able to apply for "suspension of deportation," the precursor to cancellation of removal, since the enactment of the Immigration and Nationality Act of 1952. 8 U.S.C. § 1229b. In 1996, however, Congress passed the Antiterrorism and Effective Death Penalty Act (AEDPA), and the Illegal Immigration Reform and Immigrant Responsibility Act (IIRIRA), which narrowed the class of noncitizens eligible for administrative relief and repealed provisions that had allowed noncitizens in custody to seek review of a deportation order in district court. The government read these provisions to greatly restrict noncitizens' ability to contest the Attorney General's denial of a waiver, effectively stripping courts of jurisdiction to review final removal orders against noncitizens convicted of certain criminal offenses. See *St. Cyr*, 533 U.S. at 297-298, 311-312.

In 2001, this Court in turn cast serious doubt on the constitutionality of such limits on judicial review. In *St. Cyr*, the Court explained that, if the 1996 statutory revisions denied courts the authority to review such cases in a habeas corpus proceeding while providing no alternative means of judicial review, those statutes likely were inconsistent with the requirements of the Constitution's Suspension Clause, which generally prohibits Congress from suspending

the writ of habeas corpus. 533 U.S. at 300 (citing U.S. Const. art. I, § 9, cl. 2).

In response to *St. Cyr*, Congress enacted the REAL ID Act provision at issue here, 8 U.S.C. § 1252(a)(2)(D). As the Second Circuit has explained, "[t]he Conference Report makes clear that Congress, in enacting the REAL ID Act, sought to avoid the constitutional concerns outlined by [this] Court in *St. Cyr*, which stated that as a result of the Suspension Clause, '*some* judicial intervention in deportation cases is unquestionably required by the Constitution.'" *Chen* v. *United States Department of Justice*, 471 F.3d 315, 326 (2d Cir. 2006) (*Chen II*) (quoting *St. Cyr*, 533 U.S. at 300 and citing H.R. Rep. No. 109-72, at 174 (2005), reprinted in 2005 U.S.C.C.A.N. 240, 300 (footnote omitted)). Thus, "Congress intended to 'provide a scheme [of judicial review] which is an adequate and effective substitute for habeas corpus.'" *Ibid.* (quoting H.R. Rep. No. 109-72, *supra*, at 175; bracketed material added by the court).

Congress accomplished this goal via a two-step approach. First, in Section 1252(a)(2)(B), Congress imposed a general jurisdictional bar, depriving courts of the authority to review denials of discretionary relief. This provision effectively repealed previously existing forms of judicial review. Then, in Section 1252(a)(2)(D), Congress provided a substitute for habeas corpus by granting courts jurisdiction to review specified claims. It provides:

> Nothing in subparagraph (B) or (C), or in any other provision of this chapter (other than this section) which limits or eliminates judicial review, shall be construed as precluding review of *constitutional claims or questions of law* raised upon a petition for review filed

> with an appropriate court of appeals in accordance with this section.

8 U.S.C. § 1252(a)(2)(D)(emphasis added). As the Conference Report accompanying the statute explained, this provision was intended to "restore[] such review to its former settled form prior to 1996." H.R. Rep. 109-72, at 174.

B. Proceedings below

Petitioner is a 36-year-old native of Mexico. He testified that he arrived in Kansas in 1997, where he lived until moving to Wisconsin in 2001. See Certified Administrative Record ("CAR") 111-113. There, petitioner met his girlfriend of thirteen years, with whom he has four children, all of whom were born in the United States. CAR 105, 112.

In 2009, petitioner pleaded guilty to the charge of drinking in a public park. App., *infra*, 2a; CAR 70. After the Department of Homeland Security sought his removal from the United States, petitioner conceded removability and submitted an application for cancellation of removal. App., *infra*, 2a. To establish eligibility for cancellation, petitioner had to demonstrate, among other things, ten years' continuous presence in the United States. *Id.* at 2a-3a. But the IJ denied the cancellation-of-removal application on the ground that petitioner did not present sufficient evidence to show his continuous ten-year presence in this country. The IJ refused to accept applicant's contrary testimony absent additional corroborating evidence, even though that testimony was unrebutted and undisputed, and was supported by evidence including, among other things, a traffic ticket from 2001, tax returns from 2001-2008, sworn affidavits from multiple landlords (one of whom has known the

petitioner since 2000), and a character reference from the pastor of his church. *Id.* at 3a, 18a; CAR 245-276.[2] The BIA affirmed, resting its decision exclusively on petitioner's failure to show ten years' continuous presence. App., *infra*, 11a-13a.

On petition for review, the Seventh Circuit dismissed for lack of jurisdiction under Section 1252(a)(2)(D). App., *infra*, 1a-10a. In relevant part, petitioner had argued that his case presented a mixed question of law and fact—whether the IJ incorrectly applied law to the facts of the case by requesting additional evidence of continuous physical presence when the request was not justified by a reasonable finding of lack of credibility and the requested evidence was not reasonably available. The court of appeals recognized that petitioner's argument was that the IJ "incorrectly applied the law to the facts by requiring additional evidence that [petitioner] had been in the United States for ten years of continuous residence when that evidence was not reasonably available." *Id.* at 6a. But the court considered itself to be without jurisdiction to consider that argument under its "strict" rule that "excludes from our jurisdiction challenges to an IJ's application of the law to the facts of a case"; instead, the Seventh Circuit "limit[s] [its] review to constitutional claims and questions of statutory construction." *Id.* at 8a.

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[2] The IJ also held that petitioner failed to make the required showings of "good moral character" and that "removal would result in exceptional and extremely unusual hardship to the alien's spouse, parent, or child, who is a citizen of the United States." 8 U.S.C. § 1229b(b)(1). See App., *infra*, 18a-23a. Those considerations were not addressed by the BIA or the court of appeals, however, and accordingly are not at issue here.

In dismissing on this ground, the Seventh Circuit "acknowledge[d]" that its reading of Section 1252-(a)(2)(D) conflicts with the contrary approach taken by at least five other circuits, which hold "the position that the jurisdiction to review questions of law referred to in 8 U.S.C. § 1252(a)(2)(D) extends to 'questions involving the application of statutes or regulations to undisputed facts, sometimes referred to as mixed questions of fact and law.'" App., *infra*, 6a (quoting *Ramadan* v. *Gonzales*, 479 F.3d 646, 650 (9th Cir. 2007) (*Ramadan II*)). Although the Seventh Circuit recognized that "[t]he conflict in the circuits on this point is a serious one," it chose to adhere to its settled rule. *Id.* at 8a.

The full court of appeals denied rehearing en banc. App., *infra*, 24a-25a. In an opinion concerning the denial of rehearing, however, Judge Hamilton agreed that the Seventh Circuit's rule departed from that of other courts of appeals and that his court is "on the wrong side of a circuit split." *Id.* at 25a-26a. He also recognized that the legislative background, as well as the meaning of similar statutory language as used outside the immigration context, "indicates an intent to preserve some judicial review for mixed questions of fact and law." *Id.* at 27a.[3]

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[3] Judge Hamilton nevertheless did not support rehearing en banc because he believed that petitioner's challenge was to a credibility determination of the IJ. App., *infra*, 28a. But that view, which was *not* the ground on which the panel held itself to lack jurisdiction, was mistaken; it departs both from the questions raised in petitioner's brief below (at 16) and the panel's understanding of the issue presented, which it recognized to be that the IJ "incorrectly applied the law to the facts." App., *infra*, 6a. The panel proceeded to deny petitioner's claim on the ground that "challenges to an IJ's application of law to the facts of a case" fall "outside of our authority." *Id.* at 8a.

REASONS FOR GRANTING THE PETITION

There is no denying the acknowledged conflict in the circuits here. And resolution of that conflict is imperative. As other courts of appeals have recognized, the approach used below both departs from the plain congressional purpose and is of doubtful constitutionality. The issue here arises with great frequency, and when it does the cases invariably involve matters of the greatest practical importance to the affected individuals facing removal from this country. And as matters now stand, identically situated persons are being treated differently, based solely on the accident of geography. This Court should grant review.

A. The courts of appeals are in conflict on whether mixed questions of law and fact are reviewable under Section 1252-(a)(2)(D)

At the outset, the courts of appeals undoubtedly are in conflict on the question whether Section 1252-(a)(2)(D) authorizes review of agency decisions resolving mixed questions of law and fact; that disagreement is clear and acknowledged. The court below candidly recognized its disagreement with numerous other courts of appeals (App., *infra*, 6a-7a), ultimately concluding that "[t]he conflict in the circuits on this point is a serious one." *Id.* at 8a. Other courts have similarly, and recently, recognized that "a circuit split has emerged over whether [Section 1252(a)(2)(D)] includes only issues of statutory construction and interpretation or also includes mixed questions of law and fact." *Rais* v. *Holder*, 768 F.3d 453 463 n.17 (6th Cir. 2014). This Court should resolve that longstanding disagreement.

a. On one side of the conflict are courts like the **Seventh Circuit** that "exclude[] from our jurisdiction challenges to an IJ's application of the law to the facts of a case" under Section 1252(a)(2)(D), "limit[ing] our review to constitutional claims and questions of statutory construction." App., *infra*, 8a. That is the Seventh Circuit's "strict" position, to which it has "adhered for years" and which it "reconsidered and reaffirmed" even after the Second Circuit vacated and modified the decision on which the Seventh Circuit originally relied in formulating its rule. *Ibid.* (citing *Chen* v. *U.S. Dep't of Justice*, 434 F.3d 144, 153-154 (*Chen I*), vacated 471 F.3d 315 (2d Cir. 2006). See *Viracacha v. Mukasey*, 518 F.3d 511, 515-516 (7th Cir. 2008); *Cevilla* v. *Gonzales*, 446 F.3d 658, 661 (7th Cir. 2006); *Cuellar Lopez* v. *Gonzales*, 427 F.3d 492, 493 (7th Cir. 2005).

At least one other court of appeals, the **Sixth Circuit**, adheres to the Seventh Circuit's rule. Like the Seventh Circuit, that court based its rule on the Second Circuit's since-rejected decision in *Chen I*. See *Almuhtaseb* v. *Gonzales*, 453 F.3d 743, 748 (6th Cir. 2006). And like the Seventh Circuit, the Sixth Circuit has adhered to its initial position even after the Second Circuit changed its rule and "a circuit split * * * emerged," "expressly * * * declin[ing] to expand its definition of 'question of law' to include mixed questions of law and fact." *Rais*, 768 F.3d at 463 n.17. See *Kozhaynova* v. *Hilder*, 641 F.3d 187, 192 (6th Cir. 2011) ("maintain[ing] a more narrow interpretation of our jurisdiction" and "limit[ing] review to constitutional or statutory interpretation

claims.").[4] See also *Diallo* v. *Gonzales*, 447 F.3d 1274, 1282 (10th Cir. 2006) (relying on *Chen I* for proposition that "the REAL ID Act grants us jurisdiction to review 'a narrow category of issues regarding statutory construction'" (quoting *Chen I*, 434 F.3d at 153)).

b. Conversely, as the court below also explained, other courts of appeals have expressly rejected that narrow approach, taking "the position that the jurisdiction to review questions of law referred to in 8 U.S.C. § 1252(a)(2)(D) extends to 'questions involving the application of statutes or regulations to undisputed facts, sometimes referred to as mixed questions of fact and law.'" App., *infra*, 6a (quoting *Ramadan II*, 479 F.3d at 650.

These courts include the **Ninth Circuit**, which, like the Second Circuit, initially limited review under the REAL ID Act "to a narrow category of issues regarding statutory construction" (*Ramadan* v. *Gonzales*, 427 F.3d 1218, 1222 (9th Cir. 2005) (*Ramadan I*)), but then held on rehearing that "the phrase 'questions of law' as it is used in section 106 of the Real ID Act includes review of the application of statutes and regulations to undisputed historical facts." *Ramadan II*, 479 F.3d at 654 (footnote omitted). See also, *e.g.*, *Garcia Perez* v. *Holder*, 380 F. App'x 675, 678 (9th Cir. 2010) (granting petition for review).

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[4] The court below believed that the Sixth Circuit does address mixed questions of law and fact. App., *infra*, 6a. The unpublished decision it cited for this proposition, however, stated only that the court would address "'non-discretionary factual determination[s].'" *Morales-Flores* v. *Holder*, 328 F. App'x 987, 989 (6th Cir. 2009) (citation omitted). As the more recent, published decisions cited in text confirm, that court's general view is that it lacks the authority to address mixed questions of law and fact.

In addition, the **Third**, **Eighth**, and **Eleventh Circuits** apply the same rule. See *Kamara* v. *Att'y Gen.*, 420 F.3d 202, 211 (3d Cir. 2005) (allowing review of "'issues of application of law to fact, where the facts are undisputed and not the subject to challenge'" (quoting *Bakhtriger* v. *Elwood*, 360 F.3d. 414, 420 (3d Cir. 2004)); *Toussaint* v. *Att'y Gen.*, 455 F.3d 409, 412 n.3 (3d Cir. 2006) (holding that, under Section 1252(a)(2)(D), "we have jurisdiction to review the BIA's application of law to the facts of this case"); *Guzman* v. *Att'y Gen.*, 500 F. App'x 130, 132 (3d Cir. 2012) ("Because this is an issue of application of law to fact and the facts are undisputed, we have jurisdiction under section 1252(a)(2)(D)."); *Nguyen* v. *Mukasey*, 522 F.3d 853, 854-855 (8th Cir. 2008) (finding that "whether the IJ properly applied the law to the facts" is a reviewable "legal question"); *Jean-Pierre* v. *U.S. Att'y Gen.*, 500 F.3d 1315 (11th Cir. 2007) ("we have jurisdiction to review [a noncitizen's] claim in so far as he challenges the application of an undisputed fact pattern to a legal standard," a "conclusion [that] is fully consonant with the decisions" in *Ramadan II*, *Chen II*, and *Kamara*).

And as the court below explained, the **Second Circuit**, while arguably applying a somewhat different test, also "allows some consideration of 'mixed' questions of law and fact, at least to the extent that similar challenges may be brought on habeas corpus review of executive detentions," which "allows a court to consider claims concerning errors in both the interpretation and application of statutes." App., *infra*, 7a (citing *Chen II*, 471 F.3d at 326-327). The Second Circuit thus has held that review under the REAL ID Act is "not limited solely to matters of statutory interpretation." *Chen II*, 471 F.3d at 326. Although the Second Circuit did "not determine the pre-

cise outer limits of the term 'questions of law' under the REAL ID Act" (*id.* at 328) and noted that it lacked jurisdiction to entertain a "challenge [that] is merely an objection to the IJ's factual findings and the balancing of factors in which discretion was exercised" (*id.* at 332), it held that "questions of law" "undeniably can encompass claims of 'erroneous *application* or interpretation of statutes.'" *Id.* at 331 (quoting *St. Cyr*, 533 U.S. at 302 (emphasis added by the Second Circuit)). See *Rosario* v. *Holder*, 627 F.3d 58, 62 (2d Cir. 2010) ("mixed questions of law and fact in BIA decisions are reviewable" when the BIA applies an erroneous legal standard, its "underlying factual determination is 'flawed by an error of law,'" or "the BIA's conclusion * * * is located so far outside the range of reasonable options that it is erroneous as a matter of law").

Finally, although these courts have not stated their rules with compete clarity, the **First**, **Fourth**, and **Fifth Circuits** will entertain challenges under the REAL ID Act involving mixed questions of law and fact in circumstances where the Seventh Circuit has stated expressly that it lacks jurisdiction. See *Lumataw* v. *Holder*, 582 F.3d 78, 86 (1st Cir. 2009) (whether IJ and BIA applied the correct filing deadline "constitutes a 'question of law' underlying the agency's timeliness determinations"); *Gourdet* v. *Holder*, 587 F.3d 1, 5 (1st Cir. 2009) ("we review only whether the undisputed and adjudicated course of conduct described by the BIA amounts to torture"); *Ramos* v. *Holder*, 660 F.3d 200, 203 (4th Cir. 2011) (citation omitted) (reviewing what "'is essentially a legal determination involving the application of law to factual findings'"); *Saintha* v. *Mukasey*, 516 F.3d 243, 249 (4th Cir. 2008) (question is factual, and therefore not reviewable under the REAL ID Act, if it

would be reviewed under the substantial evidence standard); *Zhu* v. *Gonzales*, 493 F.3d 588, 594 (5th Cir. 2007) (citation omitted)("we * * * may reverse an IJ's decision if it was decided on the basis of an erroneous application of the law'); *Huang* v. *Holder*, 444 Fed. App'x 824, 825 (5th Cir. 2011) (declining to address argument "that the BIA misapplied the rules" because argument was not raised before the BIA).

c. This Court should resolve the conflict, which concerns the meaning of a very important and frequently invoked statute. The court below expressly rejected the approach taken by numerous other courts of appeals—including the Second and Ninth Circuits, which have the largest immigration dockets in the Nation. The decisions of this latter group of courts, meanwhile, while clearly departing from the Sixth and Seventh Circuits' absolutist standard, themselves express differing views and some uncertainty about the precise scope of review under Section 1252(a)(2)(D). And there is no doubt that the differing approaches are leading to identical cases being decided differently in different circuits; the demand for additional evidence in this case would have had a different outcome had it arisen outside the Sixth or Seventh Circuits. See, *e.g.*, *Hernandez* v. *Holder*, 736 F.3d 234, 236-237 (2d Cir. 2013) (U.S. birth certificate of petitioner's child and petitioner's testimony that he entered the country two years prior to the child's birth "constitute[d] strong circumstantial evidence" of continuous physical presence); *Sanchez-Velasco* v. *Holder*, 593 F.3d 733, 735-736 (8th Cir. 2010) (reviewing whether the IJ held petitioner "to an impermissibly high burden of proof" in requiring corroborating evidence of continuous physical presence).

There is, moreover, no prospect that the conflict in the circuits will be resolved without this Court's intervention. The Seventh Circuit went out of its way to note that it has adhered to its rule "for years" and that the conflict "has stood for some time." App., *infra*, 8a. And both the Sixth and the Seventh Circuits expressly noted that they had reaffirmed their position, even after the Second Circuit changed *its* approach and vacated the *Chen I* decision upon which the Sixth and Seventh Circuits initially grounded their rule. See *id.* at 7a-8a; *Rais*, 768 F.3d at 462 n.17. The need for this Court's intervention accordingly is manifest.

B. Mixed questions of law and fact are reviewable under Section 1252(a)(2)(D)

As its departure from the holdings of many other courts of appeals suggests, the decision below is incorrect. The statutory text, legislative background, and constitutional concerns all lead to the conclusion that Section 1252(a)(2)(D) permits review of mixed questions of fact and law like the one advanced by petitioner here—questions "in which the historical facts are admitted or established, the rule of law is undisputed, and the issue is whether the facts satisfy the statutory standard." *Pullman-Standard* v. *Swint*, 456 U.S. 273, 289 n.19 (1982).

1. At the outset, that is the better reading of the plain statutory text. The issue here is whether a mixed question of law and fact falls within the term "question of law" as used in Section 1252(a)(2)(D). The statute does not define this phrase. But the Court has recognized in other contexts that questions of "law" encompass mixed questions of law and fact.

Thus, the Court held in *Bogardus* v. *Commissioner*, 302 U.S. 34, 38-39 (1937), that a statute limiting review to questions of "law" permitted intermediate appellate courts to review mixed questions of law and fact. As the Court explained, a decision by the Board of Tax Appeals about what constituted a tax-free gift is "a conclusion of law or at least a determination of a mixed question of law and fact." *Id.* at 39 (internal quotation marks omitted). In doing so, the Court held that this determination "is subject to judicial review and, on such review, the court may substitute its judgment for that of the Board." *Ibid.* (internal quotation marks omitted).

More recently, in *Swint*, the Court construed the scope of Federal Rule of Civil Procedure 52(a), which specifies standards of review for questions of law and of fact. there, the Court equated questions of "law" with mixed questions of law and fact, finding that "conclusions on mixed questions of law and fact are independently reviewable by an appellate court." 456 U.S. at 289-290 & n.19.

"When administrative and judicial interpretations have settled the meaning of an existing statutory provision, repetition of the same language in a new statute indicates, as a general matter, [Congress'] intent to incorporate its administrative and judicial interpretations as well." *Bragdon* v. *Abbott*, 524 U.S. 624, 645 (1998). Congress presumptively was aware of these interpretations and thus intended such a meaning when it when it placed similar language in Section 1252(a)(2)(D). Precedent therefore suggests that the use of the word "law" in Section 1252(a)(2)(D) requires that judicial review extend to mixed question of law and fact.

Any doubt on this linguistic point is resolved by reference to two key interpretive canons. First, an ambiguous statute must be read with reference to the "familiar * * * presumption favoring judicial review of administrative action." *Kucana* v. *Holder*, 558 U.S. 233, 251 (2010); see *St. Cyr*, 533 U.S. at 298. Second, in the immigration context, the Court has long adhered to the precept of "construing ambiguities in deportation statutes in the alien's favor." *Kawashima* v. *Holder*, 132 S. Ct. 1166, 1176 (2012). Accordingly, the text of Section 1252(a)(2)(D) should be understood to require judicial review of mixed questions of law and fact.

2. Moreover, any ambiguity in the statutory language is resolved by examination of the legislative background. There is no doubt, as Judge Cabranes explained for the Second Circuit, that Congress in Section 1252(a)(2)(D) "sought to avoid the constitutional concerns outlined by [this] Court in *St. Cyr*." *Chen II*, 471 F.3d at 326. In that decision, this Court rejected the government's argument that Congress had, in some circumstances, denied *any* judicial review to noncitizens facing deportation. As the Court explained, "[t]he writ of habeas corpus has always been available to review the legality of Executive detention" and has consistently been "invoked on behalf of noncitizens, particularly in the immigration context." *St. Cyr*, 533 U.S. at 305. Yet "at the absolute minimum, the Suspension Clause protects the writ [of habeas corpus] 'as it existed in 1789.'" *Id.* at 301. As a consequence, reading the statutes at issue in *St. Cyr* to deny review previously available in habeas "would give rise to substantial constitutional questions." *Id.* at 300. At least in part to avoid this danger, the Court read the provisions at issue in *St. Cyr* to permit judicial review. See *id.* at 300-305.

In response to the decision in *St. Cyr*, Congress enacted the provisions of the REAL ID Act at issue here, "intending to 'provide a scheme of judicial review which is an adequate and effective substitute for habeas corpus.'" *Chen II*, 471 F.3d at 326 (quoting H.R. Rep. No. 109-72 at 175). Accordingly, "[t]he Conference Report makes clear that Congress, in enacting the REAL ID Act, sought to avoid the constitutional concerns outlined by the Supreme Court in *St. Cyr*." *Ibid.*

These same constitutional concerns require the availability of habeas review of the mixed question of law and fact at issue in this case. The *St. Cyr* Court recognized that habeas review historically was available to challenge not only errors of law, but also the "erroneous *application* * * * of statutes." 533 U.S. at 302 (emphasis added). As noted, habeas also "has always been available to review the legality of Executive detention"—a classic application of law to particular facts. *Id.* at 305. And in the immigration context specifically, the Court has long held that habeas review includes review of mixed questions of law and fact. See, *e.g.*, *Chin Yow* v. *United States*, 208 U.S. 8 (1908) (granting habeas to determine whether alien was given fair hearing); *United States* v. *Wong Kim Ark*, 169 U.S. 649 (1898) (granting habeas petition after immigration official denied entry to person claiming U.S. citizenship); *United States* v. *Jung Ah Lung*, 124 U.S. 621 (1888) (affirming district court's decision to review, under habeas, new evidence of alien's eligibility to remain in the country). Necessarily, then, by intending Section 1252(a)(2)(D) to serve as a substitute for habeas relief, Congress meant to

provide for review of mixed questions in the immigration context.[5]

3. Finally, if any doubt remains about the meaning of Section 1252(a)(2)(D), it should be resolved by application of the same constitutional avoidance considerations that underlay the decision in *St. Cyr* itself. "[W]hen an Act of Congress raises a serious doubt as to its constitutionality," this Court must "first ascertain whether a construction of the statute is fairly possible by which the questions may be avoided." *Zadvydas* v. *Davis*, 533 U.S. 678, 689 (2001) (citations omitted). As we have explained, "at the absolute minimum, the Suspension Clause protects the writ 'as it existed in 1789'" (*St. Cyr*, 533 U.S. at 301 (citation omitted)), which means that any substitute for habeas must, at a minimum, protect the scope of habeas review as it existed at the founding. *Boumediene* v. *Bush*, 553 U.S. 723, 746 (2008);

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[5] The specific point is confirmed by the Conference Committee report, which explained that, "[w]hen a court is presented with a mixed question of law and fact, the court should analyze it to the extent there are legal elements, but should not review any factual elements." H.R. Rep. No. 109-72 at 175. On the face of it, this report shows Congress intended to make mixed questions of law and fact reviewable; had it not, Congress presumably would have said simply that, "when a court is presented with a mixed question of law and fact, the court should dismiss the petition for lack of jurisdiction." Cf. *Ramadan II*, 479 F.3d at 651-654 (relying on this legislative history); *Chen II*, 471 F.3d at 325-328 (same). The point also is supported by Congress's deletion of the limiting modifier "pure" from an earlier version of Section 1252(a)(2)(D), which would have allowed courts to decide only "pure questions of law." See *Ramadan II*, 479 F.3d at 653-654 (deletion of "pure" indicates Congress intended courts to have jurisdiction to decide mixed questions of law and fact); cf. *Chen II*, 471 F.3d at 327.

St. Cyr, 533 U.S. at 301. And Founding-era courts, both in this country and in England, understood such review to extend to mixed questions.

In *Gardener's Case*, for example, the King's Bench used habeas review to assess whether a "dagg," a certain kind of firearm, "was [a] hand-gun within the [applicable] statute." *Gardener's Case*, (1600) 78 Eng. Rep. 1048 (K.B.). Likewise, *R.* v. *Young* employed habeas review to determine whether various laborers satisfied statutory conditions for exemptions from naval impressment. *R.* v. *Young*, (1808) 103 Eng. Rep. 650 (K.B.); see also *Richard Good's Case*, (1760) 96 Eng. Rep. 137 (K.B.) (employing habeas review to see whether a "ship's carpenter" was a "seafaring man" within the meaning of impressment statutes). Both cases involved what we would now call mixed questions of law and fact.

In this country, founding-era habeas review also extended to mixed questions. Thus, in *Ex parte Randolph*, Chief Justice Marshall (sitting as a circuit judge) used habeas review to determine whether a soldier's factual circumstances made him an "officer" for purposes of a statute detaining "officers" for debts owed to the Federal Treasury. 20 F. Cas. 242, 254-256 (C.C.D. Va. 1833). That inquiry, too, addressed the application of law to fact.

Founding-era habeas was particularly rigorous for detentions authorized by "inferior," non-judicial decision-making bodies, such as quasi-administrative and executive agencies. See *Boumediene*, 553 U.S. at 780 ("the common-law habeas court's role was most extensive in cases of pretrial and noncriminal detention"); see also Gerald L. Neuman, *Habeas Corpus, Executive Detention, and the Removal of Aliens*, 98 Colum. L. Rev. 961, 982-983 (1998). This rigorous

habeas review was extended to review of such entities as justices of the peace,[6] bankruptcy commissioners,[7] military units engaged in impressments,[8] city sewer commissions,[9] and insane asylums.[10] This Court's own early precedent further affirms this precept, requiring especially rigorous habeas review of decisions made by "inferior" tribunals—those "courts of special and limited jurisdiction." See, *e.g.*, *Ex parte Watkins* 28 U.S. 193, 205 (1830). Such decision-makers were closely analogous to today's immigration judges. Thus, the historical background demonstrates that "the Suspension Clause questions that would be presented by the [Seventh Circuit's] reading of the immigration statutes before [the Court] are difficult and significant." *St. Cyr*, 533 U.S. at 304.

This understanding, moreover, is supported by the Court's more modern habeas doctrine. The Court has emphasized two key concerns in determining which decisions require close habeas review: (1) the gravity of consequences associated with the determination under review; and (2) the risk of an erroneous determination. *Boumediene*, 553 U.S. at 781-785. On both counts, review of IJ decisions merits especially searching habeas review.

Habeas review is particularly important when "the consequence of error" is severe, such as the "de-

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[6] See *Gardener's Case*, (1600) 78 Eng. Rep. 1048 (K.B.)).

[7] See *Hollingshead's Case*, (1702) 91 Eng. Rep. 307 (K.B.); *R.* v. *Nathan*, (1730) 93 Eng. Rep. 97, 914 (K.B.).

[8] See *Ex parte Drydon*, (1793) 101 Eng. Rep. 235, 236 (K.B.), *Goldswain's Case*, (1778) 96 Eng. Rep. 711 (K.B.).

[9] See *Hetley* v. *Boyer,* (1613) 79 Eng. Rep. 287 (K.B.).

[10] See *R.* v. *Turlington*, (1761) 97 Eng. Rep. 741 (K.B.).

tention of persons" for indeterminate amounts of time. *Boumediene*, 553 U.S. at 785. In the immigration context, the consequence of any error—removal—is grave indeed, for "[p]reserving [a] client's right to remain in the United States may be more important to the client than any potential jail sentence." *Padilla* v. *Kentucky*, 559 U.S. 356, 368 (2010) (internal quotation marks omitted).

Relatedly, this Court has found that "the necessary scope of habeas review in part depends upon the rigor of any earlier proceedings." *Boumediene*, 553 U.S. at 781. Searching habeas review—including review of mixed questions—is especially important when there is a "considerable risk of error in the tribunal's findings of fact." *Id.* at 785. And that, unfortunately, is the case in this context: determinations by the BIA in general and IJs in particular routinely "fall[] below the minimum standards of legal justice." *Benslimane* v. *Gonzales*, 430 F.3d 828, 829-830 (7th Cir. 2005). This is a long-standing and well-documented problem. See Peter H. Schuck & Theodore Hsien Wang, *Continuity and Change: Patterns of Immigration Litigation in the Courts, 1979-1990*, 45 Stan. L. Rev. 115, 167 (1992) (noting that, from 1989-1990, noncitizens succeeded in approximately 28% of cases in which they sought judicial review of final orders of deportation or exclusion). Accordingly, this Court's recent precedent confirms the propriety of close review of IJ decision-making.

C. The question presented here is a recurring one of great practical importance

Finally, the division in the courts of appeals and the error committed by the court below are matters of particular importance: the meaning of Section 1252(a)(2)(D) has significant practical consequences

that extend to many areas of immigration law, including cancellation of removal, asylum, and humanitarian waivers. 8 U.S.C. § 1252(a)(2)(A)-(B). Each of these issues affects a substantial number of people: according to the Executive Office of Immigration Review (EOIR), there are over 270,000 immigration matters filed each year, and 25,811 cancellations of removal have been granted since the REAL ID Act was enacted in 2005. EOIR, U.S. Dep't of Justice, FY2013 Statistics Yearbook at A2, N1 (2014); EOIR, U.S. Dep't of Justice, FY2008 Statistics Yearbook, at R3 (2009).

The individuals whose futures hang in the balance in these proceedings may have lived in the United States for decades, but often lack the paperwork to prove it. If removed, they will be separated from their spouses, their children, their homes, and their livelihoods—as will be petitioner, whose four children live with him in the United States. See *Woodby* v. *INS*, 385 U.S. 276, 286 (1966) ("[M]any resident aliens have lived in this country longer and established stronger family, social, and economic ties here than some who have become naturalized citizens.").

In light of these "drastic deprivations" (*Woodby*, 385 U.S. at 285), the scope of judicial review in removal proceedings is an exceptionally important question. As this Court has recognized, removal "visits a great hardship on the individual and deprives him of the right to stay and live and work in this land of freedom," requiring courts to exercise "[m]eticulous care * * * lest the procedure by which he is deprived of that liberty not meet the essential standards of fairness." *Bridges* v. *Wixon*, 326 U.S. 135, 154 (1945).

Yet, as noted previously, federal courts have repeatedly questioned the BIA's ability to meet even basic standards of fairness. As we have noted, the Seventh Circuit itself, pointing to the reality that it reversed the BIA in some 40% of the cases that are resolved on the merits (based on data from 2005), observed that the immigration adjudication system "has fallen below the minimum standards of legal justice." *Benslimane*, 430 F.3d at 830. Immigration adjudicators routinely make "significant mistake[s]," are "not aware of the most basic facts," have "gaping hole[s] in [their] reasoning," and are unduly influenced by "prejudgment, personal speculation, bias and conjecture." *Id.* at 829 (internal quotation marks omitted) (collecting cases). In light of the severe shortcomings of the administrative system, it is vital for Article III courts to exercise review.

And in this setting, the particular issue presented here has special importance because mixed questions of law and fact arise with great frequency in immigration matters. Such questions include frequently recurring issues such as whether an application for relief was time barred (*e.g.*, *Khunaverdiants* v. *Mukasey*, 548 F.3d 760, 765 (9th Cir. 2008)), whether an immigrant satisfied the conditions for changed circumstances (*e.g.*, *Ramadan II*, 479 F.3d at 657), or whether past acts amounted to "persecution" or someone is more likely than not to be "tortured" if removed. *Cadet* v. *Bulger*, 377 F.3d 1173, 1192 (11th Cir. 2004). At present, immigrants' ability to receive judicial review on these questions is based on the circuit in which they file.

The value of uniformity, at a particular premium in the context of immigration law, is badly threatened by the Seventh Circuit's aberrant position. Cf.

Aguirre v. *INS*, 79 F.3d 315, 317 (2d Cir. 1996) (concluding that "the interests of nationwide uniformity outweigh our adherence to Circuit precedent in this instance"). By its own account, the Seventh Circuit is an outlier in what it recognizes to be a "serious" circuit conflict (App., *infra*, 8a), on an issue that jeopardizes the ability of thousands of long-time residents of the United States to stay in the country.

The issue here is ripe for review: it has been carefully considered by courts across the country; the minority holdings (like the Seventh Circuit's) have been reaffirmed repeatedly; and the issue is squarely presented in this case. This Court should resolve the issue now.[11]

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[11] We note that Judge Hamilton, in voting against rehearing, observed that the IJ (although not the BIA) invoked alternative grounds in denying petitioner relief, and suggested that petitioner "has not offered any persuasive reason to find a legal error in the immigration judge's handling of the good moral character or extreme hardship questions." App., *infra*, 28a. Petitioner failed to make such a showing to Judge Hamilton, however, because those alternative grounds were not before the Seventh Circuit at all; the BIA premised its ruling exclusively on the requirement of continuous physical presence. In fact, for the reasons petitioner argued before the IJ and BIA, there are substantial reasons to believe that he will prevail on the alternative issues before the BIA if the case is remanded. In these circumstances, this Court's usual approach is to grant review, resolve the question presented, and remand the case so that the lower court or agency may address any alternative grounds in the first instance. See, *e.g.*, *Fitzgerald* v. *Barnstable Sch. Comm.*, 555 U.S. 246, 260 (2009).

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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JUNE 2015

* The representation of petitioner by a clinic affiliated with Yale Law School does not reflect any institutional views of Yale Law School or Yale University.