No. 14-1495

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

REPLY BRIEF FOR PETITIONER

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PETITIONER'S REPLY BRIEF

The government's opposition brief does not dispute the central points of the petition. It acknowledges that the circuits are in conflict on the question whether courts of appeals may review mixed questions of law and fact under 8 U.S.C. § 1252(a)(2)(D). Opp. 11-12. It does not deny that the conflict is leading to inconsistent outcomes in identical cases, in an area of the law where uniformity is imperative. And it offers no reason to doubt that the issue is one of enormous practical importance, arising with great frequency—and, when it does arise, determining whether long-time residents of the United States may be eligible for relief from removal. See Pet. 22-25.

The government instead hinges its opposition on a two-pronged contention that this case does not offer a suitable vehicle with which to resolve the question presented. As we explain below, however, this contention offers no valid ground for denying review.

The government also argues at considerable length that the decision below is correct on the merits. Of course, even if there were anything to this contention, it would not justify denial of review in a circumstance where the Seventh Circuit is at the short end of a "serious" and persistent conflict in the circuits. Pet. App. 8a. But here, too, the government is wrong: the decision below departs from the language and manifest purpose of the statute, while raising serious constitutional concerns. The Court accordingly should grant the petition, correct the Seventh Circuit's error, and bring uniformity to this important area of the law.

A. This case presents an appropriate vehicle for resolution of the conflict on the meaning of Section 1252(a)(2)(D)

The only real argument the government offers against review is that "this case would be an unsuitable vehicle to resolve" the conflict in the circuits on whether Section 1252(a)(2)(D) permits review of mixed questions of law and fact. Opp. 12. That contention is a makeweight; there is no impediment to the resolution in this case of the question presented.

1. The government's first "vehicle" assertion is that "[t]he dispute [in this case] is exclusively over an historical fact—whether petitioner entered the country on or before March 3, 1999"—and that petitioner's claim before the Seventh Circuit therefore "raise[d] a 'purely factual issue'" rather than one of mixed law and fact. Opp. 19-20. That being so, the government continues, "petitioner could not obtain relief in this case, even if the Court were to resolve the question presented in his favor." Opp. 20. But this contention misses the mark, for two reasons.

First, as a preliminary matter, the government's contention is simply beside the point. There is no serious doubt that the Seventh Circuit understood the argument presented by petitioner to be one of mixed law and fact—that is, "that the IJ incorrectly applied the law to the facts" (Pet. App. 6a)—and that the court of appeals held that it lacked jurisdiction to entertain petitioner's mixed-question claim under its "strict" rule "that § 1252(a)(2)(B) excludes from [appellate] jurisdiction challenges to an IJ's application of the law to the facts of a case." Pet. App. 8a. That is why the Seventh Circuit did not dismiss petitioner's challenge on the uncontroversial ground that courts lack jurisdiction under Section 1252(a)(2)(D) to entertain purely factual

challenges (a rule that is applied by every circuit), and why it instead offered a lengthy analysis of the appropriate treatment of mixed questions before reaffirming and applying its strict rule that precludes review of such questions. Pet. App. 6a-8a.

In these circumstances, the government's contention that the Seventh Circuit was wrong in regarding petitioner's question as a mixed one (see Opp. 20 & n.4) is no reason to deny review. To the contrary, the Court's usual practice in such a setting is to grant review, resolve the question presented, and remand so that issues of ultimate relief may be addressed by the lower court. See, e.g., *Fitzgerald*, 555 U.S. at 260. If the government at that point wants to contend that petitioner's challenge really is one of pure fact, it will be free to do so on remand to the Seventh Circuit—after this Court settles the meaning of Section 1252(a)(2)(D).

Second, the government is wrong in its characterization of the issue presented by petitioner to the Seventh Circuit as the purely factual one whether he had been continuously present in the United States for ten years. See Opp. 12, 19-20. As the Seventh Circuit carefully explained, petitioner actually "argue[d] that the IJ incorrectly applied the law to the facts by requiring additional evidence that he had been in the United States for ten years of continuous residence when that evidence was not reasonably available. [Petitioner] urges that the IJ erred by calling for documentary evidence to supplement his testimony without considering whether that evidence could reasonably be obtained." Pet. App. 6a. See Pet. Ct. App. 16 (arguing that corroborating evidence "was not readily available" and that "[r]equiring such evidence, with no warning of such or analysis of why it was required, resulted in a violation of the Petitioner's statutory rights").

The Seventh Circuit was correct in regarding this question as a mixed one. The particular question that the Seventh Circuit declined to address was not one of historical fact; it was whether, given the undisputed factual circumstances, it was reasonable for the IJ to demand documentary evidence without considering the availability of that evidence. Other courts likewise have regarded analogous questions as being mixed ones of law and fact. See, *e.g.*, *Diallo* v. *INS*, 232 F.3d 279, 287 (2d Cir. 2000) (court found that a mixed question was presented by allegation that agency failed to "explain why it was reasonable in this case to expect additional corroboration" or to "assess the sufficiency of [the applicant's] explanations for the absence of corroborating evidence").[1] Consequently, the government's assertion that petitioner would not prevail "[e]ven under the precedent of those circuits that petitioner claims are favorable to his position" (Opp. 22) is wrong; that assertion is premised on the government's mischaracterization of the argument presented below by petitioner.[2]

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[1] Although *Diallo* predated the enactment of Section 1252(a)(2)(D), its relevance for present purposes lies in its recognition that questions of this sort are mixed ones of law and fact. See 232 F.3d at 287.

[2] The government also misunderstands our citation to *Hernandez* v. *Holder*, 736 F.3d 234 (2d Cir. 2013), and *Sanchez-Velasco* v. *Holder*, 593 F.3d 733 (8th Cir. 2010), at Pet. 14. Although the government is correct that those decisions did not involve the application of Section 1252(a)(2)(D) (see Opp. 20-21), our point was that, had the Seventh Circuit actually reached the merits of petitioner's argument that the IJ's demand for additional evidence was unreasonable, petitioner might well have prevailed, as did (in relevant part) the applicant in *Hernandez*. See 736 F.3d at 237. The government has nothing to say on that point.

2. The government's second "vehicle" argument rests on its current view that the basic REAL ID Act jurisdictional bar contained in 8 U.S.C. § 1252(a)(2)-(B)(i) (to which Section 1252(a)(2)(D) creates an exception) does not apply at all to cases, like this one, where the IJ is asked to make a nondiscretionary "continuous-presence determination." Opp. 23; see *id.* at 10-11. Here, the government's chain of reasoning runs as follows: **(1)** The Seventh Circuit erred when it held, in *Cevilla* v. *Gonzales*, 446 F.3d 658 (7th Cir. 2006), that the jurisdictional bar of Section 1252(a)(2)(B)(i) precludes judicial consideration of cases (like this one) that do not involve discretionary determinations, an approach that conflicts with that of all other circuits. **(2)** The panel below accordingly erred when (at the government's urging) it applied the *Cevilla* rule to bar petitioner's challenge in *this* case.[3] **(3)** If the Court grants review in this case, it "would likely first decide the antecedent jurisdictional question of the scope of Section 1252(a)(2)(B)(i), and the government would urge the Court to hold that Section 1252(a)(2)(B)(i) does not preclude judicial review here." Opp. 26. **(4)** If the Court were to follow that course, it would have no occasion to address the question presented in the petition, whether Section 1252(a)(2)(D) permits consideration of mixed questions of law and fact that otherwise are subject to the jurisdictional bar of Section 1252(a)(2)(B)(i). **(5)** Although such a holding that Section 1252(a)(2)(B)(i) does not preclude the exercise of jurisdiction here would resolve a different significant

[3] The government's brief to the panel simply invoked *Cevilla* and similar Seventh Circuit decisions for the proposition that review was unavailable, without suggesting that the government disagreed with that conclusion or believed that *Cevilla* should be overruled. See U.S. Ct. App. Br. 2, 18-21.

conflict in the circuits (that created by the *Cevilla* rule itself), the Court nevertheless should deny review, leaving *both* conflicts in place, because the Seventh Circuit might (or might not) choose to overrule *Cevilla* in future hypothetical litigation. See Opp. 26.

This Rube Goldberg chain of reasoning, however, hops the track at several points. *First*, although we have no quarrel with the government's disavowal of *Cevilla*, it is unlikely that, if the Court grants review in this case, it would in fact first decide the "antecedent" question of the scope of Section 1252(a)(2)(B)(i). Opp. 26. As the government recognizes, the application of Section 1252(a)(2)(B)(i) was neither contested below nor raised in the petition for certiorari. Yet it is fundamental that "[o]nly the questions set out in the petition, or fairly included therein, will be considered by the Court" (Sup. Ct. R. 14.1(a)), and the Court "do[es] not decide in the first instance issues not decided below." *Fitzgerald*, 555 U.S. at 260. The Court therefore routinely disregards alternative bases for relief that could have been, but were not, raised in the petition for certiorari or before the lower courts. See Steven M. Shapiro *et al.*, SUPREME COURT PRACTICE 464-465 (10th ed. 2013). The Court would likely take that course here, declining to address the validity of *Cevilla*.[4]

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[4] The government's contrary argument invokes *CIGNA Corp.* v. *Amara*, 131 S. Ct. 1866, 1876 (2011), for the proposition that the Section 1252(a)(2)(B)(i) and 1252(a)(2)(D) questions are "'closely enough related'" that the Court would choose to address Section 1252(a)(2)(B)(i) even though that provision was not discussed below or in the petition. Opp. 26. But here, the arguments involve distinct statutory provisions that provide alternative bases for reaching the same conclusion (that is, reviewability), which was not the case is *CIGNA*.

Second, if the Court did decide to take the extraordinary step of reaching beyond the question presented in the petition to address the scope of Section 1252(a)(2)(B)(i), that would not be a bad thing. The government concedes that the circuits are in conflict on that question, that *Cevilla* was wrongly decided, and that the Seventh Circuit's position on the issue should be overturned. Opp. 26-27. Such an outcome therefore would eliminate a significant conflict in the circuits and bring necessary clarification to the law. The government nevertheless suggests that the Seventh Circuit "should have an initial opportunity to reconsider its precedent." Opp. 26. But that prudential consideration is hardly a sufficient reason to leave *two* circuit conflicts on the books indefinitely, in an area of the law where there is an especially "strong interest in national uniformity." *Cazarez-Gutierrez* v. *Ashcroft*, 382 F.3d 905, 912 (9th Cir. 2004).

Third, that is particularly so given the Catch-22 nature of the government's position. Having prevailed before the panel, the government opposed the petition for en banc rehearing regarding Section 1252(a)(2)(D) by contending that *Cevilla*'s construction of Section 1252(a)(2)(B)(i) was wrong and should be reversed in some future case—even though the government concedes that, under a proper reading of the law, petitioner *is* entitled to challenge the IJ's ruling before the court of appeals. And although the government recognizes that this Court *could* grant the current petition and consider petitioner's Section 1252(a)(2)(D) claim, it perversely urges the Court to deny review because, if the Court grants the petition, it might instead reverse the Seventh Circuit's concededly erroneous *Cevilla* rule—a step the government agrees should be taken by some court at some time.

Fourth, the government is wrong in its related contention that, because Section 1252(a)(2)(B)(i) does not properly apply in continuous-presence cases, "this case would present a highly artificial context in which to consider the proper construction of the proviso in Section 1252(a)(2)(D)." Opp. 27. For reasons we have explained, were the Court to grant review here, it likely would address only the threshold issue whether mixed questions are reviewable under Section 1252(a)(2)(D), leaving it to the Seventh Circuit on remand to apply this Court's holding to petitioner's particular challenge. And, in any event, the government is incorrect in suggesting that there is something "artificial" or anomalous about petitioner's claim in this case; his contention—that it was unreasonable to demand corroborative evidence in the circumstances here—is a plain-vanilla mixed question of the sort that could arise in any immigration context. It is thus revealing that the government fails to identify *any* concrete way in which the mixed question here differs from those that arise in settings where the government concedes Section 1252(a)(2)(D) to apply.

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

Finally, perhaps because the government recognizes that its other arguments against review are insubstantial, its first and longest contention is a defense of the merits of the Seventh Circuit's rule. Opp. 13-18. As we have noted, this could in no circumstance be a valid reason for denying the petition given the acknowledged, intractable conflict in the circuits. But the government's argument also is wrong on its own terms, for several reasons.

First, the government is incorrect in contending that the statutory phrase "questions of law" ordinarily "refers only to 'pure' questions of law, such as questions of statutory interpretation, not to mixed questions of law and fact." Opp. 13. As Judge Cabranes explained for the Second Circuit, the term "questions of law" as used in this context "is subject to countless interpretations" (*Chen II*, 471 F.3d at 324); we showed in the petition (at 16) that courts, including this Court, had interpreted the term to include mixed questions prior to the enactment of Section 1252(a)(2)(D).[5] At a minimum, then, the statutory text does not compel the government's reading.

Second, the government's contention that the "basic purpose" and "origin" of Section 1252(a)(2)(D) was to "limit judicial review" (Opp. 14) is plainly wrong. In fact, there is absolutely no doubt that Congress enacted Section 1252(a)(2)(D) as a response to this Court's decision in *St. Cyr*. See *Chen II*, 471 F.3d at 326; Opp. 14; Pet. 17-18. Trying to make the best of this reality, the government observes that *St. Cyr* itself involved a "pure question[] of law.'" Opp. 14 (quoting *St. Cyr*, 553 U.S. at 305). But the key point for present purposes is the Court's central rationale in *St. Cyr*: that, "at the absolute minimum, the Suspension Clause protects the writ [of habeas corpus] 'as it existed in 1789.'" 553 U.S. at 301. Congress thus enacted Section 1252(a)(2)(D) "intend[ing] to 'provide a scheme of judi-

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[5] Although the government does not deny that *Bogardus* addressed a mixed question, it insists that the decision has no relevance here. Opp. 16. But *Bogardus* found jurisdiction under a statutory regime that limited review to questions of law. See *Helvering* v. *Rankin*, 295 U.S. 123, 131 (1935); *Old Colony Trust Co. v. Comm'r*, 279 U.S. 716, 728 (1929). It therefore is apparent that mixed questions were regarded as calling for a finding of law.

cial 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 (2005)).

That understanding is fatal to the government's position here. Although the government dismisses as sloppy language this Court's observation in *St. Cyr* that habeas review historically was available to challenge the "erroneous *application* * * * of statutes" (Opp. 17 (emphasis added) (quoting *INS* v. *St. Cyr*, 533 U.S. 289, 302 (2001))), we showed in some detail in the petition (at 18-22) that habeas was available for review of mixed questions of law and fact at the time of the Founding. The government does not deny that historical reality—or, indeed, make any response to the point at all. Yet if review of mixed questions always has been available in habeas, Congress's intent to make Section 1252(a)(2)(D) an adequate "substitute" for habeas review necessarily means that such questions are reviewable under the statute. This belies the government's assertion (Opp. 15) that the "drafting history" of Section 1252(a)(2)(D) supports its position: "The 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*." *Chen II*, 471 F.3d at 326; Pet. 19 n.5.

Third, and relatedly, *St. Cyr*'s holding in favor of the availability of review expressly rested in substantial part on constitutional avoidance concerns. See 533 U.S. at 300-305. As we show in the petition (at 16-22), and as *amicus* Constitutional Accountability Center demonstrates in its brief, those same concerns are present in this case precisely because the writ "'as it existed in 1789'" (*St. Cyr*, 553 U.S. at 301) reached mixed questions of law and fact; reading Section 1252(a)(2)(D) to deny review previously available in habeas "would

give rise to substantial constitutional questions" under the Suspension Clause. *Id.* at 300. Here again, the government ignores this central point entirely.

* * *

Against this background, the decision below is wrong. And the issue here, an important one on which the circuits are divided, is squarely presented in this case. In these circumstances, the government has offered no persuasive reason for the Court to leave the law in a state of confusion.

CONCLUSION

The petition should be granted.

Respectfully submitted.

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AUGUST 2015

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