No. 13-323

In The
Supreme Court of the United States

JOSE ALBERTO PEREZ-GUERRERO,

Petitioner,

v.

ERIC H. HOLDER, U.S. Attorney General,

Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Eleventh Circuit

REPLY BRIEF

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REPLY BRIEF IN SUPPORT OF PETITION FOR CERTIORARI

The United States' brief in opposition to certiorari only reinforces the need for this Court to settle the circuit split on whether Congress restricted Article III jurisdiction in deferral of removal cases brought under the Convention Against Torture. In fact, the United States agreed with Mr. Perez-Guerrero on the need to settle that issue, limiting its opposition to arguments that this case presents a poor vehicle for resolving the matter. Those arguments are unpersuasive as to certiorari; as to the merits, they demonstrate the need for an appellate standard of review that encompasses the full record. The petition for certiorari should be granted.

A. The Parties Agree that the Issue Presented Warrants the Court's Attention

The United States acknowledges the circuit split below, involving nine courts of appeals, and does not deny the need for uniformity in appellate review of the Nation's immigration system. *See* Opp'n 13. Nor does the United States deny that the issue presented has important implications for the Nation's treaty commitments and the lives of persecuted aliens – 29,000 of whom had cases adjudicated under the Convention Against Torture in 2012 alone. Pet. 12-13. The parties are thus in agreement that the issue presented warrants the Court's attention.

B. The United States Has Not Shown that This Case Is a Poor Vehicle Through Which to Decide an Issue the United States Agrees the Court Should Decide

Because the *issue* presented is undeniably certiorari-worthy, the United States' only opposition to granting certiorari is that somehow this case is the wrong one for the Court to decide the issue. The Government's arguments are undeveloped and beside the point. The matter at hand is a basic exercise in statutory interpretation, neatly presented in a live controversy, and the Government does not explain why the reasons it offers make this case an inappropriate vehicle for deciding the issue.

The Government attempts to draw the Court's attention away from the statutory question by focusing on Mr. Perez-Guerrero's background. But the specifics of Mr. Perez-Guerrero's conduct do not make this Court's task any harder. This is not a situation in which the question presented is buried in procedural muck. *Cf. Jones v. State Bd. of Ed. of Tenn.*, 397 U.S. 31, 32 (1970) (a "cloud[y]" record makes a case a poor vehicle). There are no messy preliminary issues for the Court to work through. The parties agree on the fact of Mr. Perez-Guerrero's convictions, the details underlying which are immaterial to how the statute should be interpreted. The parties simply disagree about the effect of his convictions on appellate jurisdiction over his deferral of removal claim. That presents a clean question to answer: did Congress strip Article III jurisdiction over fact issues in deferral

of removal cases without expressly stating as much? The Court can answer that question without reference to the specifics of Mr. Perez-Guerrero's case.

The Government also seems to suggest that certiorari should be denied because Mr. Perez-Guerrero is a "bad guy." Aside from the irrelevance of petitioner's moral standing on the need for a nationally-uniform statutory interpretation, this is a strange case for the Government to urge an equitable approach. Mr. Perez-Guerrero broke the law and served his sentence. The United States broke its promises of safety and turned its back on a high-level informant after he had nothing left to give the Government. Neither side in this case has entirely clean hands.

It is unlikely that *any* petitioner seeking to raise this jurisdictional issue will be without sin; by definition the issue affects aliens with criminal convictions. Surely the Government is not arguing that, because criminals will be the ones seeking review, the Court should decline to grant certiorari on the issue presented here as a categorical matter. That being the case, Mr. Perez-Guerrero's personal characteristics are no bar to resolving the issue now rather than waiting for a more saintly candidate. There is nonetheless some value in the Government's attention to the underlying facts, to which a disproportionate part of the Government's brief is dedicated: it illustrates how it is intellectually difficult, if not impossible, to evaluate these fact-bound cases detached from the record.

Turning to the specifics of the Government's three main arguments, none is convincing: they do not go to the simple statutory interpretation issue at hand and do not explain what specifically about this case makes deciding that issue difficult. First, the United States contends that Mr. Perez-Guerrero did not adequately seek appellate review of the factual aspects of the underlying immigration rulings. That is an overly atomistic reading of the record, based on a single sentence from over fifty pages of briefing below. Opp'n 19. Standing alone, that sentence could have been more artfully phrased, but it must be read in context. The theory of Mr. Perez-Guerrero's appeal has always been that the immigration judge and the Board of Immigration Appeals reached their challenged conclusion "not through a careful sifting of the facts, but by failing to engage with the overwhelming evidence supporting a finding of Mexican-government-implicated torture." Petitioner's Corrected Brief in Supp. of Pet. to Review Final Order of Removal 17 (Apr. 12, 2012). Mr. Perez-Guerrero's challenge necessarily encompassed how the agency evaluated the facts.

More fundamentally, the Government's implicit premise that the jurisdictional issue was not squarely before the Eleventh Circuit is incorrect. From the moment Petitioner appealed to the court below, the United States argued that the circuit lacked jurisdiction. Opp'n 18-19. Now, having prevailed on that argument, the United States seems to claim that the circuit did not have an opportunity to rule on it. Not

so; the court below ultimately reached the issue and found against Mr. Perez-Guerrero on prior precedent grounds. App. 13-14. And the Government, correctly, does not argue Mr. Perez-Guerrero *waived* the jurisdictional issue. *See Henderson v. Shinseki*, ___ U.S. ___, 131 S. Ct. 1197, 1202 (2011); *Arbaugh v. Y&H Corp.*, 546 U.S. 500, 514 (2006) ("[S]ubject-matter jurisdiction, because it involves a court's power to hear a case, can never be forfeited or waived."). The issue was – and is – live.

The Government's other arguments against certiorari are no more persuasive. The Government argues secondly that Mr. Perez-Guerrero should have sought *en banc* rehearing in the court below rather than seeking certiorari. That is not the law. *E.g.*, 11th Cir. R. 35-3. And although *en banc* review below may or may not have benefitted Mr. Perez-Guerrero individually, it would not have resolved the circuit split on the statutory issue presented here.

Third, the United States argues that Mr. Perez-Guerrero has not shown this Court that he will ultimately prevail if 8 U.S.C. § 1252(a)(2)(C) is interpreted to allow Article III review of factual issues. That is incorrect. For instance, Mr. Perez-Guerrero's petition described unrebutted expert testimony that he "would be killed" if removed to Mexico, which the immigration courts ignored without a record basis. Pet. 4. Other errors abound, such as the BIA's theory that Mr. Perez-Guerrero would "face danger" from the murderous cartels – just some undefined danger short of torture. Pet. 5. That finding has no record

support; the un-challenged evidence was that the cartels would kill Mr. Perez-Guerrero, not slap him on the wrist. However deferential the standard of review may be for agency factual findings, the findings must have adequate support in the record. Here the agency's do not, which is precisely why Mr. Perez-Guerrero challenged them below. In any event, those errors will be litigated as necessary on remand, not at the certiorari stage.

Ultimately, the Government fails to advance a single persuasive reason why the Court should decline the opportunity to address this issue, and instead, merely urges the Court to wait for a "better" case to resolve the circuit split without a principled and specific explanation of why this case is an inappropriate vehicle. Meanwhile, circuits across the country will continue to review deferral of removal cases differently, leading to divergent outcomes and systemic inequities as between places like Miami, Chicago, Los Angeles, and Houston, a system the United States – as jailer – can control to its advantage.

CONCLUSION

The Government's brief in opposition amplifies the need for this Court's review. The United States agrees that the issue presented deserves the Court's attention. The reasons offered for nonetheless

denying certiorari are unpersuasive. The petition should be granted.

Respectfully submitted,

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