No. ____

IN THE

Supreme Court of the United States

RUFINO ANTONIO ESTRADA-MARTINEZ,
Petitioner,

v.

LORETTA E. LYNCH, ATTORNEY GENERAL OF THE UNITED STATES,
Respondent.

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

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Petitioner, Mr. Rufino Antonio Estrada-Martinez, fled his native country of Honduras to escape politically motivated torture, confinement, and threats to his life. He made his way to the United States, where he applied for and received asylum. After settling in Chicago, he engaged in a consensual sexual relationship with a co-worker who was, unknown to Mr. Estrada, sixteen years old. Although he had genuinely and reasonably believed that his co-worker was an adult (as later found by the Immigration Judge ("IJ")), he pled guilty to statutory aggravated criminal sexual abuse. He received no prison sentence for the offense. Nevertheless, the government ordered him removed on the basis of his offense, and Mr. Estrada returned to Honduras, where he was again beaten and threatened by government officials. Mr. Estrada then fled back to the United States and applied for, *inter alia*, withholding of removal.

The IJ granted Mr. Estrada's application for withholding of removal because she found that there was a likelihood that Mr. Estrada would suffer persecution and torture should he be returned to Honduras. The IJ also determined that his previous conviction did not bar relief because it was not a "particularly serious crime," 8 U.S.C. § 1231(b)(3)(B)(ii). The IJ relied for her decision on Mr. Estrada's lenient sentence of probation with no jail time; his credible testimony that he believed the victim was an adult; the relatively advanced age of the victim; and the ongoing, consensual nature of the relationship. The Board of Immigration Appeals ("BIA") reversed the IJ's decision on the sole basis

that Mr. Estrada's previous conviction was a "particularly serious crime," *id.*, barring him from relief. The BIA did little to explain its decision, outside of refusing to grant weight to the mitigating factors surrounding Mr. Estrada's offense, upon which the IJ had relied.

On a petition for review, the Seventh Circuit further entrenched a 5–3 circuit split when it declined to exercise jurisdiction over the decision of the BIA. Though acknowledging that "[o]ther circuits disagree," the Seventh Circuit held that the BIA's "particularly serious crime" determination is within the "discretion" of the Attorney General and thus unreviewable under 8 U.S.C. § 1252(a)(2)(B)(ii), which bars review of any "decision or action of the Attorney General . . . the authority for which is specified under this subchapter to be in the discretion of the Attorney General."

The question presented is whether the Attorney General's decision that an alien's crime is "particularly serious," *id.* § 1231(b)(3)(B)(ii), thus barring the alien from receiving withholding of removal, is a decision "specified" by Congress "to be in the discretion of the Attorney General," *id.* § 1252(a)(2)(B)(ii), and therefore not reviewable by federal courts.

PARTIES TO THE PROCEEDING

The sole petitioner below was Rufino Antonio Estrada-Martinez. The sole respondent below was Loretta Lynch, in her official capacity as Attorney General of the United States.

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PETITION FOR WRIT OF CERTIORARI

Petitioner Rufino Antonio Estrada-Martinez respectfully requests that this Court grant Certiorari to review the final judgment of the United States Court of Appeals for the Seventh Circuit.

OPINIONS BELOW

The opinion of the court of appeals is reported at 809 F.3d 886 and reproduced at Pet. App. 1a. The unreported decision of the Board of Immigration Appeals is reproduced at Pet. App. 24a. The unreported oral decision of the Immigration Judge is reproduced at Pet. App. 37a.

JURISDICTION

The court of appeals entered its judgment on December 31, 2015. Pet. App. 1a. This Court has jurisdiction under 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS

The relevant statutory provisions are 8 U.S.C. §§ 1231(b)(3), 1252(a)(2)(B)(ii), and they are reprinted in the appendix at Pet. App. 46a.

STATEMENT OF THE CASE

A. Legal Framework.

The Immigration and Nationality Act, 8 U.S.C. § 1101 *et seq*, ("INA"), and the regulations implementing the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, Dec. 10, 1984, S. Treaty Doc. No. 100-20 (1988), 1465 U.N.T.S. 85 ("Convention"), as relevant here, provide two distinct forms of relief to aliens subject to valid orders of removal. The remedy of withholding of removal is available under the INA for any alien who proves that his "life or freedom"

would be threatened in the removal country, on the basis of protected characteristics such as race or political affiliation. 8 U.S.C. § 1231(b)(3)(A).[1] The remedy of deferral of removal is available under the Convention for those who are likely to be tortured upon removal. 8 C.F.R. § 1208.17(a). Deferral is a distinct and less robust form of relief than withholding. *See, e.g.*, *id.* § 1208.17(d)(1) (providing procedures for termination of deferral of removal at "any time while deferral of removal is in effect").

Withholding of removal is unavailable if the Attorney General decides that the alien has been convicted of a "particularly serious crime." 8 U.S.C. § 1231(b)(3)(B)(ii). The INA does not define "particularly serious crime," except that all aggravated felonies with a prison sentence of at least five years are *per se* particularly serious crimes. *Id.* § 1231(b)(3)(B). For crimes that do not satisfy that description, the BIA weighs multiple factors to decide whether a crime is "particularly serious." The BIA "examine[s] the nature of the conviction, the type of sentence imposed, and the circumstances and underlying facts of the conviction." *In Re N-A-M-*, 24 I. & N. Dec. 336, 342 (BIA 2007).

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[1] Withholding of removal is also available under the Convention if the alien can prove a likelihood of torture, even when the torture is not related to a protected characteristic such as political affiliation. 8 C.F.R. § 1208.16(c). But for purposes of this case, that basis of relief is irrelevant. Mr. Estrada's future likelihood of torture would necessarily be covered by the INA because any future torture would be related to his prior political activities.

Once the BIA issues a final order, either party can petition a federal court of appeals for review of that order, *see* 8 U.S.C. § 1252(a)(1); 28 U.S.C. § 2342, but there are limits on the jurisdiction of the reviewing court. As relevant here, courts have no jurisdiction to review a "decision or action of the Attorney General . . . the authority for which is specified under this subchapter to be in the discretion of the Attorney General." 8 U.S.C. § 1252(a)(2)(B)(ii). If subsection 1252(a)(2)(B)(ii) applies, federal courts retain jurisdiction over only "constitutional claims or questions of law." *Id.* § 1252(a)(2)(D).

B. Factual Background

In 1993, Mr. Estrada led a peasant land takeover in his native country, Honduras. Pet. App. 4a, 39a. A retired military colonel owned the land and forced Mr. Estrada and a group of co-workers to work the land for agricultural purposes. *Id.* at 39a. Mr. Estrada led a group of his co-workers—a group with "political undertones," as the IJ found—that occupied the land. *Id.* at 32a, 39a, 43a–44a. In response, Honduran police arrested Mr. Estrada and thirteen of his fellow occupiers. *Id.* at 39a. Though most of his colleagues were released "quickly," Mr. Estrada was held by police for two months. *Id.*

While detained, Mr. Estrada endured "numerous forms of torture." *Id.* His jailers beat him severely, "sometimes to the point of unconsciousness." *Id.* at 4a. They subjected him to "helicopter beatings," which included binding his hands and feet, suspending him off the ground, and hitting the soles of his feet with sticks. *Id.* at 39a. They suffocated him by placing a bag over his head. *Id.* at 4a. They

simulated drowning by forcing his head under water. *Id*. They subjected him to electric shocks. *Id*. They threatened his family, including his two young children. *Id*. He was released only after his colleagues staged a hunger strike. *Id*. at 39a.

After Mr. Estrada's release, a friend warned Mr. Estrada about a suspicious vehicle near his home, which had been ransacked while he was away. Pet. App. 4a. Fearing for his safety, Mr. Estrada relocated within Honduras before fleeing to Mexico and ultimately the United States. *Id*. Mr. Estrada settled in Chicago, and the United States granted him asylum in 1995. *Id*. Mr. Estrada's family left Honduras a few years later. *Id*. at 42a.

In late 1995 and early 1996, Mr. Estrada engaged in a consensual sexual relationship with a woman who worked with him at a restaurant. *Id*. at 5a, 42a. The woman was a co-worker, and Mr. Estrada believed that she was an adult—a belief the IJ would later credit as "candid" and believable. *Id*. But in actuality, she was sixteen years old. *Id*. The relationship continued for weeks or months, and it was only after the victim's estranged father alerted police that the authorities arrested Mr. Estrada and charged him with a crime. *Id*. at 42a–43a. At that point, Mr. Estrada learned that he had been engaging in a sexual relationship with a minor, and he pled guilty to aggravated criminal sexual abuse, *see* 720 Ill. Comp. Stat. 5/12-16(d) (1992). Pet. App. 29a–30a. The judge sentenced Mr. Estrada to only four years of probation, and Mr. Estrada was required by statute to register as a sex offender for ten years, a sentence he completed. Pet. App. 5a.

In 2001, the government initiated removal proceedings against Mr. Estrada on the basis of his conviction. *Id.* at 38a. Mr. Estrada attempted to pursue an application for adjustment of status, but due to confusion about the date of his hearing, Mr. Estrada missed his hearing and the IJ ordered him removed *in absentia*. *Id.* The IJ denied his motion to reopen proceedings. *Id.*

Mr. Estrada returned to Honduras in 2007, and upon his arrival the police detained him and beat him. *Id.* at 5a. The police threatened to create a file on him if he did not pay them. *Id.* Mr. Estrada paid the extortion money and fled back to the United States, fearing for his safety. *Id.* Mr. Estrada had earlier received a letter from his father stating that the colonel was still looking for Mr. Estrada and would kill him if he returned to Honduras. *Id.* After Mr. Estrada's return to the United States, one of his friends, who participated in the land invasion in 1993, sent Mr. Estrada a letter stating that the colonel continued to look for Mr. Estrada. *Id.* at 5a–6a.

In 2013, U.S. immigration agents arrested Mr. Estrada and the government reinstated his earlier order of removal. *Id.* at 6a. An asylum officer determined that Mr. Estrada had a credible fear of persecution and referred his case to an IJ for a hearing. *Id.* at 37a–38a. Mr. Estrada applied for withholding of removal and deferral of removal.

C. Procedural History

The IJ granted Mr. Estrada's application for withholding of removal. *Id.* at 44a. The IJ found that Mr. Estrada had been persecuted and tortured

in the past and that he was likely to be persecuted and tortured if he returned to Honduras, on account of his past membership in an organization and his political activities. *Id.* Moreover, the IJ determined that Mr. Estrada's statutory sexual abuse conviction was not a "particularly serious" crime. *Id.* at 43a. She explained that her decision was informed by Mr. Estrada's lenient sentence; Mr. Estrada's candid and credible testimony, including his lack of knowledge about his co-worker's age; the ongoing, consensual nature of the relationship; and the distinction between a relationship with someone who is sixteen as opposed to a younger age. *Id.*

The government appealed to the BIA, which reversed the order of the IJ. *Id.* at 36a. With respect to the withholding of removal claim, the BIA determined that Mr. Estrada's offense *was* a "particularly serious crime," making him ineligible for relief. *Id.* at 25a–31a, 36a. The BIA refused to weigh as a mitigating factor the fact that the victim was sixteen, rather than a younger age. *Id.* at 30a. The BIA also gave no weight to Mr. Estrada's lack of knowledge of her age; the BIA reasoned that he must have known the victim was under-age or he would not have pled guilty, and the BIA held that the IJ clearly erred when she found otherwise. *Id.* at 30a–31a. The BIA held that Mr. Estrada's crime was "particularly serious" and denied Mr. Estrada withholding of removal. *Id.* at 30a. The BIA also found that the IJ clearly erred when she found a likelihood of torture and accordingly denied Mr. Estrada's application for deferral of removal under the Convention. *Id.* at 32a–36a.

Mr. Estrada filed a petition for review in the Seventh Circuit, but the Seventh Circuit further entrenched a 5–3 circuit split by refusing to examine the BIA's decision that Mr. Estrada's previous conviction was a "particularly serious crime." Pet. App. 13a. Mr. Estrada argued that the BIA's decision was rife with errors, failed to weigh key factors, and did not impute the proper weight to the IJ's factual findings. The Seventh Circuit noted that the BIA's decision was not necessarily persuasive, including, for instance, the BIA's failure to give weight to Mr. Estrada's lack of knowledge on the sole basis that he had pled guilty to the crime. Pet. App. 12a n.3 ("[The BIA's] logic is not compelling."). But the Seventh Circuit held that it lacked jurisdiction to review the BIA's decision due to 8 U.S.C. § 1252(a)(2)(B)(ii), which divests federal courts of jurisdiction over "decision[s]" of the Attorney General "specified" to be in the "discretion of the Attorney General."

The Seventh Circuit acknowledged that "[o]ther circuits disagree that § 1252(a)(2)(B)(ii) precludes review of the Attorney General's determination that a crime is 'particularly serious'" and cited contrary decisions of the Second, Third, Sixth, and Ninth Circuits, but the court declined to follow them. Pet. App. 9a & n.2. The Seventh Circuit instead held that such determinations are "left by statute to the discretion of the Attorney General." Pet. App. 10a (internal citation omitted). The Seventh Circuit explained that Mr. Estrada's arguments were not legal or constitutional in nature, so the court's jurisdiction was not saved by 8 U.S.C. § 1252(a)(2)(D), which exempts legal questions from the jurisdiction-

stripping provisions of the statute. Accordingly, the Seventh Circuit refused to review the BIA's decision with respect to the claim for withholding of removal and dismissed that portion of the petition. Pet. App. 22a.[2]

REASONS FOR GRANTING THE WRIT

The decision below deepens an already mature split in the courts of appeals regarding whether federal courts have jurisdiction to review the Attorney General's decision that a crime is "particularly serious," 8 U.S.C. § 1231(b)(3)(B)(ii), and this case is an ideal vehicle to resolve the split of authority. As this Court explained in *Kucana v. Holder*, subsection 1252(a)(2)(B)(ii) strips courts of jurisdiction to review only those decisions "*specified under this subchapter* to be in the discretion of the Attorney General." 558 U.S. 233, 237 (2010) (internal citation omitted). This Court should grant the petition to decide whether subsection 1231(b)(3)(B)(ii) falls into that category.

There is a 5–3 circuit split on the question presented. Five circuit courts—the Second, Third, Sixth, Ninth, and Tenth—finding nothing in subsection 1231(b)(3)(B) that commits the decision of whether a crime is "particularly serious" to the "discretion" of the Attorney General, have held that they retain jurisdiction to review such determinations. Several of these circuits have noted

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[2] The Seventh Circuit reversed the BIA on the deferral of withholding claim because the BIA failed to apply the clear error standard correctly, Pet. App. 20a, but that portion of the case has no bearing on this petition. *See infra* Section III.A.

the importance of this Court's decision in *Kucana*, where this Court held that "Congress barred court review of discretionary decisions only when Congress itself set out the Attorney General's discretionary authority in the statute." *Kucana*, 558 U.S. at 247.

In *Kucana*, this Court addressed the question whether it had jurisdiction over a petitioner's motion to reopen his removal proceedings. *Id.* at 237. The Attorney General had promulgated regulations that committed decisions on motions to reopen to the discretion of the BIA, and the Attorney General argued that such a regulation was sufficient to strip federal courts of jurisdiction. *Id.* at 239. But this Court held that federal courts retained jurisdiction because the statute "precludes judicial review only when the *statute itself* specifies the discretionary character of the Attorney General's authority." *Id.* at 244 (emphasis added). Indeed, three circuit courts—the Sixth, Ninth, and Tenth—have explicitly relied on *Kucana* to exercise review over the Attorney General's determinations under subsection 1231(b)(3)(B). *Delgado v. Holder*, 648 F.3d 1095, 1099–1100 (9th Cir. 2011) (*en banc*) (overruling *Matsuk v. I.N.S.*, 247 F.3d 999 (9th Cir. 2001)); *Berhane v. Holder*, 606 F.3d 819, 821 (6th Cir. 2010); *Diaz v. Holder*, 501 F. App'x 734, 738 n.2 (10th Cir. 2012). And two other circuits—the Second and the Third—had held similarly even before *Kucana*. *Nethagani v. Mukasey*, 532 F.3d 150 (2d Cir. 2008); *Alaka v. Attorney Gen. of U.S.*, 456 F.3d 88 (3d Cir. 2006) *as amended* (Aug. 23, 2006).

In direct opposition, three circuits, including the Seventh Circuit below, the Eighth Circuit, and the Eleventh Circuit, have ruled otherwise,

acknowledging their departure from other circuits but holding that the Attorney General's determination that a crime is "particularly serious" is discretionary and thus beyond review. Pet. App. 10a; *Solis v. Mukasey*, 515 F.3d 832, 835 (8th Cir. 2008); *Cadet v. U.S. Att'y Gen.*, 598 F. App'x 746, 747 (11th Cir. 2015). In addition, the Seventh Circuit below received briefing on *Kucana* but decided that *Kucana* did not require the court to exercise jurisdiction, in direct conflict with the Sixth, Ninth, and Tenth Circuits. This entrenched split of authority is ripe for the Court's review.

Moreover, this issue is recurring and critical to many immigrants, including Mr. Estrada. At least eight federal courts of appeals have analyzed and made holdings on this issue. More broadly, federal courts frequently receive petitions that request review of the BIA's decision that a crime was "particularly serious," and these petitioners face the real possibility of persecution and threats to their safety should their applications be denied. The Seventh Circuit below indicated that Mr. Estrada's underlying arguments might be meritorious, had it decided to review them. Pet. App. 12 n.3. It is untenable that Mr. Estrada and other immigrants be denied this potential relief only because they have the misfortune of living in Chicago rather than New York or San Diego. As this Court and the federal courts of appeals have emphasized, immigration is of a national character, and uniformity is paramount for the evenhanded application of Congress's prescribed statutory schemes. This Court's review is required to resolve the split of authority on this issue of national importance.

Finally, this petition represents an ideal vehicle with which to decide this important issue. The question is squarely presented, with no tangential legal issues threatening this Court's resolution of the issue. Furthermore, the Seventh Circuit's decision is wrong and should be reversed. This Court should accordingly grant the petition and resolve this split of authority.

I. THE SEVENTH CIRCUIT'S DECISION ENTRENCHES A 5–3 SPLIT OF AUTHORITY AMONG FEDERAL COURTS OF APPEALS REGARDING WHETHER COURTS HAVE JURISDICTION TO REVIEW THE ATTORNEY GENERAL'S DECISION THAT A CRIME IS "PARTICULARLY SERIOUS."

The Seventh Circuit's decision below is in conflict with five other federal courts of appeals, the Second, Third, Sixth, Ninth, and Tenth Circuits. Conversely, the Seventh Circuit is joined by the Eighth and Eleventh Circuits in its view that it lacks jurisdiction to review "particularly serious crime" determinations. Several of these circuits have acknowledged that their holdings are in conflict with other circuits—this is not a case where "further consideration of the substantive and procedural ramifications of the problem by other courts will enable [this Court] to deal with the issue more wisely at a later date." *McCray v. New York*, 461 U.S. 961, 962 (1983) (Stevens, J., opinion respecting the denial of certiorari). The circuits explicitly disagree and have said as much.

A. Five Federal Courts of Appeals Have Held That They Have Jurisdiction to Review the Attorney General's Decision That a Crime Is "Particularly Serious."

Both before and after this Court's decision in *Kucana*, federal courts of appeals have held that they have jurisdiction to review "particularly serious crime" determinations. Before *Kucana*, the Second and Third Circuits relied on the language of the statute, 8 U.S.C. § 1252(a)(2)(B)(ii), as well as "the strong presumption in favor of judicial review of administrative action," *I.N.S. v. St. Cyr*, 533 U.S. 289, 298 (2001), to hold that the question whether a crime is "particularly serious" is not "specified" to be within the discretion of the Attorney General. *Nethagani*, 532 F.3d at 155; *Alaka*, 456 F.3d 88. After *Kucana*, The Ninth Circuit relied on that decision to rule the same way, overturning its prior precedent. *Delgado*, 648 F.3d at 1099–1100 (*en banc*). The Sixth Circuit has held that it retained jurisdiction on the nearly identical question regarding "serious nonpolitical crimes." *Berhane*, 606 F.3d at 821. And the Tenth Circuit has explained in an unpublished opinion that its review of "particularly serious crime" determinations is not limited by 8 U.S.C. § 1252(a)(2)(B)(ii). *Diaz*, 501 F. App'x at 738 n.2. These circuits acknowledge that the Attorney General has the *authority* to make these decisions but they also recognize that the statute nowhere commits the decisions to the Attorney General's "discretion."

For instance, the Third Circuit, in *Alaka*, explained that the "jurisdiction-stripping language of [subsection] 1252(a)(2)(B)(ii) applies not to all

decisions the Attorney General is entitled to make, but to a narrower category of decisions where Congress has taken the *additional step* to specify that the sole authority for the action is in the Attorney General's discretion." 456 F.3d at 95 (emphasis added). To be sure, the Attorney General has the authority to "decide[]" whether a crime is "particularly serious," 8 U.S.C. § 1231(b)(3)(B)(ii), but the "Attorney General's general authority to arrive at an outcome through the application of law to facts is distinct from the issue of whether Congress has 'specified' that the decision lies in the Attorney General's discretion and is thus unreviewable." *Alaka*, 456 F.3d at 95–96. "Congress knows how to 'specify' discretion and has done so repeatedly in other provisions of the INA." *Id.* at 97. The Third Circuit cited "no less than thirty-two additional provisions in the very subchapter of the INA referenced by 8 U.S.C. § 1252(a)(2)(B)(ii) that make explicit the grant of 'discretion' to the Attorney General or the Secretary of Homeland Security." *Id.* at 97; *see, e.g.*, 8 U.S.C. § 1157(c)(1) ("the Attorney General may, in the Attorney General's discretion"); *id.* § 1159(b) ("in the . . . Attorney General's discretion"); *id.* § 1181(b) ("the Attorney General in his discretion"); *see also Alaka*, 456 F.3d at 97 n.17 (listing statutory provisions). According to the Third Circuit, "[i]f Congress had wanted to specify the discretion to make the 'particularly serious' determination, it would have employed the same explicit language used in other provisions of the same statute." *Id.* at 98.

Based on similar reasoning, the Second Circuit arrived at the same conclusion in *Nethagani*, 532

F.3d 150. The Second Circuit explained that "[t]he question is not whether these inquiries require an exercise of discretion. They probably do. We must also determine whether the text of the subchapter in which they appear 'specifie[s]' that the 'decision' is 'in the discretion of the Attorney General.'" *Id.* at 154 (quoting 8 U.S.C. 1252(a)(2)(B)(ii)). In other cases where the Second Circuit had held a decision to be within the discretion of the Attorney General, "the relevant provision . . . explicitly characterized the act as discretionary." *Id.* at 154. For instance, the Second Circuit had previously held that "[h]ardship waivers under 8 U.S.C. § 1186a(c)(4)" were within the discretion of the Attorney General, as that provision states that "'[t]he Attorney General, *in the Attorney General's discretion*, may . . . .'" *Id.* at 154 n.2 (quoting 8 U.S.C. § 1186a(c)(4) (emphasis added). *See also id.* at 154 n.2 (listing cases where the Second Circuit held a decision to be unreviewable because the relevant statutory provisions explicitly granted discretion to the Attorney General). Noting "the 'strong presumption in favor of judicial review of administrative action,'" *id.* at 154 (quoting *St. Cyr*, 533 U.S. at 298), the Second Circuit held that, "when a statute authorizes the Attorney General to make a determination, but lacks additional language specifically rendering that determination to be within his discretion[,] . . . the decision is not one that is 'specified . . . to be in the discretion of the Attorney General.'" *Id.* at 154–55 (quoting 8 U.S.C. § 1252(a)(2)(B)(ii)).

The Ninth Circuit, in the light of this Court's decision in *Kucana*, overruled a prior panel decision and held that whether a crime is "particularly

serious" is not a decision "specified" by statute to be within the discretion of the Attorney General. *Delgado*, 648 F.3d at 1099–1100 (*en banc*). A decade previously, in *Matsuk v. I.N.S.*, the Ninth Circuit had first held that it lacked jurisdiction to review a determination that a crime was "particularly serious." 247 F.3d at 1002 *overruled by Delgado*, 648 F.3d 1095. The *en banc* Ninth Circuit explained that, under *Kucana*, "a provision is not 'specified . . . to be in the discretion of the Attorney General' unless the statute explicitly refers to the discretion of the Attorney General." *Id.* (quoting *Kucana*, 558 U.S. at 248). Because subsection 1231(b)(3)(B)(ii) contains no such explicit language, the Ninth Circuit held that it retained jurisdiction to review determinations under that subsection and overruled its previous decision in *Matsuk*. *Delgado*, 648 F.3d at 1100.

On a nearly identical question involving "serious nonpolitical crimes," the Sixth Circuit relied on *Kucana* to hold that a decision of the Attorney General under subsection 1231(b)(3)(B) is reviewable. "To 'specify' that a decision belongs to the Attorney General's discretion requires more than a hint." *Berhane*, 606 F.3d at 821 (quoting 8 U.S.C. § 1252(a)(2)(B)(ii)). "[*Kucana*] reinforces this conclusion." *Id.* at 822. "In holding that a decision committed to the Attorney General's 'discretion' *by regulation* does not satisfy the prerequisite that Congress 'specif[y]' *by statute* the Attorney General's 'discretion' over an issue," this Court's decision in *Kucana* "admonishes the courts to read the Act's jurisdiction-stripping provisions narrowly." *Id.* The Sixth Circuit explained that Congress "committed many issues" to the Attorney General's discretion,

"showing that the national legislature understood what it must do to place a decision of the Attorney General out of our reach." *Id.* at 822. The Sixth Circuit even rejected an earlier, unpublished opinion to reach this conclusion. *Id.* (declining to follow *Celaj v. Ashcroft*, 121 F. App'x 608, 610–11 (6th Cir. 2005)). To be sure, the court in *Berhane* considered subsection 1231(b)(3)(B)(iii), regarding "serious nonpolitical crimes," rather than subsection 1231(b)(3)(B)(ii), regarding "particularly serious crimes," but these subsections are both committed to the same "deci[sion]" of the Attorney General, *see id.* § 1231(b)(3)(B), and present a virtually identical legal question. The Seventh Circuit itself cited *Berhane* as a conflicting decision in its opinion below, Pet. App. 9a n.2 (citing *Berhane*, 606 F.3d at 821–23).

Finally, the Tenth Circuit has relied on *Kucana* to decide that its review of "particularly serious crime" determinations is not limited by subsection 1252(a)(2)(B)(ii). *Diaz*, 501 F. App'x at 738 n.2. The Tenth Circuit explained that the "Supreme Court held [in *Kucana*] that the jurisdictional limitation applies only when a statute expressly sets out the Attorney General's discretionary authority. There is no such statutory language applicable here." *Id.*

B. Three Federal Courts of Appeals, Including the Seventh Circuit Below, Have Held That They Lack Jurisdiction to Review the Attorney General's Decision That a Crime Is "Particularly Serious."

In direct contrast, the Seventh, Eighth, and Eleventh Circuits have held that the Attorney General's decision that a crime is "particularly

serious," is an unreviewable decision because it is "discretionary." Two of those circuits have admitted that their decisions are in conflict with other circuits.

In its decision below, the Seventh Circuit acknowledged that "[o]ther circuits" have held that they retain jurisdiction over "particularly serious crime" determinations but declined to follow them. Pet. App. 9a n.2. Instead, the court decided that subsection 1252(a)(2)(B)(ii) "prohibits [the court's] review of the [BIA's] discretionary determination that Mr. Estrada's statutory rape conviction is a 'particularly serious crime.'" Pet. App. 9a (quoting 8 U.S.C. § 1252(a)(2)(B)(ii)). The court cited its past decisions to support its holding. *See id.* (citing *Tunis v. Gonzalez*, 447 F.3d 547, 549 (7th Cir. 2006); *Petrov v. Gonzalez*, 464 F.3d 800, 802 (7th Cir. 2006)). In *Tunis*, the Seventh Circuit stated that "the Attorney General has discretion to rule that [an alien's crime] is not a 'particularly serious crime' and hence does not bar [withholding of removal]." 447 F.3d at 549 (quoting 8 U.S.C. § 1231(b)(3)(B)(ii)). Accordingly, the *Tunis* court opined that "[t]he courts have . . . no jurisdiction to review [the Attorney General's] determinations under 8 U.S.C. § 1231(b)(3)(B)(ii)." 447 F.3d at 549. The *Tunis* court then cited Ninth Circuit decisions that have since been abrogated, insofar as they considered "particularly serious crime" determinations to be unreviewable. *See id.* (citing *Afridi v. Gonzales,* 442 F.3d 1212, 1218 (9th Cir. 2006); *Unuakhaulu v. Gonzales,* 416 F.3d 931, 935 (9th Cir. 2005)). And in *Petrov*, the Seventh Circuit merely stated that "[w]e concluded in *Tunis* . . . that classification of a particular crime as 'particularly serious' often is discretionary." *Petrov*, 464 F.3d at

802. Though briefed on *Kucana*, *see, e.g.*, Reply Brief for Petitioner, at 1–2, *Estrada-Martinez v. Lynch*, No. 15-1139 (7th Cir. Dec. 31, 2015), the Seventh Circuit below was not persuaded by that decision.

The Eight Circuit has also decided that it "may review [the Attorney General's determination that a crime is particularly serious] only to consider a constitutional claim or a question of law [under subsection 1252(a)(2)(D)]." *Solis*, 515 F.3d at 835. *See also Lovan v. Holder*, 574 F.3d 990, 998 (8th Cir. 2009) (refusing to review non-legal challenge to the BIA's determination that a crime was "particularly serious"). In *Solis*, the Eighth Circuit approvingly cited *Afridi*, 442 F.3d at 1218, and the now-abrogated conclusion of the Ninth Circuit that it had jurisdiction over questions of law alone. *Solis*, 515 F.3d at 835. The Eighth Circuit noted that its conclusion was in conflict with that of the Third Circuit, *id.* at 835 n.3, but declined to follow that court's lead.

Finally, in an unpublished opinion, the Eleventh Circuit has also declined to exercise jurisdiction over "particularly serious crime" determinations. *Cadet*, 598 F. App'x at 747. "The Attorney General has discretion to determine whether an alien . . . has committed a 'particularly serious crime'" and that "discretionary determination is shielded from judicial review." *Id.* (citing 8 U.S.C. § 1252(a)(2)(B)(ii)).

II. WHETHER FEDERAL COURTS HAVE JURISDICTION TO REVIEW THE ATTORNEY GENERAL'S DECISION THAT A CRIME IS "PARTICULARLY SERIOUS" IS AN IMPORTANT AND RECURRING QUESTION THAT REQUIRES A UNIFORM RESOLUTION.

Federal courts of appeals continuously receive petitions to review BIA decisions that a crime was "particularly serious." These questions invariably affect a vulnerable class of immigrants: those who will, on the basis of this determination, be deported to countries that threaten their freedom and safety. On a question of this importance, borne out of the quintessentially national immigration system, basic fairness requires that there be a uniform response, lest immigrants in Chicago be deported while immigrants in New York and San Diego receive relief. Moreover, the resolution of this issue is crucial for Mr. Estrada, because if the Seventh Circuit had reviewed the BIA's decision in this case, it would very likely have reversed and remanded to the BIA for further proceedings.

A. Uniformity Is Paramount In the Administration of Federal Immigration Laws.

As this Court has recognized, uniformity is particularly important in the immigration sphere, a fundamentally national legal regime. This Court has explained that immigration laws should be uniformly interpreted and administered because of "the Nation's need to speak with one voice in immigration matters." *Zadvydas v. Davis*, 533 U.S. 678, 700–01 (2001) (adopting, "for the sake of *uniform* administration in the federal courts," as "reasonable"

a six-month period for detention of aliens under a final order of removal (emphasis added)). Immigration regulation is one of the few legal frameworks with an almost exclusively national character. *See* U.S. Const. art. I, § 8, cl. 4; *see also, e.g.*, *Galvan v. Press*, 347 U.S. 522, 531 (1954) ("Policies pertaining to the entry of aliens and their right to remain here are . . . entrusted exclusively to Congress."). The lower courts, including the Seventh Circuit, have recognized that "[n]ational uniformity in the immigration and naturalization laws is paramount." *Rosendo-Ramirez v. I.N.S.*, 32 F.3d 1085, 1091 (7th Cir. 1994). *See also Jaramillo v. I.N.S.*, 1 F.3d 1149, 1155 (11th Cir. 1993) (recognizing that "nationwide uniformity" in immigration matters "is particularly important"); *Aguirre v. I.N.S.*, 79 F.3d 315, 317 (2d Cir. 1996) (concluding that "the interests of nationwide uniformity [in the administration of immigration laws] outweigh our adherence to Circuit precedent in this instance"); *Gerbier v. Holmes*, 280 F.3d 297, 311 (3d Cir. 2002) (recognizing "the need for uniformity in the immigration context"); *Cazarez-Gutierrez v. Ashcroft*, 382 F.3d 905, 912 (9th Cir. 2004) (relying on "the presumption that [immigration] laws should be interpreted to be nationally uniform").

Uniformity is particularly important here, where the split of authority concerns a common and recurring issue. The courts of appeals regularly encounter requests to review "particularly serious crime" determinations. Not only have at least eight circuits encountered the jurisdictional issue presented here—most on multiple occasions—but the

circuit courts also receive many more petitions that involve "particularly serious crime" determinations. *See, e.g.*, *Jara-Arellano v. Holder*, 567 F. App'x 544, 545 (9th Cir. 2014); *Camelien v. U.S. Att'y Gen.*, No. 15-10239, 2016 WL 75419 (11th Cir. Jan. 7, 2016); *Nderere v. Holder*, 467 F. App'x 56 (2d Cir. 2012); *Madrid v. Holder*, 541 F. App'x 789 (9th Cir. 2013); *Yuan v. U.S. Att'y Gen.*, 487 F. App'x 511 (11th Cir. 2012). Moreover, the BIA regularly issues decisions involving "particularly serious crime" determinations. *See, e.g.*, *Matter of G-G-S-*, 26 I. & N. Dec. 339, 344 (BIA 2014); *Matter of R-A-M-*, 25 I. & N. Dec. 657, 660 (BIA 2012); *Matter of J-S-S-*, 26 I. & N. Dec. 679 (BIA 2015); *see also Matter of Dominguez-Rodriguez*, 26 I. & N. Dec. 408, 413 n.9 (BIA 2014) ("Immigration Judges are *often* called upon to . . . determine whether the alien is ineligible for asylum and withholding of removal as one convicted of a 'particularly serious crime.'" (emphasis added)).

Of the many immigration petitioners who seek review in the courts of appeals, some receive review, *see, e.g.*, *Jara-Arellano*, 567 F. App'x at 545 (9th Cir. 2014) (remanding to the BIA to explain its decision), while others, of course, do not—including Mr. Estrada. *See, e.g.*, Pet. App. 1a; *Camelien*, 2016 WL 75419, at *2 ("[W]e lack jurisdiction to consider these discretionary determinations."). This inconsistency is antithetical to the "Nation's need to speak with one voice in immigration matters." *Zadvydas*, 533 U.S. at 700. "Because uniformity among federal courts is important on questions of this order," this Court should "grant[] certiorari to end the division of authority." *Thompson v. Keohane*, 516 U.S. 99, 106 (1995).

B. Decisions Concerning Exceptions to Withholding of Removal Affect a Vulnerable Class of Litigants and Should Be Reviewed In a Uniform Fashion By Federal Courts of Appeals.

Uniformity in immigration law is nowhere more important than with respect to exceptions to withholding of removal, where applicants are inherently at risk of persecution and threats to their safety. Withholding of removal is available only to those applicants who can demonstrate a "clear probability" that, upon deportation, they will be subject to persecution. *Ahmed v. Holder*, 611 F.3d 90, 94 (1st Cir. 2010). Congress considered this form of relief so essential that it made withholding of removal mandatory where the applicant proves such a likelihood. *See, e.g.*, *Sow v. Mukasey*, 546 F.3d 953, 956 (8th Cir. 2008) ("[W]ithholding of removal . . . is a mandatory form of relief if the applicant shows a clear probability that he or she will face persecution." (internal citation and alteration omitted)). This Court has observed that, although "deportation is not technically a criminal proceeding, it visits a great hardship on the individual and deprives him of the right to stay and live and work in this land of freedom," so "[m]eticulous care must be exercised 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). That admonition applies with even greater force where the deportee is likely to face threats to his freedom and safety upon his removal.

And an appeal to the BIA alone is insufficient to ensure that review of these critical decisions is

effective. As Judge Richard Posner has commented, the process of immigration adjudication is often "inadequate" and the BIA "does not have the resources to [perform] more than a perfunctory review." Lynne Marek, *Posner Blasts Immigration Courts as 'Inadequate' and Ill-Trained*, Nat'l L.J. (web ed.), Apr. 22, 2008.[3] Judge John Walker, Jr., a former Chief Judge of the Second Circuit, has remarked that the circuit courts are often "'the first meaningful review that [an immigration] petitioner has.'" Michael Corradini, *The Role of the Circuit Courts in Refugee Adjudication: A Comparison of the Fourth and Ninth Circuits*, 23 Geo. Immigr. L.J. 201, 215 (2008) (internal citation omitted).

Review by an Article III court ensures that these sensitive questions receive the care and uniformity they deserve. In *Delgado*, for instance, 648 F.3d at 1108, the Ninth Circuit reversed the BIA when it failed to explain its decision that a crime was "particularly serious." *See also Jara-Arellano*, 567 F. App'x at 545 (remanding to BIA to explain its decision); *Wolfgramm v. Mukasey*, 277 F. App'x 676, 677 (9th Cir. 2008) (same); *Yousefi v. U.S. I.N.S.*, 260 F.3d 318, 329 (4th Cir. 2001) (remanding to BIA to reconsider due to its "complete failure" to consider "key . . . factors"). The gravity of these decisions demands careful thought and explanation at the very least—review by a federal court of appeals ensures that each applicant will receive as much.

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[3] http://www.nationallawjournal.com/id=900005561504/Posner-Blasts-Immigration-Courts-as-Inadequate-and-IllTrained?slreturn=20160225142659 (last visited Mar. 28, 2016).

C. Whether Federal Courts Can Review the Attorney General's Decision That a Crime Is "Particularly Serious" Is Critical to Mr. Estrada In This Case.

This case presents an illustrative example of why federal courts must exercise their jurisdiction over the BIA's decision that a crime is "particularly serious." Even without reviewing the BIA's determination, the Seventh Circuit below could not help but point out that some of its reasoning made no sense. Pet. App. 12a n.3 ("[The BIA's] logic is not compelling, but the question is beyond our jurisdiction"). If the Seventh Circuit performs a full review of the BIA's determination, even under a deferential standard, it will find that little else in the BIA's decision makes sense. Mr. Estrada's statutory right to that review should not be foreclosed based on the federal circuit in which he made his home.

As an initial matter, the BIA failed a basic requirement of adjudication: it did not explain its decision. *See, e.g.*, *Delgado*, 648 F.3d at 1108 (remanding to the BIA because the court could not determine "what led the [BIA] to find [a] crime particularly serious"). Though the BIA (erroneously) discounted the importance of some of the mitigating factors on which the IJ relied, the BIA did little to explain its *affirmative* decision that Mr. Estrada's crime was "particularly serious," other than restate the legal standard. Pet. App. 30a. The BIA did not explain how a sentence of only four years of probation supports a determination that Mr. Estrada's crime was "particularly serious." It did not explain what "circumstances of his offense" tended to prove Mr. Estrada had committed a "particularly

serious" crime. It did not explain how the requirement that he register as a sex offender was relevant, especially where that requirement was mandatory under Illinois law. *See* 1992 Ill. Legis. Serv. P.A. 87-1064 §§ 2–3, 7 (H.B. 2736) (West) (requiring any person convicted of aggravated criminal sexual abuse to register as a sex offender, and providing that "[a]ny person required to register under this Article shall be required to register for a period of 10 years after conviction if not confined to a penal institution").

The BIA also erroneously refused to give weight to mitigating factors. For instance, the BIA held that the IJ clearly erred when she found that Mr. Estrada did not know the victim was underage. Pet. App. 30a–31a. The BIA's rationale on this point was little more than a belief that if Mr. Estrada had truly lacked knowledge of the victim's age, he would have gone to trial rather than plead guilty. *Id.* The Seventh Circuit noted that this logic is not "compelling," *id.* at 12a n.3, and indeed, this logic is indefensible. Mr. Estrada received a short sentence of probation with no jail time, so it is likely that Mr. Estrada simply wanted to guarantee himself a light sentence. Similarly, the BIA refused to give weight to the fact that the victim was sixteen, rather than a younger age. *Id.* at 30a. According to the BIA, minors are inherently at risk of exploitation, so the age difference between a 16-year-old and a 13-year-old makes no difference. *Id.* The BIA's logic is not only unconvincing—effectively reasoning that a 7-year-old is at the same risk of exploitation as a 17-year-old—but courts have noted that the opposite is true: older adolescents *are* more able to make

reasonable and consensual choices. *See, e.g.*, *Estrada-Espinoza v. Mukasey*, 546 F.3d 1147, 1154 (9th Cir. 2008) ("[T]he assumption that a minor's legal incapacity implies that the proscribed sexual intercourse is non-consensual . . . may be valid where the minor is a younger child [but] does not hold true where the victim is an older adolescent." (internal citation omitted)).

The IJ's determination was well-supported, and if the Seventh Circuit reviewed the BIA's contrary decision, the court would have had its choice of reasons to reverse and remand. Mr. Estrada's fate should not rest on the unhappy accident that he lives in one of the few circuits to interpret a jurisdiction-stripping provision more broadly than intended. If uniformity means anything in the immigration context, surely it means that Mr. Estrada should have the same review of a questionable administrative decision that an applicant would receive one state away.

III. THIS CASE PRESENTS AN IDEAL VEHICLE TO DECIDE THIS IMPORTANT QUESTION.

This petition presents an ideal vehicle to decide whether Congress committed "particularly serious crime" determinations to the discretion of the Attorney General. The Seventh Circuit squarely ruled on the issue below, and it did so incorrectly and should be reversed.

A. The Question Is Squarely Presented.

There is no doubt that the question is squarely presented. The Seventh Circuit dismissed the petition with respect to Mr. Estrada's claim for withholding of removal for the sole reason that

subsection 1252(a)(2)(B)(ii) divested the court of jurisdiction. The Seventh Circuit did not make any alternative holdings. It did not even suggest that Mr. Estrada's underlying merits argument was frivolous. To the contrary, the Seventh Circuit suggested that Mr. Estrada's argument had force. *See supra* Section II.C. And the Seventh Circuit acknowledged that it acted in conflict with other federal courts of appeals. Pet. App. 9a n.2 ("Other circuits disagree that § 1252(a)(2)(B)(ii) precludes review . . . ."). The Seventh Circuit seems to have done everything it could do to present this question for the Court's review.[4]

Moreover, the split procedural posture of the case is not an impediment to this Court's review. Although the Seventh Circuit granted his petition in part and remanded to the BIA to reconsider his deferral of removal claim, that partial grant has no effect on Mr. Estrada's claim for withholding of removal under the INA. Withholding of removal is a distinct, more robust form of relief than deferral of removal under the Convention. *See, e.g.*, *Moral-Salazar v. Holder*, 708 F.3d 957, 962 (7th Cir. 2013) ("Deferral of removal under the [Convention] is a

[4] Respondent might argue that the courts of appeals have begun to converge on common ground in light of *Kucana*, obviating the need for review, but that view is mistaken. To be sure, the Ninth Circuit has changed its view on the basis of *Kucana*. *See Delgado*, 648 F.3d at 1100. But the Seventh Circuit decided not to change its view *in this very case*, even though Mr. Estrada briefed the court on *Kucana* below. This split of authority will not be resolved without this Court's review.

unique remedy."). "[C]laims for relief under the Convention . . . and [claims] for withholding of removal" are "analytically separate." *Kamalthas v. I.N.S.*, 251 F.3d 1279, 1283 (9th Cir. 2001). Mr. Estrada's claim for withholding will remain ripe regardless of the disposition of his claim for deferral.

If the BIA grants Mr. Estrada deferral of removal, he will still pursue his claim for withholding of removal, a preferable remedy to deferral. As the Department of Justice has itself explained, deferral of removal "is a more temporary form of protection [than withholding]. It can be terminated more quickly and easily if an alien no longer is likely to be tortured in the country of removal, or if the U.S. government receives assurances that the alien will not be tortured if returned." Executive Office of Immigration Review Fact Sheet, Asylum and Withholding of Removal Relief, Convention Against Torture Protections, Jan. 15, 2009.[5] For instance, the government may, at any time, request a hearing after an immigrant is granted deferral of removal. 8 C.F.R. § 1208.17(d)(1). At that hearing, the burden is on the immigrant to prove that he is still likely to be tortured upon removal—otherwise, the deferral of removal will be cancelled. *Id.* § 1208.17(d)(4). The same procedure does not exist under withholding of removal. *See generally id.* § 1208.16.

And if the BIA denies Mr. Estrada's claim for deferral of removal, he will still have the opportunity to argue his claim for withholding of removal under

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[5] http://www.justice.gov/sites/default/files/eoir/legacy/2009/01/23/AsylumWithholdingCATProtections.pdf (last visited Mar. 28, 2016).

the INA. A deferral of removal claim requires the applicant to prove that it is "more likely than not" that he would be tortured upon deportation. *Id.* § 1208.17(a). By contrast, a claim for withholding of removal under the INA requires the applicant to establish that his "life or freedom would be threatened." 8 U.S.C. § 1231(b)(3)(A). "[L]ife or freedom" is a broader category than "torture," so even if the BIA decides that Mr. Estrada has failed to prove a likelihood of torture, Mr. Estrada can still pursue withholding of removal on the basis of a likelihood of other forms of persecution and danger. *See, e.g.*, *Kamalthas*, 251 F.3d at 1283.

B. The Decision of the Seventh Circuit Is Wrong.

The question presented deserves uniform resolution regardless of the outcome, but this vehicle is also appropriate because the Seventh Circuit's decision is wrong and should be reversed. The Seventh Circuit below failed to apply *Kucana*, and in any case, the Seventh Circuit's decision violates basic legal principles and the policies underlying the relevant statutory provisions.

As an initial matter, the Seventh Circuit failed to apply this Court's decision in *Kucana,* which circumscribed the reach of the jurisdiction-stripping provision in subsection 1252(a)(2)(B)(ii) by making clear that it is insufficient that a decision of the Attorney General *be* discretionary; the decision must also be "'*specified*'" by statute to be within the discretion of the Attorney General. *Kucana*, 558 U.S. at 237 (quoting 8 U.S.C. § 1252(a)(2)(B)(ii)). Multiple courts of appeal have noted the importance of *Kucana* to the resolution of this question. *See, e.g.*,

Delgado, 648 F.3d at 1100, (overruling prior decision on basis of *Kucana*); *Diaz*, 501 F. App'x at 738 n.2 (explaining that prior dicta limiting review of "particularly serious crime" determinations was not binding in the light of *Kucana*). Because subsection 1231(b)(3)(B)(ii) does not "specif[y]" any discretionary authority, courts retain jurisdiction.

Even without *Kucana*, basic principles of statutory interpretation require courts to exercise jurisdiction over "particularly serious crime" determinations. The Second and Third Circuits, for instance, relied on the plain, unambiguous language of the statute to hold that they retain jurisdiction. As one court put it: "The question is not whether these inquiries require an exercise of discretion. They probably do. We must also determine whether the text of the subchapter in which they appear 'specifie[s]' that the 'decision' is 'in the discretion of the Attorney General.'" *Nethagani*, 532 F.3d at 154 (quoting 8 U.S.C. § 1252(a)(2)(B)(ii)). Nothing in the provision "specifies" that it is a discretionary decision of the Attorney General—and Congress has explicitly "specifie[d]" such discretion in numerous *other* provisions of the statutory scheme. *See, e.g.*, 8 U.S.C. § 1157(c)(1) ("[T]he Attorney General may, in the Attorney General's discretion . . . ."). The Seventh Circuit failed to examine this question and instead relied only on the notion that the Attorney General's decision is "discretionary," Pet. App. 9a–10a. But that question is only the first part of the analysis—more important is whether *Congress specified* that the decision is within the Attorney General's discretion.

The Seventh Circuit's decision also erroneously reads out part of the language of the provision. If *any* discretionary decision of the Attorney General is unreviewable, the phrase "specified under this subchapter to be in the discretion of the Attorney General" is, at best, unnecessarily complicated. 8 U.S.C. § 1252(a)(2)(B)(ii). Congress could have simply provided that "any discretionary decision" of the Attorney General was unreviewable. Accordingly, the Seventh Circuit's decision impermissibly reduces statutory language to surplusage. *Lowe v. S.E.C.*, 472 U.S. 181, 207 n.53 (1985) ("[W]e must give effect to every word that Congress used in the statute.").

Moreover, if consistently applied, the Seventh Circuit's rationale would put a vast swath of the INA beyond judicial review. The Seventh Circuit stated that "particularly serious crime" determinations are "often" discretionary. Pet. App. 10a (internal citation omitted). If courts lack jurisdiction over every "decision" of the Attorney General that can involve some element of discretion, then nearly every decision that the Attorney General makes under the relevant subchapter of the INA is unreviewable. "Such an extraordinary delegation of authority cannot be extracted from the statute Congress enacted." *Kucana*, 558 U.S. at 252.

Even if there were some ambiguity in the statute, this Court has emphasized the strong "presumption favoring judicial review of administrative action." *Id.* at 251. It "takes clear and convincing evidence to dislodge the presumption." *Id.* at 252. *See also St. Cyr*, 533 U.S. at 298 (noting "the strong presumption in favor of judicial review of administrative action"). And this Court has "consistently applied that

interpretive guide to legislation regarding immigration, and particularly to questions concerning the preservation of federal-court jurisdiction." *Kucana*, 558 U.S. at 251. That presumption requires resolving any ambiguity in favor of review.

Finally, the Seventh Circuit's decision fails for at least two reasons related to the policies underlying Congress's statutory scheme. First, it makes little sense of the statute to grant the Attorney General unreviewable discretionary authority over an exception to a form of relief that Congress made mandatory. *See* 8 U.S.C. § 1231(a)(3)(A) ("[T]he Attorney General *may not* remove an alien to a country if . . . the alien's life or freedom would be threatened in that country." (emphasis added)); *see also, e.g., Sow*, 546 F.3d at 956. Because this form of relief is so important, decisions to deny it should not be made at the Attorney General's whim. Rather, it makes more sense that "Congress would leave in place judicial oversight . . . to ensure a proper and lawful disposition of immigration proceedings," *Kucana*, 558 U.S. at 250 (internal citation omitted), particularly withholding proceedings, which always involve potential threats to life and safety, *see supra* Section II.B.

Second, where Congress *has* specified a decision to be within the discretion of the Attorney General, those decisions usually involve the Attorney General's authority not to deny but to *grant* relief to aliens—"matter[s] of grace," as this Court has called them. *Kucana*, 558 U.S. 247–49 (internal citation omitted). For instance, Congress granted the Attorney General discretionary authority to admit

refugees "determined to be of special humanitarian concern to the United States," 8 U.S.C. § 1157(c)(1); to waive, in certain cases, the inadmissibility of aliens affiliated with totalitarian political parties, *id.* § 1181(b); and to waive inadmissibility based on certain offenses, *id.* § 1182(h)–(i). Given the almost criminal nature of a deportation proceeding, *see Bridges,* 326 U.S. at 154, it makes no legal or policy sense to interpret the INA to bar review of decisions *excepting* an alien from statutory relief. Congress might restrict judicial review of the Attorney General's *grace*, but it would be an unjustified leap then to assume that Congress has restricted judicial review of the Attorney General's decision to deprive an alien of what is otherwise his or her statutory right.

CONCLUSION

For the foregoing reasons, the Court should grant the petition for a writ of certiorari.

Respectfully submitted,

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March 30, 2016

Counsel for Petitioner

APPENDIX

APPENDIX A

In the
United States Court of Appeals
For the Seventh Circuit

No. 15-1139

RUFINO ANTONIO ESTRADA-MARTINEZ,

Petitioner,

v.

LORETTA E. LYNCH, ATTORNEY GENERAL OF THE UNITED STATES,

Respondent.

Petition for Review of an Order of
the Board of Immigration Appeals.
No. A073-223-323

ARGUED SEPTEMBER 24, 2015 — DECIDED DECEMBER 31, 2015

Before MANION, ROVNER, and HAMILTON, *Circuit Judges*.

HAMILTON, *Circuit Judge*. Petitioner Rufino Antonio Estrada-Martinez faces removal to Honduras, a country that he fled in 1994 after police there detained and tortured him. An immigration judge

granted Estrada relief from removal, finding that he will more likely than not face torture if he is removed to Honduras. The Board of Immigration Appeals disagreed regarding the likelihood that Estrada will be tortured, so it reversed the judge's grant of relief. Estrada has petitioned for review. He claims both eligibility for "withholding of removal" under the Immigration and Nationality Act ("the Act") and the United Nations Convention Against Torture ("the Convention") and eligibility for "deferral of removal" under only the Convention.

Estrada is not eligible for withholding of removal because he was convicted in an Illinois state court of statutory rape in 1996, and the Board has characterized his conviction as "particularly serious." Committing a crime that the Attorney General deems "particularly serious" bars withholding of removal under the Act and the Convention. We do not have jurisdiction to review that discretionary judgment unless a petitioner presents a legal or constitutional question, and Estrada's attempt to frame his challenge to the "particularly serious crime" determination as a legal issue is not persuasive.

Estrada may well be eligible, however, for deferral of removal under the Convention. As noted, the immigration judge found it more likely than not that Estrada will be tortured if he is removed to Honduras. The Board was required to review that factual finding only for clear error, not *de novo*. 8 C.F.R. § 1003.1(d)(3)(i); *Matter of Z-Z-O-*, 26 I. & N. Dec. 586, 590 (BIA 2015). In this case the Board failed to apply the clear error standard of review, so we reverse the Board with respect to Estrada's request for deferral of removal. We remand for reconsideration of the

immigration judge's decision under the correct standard of review.

I. *The Legal Framework*

A brief explanation of the relevant statutes and regulations will be helpful before we lay out the facts of Estrada's case. Estrada seeks relief from removal under three provisions of law: (1) withholding of removal under the Act, 8 U.S.C. § 1231(b)(3)(A); (2) withholding of removal under the Convention, 8 C.F.R. § 1208.16(c); and (3) deferral of removal under the Convention, 8 C.F.R. § 1208.17(a).

Commission of a crime that the Attorney General finds to be "particularly serious" bars withholding of removal under both the Act and the Convention. 8 U.S.C. § 1231(b)(3)(B)(ii); 8 C.F.R. § 1208.16(d)(2). Aggravated felonies punished by at least five years of imprisonment are automatically "particularly serious." The Attorney General also has authority to determine that other criminal convictions are "particularly serious." 8 U.S.C. § 1231(b)(3)(B). In finding that a crime is "particularly serious," immigration authorities may examine "the nature of the conviction, the type of sentence imposed, and the circumstances and underlying facts of the conviction." *In re N-A-M-*, 24 I. & N. Dec. 336, 342 (BIA 2007). In some cases, however, the Board has instead "focused exclusively on the elements of the offense, i.e., the nature of the crime." *Id.*

Even where an unauthorized immigrant has committed a "particularly serious crime," however, deferral of removal under the Convention remains available if he will "more likely than not" be tortured if removed to the particular country. 8 C.F.R.

§§ 1208.16(c)(4) & 1208.17(a), In making this determination, immigration authorities must consider all relevant evidence including: (1) "Evidence of past torture inflicted upon the applicant;" (2) "Evidence that the applicant could relocate to a part of the country of removal where he or she is not likely to be tortured;" (3) "Evidence of gross, flagrant or mass violations of human rights within the country of removal," and (4) "Other relevant information regarding conditions in the country of removal." *Id.*, §§ 1208.16(c)(3) & 1208.17(a).

II. *Factual Background*

In 1993, Estrada led a peasant land takeover in Honduras. The land that he and his comrades occupied belonged to a retired military colonel, Avilio Martinez. Honduran police arrested Estrada and thirteen of his comrades, holding Estrada for two months. During that time, Estrada was tortured. His jailers beat him severely, sometimes to the point of unconsciousness. They suffocated him by putting a bag over his head, pushed his head under water to simulate drowning, subjected him to electric shocks, and threatened the lives of his family, including his two young children.

Shortly after his release from police detention and torture, a friend warned Estrada about a suspicious vehicle near Estrada's home, and his home was ransacked while he was away. Fearing for his safety, Estrada at first relocated within Honduras but then fled to Mexico and later to the United States. The United States granted him asylum in 1995.

Estrada settled in Chicago. He initially found work at a window and door company, and since 2005

he has worked as a flooring installer. He received services, including psychological care and help transitioning to life in the United States, from the Heartland Alliance, an organization dedicated to helping individuals recovering from torture.

In 1996, however, Estrada was charged with statutory rape for sexual acts with a sixteen-year-old girl with whom he worked at a restaurant. He was thirty-three years old at the time, and their relationship continued over a period of weeks or months. On the advice of his attorney, Estrada pled guilty. He was unaware of the potential immigration consequences of his plea. The judge sentenced Estrada to only four years of probation and also required him to register as a sex offender for ten years. Estrada successfully completed this sentence.

In December 2006, however, Estrada was ordered removed from the United States due to his conviction. Upon his arrival in Honduras in 2007, police at the airport detained him, beat him, found some paperwork referring to his conviction, and threatened to create a file on him if he did not pay them. Estrada paid the extortion, and the police freed him. He spent a week in the city where his parents lived, then returned illegally to the United States because he continued to fear for his safety in Honduras.

Estrada has not heard directly from the retired Colonel Martinez since leaving Honduras in 1994, but in 2006 he received a letter from his father telling him that Martinez had continued to make threats against him and would kill him if he returned to Honduras. A 2014 letter from one of Estrada's comrades in the land invasion also reported that

Martinez was still looking for Estrada. Estrada's wife and children remained in Honduras safely for three or four years after Estrada fled, but they have since come to the United States. His parents remain in Honduras. Estrada's comrades in the land invasion continue to farm the land they invaded, apparently without trouble. Estrada believes that if he returns to Honduras he will be specially targeted because he was the leader of the land invasion.

In 2013, U.S. immigration agents arrested Estrada. The government reinstated his earlier order of removal, but Estrada expressed a fear that he will be tortured if he is removed to Honduras. These proceedings for withholding of removal under the Act and the Convention and deferral of removal under the Convention followed.

In 2014, an immigration judge granted Estrada relief from removal. She held that Estrada's statutory rape conviction was not "particularly serious," citing his lenient sentence and his testimony that he believed his victim was eighteen years old. The judge also found that Estrada was eligible for withholding of removal under the Act and the Convention because he established that it is more likely than not that he will be tortured if he is removed to Honduras. The judge credited Estrada's testimony regarding his treatment in Honduras. She relied on his past torture, his continued fear of arrest and torture after he relocated within Honduras in 1993 and 1994, the 2006 letter indicating that Martinez had made continued threats against Estrada, Martinez's continuing connections to the Honduran police and military, and Estrada's 2007

arrest, beating, and extortion at the airport in Honduras.

The judge also referred to U.S. State Department and United Nations High Commissioner for Refugees reports on political violence in Honduras.[1] She noted that Honduras continues to suffer from violence surrounding peasant land disputes. These disputes can involve detention, torture, and even killing of peasant leaders and human rights activists. The police are sometimes involved in or complicit with this violence. Police detainees in Honduras are sometimes tortured and denied due process of law.

The Board of Immigration Appeals reversed the judge's decision both as to the "particularly serious crime" determination and the likelihood that Estrada will be tortured if he returned to Honduras. With regard to the likelihood of torture, the Board labeled only one of the judge's specific factual findings clearly erroneous: the finding that Estrada was not free from ongoing torture after he relocated within Honduras in 1993 and 1994 immediately after he was released from custody and torture. After identifying this one instance of clear factual error, the Board proceeded to reweigh the evidence considered by the judge. The Board said it was "not persuaded" that Estrada will likely be tortured if he is removed to Honduras. It noted that Estrada has not received any threats

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[1] The record contains Human Rights Watch reports on Honduras that are marked with the High Commissioner's logo but are not official High Commissioner reports. The record does not appear to contain official High Commissioner reports. It is possible that the immigration judge confused these Human Rights Watch reports with official High Commissioner reports.

directly from Martinez since coming to the United States and that the other peasant activists appear to have been able to remain on the land safely. With regard to the "particularly serious crime" determination, the Board considered Estrada's sentence and noted that statutory rape involves an inherent risk of exploitation of minors. It considered but declined to give weight to Estrada's victim's age and Estrada's claimed mistake about her age. Estrada then filed this petition for judicial review.

III. *Jurisdictional Limits*

We must first address the jurisdictional limits of judicial review under the Immigration and Nationality Act. First, 8 U.S.C. § 1252(a)(2)(B)(ii) prohibits courts of appeals from reviewing decisions assigned by statute to the discretion of the Attorney General or Secretary of Homeland Security. See *Kucana v. Holder*, 558 U.S. 233, 237 (2010). Second, § 1252(a)(2)(C) prohibits review of "any final order of removal" where removability is based on, among other things, the commission of an aggravated felony. Notwithstanding these provisions, however, § 1252(a)(2)(D) permits the review of "constitutional claims or questions of law." There is some disagreement among the circuits on the effects of these provisions, but we follow this circuit's precedents.

It is settled in this circuit that § 1252(a)(2)(C) does not prohibit our review of orders denying deferral of removal under the Convention. *Lenjinac v. Holder*, 780 F.3d 852, 855 (7th Cir. 2015) (noting that "deferral of removal is not a final remedy and therefore the [Act] does not bar judicial review");

Issaq v. Holder, 617 F.3d 962, 970 (7th Cir. 2010) (stating that § 1252(a)(2)(C) does not bar our review of denial of deferral of removal under the Convention). Deferral of removal is "like an injunction" and "can be final enough to permit judicial review, but at the same time not be the kind of 'final' order covered by § 1252(a)(2)(C)." *Wanjiru v. Holder*, 705 F.3d 258, 264 (7th Cir. 2013); contra, e.g., *Ortiz-Franco v. Holder*, 782 F.3d 81, 86–87 (2d Cir. 2015) (listing precedents), petition for cert. filed (U.S. Sept. 23, 2015) (No. 15-362). Section 1252(a)(2)(C) does not prohibit our review of the Board's decision to deny Estrada deferral of removal. And in any case, § 1252(a)(2)(D) permits us to review constitutional claims and questions of law.

Under our circuit's precedent, however, § 1252(a)(2)(B)(ii) prohibits our review of the Board's discretionary determination that Estrada's statutory rape conviction is a "particularly serious crime," except for legal and constitutional questions allowed under § 1252(a)(2)(D). *Tunis v. Gonzales*, 447 F.3d 547, 549 (7th Cir. 2006); see also *Petrov v. Gonzales*, 464 F.3d 800, 802 (7th Cir. 2006) (citing *Tunis* for proposition that "classification of a particular crime as 'particularly serious' often is discretionary" and thus § 1252(a)(2)(B)(ii) bars review).[2] As noted above,

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[2] Other circuits disagree that § 1252(a)(2)(B)(ii) precludes review of the Attorney General's determination that a crime is "particularly serious." See, e.g., *Arbid v. Holder*, 700 F.3d 379, 383–84 (9th Cir. 2012) (recognizing shift in Ninth Circuit precedent following *Kucana*); *Berhane v. Holder*, 606 F.3d 819, 821–23 (6th Cir. 2010) (citing *Kucana* for proposition that "[t]o 'specify' that a decision belongs to the Attorney General's discretion requires more than a hint"); *Nethagani v. Mukasey*,

the determination that a crime is "particularly serious" bars withholding of removal under both the Act and the Convention, but does not bar deferral of removal under the Convention. 8 U.S.C. § 1231(b)(3)(B)(ii); 8 C.F.R. §§ 1208.16(d)(2) & 1208.17(a).

The Attorney General argues that § 1252(a)(2)(C) rather than § 1252(a)(2)(B)(ii) precludes our review of the "particularly serious crime" determination. For this proposition, the Attorney General cites *Petrov*, 464 F.3d at 801–02, and *Ali v. Achim*, 468 F.3d 462, 470 (7th Cir. 2006). *Petrov*, however, stated that a discretionary determination that a crime is "particularly serious" is unreviewable under § 1252(a)(2)(B)(ii), not § 1252(a)(2)(C). 464 F.3d at 802. *Ali* did not specify between the two statutory provisions. 468 F.3d at 465, 468–70. The plain language of § 1252(a)(2)(B)(ii), precluding review of decisions left by statute to the "discretion" of the Attorney General or Secretary of Homeland Security, fits with the decision involved in characterizing a crime as "particularly serious," which we have previously said "often is discretionary." See *Petrov*, 464 F.3d at 802. Thus, absent a legal or constitutional issue, § 1252(a)(2)(B)(ii) bars review of a discretionary decision that a crime is "particularly serious." 8 U.S.C. § 1252(a)(2)(B)(ii) & (a)(2)(D).

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532 F.3d 150, 154–55 (2d Cir. 2008); *Alaka v. Attorney Gen. of the U.S.*, 456 F.3d 88, 95 (3d Cir. 2006), as amended Aug. 23, 2006 ("The jurisdiction-stripping language of § 1252(a)(2)(B)(ii) applies not to all decisions the Attorney General is entitled to make, but to a narrower category of decisions where Congress has taken the additional step to specify that the sole authority for the action is in the Attorney General's discretion.").

IV. *This "Particularly Serious Crime" Determination*

Estrada tries to avoid this jurisdictional bar to our review of the Board's "particularly serious crime" determination by framing his challenge as a legal issue. He argues that the Board made a legal error by adopting a categorical approach to deciding whether his statutory rape conviction was "particularly serious." According to Estrada, the Board failed to consider individual aspects of his conviction. He claims the Board "ignored" the fact that his victim was sixteen years old, erroneously discounted his mistake of age, and failed to recognize the significance of his sentence of probation rather than prison time. Although Estrada presents cogent arguments for reweighing the factors leading to the Board's "particularly serious crime" determination, his attempt to frame this argument as a legal error is not convincing. We lack jurisdiction to review the Board's weighing of these factors.

There are different threads of Board authority regarding how to determine that a crime is "particularly serious." Estrada is right that Board precedent identifies certain factors that may be considered in determining whether a crime is "particularly serious." *In re N-A-M-*, 24 I. & N. Dec. 336, 342 (BIA 2007); *Matter of Frentescu*, 18 I. & N. Dec. 244, 247 (BIA 1982), superseded in part by statute as recognized in *In re N-A-M-*, 24 I. & N. Dec. at 339–40. The Board may use a case-by-case approach in this analysis. *Ali*, 468 F.3d at 470 (holding that it is not legal error for the Board to apply a case-by-case analysis). However, the Board has also sometimes "focused exclusively on the

elements of the offense, i.e., the nature of the crime." *In re N-A-M-*, 24 I. & N. Dec. at 342–43. Board precedent appears to support more than one method for determining whether a crime is "particularly serious."

Here, however, we do not agree with Estrada that the Board's opinion used a categorical approach. Rather than ignoring the age of the victim, the Board considered but declined to give weight to the fact that the victim was sixteen rather than a younger age. It said it did so because of the inherent risk of exploitation in a sexual relationship between an adult and a minor. The Board also considered but declined to give "great weight" to Estrada's claim, which the immigration judge credited, that he did not know his victim was a minor, noting that Estrada chose not to pursue a mistake-of-age defense.[3] The Board also considered the length of Estrada's probation and the requirement that he register as a sex offender. The requirement that Estrada register as a sex offender may have been mandatory under state law, but the length of probation was certainly a discretionary decision by the sentencing judge.

This analysis by the Board was not an application of the categorical approach. The categorical approach would look only at the "statute defining the crime of

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[3] The Board's decision not to give weight to the absence of a mistake-of-age defense was not legal error, despite Estrada's choice to plead guilty. Estrada could have refused to plead guilty and defended based on mistake of age. Following this reasoning, the Board found that the immigration judge clearly erred "to the extent" that the judge found that Estrada's claimed mistake of age did not conflict with the sentence he received. This logic is not compelling, but the question is beyond our jurisdiction.

conviction," not the actual underlying conduct and circumstances. *Moncrieffe v. Holder*, 569 U.S. —, —, 133 S. Ct. 1678, 1684 (2013), quoting *Gonzales v. Duenas-Alvarez*, 549 U.S. 183, 186 (2007). Here, the Board considered the punishment imposed on Estrada—the length of the term of probation and the requirement that he register as a sex offender. The Board also analyzed but did not find persuasive the age of the victim and Estrada's claim of ignorance as to the victim's age. Whether or not we would agree in the first instance, it is clear that the Board's analysis engaged with factors beyond just the statute defining the crime of conviction.

Thus, Estrada does not succeed in framing his argument against the Board's "particularly serious crime" determination as legal error. To the extent that Estrada also argues that the Board's decision incorrectly weighed the relevant factors, those arguments are beyond our jurisdiction. 8 U.S.C. § 1252(a)(2)(B)(ii).

V. *Deferral of Removal*

Despite the determination that his statutory rape conviction was "particularly serious," Estrada may still be eligible for deferral of removal under the Convention. 8 C.F.R. §§ 1208.16(c)(4) & 1208.17(a). The decisive factual issue in this analysis is whether it is "more likely than not" that the unauthorized immigrant will be tortured if removed to the country for which he or she seeks deferral of removal. *Id.*

The likelihood that Estrada will be tortured is a question of fact. *Rosiles-Camarena v. Holder*, 735 F.3d 534, 538–39 (7th Cir. 2013); *Matter of Z-Z-O-*, 26 I. & N. Dec. 586, 590 (BIA 2015). Here, the

immigration judge found that it is more likely than not that Estrada will be tortured if removed to Honduras. The Board reversed, stating that it was "not persuaded" of the likelihood of torture.

The Board's approach to this factual issue reflects a legal error. Under the Board's own regulations, its review of an immigration judge's finding of fact is limited. The Board must not find facts in the first instance; it must review the judge's determinations of fact only for clear error. 8 C.F.R. § 1003.1(d)(3)(i); *Matter of Z-Z-O-*, 26 I. & N. Dec. at 590.[4]

Whether the Board applied the proper standard of review is a legal question. *Rosiles-Camarena*, 735 F.3d at 536. We therefore review *de novo* whether the Board exceeded its clear-error scope of review. See *Lenjinac*, 780 F.3d at 854; *Vitug v. Holder*, 723 F.3d 1056, 1062–63 (9th Cir. 2013); *Kabba v.*

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[4] This limited review of fact-finding is distinct from that of other agencies that have not circumscribed through regulation their review of their administrative law judges' fact-finding. For example, the Occupational Safety and Health Review Board is not bound by fact and credibility determinations made by an administrative law judge, although those determinations are entitled to "some weight," and there must be substantial evidence for rejecting them. *Pratt & Whitney Aircraft v. Sec'y of Labor*, 649 F.2d 96, 105 (2d Cir. 1981); *Allis-Chalmers Corp. v. Occupational Safety & Health Review Comm'n*, 542 F.2d 27, 30 (7th Cir. 1976). Similarly, the National Labor Relations Board is not bound by an administrative law judge's factual findings, although those factual findings are entitled to weight as part of the record, and the Board holds itself to a "clear preponderance of the evidence" standard in overturning a judge's credibility determinations. *Slusher v. NLRB*, 432 F.3d 715, 727 & n.5 (7th Cir. 2005); *In re Robert F. Kennedy Med. Ctr.*, 336 NLRB 765, 765 n.2 (2001).

Mukasey, 530 F.3d 1239, 1245 (10th Cir. 2008) (reviewing *de novo* as a question of law "whether the BIA *applied* the correct legal standard, not simply whether it *stated* the correct legal standard") (emphasis in original).

The clear-error standard of review precludes the Board from simply reweighing the evidence to reverse the immigration judge. According to the agency commentary on the final regulation mandating clear-error review, a judge's "factfinding may not be overturned simply because the Board would have weighed the evidence differently or decided the facts differently had it been the factfinder." Board of Immigration Appeals: Procedural Reforms to Improve Case Management, 67 Fed. Reg. 54878-01, 54889 (Executive Office for Immigration Review, Immigration and Naturalization Service August 26, 2002), citing *Anderson v. Bessemer City*, 470 U.S. 564, 573 (1985). Rather, "the BIA must find that, on balance, the weight of the evidence so strongly militates against the IJ's finding that the BIA 'is left with the definite and firm conviction that a mistake has been committed.'" *Zhou Hua Zhu v. U.S. Attorney Gen.*, 703 F.3d 1303, 1315 (11th Cir. 2013), quoting 67 Fed. Reg. at 54889; see also *Anderson*, 470 U.S. at 573 (quoting the same standard). The Board must explain how the immigration judge clearly erred. *Vitug*, 723 F.3d at 1063.

Federal Rule of Civil Procedure 52(a)(6) helps to illuminate the Board's burden in overturning an immigration judge's factual findings. We have noted that Rule 52(a)(6) "may have been the inspiration for § 1003.1(d)(3)(i)," the regulation requiring the Board

to review immigration judges' factual findings for clear error. See *Rosiles-Camarena*, 735 F.3d at 538. Indeed, the Board's own commentary on the regulation cited *Anderson v. Bessemer City*, the case providing the definitive interpretation of Rule 52(a)(6)'s clear-error standard. 67 Fed. Reg. at 54889–90, citing *Anderson*, 470 U.S. at 573–75.[5]

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[5] Many circuits use the *Anderson* standard to evaluate whether the Board adhered to its required clear-error standard of review. See, e.g., *Zumel v. Lynch*, 803 F.3d 463, 475–76 (9th Cir. 2015) (using the *Anderson* standard in concluding that the Board exceeded its proper clear-error scope of review of an immigration judge's finding, noting that the Board did not explain "why the [judge's] determination … was 'illogical or implausible, or without support in inferences that may be drawn from the facts in the record'"), quoting *Rodriguez v. Holder*, 683 F.3d 1164, 1170 (9th Cir. 2012); *Zhou Hua Zhu*, 703 F.3d at 1309 (stating that the "the Department explicitly adopted the standard for clear error drawn from Supreme Court case law" in holding that the Board impermissibly failed to apply a clear-error standard in reviewing an immigration judge's findings regarding the likelihood of an immigrant's future persecution and current country conditions); *Alvarado de Rodriguez v. Holder*, 585 F.3d 227, 235–36 (5th Cir. 2009) (citing *Anderson* in holding that Board impermissibly failed to apply clear-error standard of review in overturning an immigration judge's findings and credibility determinations regarding whether an immigrant entered into a marriage in good faith); *Kabba v. Mukasey*, 530 F.3d 1239, 1246 (10th Cir. 2008) (citing *Anderson* in holding that the Board failed to apply the required clear-error standard in overturning an immigration judge's credibility determination); *Fen Yong Chen v. Bureau of Citizenship & Immigration Servs.*, 470 F.3d 509, 514–15 (2d Cir. 2006) (citing *Anderson* standard in holding that the Board failed to apply the required clear-error standard in rejecting an immigration judge's credibility determination).

Rule 52(a)(6) prohibits courts of appeals from setting aside a district court's factual findings unless they are clearly erroneous. Under that standard, "Where there are two permissible views of the evidence, the factfinder's choice between them cannot be clearly erroneous." *Anderson*, 470 U.S. at 574. A factual finding must be "illogical or implausible" or lack "support in inferences that may be drawn from the facts in the record" for an appellate court to overturn it on clear error review. *Id.* at 577. When a fact-finder bases her finding on a decision to credit a witness's testimony, that finding "can virtually never be clear error" as long as the testimony is "coherent and facially plausible," "not internally inconsistent," and "not contradicted by extrinsic evidence." *Id.* at 575.

Here, the Board exceeded the permissible scope of its review. It did not explicitly find that the immigration judge's finding regarding the likelihood of torture was clearly erroneous. Instead, it reversed the immigration judge because it was "not persuaded that the objective evidence establishes that the applicant will likely be tortured in Honduras upon his return." We assume this would have been a sufficient reason for reversal on review *de novo*, but it overstepped the more limited bounds of clear-error review.

The Board identified only one debatable instance of "clear error" in the immigration judge's fact-finding, although we will assume its validity for our purposes. The Board found that the judge's determination that Estrada "was not free from ongoing torture or harm after relocating within Honduras" was "clearly erroneous." This finding of clear error appears to be

correct to the extent the judge found that Estrada was actually tortured in the time period between fleeing his village in Honduras and escaping to the United States. As best we can tell, Estrada was not actually tortured during that period, though he had ample reason to fear torture. After his release from the detention and torture, he reported sightings of a suspicious vehicle near his home, and his house was ransacked while he was away. In context, it is at least arguable that the immigration judge was instead referring to the threat of torture during the time Estrada remained in Honduras rather than to actual torture, but for our purposes we will assume that finding was clearly erroneous.

This one instance of arguable clear error does not by extension make the judge's finding regarding Estrada's likelihood of torture also clearly erroneous. See *Rosiles-Camarena*, 735 F.3d at 538–39 (holding that the Board must review for clear error even "ultimate" facts that are based on other subsidiary facts). The judge based her likelihood-of-torture finding on many undisputed subsidiary facts, such as Estrada's actual torture while in police custody, the 2006 threat against Estrada, Martinez's continued connections to the Honduran security apparatus, and the reported country conditions in Honduras. The (presumed) fact that Estrada was not again tortured while in Honduras following his release does not make the judge's determination that Estrada will likely be tortured if he is returned to Honduras implausible or illogical. See *Anderson*, 470 U.S. at 577, 579 (holding that a district court's fact-finding was not clearly erroneous because it did not meet those criteria). The judge's likelihood-of-torture

determination was still a "permissible" view of the evidence, which the Board could not overturn simply because, "had it been sitting as the trier of fact, it would have weighed the evidence differently." *Id.* at 574; see also *Rosiles-Camarena*, 735 F.3d at 538–39 (reversing and remanding a Board decision based on Board's "independent appellate decision on *facts*") (emphasis in original).

The Board's opinion demonstrates its impermissible reweighing of the evidence to reverse the judge's finding regarding Estrada's likelihood of torture. The judge found Estrada's testimony regarding his experience in Honduras candid and credible. The Board did not dispute the judge's findings that Estrada was previously tortured at the direction of Colonel Martinez for his leadership role in the peasant takeover of Martinez's land, nor that Martinez continues to have close connections to the Honduran military and police. The Board discounted these facts, however, stating that "the relevant facts are not frozen at the time of the applicant's departure from Honduras in 1994." The Board conceded that Estrada's fear of torture is consistent with the current conditions in Honduras but said this was "not enough" to convince it that Estrada is likely to face torture if he is removed. Similarly, the Board acknowledged the threats made against Estrada as recently as 2006, but it discounted these threats, saying that Estrada has heard nothing directly from Martinez since he left Honduras and that his mistreatment by police at the airport in 2007 had nothing to do with his leadership in the land invasion. Finally, while the judge declined to give weight to the fact that Estrada's peasant comrades in the land

invasion remain on the land without trouble, the Board chose to view this as significant.

The Board's treatment of these factual matters shows that the Board, rather than reviewing the judge's findings of fact for clear error as required by regulation, instead reweighed the evidence to come to a conclusion different from the judge's. The Board did not conclude that the judge's finding regarding Estrada's likelihood of torture was "illogical or implausible" or lacked "support in inferences that can be drawn from facts in the record." See *Anderson*, 540 U.S. at 577; see also *Zumel*, 803 F.3d at 476 (concluding that the Board exceeded its proper clear error scope of review of an immigration judge's finding because the Board did not explain "why the [judge's] determination … was 'illogical or implausible, or without support in inferences that may be drawn from the facts in the record'"). The Board also did not find that Estrada's testimony, which the judge credited and upon which she in part based her finding, was incoherent, facially implausible, internally inconsistent, or contradicted by extrinsic evidence. See *Anderson*, 470 U.S. at 575. Thus, the Board made a legal error by failing to apply the required clear-error standard. See *Rosiles-Camarena*, 735 F.3d at 539.

VI. *Disposition of the Petition*

The question remains how to remedy the Board's legal error. Generally, if an agency commits legal error, we remand the decision to the agency for proceedings under the correct legal framework. *E.g., Rosiles-Camarena*, 735 F.3d at 539, citing *Gonzales v. Thomas*, 547 U.S. 183 (2006); *Zhou Hua Zhu*, 703

F.3d at 1315. The agency is entitled to make factual determinations and to have an opportunity to apply the law to those facts. *Gonzales*, 547 U.S. at 186. Remand is also generally required when a question of law implicates an agency's interpretation of the statute it enforces. *Negusie v. Holder*, 555 U.S. 511, 523 (2009).

Remand is not always necessary, however. Courts of appeals have declined to remand when the facts are established and the correct outcome is clear. For example, in *Vitug*, the Ninth Circuit held that the Board failed to review the immigration judge's factual findings under the proper clear-error standard of review. 723 F.3d at 1064. The Ninth Circuit directed withholding of removal for the petitioner because "no reasonable factfinder" could come to a different conclusion based on the immigration judge's uncontroverted findings. *Id.* at 1065–66; see also *Ghebremedhin v. Ashcroft*, 392 F.3d 241, 243 (7th Cir. 2004) (court has ability to decide petition on merits without remand if "the record evidence compels the result that we have reached," but case was remanded on other grounds). In the majority of cases in which the Board applied the incorrect standard of review, however, courts of appeals remand for further consideration under the correct standard of review. See, e.g., *Rosiles-Camarena*, 735 F.3d at 539; *Ridore v. Holder*, 696 F.3d 907, 919 (9th Cir. 2012).

The facts in this case are not in dispute. The immigration judge and Board did not question the veracity of Estrada's evidence of his past torture, the 2006 threat against him, Martinez's continuing influence with Honduras's security apparatus, and

the continuing conditions of violence against leaders of peasant movements in Honduras. Honduran peasant leaders continue to experience violence and human rights abuses committed by police. Based on these undisputed facts, the immigration judge concluded that Estrada will more likely than not be tortured if he is removed to Honduras. That finding appears cogent and well supported by credible evidence regarding both Estrada's individual case and more general conditions of violence in Honduras. We nevertheless remand this case to the Board to apply clear error review. Unless the Board determines that the judge's finding regarding the likelihood of torture was clearly erroneous, Estrada is entitled to deferral of removal under the Convention.

To sum up, we DISMISS for lack of jurisdiction Estrada's challenge to the Board's decision that his statutory rape conviction was a "particularly serious crime." We also find, however, that, on the issue of deferral of removal under the Convention Against Torture, the Board failed to apply the correct standard of review to the immigration judge's finding that Estrada will likely face torture if he is removed to Honduras. In that respect we GRANT Estrada's petition and REMAND his case to the Board of Immigration Appeals for further proceedings consistent with this opinion.

MANION, *Circuit Judge*. I join the panel's decisions to affirm the Board of Immigration Appeals, with this note. Implicit in the Board's statement that "the relevant facts are not frozen at the time of [Estrada's] departure from Honduras in 1994" is the fact that the Martinez family's connections to the police and military may not remain intact. The CAT allows "deferral" of removal. Martinez was a retired colonel at least 22 years ago. That connection to the government, possibly along with his sons' police connections, appears necessary to the claimed risk of torture. If Martinez is dead and his police-officer sons pose no problem, the CAT deferral should end. CAT protection should not be speculative. To determine whether the precise threat to Estrada still exists, the Board may need to remand this case to the immigration judge.

APPENDIX B

U.S. Department of Justice
Executive Office for Immigration Review

Falls Church, Virginia 20530

Decision of the Board of Immigration Appeals

File: A073 223 323 – Chicago, IL Date: Dec 23 2014

In re: RUFINO ANTONIO *ESTRADA*-MARTINEZ

IN ASYLUM AND/OR WITHHOLDING PROCEEDINGS

APPEAL

ON BEHALF OF APPLICANT: Robert S. Whitehill, Esquire
Chidi P. Ifionu
Michael Behrens, Jr.
Amy Rogers
Sara E. Rowley

ON BEHALF OF DHS: Seth B. Fitter
Senior Attorney

APPLICATION: Withholding of removal; Convention Against Torture

The Department of Homeland Security, Immigration and Customs Enforcement ("DHS"), appeals from the Immigration Judge's August 4, 2014,

decision granting the applicant's applications for withholding of removal from Honduras under section 241(b)(3)(A) of the Immigration and Nationality Act, 8 U.S.C. § 1231 (b)(3)(A), and withholding of removal from Honduras under the Convention Against Torture. The appeal will be sustained.

The Board defers to the factual findings of an Immigration Judge, unless they are clearly erroneous, but it retains independent judgment and discretion, subject to applicable governing standards, regarding pure questions of law and the application of a particular standard of law to those facts. 8 C.F.R. § 1003.1(d)(3). On appeal, the DHS challenges the Immigration Judge's determination that the applicant is not excepted from being granted withholding of removal under the Act by operation of section 241(b)(3)(B)(ii) of the Act based upon the contention that the applicant, having been convicted of a particularly serious crime, is a danger to the community. The DHS also challenges the Immigration Judge's determination that the applicant met his burden of proving through objectively reliable evidence that he will likely be tortured by, or with the acquiescence of, the government of Honduras.

Withholding of Removal Under Section 241(b)(3)(A) of the Act

The Act does not define the phrase "particularly serious crime." We first articulated the framework for determining whether a crime was particularly serious under former section 243(h)(2)(B) of the Act, 8 U.S.C. § 1253(h)(2)(B) (1982), in *Matter of Frentescu*, 18 I&N Dec. 244 (BIA 1982). At that time, we held

that, in judging the seriousness of a crime, "we look to such factors as the nature of the conviction, the circumstances and underlying facts of the conviction, the type of sentence imposed, and, most importantly, whether the type and circumstances of the crime indicate that the alien will be a danger to the community," as provided in the statute. *Id.* at 247. We further found that offenses against persons are more likely to be categorized as particularly serious crimes but recognized that there may be instances where crimes against property will be considered particularly serious. *Id.*

In subsequent decisions, we held that, once an alien is found to have been convicted of a particularly serious crime, there is no need for a separate determination whether he is a danger to the community. *See Matter of N-A-M-*, 24 I&N Dec. 336 (BIA 2007), *aff'd, N-A-M- v. Holder*, 587 F.3d 1052 (10th Cir. 2009), *cert. denied*, 131 S. Ct. 898 (2011); *Matter of Q-T-M-T-*, 21 I&N Dec. 639, 646-47 (BIA 1996); *Matter of K-*, 20 I&N Dec. 418, 423-24 (BIA 1991); *Matter of Carballe*, 19 I&N Dec. 357, 360 (BIA 1986). Our interpretation has been accepted by the United States Court of Appeals for the Seventh Circuit, the jurisdiction in which the instant case arises. *See Garcia v. INS*, 7 F.3d 1320, 1323 (7th Cir. 1993).

Since our decision in *Matter of Frentescu*, the provision that bars aliens with particularly serious crimes from being granted withholding of deportation or removal has been amended three times. Congress first amended former section 243(h)(2) of the Act in 1990, providing that aggravated felonies are to be categorically considered particularly serious crimes

and obviating the need for an individualized analysis of the underlying facts of the aggravated felony conviction. Immigration Act of 1990, Pub. L. No. 101-649, § 515(a)(2), 104 Stat. 4978, 5053 (effective Nov. 29, 1990); *Matter of L-S-*, 22 I&N Dec. 645, 650 (BIA 1999). However, in 1996 Congress gave the Attorney General discretionary authority to override the categorical bar that designated every aggravated felony as a particularly serious crime. Antiterrorism and Effective Death Penalty Act of 1996, Pub. L. No. 104-132, § 413(f), 110 Stat. 1214, 1269 (effective Apr. 24, 1996) ("AEDPA"). Interpreting the effect of the amended provision in *Matter of Q-T-M-T-*, *supra*, at 654, we applied a rebuttable presumption in section 243(h) cases that an aggravated felony was a particularly serious crime.

Months after the passage of the AEDPA, Congress again revised the "particularly serious crime" clause, eliminating the categorical bar to withholding of removal for aliens convicted of an aggravated felony. *See Matter of L-S-*, *supra*, at 650-51; *Matter of S-S-*, 22 I&N Dec. 458, 463 (BIA 1999), *overruled in part by Matter of Y-L-*, *A-G- & R-S-R-*, 23 I&N Dec. 270, 273-74 (A.G. 2002). This last revised version of the particularly serious crime clause remains in effect and applies to the applicant's case.

The Act currently provides that an alien is ineligible for withholding of removal if "the Attorney General decides that...the alien, having been convicted by a final judgment of a particularly serious crime, is a danger to the community of the United States." Section 241(b)(3)(B)(ii) of the Act; *see also* 8 C.F.R. § 1208.16(d)(2) (providing that an "alien who has been convicted of a particularly serious

crime shall be considered to constitute a danger to the community"). Section 241(b)(3)(B) further states that "[f]or purposes of [section 241(b)(3)(B)(ii)], an alien who has been convicted of an aggravated felony . . . for which the alien has been sentenced to an aggregate term of imprisonment of at least 5 years shall be considered to have committed a particularly serious crime." However, the Attorney General is not precluded from determining that the alien has been convicted of a particularly serious crime, regardless of the sentence imposed. *See Matter of N-A-M-*, *supra*, at 337.

We have held that for an alien who has not been convicted of an aggravated felony or whose aggravated felony conviction did not result in an aggregate term of imprisonment of 5 years or more, it is necessary to examine the nature of the conviction, the type of sentence imposed, and the circumstances and underlying facts of the conviction to determine whether the crime was particularly serious. *See Matter of N-A-M-*, *supra*, at 342. If the elements of an offense are found to potentially bring it within the ambit of a particularly serious crime, all reliable information that is relevant to the determination may be considered. *Id.* A particularly serious crime analysis is centered on the crime that was committed. *Matter of Carballe*, 19 I&N Dec. at 360. Consequently, the inquiry does not involve an examination of an alien's personal circumstances and equities, such as family or community ties or any risk of persecution in the country of removal. *Matter of L-S-*, *supra*, at 651; *Matter of Q-T-M-T-*, *supra*, at 656; *Matter of K- supra*, at 418. The presence or absence of harm to the victim is also a pertinent factor in

evaluating whether a crime was particularly serious. See, *Matter of R-A-M-*, 25 I&N Dec. 657, 661 (BIA 2012); *Matter of N-A-M-*, *supra*, at 343.

The record establishes that the applicant was convicted in August 1996, for the offense of aggravated criminal sexual abuse under 720 ILCS 5/12-16(d). The applicant's offense is not an aggravated felony for which he was sentenced to a term of imprisonment of at least 5 years. Thus, the proper inquiry is an examination of the nature of the conviction, the type of sentence imposed, and the circumstances and underlying facts of the conviction. *See Ali v. Achim*, 468 F.3d 462, 468-70 (7th Cir. 2006).

We consider the facts related to the applicant's conviction as found by the Immigration Judge except for those factual findings determined to be clearly erroneous. *See* 8 C.F.R. § 1003.1(d)(3)(i). We review the judgment of the Immigration Judge that the facts establish that the applicant has been convicted of a particularly serious crime de novo. *See* 8 C.F.R. § 1003.1(d)(3)(ii); *see also Matter of H-L-H- & Z-Y-Z-*, 25 I&N Dec. 209, 212 (BIA 2010) (The Board may give different weight to the evidence than that given by the Immigration Judge in making discretionary judgments). The nature of the applicant's offense, which involved the criminal sexual abuse of his victim potentially brings his offense within the ambit of a particularly serious crime. Therefore, all reliable information relevant to a determination of whether it is a particularly serious crime may be considered. *See Matter of N-A-M-*, *supra*, at 342. The applicant was detained for about two months pursuant to his criminal proceedings and was sentenced to a 4-year period of probation and required to register as a sex

offender for 10 years. The evidence indicates that, as an adult, he was involved in a sexual relationship with a minor and fondled the vagina of his 16-year-old victim.

This Board finds based on the nature of his offense, the length of his probation and the requirement that he register as a sex offender, and the underlying circumstances of his offense that he has been convicted of a particularly serious crime. In this regard, we do not weigh his crime less seriously because it was committed against a 16-year-old and not a 13-year-old. His victim could not legally consent to engaging in sexual activity with the applicant and was a member of a class of minors that are given special protection under the laws as vulnerable victims. There is an inherent risk of exploitation, if not coercion, when an adult solicits a minor to engage in sexual activity. Minors as a group have a less well-developed sense of judgment than adults, and thus are at greater peril of making chokes that are not in their own best interests. *See Gattem v. Gonzales*, 412 F.3d 758, 765 (7th Cir. 2005). This Board also does not give great weight in assessing the seriousness of his crime to the applicant's claim that he did not know his victim was a minor. In this regard, to the extent that the Immigration Judge made a factual finding that the applicant's claimed belief regarding the age of his victim did not appear to conflict with the nature of the sentence that he received in his criminal proceedings, the Immigration Judge's finding is clearly erroneous. At the time of the applicant's conviction, an affirmative defense to a charge under the former statutory provision at 720 ILCS 5/12-16(d)

existed at 720 ILCS 5/12-17(b) when the accused reasonably believed the victim to be a person 17 years of age or older.[1] *See People v. Douglas*, 381 Ill.App.3d 1067, 886 N.E.2d 1232 (Ill.App.2 Dist, 2008); *see also People v. Gonzalez*, 385 Ill.App.3d 15, 895 N.E.2d 982 (Ill.App. 1 Dist., 2008). Thus, the applicant could have raised a reasonable mistake as to the age of his victim as a defense to conviction.

Inasmuch as this Board has determined that the applicant's conviction in 1996 for aggravated criminal sexual abuse is a conviction for a particularly serious crime, the applicant's removal may not be withheld under section 241(b)(3)(A) of the Act by operation of section 241(b)(3)(B)(ii) of the Act. The applicant's conviction for a particularly serious crime also renders him ineligible for withholding of removal under the Convention Against Torture pursuant to the regulation at 8 C.F.R. § 1208.16(d)(2). However, the applicant may pursue deferral of removal under the Convention Against Torture pursuant to 8 C.F.R. § 1208.17. The requirements for establishing eligibility for deferral of removal are the same as the requirements for withholding of removal. Thus, we address the Immigration Judge's decision granting the applicant protection under the Convention Against Torture.

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[1] Former section 720 ILCS 5/12-17(b), was subsequently renumbered and is now contained at 720 ILCS 5/11-1.70 with the law still providing an affirmative defense to a charge of aggravated criminal sexual assault which has also been renumbered and is contained at 720 ILCS 5/11-1.60.

Convention Against Torture

In order to establish eligibility for protection under the Convention Against Torture, the applicant must establish by objective evidence that he will likely be tortured by, or with the acquiescence of (to include the concept of willful blindness), a government official of Honduras upon his return. 8 C.F.R. §§ 1208.16(c)(2) and 1208.18(a)(1); *Huang v. Mukasey*, 525 F.3d 559, 564 (7th Cir. 2008). The implementing regulations do not create a presumption of future torture arising from past torture, but evidence of past torture is relevant in assessing the likelihood of torture upon return. 8 C.F.R. § 1208.16(c)(3)(i). Torture is an extreme form of cruel and inhuman treatment and does not include lesser forms of cruel, inhuman or degrading treatment of punishment that do not amount to torture. 8 C.F.R. § 1208.18(a)(2). In order to constitute torture, an act must be directed against a person in the offender's custody or physical control. 8 C.F.R. § 1003.18(a)(6). Acquiescence of a public official requires that the public official, prior to the activity constituting torture, have awareness of such activity and, thereafter, breach his or her legal responsibility to intervene to prevent such activity. 8 C.F.R. § 1003.18(a)(7). Evidence that the applicant can relocate to another part of Honduras where he is not likely to be tortured is also properly considered. 8 C.F.R. § 1208.16(c)(3)(ii).

The applicant's claim is that he will likely be tortured because he was tortured over 20 years ago for his leadership of a land invasion, the individual whose land was invaded has ties to present law enforcement authorities in Honduras due to past employment, he heard that the individual whose land

he invaded still threatened him in 2006, and general country conditions in Honduras establish continuing government corruption, abuse, and suspected human rights violations by the military and police.

However, the Immigration Judge also found that the applicant had been able to relocate within Honduras after his torture and prior to departing Honduras in 1994. While the Immigration Judge found that the applicant was not free from ongoing torture or harm after relocating within Honduras, the Immigration Judge's factual finding finds no support in the record and is clearly erroneous. On the contrary, the applicant testified that in November 1993, after he was tortured, he moved to a different part of Honduras that was 8 to 10 hours away by car (Tr. at 32). He indicated that he was never harmed there. The applicant then related that, when he was freed from detention, he did not return to his abode one day because a friend told him a suspicious car had been seen in the area and the applicant relocated after his home and property were damaged by police before the next morning (Tr. at 32-33). The applicant indicated that he moved with his parents to Sequadro [phonetic sp.] and was never harmed in that location (Tr. at 32-33). The applicant did not testify regarding any instance of harm or torture occurring to him after he relocated. The applicant also testified that he took his parents with him to the home of his in-laws in San Pedro de Sula prior to his departure from Honduras in 1994 and he did not indicate that he was tortured or harmed in San Pedro de Sula at that time (Tr. at 39). He also returned to San Pedro de Sula after his removal from the United States on June 28, 2007, and was never tortured or harmed in San

Pedro de Sula stemming from his actions leading the land invasion over a decade earlier (Tr. at 33, 38-39).

The threat to the applicant in 2006 occurred prior to the applicant's removal from the United States in 2007 and the Immigration Judge did not find, and the record does not establish, that any harm he experienced during the short period he remained in Honduras in 2007 was tied to his past leadership in a land invasion. The applicant has not heard anything directly from the landowner he fears while in the United States or during the period of time he was in Honduras in 2007 (Tr. at 26). Furthermore, the applicant did not identify any other participants in the land invasion who are presently being tortured in Honduras as a result of their participation in the land invasion in 1993 (I.J. at 7).

While the applicant has indicated that the other participants are not similarly situated because he was viewed as the leader, the absence of evidence that other participants have been tortured is material to the likelihood that the applicant will be tortured on account of his leadership of the land invasion, particularly where at least some of the individuals remain living on the invaded land and have been allowed to cultivate it (I.J. at 4-5). Similarly, the applicant's family remained in Honduras for approximately 3 years without harm after he departed in 1994 (I.J. at 5). The lack of any repercussion to his family while they remained in Honduras is material to the likelihood that the applicant will be tortured upon his return for his participation in a land invasion as the fact that the landowner was not motivated to seek out and harm the applicant's family as a means of punishing the

applicant for leading the land invasion implicates whether the landowner remained motivated to seek out and torture the applicant after the applicant's release from custody in 1993.

Finally, the relevant facts are not frozen at the time of the applicant's departure from Honduras in 1994. The applicant was removed to Honduras in 2007. He was in the custody of police. He was not tortured nor was there any threat to inform the landowner he fears of his presence in Honduras. In this regard, the applicant testified that, while he was detained upon his return in 2007, he was beaten and threatened that a file would be created on him if he did not pay a bribe. The applicant's claim is consistent with the country conditions evidence and, as the Immigration Judge determined, is credible. However, the actions of police upon his return do not rise to the level of torture under the regulation at 8 C.F.R. § 1208.18(a)(2).

While the applicant may subjectively believe that the landowner he fears could learn of his presence in Honduras and undertake to torture him with the acquiescence of the Honduran government, the objective evidence in the record demonstrates that the applicant was able to safely relocate within Honduras at a time contemporaneous with events, that he was not harmed by the landowner upon his return to Honduras in 2007 despite the alleged threat in 2006, that he was not tortured when he was in the custody of Honduran authorities in 2007, that other participants in the land invasion live in Honduras and are not being tortured for their participation, and that his family remained in Honduras after he departed in 1994 and was not harmed despite his

leadership of the land invasion. This Board is not persuaded that the objective evidence establishes that the applicant will likely be tortured in Honduras upon his return. It is not enough that the evidence of country conditions in Honduras indicates that the police and military in Honduras can act brutally and in violation of human rights. Given the opportunity for his fears to be realized in 2007, based upon the same facts he has presented, he was not tortured. The applicant has not established that his torture by or with government acquiescence was likely in 2007, and he has not established through objective evidence that his torture upon return to Honduras is more likely to occur now. Accordingly, the following orders will be entered.

ORDER: The appeal is sustained.

FURTHER ORDER: The application for withholding of removal under section 241(b)(3)(A) of the Act is denied pursuant to operation of section 241(b)(3)(ii) of the Act.

FURTHER ORDER: The application for deferral of removal is denied.

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FOR THE BOARD

APPENDIX C

UNITED STATES DEPARTMENT OF JUSTICE
EXECUTIVE OFFICE FOR IMMIGRATION REVIEW
UNITED STATES IMMIGRATION COURT
CHICAGO, ILLINOIS

File: A073-223-323 August 4, 2014

In the Matter of	)
RUFINO ANTONIO ESTRADA-MARTINEZ	) IN WITHHOLDING) ONLY) PROCEEDINGS
APPLICANT	
CHARGES:	
APPLICATIONS:	
ON BEHALF OF APPLICANT: PRO SE	
ON BEHALF OF DHS: COLLEEN PEPPARD	

ORAL DECISION OF THE IMMIGRATION JUDGE

The applicant in these proceedings is a 51-, almost 52-, year-old native and citizen of Honduras. The applicant was placed in these withholding only proceedings after the determination by the Department of Homeland Security that he had a reasonable fear of being persecuted in his country. This is a withholding only proceeding due to the fact that the Government has reinstated a prior order, an

in absentia order, of removal dated December 21, 2006, upon which order the applicant was actually removed on June 28, 2007. The applicant has indicated that he returned to the United States one week after his removal. The asylum officer's determination referring this proceeding to the Court is dated April 2, 2014. *See* Group Exhibit 1.

In this particular case, the applicant was previously granted asylum. He initially came to the United States in 1994 and applied for asylum. His application was granted on March 15, 1995.

Thereafter, he applied for adjustment of status. That was denied and he was placed in a removal proceeding on March 26, 2001. The case was held in abeyance while the Government determined that the then respondent's request for a waiver under Section 209(c) of the Immigration and Nationality Act should be denied. Their decision was rendered on November 15, 2004.

The respondent's case was scheduled before the Immigration Judge on December 21, 2006, to renew his application for adjustment of status and a waiver. However, those matters were never resolved because the respondent did not appear at his hearing and was ordered removed in his absence.

His attorney did file a subsequent motion to reopen. That motion to reopen was denied on February 1, 2007. *See* Group Exhibit 3.

The applicant remains eligible for protection from persecution or torture pursuant to Section 241(b)(3) or under the U.N. Convention against Torture if he can establish it is more likely than not he would be subjected to persecution or torture in his country.

The respondent in fact was granted asylum based on prior mistreatment, including beatings and torture inflicted upon him by the police and intelligence officers acting on behest of a former military colonel who had been the employer of the applicant. The applicant, and a group of coworkers, staged a so-called invasion of land that they had been forced to work. They did this in 1993. Shortly thereafter, 13 of them were arrested by the police and subjected to torture. The respondent was held longer than the others. He was held for approximately two months. The others were released quickly. The respondent was subjected to numerous forms of torture, including severe beatings, suffocation, helicopter beatings and threats that his family, including two very young children, would be killed.

After he came to the United States, respondent received services to assist him in recovering from psychological and psychiatric and physical problems associated with torture. He received these services from 1995 until 2011 at the Heartland Alliance for Human Needs and Human Rights. *See* Group Exhibit 2.

The applicant fled his village after he was released by the police. He was released after his colleagues staged a hunger strike. He relocated his family to the San Pedro Sula city, where his in-laws lived. He himself went to live at a location approximately an eight to ten hour drive, but fled from there to Mexico after observing that cars with tinted windows appeared to be following him. He sought protection in Mexico. Apparently, that was not granted. Thereafter, he came to the United States and was granted asylum.

Conditions in Honduras continue to remain politically volatile and violent. The police are known to be involved in and complicit with killings, torture, mistreatment of detainees and other violence leveled at human rights activists, journalists, campesino community leaders in connection with ongoing land disputes not involving the land related to the respondent's dispute. There continues to be impunity for serious political abuse. This is referenced by the UNHCR as a chronic problem. Since 2011, military personnel have received an emergency decree allowing them to carry out public security duties. They have the power to seize control of violent neighborhoods, carry out arrests despite a history of abuse by the military against civilians. Since 2009, over 90 people have been killed in land disputes. Scores more have been the victims of attacks and threats. Most victims have been peasants. The most recent State Department report relating to Hondurans reports pervasive societal violence, killings in rural areas of indiginous people, agricultural workers, bystanders, private security guards and security forces related to land disputes, infrastructure development projects, organized crime and other factors. Violence persists against detainees. There are lengthy pretrial detentions and failure to provide due process of law. There continues to be encroachment on indiginous lands. Although the government took steps to prosecute and punish officials who committed abuses, corruption, intimidation and poor functioning of the justice system were serious impediments to the protection of human rights. There continue to be instances in which military or police officials are suspected of

human rights violations and have not been investigated or punished.

The applicant was removed in June of 2007. Upon his arrival, the authorities reviewed paperwork he had brought with him referencing the reason for his removal, the conviction in 1996 for aggravated criminal sexual abuse. *See* Exhibit 3, tab D. They demanded a bribe to release him without creating a file on him. During that short detention, his was beaten and threatened.

The applicant last heard from his father in 2006 that the individual whose land he successfully invaded as part of the campesino movement still had made threats against him and would be likely to kill him if he returned. That individual, Avilio Martinez, according to the applicant, still remains in Honduras. The applicant has not heard directly from him, has not received any direct threats.

His father has passed away. His mother and two of his siblings live in Honduras. None of them have been harmed or threatened. The other individuals with whom the applicant invaded Mr. Martinez' land continue to reside on that land, not as a group, but as individuals who have been allowed to cultivate it. The applicant, however, has never returned to that area.

He has presented a letter. The Court gives it little weight because the translation has not been attested to, but it verifies his story.

I will also note that the applicant has told his story when he filed his initial application in 1995 and again to the asylum officer in 2014 and again to this Court, although somewhat truncated in the

testimony, and has been remarkably consistent throughout. I find that he has testified candidly and credibly and as he could have documented his case, he has provided an explanation for the failure to document his case. He has indicated that his wife, with whom he is now separated, destroyed documents that he previously had in connection with his asylum application and because he is in custody and unrepresented, he has not been able to gather other potential evidence.

The Government opposes both withholding of removal under 241(b)(3) and under the U.N. Convention against Torture based on the long period of time that has elapsed, the fact that the applicant has not received any threats and that his family members remained in Honduras after he left without being harmed. They remained in Honduras for about three or four years after he fled.

The Government also opposes a grant under 241(b)(3) as they believe that the applicant's crime constitutes a particularly serious offense. I will note that this is aggravated criminal sexual abuse, that the applicant was convicted of fondling the vagina of his victim. It appears she was 16. He believes she was 17. It appeared to have been a consensual relationship that went on over a period of time. At the time of the offense, the applicant would have been 33 years of age. The applicant has testified that he was, in fact, unaware that his victim was under 18. He was arrested after she apparently left her home due to a dispute with her parents. The victim's father contacted the police. He was initially detained for about two months, but was not sentenced to any time. After his guilty plea, he was given probation

for four years. He was required to register as a sex offender for ten years, which he did every year. The Government has not presented any evidence other than the indictment, the statute and the sentence.

Given the sentence that the applicant received and given his what appears to be very candid and credible testimony, I do not believe that this is a particularly serious offense. Again, not to diminish the misconduct. This is an aggravated felony. There is no presumption that it is a particularly serious offense. It is again a statutory rape case. The applicant has testified, and the Government has not put in evidence to refute this, that this victim was at the older of the age range. There is a significance, in this Court's mind, between a victim who would be 13 or 14 or 15 and one that is 16. And the applicant's testimony that this was an ongoing consensual relationship, that in his mind that he believed she was 18, does not appear to conflict with the nature of the sentence that he received from the State Court that did have the evidence in front of it.

I find that he is not statutorily barred from protection under 241(b)(3). I find that the fact that he has previously been arrested and beaten and tortured by the police on account, first, of his membership in a group, which although it committed a crime, had political undertones and more recently when he was removed in 2007 on account of his being removed was again beaten. In the backdrop of the country condition reports, both the U.S. Department of State and U.N. High Commission for Refugees, it is clear that conditions have not materially changed. The fact does remain that the applicant for a period of time was able to relocate within his country. This

appeared to have been from approximately March of 1993 until he left in May of 1994. However, it does not appear that the circumstances of his life were free from harm of ongoing torture and death. Threats were leveled against him as recently as 2006. Although his compatriots were allowed to return to the land and apparently succeeded in either owning it or receiving some sort of possessory rights, they had all been released months before the applicant was and had not been subjected to the forms of torture that he had been subjected to because he had been identified as the leader of the group. The individual with whom the dispute arose, Avilio Martinez, continues to reside in Honduras. He is retired from the military, but continues to have connections with the police and intelligence officers. The applicant's testimony on this is credible and worthy of belief.

Accordingly, I find that the past torture that he was subjected to, the more recent mistreatment at the hands of the police and threats evidence that it is more likely than not if he returns to his country he will be subjected to police brutality, including torture and including persecution, threats made on account of his prior membership in an organization and his prior political activities.

ORDER

The decision of this Court is that he should be granted withholding of removal under Section 241(b)(3) and protection under the U.N. Convention against Torture in the form of withholding of removal to Honduras.

Please see the next page for electronic signature

ELIZA C. KLEIN
Immigration Judge

//s//

Immigration Judge ELIZA C. KLEIN
kleine on September 8, 2014 at 1:09 PM GMT

APPENDIX D

8 U.S.C. § 1231(b)(3)

* * *

(3) Restriction on removal to a country where alien's life or freedom would be threatened

(A) In general

Notwithstanding paragraphs (1) and (2), the Attorney General may not remove an alien to a country if the Attorney General decides that the alien's life or freedom would be threatened in that country because of the alien's race, religion, nationality, membership in a particular social group, or political opinion.

(B) Exception Subparagraph (A) does not apply to an alien deportable under section 1227(a)(4)(D) of this title or if the Attorney General decides that—

(i) the alien ordered, incited, assisted, or otherwise participated in the persecution of an individual because of the individual's race, religion, nationality, membership in a particular social group, or political opinion;

(ii) the alien, having been convicted by a final judgment of a particularly serious crime is a danger to the community of the United States;

(iii) there are serious reasons to believe that the alien committed a serious nonpolitical

crime outside the United States before the alien arrived in the United States; or

(iv) there are reasonable grounds to believe that the alien is a danger to the security of the United States.

For purposes of clause (ii), an alien who has been convicted of an aggravated felony (or felonies) for which the alien has been sentenced to an aggregate term of imprisonment of at least 5 years shall be considered to have committed a particularly serious crime. The previous sentence shall not preclude the Attorney General from determining that, notwithstanding the length of sentence imposed, an alien has been convicted of a particularly serious crime. For purposes of clause (iv), an alien who is described in section 1227(a)(4)(B) of this title shall be considered to be an alien with respect to whom there are reasonable grounds for regarding as a danger to the security of the United States.

* * *

8 U.S.C. § 1252(a)(2)(B)(ii)

* * *

(B) Denials of discretionary relief 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), and regardless of whether the judgment, decision, or action is made in removal

proceedings, no court shall have jurisdiction to review—

* * *

(ii) any other decision or action of the Attorney General or the Secretary of Homeland Security the authority for which is specified under this subchapter to be in the discretion of the Attorney General or the Secretary of Homeland Security, other than the granting of relief under section 1158(a) of this title.

* * *