No. 18-953

In the Supreme Court of the United States

MOHAMED FAZLAN MOHAMED FAWZER, PETITIONER

v.

WILLIAM P. BARR, ATTORNEY GENERAL

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

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QUESTION PRESENTED

Whether the motive standard that governs applications for asylum, under which an applicant must demonstrate that a protected trait is "at least one central reason" for the claimed persecution, also governs applications for statutory withholding of removal.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. A1-A11) is not published in the Federal Reporter but is reprinted at 755 Fed. Appx. 72. The decisions of the Board of Immigration Appeals (Pet. App. A12-A19) and the immigration judge (Pet. App. A20-A54) are unreported.

JURISDICTION

The judgment of the court of appeals was entered on November 15, 2018. The petition for a writ of certiorari was filed on January 16, 2019. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. The Immigration and Nationality Act (INA), 8 U.S.C. 1101 *et seq.*, provides for various forms of relief and protection for people facing removal from the United States. This case involves two such forms of relief and protection: asylum and withholding of removal.

Asylum is a form of discretionary relief. 8 U.S.C. 1158(b)(1)(A). The Attorney General and Secretary of Homeland Security may grant asylum once an applicant demonstrates (among other conditions) that he is unable or unwilling to return to his country of origin "because of persecution or a well-founded fear of persecution on account of race, religion, nationality, membership in a particular social group, or political opinion." 8 U.S.C. 1101(a)(42)(A). Under amendments to the INA made by the REAL ID Act of 2005, Pub. L. No. 109-13, 119 Stat. 302, the applicant must establish that a protected ground is "at least one central reason" for the claimed persecution. 8 U.S.C. 1158(b)(1)(B)(i). The Board of Immigration Appeals (Board) has ruled that a protected trait does not amount to a "central reason" for the persecution if the trait plays only "a minor role" or is "incidental, tangential, superficial, or subordinate to another reason for harm." *In re J-B-N & S-M-*, 24 I. & N. Dec. 208, 214 (2007).

Withholding of removal, by contrast, is a form of mandatory protection. The Attorney General ordinarily must not remove an applicant to a particular country if "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." 8 U.S.C. 1231(b)(3). This standard, which requires an alien to show a "clear probability of persecution," is more "stringent" than the standard for eligibility for asylum, which requires only a "'well-founded fear of persecution.'" *INS* v. *Cardoza-Fonseca*, 480 U.S. 421, 443-444 (1987). Unlike the provisions addressing asylum, the provisions addressing withholding of removal do not expressly address the standard to be ap-

plied in cases involving mixed motives (beyond requiring the applicant to show that his life or freedom would be threatened "because of" a protected trait). But the Board has ruled that the same "one central reason" standard that governs asylum claims should also govern withholding claims. *In re C-T-L-*, 25 I. & N. Dec. 341, 346 (2010). An applicant seeking withholding of removal, just like an applicant seeking asylum, must thus establish that a protected ground is "at least one central reason" for the claimed persecution. *Id.* at 348.

The REAL ID Act sets out a framework that governs assessments of credibility in asylum and withholding cases. In two provisions applicable to asylum cases, the Act provides that the trier of fact may make credibility determinations and require the applicant to provide corroborating evidence even for "otherwise credible testimony." 8 U.S.C. 1158(b)(1)(B)(ii); see 8 U.S.C. 1158(b)(1)(B)(iii). A separate provision makes this framework applicable to withholding cases: "In determining whether an alien has demonstrated that the alien's life or freedom would be threatened for a reason described in [the provision of the withholding statute setting out the protected grounds], the trier of fact shall determine whether the alien has sustained the alien's burden of proof, and shall make credibility determinations, in the manner described in [8 U.S.C. 1158(b)(1)(B)(ii) and (iii)]." 8 U.S.C. 1231(b)(3)(C).

2. Petitioner is a native and citizen of Sri Lanka. Pet. App. A12. He was admitted to the United States in September 2011 as a nonimmigrant student, but he failed to attend school. *Id.* at A21. The Department of Homeland Security accordingly initiated removal proceedings under 8 U.S.C. 1227(a)(1)(C)(i), which provides for the removal of a nonimmigrant who fails to

comply with the conditions under which he was admitted. Pet. App. A20. Petitioner admitted the allegations, and the immigration judge sustained the charge of removability. *Id.* at A20-A54.

Petitioner sought asylum and withholding of removal, suggesting that he faced persecution in Sri Lanka because of religion, ethnicity, and political opinion. Pet. App. A5, A22. Petitioner's application rested on an alleged incident in Sri Lanka involving his family's used-car business. *Id.* at A14. Petitioner claimed that he became involved in a business dispute with a customer who refused to pay for a car, that he reported the customer to the police, and that the customer and others then kidnapped, beat, and detained him. *Ibid.* Petitioner claimed that the assailants targeted him because he is a Muslim, because he belongs to an ethnic minority in Sri Lanka, and because he and his family belonged to a minority political party. *Id.* at A15. Petitioner also claimed that his assailants made "disparaging remarks" about his religion and political party. *Id.* at A16.

3. Following a hearing, the immigration judge issued an oral decision denying petitioner's application, and he ordered petitioner removed to Sri Lanka. Pet. App. A20-A54.

The immigration judge found that petitioner had not "credibly shown" that the "events" he described "actually" "did occur." Pet. App. A52. The immigration judge observed that petitioner's evidence was "sketchy," that it contained "clear discrepancies," and that it "contradict[ed]" rather than supported petitioner's "version of the story." *Id.* at A39, A41, A52.

The immigration judge further found that, even on petitioner's own account, petitioner had failed to show

that religion, ethnicity, or political opinion was a "central reason why he might have been subjected to persecution" in the past "or would be in the future." Pet. App. A38; see *id.* at A35. The immigration judge explained that, even on petitioner's account, petitioner's mistreatment resulted from a business dispute about "control over [a] car" and "who would pay for the car"—not religion, ethnicity, or political opinion. *Id.* at A32-A33. In reaching that conclusion, the immigration judge emphasized that petitioner "ha[d] not shown that there is a pattern or practice of persecution of Muslims in Sri Lanka," that petitioner's practice of his religion "is not really an issue in this story," and that petitioner's family members (who had written letters in support of his application) had not indicated that they faced "a pattern of mistreatment * * * based on their Muslim religion." *Id.* at A36-A38. The immigration judge further emphasized that the dispute that led to petitioner's alleged mistreatment did not relate to the "government," and did not involve "representatives" of the government or the ruling party. *Id.* at A33. The immigration judge acknowledged petitioner's claims that his assailants made disparaging remarks about his religion and political affiliation, but concluded that these traits were at most "secondary or background issue[s] in his story," not "motivating factor[s]" for his alleged mistreatment. *Id.* at A34-A35, A37.

4. The Board dismissed petitioner's appeal. Pet. App. A12-A19.

The Board declined to address the immigration judge's finding that petitioner was not credible, instead ruling that there was "no clear error in the immigration judge's alternative finding that [petitioner] ha[d] not established a link, or nexus, between the business dispute

and the related kidnapping/extortion and a protected ground." Pet. App. A15. The Board perceived no clear error in the immigration judge's finding that the "predominant motive" for petitioner's alleged mistreatment "was financial," and that "the insults about [petitioner's] religion and political affiliation appear to be incidental or tangential to the persecutor's actual motive." *Id.* at A17. The Board thus concluded that, because petitioner "ha[d] not demonstrated that a protected ground * * * was at least one central reason for the harm he experienced and fears upon return, he ha[d] not met his burden of proof for asylum," and also had "not satisfied the * * * standard of eligibility required for withholding of removal." *Id.* at A18.

5. The court of appeals denied the petition for review in a summary order. Pet. App. A1-A11.

The court of appeals explained that petitioner was required to show that "the protected ground is or will be 'at least one central reason' for his persecution." Pet. App. A4 (citation omitted). The court determined that petitioner could not satisfy this standard. In the court's view, the Board "reasonably concluded that [petitioner's] asserted mistreatment arose not from a protected ground but from a business dispute." *Id.* at A5. The court read the record to show that petitioner "repeatedly sought payment of the money his family was owed," and that, during the alleged attack, the assailant "repeatedly referred to [petitioner's] efforts to obtain the money." *Ibid.* The court thus sustained the Board's conclusion that the "alleged persecutors 'were motivated by financial gain' and that insults directed at [petitioner's] religion and political affiliation were 'incidental or tangential to the persecutor's actual motive.'" *Id.* at A6.

ARGUMENT

Petitioner contends (Pet. 15-20) that the court of appeals erred by requiring an applicant for withholding of removal to show that a protected trait was "at least one central reason," rather than merely "a reason," for the claimed persecution. Pet. 16 (citation omitted). The court, however, applied the proper legal standard in evaluating his claim. Petitioner is correct that some courts of appeals have reached conflicting decisions about the applicable standard in withholding-of-removal cases, but this conflict is poorly developed and does not warrant this Court's intervention at this time. In all events, this case would be a poor vehicle for resolving any conflict: Petitioner forfeited (indeed, waived) that claim before the court of appeals; the court did not pass on the question presented; petitioner's application for withholding of removal would fail even on his own standard; and the immigration judge identified an alternative basis for denying petitioner's application. Further review is therefore unwarranted.

1. The court of appeals' decision was correct. The court applied the correct legal standard in evaluating petitioner's claim for withholding of removal, asking whether a protected ground was or would be "at least one central reason" for the claimed persecution. And the court correctly applied that standard to the facts of this case.

The INA expressly adopts a motive standard for asylum cases; the applicant must show that a protected trait was "at least one central reason" for the claimed persecution. 8 U.S.C. 1158(b)(1)(B)(i). The INA does not, however, expressly set forth a motive standard for withholding-of-removal cases, beyond requiring the ap-

plicant to show that his life or freedom would be threatened "because of" a protected trait. 8 U.S.C. 1231(b)(3). Yet the best reading of the statute is that the same "at least one central reason" standard that governs asylum cases also governs withholding cases.

The "at least one central reason" standard follows from the plain terms of the INA's withholding-of-removal provision. Under that provision, an applicant for withholding of removal must show that his life or freedom would be threatened "because of" a protected trait. 8 U.S.C. 1231(b)(3). This Court has explained that "[t]he words 'because of' mean 'by reason of.'" *Gross* v. *FBL Fin. Servs., Inc.*, 557 U.S. 167, 176 (2009) (citation omitted). The Court has further explained that, as a matter of "ordinary meaning," a person acts "because of" a protected trait only if that trait "'actually played a role'" in his decision and "'had a determinative influence on the outcome.'" *Ibid.* (citation and emphasis omitted). The "at least one central reason" standard captures that ordinary meaning. A trait that played only an incidental, tangential, or superficial role in the alleged mistreatment would not have "had a determinative influence on the outcome." *Ibid.* (citation and emphasis omitted).

The textual parallels between the statutory provisions governing asylum and withholding of removal support the use of the same standard in both classes of cases. An applicant for asylum must show that he faces persecution "on account of" a protected trait, 8 U.S.C. 1101(a)(42)(A), while an applicant for withholding of removal must show that he faces persecution "because of" a protected trait, 8 U.S.C. 1231(b)(3)(A). As this Court has observed, "because of" and "on account of" are syn-

onymous. *Gross*, 557 U.S. at 176 (citation omitted). Indeed, this Court has used "because of" and "on account of" interchangeably in discussing asylum and withholding of removal. *INS* v. *Elias-Zacharias*, 502 U.S. 478, 481-483 (1992) (citation omitted).

In addition, where a statute contains a "gap" about the "standard" that governs a legal issue, this Court often "borrow[s]" an appropriate standard from an analogous statutory provision. *Martel* v. *Clair*, 565 U.S. 648, 657, 660 (2012). The Court usually "prefer[s] to copy something familiar than concoct something novel," so that courts can "rely on experience and precedent, with a standard already known to work effectively." *Id.* at 660. Here, the INA requires an applicant for withholding of removal to show that he faces persecution "because of" a protected trait, but it is otherwise silent about the motive standard for withholding cases. In such circumstances, the appropriate course is to use the "familiar" motive standard that the agency and courts use in asylum cases, not to "concoct something novel" just for withholding cases. *Ibid.*

Furthermore, the Board has explained that using different motive standards for asylum and withholding cases would create severe practical difficulties. *In re C-T-L-*, 25 I. & N. Dec. 341, 346 (2010). Every application for asylum "necessarily includes" an application for withholding of removal. *Id.* at 347. The rules governing these two forms of relief and protection differ in some respects, but "[t]he existing distinctions are generally straightforward to apply because they involve either basic eligibility criteria or the overarching burden of proof." *Id.* at 346. In contrast, using different motive standards for asylum and withholding of removal would "require a bifurcated analysis on a single subissue in the

overall case," "mak[ing] these adjudications more complex, unclear, and uncertain." *Id.* at 347. "On the other hand, applying the same standard promotes consistency and predictability, which are important principles in immigration law." *Ibid.*

In all events, under *Chevron U.S.A. Inc.* v. *Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984), a court should defer to an agency's reasonable interpretation of an ambiguous statute that the agency administers. *Id.* at 842-843. The INA does not unambiguously set forth a motive standard for withholding-of-removal cases. For the reasons just discussed, the Board's "at least one central reason" standard reflects at least a reasonable reading of that ambiguous text. The Board's interpretation therefore warrants deference.

2. Invoking the Ninth Circuit's decision in *Barajas-Romero* v. *Lynch*, 846 F.3d 351 (2017), petitioner erroneously contends (Pet. 15-20) that an applicant for withholding of removal need only show that a protected trait was "a reason," rather than at least "one central reason," for the claimed persecution. Pet. 16 (citation omitted). The Ninth Circuit's reading rests on an amendment made in the REAL ID Act that provides: "In determining whether an alien has demonstrated that the alien's life or freedom would be threatened *for a reason described in subparagraph (A)* [*i.e.*, the provision of the withholding statute setting out the protected traits], the trier of fact shall determine whether the alien has sustained the alien's burden of proof, and shall make credibility determinations, in the manner described in [the asylum statute]." 8 U.S.C. 1231(b)(3)(C) (emphasis added). The Ninth Circuit interpreted that provision's use of the term "for a reason described in subparagraph (A)," *ibid.*, to mean that Congress required applicants

for withholding of removal to show only that a protected trait is a "reason," not "at least one central reason," for the persecution. *Barajas-Romero*, 846 F.3d at 358. The Ninth Circuit, however, misread the statute.

Naturally read, the phrase "for a reason described in subparagraph (A)," 8 U.S.C. 1231(b)(3)(C), is just a shorthand reference to the list of protected traits in subparagraph (A): "race, religion, nationality, membership in a particular social group, or political opinion." 8 U.S.C. 1231(b)(3)(A). Nothing in the phrase suggests that it prescribes new substantive standards, for assessing mixed motives or otherwise.

The legal backdrop against which Congress adopted Section 1231(b)(3)(C) confirms that the natural reading is the correct one. Before Congress adopted the REAL ID Act in 2005, courts and the Board had "consistently" used the same motive standard in "withholding of removal cases" as in "asylum cases." *In re C-T-L-*, 25 I. & N. Dec. at 346; see, *e.g.*, *Gafoor* v. *INS*, 231 F.3d 645, 653 n.5 (9th Cir. 2000); *In re A-M-*, 23 I. & N. Dec. 737, 739 (B.I.A. 2005); *In re V-T-S-*, 21 I. & N. Dec. 792, 796 (B.I.A. 1997). If Congress wanted to "overturn" that "settled body of law," it would have done so directly, not in an "oblique way." *Helsinn Healthcare S.A.* v. *Teva Pharm. USA, Inc.*, 139 S. Ct. 628, 634 (2019) (citation omitted).

The adoption of 8 U.S.C. 1231(b)(3)(C) would have been an oblique way to require the Board to use bifurcated motive standards for asylum and withholding cases. First, the phrase "for a reason described in subparagraph (A)" reads as a straightforward cross-reference to the withholding statute's list of protected traits. A statutory cross-reference would have been an unusual place to bury a distinct substantive standard. Second,

the function of the provision as a whole is to promote uniformity between asylum and withholding cases, by requiring the agency to use the same framework for credibility determinations in the latter that it uses in the former. *Ibid.* A provision designed to promote consistency would have been an unusual place to bury a requirement to apply inconsistent motive standards.

The Ninth Circuit also rested on the fact that the withholding statute expressly makes certain of the asylum statute's provisions regarding burden of proof and credibility determinations applicable to withholding cases, but does not expressly make the provision containing the "at least one central reason" standard applicable to withholding cases. See *Barajas-Romero*, 846 F.3d at 358. The Ninth Circuit overlooked the most natural explanation for the omission of a cross-reference to the "one central reason" provision of the asylum statute: That provision requires the applicant to establish that he is a "refugee," 8 U.S.C. 1158(b)(1)(B)(i), a requirement that is inapplicable to a withholding claim. In any event, the statutory pattern that the Ninth Circuit observed demonstrates, at most, that the statute contains a gap in fleshing out the motive standard applicable to withholding applications. Under *Chevron*, it is up to the agency to fill that gap.

3. Petitioner correctly observes (Pet. 15-17) that the courts of appeals have reached conflicting decisions about the proper motive standard for withholding-of-removal cases. The conflict, however, is far less developed than petitioner suggests. One court of appeals, the Third Circuit, has issued a published opinion adopting the "'at least one central reason'" standard for withholding-of-removal cases—although it has done so in a footnote in a case on which "the parties appear[ed] to agree on this

point." *Gonzalez-Posadas* v. *Attorney Gen. U.S.*, 781 F.3d 677, 685 n.6 (2015) (citation and emphasis omitted). Four more courts of appeals have applied the "at least one central reason" standard in unpublished, non-precedential opinions. See *Lopez-Diaz* v. *Lynch*, 661 Fed. Appx. 116, 117 (2d Cir. 2016); *Gitata* v. *Holder*, 486 Fed. Appx. 369, 369 n.3 (4th Cir. 2012) (per curiam); *Torres-Vaquerano* v. *Holder*, 529 Fed. Appx. 444, 447 (6th Cir. 2013); *Lucas* v. *Lynch*, 654 Fed. Appx. 256, 259-260 (8th Cir. 2016) (per curiam). On the other side of the ledger, only one court of appeals, the Ninth Circuit, has issued a published opinion adopting the lower "a reason" standard for withholding-of-removal cases. See *Barajas-Romero*, 846 F.3d at 351.

Petitioner cites (Pet. 15) several additional cases, but those cases do not squarely address the question presented. In each of those cases, the court of appeals did not discuss the "at least one central reason" and "a reason" standards, and instead resolved the case on unrelated grounds. See *Perez-Rabanales* v. *Sessions*, 881 F.3d 61, 67 (1st Cir. 2018) (cognizability of alien's proposed particular social group); *Ramsameachire* v. *Ashcroft*, 357 F.3d 169, 182 (2d Cir. 2004) (adverse credibility finding); *Guled* v. *Mukasey*, 515 F.3d 872, 881 (8th Cir. 2008) (same).

The upshot is that only two courts of appeals have addressed the question presented in published opinions —and one of them did so in a footnote in a case without the benefit of adversarial briefing. The conflict is insufficiently developed to warrant this Court's intervention at this time.

4. In all events, this case would be a poor vehicle for resolving any conflict among the courts of appeals over the question presented.

First, petitioner failed to preserve—indeed, waived—his claim before the court of appeals. Petitioner, represented by counsel, *accepted* that "a protected ground must have been 'or will be at least one central reason' for the persecution" in order to entitle him to asylum and withholding of removal. Pet. C.A. Br. 28 (citation omitted). Petitioner instead argued that "[his] religious beliefs and political affiliation was at least one central reason for the persecution." *Id.* at 27. By affirmatively asking the court of appeals to use the "at least one central reason" standard, petitioner waived any claim that the court of appeals erred by using that standard. At a minimum, petitioner forfeited the claim by failing to ask the court to use the "a reason" standard.

Second, the court of appeals failed to pass on the question presented. The court applied the "at least one central reason" standard, but it did not consider (presumably because petitioner did not ask it to consider) whether that standard reflects a reasonable reading of the withholding-of-removal statute. See Pet. App. A4. There is no sound basis for this Court—which is "a court of review, not of first view," *Cutter* v. *Wilkinson*, 544 U.S. 709, 718 n.7 (2005)—to consider that issue in the first instance.

Third, petitioner's application for withholding of removal would fail even under the "a reason" standard. The immigration judge concluded that petitioner had failed to show that a protected trait was even "*a* motivating factor" in his alleged persecution. Pet. App. A37 (emphasis added).

Finally, the immigration judge identified an alternative ground for denying petitioner's application for withholding of removal: He determined that petitioner's ac-

count was not credible. The immigration judge explained that the "discussion" of a "possible protected basis" for the alleged persecution "is, in a sense, immaterial," because petitioner "ha[d] not actually shown that [the alleged persecution] did occur" in the first place. Pet. App. A52. The Board did not reach the immigration judge's alternative determination, see *id.* at A15, but it could still dismiss petitioner's appeal on that basis if this matter were remanded to it.

4. The petition also presents (at i) a second question: whether an applicant for asylum and withholding of removal may establish a basis for relief or protection by showing that the asserted persecution was based, "at least in part, on political and religious animus, as well as a pecuniary motive." This question presented appears to be a reformulation of petitioner's first question presented. But to the extent this question challenges the application of the asylum and withholding standards to the facts of petitioner's case, petitioner fails to develop the challenge in the body of his petition. In any event, the immigration judge's findings of fact are conclusive unless "no reasonable factfinder" could have reached them. *Elias-Zacarias*, 502 U.S. at 484; see 8 U.S.C. 1252(b)(4)(B). The immigration judge's findings in this case were at least reasonable. Further review of those factbound rulings is not warranted.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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