No. 20-45

In the Supreme Court of the United States

TAKHIR ASHIROVICH KHAYTEKOV, PETITIONER

v.

WILLIAM P. BARR, ATTORNEY GENERAL

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

BRIEF FOR THE RESPONDENT

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QUESTIONS PRESENTED

1. Whether the government must provide the written notice required to trigger the stop-time rule for cancellation of removal in 8 U.S.C. 1229b(d)(1)(A) in a single document.

2. Whether the court of appeals permissibly declined to consider petitioner's challenge to the Board of Immigration Appeals' finding that he knowingly filed a frivolous asylum application where the court found that an independent and unreviewable basis supported the Board's decision denying petitioner's application for discretionary relief.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-12a) is not published in the Federal Reporter but is reprinted at 794 Fed. Appx. 497. The decisions of the Board of Immigration Appeals (Pet. App. 13a-25a) and the immigration judge (Pet. App. 26a-47a) are unreported.

JURISDICTION

The judgment of the court of appeals was entered on December 16, 2019. A petition for rehearing was denied on February 19, 2020 (Pet. App. 48a). The petition for a writ of certiorari was filed on July 15, 2020. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. a. Under the Immigration and Nationality Act (INA), 8 U.S.C. 1101 *et seq.*, an alien who is lawfully admitted to the United States as a nonimmigrant, but overstays his period of authorized admission, is removable. 8 U.S.C. 1227(a)(1)(B). Such an alien may nonetheless be eligible for relief from removal in the form of adjustment of status. See 8 U.S.C. 1255. An alien may be granted adjustment of status if he applies for that form of relief, "is eligible to receive an immigrant visa and is admissible to the United States for permanent residence," and "an immigrant visa is immediately available to him at the time his application is filed." 8 U.S.C. 1255(a). Various grounds may make an alien inadmissible, including "seek[ing] to procure" immigration benefits "by fraud or willfully misrepresenting a material fact." 8 U.S.C. 1182(a)(6)(C)(i).

If an alien applying for adjustment of status is inadmissible to the United States, he may still be eligible for a waiver of inadmissibility that would enable him to attain statutory eligibility for adjustment. An alien who is inadmissible because of fraud or willful misrepresentation of a material fact in attempting to obtain immigration benefits may apply for a waiver of inadmissibility under Section 1182(i). To qualify for a waiver of inadmissibility under Section 1182(i), an alien must be the "spouse, son, or daughter of a United States citizen or of an alien lawfully admitted for permanent residence," and establish that his removal "would result in extreme hardship to the" qualifying relative. 8 U.S.C. 1182(i)(1).

An alien seeking adjustment of status or a waiver of inadmissibility "has the burden of proof to establish" both that he "satisfies the applicable eligibility require-

ments" and that he "merits a favorable exercise of discretion." 8 U.S.C. 1229a(c)(4)(A); see 8 C.F.R. 1240.8(d); cf. 8 U.S.C. 1252(a)(2)(B)(i).

b. The INA also allows the Attorney General, in his discretion, to cancel an alien's removal in certain situations. An alien who is not a lawful permanent resident is eligible for consideration for a discretionary grant of cancellation of removal if he (1) "has been physically present in the United States for a continuous period of not less than 10 years immediately preceding the date of such application," (2) "has been a person of good moral character during such period," (3) has not committed any of certain offenses, and (4) "establishes that removal would result in exceptional and extremely unusual hardship" to a qualifying relative who is a United States citizen or lawful permanent resident. 8 U.S.C. 1229b(b)(1). The INA provides that the period of continuous physical presence terminates when an alien is served with a notice to appear for immigration proceedings. 8 U.S.C. 1229b(d)(1).

c. The INA additionally provides that the Secretary of Homeland Security or the Attorney General may, in his discretion, grant asylum to an alien who demonstrates that he is a "refugee." 8 U.S.C. 1158(b)(1)(A). If an alien knowingly files a "frivolous" asylum application, the alien "shall be permanently ineligible" for any discretionary form of relief under the INA, 8 U.S.C. 1158(d)(6), including waiver of inadmissibility and cancellation of removal, see *Albu* v. *Holder*, 761 F.3d 817, 819 (7th Cir. 2014) (upholding denial of cancellation of removal based on application of the bar). The applicable regulations provide that "an asylum application is frivolous if any of its material elements is deliberately fabricated." 8 C.F.R. 1208.20. A finding of frivolousness

"shall only be made if the immigration judge or the [Board of Immigration Appeals] is satisfied that the applicant, during the course of the proceedings, has had sufficient opportunity to account for any discrepancies or implausible aspects of the claim." *Ibid.*

2. Petitioner is a native of Turkmenistan and a citizen of Uzbekistan. Pet. App. 13a. He lawfully entered the United States on June 3, 2001, relying on a nonimmigrant visitor's visa with an authorized period of admission not to extend beyond December 2, 2001. Administrative Record (A.R.) 1449. Petitioner sought extensions of his authorized period of admission through December 2, 2002, which were granted. *Ibid.* Petitioner thereafter remained in the United States without authorization. *Ibid.*

In April 2007, the Department of Homeland Security (DHS) served petitioner with a document titled "Notice to Appear." A.R. 1449 (emphasis omitted). That notice informed petitioner that "removal proceedings" were being initiated against him because he had "remained in the United States for a time longer than permitted" under the terms of his nonimmigrant admission. *Ibid.* (emphasis omitted); see 8 U.S.C. 1227(a)(1)(B). The notice did not specify the date and time of petitioner's initial removal hearing, noting that the hearing would be held "on a date to be set at a time to be set." A.R. 1449 (emphasis omitted).

Also in April 2007, DHS filed the notice to appear with the immigration court. See A.R. 1449. Pursuant to governing regulations, see 8 C.F.R. 1003.18, the immigration court provided petitioner with a document titled "Notice of Hearing in Removal Proceedings," which informed petitioner that it had scheduled his removal hearing for April 18, 2007, at 12:30 p.m. A.R.

1445-1446 (capitalization altered). Petitioner appeared at that hearing before an immigration judge (IJ). A.R. 988. Petitioner's proceedings were continued to allow him time to obtain and confer with counsel. A.R. 993-996; see A.R. 998-999. On January 28, 2008, he again appeared before the IJ and through counsel admitted the factual allegations against him and conceded removability. A.R. 1004-1005.

Proceedings were again continued to February 25, 2008, and on that date petitioner filed an application for asylum and withholding of removal. A.R. 1009-1010; see A.R. 1014. Petitioner's asylum application stated that he had been "mistreated, injured and persecuted because of [his] race, ethnicity, nationality and political and religious beliefs," and that he "fear[ed] continued physical attacks, persecution and mistreatment" if returned to Uzbekistan. A.R. 1313; see A.R. 1108-1110. He also stated that he "belonged to political and religious groups that disagree with the government." A.R. 1314; see A.R. 1065.

On February 25, 2009, the IJ held a hearing, which was intended to consider the merits of petitioner's asylum application. See A.R. 1013. At that hearing, petitioner, through counsel, stated on the record that he was withdrawing his previously-filed application for asylum and related protection and was instead pursuing adjustment of status based on his marriage to a United States citizen, which had occurred since petitioner had filed his asylum application. A.R. 1013-1015. Proceedings were continued several times over the course of the following year as DHS separately adjudicated the I-130 visa petition filed on petitioner's behalf by his wife. See A.R. 1020-1029, 1354-1359. At a hearing on January 21, 2010, petitioner informed the IJ that the I-130 petition

had been approved, and the IJ scheduled a hearing on his application for adjustment of status. A.R. 1033.

Over the course of two hearings in May 2012 and May 2013, petitioner testified in support of his application for adjustment of status. See A.R. 1035-1117. At those hearings, due to inconsistencies between petitioner's application for adjustment of status and the asylum application he had previously filed, petitioner was closely questioned about and given the opportunity to explain the contents of his asylum application and the veracity of statements made in that application. See AR 1064-1066, 1108-1112. The government and the IJ questioned petitioner about the fact that his application for asylum stated that he had been injured and attacked and that he belonged to political and religious groups—although, as petitioner admitted and the IJ found, neither of those assertions was true. See *ibid.*; see also A.R. 968-969. At the conclusion of the May 2013 hearing, petitioner conceded that he knowingly signed and submitted an asylum application that contained false statements because he believed that would increase his likelihood of being permitted to remain in the United States. A.R. 1112.

The IJ denied petitioner's application for adjustment of status. A.R. 961-972. The IJ initially determined that petitioner was not credible, based on petitioner's nonresponsive and evasive testimony; contradictions between the evidence presented and petitioner's testimony; the fact that various immigration documents filed by petitioner "contain[ed] patently false information"; and petitioner's deliberate fabrication of his application for asylum. A.R. 968; see A.R. 968-969.

Turning to the merits of petitioner's application for adjustment of status, the IJ concluded that petitioner

had not established his admissibility to the United States. A.R. 969-970. The IJ found that petitioner's misrepresentations and fabrications, which were made in order to obtain immigration benefits, rendered him inadmissible. *Ibid.*; see 8 U.S.C. 1182(a)(6)(C)(i). The IJ noted that petitioner "ha[d] not filed an application for waiver of these grounds of inadmissibility, although clearly he is or was aware of them." A.R. 970. In the alternative—and independent of the finding that petitioner had not demonstrated statutory eligibility for adjustment of status—the IJ balanced the positive and negative factors in the case and found that petitioner should not be granted adjustment of status because he did not merit a favorable exercise of discretion. A.R. 970-972. As part of both his credibility determination and his ultimate merits ruling, the IJ relied on petitioner's failure to submit any documentation regarding a 2002 criminal charge. See A.R. 970.

The Board of Immigration Appeals (Board) upheld the IJ's determination that petitioner failed to carry his burden of establishing his admissibility to the United States and dismissed his administrative appeal. A.R. 893-894. The Board's affirmance was based solely on the fact that petitioner had failed to provide documents clarifying the disposition of his 2002 arrest; the Board found that without such clarification, petitioner had failed to demonstrate that he was not inadmissible due to a resulting conviction. *Ibid.* The Board thus found it unnecessary to consider any of the other issues resolved by the IJ. A.R. 894 n.2. Petitioner did not seek judicial review of the Board's decision.

3. a. In July 2015, petitioner filed a motion to reopen with the Board, arguing that his prior counsel had

provided ineffective assistance. A.R. 786-797. Petitioner asserted that prior counsel had failed to submit evidence that his 2002 arrest had not resulted in a conviction and that the charges were dismissed. A.R. 788, 791-793. Petitioner also alleged that his prior counsel had failed to advise him of the need to seek a waiver of inadmissibility. A.R. 788-780, 791-793. The Board granted petitioner's motion to reopen, remanding "for further fact finding and consideration of [petitioner's] current eligibility for adjustment of status," and permitting petitioner to "apply for any other relief for which he may qualify." A.R. 758-759.

b. On remand, the IJ considered new evidence, heard the testimony of petitioner and his wife, and held oral argument on petitioner's applications for adjustment of status and waiver of inadmissibility. See A.R. 422-588; see also Pet. App. 28a. The IJ again denied petitioner's application for adjustment of status and also denied his application for a waiver of inadmissibility. Pet. App. 26a-47a.

At the threshold, the IJ determined that petitioner lacked credibility, based on the IJ's earlier adverse credibility determination and on additional contradictions at the more recent hearing. Pet. App. 39a-41a. Summing up his credibility findings, the IJ concluded that petitioner "is a patently dishonest person. He has filed applications which he knew contained information that was false. He has given sworn testimony before this Court in multiple hearings, which is diametrically opposed from testimony in other hearings." *Id.* at 41a.

On the merits of petitioner's application for adjustment of status, the IJ denied relief for four independent reasons. First, the IJ determined that petitioner had knowingly filed a frivolous asylum application and was

thus statutorily ineligible for any benefit under the INA, "including adjustment of status." Pet. App. 42a. Second, the IJ found that the many misrepresentations and fabrications petitioner made in the course of attempting to obtain immigration benefits rendered him inadmissible because he sought to "procure" immigration benefits by "fraud or willfully misrepresenting a material fact," 8 U.S.C. 1182(a)(6)(C)(i). Pet. App. 42a-44a. Third, the IJ found that petitioner was not eligible for a waiver of inadmissibility because he did not demonstrate that his U.S. citizen wife would suffer "extreme hardship," which is necessary for a waiver of inadmissibility based on Section 1182(a)(6)(C)(i), see 8 U.S.C. 1182(i)(1). Pet. App. 44a-45a.

Fourth and finally, the IJ noted that both adjustment of status and a waiver of inadmissibility "are discretionary forms of relief," and the IJ found that, even assuming that petitioner had met the statutory eligibility requirements for those benefits, denial of the benefits was appropriate in the exercise of discretion. Pet. App. 45a-47a. Although petitioner had been in the United States for a "long period of time," operated his own business, and "appear[ed] to be an attentive husband," the IJ found that those positive factors were outweighed by negative ones—including the fact that he misrepresented his residence, lied about his work history, failed to disclose his service in the Soviet Army, filed a fabricated asylum application, and "repeatedly and demonstrably presented dishonest testimony to [the IJ] over the course of multiple hearings"—to the extent that the IJ found that petitioner "is one of the most remarkably and demonstrably dishonest people with whom this Court has dealt in well over 30 years of experience on the bench." *Id.* at 45a-46a.

c. Petitioner appealed the IJ's decision to the Board. A.R. 357-359. The Board dismissed the appeal and denied petitioner's related motion to remand. Pet. App. 13a-25a.

The Board upheld the IJ's denial of petitioner's applications for adjustment of status and waiver of inadmissibility. Pet. App. 17a-24a. The Board began by affirming the IJ's adverse credibility determination, walking through petitioner's various inconsistencies and misrepresentations, *id.* at 17a-20a, and finding that the IJ "articulated specific, cogent reasons based in the record for finding that [petitioner] was not credible," *id.* at 17a. The Board next upheld the IJ's finding that petitioner had filed a frivolous asylum application, rejecting petitioner's argument that he did not receive notice of the consequences of filing a frivolous asylum application. *Id.* at 20a-21a. Petitioner received notice, the Board found, because the asylum application that petitioner had signed and filed warned that a frivolous application would make him ineligible for immigration benefits and because he received separate notices to the same effect at other points in time. *Ibid.* The Board likewise rejected petitioner's argument that he never actually filed his asylum application because the record showed that he filed it with the IJ and that he subsequently withdrew it—an act that would have been unnecessary had it not been previously "file[d]." *Id.* at 21a n.1. Finally, the Board "agree[d] with the [IJ] that [petitioner] ha[d] not demonstrated that he merits a waiver * * * as a matter of discretion." *Id.* at 21a. The Board found that the adverse factors in petitioner's case, including the "many misrepresentations in his applications and before the [IJ]," outweighed the positive fac-

tors. *Id.* at 23a; see *id.* at 22a-24a. As part of its balancing of the equities, the Board took into account new evidence that petitioner offered for the first time on appeal. See *id.* at 22a n.4.

The Board also rejected petitioner's arguments based on asserted deficiencies in his notice to appear. Pet. App. 14a-16a. While petitioner's appeal was pending, this Court decided *Pereira* v. *Sessions*, 138 S. Ct. 2105 (2018), holding that a document labeled a "notice to appear" that fails to specify the time or place of an alien's removal proceedings does not trigger the stop-time rule governing the calculation of the alien's continuous physical presence for purposes of eligibility for cancellation of removal, 8 U.S.C. 1229b(d)(1)(A). 138 S. Ct. at 2110. Petitioner relied on *Pereira* and argued that, because the notice of the date and time of his initial removal hearing were contained in a document separate from his initial notice to appear, the IJ lacked jurisdiction over his removal proceedings, A.R. 27-34—and also that he should be permitted to seek cancellation of removal because his period of continuous physical presence was never terminated and he had been present in the United States longer than ten years, see A.R. 37. The Board held that "a notice to appear that does not specify the time and place of an alien's initial hearing vests an [IJ] with jurisdiction over the removal proceedings as long as a notice of hearing specifying this information is later sent to the alien." Pet. App. 15a. Because petitioner received such a notice and appeared at his initial removal hearing, the Board concluded that "jurisdiction properly vested with the [IJ]." *Id.* at 15a-16a. In rejecting petitioner's challenge to his notice to appear, the Board also erroneously distinguished his

case from *Pereira* as not presenting any question regarding cancellation of removal. See *id.* at 15a.

4. a. Petitioner filed a petition for review with the court of appeals, which, in an unpublished opinion, denied the petition in part and dismissed it in part. Pet. App. 1a-12a. The court began by dismissing for lack of jurisdiction petitioner's challenge to the Board's denial of his motion to remand for consideration of new evidence, which the Board had considered as part of its weighing of the equities in determining whether a favorable exercise of discretion was warranted. *Id.* at 4a-9a; see *id.* at 22a n.4.

The court of appeals next rejected petitioner's challenge to the Board's denial of his request for cancellation of removal in light of *Pereira*. Pet. App. 10a-12a. The court noted that the Board erred in stating that petitioner was not seeking cancellation of removal, but held that that mistake was harmless error in light of circuit precedent. *Id.* at 10a. Although petitioner's initial notice to appear did not contain all the required information under *Pereira*, "before [petitioner] had been in the United States for 10 years, the government sent him a *second* notice telling him of the time and place of his removal proceedings." *Id.* at 11a. Because the court of appeals had held in a previous case "that the government can trigger the stop-time rule by sending a follow-up communication with information missing from an original notice" within ten years of entry, petitioner was "not eligible to seek cancellation of removal." *Id.* at 11a-12a.

Finally, the court of appeals declined to address the Board's frivolousness determination because consideration of that issue was "not necessary for [its] disposition of the petition." Pet. App. 12a (citation omitted).

The court noted that it lacked jurisdiction to review petitioner's challenge to the denial of his request for a waiver of inadmissibility to the extent the denial was "based on [the Board's] discretionary balancing of the negative and positive aspects of his case," *ibid.*, because the INA strips federal courts of jurisdiction over such discretionary determinations, see 8 U.S.C. 1182(i), 1252(a)(2)(B)(i). Pet. App. 4a-5a. Because the unreviewable "balancing would doom [petitioner]'s requests for relief even if [the court] reversed the Board's separate finding[] that he filed a frivolous asylum application," the court of appeals concluded that it "need not reach th[at] issue[]." *Id.* at 12a.

b. The court of appeals denied petitioner's petition for rehearing en banc; no judge requested a vote on the petition. Pet. App. 48a.

ARGUMENT

On the first question presented, petitioner argues (Pet. 12-13) that the Court should hold this petition pending its decision in *Niz-Chavez* v. *Barr*, cert. granted, No. 19-863 (oral argument scheduled for Nov. 9, 2020). The government does not oppose holding the petition for the decision in *Niz-Chavez*.

On the second question presented, petitioner contends (Pet. 22-25) that the court of appeals erred by declining to review the Board's affirmance of the IJ's finding that he knowingly filed a frivolous asylum application. The court's one-paragraph disposition of that issue in its unpublished, non-precedential decision does not warrant this Court's review. In any event this case would be a poor candidate for further review because the finding that petitioner fabricated his asylum application is clearly supported by the record, including by

petitioner's own admission. And that finding is reinforced by the broader context of petitioner's extensive removal proceedings in which the IJ found that petitioner had "repeatedly and demonstrably presented dishonest testimony" over the course of "multiple hearings." Pet. App. 46a; see *id.* at 45a-46a.

1. Petitioner contends (Pet. 12-13) that the Court should hold this petition pending its decision in *Niz-Chavez* v. *Barr*, *supra* (No. 19-863). The issue resolved by the court of appeals that is the subject of the first question presented—whether the government may provide the written notice required to trigger the stop-time rule for purposes of eligibility for cancellation of removal, 8 U.S.C. 1229b(d)(1)(A), in more than one document—is the same as the question presented in *Niz-Chavez*. Even if petitioner were to overcome that bar to cancellation of removal, however, he would still bear the burden of proof to establish, *inter alia*, that he was a person of good moral character during the ten-year period prior to his filing of the application for cancellation of removal and that he should be granted that relief as a matter of discretion. See pp. 2-3, *supra*. Nonetheless, the government does not oppose petitioner's request that, on the first question presented, the petition be held for the decision in *Niz-Chavez*.

2. a. i. The court of appeals declined to review the frivolousness finding because independent and unreviewable grounds supported the Board's decision denying discretionary relief. The court properly found that the INA barred it from reviewing the Board's discretionary balancing and that the Board's decision not to exercise its discretion to grant adjustment of status and a waiver of inadmissibility was an independent basis for denying petitioner's requests for that relief. Pet. App.

12a; see 8 U.S.C. 1182(i), 1252(a)(2)(B)(i). Petitioner does not dispute those holdings. Thus, the court concluded, a reversal of the frivolousness finding "would not change the outcome of [petitioner's] application for adjustment of status and a waiver of inadmissibility." Pet. App. 12a. On that basis, the court of appeals found that it "need not reach" the frivolousness finding "because [it is] 'not necessary for our disposition of the petition.'" *Ibid.* (citations omitted).

This Court routinely declines to review issues unnecessary to its decision, and has long held that "[a]s a general rule courts and agencies are not required to make findings on issues the decision of which is unnecessary to the results they reach." *INS* v. *Bagamasbad*, 429 U.S. 24, 25 (1976) (per curiam). In *Bagamasbad*, an alien who had overstayed her tourist visa sought adjustment of status; the agency found that she did not merit an exercise of discretion and denied her application on that basis alone, declining to address whether she met the statutory requirements for relief. *Id.* at 24-25. The court of appeals found that "although the immigration judge had properly exercised his discretion to deny [the] application," the judge was required "to make findings and reach conclusions with respect to [the alien's statutory] eligibility." *Id.* at 25. This Court reversed. The Court noted that "it [wa]s conceded that [the] application would have been properly denied whether or not [the alien] satisfied the statutory eligibility requirements." *Id.* at 26. "[A]bsent an express statutory requirement" that an agency issue findings, there was nothing that required the agency—and, by extension, the court of appeals—to address the question of statutory eligibility. *Ibid.*; see *id.* at 25-26; cf. *INS* v.

Rios-Pineda, 471 U.S. 444, 449 (1985) ("[I]f the Attorney General decides that relief should be denied as a matter of discretion, he need not consider whether the threshold statutory eligibility requirements are met.").

The rationale the court of appeals gave here for declining to pass upon the Board's frivolousness ruling was consistent with *Bagamasbad*. The Board concluded that, even assuming petitioner had met the statutory eligibility requirements, relief was not appropriate in the exercise of discretion. Pet. App. 21a-24a; see *id.* at 45a-47a. Because the court of appeals lacked jurisdiction to review that determination, it could not disturb the Board's final decision regarding petitioner's application for discretionary relief. Consideration of the frivolousness issue was "unnecessary to the results [it] reach[ed]," *Bagamasbad*, 429 U.S. at 25, with respect to the discretionary relief petitioner sought in this case.

ii. Petitioner contends (Pet. 22-25) that the court of appeals erred because its decision not to address the frivolousness issue was based on the jurisdictional ground of mootness, asserting that "the court effectively treated the [frivolousness determination] as moot." Pet. 22. See Pet. 11 (stating that "[t]he court * * * held * * * that the [frivolousness] issue was moot"); see also Pet. 2-3, 13-15, 22-25 (treating the decision below as relying on mootness). But the court of appeals did not hold that mootness or any other jurisdictional bar prevented it from reaching the frivolousness determination or that it otherwise lacked authority to do so. Instead, the court of appeals merely stated that it "need not address" petitioner's arguments on the frivolousness determination because any finding "would not change the outcome of [petitioner]'s applications" for relief. Pet. App. 12a.

Petitioner points (Pet. 24) to the collateral consequences a finding of frivolousness may have and asserts that the "decision below cannot be reconciled with this Court's decisions holding that collateral immigration consequences * * * sustain an ongoing case or controversy." But the court of appeals did not hold that the possibility of collateral immigration consequences is insufficient to sustain an Article III case or controversy. It did not discuss that issue at all. There is thus no conflict between the decision below and the decisions of this Court on which petitioner relies (Pet. 23-25), because those decisions all dealt with mootness. See *INS* v. *Cardoza-Fonseca*, 480 U.S. 421, 426 n.3 (1987); *United States* v. *Villamonte-Marquez*, 462 U.S. 579, 581 n.2 (1983); *Fiswick* v. *United States*, 329 U.S. 211, 221-223 (1946).

Moreover, quite aside from any issue of mootness, the court of appeals did not even address whether collateral consequences extending beyond the denial of petitioner's applications for discretionary relief in this case would independently warrant reaching the frivolousness issue. Thus, even if the decision of the court of appeals were binding circuit precedent, there was no holding by the court that would prevent the court from reaching the frivolousness issue in comparable circumstances in a future case, or from deciding that it was required to do so. But the fact that the decision below is non-precedential is all the more reason why review is unwarranted.

b. Petitioner relies on decisions of other courts of appeals that have reviewed a frivolousness finding. In many of the decisions on which petitioner relies, the court simply addressed the frivolousness issue on the merits without addressing whether it was required to

do so. See *Ngwa* v. *Holder*, 517 Fed. Appx. 176 (4th Cir. 2013) (per curiam); *Wang* v. *Lynch*, 845 F.3d 299 (7th Cir. 2017) (per curiam); *Ignatova* v. *Gonzales*, 430 F.3d 1209 (8th Cir. 2005); *Khadka* v. *Holder*, 618 F.3d 996 (9th Cir. 2010); see also *Liu* v. *U.S. Dep't of Justice*, 455 F.3d 106, 108 (2d Cir. 2006) (remanding to give the Board "an opportunity, in the first instance, to formulate standards for deciding when an asylum seeker's application may be deemed frivolous").[*] Other cases relied on by petitioner concerned mootness, which the court here did not discuss. See *Mingkid* v. *U.S. Attorney Gen.*, 468 U.S. 763, 768 (11th Cir. 2006); *Valenzuela-Solari* v. *Mukasey*, 551 F.3d 53, 56 (1st Cir. 2008) ("[U]nder the collateral consequences doctrine, this court has jurisdiction to consider [the] petition for review of the false citizenship ground."); *G.S.* v. *Holder*, 373 Fed. Appx. 836, 844 (10th Cir. 2010) ("[T]his matter is not moot given that there are collateral consequences arising from petitioner's removal.") (emphasis added); cf. Pet. 20-21 (citing cases holding that the court had Article III jurisdiction over the petition for review).

In any event, the unpublished decision of the court of appeals did not address whether review of a frivolousness finding would be called for because of the prospect of collateral consequences, and its decision is not precedential. It therefore does not embody a holding that could give rise to the sort of circuit conflict that might warrant review by this Court.

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[*] In a non-precedential decision cited by petitioner, the Third Circuit rejected the contention that it should decline to consider the frivolousness issue, noting the adverse consequences of the frivolousness finding. *Qin Lin* v. *Attorney Gen.*, 279 Fed. Appx. 188 (2008) (per curiam).

c. Finally, the decision below does not warrant this Court's review because the Board's frivolousness finding is supported by substantial evidence, and indeed petitioner has conceded that his asylum application was fabricated. An application for asylum is frivolous where the IJ "determines that an alien has knowingly made a frivolous application for asylum and the alien has received * * * notice" of the consequences of knowingly filing a frivolous application. 8 U.S.C. 1158(d)(6). "[A]n asylum application is frivolous if any of its material elements is deliberately fabricated," and a finding of frivolousness can be made only if the Board is satisfied that the alien had "sufficient opportunity to account for any discrepancies." 8 C.F.R. 1208.20. Substantial evidence supports the Board's findings on all of these requirements.

First, substantial evidence supports the conclusion that petitioner "knowingly made" a frivolous application for asylum. 8 U.S.C. 1158(d)(6). Although petitioner's asylum application stated that he had been mistreated, injured, and persecuted and that he belonged to political and religious groups, see pp. 5-6, *supra*, petitioner admitted before the IJ that he had never been attacked or harmed in Uzbekistan, that he did not belong to political or religious groups, and that he knowingly included those false statements to increase his chances of being permitted to remain in the United States. A.R. 1108-1112; see A.R. 1065. Petitioner thus deliberately fabricated material elements in his asylum application—falsifying the very bases for his claim for asylum—and thereby knowingly filed a frivolous asylum application.

Second, petitioner was appropriately advised "of the consequences * * * of knowingly filing a frivolous application for asylum." 8 U.S.C. 1158(d)(4)(A). Petitioner signed his application and attested to its veracity immediately below a clear warning of the consequences of filing a frivolous application for asylum. A.R. 1317 ("Applicants determined to have knowingly made a frivolous application for asylum will be permanently ineligible for any benefits under the Immigration and Nationality Act. You may not avoid a frivolous finding simply because someone advised you to provide false information in your asylum application.") (emphasis omitted). The application's warning satisfies the statutory notice requirement, see, *e.g.*, *Niang* v. *Holder*, 762 F.3d 251, 254-255 (2d Cir. 2014) (per curiam) (holding that "[b]ecause the written warning provided on the asylum application alone is adequate to satisfy the notice requirement under 8 U.S.C. § 1158(d)(4)(A) and because Niang signed and filed his asylum application containing that warning, he received adequate notice warning him against filing a frivolous application," and collecting cases from other courts of appeals holding the same).

And third, petitioner had "sufficient opportunity to account for any discrepancies" in his asylum application. 8 C.F.R. 1208.20. The government and the IJ extensively questioned petitioner about his asylum application and gave him the opportunity to explain his inconsistencies—but petitioner's explanation was that he thought his fraudulent statements would increase his chances of obtaining asylum. See A.R. 1064-1066, 1108-1112.

Petitioner thus meets all the prerequisites for a frivolousness finding under Section 1158(d)(6). In particular, he "sign[ed] this application knowing that there's

false statements in the asylum claim because [he] thought it would help [him] remain here." A.R. 1112. Review by this Court is not warranted.

CONCLUSION

With respect to the first question presented, the petition for a writ of certiorari should be held pending this Court's decision in *Niz-Chavez* v. *Barr*, cert. granted, No. 19-863 (oral argument scheduled for Nov. 9, 2020), and then disposed of as appropriate in light of the decision in that case. With respect to the second question presented, the petition for a writ of certiorari should be denied.

Respectfully submitted.

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