No. 20-674

In the Supreme Court of the United States

TITO MICHAEL UZODINMA, PETITIONER

v.

MERRICK B. GARLAND, ATTORNEY GENERAL

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

BRIEF FOR THE RESPONDENT IN OPPOSITION

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QUESTION PRESENTED

Whether 8 U.S.C. 1158(b)(1)(B)(ii) requires that an asylum applicant be given advance notice of the specific corroborating evidence that would be necessary to carry the applicant's burden of establishing eligibility for asylum, as well as an opportunity to obtain that evidence.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-10a) is reported at 951 F.3d 960. The decisions of the Board of Immigration Appeals (Pet. App. 11a-14a, 32a-34a) and the immigration judge (Pet. App. 15a-31a, 35a-40a) are unreported.

JURISDICTION

The judgment of the court of appeals was entered on March 5, 2020. A petition for rehearing was denied on June 11, 2020 (Pet. App. 45a). The petition for a writ of certiorari was filed on November 9, 2020, a Monday. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. a. The Immigration and Nationality Act (INA), 8 U.S.C. 1101 *et seq.*, provides that the Secretary of the Department of Homeland Security (DHS) and the Attorney General may, in their discretion, grant asylum to an alien who demonstrates that he is a "refugee" within the meaning of the INA. 8 U.S.C. 1158(b)(1)(A). The

INA defines a "refugee" as an alien who 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).

The REAL ID Act of 2005 (REAL ID Act or Act), Pub. L. No. 109-13, Div. B, Tit. I, § 101(a)(3), 119 Stat. 303, added a new provision placing the "burden of proof" on the asylum applicant to "establish that [he] is a refugee." 8 U.S.C. 1158(b)(l)(B)(i). The Act also added a new provision governing how an applicant may sustain that burden:

> The testimony of the applicant may be sufficient to sustain the applicant's burden without corroboration, but only if the applicant satisfies the trier of fact that the applicant's testimony is credible, is persuasive, and refers to specific facts sufficient to demonstrate that the applicant is a refugee. In determining whether the applicant has met the applicant's burden, the trier of fact may weigh the credible testimony along with other evidence of record. *Where the trier of fact determines that the applicant should provide evidence that corroborates otherwise credible testimony, such evidence must be provided unless the applicant does not have the evidence and cannot reasonably obtain the evidence.*

8 U.S.C. 1158(b)(1)(B)(ii) (emphasis added). The italicized sentence is referred to here as the REAL ID Act's corroboration provision.

b. Noting that the corroboration provision "is ambiguous with regard to what steps must be taken when the applicant has not provided" sufficient corroborating evidence, the Board of Immigration Appeals (Board)

has established "procedural requirements for submitting corroborating evidence" in support of an asylum application. *In re L-A-C-*, 26 I. & N. Dec. 516, 518 (B.I.A. 2015); see *id.* at 519-522.

In *In re L-A-C-*, the Board observed that prior to adoption of the REAL ID Act, Board precedent required that "where it is reasonable to expect corroborating evidence for certain alleged facts pertaining to the specifics of an applicant's claim, such evidence should be presented." 26 I. & N. Dec. at 519 (discussing *In re S-M-J-*, 21 I. & N. Dec. 722 (B.I.A. 1997) (en banc)). Under that precedent, "regardless of whether an applicant [wa]s deemed credible, he ha[d] the burden to corroborate the material elements of the claim where the evidence [wa]s reasonably obtainable, without advance notice from the Immigration Judge [(IJ)]." *Ibid.* The Board concluded that nothing in the REAL ID Act had displaced that procedural framework. See *ibid.* Indeed, the Board noted that the Conference Report to the REAL ID Act stated that "Congress anticipates that the standards in *Matter of S-M-J-*, including the [Board's] conclusions on situations where corroborating evidence is or is not required, will guide the [Board] and the courts in interpreting" the corroboration provision. *Ibid.* (quoting H.R. Conf. Rep. No. 72, 109th Cong., 1st Sess. 166 (2005) (Conf. Rep.)) (brackets in original); see Pet. 5 ("The REAL ID Act * * * codified the *S-M-J-* corroboration standard at 8 U.S.C. § 1158(b)(1)(B)(ii).").

Especially given the indications that Congress had intended to "codif[y] the requirements outlined in *Matter of S-M-J-*," the Board declined to read the ambiguous language of the REAL ID Act to "[r]equir[e] advance notice of the need for specific corroborating evidence and an automatic continuance." *In re L-A-C-*,

26 I. & N. Dec. at 519-520. The Board explained that adopting such a requirement would be "inconsistent with the normal procedures for conducting immigration court proceedings, which are separated into master calendar and merits hearings." *Id.* at 520-521. At master calendar hearings, the Board noted, "pleadings are taken, [and] legal and factual issues in dispute are identified and narrowed." *Id.* at 521. It is at that point, the Board explained, that applicants may request "continuances * * * for good cause, such as to secure counsel or obtain evidence in preparation" for their merits hearing. *Ibid.* "Then, during the merits hearing, witness testimony and other evidence is presented, the [IJ] makes factual findings and legal conclusions, and any applications for relief are resolved." *Ibid.* To "require the [IJ] to identify the specific corroborating evidence at the merits hearing that would be considered persuasive under the facts of the case to meet the applicant's burden of proof," and then to "grant an automatic continuance for the applicant to present that corroborating evidence at yet another future merits hearing," would impose "additional procedural requirements relating to the submission and evaluation of corroborating evidence" that there was no indication Congress had intended. *Id.* at 520.

The Board instead adopted alternative procedures to implement the corroboration provision, explaining that "[a]t the merits hearing, in circumstances where the [IJ] determines that specific corroborating evidence should have been submitted, the applicant should be given an opportunity to explain why he could not reasonably obtain such evidence." *In re L-A-C-*, 26 I. & N. Dec. at 521. The applicant's explanation must be included in the record, as well as the IJ's finding on

whether the applicant's explanation is sufficient. *Id.* at 521-522. Additionally, "if requested," the IJ must also "decide whether to grant a continuance for the applicant to obtain additional corroboration," based on "whether good cause is shown in the individual circumstances of the case." *Id.* at 522. The Board observed that "a continuance would typically be warranted where the [IJ] determines that * * * the applicant was not aware of a unique piece of evidence that is essential to meeting the burden of proof." *Ibid.* Finally, the Board instructed that "in deciding whether an applicant has met his burden of proof, an [IJ] must not place undue weight on the absence of a particular piece of corroborating evidence while overlooking other evidence in the record that corroborates the claim." *Ibid.*

2. a. Petitioner is a native and citizen of Nigeria who entered the United States on August 9, 2015 on a nonimmigrant student visa to attend Minot State University. See Pet. App. 2a; Administrative Record (A.R.) 649, 991. His student status was terminated in 2017 after he was arrested on charges of cashing fraudulent checks and subsequently failed to enroll for the spring 2017 semester. Pet. App. 2a; A.R. 233-235, 649-650, 712-713, 971-972, 991. DHS thereafter commenced removal proceedings against petitioner. See 8 U.S.C. 1227(a)(1)(C)(i); Pet. App. 2a; A.R. 991-992.

Petitioner applied for asylum, withholding of removal, and protection under the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (CAT), *adopted* Dec. 10, 1984, S. Treaty Doc. No. 20, 100th Cong., 2d Sess. (1988), 1465 U.N.T.S. 85. See Pet. App. 2a; A.R. 951-968. He claimed that he fears that if he returns to Nigeria, he will be persecuted because of his support for political

independence for the Igbo tribe of people and his support for the LGBTQ community (though he is not a member of the latter group). See Pet. App. 2a-3a.

b. At a hearing before an IJ, petitioner testified that both of his parents work for the Nigerian government, and two of his three sisters live in Nigeria. Pet. App. 27a; A.R. 688-691. He stated that his family has received threats because of his parents' involvement with Christian organizations whose members are also supporters of independence for Biafra, a separate Igbo state that attempted to secede from Nigeria during a civil war that lasted from 1967 to 1970. A.R. 723-725; see A.R. 374-375. Petitioner also stated that in 2007 and 2012, while he was in Nigeria, he experienced persecution because of his Igbo ethnicity and his family's political activism. See Pet. App. 24a-27a, 37a; A.R. 745-758, 762-770. But petitioner testified that he experienced no further persecution before he left in August 2015 to attend college in the United States, and that his parents continue to live in Nigeria and work for the government. Pet. App. 27a; A.R. 770, 776.

Petitioner further testified that in August 2016, while he was studying in the United States, he received a phone call through an internet-based messaging application from an unknown Nigerian man who threatened to kill him if he returns to Nigeria. Pet. App. 21a; A.R. 729. He stated that he reported this incident to campus security, but could not obtain a copy of the report. A.R. 729. Petitioner also said that the anonymous caller sent him threatening text messages with the addresses of his family members in Nigeria, but he testified that he does not have a copy of those messages. A.R. 730. Although petitioner testified that he does not know the caller's identity, he stated that he believes the

threats were likely made in response to posts petitioner had made on Facebook regarding his support of the LGBTQ community and his political beliefs about the Nigerian government. See A.R. 734-735, 780-781, 791-792, 955. Petitioner testified that he does not have copies of his posts because he could not log in to his Facebook account while he was in immigration detention. Pet. App. 25a; A.R. 779. He stated that he made his Facebook account private after he started receiving threats on his phone. A.R. 780.

3. a. The IJ granted petitioner's application for asylum. Pet. App. 36a-40a.

The IJ stated that she believed petitioner testified consistently and credibly. Pet. App. 36a. She found that none of petitioner's past experiences in Nigeria rose to the level of persecution, but that he had a reasonable fear of future persecution "based on his political opinion or imputed political opinion of being against the government of Nigeria." *Id.* at 39a. The IJ stated that the "things that he claims to have said on social media against the government would help support his claim for fear of being persecuted in the future," and pointed to descriptions in the Department of State Country Report for Nigeria of "numerous arbitrary unlawful killings" committed by "the government, or its agents." *Ibid.* The IJ accordingly granted petitioner's application for asylum, and did not reach petitioner's applications for withholding of removal and CAT protection. *Id.* at 40a

b. DHS appealed the IJ's decision to the Board, which sustained DHS's appeal and remanded the case. Pet. App. 32a-34a.

The Board held that the IJ had not adequately explained how she had reached the conclusion that petitioner should receive asylum based on his political opinion. Pet. App. 33a. It observed that the IJ's decision "relies almost completely on general country reports to explain any link between the threats the respondent received on his cell phone and the government of Nigeria," but concluded that "[t]he country reports * * * do not adequately support her conclusions that the respondent will face persecution either at the hands of the government or by someone the government is unable or unwilling to control." *Id.* at 33a-34a. The Board further observed that the IJ's decision had addressed neither petitioner's "parent[s'] ability to continue their employment with the Nigerian government, at relatively high levels, nor * * * the complete lack of any supporting documentation specific to" petitioner. *Id.* at 34a. Concluding that "the facts as presented do not support [petitioner's] claim to relief," the Board remanded to the IJ for further proceedings. *Ibid.*

c. On remand, the IJ held a master calendar hearing at which petitioner observed that he had read about *In re S-M-J-* and understood that if there is "evidence that I'm supposed to bring to the court, * * * I have the burden of proof of meeting that—of brin[g]ing those documents to court." A.R. 133. Petitioner stated that "the [Board's] decision * * * gives me something to work off, along with the DHS's brief on appeal," but further asked the IJ "if there's anything right now that you feel like you want to see on [the] record." A.R. 132, 134. The IJ suggested that petitioner could "focus on * * * some of the concerns the government had," noting that petitioner had "already listed their brief" as something he could work from. A.R. 134. The IJ added that given

the Board's "indicat[ion] that I didn't go through things as sufficiently[,] * * * there's maybe some lack of supporting documents that maybe, you know, if you're able to provide anything further," would be helpful. *Ibid.*

Following the master calendar hearing, both parties submitted additional evidence and petitioner testified at a subsequent merits hearing. See A.R. 137-291, 294-540.

DHS submitted a copy of petitioner's public Facebook profile, which did not show any statements by petitioner supporting Biafran independence or the LGBTQ community. A.R. 464-484. DHS also submitted the campus-security report petitioner had previously indicated he was unable to obtain. See A.R. 450-454. Unlike petitioner's prior testimony that the threats had been based on his activism on social-media pages, the report indicated that petitioner told campus security that he had received threatening messages that could be related to his attempt to cash a potentially fraudulent check sent to him by a person in Nigeria. A.R. 451.

Petitioner submitted an affidavit from his mother in Nigeria and media and Amnesty International reports on Nigeria. Pet. App. 22a; A.R. 317-330, 357-439. His mother stated that she and petitioner's father wanted to send him away from Nigeria, "where Igbo people, Christians, and pro Biafran activists are all being targeted." A.R. 317. She stated that petitioner was a "fervent and outspoken believer in the Biafran cause," and that she and petitioner's father were afraid that if he returned to Nigeria, he would be harmed by Nigerian security agents. *Ibid.* She indicated that she believed petitioner would be in danger in Nigeria "because he posted on his social media page his pro Biafra beliefs" and because "if [petitioner] has said that he posted on

his social media page that he is a supporter of LGBTQ, he will be a target." A.R. 321. Petitioner's mother's submission did not include copies of any posts to which she referred, nor did petitioner provide copies of those posts separately. When asked about that omission, petitioner testified that he could not log in to Facebook while in DHS custody, and that the Facebook pages DHS had submitted did not reflect posts that would be visible to his Facebook friends. Pet. App. 25a; A.R. 142-143, 153, 282-283. He indicated that he feared the Nigerian government would be able to access the posts, however, by "hack[ing]." A.R. 275; see A.R. 275-276. Petitioner offered no explanation of why his mother or another family member or a friend would not have been able to provide copies of the relevant posts by accessing them through that person's own account.

d. The IJ again granted petitioner's application for asylum. Pet. App. 15a-31a; A.R. 117-124.

The IJ found that the affidavit from petitioner's mother was credible and corroborated his testimony about his posts on social media, among other things. Pet. App. 25a-26a. Concluding that petitioner's "mother's affidavit corroborates [petitioner's] support" for "the Biafran state and/or of the LGBTQ community * * * and that [petitioner] placed information on his Facebook," the IJ found that "the Nigerian government * * * is aware or could become aware that [petitioner] possesses this belief or characteristic." *Id.* at 26a. The IJ determined that "the Nigeria[n] government has the capability and the inclination to punish" someone with petitioner's asserted views, and that while the fact that petitioner's parents continued to work and live in Nigeria somewhat undermined his asserted fear of future

persecution, it did not provide a sufficient basis for denying asylum. *Id.* at 26a-27a.[1]

e. DHS again appealed, and the Board again sustained the appeal. Pet. App. 11a-14a.

Although the Board concluded that the IJ had not clearly erred in finding petitioner's testimony credible, see Pet. App. 12a, it disagreed with the IJ's determination that petitioner's testimony and supporting evidence were sufficient to meet his burden of establishing a well-founded fear of future persecution in Nigeria on the basis of a protected ground, *id.* at 12a-14a. The Board concluded that petitioner "did not submit sufficient corroborating evidence regarding his claim that he will be harmed in Nigeria," observing that "there is no objective evidence of [petitioner's] experiences and no objective evidence that [petitioner] has stated his political opinion to other persons." *Id.* at 13a. The Board further determined that, "considering all the circumstances, it was reasonable to expect [petitioner] to obtain documentation that would corroborate his claimed fear of future harm, and he did not do so." *Id.* at 14a. The Board accordingly vacated the IJ's decision and ordered petitioner's removal to Nigeria. *Ibid.*

4. The court of appeals denied petitioner's petition for review. Pet. App. 1a-10a.

The court of appeals stated that the only issue in dispute was the objective reasonableness of petitioner's fear of persecution, which it observed was a question reviewed de novo by the Board and by the court of appeals. Pet. App. 4a. Relying on Section 1158(b)(1)(B)

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[1] The IJ determined that petitioner did not meet the higher burden of proof necessary to establish eligibility for withholding of removal or CAT protection. See Pet. App. 27a-28a. Petitioner did not appeal that determination to the Board. See *id.* at 12a n.1.

and the Board's decision in *In re L-A-C-*, *supra*, the court observed that petitioner bore the burden of providing reasonably available corroborating evidence to support his testimony, even if that testimony was deemed credible. See Pet. App. 5a-6a. The court determined that the Board had permissibly determined such corroborating evidence was necessary here, and that petitioner's failure to provide it meant that he could not carry his burden of proof of establishing eligibility for asylum. See *id.* at 6a.

The court of appeals then addressed the Board's statement that there was "no objective evidence that [petitioner] has stated his political opinion to other persons." Pet. App. 13a; see *id.* at 6a-7a. Treating that statement as an implicit finding that petitioner had not stated his political opinions to others, the court held that the Board had erred by making such a finding without expressly stating that the IJ had committed clear error by finding otherwise. *Id.* at 7a. But the court held that the Board's error was harmless, because petitioner had failed to show that he faced a particularized threat of persecution by the government as a result of social-media posts. See *ibid.*; see also *id.* at 4a-7a.

The court of appeals next addressed petitioner's separate argument that the Board had violated his due-process rights by "failing to notify him of the need for corroborating evidence and denying him an opportunity to provide it." Pet. App. 7a. The court held that "[a]t a merits hearing, the IJ need not identify the specific corroborating evidence that would be persuasive" and need not "grant an automatic continuance for the applicant to present corroborating evidence later." *Id.* at 8a (citing *In re L-A-C-*, 26 I. & N. Dec. at 520). The court concluded that "the asylum application form and related

statutes provide sufficient notice that corroborative evidence may be required and the consequences for failing to provide it," and added that here, petitioner had specifically acknowledged at the master calendar hearing following the Board's remand that he understood he must provide reasonably available corroborating evidence. *Id.* at 8a-9a. The court further concluded that any procedural error would have been harmless because petitioner had not shown that he would have provided the requisite corroborating evidence if he had been given additional notice. *Id.* at 9a-10a.

ARGUMENT

Petitioner contends (Pet. 27-32) that an IJ or the Board may not deny an alien's application for asylum on the ground that he failed to provide reasonably available corroborating evidence without first giving the alien notice of the specific evidence he should produce and an automatic further continuance to attempt to obtain that evidence. The court of appeals, like five other circuits, correctly rejected that contention. And while two other courts of appeals have held that an alien must receive notice of the particular corroborating evidence required and an opportunity to provide it, petitioner would not prevail even under that rule because the Board's remand order, and the further proceedings before the IJ, provided him with notice that he needed to provide corroborating evidence in order to satisfy his burden of proof. This Court has denied petitions for writs of certiorari raising this issue before, and should do so again here.[2]

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[2] See *Wei Sun* v. *Sessions*, 139 S. Ct. 413 (2018) (No. 17-1701); *Silais* v. *Sessions*, 138 S. Ct. 976 (2018) (No. 17-469).

1. The court of appeals correctly determined (Pet. App. 8a) that the REAL ID Act's corroboration provision does not require that an asylum applicant be given notice of the specific corroborating evidence that is necessary to carry his burden of proof and a continuance to gather and present that evidence.

a. The plain text of the corroboration provision does not impose such a requirement. The provision states: "Where the trier of fact determines that the applicant should provide evidence that corroborates otherwise credible testimony, such evidence must be provided unless the applicant does not have the evidence and cannot reasonably obtain the evidence." 8 U.S.C. 1158(b)(1)(B)(ii). That text makes clear that an applicant's testimony may be "otherwise credible" and yet require "corroborat[ion]" in order for the applicant to satisfy his burden of proof. *Ibid.* It also makes clear that the applicant must furnish such corroborating evidence unless the applicant does not have it and cannot reasonably obtain it. *Ibid.* But the statutory text makes no mention of any requirement of prior notice that specific evidence may reasonably be expected, and does not specify any particular procedural steps that must be taken before the decisionmaker determines that the applicant has failed to meet his burden of proof.

The history of the corroboration provision likewise shows that Congress did not intend to impose any particular procedure. The relevant Conference Report explained that the corroboration provision was "based upon the standard set forth in the [Board's] decision in *Matter of S-M-J-*," Conf. Rep. 166; see *ibid.* ("Congress anticipates that the standards in *Matter of S-M-J-* * * * will guide the [Board] and the courts in interpreting this clause."). The Conference Report quoted the Board's

statement that "where it is reasonable to expect corroborating evidence for certain alleged facts pertaining to the specifics of an applicant's claim, such evidence should be provided." *Ibid.* (quoting *In re S-M-J-*, 21 I. & N. Dec. 722, 725 (B.I.A. 1997) (en banc)). And nothing in the Board's decision in *In re S-M-J-* mandated prior notice or a particular procedure that the decisionmakers must follow when corroborating evidence may be necessary. See *In re L-A-C-*, 26 I. & N. Dec. 516, 520 (B.I.A. 2015) ("The framework set forth in *Matter of S-M-J-* did not require the [IJ] to identify the specific corroborating evidence at the merits hearing that would be considered persuasive under the facts of the case to meet the applicant's burden of proof."). In "[c]odifying the [Board's] corroboration standards," Conf. Rep. 165, Congress presumably did not intend to mandate any particular procedure either.

Indeed, requiring that applicants for asylum receive notice of the specific corroborating evidence that may reasonably be expected to support their claims and a further opportunity to present such evidence would undermine "[t]he overall purpose" of Section 1158(b)(1)(B), which was to allow the agency to follow "commonsense standards in assessing asylum claims without undue restrictions." *In re L-A-C-*, 26 I. & N. Dec. at 520. Instead of removing such restrictions, petitioner's construction of the corroboration provision would further tax the resources of "already overburdened" IJs and DHS by "necessitat[ing] two [merits] hearings" in many cases—"the first to decide whether * * * corroborating evidence is required and then another hearing after a recess to allow the alien more time to collect such evidence." *Rapheal* v. *Mukasey*, 533 F.3d 521, 530 (7th Cir. 2008). Petitioner's construction

would also be inconsistent with the general expectation in litigation that "parties with the burden of proof [must] ordinarily provide whatever corroboration they have when presenting their case in chief." *Singh* v. *Holder*, 602 F.3d 982, 988 (9th Cir. 2010), vacated, 649 F.3d 1161 (9th Cir. 2011) (en banc).

At a minimum, the Board's construction of the corroboration provision is a reasonable one entitled to deference under *Chevron U.S.A. Inc.* v. *Natural Resources Defense Council, Inc.*, 467 U.S. 837, 843-844 & n.11 (1984). In *In re L-A-C-*, the Board concluded that Section 1158(b)(1)(B)(ii) "was intended to codify *Matter of S-M-J-* and not to impose additional rigid requirements for the consideration of corroboration." 26 I. & N. Dec. at 524. The Board thus held that under the statute, "[a]pplicants have the burden to establish their claim without prompting from the [IJ]." *Id.* at 523-524. The Board noted, however, that "a continuance would typically be warranted where the [IJ] determines that * * * the applicant was not aware of a unique piece of evidence that is essential to meeting the burden of proof." *Id.* at 522. Because the Board's position about this question of internal agency adjudication procedures is at the very least consistent with the text, history, and purpose of the corroboration provision, it should be given deference. See, *e.g.*, *Holder* v. *Martinez Gutierrez*, 566 U.S. 583, 591 (2012) (holding that the Board's construction of the INA "prevails if it is a reasonable construction of the statute, whether or not it is the only possible interpretation or even the one a court might think best").

b. Petitioner's counterarguments lack merit.

Petitioner observes that the corroboration provision "says that the applicant '*should provide* evidence that

corroborates,' not 'should *have* provided.'" Pet. 29 (quoting 8 U.S.C. 1158(b)(1)(B)(ii)). He argues that the statute's "present tense use" reflects "a duty on the part of the applicant to respond to the [IJ's] determination," and that "[t]he statute then moves into future-directed language stating that the evidence 'must *be* provided,' not 'must have *been* provided,'" which, in petitioner's view, indicates that the applicant's burden to provide corroborating evidence arises only once an IJ has identified the evidence needed. *Ibid.* (citation omitted).

As the Eighth Circuit recognized (Pet. App. 8a), however, the language of the statute informs applicants looking ahead to their hearings that in some cases, their testimony "may be sufficient," while in others, corroborating evidence "must be provided," such that whether the alien has carried his burden of proof can be assessed from the perspective of what the applicant could reasonably be expected to have submitted. 8 U.S.C. 1158(b)(l)(B)(ii). Indeed, the instructions accompanying the asylum application are phrased in a similar forward-looking way. See U.S. Citizenship & Immigration Servs., DHS & U.S. Exec. Office for Immigration Review, Dep't of Justice, *I-589, Application for Asylum and for Withholding of Removal: Instructions* 8 (Aug. 25, 2020) (*I-589 Application Instructions*), https://www.uscis.gov/sites/default/files/files/form/i-589instr.pdf. ("You must submit reasonably available corroborative evidence showing * * * the specific facts on which you are relying to support your claim.").

Petitioner also argues (Pet. 30) that the Board's interpretation renders "superfluous" the last clause of the corroboration provision, which states that the applicant may not be required to provide corroborating evidence if "the applicant does not have the evidence and

cannot reasonably obtain the evidence," 8 U.S.C. 1158(b)(1)(B)(ii). He argues that "'[i]t would make no sense to ask whether the applicant can obtain the information unless he is to be given a chance to do so.'" Pet. 30 (quoting *Ren* v. *Holder*, 648 F.3d 1079, 1091 (9th Cir. 2011)) (brackets in original). That clause is not, however, superfluous: it makes clear that merely "not hav[ing] the evidence" does not excuse an applicant's obligation to provide corroboration, and that the applicant is expected to "obtain the evidence" if doing so would be "reasonabl[e]." 8 U.S.C. 1158(b)(1)(B)(ii). The clause simply codifies the standard that the Board had previously adopted in *In re S-M-J-*, *supra*, as petitioner himself elsewhere acknowledges (Pet. 5) that Congress intended to do. See p. 3, *supra*.

Finally, petitioner contends (Pet. 31) that "it is unlikely that Congress intended" that asylum applications would be denied "where the applicant was deemed credible but was unable to divine what evidence an [IJ] would require as corroboration." But no divining is required to know that objective evidence may be expected to support core premises of an asylum applicant's claim in circumstances where such objective evidence is reasonably available. As the Seventh Circuit has noted, by "clearly stat[ing] that corroborative evidence may be required," the statute itself "plac[es] immigrants on notice of the consequences [of] failing to provide corroborative evidence," *Rapheal,* 533 F.3d at 530, as do the instructions accompanying the asylum application, see *I-589 Application Instructions* 8 ("You must submit reasonably available corroborative evidence showing * * * the specific facts on which you are relying to support your claim."). In this case, for example, the Board

concluded that petitioner had failed to "submit sufficient corroborating evidence regarding his claim that he will be harmed in Nigeria for any reason." Pet. App. 13a. Given that petitioner's claimed fear of future persecution was based in large part on posts he stated he had made on social media, it was reasonably to be expected that the posts in question would be important corroboration in assessing whether that fear was objectively reasonable.

Moreover, the Board's procedures for implementing Section 1158(b)(1)(B)(ii) adequately protect an alien who reasonably did not anticipate the need for particular corroborating evidence. Those procedures provide, for example, that an IJ may not "place undue weight on the absence of a particular piece of corroborating evidence while overlooking other evidence in the record that corroborates the [alien's] claim." *In re L-A-C-*, 26 I. & N. Dec. at 522. And they authorize IJs to grant continuances to allow the applicant to obtain and submit corroborating evidence where there is "good cause" to do so, such as when "the applicant was not aware of a unique piece of evidence that is essential to meeting the burden of proof." *Ibid.*

Here, however, the Board reasonably determined that invocation of those procedures would not help petitioner: although it was evident that petitioner's social-media posts would play a central role in assessing his claim for asylum, petitioner did not provide copies of the posts himself or ask one of his Facebook contacts with access to his private page to submit them (or descriptions of them), but instead offered only an affidavit from his mother observing that "[petitioner] has said that he posted on his social media page that he is a supporter of LGBTQ" and expressing fear that petitioner "would

[be] in danger in Nigeria because he posted on his social media page his pro Biafra beliefs." A.R. 321. As the court of appeals recognized (Pet. App. 7a), the Board did not exceed its authority in determining that this evidence was insufficient to carry petitioner's burden of proof.[3]

2. Petitioner contends (Pet. 15) that this Court's review is warranted because the petition for a writ of certiorari implicates "an acknowledged 2-5 circuit split regarding the procedures that the REAL ID Act's 'asylum corroboration rule' requires of [IJs] when adjudicating a credible applicant's claim to asylum." See Pet. 16-26. That is incorrect. While the courts of appeals have disagreed about whether IJs must provide advance notice of the corroborating evidence needed to support an application for asylum, this case does not directly implicate that disagreement because petitioner *did* receive such notice and simply failed to provide the evidence that the Board determined was necessary and reasonably available.

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[3] The court of appeals found that the Board had erred by "finding that there was no objective evidence that [petitioner] had stated his political opinion to others," concluding that the Board "did not squarely address [petitioner's] mother's affidavit, which the [Board] agreed was credible." Pet. App. 7a. The court correctly recognized that any such error was harmless in light of petitioner's failure to provide other corroborating evidence to establish that he would face a particularized threat of persecution based on his social-media posts. See *id.* at 7a-8a. But it is also far from clear that there was any error in the Board's decision in the first place: the Board's statement about the lack of "objective evidence that the respondent has stated his political opinion to other persons" is best understood as simply reflecting that an affidavit from petitioner's mother, submitted to help her son avoid deportation, was not the sort of "objective" corroboration that the Board determined was called for. *Id.* at 13a.

a. Petitioner is correct (Pet. 15-26) that there is division among the circuits on the REAL ID Act's corroboration provision, 8 U.S.C. 1158(b)(1)(B)(ii).

Like the Eighth Circuit, the Second, Fourth, Fifth, Sixth, and Seventh Circuits have rejected the contention that the corroboration provision requires advance notice of what additional corroborative evidence would be necessary to carry an applicant's burden of proof and an opportunity to obtain that evidence. See *Wei Sun* v. *Sessions*, 883 F.3d 23, 30 (2d Cir. 2017) ("The Ninth Circuit * * * reads into the statute the requirements of 'notice' and an 'opportunity' to produce or explain the absence of corroborating evidence 'before' a ruling is made. But these words simply do not appear in the statute. * * * We conclude that the passage is indeed ambiguous * * * [and] that the agency's interpretation * * * is reasonable and entitled to deference.") (citations omitted), cert. denied, 139 S. Ct. 413 (2018); *Wambura* v. *Barr*, 980 F.3d 365, 374 (4th Cir. 2020) (The INA "does not reveal Congressional intent, much less clear intent, to require advance notice of a perceived lack of necessary corroborative evidence. Accordingly, we give the [Board]'s decision * * * the deference as required by *Chevron*."); *Avelar-Oliva* v. *Barr*, 954 F.3d 757, 771 (5th Cir. 2020) ("[W]e join the Second, Sixth, Seventh, and Eighth Circuits in rejecting the notion that an IJ, prior to disposing of an alien's claim, must provide additional *advance* notice of the specific corroborating evidence necessary to meet the applicant's burden of proof and an *automatic* continuance for the applicant to obtain such evidence."); *Gaye* v. *Lynch*, 788 F.3d 519, 530 (6th Cir. 2015) ("Even if it could be said that the statute is silent on the issue, and thus possibly could allow for such a construction (and we conclude it does not), it is

plainly erroneous to say that the statute *unambiguously* mandates such notice."); *Silais* v. *Sessions*, 855 F.3d 736, 745 (7th Cir. 2017) ("[N]o such prior notice or later opportunity is required, because the REAL ID Act itself informs petitioners that the IJ may require corroborating evidence—even if, as here, they are found to be credible."), cert. denied, 138 S. Ct. 976 (2018); accord *Rapheal*, 533 F.3d at 530.

By contrast, the Ninth Circuit has held that the corroboration provision requires an IJ to give "notice * * * of the corroborative evidence necessary to carry the applicant's burden of proof" and an opportunity to obtain that evidence or explain why it cannot be provided. *Ai Jun Zhi* v. *Holder*, 751 F.3d 1088, 1094 (2014) (citing *Ren*, 648 F.3d at 1090-1092). The Third Circuit has similarly held that it is not "fair to require [an applicant] to provide further corroboration without telling him so and giving him the opportunity either to supply that evidence or to explain why it was not available." *Saravia* v. *Attorney Gen. U.S.*, 905 F.3d 729, 737 (2018).

b. This case, however, does not directly implicate that circuit conflict, because petitioner did receive notice that corroborating evidence would be necessary to support his claim, and simply failed to provide it or adequately justify his failure to do so.

In the Board's first decision, the Board reversed the IJ's grant of asylum because of the "complete lack of any supporting documentation specific to [petitioner]," concluding that petitioner could not carry his burden of proof without additional corroboration of the particulars of his claims. Pet. App. 34a. On remand, in discussing what evidence petitioner should gather in advance of the merits hearing, the IJ suggested that petitioner "focus on * * * some of the concerns the government

had" raised before the Board, noting that petitioner himself had mentioned he could work from the government's brief. A.R. 134; see pp. 8-9, *supra*. And that brief had emphasized, among other things, that petitioner "failed to provide any printouts of his social media account to corroborate his political activities," explaining that such printouts were needed given that his claim rested "on the substance of his political activities" but his testimony about what precisely his posts had said was quite vague. A.R. 872-873.

While petitioner contends (Pet. 16) that he "would have prevailed in his case had it arisen in the Ninth or Third Circuits," he identifies no case in either circuit—or in any other court of appeals—that has granted a petition for review in remotely comparable circumstances. Petitioner had ample notice about the importance of his social-media posts in light of the Board's statements in its first decision, the IJ's reference to the government's brief in the master calendar hearing following the remand, and the government's discussion of the need for printouts of the posts in its brief before the Board on the first appeal. A rule requiring notice and an opportunity to provide corroborating evidence, even if unambiguously mandated by Section 1158(b)(l)(B)(ii), thus would not have benefited petitioner.

Indeed, if anything, petitioner received *more* notice than has been required by the courts of appeals whose rule he advocates. In *Jie Shi Liu* v. *Sessions*, 891 F.3d 834 (9th Cir. 2018), for example, the Ninth Circuit addressed the claim of an alien who, during the merits hearing on his application, was not given notice of the specific corroboration that the IJ thought would be necessary or an opportunity to obtain that evidence. *Id.* at 837. The court nevertheless concluded that Section

1158(b)(l)(B)(ii) was satisfied because the alien "was put on notice that corroboration was needed" when the IJ observed, almost a year prior to the merits hearing, that the alien was "'going to have to supplement'" the statement accompanying his asylum application. *Id.* at 839; see *ibid.* (concluding that "the notice provided to Liu by the IJ was specific enough to satisfy the requirements identified by *Ren*" and that the alien had sufficient time between the two hearings to produce corroborating evidence). The notice petitioner received here was far more robust than that fairly general notice the Ninth Circuit found sufficient in *Jie Shi Liu*.

c. At the very least, the unusual procedural posture of petitioner's case—involving multiple decisions by the Board reversing grants of asylum by the IJ in light of the absence of specific corroborating evidence—makes this case a poor vehicle in which to address the circuit conflict discussed above.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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