No. 21-433

# In the Supreme Court of the United States

MELVIN ALEXIS CORTEZ-RAMIREZ, PETITIONER

*v.*

MERRICK B. GARLAND, ATTORNEY GENERAL

*ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH 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 show that a protected trait is "at least one central reason" for claimed persecution, also governs applications for statutory withholding of removal.

**ADDITIONAL RELATED PROCEEDINGS**

United States Court of Appeals (5th Cir.):

*Cortez-Ramirez* v. *Garland*, No. 19-60553 (June 4, 2021)

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## OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-10a) is not published in the Federal Reporter but is reprinted at 860 Fed. Appx. 869. The decisions of the Board of Immigration Appeals (Pet. App. 11a-15a) and the immigration judge (Pet. App. 17a-38a) are unreported.

## JURISDICTION

The judgment of the court of appeals was entered on June 4, 2021. The petition for a writ of certiorari was filed on September 17, 2021. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

## STATEMENT

1. Under the Immigration and Nationality Act (INA), 8 U.S.C. 1101 *et seq.*, noncitizens facing removal from the United States may seek asylum or withholding of

removal.* Asylum is a form of discretionary relief. 8 U.S.C. 1158(b)(1)(A). The government may grant asylum once an applicant shows (among other things) that he is unable or unwilling to return to his country of nationality or last habitual residence "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 nondiscretionary protection. The government 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)(A). That standard, which requires the applicant 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 on asylum,

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* This brief uses noncitizen as equivalent to the statutory term "alien." See *Barton* v. *Barr*, 140 S. Ct. 1442, 1446 n.2 (2020) (quoting 8 U.S.C. 1101(a)(3)).

the provisions on withholding of removal do not expressly address the standard to be applied 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 also governs 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 therefore establish that a protected ground is "at least one central reason" for the claimed persecution. *Id.* at 348.

2. Petitioner, a native and citizen of El Salvador, entered the United States without inspection in May 2014. Pet. App. 2a. The Department of Homeland Security (DHS) issued him a notice to appear, charging him with being removable on the ground that he was inadmissible as "[a]n alien present in the United States without being admitted or paroled." 8 U.S.C. 1182(a)(6)(A)(i); see Pet. App. 2a. In a hearing before an immigration judge, petitioner conceded removability, but sought asylum, withholding of removal under Section 1231(b)(3)(A), and protection under regulations implementing the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, *adopted* Dec. 10, 1984, S. Treaty Doc. No. 20, 100th Cong., 2d Sess. (1988), 1465 U.N.T.S. 85. Pet. App. 2a, 11a, 18a.

Petitioner claimed that he fears that he would be killed by members of the MS-13 gang if he returned to El Salvador. Pet. App. 23a. He testified that members of MS-13 had beaten and robbed him and had beaten, robbed, or killed members of his family. *Id.* at 5a-7a, 20a-22a. He also testified that the gang's aggression was provoked by his refusal to join the gang. *Id.* at 6a.

He claimed that, when gang members or others in El Salvador asked him about joining the gang, he would respond that his religious beliefs precluded him from doing so. *Id.* at 5a-6a.

The immigration judge denied petitioner's applications and ordered him removed. Pet. App. 17a-38a. As relevant here, the immigration judge observed that petitioner was required to show that a protected ground was "'at least one central reason' for the persecution." *Id.* at 28a. The immigration judge found, with respect to the facts of petitioner's case, that "[t]he central reason for the harm, depending on the particular incident, was either because the gangs were attempting to recruit [petitioner], rob him, or force him to leave their territory." *Ibid.*

The immigration judge rejected petitioner's contention that his persecution was based on his religion. Pet. App. 28a-29a. She noted that "[a]t no point during any of the * * * incidents did [petitioner's] attackers indicate that their motivation for harming [petitioner] was due to his religion. They made no religious slurs or mention of [petitioner's] position or activities in his church." *Ibid.* She also noted that, on petitioner's own account, "the gangs attempted to recruit all young people regardless of their religious beliefs." *Ibid.* The immigration judge accordingly found that "religion was only tangentially related, if at all, to [petitioner's] harm" and that petitioner had "failed to establish that his persecution was or would be on account of his religion." *Id.* at 29a.

The immigration judge also found that petitioner's persecution was not based on any other protected ground, such as political opinion or membership in a particular social group. Pet. App. 29a-33a. Petitioner

has not challenged that finding here. See Pet. 24-25 (relying solely on religion).

The Board of Immigration Appeals dismissed petitioner's appeal. Pet. App. 11a-15a. As relevant here, the Board "agree[d] with the Immigration Judge that [petitioner] did not establish a nexus between past or feared future persecution and his religion." *Id.* at 13a. The Board observed that petitioner identified "no comment or other conduct by gang members which indicates that they had any interest in [petitioner's] religious or political beliefs." *Ibid.*

3. The court of appeals denied petitioner's petition for review in an unpublished per curiam opinion. Pet. App. 1a-10a.

The court of appeals affirmed the Board's determination that petitioner had failed to show that a protected ground was at least one central reason for his persecution. Pet. App. 7a-8a. The court explained that the only evidence "supporting any degree of nexus between a harm * * * and a protected ground" was petitioner's testimony that, on two occasions, gang members had beaten him after he cited religious beliefs as a reason for declining to join the gang. *Id.* at 7a. The court stated that, "[w]hile it is possible that these allusions to his religious beliefs were what provoked the gang members," "the more likely provocation [was] Petitioner's lack of gang affiliation or his refusal to join a gang." *Ibid.* The court accordingly concluded that "the [Board's] finding that [petitioner] failed to establish sufficient nexus [wa]s supported by substantial evidence." *Id.* at 8a.

The court of appeals then rejected petitioner's contention that an applicant for withholding of removal need show that a protected ground was only "a reason,"

rather than "one central reason," for his persecution. Pet. App. 8a-9a (citations omitted). Citing *Shaikh* v. *Holder*, 588 F.3d 861, 864 (5th Cir. 2009), the court stated that "[t]his circuit * * * has already adopted the * * * 'one central reason' interpretation" and that, "under binding Fifth Circuit precedent," that test governed petitioner's withholding application. Pet. App. 9a.

**ARGUMENT**

Petitioner contends (Pet. 15-22) that an applicant for withholding of removal need show that a protected trait was only "a reason," rather than "at least one central reason," for claimed persecution. The court of appeals correctly rejected that contention. The question presented is the subject of a circuit conflict, but that conflict is poorly developed. This case also is a poor vehicle for resolving the conflict, because the outcome of the case does not depend on which standard the court applies. This Court has recently denied two petitions for writs of certiorari presenting the same question. See *Cerritos-Quintanilla* v. *Garland*, cert. denied, No. 20-1529 (Oct. 4, 2021); *Fawzer* v. *Barr*, 139 S. Ct. 2709 (2019) (No. 18-953). The same result is warranted here.

1. The court of appeals' decision was correct. The INA expressly adopts a motive standard for asylum cases: an 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 determinations, beyond requiring the applicant to show that his life or freedom would be threatened "because of" a protected trait. 8 U.S.C. 1231(b)(3)(A). 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.

a. 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)(A). 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 also 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 synonymous. *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-Zacarias*, 502 U.S. 478, 481 (1992).

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 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.

b. Invoking the Ninth Circuit's decision in *Barajas-Romero* v. *Lynch*, 846 F.3d 351 (2017), and the Sixth Circuit's decision in *Guzman-Vazquez* v. *Barr*, 959 F.3d 253 (2020), petitioner contends (Pet. 15-22) that an applicant for withholding of removal need show that a protected trait was only "a reason," rather than "at least

one central reason," for the claimed persecution. The Ninth Circuit's reading (which the Sixth Circuit followed) rests on an amendment made in the REAL ID Act of 2005, which 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 phrase "for a reason described in subparagraph (A)," *ibid.*, to mean that Congress required applicants for withholding of removal to show that a protected trait is only "'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, either 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, 663 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 Section 1231(b)(3)(C) would have been an oblique way to require the Board to use a different motive standard for asylum than for withholding cases. The phrase "for a reason described in subparagraph (A)" reads as a straightforward cross-reference to the withholding statute's list of protected traits. Such a statutory cross-reference would have been an unusual place to bury an implied instruction to use a distinct substantive standard. Further, 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. It would be unnatural to read a provision designed to promote consistency as actually requiring the application of inconsistent motive standards.

2. Petitioner observes (Pet. 8-13) that the courts of appeals have reached conflicting decisions about the proper motive standard for withholding-of-removal cases. On petitioner's count (Pet. 9-10), seven circuits use the "at least one central reason" standard, while two circuits use the "a reason" standard. Petitioner is correct that two courts of appeals, the Sixth and Ninth Circuits, have issued published opinions adopting the "a reason" standard for withholding-of-removal cases. See *Guzman-Vazquez*, 959 F.3d at 273-274 (6th Cir.); *Barajas-Romero*, 846 F.3d at 358-360 (9th Cir.). Petitioner is

wrong, however, in counting seven courts of appeals—the First, Second, Third, Fourth, Fifth, Eighth, and Eleventh Circuits—on the other side of the divide.

To begin, the cases that petitioner cites from the First, Fourth, Eighth, and Eleventh Circuits—*Sanchez-Vasquez* v. *Garland*, 994 F.3d 40 (1st Cir. 2021), *Gitata* v. *Holder*, 486 Fed. Appx. 369 (4th Cir. 2012) (per curiam), *Lucas* v. *Lynch*, 654 Fed. Appx. 256 (8th Cir. 2016) (per curiam), and *Sanchez-Castro* v. *United States Attorney General*, 998 F.3d 1281 (11th Cir. 2021)—do not squarely address the question presented. Two of those decisions, *Gitata* and *Lucas*, were unpublished. And in all four of those cases, the noncitizen does not appear to have disputed the applicability of the "at least one central reason" standard. See *Sanchez-Castro*, 998 F.3d at 1286; *Gitata*, 486 Fed. Appx. at 369-370 & n.3; *Lucas*, 654 Fed. Appx. at 259; *Sanchez-Vasquez*, 994 F.3d at 47. The courts therefore took it for granted that the "at least one central reason" standard applied; they did not even mention the alternative "a reason" standard, let alone address the questions of statutory interpretation discussed above. "Questions which merely lurk in the record, neither brought to the attention of the court nor ruled upon, are not to be considered as having been so decided as to constitute precedents." *Webster* v. *Fall*, 266 U.S. 507, 511 (1925).

Contrary to petitioner's suggestion (Pet. 12), the Second Circuit also has not definitively addressed the question presented. Petitioner cites (Pet. 12 n.2) the Second Circuit's published opinion in *Singh* v. *Garland*, 11 F.4th 106 (2021), but that case did not even involve a dispute about whether the noncitizen had shown the requisite link between the persecution and a protected

ground. The court simply quoted the "at least one central reason" standard in the legal-background section of its opinion, *id.* at 114 (citation omitted); like the other circuits just discussed, it did not mention the alternative "a reason" standard. Petitioner also cites (Pet. 12 n.2) several unpublished decisions of the Second Circuit, but in those cases, too, the applicability of the "at least one central reason" standard appears to have been uncontested, and the alternative "a reason" standard was not discussed. See, *e.g.*, *Rochez-Torres* v. *Garland*, 855 Fed. Appx. 794, 796 (2d Cir. 2021); *Arias-Avila* v. *Garland*, 855 Fed. Appx. 54, 55 (2d Cir. 2021); *Wu* v. *Garland*, 847 Fed. Appx. 84, 85 (2d Cir. 2021).

Nor is it clear that the Fifth Circuit has definitively resolved the question presented. In the decision below, the Fifth Circuit described its previous decision in *Shaikh* v. *Holder*, 588 F.3d 861 (2009), as "binding * * * precedent" requiring application of the "at least 'one central reason'" standard to withholding cases. Pet. App. 9a (citation omitted). But the noncitizen in *Shaikh* does not appear to have disputed the applicability of that standard. Indeed, even petitioner acknowledges (Pet. 10) that the Fifth Circuit "simply assumed" the applicability of that standard. And because the decision below is itself unpublished, its characterization of *Shaikh* would not bind future Fifth Circuit panels.

That leaves only one circuit, the Third Circuit, that has definitively adopted the "at least one central reason" standard. See *Gonzalez-Posadas* v. *Attorney General*, 781 F.3d 677, 685 n.6 (2015) ("We believe that the Board's decision * * * to extend the 'one central reason' test to withholding of removal was sound and we likewise adopt that conclusion now."). But even there, the

court noted that "the parties appear[ed] to agree on this point." *Ibid.*

In short, only three courts of appeals have squarely 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.

3. This case also would be a poor vehicle for considering the question presented, because the resolution of the question presented would not affect the outcome. Given the factual determinations made by the immigration judge and Board and sustained by the court of appeals, petitioner's application for withholding would fail even under the "a reason" standard he advocates. See *Herb* v. *Pitcairn*, 324 U.S. 117, 126 (1945) ("[O]ur power is to correct wrong judgments, not to revise opinions. * * * [I]f the same judgment would be rendered by the [lower] court after we corrected its views of federal laws, our review could amount to nothing more than an advisory opinion."); Stephen M. Shapiro et al., *Supreme Court Practice* § 4.4(f), at 4-18 (11th ed. 2019) ("If the resolution of a clear conflict is irrelevant to the ultimate outcome of the case before the Court, certiorari may be denied.").

Although petitioner alleges that his religion was one reason for his persecution, the immigration judge found that "the gang members did not attack him on account of his beliefs, but simply because he refused to join them." Pet. App. 29a. The immigration judge noted that "[a]t no point * * * did [petitioner's] attackers indicate that their motivation for harming [petitioner] was due to his religion" and that "[t]hey made no religious slurs or mention of [petitioner's] position or

activities in his church." *Ibid.* The Board similarly determined that petitioner "did not establish a nexus between past or feared future persecution and his religion * * * because there is nothing in the [petitioner's] testimony or evidence to show that [the] gang members [attacked] him for those reasons." *Id.* at 13a. The Board noted that petitioner "d[id] not articulate any basis for his belief that he was or will be targeted for persecution on account of his [religion]" and that he "related no comment or other conduct by gang members which indicates that they had any interest in [his] religious or political beliefs." *Ibid.* Sustaining those findings, the court of appeals stated that "one could reasonably conclude that these alleged instances of violence were unrelated, or only tangentially related, to Petitioner's religion." *Id.* at 7a-8a. As those statements show, petitioner has not shown that his religion was even "a reason" for his persecution.

Petitioner emphasizes (Pet. 24) that he "had been assaulted on two separate occasions after telling gang members that he could not join their gang because he was a member of a church." Addressing that testimony, the court of appeals stated: "While it is possible that these allusions to his religious beliefs were what provoked the gang members in both or one incident, we find the more likely provocation to have been Petitioner's lack of gang affiliation or his refusal to join a gang." Pet. App. 7a. Petitioner reads (Pet. 24) that statement to mean that he would have satisfied the "a reason" standard, but that is not so. Petitioner bore the burden of proving that it is "more likely than not" that he faced persecution on a protected ground. 8 C.F.R. 1208.16(b)(2); see *INS* v. *Stevic*, 467 U.S. 407, 424 (1984). It is not enough for petitioner to show that it is

"possible" that religion is a reason for his persecution, Pet. App. 7a; rather, even under petitioner's reading of the statute, petitioner would have to show that it is more likely than not that it is so. Petitioner has not met that burden.

**CONCLUSION**

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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