No. 19-385

# In the Supreme Court of the United States

ABDIFATAH GAAS QORANE, PETITIONER

*v.*

WILLIAM P. BARR, 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 court of appeals erred in determining that the Board of Immigration Appeals did not abuse its discretion in denying petitioner's motion to reopen his removal proceedings based on the Board's determination that the new evidence petitioner presented was not likely to change the result of the proceeding.

## TABLE OF CONTENTS



## TABLE OF AUTHORITIES

Cases:

Cases—Continued: Page

Cases—Continued: Page



Treaty, statutes, regulations, and rule:

Regulations and rule—Continued: Page

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## OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1-14) is reported at 919 F.3d 904. The decisions of the Board of Immigration Appeals dismissing petitioner's administrative appeal (Pet. App. 24-31), denying reopening (Pet. App. 18-23), and denying reconsideration (Pet. App. 15-17) are unreported. The decision of the immigration judge (Pet. App. 32-69) is unreported.

## JURISDICTION

The judgment of the court of appeals was entered on March 26, 2019. A petition for rehearing was denied on June 20, 2019 (Pet. App. 70-71). The petition for a writ of certiorari was filed on September 18, 2019. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

**STATEMENT**

1. "The Immigration and Nationality Act (INA), 66 Stat. 163, as amended, 8 U.S.C. § 1101 et seq., and its implementing regulations set out the process for removing aliens from the country." *Mata* v. *Lynch*, 135 S. Ct. 2150, 2153 (2015). First, "[a]n immigration judge (IJ) conducts the initial proceedings"; then, "if [the IJ] orders removal, the alien has the opportunity to appeal that decision to the Board of Immigration Appeals." *Ibid.* (citing 8 U.S.C. 1229a(a)(1) and (c)(5)). With certain exceptions, if the Board upholds the removal order, the alien may seek judicial review by filing a petition for review in a court of appeals. See 8 U.S.C. 1252(a)(1).

The INA also provides that an alien "may file one motion to reopen" removal proceedings based on previously unavailable, material evidence. 8 U.S.C. 1229a(c)(7)(A) and (B); see 8 C.F.R. 1003.2(c), 1003.23(b)(3); see also *Dada* v. *Mukasey*, 554 U.S. 1, 4-5, 12-15 (2008). Such a motion is to be filed with either the IJ or the Board, depending on which was the last to render a decision in the matter. 8 C.F.R. 1003.2(c), 1003.23(b). The alien's motion to reopen must "state the new facts that will be proven at a hearing to be held if the motion is granted" and must support the motion "by affidavits or other evidentiary material." 8 U.S.C. 1229a(c)(7)(B); 8 C.F.R. 1003.2(c)(1), 1003.23(b)(3).

In general, a motion to reopen must be "filed within 90 days of the date of entry of a final administrative order of removal," 8 U.S.C. 1229a(c)(7)(C)(i), *i.e.*, "no later than 90 days after the date on which the final administrative decision was rendered in the proceeding sought to be reopened," 8 C.F.R. 1003.2(c)(2); see 8 C.F.R.

1003.23(b)(1). The 90-day deadline does not apply, however, if (as relevant here) the motion to reopen shows that asylum or withholding of removal is appropriate based on "changed country conditions arising in the country of nationality or the country to which removal has been ordered, if such evidence is material and was not available and would not have been discovered or presented at the previous proceeding." 8 U.S.C. 1229a(c)(7)(C)(ii); see 8 C.F.R. 1003.2(c)(3)(ii), 1003.23(b)(4)(i); see also 8 U.S.C. 1229a(c)(7)(C)(iv) (establishing an additional exception "for battered spouses, children, and parents") (emphasis omitted).

In addition to the procedural requirements for motions to reopen established by the INA itself, other requirements derive from regulations and decisional law. Those other sources of authority reflect that "reopening is a judicial creation later codified by federal statute." *Dada*, 554 U.S. at 12. Regulations addressing reopening were first promulgated in 1958. See *id.* at 13. In 1996, Congress amended the INA to recognize such motions. See *id.* at 14; Illegal Immigration Reform and Immigrant Responsibility Act of 1996, Pub. L. No. 104-208, Div. C, § 304(a), 110 Stat. 3009-587, 3009-593. In doing so, Congress "largely codified the Attorney General's directions on filing reopening motions," while leaving in place "the discretion of the Attorney General (or his delegate, the Board) over reopening motions." *Kucana* v. *Holder*, 558 U.S. 233, 249-250 (2010); see also *id.* at 240 n.6.

One such requirement is that a movant establish prima facie eligibility for the underlying relief sought. See *INS* v. *Wang*, 450 U.S. 139, 141 (1981) (per curiam) (citing *In re Lam*, 14 I. & N. Dec. 98 (B.I.A. 1972), and *In re Sipus*, 14 I. & N. Dec. 229 (B.I.A. 1972)); see also

*INS* v. *Abudu*, 485 U.S. 94, 104 (1988) (noting that the Board may deny a motion to reopen on "at least three independent grounds," including "that the movant has not established a prima facie case for the underlying substantive relief sought"). The prima facie eligibility requirement is not expressly set forth as such in the reopening regulations, but the regulations refer to that requirement. See 8 C.F.R. 1003.2(a) ("The Board has discretion to deny a motion to reopen even if the party moving has made out a *prima facie* case for relief."); see also 8 C.F.R. 1003.23(b)(3).

To establish a prima facie case, the movant ordinarily must show a "reasonable likelihood of success on the merits" if proceedings were reopened. *In re L-O-G-*, 21 I. & N. Dec. 413, 420 (B.I.A. 1996) (en banc). In some instances, however, the Board has required a greater showing—including where "the alien had already had an opportunity to fully present and litigate his request" for relief and "sought a remand for further consideration of the * * * application." *Id.* at 419-420. In such instances, the Board has determined that "reopening should not be granted unless the alien had met the 'heavy burden' of showing that the new evidence presented 'would likely change the result in the case.'" *Id.* at 420 (quoting *In re Coelho*, 20 I. & N. Dec. 464, 473 (B.I.A. 1992)); cf. *Sipus*, 14 I. & N. Dec. at 231 ("No hard and fast rule can be laid down as to what constitutes a sufficient showing of a prima facie case for reopening. Much depends on the nature of the case and the force of the evidence already appearing in the record."). As reflected in both the requirement of materially changed country conditions and the prima facie eligibility requirement, new evidence supporting all motions to

reopen must be "material." 8 C.F.R. 1003.2(c)(1); see also 8 C.F.R. 1003.23(b)(3).

Motions to reopen are "disfavored" because "[t]here is a strong public interest in bringing litigation to a close as promptly as is consistent with the interest in giving the adversaries a fair opportunity to develop and present their * * * cases." *Abudu*, 485 U.S. at 107. Applicable regulations grant the Board and IJs "discretion" in adjudicating motions to reopen. 8 C.F.R. 1003.2(a) (Board); see 8 C.F.R. 1003.23(b)(3) (IJ). Either the Board or an IJ may "deny a motion to reopen even if the party moving has made out a *prima facie* case for relief." 8 C.F.R. 1003.2(a); see *INS* v. *Doherty*, 502 U.S. 314, 323 (1992). This Court accordingly has recognized that "[t]he BIA has broad discretion, conferred by the Attorney General, 'to grant or deny a motion to reopen.'" *Kucana*, 558 U.S. at 250 (citation omitted). The "courts retain jurisdiction," however, "to review, with due respect, the Board's decision" whether to grant or deny a motion to reopen. *Ibid.*

In addition to motions to reopen authorized by the INA, "the BIA's regulations provide that, separate and apart from acting on the alien's motion, the BIA may reopen removal proceedings 'on its own motion'—or, in Latin, *sua sponte*—at any time." *Mata*, 135 S. Ct. at 2153 (quoting 8 C.F.R. 1003.2(a) (2015)). The Board "invoke[s] [its] sua sponte authority sparingly, treating it not as a general remedy for any hardships created by enforcement of the time and number limits in the motions regulations, but as an extraordinary remedy reserved for truly exceptional situations." *In re G-D-*, 22 I. & N. Dec. 1132, 1133-1134 (B.I.A. 1999) (en banc); see *In re J-J-*, 21 I. & N. Dec. 976, 984 (B.I.A. 1997) (en banc).

2. Petitioner is a native and citizen of Somalia. Pet. App. 33. In 2016, he applied for admission into the United States at the port of entry in Brownville, Texas. *Ibid.* Petitioner lacked proper admission documents, and the Department of Homeland Security accordingly commenced removal proceedings. *Id.* at 2.

At a hearing in the removal proceedings, petitioner conceded that he was removable but requested asylum, withholding of removal, and protection under regulations implementing Article 3 of 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, 114. Asylum is a form of discretionary relief that the Attorney General and Secretary of Homeland Security may grant if an applicant demonstrates (*inter alia*) that he is unable or unwilling to return to his country of origin "because of persecution or a well-founded fear of persecution on account of race, religion, nationality, membership in a particular social group, or political opinion." 8 U.S.C. 1101(a)(42)(A); see 8 U.S.C. 1158(b)(1)(A). Withholding of removal is a form of mandatory protection that limits the Attorney General from removing 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 requires an alien to show a "clear probability of persecution" and 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). An alien may seek withholding or deferral of removal under the CAT if he demonstrates that he

would more likely than not be tortured if removed to a particular country.[1]

Petitioner's claims for those forms of relief and protection were premised on his allegation that, if returned to Somalia, he would suffer persecution because he belonged to a minority clan known as the Ashraaf (or Ashraf) clan. Pet. App. 2. Petitioner contended that, while he was living in Somalia years earlier, members of the dominant Ayr clan had "verbally abused and slapped him" and that "members of the local militia" had "threatened to jail him if he did not pay taxes." *Id.* at 3.

In addition, petitioner asserted that, in 2010, while he was operating a water-delivery business in Qoryoley, Somalia, he had been assaulted by a delinquent customer who was a member of the dominant Ayr clan. Pet. App. 2. The customer allegedly ordered petitioner to continue selling him water even though the customer had not paid for it. *Ibid.* Petitioner asserted that, when he refused to do so, the customer pulled petitioner from his donkey cart, causing him to bump his hip on a rock. See *ibid.* The customer threatened petitioner, "saying 'if you don't listen to my orders, I will kill you,' and 'you will never survive in this city because you are a minority person.'" *Ibid.* Petitioner's mother confronted the customer, but

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[1] Article 3 of the CAT provides that "[n]o State Party shall expel, return * * * or extradite a person to another State where there are substantial grounds for believing that he would be in danger of being subjected to torture." 1465 U.N.T.S. 114. Congress directed that regulations be promulgated to implement that obligation. See Foreign Relations Authorization Act, Fiscal Years 1998 and 1999, Pub. L. No. 105-277, Div. G, Subdiv. B, Tit. XXII, § 2242(b), 112 Stat. 2681-822. The regulations implementing Article 3 of the CAT in the immigration context appear primarily at 8 C.F.R. 208.16-208.18 and 1208.16-1208.18.

neither she nor petitioner made a police report, and petitioner did not seek medical care. *Id.* at 2-3.

Within approximately one month after the donkey-cart incident, petitioner left Somalia for Uganda, where he lived for four years. See Pet. App. 3, 38-39. He subsequently moved to Angola, where he lived for six months, before traveling to the United States by way of Brazil, with the aid of a smuggler. *Id.* at 3.

Petitioner also cited more general evidence of majority clans in Somalia attacking and harassing minority clans. Pet. App. 8. Petitioner's Ashraaf clan, however, was not mentioned as a target of this abuse, even though many other minority clans were. See *ibid.* Other evidence indicated that members of the Ashraaf clan had previously been targets of abuse following conflicts in the 1990s but that they had since "achieved political influence and success." *Ibid.* Petitioner also expressed fear that the terrorist organization al-Shabaab would torture and kill him. See 17-60394 Administrative Record (A.R.) 282[2]; see also A.R. 176, 220, 337. The record of the original proceedings included the Department of State's 2015 country report for Somalia, which described al-Shabaab's wide-ranging, violent activities. See A.R. 435-440, 447; see also A.R. 388.

3. a. In January 2017, following a hearing on petitioner's claims, an IJ denied his applications for relief

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[2] The court of appeals consolidated petitioner's three petitions for review into one proceeding. See Pet. ii, 14. Three separate administrative records were filed in that single proceeding. The three records were paginated in the court of appeals using one sequence of numbers; references to the combined record here (and, it appears, in the petition) refer to page numbers assigned in the court of appeals (rather than to the pagination applied by the Board to each record individually).

and protection. Pet. App. 32-69. The IJ rejected petitioner's contention that he faced a significant risk of harm in Somalia from majority clans and terrorist groups like al-Shabaab. *Id.* at 57-62, 66-68. The IJ also determined that petitioner would not suffer persecution on account of his "membership in the Ashraaf clan, a minority clan." *Id.* at 51; see *id.* at 51-53, 57-60.

In a May 2017 decision, the Board affirmed the IJ's ruling denying relief and protection. Pet. App. 24-31. Like the IJ, the Board rejected petitioner's contention that he faced a significant risk of harm from majority clans and terrorist groups if returned to Somalia. *Id.* at 28-30. The Board did not reach the question whether the persecution petitioner alleged would be "on account of" his membership in the minority Ashraaf clan, instead affirming on the ground that the asserted harm did not rise to the level of persecution. *Id.* at 26 n.3; see *id.* at 26-29.

Petitioner sought judicial review of the Board's decision by filing a petition for review in the court of appeals. Pet. App. 3. He also sought a stay of removal, which the court of appeals denied. *Ibid.*

b. i. In October 2017, while petitioner's petition for review of the Board's decision was pending in the court of appeals—and after the ordinary 90-day deadline for filing a motion to reopen had expired—petitioner filed an untimely motion with the Board to reopen the proceedings. Pet. App. 18-19; see Pet. 12 n.7. Petitioner's motion requested reopening so that the IJ could "conduct additional evidentiary proceedings regarding his application for asylum, withholding of removal, and [CAT] protection." A.R. 555. Petitioner specifically sought to present additional evidence to support his original claims for relief. *Ibid.* He did not present new

claims, and his motion did not include a new application for relief, A.R. 571, as would be required of a motion to reopen for the purpose of submitting new claims, see 8 C.F.R. 1003.2(c)(1) ("A motion to reopen proceedings for the purpose of submitting an application for relief must be accompanied by the appropriate application for relief."). Petitioner's motion to reopen referred generally to persecution on account of "minority clan status," rather than on account of membership in the Ashraaf clan specifically, A.R. 558-559; see A.R. 555, 562, 566, the particular group the IJ's decision had addressed, cf. Pet. App. 51.

Petitioner's motion to reopen asserted that he was "at increased risk of harm by the majority clan in the Lower Shabelle province (where Qoryoley is situated) and by the Al-Shabaab insurgency." A.R. 555; see also A.R. 554; Pet. App. 19. Petitioner attached three exhibits to the motion: a report by a putative expert, Cleophus Thomas, III, A.R. 574-582 (Thomas report); the U.S. State Department's 2016 country report for Somalia, A.R. 583-625 (State Department report); and a 2017 Human Rights Watch article, A.R. 626-636. The State Department report and the Human Rights Watch article did not mention the Ashraaf clan.

The Thomas report referred to a "significant increase in the intensity of terrorist attacks and tribal violence," and to "the distinct vulnerability posed to Somali returnees from minority clans such as that of [petitioner]," but it did not provide a particular time frame. A.R. 575-576. The report also predicted, "[o]ver the next three years," a "likely * * * further deteriorat[ion]" in the "security situation in southern Somalia" due to a "phased withdrawal" of international peacekeepers. A.R. 576. The Thomas report further noted that, although al-Shabaab

still sought to recapture petitioner's hometown (Qoryoley), it had been driven from that town in 2014. *Ibid.* Due to the group's efforts to recapture Qoryoley, the report stated, conditions there had "deteriorated materially and significantly in the last six months." *Ibid.* Random violence inflicted by al-Shabaab had also increased. See A.R. 578. Quoting a 2014 *Al Jazeera* article, the report stated that "al-Shabaab has explicitly stated that returnees are '"working for the infidels[] and should face death."'" A.R. 579 & n.10. The Thomas report concluded that petitioner "faces the risk of serious physical harm should he be returned to Somalia due to his minority clan status and lack of protection paired with a deteriorating security situation from al-Shabaab attacks and clan violence in his hometown and region," A.R. 579, but did not state that the threats posed to petitioner had changed since petitioner's original removal proceedings.

ii. In a February 2018 decision, the Board denied petitioner's motion to reopen. Pet. App. 18-23. The Board observed that the motion was untimely. *Id.* at 19. The Board noted the "exception to the time limitation for motions to reopen" applicable to "asylum and withholding-of-removal [claims] based on material changed country conditions or circumstances arising in the country of nationality, that could not have been discovered or presented at the previous hearing, and that establish prima facie eligibility for relief." *Ibid.* (citing INA § 240(c)(7)(C)(ii), and 8 C.F.R. 1003.2(c)(3)(ii)). But the Board determined that petitioner "ha[d] failed to demonstrate that this exception applies to his case." *Id.* at 19-20; see *id.* at 20-22.

The Board explained that, under its precedent, to obtain reopening, petitioner bore the "heavy burden of demonstrating that the 'new evidence offered would

likely change the result in the case.'" Pet. App. 20 (quoting *In re S-Y-G-*, 24 I. & N. Dec. 247, 251 (B.I.A. 2007), review denied, 546 F.3d 138 (2d Cir. 2008), in turn quoting *Coelho*, 20 I. & N. Dec. at 473). The Board determined that petitioner had failed to carry that burden for two related reasons. *Id.* at 20-22.

First, the Board found that petitioner's new evidence did "not demonstrate materially changed conditions or circumstances, but rather a continuation of conditions that were the basis of [petitioner's] original asylum claim." Pet. App. 20; see also *id.* at 21. Referring to an earlier State Department report on Somalia from petitioner's original removal proceedings, the Board noted that "[m]inority clans in Somalia ha[d] been subjected to inter-clan violence and discrimination for years" and that the Thomas report merely "show[ed] that tribal discrimination and violence continue to exist in Somalia." *Id.* at 20. The Board also observed that, with respect to al-Shabaab, "impunity, violence, and killing by militant groups were wide-spread in Somalia at the time of [petitioner's] hearing." *Id.* at 21. The Board stated that the Thomas report thus reflected facts that "[we]re similar to the conditions or circumstances that existed at the time of [petitioner's] previous hearing, rather than 'changed' conditions or circumstances." *Id.* at 20. It concluded that petitioner "ha[d] not shown that the current country conditions represent materially changed conditions, rather than the continuation of the same or similar conditions." *Id.* at 21.

Second, the Board determined that petitioner did "not present[] sufficient evidence" of eligibility for relief, Pet. App. 20—*i.e.*, that the new evidence he presented would "establish prima facie eligibility for re-

lief," *id.* at 19. Specifically, the Board found that petitioner "ha[d] not presented sufficient evidence that he would be individually targeted based on his membership in the Ashraaf clan." *Id.* at 20. The Board explained that the Thomas report's description of risk "due to [petitioner's] minority clan status" did not address the risk of violence "targeted specifically at the Ashraaf clan." *Id.* at 21. In addition, the Board stated that petitioner's evidence regarding al-Shabaab showed that the group's "impunity and violence * * * affect a large segment of the population and groups under its control," but that "general conditions of rampant violence alone are insufficient to establish eligibility for asylum and related forms of relief." *Id.* at 21-22. The Board concluded that petitioner had not shown that "actual or imputed political opinion or clan membership would necessarily" be a motive for harm sufficient to qualify him for asylum (and, therefore, also for withholding of removal). *Id.* at 22.

The Board accordingly determined that petitioner had not demonstrated entitlement to reopening. See Pet. App. 19-22. It also declined to exercise its discretion to reopen petitioner's proceedings *sua sponte*. *Id.* at 22.

iii. Petitioner filed a second petition for review in the court of appeals, seeking review of the Board's decision denying his motion to reopen, Pet. App. 3, which was consolidated with his pending petition for review of the Board's decision on his original claims for relief, Pet. 14. Petitioner again sought a stay of removal pending review from the court of appeals and from this Court, but those requests for a stay were denied. Pet. App. 3.

c. In March 2018, while his first two petitions for review were pending in the court of appeals, petitioner filed a motion with the Board to reconsider its decision

denying his motion to reopen. Pet. App. 15. He argued (*inter alia*) that the Board had applied an incorrect standard by requiring him to show that new evidence would likely change the result in the case, and that it had overlooked his CAT claim. A.R. 671-675, 681-682.

In a June 2018 decision, the Board denied petitioner's motion for reconsideration. Pet. App. 15-17. It observed that the standard petitioner proposed for assessing motions to reopen—requiring "a 'reasonable likelihood' of prevailing on the merits"— was not "significant[ly] differen[t]" from the standard the Board had invoked in its decision. *Id.* at 16. "[B]oth" formulations, the Board reasoned, "require some likelihood that [petitioner] would prevail at a new hearing." *Ibid.* The Board also reiterated its determinations that "general conditions of rampant violence alone" do not establish eligibility for relief, and that petitioner "did not submit materially changed conditions in his native Somalia which would warrant further proceedings." *Ibid.* The Board also acknowledged that it had failed to address petitioner's CAT claim specifically in its decision denying reopening, but it cited the lack of changed conditions as its reason for denying reopening on that ground. *Id.* at 16 n.2.

Petitioner filed a third petition for review in the court of appeals seeking review of the Board's denial of reconsideration, which was consolidated with the first two. Pet. App. 3. Petitioner once more sought a stay of removal pending review from the court of appeals and from this Court, which was denied. *Ibid.* Petitioner was subsequently removed to Somalia in September 2018. *Id.* at 3-4.

4. The court of appeals denied each of petitioner's three consolidated petitions for review. Pet. App. 1-14.

a. The court of appeals first rejected petitioner's challenges to the Board's decision denying relief and protection in petitioner's original proceedings. Pet. App. 4-10. The court held that substantial evidence supported the Board's determination that petitioner had failed to show either past or potential future harm severe enough to constitute persecution. *Id.* at 5-8. The court also sustained the Board's denial of CAT protection, finding that petitioner had not shown a likelihood of torture or that state actors would be involved in causing him harm. *Id.* at 8-9.

b. The court of appeals next rejected petitioner's challenge to the Board's decision denying his motion to reopen. Pet. App. 10-13. The court reasoned that, because petitioner's motion to reopen was untimely, it could be granted only if either (A) the Board exercised its discretion to reopen the proceedings *sua sponte*, or (B) petitioner's claims were "'based on [evidence of] changed country conditions' if that evidence '[wa]s material and was not available and would not have been discovered or presented at the previous proceeding.'" *Id.* at 10 (quoting 8 U.S.C. 1229a(c)(7)(C)(ii)) (first set of brackets in original). The court observed that the Board had "refused to reopen the proceedings *sua sponte*" and that its refusal to do so was not judicially reviewable. *Id.* at 11.

The court of appeals further explained that the Board's "decision not to reopen based on changed country conditions" is reviewable, but only "through a 'highly deferential abuse-of-discretion' lens." Pet. App. 11 (quoting *Zhao* v. *Gonzales*, 404 F.3d 295, 303 (5th Cir. 2005)). Under that standard, the court explained, a court "may not grant the petition even if the BIA erred in denying reopening—unless the BIA's decision was

'capricious, racially invidious, utterly without foundation in the evidence, or otherwise so irrational that it is arbitrary.'" *Ibid.* (quoting *Zhao*, 404 F.3d at 304).

Applying that standard, the court of appeals determined that the Board had not abused its discretion in denying reopening based on petitioner's evidence of changed country conditions. Pet. App. 11-13. The court rejected petitioner's contention that the Board had "applied the wrong legal standard to his motion to reopen" by "requir[ing] him to 'demonstrate that the new evidence offered would likely change the result in the case.'" *Id.* at 12 (brackets omitted). The court explained that it "previously ha[d] used the exact same standard (albeit in unpublished opinions) when considering BIA denials of motions to reopen" and that multiple other "circuits routinely require the same thing." *Ibid.* (citing decisions of First, Third, Fourth, Sixth, Eighth, Ninth, Tenth, and Eleventh Circuits). The court "reiterate[d] that standard" here, explaining that, to be "'material'" in this context, "the evidence must be likely to change the result of the alien's underlying claim for relief." *Ibid.* (citation omitted). On the merits, the court agreed with the Board that petitioner had not satisfied that standard because his new evidence, including the Thomas report, showed "much of the same ongoing 'civil strife' in Somalia that [petitioner] had shown originally." *Id.* at 13.

c. Finally, the court of appeals rejected petitioner's challenge to the Board's denial of his motion for reconsideration of its decision denying his motion to reopen. Pet. App. 13-14. The court explained that, to prevail on that challenge, petitioner "needed to 'identify a change in the law, a misapplication of the law, or an aspect of the case that the BIA overlooked.'" *Id.* at 13 (citation

omitted). The court noted that the petitioner "arguably did one of those things" by alleging that the Board had "overlooked his CAT claim" when it denied his motion to reopen. *Ibid.* But the court explained that the Board had "duly corrected that oversight in response to [petitioner's] motion to reconsider." *Ibid.*

**ARGUMENT**

Petitioner contends (Pet. 27-37) that the Board abused its discretion in denying his untimely motion to reopen by applying an erroneous standard in evaluating whether his putative evidence of changed country conditions warranted reopening. The court of appeals correctly rejected that contention, and its decision does not conflict with any decision of this Court or of any other court of appeals. Petitioner's assertion (Pet. 16-27) that the decision below implicates a conflict among the courts of appeals and the Board's own decisions concerning the standard by which the Board, in ruling on untimely motions to reopen, assesses the assertedly new evidence lacks merit. To the extent the linguistic formulations the Board and other circuits embody meaningfully different standards, they reflect a distinction between different contexts in which the Board considers motions to reopen. But even if the question petitioner raises implicated a lower-court conflict, this case would be an unsuitable vehicle in which to resolve it. Further review is not warranted.

1. The court of appeals correctly concluded that the Board did not abuse its discretion in denying petitioner's untimely motion to reopen based on purported evidence of changed country conditions. Pet. App. 10-13.

a. The INA establishes various procedural requirements for motions to reopen, but it generally reserves substantive criteria for such motions to the discretion of

the Attorney General. See *Kucana* v. *Holder*, 558 U.S. 233, 240 n.6, 249-250 (2010). Consistent with that authority, the Board (as the Attorney General's delegate) has developed standards for adjudicating motions to reopen. See pp. 3-5, *supra*.

Among those standards are principles governing untimely motions to reopen. Although the INA makes the grant or denial of a motion to reopen discretionary with the Attorney General (or the Board acting on his behalf), the INA generally requires motions to reopen to be "filed within 90 days of the date of entry of a final administrative order of removal." 8 U.S.C. 1229a(c)(7)(C)(i). As relevant here, the INA makes an exception to that deadline permitting an alien to move for reopening beyond the 90-day deadline to seek asylum or withholding of removal that "is based on changed country conditions arising in the country of nationality or the country to which removal has been ordered, if such evidence is material and was not available and would not have been discovered or presented at the previous proceeding." 8 U.S.C. 1229a(c)(7)(C)(ii). But the INA does not define what evidence is "material" or specify when the Board should reopen a case, instead leaving that to the Board's discretion. This Court has held that the Board's judgment as to whether a motion to reopen presents new, material evidence is reviewable only for an abuse of discretion. See *INS* v. *Abudu*, 485 U.S. 94, 104-105 (1988). The Court has observed that motions to reopen in general implicate a "strong public interest" in the finality of removal proceedings. *Id.* at 107. That interest in finality is even more strongly present when the motion to reopen is itself untimely. The Court explained that "[t]he appropriate analogy is a motion for a new trial in

a criminal case on the basis of newly discovered evidence, as to which courts have uniformly held that the moving party bears a heavy burden." *Id.* at 110.

The Board has described the standard for determining whether new evidence of changed country conditions is "material" differently depending on whether the motion to reopen seeks to present new claims or instead merely to augment claims made in the original proceeding. See *In re L-O-G-*, 21 I. & N. Dec. 413, 420 (B.I.A. 1996) (en banc). Where an alien files a motion to reopen seeking to bring new claims that have not previously been adjudicated, the Board has explained, it examines whether a "reasonable likelihood of success on the merits" exists. *Ibid.* The Board explained that, "[i]n considering a motion to reopen" asserting a new claim, "the Board should not prejudge the merits of a case before the alien has had an opportunity to prove the case." *Id.* at 419. It asks whether the alien "has made out a prima facie case," "so as to make it worthwhile to develop the issues further at a full evidentiary hearing." *Id.* at 419-420. Where instead, as in this case, an alien files a motion to reopen that does not present new claims and instead merely seeks to bolster the evidentiary record supporting the original, already-adjudicated claims, the Board has explained that the alien must "me[et] the 'heavy burden' of showing that the new evidence presented 'would likely change the result in the case.'" *Id.* at 420 (quoting *In re Coelho*, 20 I. & N. Dec. 464, 473 (B.I.A. 1992)); see also *In re M-S-*, 22 I. & N. Dec. 349, 357 (B.I.A. 1998) (en banc).

The Board's distinct formulation of the inquiry in the context of motions presenting new evidence but not new claims might be viewed as translating the same overarching principles to the distinct contexts of motions

seeking to relitigate claims that already have been adjudicated by the agency. From that perspective, the Board's evaluation of whether new evidence has a reasonable likelihood of success appropriately accounts for whether the Board has already considered the claim. See *Hernandez-Perez* v. *Whitaker*, 911 F.3d 305, 320-321 (6th Cir. 2018). As the Sixth Circuit has observed, "[t]he showing necessary to make a likelihood of success 'reasonable' is, of course, fact specific—and one relevant fact is whether the claim has already been reviewed and found wanting." *Id.* at 321.

Regardless of whether the Board's statement of the standard in the context of motions presenting new evidence to support an alien's original, unsuccessful claims for relief merely reformulates the same principle to that context or embodies a different standard, it reflects the Board's reasonable judgment about the showing an alien should be required to make in that context. If the agency has already considered and rejected a particular claim, the concerns of "prejudg[ing]" the claim are not present. *L-O-G-*, 21 I. & N. Dec. at 419. And assessing whether the alien has presented a "prima facie case," *ibid.*, is unnecessary if the agency has already decided the claim on its merits—simply without the alien's allegedly new evidence. The distinction the Board has drawn makes particular sense in light of the analogy this Court drew in *Abudu* between motions to reopen in the immigration context and motions for a new criminal trial based on newly discovered evidence, which usually relate to previously-litigated issues—and which the Court explained require the movant to carry a "heavy burden." 485 U.S. at 110.

b. The court of appeals correctly determined that the Board did not abuse its discretion in applying the

likely-to-change-the-result standard here. Pet. App. 12. Petitioner's motion to reopen did not seek to present new claims, but only to supplement the existing record in support of his original claims that the Board had already considered and rejected. See A.R. 555; pp. 9-10, *supra*. Although petitioner's motion to reopen referred in general terms to potential harm he might suffer because of his "minority clan" status—rather than due to his membership in the Ashraaf clan specifically, which had been the basis for his original asylum and withholding-of-removal claims, Pet. App. 51—his motion to reopen did not seek to amend his original claims or to bring new claims.

The Board therefore conducted the appropriate inquiry by asking whether petitioner's new evidence "would likely change the result in the case," Pet. App. 20 (citation omitted), and found that it would not, *id.* at 20-22. In this Court, petitioner does not dispute the Board's determination that his new evidence failed that standard. And the court of appeals' case-specific conclusion that the Board did not abuse its discretion in making that factbound assessment of petitioner's particular evidence would not warrant this Court's review in any event. See Sup. Ct. R. 10; *United States* v. *Johnston*, 268 U.S. 220, 227 (1925) ("We do not grant * * * certiorari to review evidence and discuss specific facts.").

Petitioner nevertheless contends (Pet. 17, 27-31) that the court of appeals and the Board should have applied a "reasonable likelihood" standard in assessing whether his new evidence was material. But his argument simply overlooks the distinction the Board has drawn between motions to reopen that seek to present new claims, to which that articulation of the standard properly applies,

and motions seeking only to present new evidence concerning a claim the Board has already rejected, to which that articulation of a standard is inapposite.

2. Petitioner's assertion (Pet. 16-27) that review is warranted to resolve disagreement among the courts of appeals and within the Board's own decisions regarding the correct standard for assessing new evidence offered in support of a motion to reopen fails for similar reasons.

a. Petitioner contends that some courts construe the INA to require that an alien filing an untimely motion to reopen based on changed country conditions need only show a "reasonable likelihood" or "realistic chance" of success, Pet. 17 (quoting *Guo* v. *Ashcroft*, 386 F.3d 556, 564 (3d Cir. 2004)), whereas other courts, including the Fifth Circuit in this case, require a showing that the evidence "would likely change the result," Pet. 18 (quoting Pet. App. 12). But most of the decisions from other circuits that petitioner cites (Pet. 17 n.16, 19-22) as applying a reasonable-likelihood standard concerned what were in substance new claims that the alien sought to pursue in a motion to reopen. See *Salim* v. *Lynch*, 831 F.3d 1133, 1137 (9th Cir. 2016) (new claim for asylum rested "on an entirely distinct ground from [the alien's] prior request for relief"); *Boika* v. *Holder*, 727 F.3d 735, 738 (7th Cir. 2013) (motion to reopen concerned an asylum claim based on different facts than original); *Smith* v. *Holder*, 627 F.3d 427, 430-431 (1st Cir. 2010) (original proceedings concerned only adjustment of status); *Guo*, 386 F.3d at 560 (original claim based on religious persecution; new claim based on China's one-child family planning policy). The remaining cases he cites in that category either gave no consideration to an alternative standard, see *Shardar* v. *Attorney Gen. of the U.S.*, 503 F.3d 308, 313 (3d Cir.

2007); *Poradisova* v. *Gonzales*, 420 F.3d 70, 78 (2d Cir. 2005), or were otherwise irrelevant, see *Siong* v. *INS*, 376 F.3d 1030, 1037 (9th Cir. 2004) (concerning standard for prejudice necessary to show ineffective assistance of counsel).

Conversely, most of the decisions from other circuits that petitioner cites (Pet. 21 n.21, 23) as applying a likely-to-change-the-result formulation of the materiality standard concerned previously adjudicated claims for which an alien sought via a motion to reopen to submit additional evidence. See *Perez* v. *Holder*, 740 F.3d 57, 61 (1st Cir. 2014) (motion sought to offer additional evidence regarding same claim for withholding of removal); *Lin* v. *Holder*, 771 F.3d 177, 180-181 (4th Cir. 2014) (continuing to press asylum-related claims based on Chinese family-planning policies); *Maatougui* v. *Holder*, 738 F.3d 1230, 1239 (10th Cir. 2013) (motion sought to "revisit[]" prior asylum-related applications); *Jiang* v. *United States Att'y Gen.*, 568 F.3d 1252, 1254 (11th Cir. 2009) (like alien's second motion, the third motion to reopen also sought asylum-related relief); *Shin* v. *Mukasey*, 547 F.3d 1019, 1025 (9th Cir. 2008) (proposed second motion sought same relief as first); see also *Sutuc* v. *Attorney Gen. of the U.S.*, No. 15-2425, 2016 WL 537582 (3d Cir. Feb. 11, 2016), slip op. 7 n.4 (per curiam) (rejecting "reasonable likelihood" standard because the alien was "merely present[ing] new evidence to support her existing claims"), vacated, 643 Fed. Appx. 174 (3d Cir. 2016). Petitioner cites (Pet. 23) *Vargas* v. *Holder*, 567 F.3d 387 (8th Cir. 2009), but the Eighth Circuit has since observed that in that case the alien had "provide[d] a completely new basis for seeking cancellation of removal," *Urrutia Robles* v. *Barr*, 940 F.3d 420, 423 (8th Cir. 2019) (distinguishing

*Vargas* on that basis and applying likely-to-change-the-result standard where movant "simply urged the BIA to remand so the IJ could consider stronger evidence of rehabilitation to support his initial claim for discretionary relief"). The remaining case is inapposite. See *Huicochea-Gomez* v. *INS*, 237 F.3d 696, 699-700 (6th Cir. 2001) (concerning standard for prejudice necessary to show ineffective assistance of counsel).

Petitioner also contends (Pet. 18 n.19) that the court of appeals' decision here conflicts with its own past decisions. Even if accurate, that assertion of intra-circuit inconsistency would not warrant this Court's review. See *Wisniewski* v. *United States*, 353 U.S. 901, 902 (1957) (per curiam) ("It is primarily the task of a Court of Appeals to reconcile its internal difficulties."). In any event, that asserted conflict is likewise illusory because the previous decisions that petitioner cites where the Fifth Circuit applied a reasonable-likelihood standard concerned what amounted to new claims, not merely new evidence. See *Guevara Flores* v. *INS*, 786 F.2d 1242, 1245-1246 (1986) (original claim barely litigated because alien did not initially disclose information for fear it would reach persecutors), cert. denied, 480 U.S. 930 (1987); *Marcello* v. *INS*, 694 F.2d 1033, 1034 (per curiam) (motion to reopen concerned "an entirely independent provision" of the INA), cert. denied, 462 U.S. 1132 (1983).

b. Petitioner's contention (Pet. 25) that the Board's own decisions are inconsistent likewise lacks merit because it similarly fails to account for the different contexts the Board was addressing. Petitioner asserts (*ibid.*) that the Board's articulation of the likely-to-change-the-result standard in *Coelho* conflicts with the "reasonable likelihood" standard the Board applied in

*L-O-G-*. But petitioner overlooks that *L-O-G-* itself reconciled the two articulations of the standard to be applied and explained that the appropriate standard depends on whether or not a motion to reopen presents a new claim. See 21 I. & N. Dec. at 419-420; see also *Caballero-Martinez* v. *Barr*, 920 F.3d 543, 548 (8th Cir. 2019) ("We specifically decline to interpret *L-O-G-* as abrogating *Coelho*."); *Hernandez-Perez*, 911 F.3d at 320 ("In light of th[e] consistent interpretive history" by the Board, "*L-O-G-* is properly considered a clarification of how the *Coelho* standard applies in particular factual circumstances."); *M-S-*, 22 I. & N. Dec. at 357.

Petitioner also cites (Pet. 26 n.25) *In re S-V-*, 22 I. & N. Dec. 1306, 1308 (B.I.A. 2000) (en banc), overruled on other grounds as recognized by *In re A-M-E-*, 24 I. & N. Dec. 69, 72 (B.I.A.), review denied, 509 F.3d 70 (2d Cir. 2007), for the proposition that the Board must apply the "reasonable likelihood" standard to all motions to reopen because the standard requires consideration of facts "already available of record." See *S-V-*, 22 I. & N. Dec. at 1308 ("[W]e have reopened proceedings where the new facts alleged, when coupled with the facts already of record, satisfy us that it would be worthwhile to develop the issues further." (citation and internal quotation marks omitted)). Petitioner mistakenly infers (Pet. 26 n.25) that, by considering the relevance of facts already of record, the Board must not be limiting the "reasonable likelihood" standard "to situations in which an applicant seeks reopening to pursue relief that she had not sought previously." Petitioner's argument rests too much on too little. Facts already of record could still be relevant to new claims; at a minimum, they are relevant to show that claims are actually new. The reference in *S-V-* to considering "facts

already of record," 22 I. & N. Dec. at 1308, does not mean that the Board applies the "reasonable likelihood" standard when a motion to reopen seeks only to offer additional evidence on already adjudicated claims.

Even if petitioner were correct that the Board's decisions have sometimes been inconsistent, such intra-agency inconsistency would not warrant this Court's intervention. The Board itself (or the Attorney General, see 8 C.F.R. 1003.1(h)(1)) can resolve any conflicts concerning the import of its own decisions, and in particular the approach it has developed in its broad discretion to adjudicate motions to reopen. That mechanism, which is a familiar and unremarkable task of administrative agencies in conducting adjudications, eliminates, or at a minimum greatly reduces, any reason for this Court's review to ensure consistency in the agency's decisions. Cf. *Braxton* v. *United States*, 500 U.S. 344, 347-349 (1991) (explaining that the Court generally does not review disagreements concerning provisions of the United States Sentencing Guidelines, which can be resolved by the United States Sentencing Commission).

3. Even if the question petitioner raises regarding the standard for determining whether new evidence justifies reopening otherwise warranted review, this case would be an unsuitable vehicle in which to address it. Petitioner contends (Pet. 27-34) that the new evidence he submitted with his motion to reopen should have been assessed under a reasonable-likelihood-of-success standard, not a likely-to-change-the-results standard. But even under petitioner's preferred, reasonable-likelihood standard, his motion to reopen still should have been denied because his new evidence did not show any realistic probability that his original claims that the Board previously rejected would now succeed. As the Board explained,

the recent evidence petitioner submitted did not "demonstrate materially changed conditions or circumstances," but rather a "continuation of conditions" that were the basis for his original claims. Pet. App. 20.

Petitioner's asylum and withholding-of-removal claims were based on alleged persecution on account of his membership in the particular social group of the Ashraaf minority clan. See Pet. App. 51. His motion to reopen, however, provided no new evidence of persecution directed specifically at that particular social group. See *id.* at 20-21. And the Board determined that petitioner's evidence concerning violence and discrimination toward minority clans generally did not demonstrate "changed conditions or circumstances," because such violence and discrimination existed at the time of petitioner's original claim. *Id.* at 20. And petitioner's "failure to establish material changed circumstances" required the Board to deny reopening based on his CAT claim as well. *Id.* at 16 n.2. The question presented in the petition concerning the precise standard of materiality thus lacks practical significance in this case. Further review is not warranted.

## CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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