No. 20-1529

In the Supreme Court of the United States

LUZ DEL SOCORRO CERRITOS-QUINTANILLA, ET AL., PETITIONERS

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.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 2a-10a) is not published in the Federal Reporter but is reprinted at 826 Fed. Appx. 386. The decisions of the Board of Immigration Appeals (Pet. App. 11a-13a) and the immigration judge (Pet. App. 14a-22a) are unreported.

JURISDICTION

The judgment of the court of appeals was entered on September 17, 2020. A petition for rehearing was denied on November 30, 2020 (Pet. App. 23a). The petition for a writ of certiorari was filed on April 29, 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 origin "because of persecution or a well-founded fear of persecution on account of race, religion, nationality, membership in a particular social group, or political opinion." 8 U.S.C. 1101(a)(42)(A). Under amendments to the INA made by the REAL ID Act of 2005, Pub. L. No. 109-13, 119 Stat. 302, the applicant must establish that a protected ground is "at least one central reason" for the claimed persecution. 8 U.S.C. 1158(b)(1)(B)(i). The Board of Immigration Appeals (Board) has ruled that a protected trait does not amount to a "central reason" for the persecution if the trait plays only "a minor role" or is "incidental, tangential, superficial, or subordinate to another reason for harm." *In re J-B-N- & S-M-*, 24 I. & N. Dec. 208, 214 (2007).

Withholding of removal, by contrast, is a form of mandatory protection. The 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 persecu-

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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)).

tion," 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, 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 should also govern withholding claims. *In re C-T-L-*, 25 I. & N. Dec. 341, 346 (2010). An applicant seeking withholding of removal, just like an applicant seeking asylum, must thus establish that a protected ground is "at least one central reason" for the claimed persecution. *Id.* at 348.

2. The lead petitioner, a native and citizen of El Salvador, entered the United States without inspection in June 2014. Gov't C.A. Br. 3. The Department of Homeland Security (DHS) issued her a notice to appear, charging her with being removable on the ground that she was inadmissible under 8 U.S.C. 1182(a)(6)(A)(i) as "[a]n alien present in the United States without being admitted or paroled." Gov't C.A. Br. 3. In a hearing before an immigration judge, petitioner conceded removability, but she sought both asylum and withholding of removal on behalf of herself and her then-minor son (the other petitioner in this Court). Pet. App. 3a, 15a.

Petitioners claimed that they feared returning to El Salvador because they had been threatened by members of MS-13. Pet. App. 4a. The lead petitioner testified that the gang members had threatened her son on two occasions, that they had told him that they would kill him if he did not either join the gang or pay them

money, and that they had also threatened to kill her. *Ibid.* Neither petitioner was physically harmed, and another immediate family member (a daughter and sister of petitioners) remains unharmed in the same town in El Salvador where the threats occurred. *Id.* at 17a-18a, 20a.

The immigration judge denied the lead petitioner's application for asylum and withholding of removal and ordered her removed. Pet. App. 14a-22a. As relevant here, the immigration judge found that petitioner "failed to demonstrate or establish that there is a requisite nexus between any persecution, past or future, and a protected ground." *Id.* at 20a. In particular, noting that the gangs that had threatened petitioner and her son had been motivated by a desire to make money and to recruit gang members, the immigration judge found that being a member of her son's immediate family—the only "particular social group" she had invoked, 8 U.S.C. 1231(b)(3)—"[wa]s not at least one central reason for" those threats. Pet. App. 19a.

3. Petitioners appealed to the Board, which dismissed their appeal. Pet. App. 11a-13a. The Board "agree[d] with the Immigration Judge that [the lead petitioner] ha[d] not established a fear of persecution on account of membership in [a particular social] group." *Id.* at 12a.

4. Petitioners sought review from the court of appeals, which denied the petition for review. Pet. App. 2a-10a. The court observed that it owed deference to the immigration judge's and the Board's factual findings. *Id.* at 6a. The court concluded that petitioners could not overcome that deference, because the record did not "compel the conclusion that [the lead petitioner's] family status was one central reason for her

alleged present or future persecution." *Id.* at 3a; see *id.* at 8a-10a.

ARGUMENT

Petitioners contend (Pet. 12-30) that an applicant for withholding of removal need show only that a protected trait was "a reason," rather than "at least one central reason," for claimed persecution. That contention, which was neither pressed nor passed upon below, is not properly before this Court. The contention in any event lacks merit. The question presented is the subject of a circuit conflict, but that conflict is poorly developed, and petitioners' failure to preserve their contention below makes this case a poor vehicle for resolving it. This Court recently denied review of the same question in another case where the noncitizen had failed to preserve his contention in the court of appeals. See *Fawzer* v. *Barr*, 139 S. Ct. 2709 (2019) (No. 18-953). The same result is warranted here.

1. This Court's ordinary practice "precludes a grant of certiorari * * * when 'the question presented was not pressed or passed upon below.'" *United States* v. *Williams*, 504 U.S. 36, 41 (1992) (citation omitted). In this case, petitioners did not argue below that an applicant for withholding of removal need show only that a protected trait was "a reason," rather than "at least one central reason," for claimed persecution. To the contrary, petitioners' opening brief in the court of appeals, filed by counsel, stated that, in order to obtain asylum, an applicant "must establish that [a protected ground] was or will be at least 'one central reason' for inflicting the persecut[ion]." Pet. C.A. Br. 8 (quoting 8 U.S.C. 1158(b)(1)(B)(i)). Petitioners made no argument that a different standard applied to the persecution alleged in support of their request for withholding of removal. *Id.*

at 10-11. The court of appeals, in turn, applied the "at least one central reason" standard, but it did not consider (presumably because petitioners did not ask it to consider) whether that standard comports with the INA. Pet. App. 5a. Even after the decision below was entered, petitioners' petition for panel rehearing contended that "the panel did not properly apply the 'at least one central reason' standard," Pet. C.A. Reh'g Pet. 7 (capitalization and emphasis omitted)—without separately contending that a different standard should have been applied to the withholding request. Petitioners identify no sound basis for this Court—which is "a court of review, not of first view," *Cutter* v. *Wilkinson*, 544 U.S. 709, 718 n.7 (2005)—to consider that separate issue in the first instance.

2. 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 cases, 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 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-Zacharias*, 502 U.S. 478, 481-483 (1992) (citation omitted).

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 straight-

forward 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), petitioners contend (Pet. 26-30) that an applicant for withholding of removal need show only that a protected trait was "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 only that a protected trait is "'a' reason, not 'at least one central reason,'" for the persecution. *Barajas-Romero*, 846 F.3d at 358. The Ninth Circuit, however, misread the statute.

Naturally read, the phrase "for a reason described in subparagraph (A)," 8 U.S.C. 1231(b)(3)(C), is just a shorthand reference to the list of protected traits in subparagraph (A): "race, religion, nationality, membership in a particular social group, or political opinion." 8 U.S.C. 1231(b)(3)(A). Nothing in the phrase suggests that it prescribes new substantive standards, 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 different motive standards 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. A statutory cross-reference would have been an unusual place to bury 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.

3. Petitioners correctly observe (Pet. 15-30) that the courts of appeals have reached conflicting decisions about the proper motive standard for withholding-of-removal cases. The conflict, however, is far less developed than petitioners suggest. One court of appeals, the Third Circuit, has issued a published opinion adopting the "'at least one central reason'" standard for withholding-of-removal cases—although it did so in a footnote in a case on which "the parties appear[ed] to agree on this point." *Gonzalez-Posadas* v. *Attorney Gen. U.S.*, 781 F.3d 677, 685 n.6 (2015) (citation and emphasis omitted). Some other courts of appeals have applied the "at least one central reason" standard in unpublished, non-precedential opinions. See, *e.g.*, *Rochez-Torres* v. *Garland*, No. 19-162, 2021 WL 1961652 (2d Cir. May 17, 2021); *Gitata* v. *Holder*, 486 Fed. Appx. 369, 370 n.3 (4th Cir. 2012) (per curiam). On the other side of the ledger, two courts of appeals, the Sixth and Ninth Circuits, have issued published opinions adopting

the lower "a reason" standard for withholding-of-removal cases. See *Guzman-Vazquez*, 959 F.3d at 273 (6th Cir.); *Barajas-Romero*, 846 F.3d at 358-360 (9th Cir.). Still other courts of appeals have left the question open. See *W.G.A.* v. *Sessions*, 900 F.3d 957, 965 & n.5 (7th Cir. 2018) (acknowledging the Ninth Circuit's decision but applying the "'one central reason'" standard because the respondent had not argued "that different standards should govern" asylum and withholding claims); *Garcia-Moctezuma* v. *Sessions*, 879 F.3d 863, 868 n.3 (8th Cir. 2018) ("In light of Garcia-Moctezuma's repeated and unexcused waiver of this issue, we take no position on the relative merits of the respective interpretations in *Matter of C-T-L-* and *Barajas-Romero*.").

Petitioners cite (Pet. 18-20, 26) several additional decisions from the Fourth and Fifth Circuits, but those decisions did not squarely address the question presented. The Fifth Circuit's decision in *Efe* v. *Ashcroft*, 293 F.3d 899 (2002), predated the enactment of the REAL ID Act provisions at issue here. In two other cases, the Fifth Circuit applied the "at least one central reason" standard to withholding claims. See *Revencu* v. *Sessions*, 895 F.3d 396 (2018), and *Shaikh* v. *Holder*, 588 F.3d 861 (2009). But the noncitizens in those cases do not appear to have disputed that standard's applicability. See *Revencu*, 895 F.3d at 402; *Shaikh*, 588 F.3d at 864. After the petition for a writ of certiorari was filed, the Fifth Circuit described *Shaikh* as "binding Fifth Circuit precedent" requiring the application of the "'one central reason'" standard to both asylum and withholding, but it did so in an unpublished opinion. *Cortez-Ramirez* v. *Garland*, No. 19-60553, 2021 WL 2303048, at *4 (5th Cir. June 4, 2021) (per curiam) (cita-

tion omitted). In the Fourth Circuit decisions that petitioners cite, *Lopez Ordonez* v. *Barr*, 956 F.3d 238 (2020), and *Alvarez Lagos* v. *Barr*, 927 F.3d 236 (2019), the court determined that the applicants had satisfied the "at least one central reason" standard; it accordingly had no occasion to consider whether withholding claims are subject to a lower standard. See *Lopez Ordonez*, 956 F.3d at 244-245; *Alvarez Lagos*, 927 F.3d at 249.

In short, only three courts of appeals have addressed the question presented in published opinions—and one of them did so in a footnote in a case without the benefit of adversarial briefing. The conflict is insufficiently developed to warrant this Court's intervention at this time. And because petitioners failed to preserve their contention below, this case would in any event be a poor vehicle for resolving the conflict.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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