No. 21-539

In the Supreme Court of the United States

THEWODROS WOLIE BIRHANU, PETITIONER

v.

MERRICK B. GARLAND, ATTORNEY GENERAL

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

BRIEF FOR THE RESPONDENT

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QUESTION PRESENTED

Whether a noncitizen's mental health may be considered in determining whether he was convicted of a "particularly serious crime," which would render him ineligible for asylum or withholding of removal, 8 U.S.C. 1158(b)(2)(A)(ii), 1231(b)(3)(B)(ii).

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-47a) is reported at 990 F.3d 1242. The decisions of the Board of Immigration Appeals (Pet. App. 48a-61a) and the immigration judge (Pet. App. 62a-84a, 85a-91a) are unreported.

JURISDICTION

The judgment of the court of appeals was entered on March 9, 2021. A petition for rehearing was denied on August 3, 2021 (Pet. App. 92a-93a). The petition for a writ of certiorari was filed on October 8, 2021. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. The Immigration and Nationality Act (INA), 8 U.S.C. 1101 *et seq.*, establishes a detailed framework

governing admission to, and removal from, the United States. The INA also authorizes removable noncitizens to obtain relief or protection from removal in certain circumstances.[1] Two related forms of relief and protection are at issue here.

The INA authorizes the Attorney General, in his discretion, to grant asylum to a noncitizen who demonstrates that he is a "refugee" and otherwise satisfies the applicable eligibility requirements. 8 U.S.C. 1158(b)(1)(A); see 8 U.S.C. 1101(a)(42)(A) (defining a "'refugee'" as a noncitizen who is unwilling or unable to return to his country of nationality "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"). A noncitizen who receives asylum may become eligible to adjust status to that of a lawful permanent resident. See 8 U.S.C. 1159(b); *INS* v. *Cardoza-Fonseca*, 480 U.S. 421, 428 n.6 (1987).

Separately, the INA requires the Attorney General to withhold removal to a particular country if he "decides that 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). Although withholding is mandatory rather than discretionary, it offers a lesser form of protection than does asylum. See *Cardoza-Fonseca*, 480 U.S. at 428 n.6. Because withholding is "'country specific,'" "nothing prevents DHS 'from removing the alien to a third country other than the country to which removal has been withheld.'"

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[1] This brief uses the term "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)).

Johnson v. *Guzman Chavez*, 141 S. Ct. 2271, 2283 (2021) (brackets and citation omitted).

A noncitizen who is otherwise eligible for asylum or withholding of removal will be barred from receiving either if the Attorney General determines that the noncitizen has been convicted of a "particularly serious crime" that indicates he is a "danger to the community of the United States." 8 U.S.C. 1158(b)(2)(A)(ii) (asylum); 8 U.S.C. 1231(b)(3)(B)(ii) (withholding). The Board of Immigration Appeals (Board) has interpreted the statute to mean that "once an alien is found to have committed a particularly serious crime," there is no need to "engage in a separate determination to address whether the alien is a danger to the community." *In re N-A-M-*, 24 I. & N. Dec. 336, 342 (B.I.A. 2007).

The INA specifies certain crimes that categorically qualify as "particularly serious." See 8 U.S.C. 1158(b)(2)(B)(i) ("an aggravated felony"); 8 U.S.C. 1231(b)(3)(B) ("an aggravated felony (or felonies) for which the alien has been sentenced to an aggregate term of imprisonment of at least 5 years"). The Attorney General also has the authority to designate other offenses as particularly serious. See, *e.g.*, 8 U.S.C. 1231(b)(3)(B) ("The previous sentence shall not preclude the Attorney General from determining that, notwithstanding the length of sentence imposed, an alien has been convicted of a particularly serious crime."). In assessing whether a crime is particularly serious, the Board typically employs a non-categorical, "case-by-case" approach. *In re Frentescu*, 18 I. & N. Dec. 244, 247 (B.I.A. 1982). The Board "examine[s] the nature of the conviction, the type of sentence imposed, and the circumstances and underlying facts of the conviction," *N-A-M-*, 24 I. & N. Dec. at 342, with the noncitizen's dangerousness as the ultimate touchstone, *In re Carballe*, 19 I. & N. Dec. 357, 360 (B.I.A. 1986).

2. Petitioner, a native and citizen of Ethiopia, was admitted to the United States as a lawful permanent resident on May 19, 2007. Pet. App. 85a-86a. Petitioner "has a history of schizophrenia, paranoia, and other mental health issues." *Id.* at 55a. He "takes medication, which helps control some of the side effects of his mental health issues." *Ibid.*

Following his admission, petitioner was convicted of numerous offenses, including trespass, assault, and disorderly conduct. See Pet. App. 73a. As relevant here, petitioner was also convicted on two counts of making threats of terrorism in violation of state law. See *id.* at 87a.[2] Those charges arose from a "psychotic episode" that petitioner suffered while a student at Weber State University in December 2016. *Id.* at 3a. Petitioner made threatening comments before entering a university building, placing people in fear for their lives and causing the university to lock down the building. *Ibid.* Three days later, he sent an e-mail message to a university employee threatening to kill and dismember people unless the university met his demands. *Ibid.* Petitioner pleaded "guilty but mentally ill" to the charges. *Ibid.* (citation omitted). The state court sentenced him to an in-

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[2] The state statute provides:

> A person commits a threat of terrorism if the person threatens to commit any offense involving bodily injury, death, or substantial property damage, and * * * acts with intent to * * * prevent or interrupt the occupation of a building or a portion of the building, a place to which the public has access, or a facility or vehicle of public transportation operated by a common carrier.

Utah Code § 76-5-107.3(1)(b)(ii) (2016).

determinate term not to exceed five years, suspended his sentence, and credited him for 596 days served. *Ibid.*

3. After petitioner's release from state custody, the Department of Homeland Security served him with a Notice to Appear, charging him with being removable for having been convicted, following admission, of two crimes involving moral turpitude not arising out of a single scheme of criminal misconduct. Pet. App. 3a-4a, 85a-86a; see 8 U.S.C. 1227(a)(2)(A)(ii). Petitioner applied for asylum and withholding of removal. See Pet. App. 62a-63a.

The immigration judge sustained the charge of removability based on petitioner's convictions for making terroristic threats, denied relief and protection, and ordered that petitioner be removed to Ethiopia. Pet. App. 75a-77a, 84a, 87a-90a. Given the "nature of the conviction, the type of sentence imposed, and the circumstances and underlying facts," *id.* at 75a (citation omitted), the immigration judge concluded that petitioner's convictions for terroristic threats qualified as particularly serious crimes, rendering him ineligible for both asylum and withholding, *id.* at 75a-77a. The immigration judge acknowledged that she "ha[d] no reason to doubt that [petitioner] was experiencing some mental health problems at the time he made the[] threats." *Id.* at 72a. But she observed that, under the Board's decision in *In re G-G-S-*, 26 I. & N. Dec. 339 (2014), when "assessing whether" a conviction was for "a particularly serious crime for immigration purposes," the noncitizen's "mental health * * * is not considered." Pet. App. 76a (quoting *G-G-S-*, 26 I. & N. Dec. at 339).

Petitioner appealed to the Board, which dismissed the appeal. Pet. App. 48a-61a. The Board affirmed the immigration judge's finding that petitioner's convictions for threats of terrorism qualified as particularly serious crimes. *Id.* at 59a-60a. Petitioner contended that the immigration judge erred by failing to consider his mental health at the time of the crime as a mitigating factor, but the Board rejected that argument in light of *G-G-S-*, reaffirming that a noncitizen's mental health "is not a relevant consideration in the particularly serious crime analysis." *Ibid.*

4. The Tenth Circuit denied the petition for review, Pet. App. 1a-47a, deferring under *Chevron U.S.A. Inc.* v. *Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984), to the Board's interpretation in *G-G-S-*. Petitioner conceded that the INA is ambiguous as to whether mental health is a permissible consideration in assessing whether a conviction is for a particularly serious crime, but he contended that *G-G-S-* had arbitrarily departed from the Board's prior position that "all reliable information may be considered." Pet. App. 21a (quoting *N-A-M-*, 24 I. & N. Dec. at 338); see *id.* at 19a-20a. The court found no inconsistency, explaining that the Board reasonably concluded that mental-health evidence, even if reliable, is not relevant. *Id.* at 23a. The court held that although "*G-G-S-* may not provide the most obvious framework for determining whether an offense is a 'particularly serious crime,'" and that "criticisms of that decision * * * are well taken," the decision nevertheless reflected a sufficiently reasonable interpretation of the INA to be entitled to judicial deference. *Id.* at 29a.

Judge Bacharach dissented. Pet. App. 33a-47a. He observed that the majority's holding conflicted with decisions of the Eighth and Ninth Circuits, which had declined to defer to *G-G-S-*. *Id.* at 34a. Judge Bacharach concluded that it was arbitrary and capricious for the Board's particularly-serious-crime analysis to consider the "'totality of the circumstances,'" including "intent to harm," but then to make a "singular exception" for mental health. *Id.* at 38a-39a, 42a (citation omitted). He would therefore have "remand[ed] for the Board to reconsider [petitioner's] eligibility for asylum and withholding of removal." *Id.* at 47a.

5. After the petition for a writ of certiorari in this case was filed, the Attorney General directed the Board to refer a different case to him and invited the parties and any interested amici to submit briefs addressing whether a respondent's mental health may be considered when determining whether he was convicted of a particularly serious crime. See *In re B-Z-R-*, 28 I. & N. Dec. 424 (2021).

On May 9, 2022, the Attorney General answered that question by overruling the Board's previous decision in *G-G-S-*. See *In re B-Z-R-*, 28 I. & N. Dec. 563 (2022). Noting the Board's conclusion that "'the essential key' in determining whether an offense is particularly serious is whether it 'indicates that the [respondent] poses a danger to the community,'" the Attorney General observed that "[i]n some circumstances, a respondent's mental health condition may indicate that [he] does not pose [such] a danger." *Id.* at 565-566 (quoting *Carballe*, 19 I. & N. Dec. at 360) (first set of brackets in original). The Attorney General explained that the Board's opinion in *G-G-S-* had "provided no sound reason why mental health evidence should be treated differently from other evidence pertinent to a respondent's mental state." *Id.* at 567. He concluded that "the potential relevance of mental health evidence * * * suffices to establish that such evidence should not be categorically disregarded." *Id.* at 566. As a result, "[g]oing forward, immigration adjudicators may consider a respondent's mental health in determining whether a respondent" was convicted of a particularly serious crime. *Id.* at 567.

DISCUSSION

Petitioner renews his contention (Pet. 13-19) that the agency erred in refusing to consider evidence of his mental health in determining whether his convictions for threats of terrorism qualified as particularly serious crimes that statutorily bar him from receiving asylum or withholding of removal. The Attorney General recently concluded that the Board decision that prevented such evidence from being considered was indeed erroneous. Accordingly, this Court should grant the petition for a writ of certiorari, vacate the judgment of the court of appeals, and remand the case for further consideration (GVR) in light of *In re B-Z-R-*, 28 I. & N. Dec. 563 (A.G. 2022).

The agency below declined to consider evidence of petitioner's mental health solely on the authority of *In re G-G-S-*, 26 I. & N. Dec. 339 (B.I.A. 2014). See Pet. App. 59a-60a, 76a. Its conclusion that petitioner had been convicted of a particularly serious crime was, in turn, the sole basis for its denial of petitioner's applications for asylum and withholding of removal. See *id.* at 59a, 77a. And the court of appeals affirmed the agency by deferring to *G-G-S-* under *Chevron U.S.A. Inc.* v. *Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984). See Pet. App. 18a-29a, 31a.

After the court of appeals issued its mandate and petitioner filed his petition for a writ of certiorari, however, the Attorney General overruled *G-G-S-*, thereby eliminating the sole basis for the agency's decision to disregard evidence of petitioner's mental health, as well as the court of appeals' sole basis for deferring to the agency's interpretation. See *B-Z-R-*, 28 I. & N. Dec. at 567. Accordingly, in this case, the Court should enter a GVR order in light of *B-Z-R-*. The court of appeals may then remand to allow the agency to decide in the first instance whether petitioner's mental-health evidence alters the conclusion that his convictions qualify as particularly serious crimes and, if so, whether petitioner is otherwise entitled to asylum or withholding of removal.

The Court has previously entered GVR orders in similar circumstances. See *Lawrence* v. *Chater*, 516 U.S. 163, 167 (1996) (per curiam) (noting GVR orders on the basis of "administrative reinterpretations of federal statutes"). For example, in *Afanwi* v. *Holder*, 558 U.S. 801 (2009), the court of appeals had affirmed the Board's decision that it lacked jurisdiction over petitioner's ineffective-assistance-of-counsel claim. See *Afanwi* v. *Mukasey*, 526 F.3d 788, 795-796 (4th Cir. 2008). While the petition for a writ of certiorari was pending, the Attorney General determined that the Board *did* have jurisdiction over such claims. See *In re Compean*, 25 I. & N. Dec. 1, 3 (2009). The government therefore requested that the Court enter a GVR order "to allow the Board to adjudicate petitioner's claim of ineffective assistance unencumbered by the Board's previous conclusion that it lacked jurisdiction." Resp. Br. at 16, *Afanwi* v. *Holder*, *supra* (No. 08-906) (Aug. 26, 2009). The Court granted that request, remanding "for further consideration in light of the position asserted by the Solicitor General." *Afanwi*, 558 U.S. at 801. The same outcome is appropriate here.

CONCLUSION

The petition for a writ of certiorari should be granted, the judgment of the court of appeals vacated, and the case remanded for further proceedings in light of the Attorney General's determination in *In re B-Z-R-*, 28 I. & N. Dec. 563 (2022).

Respectfully submitted.

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