No. 09-1235

In the Supreme Court of the United States

SHOODLEY LEE CHERICHEL, PETITIONER

v.

ERIC H. HOLDER, JR., ATTORNEY GENERAL

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

BRIEF FOR THE RESPONDENT IN OPPOSITION

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QUESTION PRESENTED

Whether the court of appeals erred when it sustained the Board of Immigration Appeals' determination that, under the totality of the circumstances, including a lack of government resources in Haiti, a criminal alien does not establish that Haitian authorities specifically intend to torture him if they place him in detention on his return to Haiti.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-34a) is reported at 591 F.3d 1002. The opinions of the Board of Immigration Appeals (Pet. App. 36a-42a, 46a-55a) and the decision of the immigration judge (Pet. App. 56a-93a) are unreported.

JURISDICTION

The judgment of the court of appeals was entered on January 12, 2010. The petition for a writ of certiorari was filed on April 12, 2010. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. Torture is a universally prohibited criminal act under domestic and international law, and the United States is strongly committed to opposing torture in all

its forms. As part of that commitment, the United States is a State Party to 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. 19 (1988) (Treaty Doc.), 1465 U.N.T.S. 85. The CAT defines torture as "any act by which severe pain or suffering, whether physical or mental, is intentionally inflicted on a person" for a purpose prohibited by the CAT, "by or at the instigation of or with the consent or acquiescence of a public official." *Id.* Art. 1(1), Treaty Doc. at 19, 1465 U.N.T.S. at 113-114 (Pet. App. 94a). A State Party to the CAT is obligated to take certain steps to prevent acts of torture. Among other things, a State Party may not "expel, return (*refouler*) 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." *Id.* Art. 3(1), Treaty Doc. at 20, 1465 U.N.T.S. at 114 (Pet. App. 95a). Each State Party must also ensure that "all acts of torture are offences under its criminal law." *Id.* Art. 4, Treaty Doc. at 20, 1465 U.N.T.S. at 114 (Pet. App. 95a).

The United States ratified the CAT subject to various reservations, understandings, and declarations. See generally *Pierre* v. *Attorney Gen. of the United States*, 528 F.3d 180, 185 (3d Cir. 2008) (en banc). As relevant here, the United States understands the prohibition in Article 3(1)—against returning an individual to a State where "there are substantial grounds for believing" that he or she will be tortured, Pet. App. 95a—to bar return to another country if it is "more likely than not" that the individual will be tortured in the receiving State. S. Exec. Rep. No. 30, 101st Cong., 2d Sess. 36 (1990); see also 136 Cong. Rec. 36,198 (1990) (text of understand-

ings incorporated into the Senate resolution of advice and consent to the CAT). In addition, the United States entered into the CAT on the understanding that, in order to constitute torture, an act "must be specifically intended to inflict severe physical or mental pain or suffering." *Ibid.*[1]

2. a. As a matter of domestic law, the United States has implemented the CAT by means of both statute and regulation. The prohibition in Article 3 on removing an individual to a State where he or she is more likely than not to be tortured is implemented in part through the Foreign Affairs Reform and Restructuring Act of 1998, Pub. L. No. 105-277, Div. G., § 2242, 112 Stat. 2681-822 (8 U.S.C. 1231 note). That statute directs federal agencies to "prescribe regulations to implement the obligations of the United States under Article 3." *Id.* § 2242(a) and (b), 112 Stat. 2681-822.

The Department of Justice has promulgated regulations to implement Article 3 of the CAT in the context of aliens in removal proceedings. See generally 8 C.F.R.

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[1] The relevant understanding provided as follows:

> [T]he United States understands that, in order to constitute torture, an act must be specifically intended to inflict severe physical or mental pain or suffering and that mental pain or suffering refers to prolonged mental harm caused by or resulting from: (1) the intentional infliction or threatened infliction of severe physical pain or suffering; (2) the administration or application, or threatened administration or application, of mind altering substances or other procedures calculated to disrupt profoundly the senses or the personality; (3) the threat of imminent death; or (4) the threat that another person will imminently be subjected to death, severe physical pain or suffering, or the administration or application of mind altering substances or other procedures calculated to disrupt profoundly the senses or personality.

136 Cong. Rec. at 36,198 (Pet. App. 96a).

1208.16 *et seq.* Under those regulations, an alien who is ineligible for relief from removal under the immigration laws still cannot be removed from the United States if he or she "is more likely than not to be tortured in the country of removal." 8 C.F.R. 1208.16(c)(4). Even a criminal alien who is ineligible for withholding of removal (8 C.F.R. 1208.16(d)(2) and (3)) "shall be granted deferral of removal to the country where he or she is more likely than not to be tortured" if he or she is entitled to protection under the CAT. 8 C.F.R. 1208.17(a). The regulations specify that, "[i]n order to constitute torture, an act must be specifically intended to inflict severe physical or mental pain or suffering. An act that results in unanticipated or unintended severity of pain and suffering is not torture." 8 C.F.R. 1208.18(a)(5).

b. The United States has complied with its obligation under Article 4 of the CAT to "ensure that all acts of torture are offences under its criminal law." The federal criminal code expressly addresses torture in other countries by providing that "[w]hoever outside the United States commits or attempts to commit torture shall be fined under this title or imprisoned not more than 20 years." 18 U.S.C. 2340A(a). The statute provides for criminal jurisdiction over any defendant who is "a national of the United States" or who "is present in the United States, irrespective of the nationality of the victim or alleged offender." 18 U.S.C. 2340A(b). Acts of torture committed within the United States are also subject to other federal laws and state prohibitions.

3. a. Petitioner is a native and citizen of Haiti who was born in 1979 and entered the United States without inspection in 1982. Pet App. 2a, 58a. In April 2000, he pleaded guilty to possession of marijuana in violation of Kentucky law and was fined $100. *Id.* at 2a, 59a, 75a. In

2002, the Department of Homeland Security (DHS) initiated removal proceedings against petitioner, serving him with a Notice to Appear that charged him with being removable as an alien who is "present in the United States without being admitted or paroled." 8 U.S.C. 1182(a)(6)(A)(i); Pet. App. 2a-3a, 46a, 58a.

Before petitioner's removal hearing was completed, he was convicted in Minnesota on charges of criminal vehicular homicide and criminal vehicular operation resulting in substantial bodily harm, for which he received (and ultimately served) a 48-month sentence of imprisonment.[2] Pet. App. 2a, 47a, 58a-59a. DHS thus charged petitioner with having committed a controlled substance violation (based on his Kentucky conviction) and crimes involving moral turpitude (based on his Minnesota convictions). *Id.* at 3a & n.2, 47a, 58a. Petitioner's removal case was repeatedly continued while he appealed the Minnesota convictions, which were upheld in September 2006. *Id.* at 3a n.3, 59a.

b. In his removal proceedings, petitioner sought relief from removal under the CAT and its implementing regulations. Petitioner argued that he would be imprisoned on his return to Haiti, and that the conditions of his likely detention there would amount to torture. Petitioner accordingly sought withholding or deferral of removal. See generally 8 U.S.C. 1231(b)(3) and 8 C.F.R. 1208.16 (withholding of removal); 8 C.F.R. 1208.17 (deferral of removal).

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[2] According to the immigration judge's decision, petitioner was driving a vehicle "at a high rate of speed" with two female passengers. The vehicle went off the road, landing in a pond below an embankment. One passenger escaped from the car with substantial bodily injury, but the other was apparently trapped in the vehicle and drowned. Pet. App. 79a.

In May 2007, an immigration judge found petitioner removable based upon his concession of illegal presence and his criminal convictions. Pet. App. 4a, 48a, 75a-76a. The immigration judge also concluded that petitioner's convictions were "particularly serious crimes" that rendered him ineligible for withholding of removal. *Id.* at 4a, 78a-80a; see 8 U.S.C. 1231(b)(3)(B)(ii).

The immigration judge, however, granted petitioner deferral of removal under the CAT. Pet. App. 4a, 48a, 80a-93a. In doing so, she addressed the decision in *In re J-E-*, 23 I. & N. Dec. 291 (B.I.A. 2002) (en banc), which held that a criminal alien's anticipated detention in Haiti did not raise an inference of torture because evidence of poor prison conditions did not show that the Haitian authorities intended to inflict suffering upon Haiti's prisoners. *Id.* at 299-304. In the immigration judge's view, petitioner provided more extensive evidence of poor prison conditions in Haiti than the Board of Immigration Appeals (Board) had considered in *In re J-E-*, and petitioner had shown that prison conditions in Haiti had deteriorated in the five years since *In re J-E-* was decided. Pet. App. 82a-88a.

c. The Board reversed, concluding that petitioner had failed to establish a right to deferral of removal. See Pet. App. 36a-42a, 46a-55a.[3] The Board concluded that "the record does not demonstrate that Haitian authorities specifically intend to inflict severe physical or mental pain or suffering to criminal deportees." *Id.* at 39a. Consistent with its earlier decision in *In re J-E-*,

[3] The Board issued two decisions in this case because, on initial judicial review, the court of appeals granted the government's request (joined by petitioner) for a remand to allow the Board to reconsider questions relating to the scope of its review of factual findings. See Pet. App. 37a, 43a.

the Board concluded that poor prison conditions in Haiti were caused by inadequate resources, rather than by an intent to inflict suffering upon the persons detained there. *Id.* at 40a-41a. As a result, the Board held that the immigration judge had "erred in holding that it is more likely than not that [petitioner] would suffer torture 'by the government of Haiti or someone acting on behalf of the government.'" *Id.* at 41a.

4. Petitioner sought review from the court of appeals, which denied the petition for review. Pet. App. 1a-34a. The court reasoned that the plain language and ratification history of the CAT, as well as background legal principles, all support the conclusion that "a petitioner may not obtain relief under the CAT unless he can show that his prospective torturer has the goal or intent of inflicting severe physical or mental pain or suffering upon him." *Id.* at 25a-26a; see also *id.* at 33a ("We hold that the definition of torture under the CAT and its implementing regulations contains a specific intent element, which is satisfied only by a showing that a persecutor specifically intends to inflict severe pain or suffering upon his victim."). The court thus held that the Board had applied the proper definition of torture. *Ibid.* Although the court recognized that conditions in Haitian prisons are "deplorable, often inhuman," it held that those conditions "do not rise to the level of torture in this case because [petitioner] failed to establish that Haitian authorities have the specific intent to inflict severe physical or mental pain or suffering." *Id.* at 34a.

5. As petitioner notes (Pet. 24), Haiti suffered a massive earthquake on January 12, 2010, after which DHS halted removals to Haiti. Since then, DHS has not removed anyone to Haiti, but the question of when removals will resume is subject to regular review.

ARGUMENT

The decision of the court of appeals is correct and does not conflict with any decision of this Court or of any other court of appeals. Indeed, it is consistent with the decision of every court of appeals that has considered the issue presented by this case. Nor, contrary to petitioner's contentions, is there any conflict between the Department of Justice's Office of Legal Counsel (OLC) and its Board of Immigration Appeals that could warrant review. Further review of the decision below is thus unwarranted.

1. The court of appeals correctly affirmed the Board's determination that petitioner had failed to establish that the United States would violate Article 3 of the CAT by returning him to Haiti. The court of appeals' decision is fully consistent with the Board's decision in *In re J-E-*, 23 I. & N. Dec. 291 (B.I.A. 2002) (en banc). In that case, an alien sought to avoid removal by arguing that Haitian authorities would likely detain him upon his return and that conditions in Haitian prisons were inhumane. The Board examined the regulations implementing the CAT and concluded that it could not as a general matter "find that [Haiti's] inexcusable prison conditions constitute torture within the meaning of the regulatory definition." *Id.* at 301. As the Board explained, the regulations require an alien to establish that alleged acts of torture are "*specifically intended* to inflict severe physical or mental pain or suffering." *Id.* at 298 (citing 8 C.F.R. 208.18(a)(5)). The Board found that the alien there had established that "isolated acts of torture occur in Haitian detention facilities," but had not established that "severe instances of mistreatment are so pervasive as to establish a probability that a person

detained in a Haitian prison will be subject to torture." *Id.* at 303, 304.

In re J-E- found that the "inexcusable" conditions in Haiti's prisons resulted from "budgetary and management problems as well as the country's severe economic difficulties." 23 I. & N. Dec. at 301. The Board pointed out that the Haitian government was "attempting to improve its prison system," and that it freely permitted the International Committee of the Red Cross, other human rights groups, and journalists free access to Haiti's prisons. *Ibid.* The Board concluded that, although "Haitian authorities are intentionally detaining criminal deportees knowing that the detention facilities are substandard, there is no evidence that they are intentionally and deliberately creating and maintaining such prison conditions in order to inflict torture." *Id.* at 301.

The Board's conclusion about the application of the CAT to conditions in Haiti's prisons has been repeatedly affirmed by the courts of appeals. Petitioner cites no court of appeals decision reaching a different conclusion, and, as the Eighth Circuit recognized in this case, Pet. App. 18a, five other courts of appeals have sustained the Board's interpretation of the immigration regulations —often in the context of the potential removal of an alien to Haiti. See *Pierre* v. *Attorney Gen. of the United States*, 528 F.3d 180, 188-191 (3d Cir. 2008) (en banc) (addressing an alien's return to Haiti); *Pierre* v. *Gonzales*, 502 F.3d 109, 116-119 (2d Cir. 2007) (same); *Cadet* v. *Bulger*, 377 F.3d 1173, 1195 (11th Cir. 2004) (same); *Elien* v. *Ashcroft*, 364 F.3d 392, 398-399 (1st Cir. 2004) (same); *Villegas* v. *Mukasey*, 523 F.3d 984, 988-989 (9th Cir. 2008) (addressing an alien's return to Mexico, where he could be confined indefinitely in a mental institu-

tion).[4] That consensus in the courts of appeals counsels heavily against further review by this Court.

2. Petitioner nevertheless contends that this Court should grant certiorari to resolve an alleged "interpretive dispute" (Pet. 19) between "two executive branch agencies" (Pet. 14). Petitioner asserts (Pet. 14, 15-17, 23) that the Board's conclusion in *In re J-E-* (that returning criminal aliens to Haiti does not in itself violate the regulations implementing Article 3 of the CAT) conflicts with a 2004 OLC opinion interpreting the federal statute imposing criminal liability upon individuals who commit torture. There is, however, no conflict.

a. As an initial matter, even if there were an inconsistency in the way two components of the Department of Justice—not two "executive branch agencies," see 8 C.F.R. 1003.1(a)(1); 28 C.F.R. 0.1, 0.25—interpreted a federal law, it is not the role of this Court to resolve such inconsistencies. Cf. Sup. Ct. R. 10(a) and (b) (referring to conflicts among federal courts of appeals or state courts of last resort).

b. In any event, petitioner errs in positing a "conflict" (Pet. 14) between the Board's decisions and the OLC opinion. OLC's 2004 opinion discussed in general terms the boundaries of the criminal *mens rea* required

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[4] In this case, the court of appeals did not decide whether it should defer to the BIA's decision in *In re J-E-* because it based its holding on "the plain language of the regulations." Pet. App. 26a-27a. To the extent that the regulations governing withholding and deferral of removal under the CAT are ambiguous, other courts of appeals have correctly extended deference to the Board's interpretation of them. See *Pierre* v. *Gonzales*, 502 F.3d at 116-117 ("The BIA's decision in *In re J-E-* has commanded deference from several federal courts."); *id.* at 119 ("The deference we owe to the BIA's analysis in *In re J-E-* simply confirms the understanding we derive from plain meaning."); see also, *e.g.*, *Villegas*, 523 F.3d at 988; *Cadet*, 377 F.3d at 1193.

to establish that a particular individual acted with "specific intent" to commit torture. See Pet. App. 137a-141a. The Board's decisions, by contrast, have reached a conclusion about whether the elements of torture are present in a particular factual setting (the circumstances of criminal aliens who have been ordered removed to Haiti). The Board's decisions did not reach other factual scenarios, where other evidence might be adduced in support of a conclusion that the CAT would be violated by a particular removal. Cf. *INS* v. *Elias-Zacarias*, 502 U.S. 478, 483 (1992) ("[S]ince the statute makes motive critical, [the alien] must provide *some* evidence of it, direct or circumstantial."). Nor did the Board address other legal questions such as the showing required for governmental acquiescence in an act of torture, see Pet. App. 26a n.14 (citing, *inter alia*, *Khouzam* v. *Ashcroft*, 361 F.3d 161, 171 (2d Cir. 2004)), or the purpose for which pain and suffering is inflicted, or the severity of treatment that is required.

In its 2004 memorandum, OLC briefly considered the *mens rea* that would generally be required under domestic criminal law to establish that an individual acted with "specific intent" to commit torture. In construing the federal criminal prohibition against acts that are "specifically intended to inflict severe physical or mental pain or suffering," 18 U.S.C. 2340(1), OLC concluded that "the term 'specific intent' is ambiguous." Pet. App. 137a. Further discussion in the OLC opinion was limited to "[s]ome observations" about the specific intent element of Section 2340, because OLC expressly said that it would not be "useful to try to define the precise meaning" of the term in that context. *Id.* at 139a. As it explained, "parsing the specific intent element" too narrowly could inappropriately suggest that the criminal

law would not be violated in circumstances where an individual engaged in "conduct that might otherwise amount to torture." *Ibid.* For example, if an individual Haitian jailer engaged in "vicious acts such as burning with cigarettes, choking, hooding, kalot marassa, and electric shock," *In re J-E-*, 23 I. & N. Dec. at 302, he should not escape criminal liability by arguing that he specifically intended only to deter further criminal conduct by his victim. See also, *e.g.*, *Prosecutor* v. *Kunarac*, Case No. IT-96-23, Judgment, ¶¶ 153-155 (Int'l Crim. Trib. for the Former Yugo. June 12, 2002) (rejecting defense of accused rapist that he lacked a specific intent to commit the crime of torture because he intended only his own sexual gratification).

Rather than establish a definition of "specific intent" that might leave room for defenses that would be inconsistent with the United States' opposition to all torture, Pet. App. 104a & nn.1-4, 139a, OLC's discussion demarcated the outer boundaries of the "specific intent" spectrum. Thus, OLC observed that a conscious and affirmative desire to inflict pain and suffering would provide the *mens rea* for criminal liability for torture, *id.* at 139a, but a good faith and reasonable belief that conduct would not inflict pain and suffering would be "unlikely" to provide "the specific intent necessary to violate [S]ections 2340-2340A," *id.* at 140a. OLC's discussion did not attempt to identify any intermediate mental states that might give rise to criminal liability for torture. OLC did not opine on whether or under what circumstances intending to take a specific act with foreseeable harm might support a conclusion that state officials acted with "specific intent" for purposes of a prosecution under Section 2340A. Moreover, OLC plainly did not address circumstances where a harm is an unintended and un-

wanted consequence of conditions unrelated to a specific individual.

There is no inconsistency between OLC's analysis and the reasoning of the Board in *In re J-E-*. Like OLC, the Board concluded that a specific intent to inflict pain or suffering is an element of torture. See 23 I. & N. Dec. at 300. The Board, however, did something that OLC did not. It applied the concept of specific intent in a particular factual context: the removal of aliens to Haiti under circumstances in which they were likely to be detained. In that specific context, it concluded—in accordance with the judgment of every court of appeals to have considered the issue—that a likelihood of detention in Haiti does not, standing alone, establish a likelihood of torture by Haitian authorities. Because they address different subjects, there is not (and could not be) any conflict between OLC's opinion and the Board's decisions about Haiti.[5]

c. For similar reasons, petitioner is mistaken in contending (Pet. 22) that the Board and OLC have run afoul of the interpretive principle discussed in this Court's decision in *Clark* v. *Martinez*, 543 U.S. 371 (2005), by creating a "disparate application of the CAT across the various contexts in which it applies" and have "[a]ssign[ed] different meanings to words in a *treaty*." The CAT defines torture as the "intentional[] infliction" of

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[5] Petitioner suggests that the Board consciously disregarded the 2004 OLC opinion. See Pet. 23 (referring to the Board's "insistence on following the 2002 OLC Opinion"). But neither the 2002 nor the 2004 OLC opinion is mentioned in *In re J-E-* or the Board's decisions in this case. Indeed, to our knowledge, the Board has never referred to the 2002 or 2004 OLC opinion in any decision construing the regulations that implement the CAT. There is thus no indication that the Board believed it was disagreeing with OLC.

severe pain or suffering. Art. 1(1), Treaty Doc. at 19, 1465 U.N.T.S. at 113 (Pet. App. 94a). There is no disagreement among the regulations, the Board, and OLC that torture under the CAT requires specific intent. See 8 C.F.R. 1208.18(a)(5); Pet. App. 37a (Board); *id.* at 137a (OLC). The Board has concluded that the factual circumstances of detention in Haiti, taken as a whole, do not establish that returns to Haitian prison conditions, without more, would violate the CAT. OLC did not consider that question or any question remotely like it. And OLC did not reach conclusions about the degree to which the foreseeability of unintended harm is relevant to a determination of specific intent under the CAT.

d. Finally, petitioner is mistaken in asserting (Pet. 23) that the purported divergence between the Board and OLC means that the United States "hold[s] its own interrogators to a higher standard than it holds the Haitian government." Again, OLC did not address the factual scenario here. Nor did it take any particular position on the meaning of specific intent in this context. Moreover, a Haitian official could be prosecuted under federal law for acts of torture, including torture of someone outside the United States (such as an alien who was removed to Haiti), if that official were later "present in the United States." 18 U.S.C. 2340A(b)(2). In such a prosecution, the Haitian official would be held to the same standards that would apply to any other defendant under the statute that OLC construed.

3. There is no merit to petitioner's argument (Pet. 18-19) that the Eighth Circuit misconstrued the CAT's requirement of "specific intent" by relying upon a definition that appeared in the 1999 and 2009 editions of *Black's Law Dictionary* instead of the one contained in that dictionary's 1990 edition. While there may be le-

gally significant differences between a current dictionary definition and a definition that is "contemporaneous to the enactment of the Eighth Amendment" or Fourth Amendment (Pet. 19), the textual change between the 1990 and 1999 editions of a law dictionary is not so probative—especially when the 1999 edition was produced by a new editorial team that "[c]onsidered entries entirely anew" because the dictionary "had come to need a major overhaul." *Black's Law Dictionary* ix, x (7th ed. 1999).

Nor is certiorari warranted to resolve alleged inconsistencies (Pet. 19-22) between the Eighth Circuit's decision here and general discussions in this Court's case law of the "specific intent" elements of particular crimes. None of the cases petitioner cites addressed "specific intent" in the particular context of an intent to torture—or, as relevant here, in the unique context of the application of regulations implementing the CAT in immigration proceedings to prison conditions in Haiti. Thus, the court of appeals was correct in following the overwhelming weight of authority uniformly concluding that torture under United States law requires a specific intent to inflict pain or suffering, as well as the uniform rulings by courts of appeals concluding that returning an alien to Haitian prison conditions does not violate Article 3 of the CAT. See Pet. App. 21a-26a.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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