No. 05-266

In the Supreme Court of the United States

APOLINAR PERAFAN SALDARRIAGA, ET AL.,
PETITIONERS

v.

ALBERTO R. GONZALES, ATTORNEY GENERAL

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

BRIEF FOR THE RESPONDENT IN OPPOSITION

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QUESTION PRESENTED

Whether the court of appeals correctly affirmed the Board of Immigration Appeals' decision that petitioner's fear of retribution by drug traffickers did not establish a well-founded fear of future persecution on account of political opinion.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. A2-A13) is reported at 402 F.3d 461. The decisions of the Board of Immigration Appeals (Pet. App. A14-A20) and the Immigration Judge (Pet. App. A21-A51) are unreported.

JURISDICTION

The court of appeals entered its judgment on March 29, 2005. A petition for rehearing en banc was denied on June 1, 2005 (Pet. App. A1). The petition for a writ of certiorari was filed on August 25, 2005. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. The Immigration and Nationality Act, 8 U.S.C. 1101 *et seq.*, defines a "refugee" as an alien who is unwilling or unable to return to his or her 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). If the "Attorney General determines" that an alien is a "refugee," 8 U.S.C. 1158(b)(1), he may, in his discretion, grant the alien asylum in the United States, 8 U.S.C. 1158(b) (2000 & Supp. II 2002). In addition to the discretionary relief of asylum, mandatory withholding of removal is available if "the alien's life or freedom would be threatened in [the country of removal] 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).

The decision whether to grant asylum to an alien in removal proceedings rests with the Attorney General. 8 U.S.C. 1103(g), 1158(b)(2)(A) (2000 & Supp. II 2002); 8 U.S.C. 1229a(c)(4). Congress also provided that, in the administration of the Immigration and Nationality Act, the "determination and ruling by the Attorney General with respect to all questions of law shall be controlling." 8 U.S.C. 1103(a)(1) (2000 & Supp. II 2002). Regulations adopted by the Attorney General governing claims for relief in removal proceedings place the burden on the applicant for asylum to establish that he or she is a refugee who faces a well-founded fear of persecution. To obtain withholding of removal, the applicant bears the burden of establishing that he or she qualifies as a refugee and that his or her life or freedom would be threatened. 8 C.F.R. 208.13(a), 208.16(b).

For purposes of both forms of relief, "persecution" generally refers to significant mistreatment by the government itself or by groups or individuals that the government is unable or unwilling to control. See *In re Villalta*, 20 I. & N. Dec. 142, 147 (B.I.A. 1990); *In re Acosta*, 19 I. & N. Dec. 211, 222 (B.I.A. 1985), overruled in part on other grounds, *In re Mogharrabi*, 19 I. & N. Dec. 439 (B.I.A. 1987). Routine crimes and personal vendettas do not amount to persecution on account of political opinion. See *Silva* v. *Ashcroft*, 394 F.3d 1, 6 (1st Cir. 2005) (rejecting asylum claim based on applicant's whistle-blowing against corrupt employer as "essentially a personal dispute"); *In re Y-G-*, 20 I. & N. Dec. 794, 799-800 (B.I.A. 1994) (noting that "[a]liens fearing retribution over purely personal matters will not be granted asylum on that basis" and adding that "[s]uch persons may have well-founded fears of harm, but such harm would not be on account of race, religion, nationality, membership in a particular social group, or political opinion").

2. Petitioners are Apolinar Perafan Saldarriaga, his wife, and their two children. Petitioners are natives and citizens of Colombia who entered the United States in February 1996 on nonimmigrant B-2 visas with authorization to remain until August 1996. Pet. App. A4, A22. Petitioners were placed in immigration proceedings in April 1999 as nonimmigrants who remained in the United States for a longer time than authorized, in violation of 8 U.S.C. 1227(a)(1)(B). Pet. App. A6, A22.

Petitioner Saldarriaga then applied for asylum for himself and for his wife and children derivatively. Pet. App. A6; see 8 U.S.C. 1158(b)(3) (Supp. II 2002). Saldarriaga claimed that he had a well-founded fear of future persecution because Colombian drug dealers might

seek retribution against him based on his employment by an informant for the Drug Enforcement Administration (DEA) and on his own association with the DEA. More particularly, Saldarriaga testified that, in Colombia, he had been employed as a driver for a drug trafficker, Javier Cruz. Pet. App. A4-A5. Cruz subsequently offered Saldarriaga employment in a restaurant in Roanoke, Virginia, and Saldarriaga and his family moved to the United States after being granted temporary visas. *Ibid.* Eight months later, Cruz fired Saldarriaga in a labor dispute. *Ibid.* The next month, the *Roanoke Times* reported that Cruz was a DEA informant. *Ibid.* Saldarriaga then offered to cooperate with the DEA to help protect his immigration status. *Id.* at A5. After several interviews, however, the DEA "determined that [Saldarriaga] possessed no useful information that was not already known by the DEA." *Ibid.*

Saldarriaga testified at the immigration hearing that he was afraid to return to Colombia because he believed that Cruz had told other Colombian drug dealers that Saldarriaga had worked as a DEA informant. Pet. App. A26. Saldarriaga also testified that a group of men went to his sister-in-law's home in Colombia and threatened to kill him. *Ibid.*[1]

A DEA agent testified at the hearing that Saldarriaga was unlikely to be in danger if returned to Colom-

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[1] Although Saldarriaga claims (Pet. 12, 19) that his brother "was killed on account of [Saldarriaga's] relationship with the DEA," he cites nothing in the administrative record to support that allegation. Indeed, in his opening brief in the court of appeals (at 8), Saldarriaga asserted that his brother was killed after the decision of the immigration judge. That allegation thus is not part of the administrative record under review before this Court.

bia "because nothing had happened to other employees of Cruz who stayed in the country or to Cruz's family." Pet. App. A30. The agent noted that Cruz had been killed two years after he returned to Colombia, but explained that Cruz's death was not connected to his work with the DEA. Rather, Cruz was killed by one of his own bodyguards in a dispute with a rival drug faction. *Id.* at A5, A29.

3. The immigration judge granted the applications for asylum. Pet. App. A21-A51. The immigration judge ruled that Saldarriaga had established a well-founded fear of future persecution based on an imputed association with the DEA, *id.* at A41, because "someone identified as an informant for the DEA could be seen as actively cooperating in the fight against drug traffickers," *id.* at A47.

The Board of Immigration Appeals (Board) overturned the decision of the immigration judge. Pet. App. A14-A20. The Board ruled that Saldarriaga's "speculation that he was connected in the minds of the narcotraffickers with the DEA is not supported by persuasive evidence," *id.* at A17, and that his allegation that he would be targeted "appears to be an embellishment that evolved over time," *id.* at A18. The Board also found that Saldarriaga failed to "rebut testimony that other individuals, more closely involved with his employer than himself, had returned to Colombia and not been harmed." *Ibid.* Finally, the Board concluded that Saldarriaga's "failure to volunteer any information to authorities until he felt it was in his own best interest[] severely undermines the persuasiveness of his testimony," and that, considering the record as a whole, "the testimony in this case was clearly insufficiently accurate to persuade us that [Saldarriaga] would be targeted in

Colombia." *Ibid.* The Board then remanded the case for the immigration judge to permit petitioners to apply for voluntary departure. *Id.* at A19.[2]

4. The court of appeals unanimously denied the petition for review. Pet. App. A2-A13. As an initial matter, the court of appeals rejected the government's argument that the Board's remand to the immigration judge to address voluntary departure deprived the court of jurisdiction. *Id.* at A7. On the merits, the court ruled that Saldarriaga failed to establish "how his connection to the drug trade or his collaboration with the DEA stemmed from a political position he espouses." *Id.* at A3. The court reasoned that, to constitute persecution on the basis of political opinion, the targeted behavior of the applicant "must be motivated by an ideal or conviction of sorts before it will constitute grounds for asylum." *Id.* at A9.

The court also ruled that, even had Saldarriaga "manifested a political opinion * * *, there is no indication that the cartel members would persecute him *in response to* that manifestation." Pet. App. A12. The court noted that "the inscrutability of the political opinion [Saldarriaga] claims implies that any persecution he faces is due to the fact of his cooperation with the government, rather than the content of any opinion motivating that cooperation." *Ibid.* The court concluded that "[b]eing involved in the drug wars of a foreign country with their webs and patterns of violence and recrimination is not the same thing as being persecuted on account of a political opinion." *Id.* at A13.

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[2] One Board member issued a one-sentence dissent. Pet. App. A20.

ARGUMENT

The court of appeals' decision is correct and consistent with the decisions of this Court and of other courts of appeals. Petitioners' challenge to the court of appeals' affirmance of the Board's determination that they presented insufficient evidence of persecution on a protected ground is record-bound and does not warrant this Court's review.

1. As an initial matter, there is a jurisdictional question that stands as a potential barrier to the Court's review. The Board, in the decision under review, reversed the immigration judge's grant of asylum, but remanded the case to the immigration judge to allow petitioners to apply for voluntary departure. Pet. App. A19-A20. The Immigration and Nationality Act grants the courts of appeals jurisdiction to review only the issuance of a "final order of removal." 8 U.S.C. 1252(a)(1). Because a final determination of whether an alien will be removed or, instead, will be permitted to depart voluntarily is integral to the entry of a final order "of removal," there is a substantial question whether the court of appeals had jurisdiction over petitioners' appeal. But see Pet. App. A7 n.2 (asserting jurisdiction); *Castrejon-Garcia* v. *INS*, 60 F.3d 1359, 1361-1362 (9th Cir. 1995) (rejecting the argument that a remand for consideration of voluntary deportation deprives the Board's order of removal of finality for purposes of appeal); cf. *Del Pilar* v. *United States Attorney General*, 326 F.3d 1154, 1156-1157 (11th Cir. 2003) (per curiam) (remand for designation of country for removal does not deprive the order of removal of finality for purposes of appeal); *Perkovic* v. *INS*, 33 F.3d 615, 618-620 (6th Cir. 1994) (formal order

of deportation need not be issued before Board order is reviewable).

2. Assuming that jurisdiction exists, the court of appeals correctly determined that the record in this case is not "so compelling that no reasonable factfinder could fail to find the requisite fear of persecution" on the basis of political opinion. *INS* v. *Elias-Zacarias*, 502 U.S. 478, 484 (1992). In *Elias-Zacarias*, the Court determined that an applicant for asylum must establish that he held a political opinion and that the persecutor's motive would be to harm him "*because of* that political opinion." *Id.* at 483. The Board's decision here hewed to that standard, concluding only that petitioners' evidence was too speculative, unconvincing, and insufficiently accurate and credible (Pet. App. A17-A18) to demonstrate a well-founded fear of persecution on the basis of political opinion. The court of appeals' affirmance found only that the record did not compel the contrary conclusion. *Id.* at A8-A12.

Petitioners contend (Pet. 14-22) that there is a division in the courts of appeals concerning what constitutes a political opinion or activity. That argument does not warrant review, for two reasons. First, petitioners do not challenge the court of appeals' alternative ruling (Pet. App. A12) that, even if Saldarriaga's attempt to cooperate with the DEA amounted to a protected political activity or opinion, Saldarriaga failed to establish that the drug traffickers would persecute him "on account of" that opinion. 8 U.S.C. 1101(a)(42)(A). Showing that nexus is essential to an asylum claim. See *Elias-Zacarias*, 502 U.S. at 482-483. Because resolution of petitioners' perceived conflict thus could have no effect on the outcome of this case, further review is not warranted.

Second, no such conflict exists in any event. The decisions on which petitioners rely do not reflect any divergence in the legal standards applied by the courts of appeals to review asylum determinations. They simply reflect that application of the same legal test to different facts and circumstances can yield different outcomes. In *De Brenner* v. *Ashcroft*, 388 F.3d 629 (8th Cir. 2004), and *Agbuya* v. *INS*, 241 F.3d 1224 (9th Cir. 2001) (cited at Pet. 16-17), the courts of appeals found aliens to be eligible for asylum not because those courts applied a different legal test than the court of appeals did here, but because each court concluded that the record in the case before it demonstrated that an alien's activities were political given the circumstances of the particular conflict.

In *De Brenner*, the Eighth Circuit determined that written threats by guerrillas showed that they imputed a political opinion to De Brenner because they "expressly named [her] as a member and supporter of the [ruling party], accused her family of supporting the government, and mistakenly singled her out as an actual worker for the [political party]." 388 F.3d 637. Indeed, the insurgents had "labeled Ms. De Brenner as a political enemy." *Id.* at 638. Likewise, in *Agbuya*, the court determined that particularized evidence demonstrated that a guerrilla group viewed Agbuya "as politically aligned with the mining company and the government, and against the [guerrilla group]," 241 F.3d at 1229, and "as an opponent of Communism," *id.* at 1230. Here, petitioners offered no comparable evidence

that narcotraffickers imputed any political affiliation to Saldarriaga.[3]

3. Petitioners also urge this Court (Pet. 23) to resolve a "split among the Circuit Courts of Appeals as to whether an imputed political opinion may form the basis of political asylum." But the court of appeals in this case did not hold that an imputed political opinion could not form the basis for an asylum claim, as petitioners concede. See Pet. 24 ("[T]he Fourth Circuit has not explicitly stated that an imputed political opinion may not form the basis for an asylum claim."). The court held only that the record in this case did not compel the Board to conclude that petitioners faced a well-founded fear of persecution on that basis. Pet. App. A12.

4. Petitioners contend (Pet. 32-35) that the court of appeals misapplied the burden of proof by requiring Saldarriaga to establish that he had a well-founded fear of persecution by a preponderance of the evidence.

The law is clear. "The burden of proof is on an applicant to establish her asylum claim." *In re S-M-J-*, 21 I. & N. Dec. 722, 724 (B.I.A. 1997); see *Elias-Zacarias*, 502 U.S. at 483-484. "[I]t is the alien who bears the burden of proving that he would be subject to, or fears, persecution." *In re Acosta*, 19 I. & N. Dec. 211, 215, 222 (B.I.A. 1985), overruled in part on other grounds, *In re Mogharrabi*, 19 I. & N. Dec. 439 (B.I.A. 1987). The alien's "burden of persuasion" refers to the burden of "convinc[ing] the trier of fact of the truth of the allegations

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[3] Petitioners' reliance (Pet. 16-17) on *Lukwago* v. *Ashcroft*, 329 F.3d 157 (3d Cir. 2003), to demonstrate a conflict in the circuits on the definition of political opinion is misplaced because that case did not even involve an asylum claim based on political opinion. The decision in that case turned upon the statutory definition of a "particular social group." *Id.* at 170.

that form the basis of the claim for asylum or withholding of deportation." *Acosta*, 19 I. & N. Dec. at 215. "[T]he party charged with the burden of proof must establish the truth of his allegations by a preponderance of the evidence." *Ibid.* (citations and footnote omitted).

Petitioners' argument confuses the burden of proof, which petitioners unquestionably bear, with the legal standard by which they must prove their case—*i.e.*, a well-founded fear of persecution. To establish a well-founded fear of persecution, an alien must show that there is a "reasonable possibility" that he will be persecuted on account of a protected ground. *INS* v. *Cardoza-Fonseca*, 480 U.S. 421, 440 (1987) (citation omitted); *Mogharrabi*, 19 I. & N. Dec. at 445-446 (adopting a "reasonable person" test). That standard is lower than the "clear probability" standard governing withholding of removal. *Cardoza-Fonseca*, 480 U.S. at 431.

The Board's decision, which the court of appeals affirmed, recognized that petitioners needed to prove only a well-founded fear of persecution, Pet. App. A17, but concluded that petitioners had failed to make that showing, *id.* at A17-A18. In concluding that the record did not compel a contrary conclusion, the court of appeals did not alter either the established allocation of burdens of proof or the legal standard of a "well-founded fear of persecution" that petitioners are statutorily required to satisfy, 8 U.S.C. 1101(a)(42)(A). See Pet. App. A6, A8. Indeed, contrary to petitioners' argument (Pet. 34), nowhere did either the court of appeals or the Board require Saldarriaga to establish that it was more likely than not that he would be persecuted on account of a political opinion.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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