No. 16-255

In the Supreme Court of the United States

DAB BAHADUR BISHWAKARMA, PETITIONER

v.

LORETTA E. LYNCH, 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 an immigration judge, who has a statutory duty to develop the record in removal proceedings, including by "interrogat[ing], examin[ing], and cross-examin[ing] the alien," 8 U.S.C. 1229a(b)(1), violated petitioner's due process rights by questioning him during an evidentiary hearing, when petitioner was not prevented from presenting any additional evidence or testimony to support his claims.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-5a) is not published in the *Federal Reporter*, but is reprinted at 644 Fed. Appx. 314. The decisions of the Board of Immigration Appeals (Pet. App. 6a-8a, 9a-14a) and the immigration judge (Pet. App. 15a-64a) are unreported.

JURISDICTION

The judgment of the court of appeals was entered on March 25, 2016. A petition for rehearing was denied on May 27, 2016 (Pet. App. 65a-66a). The petition for a writ of certiorari was filed on August 25, 2016. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. a. The Immigration and Nationality Act (INA), 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 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." 8 U.S.C. 1101(a)(42)(A). If the "Secretary of Homeland Security or the Attorney General determines" that an alien who is present in or arriving at the United States is a refugee, the Secretary or the Attorney General "may," in his or her discretion, "grant asylum" in the United States if the applicant is otherwise eligible. 8 U.S.C. 1158(b)(1)(A). In addition to the discretionary relief of asylum, mandatory withholding of an alien's removal from the United States is available "if the Attorney General decides that 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).

An applicant bears the burden of establishing that he or she is a refugee eligible for asylum or that his or her life or freedom would be threatened so as to warrant withholding of removal. 8 C.F.R. 208.13(a), 208.16(b). That burden may be satisfied through testimony alone, but only where the testimony "is credible, is persuasive, and refers to specific facts sufficient to demonstrate that the applicant is a refugee." 8 U.S.C. 1158(b)(1)(B)(ii); see 8 U.S.C. 1231(b)(3)(C). Implementing regulations require that the immigration judge decide an application for asylum and withholding of removal "after an evidentiary hearing to resolve factual issues in dispute." 8 C.F.R. 1240.11(c)(3).

b. The INA provides that an immigration judge "shall administer oaths, receive evidence, and interrogate, examine, and cross-examine the alien and any

witnesses." 8 U.S.C. 1229a(b)(1). The Board of Immigration Appeals (BIA or the Board) has described that provision as establishing "the Immigration Judge's duty to fully develop the record." *In re E-F-H-L*, 26 I. & N. Dec. 319, 323 (B.I.A. 2014). The Attorney General therefore has concluded that "[i]t is appropriate for Immigration Judges to aid in the development of the record, and directly question witnesses," but has cautioned that, in so doing, the "the Immigration Judge must not take on the role of advocate." *In re J-F-F-*, 23 I. & N. Dec. 912, 922 (A.G. 2006).

2. a. Petitioner, a native and citizen of Nepal, entered the United States at an unknown location and unspecified date. Pet. App. 16a. Petitioner filed an affirmative application for asylum, withholding of removal, and protection under the United Nations 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.[1] Pet. App. 16a-17a. An asylum officer referred petitioner's case to an immigration judge, and on July 23, 2009, the Department of Homeland Security commenced removal proceedings by filing a Notice to Appear with the immigration court, alleging that petitioner was removable under 8 U.S.C. 1182(a)(6)(A)(i). Pet. App. 17a; see 8 C.F.R. 1239.1(a). Petitioner conceded removability but renewed his application for asylum, withholding of removal, and CAT protection, claiming that he and his family had been harmed at the hands of Maoists in Nepal due

[1] The immigration judge stated that petitioner's asylum application was filed on June 4, 2009, see Pet. App. 16a; however, the application was date stamped on both May 21, 2009, and June 4, 2009. See *id.* at 43a-44a; notes 2 & 3, *infra*.

to his membership in a political party—the Rastriya Prajatantra Party (RPP)—that supports the Nepali monarchy. Pet. 5; Pet. App. 19a.

b. On April 25, 2011, the immigration judge, in a lengthy opinion, found petitioner removable by clear and convincing evidence, and denied his applications for asylum, withholding of removal and CAT protection. Pet. App. 16a-64a. The immigration judge concluded that petitioner failed to offer credible testimony in support of his claim, pointing to numerous discrepancies in his story, including internal inconsistencies in his testimony. *Id.* at 28a. The judge observed that there were conflicts among his testimony, written affidavit, and documentary record evidence; that the record contains no documents from the RPP regarding petitioner's alleged membership; and that petitioner was unfamiliar with basic political facts relevant to his asylum claim.[2] *Id.* at 28a-38a.

The immigration judge found that "the most significant inconsistency within [petitioner's] testimony is that he could not establish a basic timeline of the abuse that he and his family endured in Nepal." Pet. App. 31a. The judge also detailed petitioner's incon-

[2] The immigration judge also found that petitioner failed to establish by clear and convincing evidence that his asylum application was timely filed within one year of his entry into the United States. See Pet. App. 38a-42a; see also 8 U.S.C. 1158(a)(2)(B). Petitioner's asylum application stated that he entered the United States on May 24, 2008, but petitioner attempted to prove at the asylum hearing that he in fact arrived in the United States in early June 2008. Pet. App. 41a-42a. The immigration judge found that petitioner did not credibly establish his arrival date in the United States, and using June 4, 2009, as the filing date for petitioner's asylum application, the immigration judge concluded that petitioner failed to prove that his application was timely. *Id.* at 40a-42a.

sistent description of several events central to petitioner's asylum claim. For example, the judge discredited petitioner's account of his alleged abduction by Maoists in 2001. *Id.* at 30a-31a. The judge noted discrepancies in the year that the abduction allegedly occurred, and petitioner's failure to testify consistently as to which family members were abducted; and the judge observed that petitioner was "inconsistent about the abuse he endured" at the hands of the Maoists because petitioner testified at the hearing to having been beaten and forced to build toilets, but added in his affidavit that Maoists attacked him with knives. *Id.* at 30a; see *id.* at 31a. Similarly, the judge noted that petitioner's "testimony about his sister's murder is also inconsistent with his affidavit": petitioner's affidavit stated that her murder occurred after Maoists forced petitioner and his family into a labor camp, but petitioner testified that his sister was murdered after Maoists took him, his sister, and his wife to the forest. *Id.* at 32a. The judge found that "[t]he multitude of inconsistencies about the abduction within [petitioner's] testimony and between that testimony and his affidavit raises serious concerns about the veracity of [petitioner's] claims." *Id.* at 31a.

The immigration judge also noted discrepancies between petitioner's testimony and the information petitioner provided to his own expert witnesses. See Pet. App. 34a-36a. For instance, one expert, Dr. Mary Cameron, related that the Maoists commonly bombed communication towers in rural areas to cut off local communities, and stated that petitioner told her that such bombings had occurred in his community. *Id.* at 34a. The judge noted, however, that petitioner never mentioned any bombings in his testimony, affidavit, or

asylum application. *Id.* at 34a-35a. Another expert witness, Dr. Karin Montero, testified to her medical examination of petitioner, and stated in her report that petitioner described "having suffered beatings with 'sticks' and 'big guns,'" resulting in "blood pouring out of his nose and mouth," and petitioner told her that, on three occasions, those beatings resulted in a loss of consciousness. *Id.* at 35a (citation omitted). But the immigration judge noted that petitioner never described comparable injuries in his affidavit or asylum application. *Ibid.* Rather than "bolster [petitioner's] credibility," the judge thus found that the expert reports "provide[d] further unexplained discrepancies." *Id.* at 36a.

Having found the inconsistencies in petitioner's story to be "pervasive" and at "the heart of [petitioner's] asylum claim," Pet. App. 38a, the immigration judge concluded that petitioner "failed to present believable, consistent, and sufficiently detailed testimony to provide a plausible and coherent account of the basis of his fear" of persecution. *Ibid.* (citing 8 C.F.R. 208.13(a)). The judge accordingly denied petitioner's claim for asylum, withholding of removal, and protection under the CAT. See *id.* at 60a-61a, 63a.

c. Petitioner appealed the immigration judge's decision to the Board, which dismissed petitioner's appeal. Pet. App. 9a-14a. The Board determined that, in denying petitioner's asylum claim, the immigration judge "considered the totality of the circumstances, including substantive and material inconsistencies that go to the heart of [petitioner's] claimed persecution." *Id.* at 13a. The Board cited petitioner's "confusing and inconsistent" testimony regarding "central events in the alleged acts of persecution," such as petitioner's

first abusive contact with the Maoists, the dates and circumstances of his siblings' murders, and the chronology of events surrounding his own alleged abduction by the Maoists. *Id.* at 12a-13a. The Board further noted "material inconsistencies" between petitioner's testimony and the version of his story presented in expert affidavits. *Id* at 13a. The Board found that those inconsistencies supported the immigration judge's adverse credibility determination.[3] *Ibid.*

d. Petitioner filed a petition for review with the court of appeals. On December 9, 2013, the court granted the government's unopposed motion for remand to allow the Board to consider, in the first instance, petitioner's allegation that the immigration judge violated his due process rights during the original proceedings. Pet. App. 6a, 67a-68a.

On July 2, 2014, the Board addressed and rejected petitioner's due process claim. Pet. App. 6a-8a. The Board first found that the immigration judge's asylum-denial rate, standing alone, was insufficient to establish that the judge was biased against petitioner, and instead held that any due process violation must be established based on "the record *in this matter* to determine whether the Immigration Judge's conduct was improper." *Id.* at 7a; see *id.* at 6a-7a. The Board determined that the immigration judge's questioning of petitioner in this case was not biased and rather

[3] The Board also agreed with the immigration judge that because petitioner could not establish his exact date of entry, petitioner failed to establish by clear and convincing evidence that his asylum application was timely filed. Pet. App. 10a-11a. The Board further noted that petitioner had not established any changed circumstances or extraordinary circumstances that would excuse late filing of the application. *Id.* at 11a.

was "intended to fully develop [petitioner's] claim." *Id.* at 7a. The Board further observed that the immigration judge's questions did not prevent petitioner from introducing testimony or evidence in support of his claim. *Ibid.* The Board therefore concluded that no violation of petitioner's due process rights occurred.[4] *Ibid.*

e. Petitioner again timely filed a petition for review with the court of appeals, which, on March 25, 2016, denied the petition for review. Pet. App. 1a-5a. The court, reviewing the due process claim de novo, agreed with the Board that the immigration judge's questions were appropriate and in accordance with his duty to fully develop the record. *Id.* at 3a. The court also found that petitioner was not prejudiced by the immigration judge's conduct at the hearing because petitioner was not prevented from presenting any testimony or evidence. *Ibid.* Accordingly, the court concluded that petitioner had not been denied due process. *Ibid.*

The court of appeals also affirmed the immigration judge's adverse credibility determination, noting the "material" internal inconsistencies in petitioner's description of events. Pet. App. 4a. That adverse credibility determination, the court concluded, supported the denial of both asylum and withholding of removal.[5] *Id.* at 4a-5a.

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[4] The Board again concluded that the immigration judge's adverse credibility determinations were supported by the record and a "plausible view[] of the evidence," including "reasonable inferences from [petitioner's] testimony." Pet. App. 7a.

[5] Because it addressed the merits of petitioner's claim, the court of appeals did not reach the issue of whether petitioner's asylum application was timely. Pet. App. 2a-3a. The court also determined that petitioner had abandoned his CAT claim. *Id.* at 2a.

ARGUMENT

Petitioner contends (Pet. 14-20) that the immigration judge violated his due process rights by "abandon[ing] the judicial role to conduct the government's cross-examination for it" during the hearing on petitioner's application for asylum and withholding of removal, and for relief under the CAT. Pet. 20. The court of appeals properly rejected that contention, concluding that the immigration judge questioned petitioner in furtherance of the judge's statutory duty to develop the record and that the judge's questions did not interfere with petitioner's presentation of his claims. Pet. App. 3a. The court's unpublished decision is correct and does not conflict with any decision of this Court or of any another court of appeals. Petitioner's fact-bound challenge does not warrant this Court's review.

1. An immigration judge's duty to develop the record is governed by statute, 8 U.S.C. 1229a(b)(1), which provides that an immigration judge not only shall receive evidence, but also "shall interrogate, examine, and cross-examine, the alien and any witness." *Ibid.* Petitioner fails to acknowledge that statutory duty or to meaningfully address the court of appeals' determination that the immigration judge's questioning in this case was within the scope of that statutory responsibility. See Pet. App. 3a.

The courts of appeals agree that Section 1229a(b)(1) allows an immigration judge to question the alien during removal proceedings, and that even "vigorous" questioning does not in and of itself deny due process. See, *e.g.*, *Abulashvili* v. *Attorney Gen. of U.S.*, 663 F.3d 197, 207-208 (3d Cir. 2011) (The immigration judge "had every right to exercise her discretion to

question" the alien.); *Castilho de Oliveira* v. *Holder*, 564 F.3d 892, 899 (7th Cir. 2009) (An immigration judge's "cross-examination of witnesses is not alone cause for concern," as it is authorized by the statute.); *Aguilar-Solis* v. *INS*, 168 F.3d 565, 569 (1st Cir. 1999) ("[T]he [immigration judge's] cross-examination was wholly consistent with the requirements of the Immigration and Nationality Act."); *Calderon-Ontiveros* v. *INS*, 809 F.2d 1050, 1052 (5th Cir. 1986) ("[T]he immigration judge's vigorous questioning * * * did not deny [the alien] a fair and meaningful hearing."). Courts of appeals, including the Fifth Circuit, thus agree that the immigration judge is permitted to invoke his statutory authority to interrogate and cross-examine witnesses to develop the record, so long as the immigration judge does not overstep his judicial role. See *Wang* v. *Holder*, 569 F.3d 531, 540-541 (5th Cir. 2009).

Petitioner is incorrect in asserting (Pet. 16) that the Fifth Circuit's unpublished decision "effectively established as a matter of law" that an immigration judge may undertake the role of the prosecutor during an asylum hearing. To the contrary, the Fifth Circuit has recognized, in precedential decisions on which the panel in this case relied, that "a due process violation can be premised upon the absence of a neutral arbiter"; and it has identified several factors to determine whether an immigration judge has violated that principle, including whether the judge's questions were "designed to trick" the alien, whether the nature of the questions indicate bias, and whether the judge's conduct prevented the alien from presenting evidence or otherwise prejudiced him. *Wang*, 569 F.3d at 540; *Calderon-Ontiveros*, 809 F.2d at 1052. The Board has

similarly long held that where the fact-finder fails to remain impartial, the hearing "is lacking in the fundamental fairness required by due process." *In re Lam*, 14 I. & N. Dec. 168, 170 (B.I.A. 1972) (citation omitted).

Contrary to petitioner's contention (Pet. 16-20), the Third and Seventh Circuits have not adopted a different rule than the Fifth Circuit; rather, the decisions cited by petitioner held that due process had been violated based on the particular facts presented, which, in each instance, are distinguishable from petitioner's case. In *Rodriguez Galacia* v. *Gonzales*, 422 F.3d 529 (2005), for example, the Seventh Circuit found that a time limit imposed by the immigration judge prevented the alien from presenting all of her evidence. *Id.* at 539. In *Giday* v. *Gonzales*, 434 F.3d 543 (7th Cir. 2006), the court noted that "[o]f course a large volume of questions alone does not create a due process violation," because an immigration judge "is not merely the fact-finder and adjudicator, but also has an obligation to establish the record." *Id.* at 548-550. The court found, however, that the questioning in that case had "become[] so aggressive that it frazzle[d the] applicant[] and nit-pick[ed] inconsistencies." *Id.* at 549. By contrast, the immigration judge here questioned petitioner on material discrepancies in his story.

Other cases from the Seventh Circuit further emphasize that, to determine whether an immigration judge acted in accordance with due process, courts of appeals must consider the totality of the circumstances and whether the petitioner was prevented from presenting evidence—not merely how often the immigration judge interrupted. See, *e.g.*, *Castilho de Oliv-*

eira, 564 F.3d at 899-900 (examining "the record as a whole" to find that the immigration judge displayed reversible bias based on "the tone of the [judge's] cross-examination," "inappropriate questions and comments[,] and the [judge's] ultimate failure to engage with the evidence in the record while resting his decision on speculation and irrelevancies"); *Apouviepseakoda* v. *Gonzales*, 475 F.3d 881, 887 (7th Cir. 2007) ("[A]n [immigration judge's] frequent interruptions of or assumption of control over testimony do not deprive a hearing of fairness where those actions are designed to focus the hearing and exclude irrelevant evidence.").

Similarly, in *Abulashvili*, *supra*, a Third Circuit decision cited by petitioner (Pet. 16, 18), the court acknowledged that the immigration judge "had every right to exercise her discretion to question [the alien]," but concluded that "[o]n this record, we can have no confidence that the [immigration judge] was merely trying to ensure that [the alien] had a full opportunity to tell his story," because the judge "ignored crucial parts of [the alien's] testimony in finding omissions that simply did not exist." 663 F.3d at 207-208. The court made clear that due process was not violated simply because the immigration judge asked numerous questions; rather, the court's conclusion that due process had been violated was based on the context of the questions, its examination of the record as a whole, and the court's finding that the immigration judge failed to "fairly consider[] the entire record before making credibility determinations." *Id.* at 208; see *Abdulrahman* v. *Ashcroft*, 330 F.3d 587, 596 (3d Cir. 2003) (rejecting a similar due process claim after consideration of "the record as a whole," including the

petitioner's ability to present testimony and documentary evidence).

Petitioner therefore has not shown that the Fifth Circuit in this case applied an incorrect legal standard, or that any conflict exists in legal rules applied by the courts of appeals; rather, he points only to different outcomes that may be explained by the application of the same rule to different fact patterns.

2. a. The record in this case shows that the immigration judge acted in accordance with his statutory authority by eliciting context for petitioner's evidence and attempting to place petitioner's story in chronological order. See Pet. App. 3a; see also C.A. ROA 274, 287-298. The immigration judge began questioning petitioner only after observing that petitioner's responses to his attorney's questions "wander[ed] all over" and failed to "present[] any coherent narrative" or "any coherent order." C.A. ROA 274. After the judge made a series of open-ended requests for additional information, petitioner's counsel resumed his direct examination of petitioner. *Id.* at 277-278.

Similarly, after the conclusion of cross-examination, the immigration judge again asked a series of follow-up questions to further clarify petitioner's testimony. C.A. ROA 284. The first three pages of the immigration judge's renewed questioning, which petitioner describes (Pet. 18) as "aggressive" and "tendentious," sought basic background information such as where petitioner grew up, his schooling, what he did for a living, and his marriage. C.A. ROA 284-286. The immigration judge then asked petitioner when he first had any contact with Maoists—an issue clearly central to his claim of having been persecuted by the Maoists—and again sought to establish a coherent timeline

for petitioner's claims. *Id.* at 287-298. The immigration judge provided petitioner with additional opportunities to complete the chronology after finding that petitioner's story was inconsistent and failed to account for significant periods of time. *Id.* at 300. That information was material to determining petitioner's credibility. Questioning for such purposes is within the broad range of an immigration judge's authority under 8 U.S.C. 1229a(b)(1). At no time, moreover, did petitioner's counsel object to this line of questioning, and, at the conclusion of the immigration judge's questions, petitioner's counsel performed a redirect examination. *Id.* at 302. Like the immigration judge's questions, counsel's examination focused on clarifying the timeline of events. *Id.* at 303-310.

b. Petitioner also alleges (Pet. 19) that the immigration judge's conduct prejudiced him because the judge's questioning resulted in "illusory" inconsistencies in petitioner's story. The court of appeals, however, correctly concluded that petitioner, who was represented by counsel, was not prejudiced by the immigration judge's questioning. Pet. App. 3a; see *Calderon-Ontiveros*, 809 F.2d at 1052 ("In the administrative law context, as elsewhere, procedural due process is violated only if the government's actions substantially prejudice the complaining party.").

The immigration judge's adverse credibility determinations fairly relied on material inconsistencies between petitioner's affidavit and his hearing testimony, and petitioner's failure to put key events in sequence until after being questioned by the immigration judge. Those discrepancies were far from "illusory." See Pet. 19. For example, on direct examination, petitioner testified that the first time the Maoists

threatened him, "they abducted the whole family." C.A. ROA 265. His affidavit, by contrast, made no mention of petitioner's entire family being taken, but instead described being "captured" with his father. *Id.* at 630. The immigration judge reasonably questioned petitioner about this incident, and petitioner again testified that the Maoists took his whole family —his father, wife, brothers, and children—from his home. *Id.* at 287. Petitioner's account of that incident also suffered from numerous other discrepancies, including differences in the year that the Maoists abducted him, and differing accounts of the nature and severity of abuse petitioner and his family allegedly suffered. See Pet. App. 30a-32a.

Petitioner attempts (Pet. 9-10) to reconcile some of these inconsistencies as misstatements or as the product of the immigration judge's misunderstanding of the various alleged abusive incidents. The immigration judge, the Board, and the court of appeals, however, each found that an adverse credibility determination was warranted given petitioner's repeated failure to establish a consistent chronology of events, his "inconsistent and often vague testimony," and multiple discrepancies between petitioner's testimony and other evidence. Pet. App. 4a; see *id.* at 4a, 12a-14a, 28a-38a. That the immigration judge's efforts to clarify petitioner's story revealed additional inconsistencies in petitioner's account does not amount to improper prejudice or bias violative of due process, but, rather, reflects an appropriate performance of the judge's statutory role.

The absence of prejudice to petitioner also would make this case a poor vehicle for considering the boundaries of proper questioning by an immigration

judge during removal proceedings. The courts of appeals agree that due process is violated only where improper questioning prevented the alien from presenting evidence or otherwise prejudiced his claim. See Pet. App. 7a; see also *Rodriguez Galacia*, 422 F.3d at 539; *Abdulrahman*, 330 F.3d at 596-597; *Kerciku* v. *INS*, 314 F.3d 913, 917-918 (7th Cir. 2003). Petitioner points to no evidence or testimony that was precluded as a result of the immigration judge's questioning, and other than his claim of bias—which the Board and the court of appeals also rejected on the record—points to no other prejudice that resulted from the immigration judge's conduct. See Pet. App. 4a.

3. Review by this Court likewise is unwarranted to the extent petitioner means to assert that the immigration judge in his case was biased. See Pet. 14-16. Although a biased fact-finder may violate due process, this Court observed in *Liteky* v. *United States*, 510 U.S. 540 (1994), that "judicial remarks during the course of a trial that are critical or disapproving of, or even hostile to, counsel, the parties, or their cases, ordinarily do not support a bias or partiality challenge" unless "they reveal such a high degree of favoritism or antagonism as to make fair judgment impossible." *Id.* at 555.

The Fifth Circuit follows these general principles, and like other courts of appeals, has relied on *Liteky* as a guide to determining whether an immigration judge exhibited reversible bias. See *Wang*, 569 F.3d at 540-541 (discussing *Liteky*, *supra*); see also *Anita-Perea* v. *Holder*, 768 F.3d 647, 661 (7th Cir. 2014); *Johns* v. *Holder*, 678 F.3d 404, 408 (6th Cir. 2012); *Vargas-Hernandez* v. *Gonzales*, 497 F.3d 919, 926 (9th

Cir. 2007); *Shu Lin Ni* v. *BIA*, 439 F.3d 177, 180-181 (2d Cir. 2006); *Wang* v. *Attorney Gen. of U.S.*, 423 F.3d 260, 269 (3d Cir. 2005); *Aguilar-Solis*, 168 F.3d at 569.

Petitioner's claim (Pet. 15) of a conflict with *Williams* v. *Pennsylvania*, 136 S. Ct. 1899, 1906 (2016), is also misplaced. Petitioner asserts (Pet. 15) that *Williams* issued a "clear directive" against the "conflation of the prosecutorial and judicial functions"; but that decision is inapposite here. In *Williams*, this Court held that due process required a judge's recusal from deciding a motion to overturn a criminal sentence where the judge previously had served as a prosecutor who participated in the decision to seek the death penalty against the defendant. 136 S. Ct. at 1905. This Court found that "[w]hen a judge has served as an advocate for the State in the very case the court is now asked to adjudicate, a serious question arises as to whether the judge, even with the most diligent effort, could set aside any personal interest in the outcome." *Id.* at 1906. *Williams* thus found "an impermissible risk of actual bias when a judge earlier had significant, personal involvement as a prosecutor in a critical decision regarding the * * * case," *id.* at 1905; it does not address the boundaries of judicial conduct of a hearing. *Ibid.* The Fifth Circuit had no cause to address *Williams* because the factual scenario in that case has no apparent relationship to petitioner's claim.

4. Petitioner also argues (Pet. 21-23) that review is warranted because, he asserts, the immigration judge's rate of denying asylum provides evidence that the immigration judge was biased and predetermined his claim. The Board properly rejected petitioner's asser-

tion of bias based on statistics, finding correctly that a bias claim must be established based on the record in the particular case. Pet. App. 6a-7a. Accordingly, that contention does not support further review.

In *McCleskey* v. *Kemp*, 481 U.S. 279 (1987), this Court examined the use of statistics to determine whether the application of the death penalty was discriminatory. The Court concluded that, while the statistics indicated that a defendant such as McCleskey was more likely to be subject to the death penalty, to prevail, he was required to prove "that the decisionmakers in *his* case acted with discriminatory purpose." *Id.* at 292. Similarly, a recent study released by the U.S. Government Accountability Office (GAO) found that variations in outcomes exist across immigration judges and courts, even when controlling for a number of factors. See GAO, GAO-17-72, *Asylum: Variation Exists in Outcomes of Applications Across Immigration Courts and Judges* 29-30 (2016). The GAO acknowledged, however, that the study was not able to control for factors "such as the nature or key characteristics of the claim," because the Department of Justice's Executive Office for Immigration Review does not track the data relating to details of individual proceedings. *Id.* at 30. The GAO thus recognized the limitations of such outcome statistics. The Board therefore properly concluded that any appellate review must rely on the factors and record present in the case at bar, rather than on statistical analysis.

For the foregoing reasons, petitioner's fact-bound challenge to the unpublished and nonprecedential decision of the court of appeals does not warrant this Court's review.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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