No. 17-469

In the Supreme Court of the United States

HERNEL SILAIS, PETITIONER

v.

JEFFERSON B. SESSIONS III, ATTORNEY GENERAL

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

BRIEF FOR THE RESPONDENT IN OPPOSITION

NOEL J. FRANCISCO
Solicitor General
Counsel of Record
CHAD A. READLER
Acting Assistant Attorney General
DONALD E. KEENER
JOHN W. BLAKELEY
PATRICK J. GLEN
Attorneys

Department of Justice
Washington, D.C. 20530-0001
SupremeCtBriefs@usdoj.gov
(202) 514-2217

QUESTION PRESENTED

Whether the REAL ID Act of 2005's corroboration provision, 8 U.S.C. 1158(b)(1)(B)(ii), requires an immigration judge (IJ) to give an asylum applicant notice of the specific corroborating evidence the IJ deems necessary and an opportunity to obtain that evidence.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 3a-22a) is reported at 855 F.3d 736. The decisions of the Board of Immigration Appeals (Pet. App. 23a-29a) and the immigration judge (Pet. App. 30a-57a) are unreported.

JURISDICTION

The judgment of the court of appeals was entered on April 28, 2017. A petition for rehearing was denied on June 27, 2017 (Pet. App. 1a-2a). The petition for a writ of certiorari was filed on September 25, 2017. 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.*, provides that the Secretary of Homeland Security and the Attorney General may, in

their discretion, grant asylum to an alien who demonstrates that he is a "refugee" within the meaning of the INA. 8 U.S.C. 1158(b)(1)(A). The INA defines a "refugee" as an alien who is unable or unwilling to return to his country of origin "because of persecution or a well-founded fear of persecution on account of race, religion, nationality, membership in a particular social group, or political opinion." 8 U.S.C. 1101(a)(42)(A).

The REAL ID Act of 2005 (REAL ID Act or Act), Pub. L. No. 109-13, Div. B, § 101(a)(3), 119 Stat. 303, added a new provision placing the "burden of proof" on the asylum applicant to "establish that [he] is a refugee." 8 U.S.C. 1158(b)(1)(B)(i). The Act also added a new provision governing how an applicant may sustain that burden:

> The testimony of the applicant may be sufficient to sustain the applicant's burden without corroboration, but only if the applicant satisfies the trier of fact that the applicant's testimony is credible, is persuasive, and refers to specific facts sufficient to demonstrate that the applicant is a refugee. In determining whether the applicant has met the applicant's burden, the trier of fact may weigh the credible testimony along with other evidence of record. *Where the trier of fact determines that the applicant should provide evidence that corroborates otherwise credible testimony, such evidence must be provided unless the applicant does not have the evidence and cannot reasonably obtain the evidence.*

8 U.S.C. 1158(b)(1)(B)(ii) (emphasis added). The italicized sentence is referred to here as the REAL ID Act's corroboration provision. Along with the rest of Section 1158(b)(1)(B)(ii), it applies to all asylum applications

made on or after May 11, 2005, the Act's date of enactment. § 101(h)(2), 119 Stat. at 305.

2. a. On February 5, 2011, petitioner, a native and citizen of Haiti, arrived in the United States near El Centro, California, without a valid immigrant visa or other entry document. Pet. App. 4a, 32a; A.R. 904. The Department of Homeland Security (DHS) commenced removal proceedings against him. See 8 U.S.C. 1182(a)(7)(A)(i); Pet. App. 4a; A.R. 904-905. Petitioner conceded his removability but applied for asylum. Pet. App. 32a; A.R. 177, 835-836.[*] Petitioner claimed that he had suffered persecution in Haiti at the hands of a private group called the Chimere, whose members supported the government then in power. Pet. App. 33a, 37a; A.R. 180.

b. At a hearing before an immigration judge (IJ), petitioner testified that he was targeted by the Chimere because he was a member of a Haitian opposition party known as the Organization of People in the Struggle. Pet. App. 33a. According to his testimony, petitioner had a number of confrontations with the Chimere between 2002 and 2004. *Id.* at 5a-6a. Petitioner claimed that in one incident, a Chimere member pushed him down and threatened him by placing a gun in his mouth. *Id.* at 5a. Petitioner testified that in another incident,

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[*] Petitioner also requested withholding of removal under the INA and protection under the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, *adopted* Dec. 10, 1984, S. Treaty Doc. No. 20, 100th Cong., 2d Sess. (1988), 1465 U.N.T.S. 85. Pet. App. 32a. Those requests were denied, *id.* at 4a, 12a n.5, 28a-29a, 55a-57a, and petitioner does not challenge those denials in his petition for a writ of certiorari.

members of the Chimere attacked him in his neighborhood, tracked him to a friend's house where he had run to hide, and attacked him again. *Id.* at 5a-6a.

According to his testimony, petitioner left for the Dominican Republic in November 2004 but returned to Haiti in January 2006. Pet. App. 6a. He testified that he graduated from professional school in January 2007 and then co-founded an organization for orphaned children. *Ibid.* Petitioner claimed that at an event hosted by the organization in 2009, members of the Chimere confronted and beat him. *Id.* at 6a-7a. Petitioner testified that nearly a year later, those same members kicked and hit him after he tried to stop them from stuffing ballots during the Haitian presidential election. *Id.* at 7a. The police detained one of the perpetrators "but released him after [petitioner] departed without filing a report." *Ibid.* Petitioner testified that following the election, he traveled by boat to Guatemala and eventually made his way into the United States. *Ibid.*

During his testimony, petitioner acknowledged that he had never reported any of those alleged incidents involving the Chimere to the police. Pet. App. 7a, 37a. Petitioner was also asked whether he had asked his family members to provide any statements in support of his asylum application. A.R. 286. When petitioner answered "[n]o," the DHS attorney asked why he had not. *Ibid.* Petitioner responded: "It didn't come to my mind to ask." A.R. 287.

In addition to testifying, petitioner submitted numerous pieces of documentary evidence in support of his application for asylum. See Pet. App. 42a-44a. That evidence included documents relating to his political activity and his educational and work background; a dec-

laration of James Lete, the friend who allegedly let petitioner hide in his house; and State Department reports on conditions in Haiti. See *id.* at 34a-35a, 42a-44a.

c. The IJ continued the hearing to a date when petitioner's expert on conditions in Haiti could testify. Pet. App. 4a. Before that date, DHS submitted a written closing argument, highlighting inconsistencies in petitioner's statements. *Id.* at 8a; A.R. 444-450. Petitioner submitted a response along with supplemental documentary evidence. A.R. 380-443. The supplemental evidence included a declaration of petitioner's ex-fiancée's brother, Franck Laguerre, concerning the chain of custody for certain documents that petitioner had earlier submitted. A.R. 431-433; see A.R. 295. In that declaration, Laguerre, who lived in the United States, stated that he had picked up the documents while on a business trip to Haiti and then mailed them to petitioner. A.R. 431-432.

When the hearing resumed, the IJ excluded petitioner's supplemental documentary evidence because it had not been timely filed. A.R. 323-324. The IJ then heard testimony from petitioner's expert, who stated that there had been conflict among political groups in Haiti, but that the relationship between his own human rights organization and Haitian officials had improved over time. Pet. App. 8a-9a.

3. The IJ denied petitioner's application for asylum. Pet. App. 30a-57a.

a. The IJ found that petitioner's "testimony regarding key aspects of his claim was vague and inconsistent." Pet. App. 46a. The IJ observed, for example, that whereas petitioner had testified that he had returned to Haiti from the Dominican Republic in January 2006, he had averred in an earlier statement that he had

returned in November 2006. *Ibid.* The IJ also observed that petitioner could not remember how long he had hid at his friend's house after being attacked by members of the Chimere, and that petitioner and his friend had given conflicting accounts about where that attack had taken place. *Id.* at 47a. As the IJ noted, petitioner had originally stated that the attack had occurred at a political meeting but later stated that it had occurred in the street; petitioner's friend had given yet another account, stating that petitioner had been attacked at his family's home. *Ibid.* The IJ further noted that petitioner could not identify who helped him establish the organization for orphaned children or recall how many people were with him on the boat to Guatemala. *Id.* at 49a.

The IJ found that "[i]n addition to these numerous inconsistencies, none of which were adequately clarified or explained, the respondent also failed to adequately corroborate his claim." Pet. App. 49a. The IJ explained that although petitioner had submitted "a wealth of media articles and Department of State reports," "none of it corroborates [his] individual story." *Id.* at 50a. According to the IJ, the same was true of petitioner's expert: "he does not know [petitioner] personally and could not attest to any specific facts of his claim." *Id.* at 51a. At the same time, the IJ observed, none of the "people that could have corroborated his claim"—such as Laguerre, his family members, or his coworkers—submitted statements or appeared in court to testify on his behalf. *Id.* at 50a. Moreover, the IJ found, petitioner had "not adequately explain[ed] to the court any efforts he made to try to get additional evidence for his claim." *Id.* at 51a.

Despite having "serious questions about [petitioner's] testimony," the IJ ultimately declined to "find

that the inconsistencies were severe enough to find him not credible." Pet. App. 52a. But "based on [petitioner's] vague and inconsistent testimony and the lack of evidence to corroborate events central to his claim," the IJ found that petitioner had "not met his burden of proof to establish eligibility for asylum." *Ibid.*

b. "In the alternative," the IJ determined that "even if [petitioner] had provided detailed, consistent, and adequately-corroborated testimony, his claim must still be denied because the harm he claims to have suffered does not rise to the level of persecution, and he has not shown that the government would be unable or unwilling to protect him." Pet. App. 52a. The IJ observed that "[t]he term 'persecution' carries a high standard" and has been defined as "the use of *significant* physical force against a person's body." *Id.* at 52a-53a (citations omitted). Applying that standard, the IJ found that petitioner had "not established that he suffered past persecution." *Id.* at 53a. The IJ found that although petitioner had "testified to multiple encounters with the Chimere while he was in Haiti," "most of these incidents involved harassment and intimidation." *Ibid.* While acknowledging that "[o]n some occasions the harassment became physical," the IJ found that "the mistreatment [petitioner] suffered, even when taken together, does not rise to the level of past persecution." *Ibid.*

In addition, the IJ found that petitioner "has not shown that the government is unwilling or unable to protect him." Pet. App. 54a. The IJ explained that "[p]ersecution is 'something a *government* does,'" and that "[t]he acts of private citizens do not constitute persecution unless the government 'is complicit in those acts or is unable or unwilling to take steps to prevent them.'" *Ibid.* (citations omitted). The IJ found that "[i]n this

case, [petitioner] never contacted the police and did not give them an opportunity to investigate or intervene." *Ibid.* The IJ further noted that "the one time the police did appear"—following the ballot-stuffing incident—petitioner "fled when the police took his assailant into custody." *Ibid.* Moreover, the IJ added, "the candidate [petitioner] supported in the last election * * * is now the president of Haiti." *Ibid.*

4. The Board of Immigration Appeals (Board) dismissed petitioner's administrative appeal, adopting and affirming the decision of the IJ. Pet. App. 23a-29a.

The Board upheld the IJ's "determination that [petitioner's] testimony was not sufficiently persuasive or probative to alone satisfy his burden of proof." Pet. App. 24a. Accordingly, the Board determined that the IJ "did not err in requiring additional corroborative evidence from [petitioner]." *Id.* at 25a. In particular, the Board "agree[d] that [petitioner] did not provide, or adequately explain the absence of, reasonably available corroborating evidence regarding critical elements of his claim, such as affidavits or other evidence from coworkers or family members in Haiti." *Ibid.*

The Board also rejected petitioner's argument that the IJ erred in excluding his supplemental documentary evidence. Pet. App. 26a-28a. In his brief before the Board, petitioner argued that the REAL ID Act "required that the Court allow [petitioner's] additional corroboration into the record." A.R. 96. Petitioner reasoned that because the Act's corroboration provision "provides that '[corroborating] evidence *must be* provided,'" "the Court must allow such evidence into the record if the Court has determined that it is necessary." A.R. 97 (quoting 8 U.S.C. 1158(b)(1)(B)(ii)). Petitioner further argued that the exclusion of his supplemental

evidence "prejudice[d]" him because the evidence—namely, Laguerre's declaration—"directly addresse[d] the chain of custody issue that the Court found insufficiently corroborated." A.R. 98.

The Board concluded that the IJ "properly rejected [petitioner's] evidence as untimely." Pet. App. 27a. The Board cited 8 C.F.R. 1003.31(c), which provides: "If an application or document is not filed within the time set by the Immigration Judge, the opportunity to file that application or document shall be deemed waived." Pet. App. 27a. "Moreover," the Board reasoned, "[petitioner] has not established prejudice as the evidence he sought to introduce was rehabilitative in nature rather than evidence corroborating critical elements of his claim." *Id.* at 28a. The Board explained that petitioner's supplemental evidence "did not address the weaknesses that the [IJ] identified in [his] claim; namely, the lack of testimony and evidence from witnesses who could corroborate the events upon which [his] claim was based." *Id.* at 27a.

5. The court of appeals denied the petition for review. Pet. App. 3a-22a.

a. In the court of appeals, petitioner argued that the Board erred in affirming the IJ's decision to exclude his supplemental evidence. Pet. C.A. Br. 36-42. Petitioner noted in his opening brief that in *Ren* v. *Holder*, 648 F.3d 1079 (2011), the Ninth Circuit had concluded that the REAL ID Act's corroboration provision "requires that an IJ give a non-citizen notice of the need for corroboration before denying the case on that basis." Pet. C.A. Br. 42 n.6. But petitioner expressly disclaimed any reliance on *Ren*, explaining that he "does not contend that he should have received notice." *Ibid.* Rather, petitioner argued that because he had "*anticipated* the

IJ's interest in certain additional corroboration and submitted it prior to the close of proceedings," the issue was limited to whether the IJ should have admitted that evidence. *Ibid.*

The court of appeals determined that petitioner could not prevail on that claim because he could not "show 'prejudice such that the IJ's mistake impacted the outcome of the proceedings.'" Pet. App. 18a (citation omitted). The court acknowledged that "the Agency denied his claim in part due to inconsistencies across his written and oral testimony and a lack of corroborating evidence from [Laguerre], who retrieved certain documentary evidence from Haiti." *Ibid.* But the court concluded that while "some of the rejected evidence arguably would have addressed these issues," "*none* of the supplemental proffer addressed the Agency's repeated concern: the lack of evidence specifically corroborating the incidents of violence about which [petitioner] testified." *Id.* at 19a. The court pointed in particular to the fact that there was "no testimony from family or co-workers who were also allegedly beaten and threatened." *Ibid.* "As none of the additional evidence would have filled this gap," the court determined that petitioner "cannot show that the outcome would have been different had the IJ admitted his supplemental evidence." *Ibid.*; see also *id.* at 20a ("[E]ven if the IJ had admitted the extra materials at issue, [petitioner's] case still would have lacked corroborating evidence of the specific incidents of harm and violence to him and his family.").

b. In a footnote in his reply brief, petitioner had argued for the first time that, to the extent that the IJ required "other forms of corroboration" beyond the supplemental evidence he had submitted, the IJ "had

given [him] no warning that such evidence was necessary," in violation of the REAL ID Act's corroboration provision. Pet. C.A. Reply Br. 23 n.7. Petitioner acknowledged that the court of appeals had held in *Darinchuluun* v. *Lynch*, 804 F.3d 1208 (7th Cir. 2015), that "notice is not required" under the statute, but he argued, without elaboration, that "*Darinchuluun* was incorrectly decided and this Court should overturn it." Pet. C.A. Reply 23 n.7. The court of appeals determined that petitioner had "waive[d] this argument by failing to support it in any way." Pet. App. 19a.

c. Finally, the court of appeals upheld the IJ's determination that "the alleged harm [petitioner] had experienced did not amount to past persecution." Pet. App. 21a. The court explained that the "evidence of his and his family's harm, while disturbing," did not compel a different conclusion. *Ibid.* The court also determined that petitioner had "failed to successfully demonstrate that the Haitian government was unable or unwilling to protect him." *Ibid.* Indeed, the court noted, petitioner "did not report any of the alleged incidents of harm to the Haitian police to give them an opportunity to intervene." *Ibid.*

6. The court of appeals denied rehearing en banc. Pet. App. 1a-2a.

ARGUMENT

Petitioner contends (Pet. 12) that when an IJ determines, pursuant to 8 U.S.C. 1158(b)(1)(B)(ii), that additional evidence should be provided to corroborate otherwise credible testimony, the IJ "must provide notice to [the] asylum applicant of what evidence the IJ deems lacking and an opportunity to obtain it." The court of appeals determined that petitioner waived that contention, and in any event, the contention lacks merit. Al-

though a circuit conflict exists on whether the REAL ID Act's corroboration provision requires an IJ to give notice and an opportunity to present the specific corroborating evidence the IJ determined was necessary, this case would be a poor vehicle for further review, not only because petitioner waived the issue, but also because the judgment below rests on independent and adequate grounds. The petition for a writ of certiorari should be denied.

1. Petitioner argues (Pet. 12) that an IJ may not deny an asylum application for lack of corroboration without first providing notice of the specific corroborating evidence the IJ deems necessary and an opportunity for the applicant to present such evidence. That argument does not warrant further review.

a. The court of appeals declined to consider petitioner's argument after determining that he had "waive[d]" it. Pet. App. 19a. For that reason alone, no further review is warranted. See *Zobrest* v. *Catalina Foothills Sch. Dist.*, 509 U.S. 1, 8 (1993) ("Where issues are neither raised before nor considered by the Court of Appeals, this Court will not ordinarily consider them.") (citation omitted).

Before both the Board and the court of appeals, petitioner argued that the IJ should have considered the supplemental documentary evidence that he submitted after the initial hearing. Pet. C.A. Br. 36-42; A.R. 94-98. That evidence included Laguerre's declaration about the chain of custody for certain documents he had earlier submitted. A.R. 431-433. In arguing for the admission of his supplemental evidence, petitioner expressly stated that he was "not contend[ing] that he should have received notice" that the evidence was necessary. Pet. C.A. Br. 42 n.6. Rather, he argued that he

had "*anticipated*" the need for that supplemental evidence, *ibid.*, and urged that it be admitted, *id.* at 36-42; A.R. 94-98. After reviewing petitioner's supplemental evidence, however, both the Board and the court of appeals determined that even if the evidence had been admitted, the outcome of the proceedings would have been the same. Pet. App. 19a-20a, 27a-28a. That is because "*none* of the supplemental proffer addressed the Agency's repeated concern: the lack of evidence specifically corroborating the incidents of violence about which [petitioner] testified." *Id.* at 19a.

In seeking review in this Court, petitioner makes a different argument. Relying on the Ninth Circuit's decision in *Ren* v. *Holder*, 648 F.3d 1079 (2011), see Pet. 4, 13, 16-17, 26, petitioner now argues that the IJ "should have given [him] notice of what *additional* corroboration"—beyond that which he had included in his supplemental proffer—"she would have liked to have seen," Pet. 37 (emphasis added). In the court of appeals, however, petitioner expressly disclaimed any reliance on *Ren*, including any argument that "he should have received notice." Pet. C.A. Br. 42 n.6; see *ibid.* ("The BIA incorrectly stated that [petitioner] relies for this argument on *Ren*."). And it was only in a footnote in his reply brief that petitioner argued that the court should "overturn" its decision in *Darinchuluun* v. *Lynch*, 804 F.3d 1208 (7th Cir. 2015), which held that "notice is not required." Pet. C.A. Reply Br. 23 n.7. Accordingly, the court deemed that argument "waive[d]." Pet. App. 19a; see *ibid.* (citing circuit precedent "recognizing the well-established principle that arguments that are 'underdeveloped, conclusory, or unsupported by law' are waived") (citation omitted).

Petitioner nevertheless insists that the argument was "passed upon" below because the court of appeals "felt obligated to discuss it in its opinion." Pet. 38 (citation omitted). But the court merely recited the holding of *Darinchuluun* before concluding that petitioner had "waive[d]" any argument that the decision was "incorrectly decided." Pet. App. 19a. Contrary to petitioner's suggestion, the court did not "pass[] upon" the merits of such an argument. Pet. 38 (citation omitted).

Petitioner also asserts (Pet. 38) that the court of appeals determined, "[a]t most," that he "had waived the question for purposes of en banc review, and not for appeal to this Court." But the court of appeals did not limit its determination in that way. Pet. App. 19a. And although there are circumstances in which this Court may be willing to overlook a party's failure to challenge "squarely applicable, recent circuit precedent" in the lower courts, the Court has indicated that it may be willing to do so only where the petitioner contested the issue "as a party to the recent proceeding upon which the lower courts relied for their resolution of the issue." *United States* v. *Williams*, 504 U.S. 36, 44-45 (1992). Given that petitioner was not a party in *Darinchuluun*, he cannot benefit from that rule here.

b. In any event, the court of appeals correctly determined in *Darinchuluun* that the REAL ID Act's corroboration provision does not require an IJ to first notify an asylum applicant that specific corroborating evidence is necessary and then provide the applicant with an opportunity to present such evidence. 804 F.3d at 1216-1217.

i. The plain text of the corroboration provision does not impose such a requirement. The provision states: "Where the trier of fact determines that the applicant

should provide evidence that corroborates otherwise credible testimony, such evidence must be provided unless the applicant does not have the evidence and cannot reasonably obtain the evidence." 8 U.S.C. 1158(b)(1)(B)(ii). That text makes clear that an IJ may find an applicant's testimony to be "otherwise credible" and yet determine that "corroborat[ing]" evidence is necessary for the applicant to satisfy his burden of proof. *Ibid.* It also makes clear that an IJ may hold the absence of corroborating evidence against the applicant unless the applicant "cannot reasonably obtain [such] evidence." *Ibid.* But the statutory text makes no mention of any requirement of prior notice and does not specify any particular procedure that an IJ must follow before determining that the applicant has failed to meet his burden of proof.

The history of the corroboration provision likewise indicates that Congress did not intend to impose any particular procedure on IJs. The relevant conference committee's report explained that the corroboration provision was "based upon the standard set forth in the [Board's] decision in *Matter of S-M-J-*." H.R. Conf. Rep. No. 72, 109th Cong., 1st Sess. 166 (2005) (Conf. Rep.); see also *ibid.* ("Congress anticipates that the standards in *Matter of S-M-J-* * * * will guide the [Board] and the courts in interpreting this clause."). In that decision, the Board stated that "where it is reasonable to expect corroborating evidence for certain alleged facts pertaining to the specifics of an applicant's claim, such evidence should be provided." *Matter of S-M-J-*, 21 I. & N. Dec. 722, 725 (B.I.A. 1997). But the Board made no mention of any requirement of prior notice and did not mandate any particular procedure for IJs to follow. See *Matter of L-A-C-*, 26 I. & N. Dec. 516,

520 (B.I.A. 2015) ("The framework set forth in *Matter of S-M-J-* did not require the [IJ] to identify the specific corroborating evidence at the merits hearing that would be considered persuasive under the facts of the case to meet the applicant's burden of proof."). In "[c]odifying the [Board's] corroboration standards," Conf. Rep. 165, Congress presumably did not intend to mandate any particular procedure either.

Indeed, requiring IJs to give notice and an opportunity to present the specific corroborating evidence they deem necessary would undermine "[t]he overall purpose" of Section 1158(b)(1)(B), which "was to allow [IJs] to follow commonsense standards in assessing asylum claims without undue restrictions." *Matter of L-A-C-*, 26 I. & N. Dec. at 520. Instead of removing such restrictions, petitioner's construction of the corroboration provision would further tax the resources of "already overburdened" IJs and DHS by "necessitat[ing] two hearings" in many cases—"the first to decide whether * * * corroborating evidence is required and then another hearing after a recess to allow the alien more time to collect such evidence." *Rapheal* v. *Mukasey*, 533 F.3d 521, 530 (7th Cir. 2008). Petitioner's construction would also be inconsistent with the general expectation in litigation that "parties with the burden of proof [must] ordinarily provide whatever corroboration they have when presenting their case in chief." *Singh* v. *Holder*, 602 F.3d 982, 988 (9th Cir. 2010), vacated, 649 F.3d 1161 (9th Cir. 2011) (en banc).

At a minimum, the Board's contrary construction of the corroboration provision is a reasonable one. See *Chevron U.S.A. Inc.* v. *Natural Res. Def. Council, Inc.*, 467 U.S. 837, 843-844 & n.11 (1984). In *Matter of L-A-C-*, the Board concluded that Section 1158(b)(1)(B)(ii)

"was intended to codify *Matter of S-M-J-* and not to impose additional rigid requirements for the consideration of corroboration." 26 I. & N. Dec. at 524. The Board thus held that under the statute, "[a]pplicants have the burden to establish their claim without prompting from the [IJ]." *Id.* at 523-524. The Board emphasized, however, that the statute does not displace "the discretion of the [IJ] to decide whether there is good cause to continue the proceedings in a particular case for additional corroboration." *Id.* at 524. And the Board noted that "a continuance would typically be warranted where the [IJ] determines that * * * the applicant was not aware of a unique piece of evidence that is essential to meeting the burden of proof." *Id.* at 522. Because the Board's position is at the very least consistent with the text, history, and purpose of the corroboration provision, it should be given deference. See *Holder* v. *Martinez Gutierrez*, 566 U.S. 583, 591 (2012).

ii. Petitioner's counterarguments lack merit. Petitioner argues that what he characterizes as the corroboration provision's "future directed language"—*e.g.*, that corroborating evidence "must *be* provided" instead of "must *have been* provided"—should be read with "the IJ's determination that corroboration is required" as its reference point. Pet. 16 (citations omitted) (emphases altered). Thus, according to petitioner (*ibid.*), "the IJ's determination that corroboration is required" must "come[] *before* an applicant must provide such evidence." But the provision's future-directed language can be read from the perspective of a different reference point—namely, the filing of the application for asylum. The language would thus inform an applicant looking ahead to his hearing that in some cases, his testimony "may be sufficient," while in others, corroborating

evidence "must be provided," such that the IJ can in turn assess the issue from the perspective of what the applicant should submit at the hearing. 8 U.S.C. 1158(b)(1)(B)(ii). Indeed, the instructions accompanying the asylum application are phrased in a similar forward-looking way. See Dep't of Homeland Sec. & Dep't of Justice, *I-589, Application for Asylum and for Withholding of Removal: Instructions* 8 (May 16, 2017) ("You must submit reasonably available corroborative evidence showing * * * the specific facts on which you are relying to support your claim."), https://www.uscis.gov/sites/default/files/files/form/i-589instr.pdf. Congress's use of future-directed language is therefore not dispositive.

Petitioner also observes that various provisions of the REAL ID Act contemplate "some record regarding the availability of corroboration," Pet. 18-19, which he argues "necessarily presupposes that the IJ will give the applicant notice of the additional corroboration the IJ wants," Pet. 22. See, *e.g.*, 8 U.S.C. 1158(b)(1)(B)(ii), 1252(b)(4). But a record regarding the availability of corroboration can be made without the IJ identifying in advance what specific corroborating evidence he deems necessary for the applicant to meet his burden of proof. This case illustrates the point. During the hearing, the DHS attorney asked petitioner why he had not obtained statements from family members in support of his application for asylum. A.R. 286. Petitioner did not say that his family members were unavailable. Instead, he responded that "[i]t didn't come to [his] mind to ask" for such statements. A.R. 287. The IJ thus found that petitioner "did not adequately explain * * * any efforts he made to try to get additional evidence for his claim,"

Pet. App. 51a, and the court of appeals agreed that petitioner had "failed to demonstrate * * * that obtaining such evidence would have required unreasonable efforts," *id.* at 19a; see *id.* at 25a.

Petitioner further contends (Pet. 24-29) that his construction of the corroboration provision is necessary to avoid serious due process concerns. Those concerns are misplaced. By "clearly stat[ing] that corroborative evidence may be required," the statute itself "plac[es] immigrants on notice of the consequences [of] failing to provide corroborative evidence." *Rapheal*, 533 F.3d at 530. Moreover, as the Board has explained, IJs retain the discretion to grant additional opportunities to present corroborating evidence when the circumstances warrant, such as when "the applicant was not aware of a unique piece of evidence that is essential to meeting the burden of proof." *Matter of L-A-C-*, 26 I. & N. Dec. at 522.

Petitioner's reliance (Pet. 29-31) on a handbook published by the United Nations High Commissioner for Refugees (UNHCR) is likewise misplaced. The handbook states that an applicant for refugee status "should * * * [m]ake an effort to support his statements by any available evidence and give a satisfactory explanation for any lack of evidence. If necessary he must make an effort to procure additional evidence." UNHCR, *Handbook and Guidelines on Procedures and Criteria for Determining Refugee Status Under the 1951 Convention and the 1967 Protocol Relating to the Status of Refugees* ¶ 205(a)(ii), at 40 (reissued Dec. 2011), http://www.unhcr.org/3d58e13b4.pdf. That guideline does not mention any requirement of prior notice or specify any procedure that an examiner must follow.

Indeed, the Board regarded the handbook as "consistent with" its decision in *Matter of S-M-J-*, which would later become the basis for the REAL ID Act's corroboration provision. 21 I. & N. Dec. at 724. The court of appeals in *Darinchuluun* thus correctly held that the corroboration provision does not require an IJ to give an applicant notice of the specific corroborating evidence the IJ deems necessary and an opportunity to obtain that evidence.

2. Although there is a circuit conflict on the interpretation of the REAL ID Act's corroboration provision, 8 U.S.C. 1158(b)(1)(B)(ii), this case would be a poor vehicle for resolving it.

a. Petitioner is correct (Pet. 12-13) that there is division among the circuits. Like the Seventh Circuit in *Darinchuluun*, 804 F.3d at 1216-1217, the Sixth Circuit has concluded that the REAL ID Act's corroboration provision does not require an IJ to give an asylum applicant notice of the need for specific corroborating evidence and an opportunity to present it, see *Gaye* v. *Lynch*, 788 F.3d 519, 529-530 (2015). By contrast, the Ninth Circuit has held that the corroboration provision requires an IJ to give such notice and opportunity. See *Ai Jun Zhi* v. *Holder*, 751 F.3d 1088, 1094-1095 (2014) (citing *Ren*, 648 F.3d at 1090-1092).

Contrary to petitioner's contention (Pet. 12-14), the conflict does not extend beyond those circuits. Both of the Third Circuit decisions petitioner cites (Pet. 13) involved applications for asylum or other relief filed before the REAL ID Act's date of enactment, and neither purported to construe the Act's corroboration provision. See *Chukwu* v. *Attorney Gen. of U.S.*, 484 F.3d 185, 191 n.2 (2007); *Toure* v. *Attorney Gen. of U.S.*, 443 F.3d 310, 326 n.9 (2006). And in the Second Circuit case

on which petitioner relies (Pet. 14), the applicant did "not contend that the notice given by the IJ with respect to the need for [corroborating evidence] was inadequate"; rather, the "only" issue was whether that evidence was "reasonably available." *Yan Juan Chen* v. *Holder*, 658 F.3d 246, 253 n.4 (2011) (per curiam). Thus, only the Sixth, Seventh, and Ninth Circuits have addressed the question presented.

b. This case would be a poor vehicle for resolving the circuit conflict.

First, as explained above, see pp. 12-14, *supra*, petitioner "waive[d]" the argument that the REAL ID Act's corroboration provision requires notice and an opportunity to present the specific corroborating evidence an IJ deems necessary, Pet. App. 19a. Because the argument was neither preserved nor considered below, this case would not be an appropriate vehicle for further review.

Second, this Court's review would have no effect on the outcome of this case because the judgment below rests on "alternative" grounds—namely, the IJ's determinations (1) that "the harm [petitioner] claims to have suffered does not rise to the level of persecution," and (2) that "he has not shown that the government [of Haiti] would be unable or unwilling to protect him." Pet. App. 52a. The court of appeals upheld each of those determinations. *Id.* at 21a. And each independently renders petitioner ineligible for asylum, even if his testimony was sufficiently corroborated. *Id.* at 52a. Because this Court's resolution of the question presented would not be outcome-determinative, this case would not be an appropriate vehicle for further review.

Petitioner contends (Pet. 37) that the IJ's other determinations "likely would have been different if [petitioner had] offered satisfactory additional corroboration." But the IJ disagreed, explaining that "*even if* [petitioner] had provided detailed, consistent, and adequately-corroborated testimony, his claim must still be denied." Pet. App. 52a (emphasis added). That is because petitioner's own testimony, even if accepted as true, failed to establish that the "mistreatment" he suffered rose "to the level of past persecution," *id.* at 53a, or that "the government is unwilling or unable to protect him," *id.* at 54a. Indeed, petitioner himself testified that he "never contacted the police and did not give them an opportunity to investigate or intervene." *Ibid.* To the extent that petitioner now wishes (Pet. 37) to introduce evidence that contradicts his testimony or describes harms and events he never testified to, such evidence would be inadmissible in any event, because it would not meet the definition of "corroborat[ing]" evidence in the first place. 8 U.S.C. 1158(b)(1)(B)(ii).

Petitioner also contends (Pet. 38) that the IJ's other determinations "cannot be considered dispositive" if this Court were to conclude that "the record is incomplete as a result of" the exclusion of his supplemental documentary evidence. But both the Board and the court of appeals reviewed the supplemental evidence that was excluded and concluded that petitioner "cannot show that the outcome would have been different had the IJ admitted his supplemental evidence." Pet. App. 19a; see *id.* at 27a-28a. Indeed, none of petitioner's supplemental evidence—which, at most, corroborated particular aspects of his testimony—could have altered the IJ's conclusion that "even if [petitioner] had provided

detailed, consistent, and adequately-corroborated testimony, his claim must still be denied." *Id.* at 52a.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

NOEL J. FRANCISCO
Solicitor General
CHAD A. READLER
Acting Assistant Attorney General
DONALD E. KEENER
JOHN W. BLAKELEY
PATRICK J. GLEN
Attorneys

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