No. 21-1494

# In the Supreme Court of the United States

DARIA DAMIAN-GALLARDO, PETITIONER

*v.*

MERRICK B. GARLAND, ATTORNEY GENERAL

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

**BRIEF FOR THE RESPONDENT IN OPPOSITION**

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## QUESTIONS PRESENTED

1. Whether petitioner failed to exhaust her administrative remedies before the Board of Immigration Appeals with respect to her applications for relief from removal.

2. Whether an immigration judge must ask a noncitizen about the nature and scope of any mental illness or the effects of prescribed medication when evaluating the noncitizen's mental competency to participate in removal proceedings, where the record contains her medical records and the immigration judge evaluates, through direct questioning, her ability to participate in the proceedings.

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## OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 3a-7a) is not published in the Federal Reporter but is available at 2021 WL 5412342. The decisions of the Board of Immigration Appeals (Pet. App. 8a-11a) and the immigration judge (Pet. App. 15a-30a) are unreported.

## JURISDICTION

The judgment of the court of appeals was entered on November 19, 2021. A petition for rehearing was denied on February 25, 2022 (Pet. App. 1a-2a). The petition for a writ of certiorari was filed on May 26, 2022. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

## STATEMENT

1. a. Petitioner is native and citizen of Mexico. Pet. App. 37a; Administrative Record (A.R.) 216. In May

2008, petitioner unlawfully entered the United States. Pet. App. 39a; A.R. 280, 549; cf. A.R. 513-514 (documenting two prior unlawful entries in June 2007). In January 2017, a state court convicted petitioner of a misdemeanor drug offense but deferred entry of the criminal judgment under a diversion program. A.R. 506, 511, 519; see A.R. 136. In August 2017, petitioner was again arrested—this time for a felony drug offense and a misdemeanor weapons offense, A.R. 511-512, 520; see A.R. 136—after which she was placed in removal proceedings, A.R. 519, 549-551. Because that violated the terms of the diversion program, the state court reinstated criminal proceedings and revoked its order deferring entry of the January 2017 judgment, A.R. 505.

b. In August 2017, when interviewed by immigration officials, petitioner initially "claim[ed] no fear of returning to Mexico." A.R. 520. Petitioner accordingly sought cancellation of removal under 8 U.S.C. 1229b, alleging that her removal would result in "exceptional and extremely unusual hardship" to her two United States citizen children, 8 U.S.C. 1229b(b)(1)(D). See A.R. 132, 135 (children born in 2009 and 2016); cf. Pet. App. 20a-21a (neither child had lived with petitioner for years). After an immigration judge informed petitioner that she would be ineligible for cancellation of removal if she had been convicted of a drug offense, A.R. 248, 251-252, petitioner in December 2017 applied for relief and protection from removal by asserting claims for asylum, 8 U.S.C. 1158; statutory withholding of removal, 8 U.S.C. 1231(b)(3); and withholding of removal under regulations implementing the Convention Against Torture (CAT), 8 C.F.R. 1208.16(c)(4), 1208.17. See A.R. 121-131.

With exceptions not relevant here, a noncitizen seeking a discretionary grant of asylum must apply for asylum "within 1 year after the date of the alien's arrival in the United States." 8 U.S.C. 1158(a)(2)(B) and (D). Cf. 8 U.S.C. 1158(a)(3), 1252(a)(2)(D) (generally precluding judicial review of timeliness).[1] The noncitizen then has the burden of proving that she is a "refugee," 8 U.S.C. 1158(b)(1)(A) and (B)(i), by showing that she is unable or unwilling to return to her country of nationality because of either "[past] persecution or a well-founded fear of [future] persecution on account of" a protected ground, including "membership in a particular social group," 8 U.S.C. 1101(a)(42)(A). See *INS* v. *Elias-Zacarias*, 502 U.S. 478, 481-483 & n.1 (1992). With exceptions not relevant here, a "'particular social group'" is one that comprises members who "share a common immutable characteristic"; is both "defined with particularity" and "socially distinct within the society in question"; and is defined, and exists, independently from the harms to which its members are purportedly subjected. *In re M-E-V-G-*, 26 I. & N. Dec. 227, 236-237 & n.11 (B.I.A. 2014).

A noncitizen seeking withholding of removal under Section 1231(b)(3) must make a similar but more difficult showing. To be eligible for statutory withholding, the noncitizen must show that, if she were removed to a country, her "life or freedom would be threatened" in that country "because of," *inter alia*, her "membership in a particular social group." 8 U.S.C. 1231(b)(3)(A). That requires proving that it is "more likely than not" that she would be persecuted if so removed. *INS* v.

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[1] This brief "uses the term 'noncitizen' as equivalent to the statutory term 'alien.'" *Barton* v. *Barr*, 140 S. Ct. 1442, 1446 n.2 (2020) (citing 8 U.S.C. 1101(a)(3)).

*Aguirre-Aguirre*, 526 U.S. 415, 419 (1999) (citation omitted).

Finally, a noncitizen seeking withholding of removal under the CAT must prove that it is "more likely than not" that "she would be tortured if removed to the proposed country of removal," 8 C.F.R. 1208.16(c)(2), by establishing, *inter alia*, harm inflicted "by, or at the instigation of, or with the consent or acquiescence of, a public official acting in an official capacity," 8 C.F.R. 1208.18(a)(1).

c. A noncitizen is "competent to participate in immigration proceedings" if "she has a rational and factual understanding of the nature and object of the proceedings, can consult with the attorney or representative if there is one, and has a reasonable opportunity to examine and present evidence and cross-examine witnesses." *In re M-A-M-*, 25 I. & N. Dec. 474, 479 (B.I.A. 2011). This case in part concerns the process by which competency is evaluated in removal proceedings.

A noncitizen is presumed mentally competent in removal proceedings. *M-A-M-*, 25 I. & N. Dec. at 477. But if "indicia of incompetency"—for instance, an "inability to understand and respond to questions"—are observed by the immigration judge or revealed by the evidence, the "[j]udge must take measures to determine whether [the noncitizen] is competent to participate in [the] proceedings," *id.* at 479-480. "The approach taken [to assess competency] in any particular case will vary based on the circumstances of the case." *Id.* at 480. For instance, the Board of Immigration Appeals (Board) has stated that the immigration judge "may modify the questions posed to the [noncitizen] to make them very simple and direct" and should generally ask "questions about where the hearing is taking place, the nature of

the proceedings, and the [noncitizen's] state of mind." *Ibid.* The judge "might [also] ask the [noncitizen] whether he or she currently takes or has taken medication to treat a mental illness and what the purpose and effects of that medication are." *Id.* at 481. If warranted, further processes, including a psychiatric examination, may be ordered. *Ibid.*

2. In January 2018, an immigration judge, after a hearing at which petitioner appeared pro se, ordered petitioner removed from the United States, Pet. App. 37a-46a, based on petitioner's admission that she was removable and on "all the supporting documents in the record," *id.* at 37a-38a. The immigration judge further found that petitioner had failed to establish her eligibility for asylum, statutory withholding of removal, or withholding of removal under the CAT. *Id.* at 41a-45a.

Petitioner appealed to the Board. A.R. 173-175, see A.R. 160-161 (petitioner's brief). The Board remanded to the immigration judge. Pet. App. 33a-36a. The Board observed that during the removal proceedings, petitioner had stated on multiple occasions that she "did not understand what was being told to her" and "did not remember things"; had smiled or laughed in a manner inconsistent with the circumstances; and had "mentioned that she had been hit by a car, had undergone many surgeries, and experienced dizziness," and had "seen a psychologist at the detention facility." *Id.* at 34a-35a. The Board concluded that the record contained sufficient "indicia of mental incompetency" to warrant a competency hearing under its *M-A-M-* decision. *Id.* at 34a, 36a.

3. a. On remand, the case was assigned to a new immigration judge who considered petitioner's medical and mental-health records from her immigration deten-

tion (A.R. 357-415). See Pet. App. 16a. Those records reflect that petitioner had a history of chronic pain, Diabetes Mellitus, pre-detention methamphetamine abuse, and no history of mental-health treatment or psychotropic medications. A.R. 382, 408, 412. The records also reflect that petitioner's immigration detention corresponded to the "onset of [mental-health] problems," namely, an "adjustment disorder" associated with her "detention." A.R. 382; see A.R. 410 (recording "depress[ion] about her situation being [in detention]"). Mental-health professionals assessed petitioner as having "[a]djustment disorder with mixed anxiety and depressed mood" and other reactions to severe stress, which they treated with counseling and anxiety-coping skills. See, *e.g.*, A.R. 361, 368, 370, 381, 409, 411, 413.

The medical records reflect that after the first immigration judge ordered petitioner removed, petitioner was upset, A.R. 396, and "fe[lt] more depressed," A.R. 384. In April 2018, a psychiatrist prescribed petitioner "Fluoxetine HCl," the generic version of "Prozac," as an "antidepressant medication." A.R. 382-383. Petitioner reported hearing a "voice" ("[a]uditory [h]allucinations") starting in late April 2018. A.R. 363. In May 2018, petitioner's psychiatrist concluded that the antidepressant was already "ha[ving] some effect" but he increased its dosage to address petitioner's "unrelieved depression." A.R. 368. Petitioner's mental status was repeatedly evaluated during her detention, where she consistently presented as having average intelligence, "[g]ood" insight and judgment, and "[i]ntact" memory. See, *e.g.*, A.R. 367, 370, 408, 410, 413. Among other things, petitioner's treating psychologist opined in May

2018 that petitioner's "actions were logical and goal directed." A.R. 376.[2]

The immigration judge subsequently held a competency hearing. Pet. App. 16a; A.R. 34-45. The judge informed petitioner that the hearing's purpose was to determine whether petitioner had a "psychological condition" or took medication that prevented her from "understand[ing] the[] proceedings" and representing herself. A.R. 36. Petitioner initially expressed some confusion in an exchange quoted in the certiorari petition. Pet. 9-10 (quoting A.R. 36-37). The judge then simplified her explanation, after which petitioner stated that she understood. A.R. 37. In response to further questioning by the judge, petitioner indicated that she understood questions about her prior testimony in the removal proceedings, her contacts with her family, her presence in the United States, her fear of returning to Mexico, her mistreatment while in Mexico, and the consequences of an adverse decision by the judge. A.R. 37-43. The judge, for instance, asked petitioner if she

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[2] The medical records reflect that petitioner's other medications during her 2017-2018 detention were unrelated to further mental or cognition issues. Cf. Pet. 7 (referring to a "laundry list of daily medications"). Petitioner received over-the-counter pain medications, A.R. 361, 369, 412 (Ibuprofen, Asprin, Acetaminophen), antibiotics, A.R. 392, 396, 408 (Bactrim, Sulfamethoxazole-Trimethoprim, Metronidazole, Amoxicillin), an antacid, A.R. 398, 408 (Omeprazole), and a contraceptive, A.R. 361, 371 (Levora). Petitioner, who was obese and had diabetes, A.R. 382, was also briefly provided cholesterol medication and a common cardiac medication, A.R. 361, 369 (Atorvastatin/Lipitor and Nitroglycerin). Finally, petitioner was prescribed Gabapentin, A.R. 361, 410, an anticonvulsant used to treat nerve pain, including in diabetics. See Miroslav Backonja et al., *Gabapentin for the Symptomatic Treatment of Painful Neuropathy in Patients With Diabetes Mellitus*, 280 J. Am. Med. Ass'n 1831, 1832, 1835 (Dec. 1998).

would be able to "tell [the judge] the reasons why [she was] fearful of going back to Mexico" if the judge asked questions slowly. A.R. 40. When petitioner responded by stating, "they ask me so many questions that I don't remember all of them," the judge clarified that she was "not worried about [petitioner] remembering them all" and instead wanted to talk with petitioner at a later date to ask "some questions again slowly and give [petitioner] an opportunity to tell [the judge] the reasons [she was] very fearful of returning back to Mexico." A.R. 41. Petitioner stated that she understood. *Ibid.*

The immigration judge found based on "a preponderance of the evidence" that petitioner was mentally "competent" and could "exercise her rights effectively" because petitioner was able "to understand the[] proceedings" and "to speak and represent herself." A.R. 43-44. The judge explained that "although there are some things [petitioner] may not have understood in the past," petitioner "does seem to comprehend exactly what is going on in these proceedings and has the ability to answer the questions" posed to her if the questions are "asked slowly and explained to her more thoroughly." A.R. 43. The judge accordingly found "no reasonable cause to believe that [petitioner] is incompetent." *Ibid.*

In a subsequent hearing, the same immigration judge continued to evaluate petitioner. "Based on all of the questions and information provided by [petitioner]," the judge "found respondent was competent to proceed on her own." Pet. App. 16a-17a; see A.R. 70-71 (discussing medications); A.R. 76 (finding that petitioner "understands the nature and purpose of the proceedings" and "has the ability to present the information and respond to all questions being asked by this court").

b. After the subsequent hearing, the immigration judge issued an oral decision and order. Pet. App. 15a-30a. The immigration judge found that petitioner is removable and ineligible for several forms of relief from removal, *id.* at 16a, 18a-29a, and ordered that petitioner be removed from the United States, *id.* at 12a-14a, 30a.

The immigration judge determined that petitioner was ineligible for asylum on multiple grounds. Pet. App. 21a-27a. The judge first found that petitioner's application was untimely. *Id.* at 21a. The judge further found that, in any event, petitioner did not establish the "past persecution or a well-founded fear of future persecution" necessary for refugee status based on petitioner's prior abuse in Mexico by her (deceased) father, by her maternal uncle, and, later, by a man named Martiniano who fathered two of petitioner's other children when he was a Mexican police officer and who petitioner was unsure was "still alive." *Id.* at 22a-23a; cf. A.R. 124 (father is deceased). The judge found that petitioner failed to show that any of her past abuse was "based on" her membership in "a particular social group" or any other protected ground, Pet. App. 23a-24a, or that the Mexican government "would have been unable or unwilling to protect her" if it had been "aware of the situation," *id.* at 24a-25a. The judge additionally found that petitioner's fear of future persecution in Mexico was not objectively reasonable, *id.* at 26a-27a; that the future harm she feared was not persecution on account of a protected ground, *id.* at 26a; that petitioner failed to show that the Mexican government, or a group it was "unable or unwilling [to] control[,] would be responsible for any [such] harm," *ibid.*; and that petitioner could avoid those she feared by "mov[ing] to some other area in Mexico," *id.* at 27a.

The immigration judge similarly determined that petitioner was ineligible for statutory withholding of removal under 8 U.S.C. 1231(b)(3). Pet. App. 27a-28a. The judge explained petitioner did not satisfy her burden under Section 1231(b)(3) of proving that she "more likely than not" would be "persecuted on account of a statutorily protected ground" if returned to Mexico because petitioner had "failed to meet" the parallel but "lower burden required for asylum." *Ibid.*

Finally, the immigration judge concluded that petitioner was not eligible for protection under the CAT because she failed to establish that she "would be subjected to torture" if returned to Mexico. Pet. App. 28a-29a. The judge found "no indication" either that "there is anyone in Mexico who currently is seeking to harm [petitioner]" or that petitioner would be harmed "with the acquiescence of anyone in the Mexican government." *Id.* at 29a.

4. a. Petitioner filed a Notice of Appeal (A.R. 14-16) with the Board, stating that the reason for her appeal was that the Board had previously remanded the case "because I didn't understand what was happening the first time and I still don[']t." A.R. 15. The notice similarly suggested that petitioner qualified as a mentally disabled member of the class action in *Franco-Gonzalez* v. *Holder*, No. 2:10-cv-2211, 2013 WL 8115423 (C.D. Cal. Apr. 23, 2013), and indicated that petitioner intended to file a separate written brief or statement to support her appeal. A.R. 15.

Petitioner's two-page brief (A.R. 6-7) was nearly identical to her two-page brief in her first appeal (A.R. 160-161). Both stated that the immigration judge "never took into consideration [petitioner's] medical condition or [her] [p]sychological issues"; that petitioner felt

"confused [about] every question that the [judge] or Government were asking [her]" and "did not know how to explain [herself] due to [her] mental condition"; and that petitioner "believe[d] that the [judge] c[ould] not [have] ma[d]e a proper assessment regarding [her] health." A.R. 6-7; see A.R. 160-161. Both briefs likewise stated (without elaboration) that petitioner came to the United States because she "was running from Mr. Martiniano" and "was fearful for [her] life"; that "independent judicial review is critical" in "asylum law," which protects "refugees fleeing persecution"; that petitioner was "not given this review of [her] claims to relief"; and that "[petitioner] believe[d] that there are well founded issues regarding [her] fear to return to [Mexico]." A.R. 7; see A.R. 161. Petitioner's brief added that "[a]lthough the [immigration judge] believes I am not incompetent, I do have issues in remembering things due to the injuries and surgeries that I have suffered" and that the case should be reconsidered "because of my mental competency." A.R. 7.[3]

b. The Board dismissed petitioner's appeal. Pet. App. 9a-11a. The Board observed that petitioner's brief "largely duplicate[d] the submission provided in connection with [her] original appeal" by arguing that the immigration judge "did not consider her medical and psychological issues." Pet. App. 10a. But the Board explained that the "Immigration Judge in fact considered [petitioner's] mental and physical state as [it] relates to her ability to understand and participate in removal

[3] Petitioner's brief also included some new statements that made materially similar points. A.R. 7 ("I get nervous because I am not knowledgeable in Immigration Law and the fact that I had no schooling"; "I get confused and do not know how to react"; "I am scared of life to return to Mexico.").

proceedings." *Id.* at 11a. The Board further explained that "competency is a finding of fact" subject to administrative review only for "clear[] erro[r]" and that petitioner had failed to "establish[] any clear error in the Immigration Judge's competency finding." *Ibid.*

The Board observed that petitioner "d[id] not challenge the substance of the Immigration Judge's denials of her applications for relief." Pet. App. 10a. And because petitioner "d[id] not meaningfully challenge the substantive portions of the Immigration Judge's decision," the Board dismissed the appeal. *Id.* at 11a.

5. Petitioner sought review from the court of appeals, which appointed counsel to represent her, Pet. 11, but denied the petition for review in part and dismissed it in part, Pet. App. 1a-7a.

a. With respect to the question of petitioner's competency, the court of appeals denied the petition based on its determination that the Board did not abuse its discretion in upholding the immigration judge's competency decision. Pet. App. 4a-6a. The court explained that the immigration judge's "inquiry into [petitioner's] competency comfortably satisfied the procedural guidelines set forth by [the Board's] precedent," which does not mandate any "specific approach, method, or manner of inquiry" but rather recognizes that the requisite "inquiry will vary with the circumstances." *Id.* at 4a. And in this case, the court explained, the immigration judge permissibly and "consistently simplified, explained, and repeated questions when [petitioner] expressed confusion about the topic or question at hand"; "considered [petitioner's] medical records"; "asked petitioner about her medications and how she was feeling"; and "continued the proceedings to allow submission of additional evidence." *Id.* at 5a.

The court of appeals likewise determined that the immigration judge's factual finding that petitioner "was competent to participate in her removal proceedings was supported by substantial evidence." Pet. App. 5a. The court observed that one could "cherry-pick the record" to "find instances in which [petitioner] expressed momentary confusion," but it concluded that the record as a whole showed that such passing moments were "outweighed by the many instances where [petitioner] was able to communicate effectively with the [judge], answer the [judge's] questions, and present evidence going to the core of her claims." *Ibid.* The court added that the record showed not only that petitioner "was capable of participating in her removal proceedings" but that "she, in fact, did." *Ibid.*[4]

b. The court of appeals dismissed the balance of the petition for want of jurisdiction based on its conclusion that petitioner "failed to exhaust" her challenges to the denial of her applications for relief from removal. Pet. App. 6a-7a. The court explained that "[a]lthough pro se briefs filed with the [Board] are construed liberally" and need not "use specific legal terms or elaborate on any stated argument," a pro se litigant must still "offer the [Board] more than a blank slate," and "petitioner's brief to the [Board] did not meaningfully identify a particular error in the [immigration judge's] decision," "[e]ven given its most liberal construction." *Id.* at 6a. The court concluded that petitioner failed "meaningfully [to] direct[] the [Board] to review a particular aspect of the [immigration judge's] detailed order" because petitioner's "recital, without elaboration, of her

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[4] Petitioner's petition for review, filed through counsel, did not renew petitioner's earlier suggestion that she might be a member of the *Franco-Gonzalez* class. See, *e.g.*, Pet. C.A. Br. 12-29.

filed applications for asylum, withholding of removal, and relief under the Convention Against Torture in the caption of her brief" and her "general declaration that she feared returning to [Mexico]" were insufficient to present any merits issue for the Board's review. *Ibid.*

**ARGUMENT**

Petitioner contends (Pet. 15-16, 21-24) that the court of appeals erred in determining that the Board permissibly exercised its discretion in upholding the immigration judge's competency determination. Petitioner further contends (Pet. 13-15, 18-21) that the court erred in dismissing petitioner's challenge to the denial of asylum and withholding relief on the ground that petitioner failed to exhaust her administrative remedies. The decision of the court of appeals is correct and does not conflict with any decision of this Court or any other court of appeals. Moreover, this case would be a poor vehicle for review because petitioner's underlying claims to relief from removal lack merit. No further review is warranted.

1. a. The court of appeals correctly determined that the Board permissibly exercised its discretion in upholding the immigration judge's competency determination. See Pet. App. 4a-6a. Petitioner does not dispute that the record contains "substantial evidence" supporting the immigration judge's factual finding that petitioner was, in fact, mentally competent to participate in her removal proceedings. *Id.* at 5a; see 8 U.S.C. 1252(b)(4)(B); *INS* v. *Elias-Zacarias*, 502 U.S. 478, 481 & n.1, 483-484 (1992). Nor does petitioner appear generally to dispute the court of appeals' analysis regarding the "procedural" propriety of the immigration judge's competency inquiry, which, *inter alia*, "considered [petitioner's] medical records" and included ques-

tions to petitioner about the "medications" that she was taking. Pet. App. at 4a-5a; see A.R. 70-71, 357-414. Petitioner instead presents the narrow question whether, notwithstanding the immigration judge's acquisition of other information to inform her competency determination, the Immigration and Nationality Act (INA), 8 U.S.C. 1101 *et seq.*, "requires an immigration judge to inquire about the nature and scope of an individual's mental illness or the effects of prescribed medication." Pet. 17-18; see Pet. i (second question presented). Nothing in the INA required the immigration judge to pose those specific questions in the course of evaluating competency.

The INA provides that, "[i]f" a noncitizen is not mentally competent, such that "it is impracticable by reason of [the] alien's mental incompetency for the alien to be present at the proceeding, the Attorney General shall prescribe safeguards to protect the rights and privileges of the alien." 8 U.S.C. 1229a(b)(3). But the INA does not itself address the procedure by which an immigration judge should evaluate the competency of a noncitizen in removal proceedings. Congress has instead vested the Attorney General with authority to determine such adjudicatory matters, 8 U.S.C. 1103(g), and the Board—as the Attorney General's delegee, see 8 C.F.R. 1003.1(a)(1)—has established the framework governing that process in *In re M-A-M-*, 25 I. & N. Dec. 474 (B.I.A. 2011).

In *M-A-M-*, the Board emphasized that "[t]he approach taken [to assess competency] in any particular case will vary based on the circumstances of the case." 25 I. & N. Dec. at 480; see Pet. App. 4a ("no specific approach, method, or manner of inquiry is mandated"). The Board, for instance, stated that an immigration

judge, among other things, "*might* ask the [noncitizen] * * * what [are] the purpose and effects of [any] medication" that she takes, *M-A-M-*, 25 I. & N. Dec. at 481 (emphasis added), but the Board does not require that specific inquiry. Petitioner accordingly acknowledges (Pet. 22) that the Board has "not impose[d] a specific list of questions [that] an immigration judge must ask" and the relevant questions will "depend[] on the circumstances" of the case.

To the extent that petitioner seeks to have a reviewing court impose its own framework for assessing mental competency in immigration proceedings, the federal courts lack that authority. It is a "very basic tenet of administrative law that agencies should be free to fashion their own rules of procedure." *Vermont Yankee Nuclear Power Corp.* v. *NRDC*, 435 U.S. 519, 544 (1978). Thus, if an "agency complie[s] with the procedures mandated by the relevant statutes," a reviewing court should not "stray beyond the judicial province" by "impos[ing] upon the agency its own notion of which procedures are 'best' or most likely to further" the "public good." *Id.* at 549 & n.21; accord *Garland* v. *Ming Dai*, 141 S. Ct. 1669, 1677 (2021); *Perez* v. *Mortgage Bankers Ass'n*, 575 U.S. 92, 102 (2015).

To the extent petitioner argues that the Board abused its discretion in the particular circumstances of this case by not requiring the immigration judge to ask the two questions that petitioner identifies, that fact-bound contention presents no question warranting this Court's review. See *United States* v. *Johnston*, 268 U.S. 220, 227 (1925) ("We do not grant a certiorari to review evidence and discuss specific facts."). Moreover, as the court of appeals explained, the entire competency inquiry here "comfortably satisfied the procedural guide-

lines" in *M-A-M-*, because the immigration judge "considered [petititioner's] medical records"; asked petitioner "about her medications and how she was feeling"; asked petitioner if she understood the various aspects of the process and could answer questions about her claims; "consistently simplified, explained, and repeated questions when [petitioner] expressed confusion"; and continued to evaluate petitioner throughout multiple hearings. Pet. App. 4a-5a; see pp. 5-8, *supra*. Indeed, as the court explained, petitioner ultimately "pays little heed to the results obtained" from all of the other questions that the immigration judge asked in the course of the inquiry. Pet. App. 5a.

b. Petitioner states (Pet. 17-18) that "this case presents the clean legal issue of whether the INA requires an immigration judge to inquire about [a] the nature and scope of an individual's mental illness or [b] the effects of prescribed medication." But petitioner identifies nothing in the INA or any other source of law mandating those particular questions. Petitioner instead appears (Pet. 16, 23-24) to rest her position on the Second Circuit's unpublished summary order in *K.O.* v. *Garland*, 860 Fed. Appx. 188 (2021), which petitioner contends conflicts with the court of appeals' decision in this case. Petitioner misreads *K.O.*, which reflects no division of authority that might warrant this Court's review.

In *K.O.*, the immigration judge failed to "make [any] finding about K.O.'s competency," which the government conceded was error under the Board's *M-A-M-* decision because the record showed both that K.O. had "urged that the [judge] consider his history of mental illness" and that K.O. suffered from "post-traumatic stress disorder (PTSD), anxiety, and depression, and

[had been] prescribed medication for PTSD while in immigration custody." *K.O.*, 860 Fed. Appx. at 190. The failure to make any competency finding itself warranted a remand for further proceedings. But the Second Circuit also stated that the immigration judge's error was "compounded" by the judge's misreading of the record —which clearly reflected K.O.'s PTSD—as containing nothing about "any [PTSD] diagnosis." *Ibid.* The court observed (in a passage from which petitioner quotes only the text italicized below, Pet. 16) that "[p]erhaps due to this misapprehension regarding the available documentation of K.O.'s mental illness, the [immigration judge] made no inquiry about *the nature and scope of that illness* (or the *prescribed medication*) other than to generally ask, 'Sir, with respect to your psychological issues, have you understood everything today?'" 860 Fed. Appx. at 190 (emphases added; citation omitted). The court then stated that "[*t*]*hat general question*, at the conclusion of the hearing, d[id] not comply with the inquiry necessary under the [Board's] own precedent" in *M-A-M-* regarding competency inquiries. *Ibid.* (emphasis added).

The summary order in *K.O.* does not, as petitioner suggests (Pet. 15-16), conflict with the court of appeals' decision here, which relies not only on the immigration judge's proper review of medical records relevant to petitioner's competency but also on the numerous questions that the judge posed to petitioner to ascertain petitioner's ability to understand and participate in the proceedings. The *K.O.* court, by contrast, had no occasion to decide whether an immigration judge should supplement such an inquiry with the specific questions that petitioner proposes. Petitioner suggests that *K.O.* held that an immigration judge must "meaningfully ask

about 'the nature and scope of an illness' or the effects of 'prescribed medication.'" Pet. 16 (quoting *K.O.*, 860 Fed. Appx. at 190) (brackets omitted). But *K.O.* simply observed that the immigration judge had *no information* on which to properly consider "the nature and scope" of the noncitizen's PTSD or "prescribed medication" because the judge had misread the record and asked only one "general" (and unilluminating) question about "psychological issues." 860 Fed. Appx. at 190. Furthermore, the Second Circuit's unpublished order has no "precedential effect" in future cases and cannot even be "cite[d]" in the Second Circuit (except in subsequent proceedings in K.O.'s own case). 2d Cir. R. 32.1.1(a) and (b)(2). *K.O.* thus does not reflect a division of authority warranting this Court's review.

2. a. The court of appeals also correctly determined that petitioner had failed to preserve the merits of her claims for relief from removal by failing to exhaust her administrative remedies before the Board. Pet. App. 6a. Judicial review of a final order of removal is available "only if" the noncitizen "has exhausted all administrative remedies available to the alien as of right." 8 U.S.C. 1252(d)(1). And to exhaust the remedy of an administrative appeal to the Board, a noncitizen must file a Notice of Appeal containing a statement "identify[ing] the reasons for the appeal" that "*specifically* identif[ies] the findings of fact, the conclusions of law, or both, that are being challenged," including any "question of law [that] is presented" and any "specific facts contested." 8 C.F.R. 1003.3(b) (emphasis added); see 8 C.F.R. 1003.1(d)(2)(i)(A) (providing for summary dismissal of appeal if the noncitizen "fails to specify the reasons for the appeal"). The Notice of Appeal must also indicate whether the noncitizen "will be filing a sep-

arate written brief or statement in support of the appeal." 8 C.F.R. 1003.3(b). Even if such a brief could cure any deficiency in the noncitizen's Notice of Appeal (as the court of appeals appears to have assumed here), petitioner's brief failed to adequately identify any issues concerning the denial of relief. Pet. App. 6a.

The form on which petitioner filed her Notice of Appeal (A.R. 14-16) included the specific warning that the appellant "must clearly explain the specific facts and law on which you base your appeal of the Immigration Judge's decision" and that "[t]he Board may summarily dismiss your appeal" if that explanation is omitted. A.R. 15. But petitioner's Notice of Appeal identified no issue concerning the merits of her applications for relief. It simply addressed the question of competency, stating that petitioner "still d[id not]" "understand what was happening" in the proceedings. *Ibid.*; see p. 10, *supra*.

Petitioner's brief likewise failed to "provide the [Board] with sufficient notice of [any] specific issue being contested" (other than perhaps petitioner's competency), and it ultimately offered little "more than a blank slate," even when "construed liberally" in light of petitioner's pro se status. Pet. App. 6a. Petitioner's listing of her "Applications" for relief as the caption of her brief, A.R. 6 (emphasis omitted), was unilluminating, particularly because petitioner conceded removability, making the entire case about her applications for relief. Petitioner's statement that "independent judicial review is critical" in "asylum law," which protects "refugees fleeing persecution," and her unelaborated assertion that she was "not given this review of [her] claims for relief," A.R. 7, likewise identified no meaningful appellate issue because the immigration judge did in fact review and rule upon petitioner's asylum and other

claims. Petitioner's observation that she came to the United States because she "was running from Mr. Martiniano" and "was fearful for [her] life, *ibid.*, presented no issue for appeal because the immigration judge found petitioner credible, Pet. App. 18a, 25a, and therefore accepted that she ran from Martiniano and "subjective[ly] fear[ed her] return" to Mexico. *Id.* at 22a, 25a. Finally, petitioner's statement of her "belie[f]" that there are legitimate "issues regarding [her] fear to return to [her] home country," A.R. 7, failed to identify any such "issues" for consideration.

Petitioner ignores a noncitizen's obligation to identify the issues for her administrative appeal, see Pet. 18-19 (failing to discuss 8 C.F.R. 1003.3(b)), and fails to explain how her brief's limited and general statements meaningfully identified for the Board any merits issue for appellate review, see Pet. 20-21. If such unilluminating statements by a pro se litigant were sufficient, noncitizens in removal proceedings could require the Board to review *every issue* resolved in their proceedings with similarly vague statements that do not fairly identify any issue for appeal, substantially hindering the Board's ability to resolve timely the cases on its already crowded appellate docket.

b. Petitioner contends (Pet. 13-15) that decisions from the Third, Seventh, and Eleventh Circuits deem similar administrative briefing by pro se litigants sufficient to exhaust their administrative remedies. But none of those decisions reflects any division of authority warranting review.

The Third Circuit in *Lin* v. *Attorney General*, 543 F.3d 114 (2008), for instance, agreed that "an alien taking an appeal of an [immigration judge's] decision 'must specifically identify the findings of fact, the conclusions

of law, or both, that are being challenged.'" *Id.* at 124 (quoting *Sidabutar* v. *Gonzales*, 503 F.3d 1116, 1120 (10th Cir. 2007), which quotes 8 C.F.R. 1003.3(b)). And although the Second Circuit (like the court of appeals here) appears to have agreed that pro se filings should be liberally construed by requiring that a noncitizen make "some effort" to "place the Board on notice of a straightforward issue being raised on appeal," *id.* at 121 (citation omitted), the court concluded that Lin did *not* exhaust his administrative remedies because, although he did specifically "challenge[] the [governing] legal standard before the [Board]," his "Notice of Appeal and his brief did absolutely nothing to alert the [Board] that he was challenging the [immigration judge's] credibility determination." *Id.* at 122. Like the court of appeals here, *Lin* emphasized that it would "not require the [Board] to guess which issues have been presented and which have not." *Ibid.* And although *Lin* ultimately considered the merits of the credibility determination, it did so only because the Board had "waived its specificity requirement" for exhaustion by deciding the merits of that issue, *id.* at 125. See *id.* at 122-126.

The Third Circuit applied a similar approach in *Yan Lan Wu* v. *Ashcroft*, 393 F.3d 418 (2005), where Yan's Notice of Appeal and brief to the Board specifically argued that the immigration judge "erred in finding that [Yan] doesn't have a fear of [the] Chinese government but the local people." *Id.* at 422 (citation omitted; second set of brackets in original). The court concluded that Yan did not need to argue "explicitly" that the immigration judge had "erred in considering only her [ambiguous] airport interview" in which Yan referred to "'the people in the village,'" because such a high degree of specificity was unnecessary where Yan had argued to

the Board that her testimony was that the "'police'" (not mere people in her village) raided and surveilled her home and thus sufficiently made "the Board aware of what issues were being appealed." *Id.* at 422 & n.4, 424 (citations omitted); see *id.* at 424-425 (explaining that the immigration judge found Yan "to be credible, but then render[ed] a decision that is contrary to [her] testimony," which "repeated[ly]" referred "to 'police,' 'arrest,' 'village officials,' or 'village authority'" and thus "evinc[ed] state-sponsored persecution," not harassment by mere villagers) (citation omitted). The court of appeals here likewise did not require a high degree of specificity from petitioner. Even so, it concluded that she failed to "meaningfully identify [any] particular error" for appeal. Pet. App. 6a; cf. *Abdulrahman* v. *Ashcroft*, 330 F.3d 587, 594-595 (3d Cir. 2003) (holding that the argument that the immigration judge "'erred as a matter of law and discretion'" was a "generalized claim" that did not exhaust the contention that the judge applied the wrong "burden of proof").

The Seventh Circuit has likewise recognized that "filings by *pro se* litigants should be liberally construed" and that it is enough "[i]f the judge can see what the *pro se* litigant is driving at." *Korsunskiy* v. *Gonzales*, 461 F.3d 847, 850 (2006). But in the very next sentence, the court emphasized that "this principle does not relieve litigants from the need to take those steps required to present and preserve their claims," *ibid.*, and the court ultimately ruled *against* the noncitizen, holding that he had "not exhausted" the relevant claim because he had conceded the underlying charge of excludability. *Id.* at 849-850. The Seventh Circuit has thus determined that 8 C.F.R. 1003.3(b) authorizes the Board to dismiss a noncitizen's appeal that is "lacking in specificity." *Pa-*

*sha* v. *Gonzales*, 433 F.3d 530, 532-533 (2005) (adding that the Board will "waive [such] a failure to exhaust" if it nevertheless resolves "the merits" of the relevant claim).

Finally, in *Alim* v. *Gonzales*, 446 F.3d 1239 (11th Cir. 2006), the government did not dispute that Alim had properly challenged the immigration judge's credibility findings before the Board. The government instead contended that that specific challenge did not extend to Alim's claims for withholding of removal under Section 1231(b)(3) and the CAT because Alim's brief to the Board had "only argued the merits of [his] asylum claim." *Id.* at 1253-1254. The Eleventh Circuit rejected that contention, concluding that the "only" plausible reading of the brief's challenge to the judge's "credib[ility]" finding was that it pertained to Alim's Section 1231(b)(3) and CAT claims. *Id.* at 1254. The court explained that not only had Alim's brief discussed the Section 1231(b)(3) and CAT claims in its procedural summary and prayer for relief, but those "were the *only* two claims that the [immigration judge] heard evidence on." *Ibid.* (emphasis added). Moreover, the brief discussed the judge's "factual findings, and legal conclusions, on the merits of these two claims," and it specifically "argu[ed] that the [judge had] erred" in finding that Alim was not credible, "a finding that could *only* [have] be[en] relevant to the merits of the [Section] 1231(b)(3) and CAT claims." *Ibid.* (emphasis added). In this case, by contrast, petitioner failed to give the Board "sufficient notice" of any arguments challenging the denial of her claims for relief by failing to "meaningfully identify" any such errors. Pet. App. 6a.

3. In any event, this case would be a poor vehicle for this Court's review because petitioner's underlying

claims for relief from removal lack merit. Petitioner's asylum claim was properly found to be time-barred, Pet. App. 21a, and that issue is not subject to judicial review in this case. See 8 U.S.C. 1158(a)(2)(B), (D), and (3). Petitioner's Section 1231(b)(3) withholding claim fails for multiple independent reasons, including that the immigration judge permissibly found that (1) petitioner lacks an objectively reasonable fear of future harm from Martiniano based on events that occurred long ago, given that he did not seek to harm petitioner after she left him while she still lived in Mexico and there is "no indication that he is still even living," Pet. App. 22a-23a, 26a-27a; (2) petitioner's past abuse was not based on any of the "enumerated grounds" such as membership in a particular social group, *id.* at 23a-24a, 26a; see p. 3, *supra*; and (3) there is no indication that petitioner cannot avoid harm by "mov[ing] to some other area in Mexico," Pet. App. 27a. Finally, petitioner's CAT-based claim fails because the immigration judge permissibly found that she failed to show a likelihood of torture if she were returned to Mexico or that any harm would be with the consent or acquiescence of a government official "acting in an official capacity," 8 C.F.R. 1208.18(a)(1). See Pet. App. 29a.

**CONCLUSION**

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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