No. 21-1240

# In the Supreme Court of the United States

OSCAR ARMANDO AMAYA, 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 a de novo standard of review should apply to the Board of Immigration Appeals' determination that any harm that petitioner experienced in El Salvador did not rise to the level of "severe pain or suffering, whether physical or mental," 8 C.F.R. 1208.18(a)(1).

2. Whether the Board of Immigration Appeals gave reasoned consideration to evidence regarding country conditions in assessing the possibility that petitioner would be tortured in El Salvador because of his gang tattoos.

**ADDITIONAL RELATED PROCEEDING**

United States Court of Appeals (9th Cir.):

*Amaya* v. *Garland*, No. 20-72745 (Sept. 15, 2021), reh'g denied (Dec. 10, 2021)

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### OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 5a-7a) is not published in the Federal Reporter but is reprinted at 859 Fed. Appx. 28. The decisions of the Board of Immigration Appeals (Pet. App. 16a-30a) and the immigration judge (Pet. App. 31a-47a) are unreported.

### JURISDICTION

The judgment of the court of appeals was entered on September 15, 2021. A petition for rehearing was denied on December 10, 2021 (Pet. App. 3a-4a). The petition for a writ of certiorari was filed on March 10, 2022. 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.*, authorizes the removal of certain

classes of noncitizens from the United States. 8 U.S.C. 1182, 1227.[1] During removal proceedings, a noncitizen may apply for protection from removal to a particular country under regulations implementing the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (Convention or CAT), *adopted* Dec. 10, 1984, S. Treaty Doc. No. 20, 100th Cong., 2d Sess. (1988), 1465 U.N.T.S. 85.

Under Article 3 of the Convention, party States agree not to "expel, return (*refouler*) or extradite a person to another State where there are substantial grounds for believing that he would be in danger of being subjected to torture." Art. 3(1), 1465 U.N.T.S. 114. After the Convention entered into force for the United States, Congress directed that regulations be promulgated "to implement the obligations of the United States under Article 3." Foreign Affairs Reform and Restructuring Act of 1998, Pub. L. No. 105-277, Div. G, § 2242(b), 112 Stat. 2681-822. The Attorney General promulgated the relevant regulations in 1999. 64 Fed. Reg. 8478, 8479 (Feb. 19, 1999).

Under those regulations, a noncitizen applying for CAT protection bears the burden of "establish[ing] that it is more likely than not that he or she would be tortured if removed to the proposed country of removal." 8 C.F.R. 1208.16(c)(2). The regulations define "[t]orture" as:

> any act by which severe pain or suffering, whether physical or mental, is intentionally inflicted on a person for such purposes as obtaining from him or her

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

> or a third person information or a confession, punishing him or her for an act he or she or a third person has committed or is suspected of having committed, intimidating or coercing him or her or a third person, or for any reason based on discrimination of any kind, when such pain or suffering is inflicted by, or at the instigation of, or with the consent or acquiescence of, a public official acting in an official capacity or other person acting in an official capacity.

8 C.F.R. 1208.18(a)(1).

The regulations further provide that, "[i]n assessing whether it is more likely than not that an applicant would be tortured in the proposed country of removal, all evidence relevant to the possibility of future torture shall be considered, including, but not limited to": (i) "[e]vidence of past torture inflicted upon the applicant"; (ii) "[e]vidence that the applicant could relocate to a part of the country of removal where he or she is not likely to be tortured"; (iii) "[e]vidence of gross, flagrant or mass violations of human rights within the country of removal, where applicable"; and (iv) "[o]ther relevant information regarding conditions in the country of removal." 8 C.F.R. 1208.16(c)(3).

CAT protection may "be granted either in the form of withholding of removal or in the form of deferral of removal." 8 C.F.R. 1208.16(c)(4). A noncitizen "entitled to [CAT] protection shall be granted withholding of removal unless [the noncitizen] is subject to mandatory denial of withholding of removal" under 8 C.F.R. 1208.16(d)(2) or (3). A noncitizen is subject to such mandatory denial if, for instance, the noncitizen has been convicted of a "particularly serious crime." 8 U.S.C. 1231(b)(3)(B)(ii); see 8 C.F.R. 1208.16(d)(2). If he has been, he may still be granted "deferral of removal." 64

Fed. Reg. at 8481-8482; see 8 C.F.R. 1208.17(a). A deferral of removal means only that the noncitizen may not be removed "to the country in which it has been determined that the [noncitizen] is likely to be tortured"; the noncitizen still "may be removed at any time to another country where he or she is not likely to be tortured." 8 C.F.R. 1208.17(b)(2).

2. Petitioner is a native and citizen of El Salvador. Pet. App. 6a. In 2006, he traveled to the United States with his mother and his brother Fernando. *Id.* at 38a; Administrative Record (A.R.) 420-421. The Department of Homeland Security (DHS) placed them in removal proceedings, charging that they were subject to removal as noncitizens present in the United States without being admitted or paroled. A.R. 421, 2475-2477; see 8 U.S.C. 1182(a)(6)(A)(i).

At the time, petitioner was about 12 years old, and his proceedings were consolidated with those of his mother and brother. Pet. App. 32a. After all three conceded removability, petitioner's mother applied for asylum, seeking derivative status for her sons. A.R. 421, 2458-2461. An immigration judge (IJ) granted the application. Pet. App. 102a-122a; A.R. 420-435. In 2010, the Board of Immigration Appeals (Board) vacated the IJ's decision and ordered the removal of petitioner, his mother, and his brother from the United States. A.R. 2455-2456. In 2014, the court of appeals remanded the case to the Board for reconsideration in light of intervening Ninth Circuit and Board precedent. Pet. App. 123a-125a; A.R. 530-531. The Board, in turn, remanded the proceedings to the IJ. Pet. App. 126a-127a; A.R. 2449.

In 2017, while the proceedings were pending before the IJ on remand, petitioner was convicted of second-degree robbery, in violation of California law, and sentenced to five years of imprisonment. Pet. App. 32a-33a; A.R. 2371. The immigration court severed petitioner's case from his mother's and brother's proceedings and ordered his case administratively closed while he was in state custody. A.R. 124, 2382. In 2019, after petitioner was released from state prison, the immigration court recalendared his removal proceedings. Pet. App. 33a. By that point, the immigration court had granted asylum to petitioner's mother and brother. *Id.* at 84a-85a; A.R. 387, 389. The IJ thus proceeded to consider a separate application for relief and protection that petitioner had submitted in his own name. Pet. App. 33a-34a; see A.R. 2383-2396. Petitioner asserted that he feared returning to El Salvador because (1) in 2005, before he had left the country, he had cooperated in the prosecution of MS-13 gang members who had killed his brother Ronald in his presence, and (2) after arriving in the United States, he became affiliated with the Norteños, a California gang, and acquired several gang-related tattoos that could cause him to be targeted by Salvadoran "gangs, death squads, and the police." Pet. App. 18a; see *id.* at 6a, 37a-38a.

After a hearing, the IJ ordered petitioner's removal to El Salvador. Pet. App. 31a-47a. The IJ determined that petitioner's second-degree-robbery conviction constituted a "particularly serious crime" that rendered him ineligible for asylum, withholding of removal under the INA, and withholding of removal under the CAT regulations. *Id.* at 35a. The IJ also denied petitioner's request for deferral of removal under the CAT regulations, finding that he had "not met his burden to establish it is more likely than not he would be tortured if returned to El Salvador." *Id.* at 40a; see *id.* at 36a-47a.

In assessing whether petitioner had met his burden, the IJ considered whether petitioner had "been subjected to past torture in El Salvador." Pet. App. 40a. The IJ found that he had not. *Ibid.* The IJ explained that, although petitioner "witnessed his brother's murder, which was certainly a psychologically difficult event that resulted in his diagnosis of post-traumatic stress disorder," petitioner "was not physically harmed by gang members, and he suffered no other known harm, even after identifying the gang members to police." *Ibid.* The IJ thus determined that petitioner's experience did not "rise[] to the level of torture, as torture is an extreme form of pain and suffering." *Ibid.*

The IJ also considered whether "the objective evidence sufficiently establishes that there is a more likely than not chance [petitioner] will experience torture in the future in El Salvador." Pet. App. 40a. The IJ found "a lack of evidence that [MS-13 gang members] have any continuing interest in harming [petitioner] now, fourteen years" after Ronald's murder. *Id.* at 41a. And the IJ found petitioner's fear that "gang members *may* see his tattoos, *may* question him about his tattoos or loyalty, *may* harm him, and *may* subject him to torture or death" to be "impermissibly speculative." *Id.* at 42a.

The IJ further "considered all country condition evidence to determine if there is a more likely than not risk of torture to [petitioner]." Pet. App. 43a. The IJ found that, although the evidence "paint[ed] a grim picture regarding the current levels of violence in El Salvador," there was "a lack of objective evidence that [petitioner] himself [would] be targeted," as well as "a lack of evidence" that he would be subjected to "an extreme form of pain and suffering." *Id.* at 43a-44a. The IJ also found the evidence insufficient to establish that petitioner "would face torture at the hands of government authorities or with their consent or acquiescence." *Id.* at 44a. The IJ explained that "the efforts taken by the government to arrest, detain, and prosecute Ronald's murderers show they were willing to assist [petitioner's] family and punish criminals within the country." *Id.* at 46a. Thus, "[e]ven aggregating all risks of torture referred to in the record," the IJ was "unable to find that [petitioner] ha[d] met his burden" under the Convention. *Ibid.*

3. The Board dismissed petitioner's appeal. Pet. App. 16a-30a. The Board observed that because petitioner had "not raised any challenge to the [IJ's] conclusion that he is ineligible for asylum and withholding of removal," the "sole issue on appeal [wa]s whether [he] qualifies for deferral of removal under the Convention." *Id.* at 17a. Finding no clear error in any of the IJ's "factual findings," the Board affirmed the denial of deferral of removal. *Id.* at 29a-30a.

The Board "discern[ed] no reason to disturb the [IJ's] findings and determination regarding the issue of past torture." Pet. App. 20a. First, the Board "agree[d] with the [IJ] that the harm [petitioner] experienced in El Salvador does not rise to the level of torture"—*i.e.*, to the level of "'severe pain or suffering, whether physical or mental.'" *Id.* at 19a (quoting 8 C.F.R. 1208.18(a)(1)). The Board explained that, although petitioner "was present when MS-13 gang members killed his brother," he "was not targeted or pursued"; he "was able to return to the scene without incident"; and "he has not demonstrated a need for mental health services that would support a finding that [his] trauma rises to the level of persecution." *Id.* at 19a-20a. Second, the Board found that petitioner "presented insufficient evidence to establish that any harm he may have experienced when his brother was killed by the gang members was specifically intended to harm him." *Id.* at 20a. The Board explained that "[a]cts that merely have the foreseeable result of inflicting harm are not sufficient; 'the actor must intend the actual consequences of his conduct.'" *Ibid.* (brackets and citation omitted).

The Board further determined that, "even if the 2005 incident constitutes past torture," the "record supports the [IJ's] finding that [petitioner] does not face a clear probability of future torture." Pet. App. 20a. The Board found the evidence insufficient to establish that Ronald's alleged murderers would have any continuing interest in petitioner, "[g]iven the passage of almost 14 years since [petitioner] departed El Salvador." *Id.* at 26a; see *id.* at 21a, 25a-26a. The Board also rejected petitioner's assertion that "he might be tortured upon return to El Salvador based on country conditions evidence that gang members and the police in El Salvador could target him because of his tattoos." *Id.* at 22a. The Board explained that, besides pointing to his tattoos, petitioner had "not otherwise identified record evidence demonstrating whether and how each step in his hypothetical chain of events is more likely than not to happen." *Ibid.* The Board thus found the evidence insufficient to establish "an individualized likelihood of future torture." *Id.* at 25a; see *id.* at 20a-21a (finding that "the record does not reveal that [petitioner] risks being singled out personally for torture").

Finally, the Board determined that, "even if [petitioner] were able to establish that the MS-13 gang members or death squads were interested in torturing him," he "did not establish that a public official or person acting in an official capacity would acquiesce to the torture." Pet. App. 28a-29a. The Board found petitioner's "reliance on generalized evidence of widespread violent crime and corruption, which is not particular to him," to be "insufficient." *Id.* at 27a. The Board explained that, "while the background evidence may indicate some instances of corruption and government complicity with gangs, evidence of the general possibility of such events does not meet [petitioner's] burden of establishing that it is more likely than not that he will be subjected to such treatment." *Id.* at 29a.

4. The court of appeals denied petitioner's petition for review in an unpublished decision. Pet. App. 5a-7a. The court upheld the Board's determination that petitioner "did not suffer past torture." *Id.* at 6a. "[R]eviewing for substantial evidence [the] factual findings underlying the [Board's] determination," the court found that the "record does not reflect that members of the [MS-13 gang] intended to specifically torture [petitioner]." *Ibid.* The court further determined that, "[a]bsent the inference that stems from a finding of past torture, the evidence does not compel the conclusion that [petitioner] faces a 'likelihood of future torture' if removed to El Salvador." *Id.* at 7a. The court explained that the "only evidence presented by [petitioner] was of a generalized nature, which does not suffice." *Ibid.*

**ARGUMENT**

Petitioner contends (Pet. 12-15) that de novo review should apply to the Board's determination that any harm that petitioner experienced in El Salvador did not rise to the level of "severe pain or suffering, whether physical or mental," 8 C.F.R. 1208.18(a)(1). The court of appeals did not address what standard of review should apply to that determination because it upheld the Board's decision on the independent ground that any harm that petitioner experienced was not intentionally inflicted. The court correctly applied a substantial-evidence standard to the issue of intent, and its application of that standard does not conflict with any decision of this Court or another court of appeals. In any event, this case would be a poor vehicle for this Court's review because the issue on which petitioner seeks certiorari would not be outcome-determinative.

Petitioner also contends (Pet. 20-28) that the Board failed to give reasoned consideration to evidence regarding country conditions in assessing the possibility that he would be tortured in El Salvador because of his gang tattoos. That contention lacks merit, and petitioner has not identified any court of appeals in which the outcome of his case would have been different. In any event, this case would be a poor vehicle for this Court's review because petitioner did not pursue below the relief that he now seeks in his petition for a writ of certiorari. His petition should therefore be denied.

1. Petitioner contends (Pet. 17) that a de novo standard of review should apply to "whether the undisputed facts demonstrated that [he] suffered past mental suffering amounting to torture." That contention does not warrant this Court's review.

a. The court of appeals' decision in this case does not implicate the question on which petitioner seeks certiorari. The Board in this case affirmed the IJ's determination that petitioner did not suffer past torture in El Salvador on two independent grounds: (1) that "the harm [petitioner] experienced in El Salvador d[id] not rise to the level of torture," *i.e.*, to the level of "'severe pain or suffering, whether physical or mental,'" Pet. App. 19a (quoting 8 C.F.R. 1208.18(a)(1)); and (2) that, "[i]n addition," the evidence was "insufficient" to "establish that any harm he may have experienced when his brother was killed by the gang members was specifically intended to harm him," *id.* at 20a.

In upholding the Board's decision on the issue of past torture, the court of appeals reached only the second of those grounds. Pet. App. 6a. And consistent with this Court's precedent, the court of appeals treated the gang members' intent as a question of fact. See *U.S. Bank N.A.* v. *Village at Lakeridge, LLC*, 138 S. Ct. 960, 966 (2018) (describing "questions of who did what, when or where, how or why"—including questions of "motives"—as questions of "'basic' or 'historical' fact," to be "review[ed] deferentially") (citation omitted). The court thus described the Board's finding of no intent as a "factual finding[] underlying the [Board's] determination of ineligibility for CAT [protection]." Pet. App. 6a (citing *Xochihua-Jaimes* v. *Barr*, 962 F.3d 1175, 1183 (9th Cir. 2020)). And in accordance with 8 U.S.C. 1252(b)(4)(B), the court applied substantial-evidence review to that factual finding. See 8 U.S.C. 1252(b)(4)(B) (requiring courts of appeals to treat the agency's "findings of fact [as] conclusive unless any reasonable adjudicator would be compelled to conclude to the contrary"); *Nasrallah* v. *Barr*, 140 S. Ct. 1683, 1692 (2020) (explaining that Section 1252(b)(4)(B)'s "standard of review is the substantial-evidence standard").

Petitioner does not dispute that the issue of intent—the issue addressed by the court of appeals—is a factual one that is properly subject to substantial-evidence review. Indeed, he acknowledges that the "'substantial evidence'" standard applies to the Board's "factual findings." Pet. 13 (citing 8 U.S.C. 1252(b)(4)(B)). And in his briefing below, he referenced the "'deferential'" "standard of review for factual findings" in addressing whether members of MS-13 had the "intent to target" him. Pet.

C.A. Reply Br. 5 (quoting *Parada* v. *Sessions*, 902 F.3d 901, 909 (9th Cir. 2018)).

Petitioner instead contends (Pet. 17) that the court of appeals should have "review[ed] the record *de novo* to determine whether the undisputed facts demonstrated that [he] suffered past mental suffering amounting to torture." But having upheld the Board's finding of no intent, the court had no occasion to reach the Board's determination that "the harm [petitioner] experienced in El Salvador d[id] not rise to the level of * * * 'severe pain or suffering, whether physical or mental.'" Pet. App. 19a (quoting 8 C.F.R. 1208.18(a)(1)). The court thus did not address what standard of review should apply to that determination, and its decision does not implicate the question on which petitioner seeks this Court's review.

Throughout his petition for a writ of certiorari, petitioner also appears to treat as "undisputed" that the gang members who killed his brother specifically intended to harm petitioner. Pet. 17-18; see Pet. 15 n.4 (asserting that, "[h]ere, there is no dispute about the facts"). But the Board found otherwise, Pet. App. 20a, and the court of appeals upheld that finding, *id.* at 6a. Thus, to the extent that petitioner's first question presented rests on the premise that the gang members' intent is "undisputed," Pet. ii, that premise is mistaken. For that reason as well, the first question presented is not implicated here.

b. Contrary to petitioner's contention (Pet. 14-15), the court of appeals' application of the substantial-evidence standard in this case does not conflict with any decision of another court of appeals.

*Turkson* v. *Holder*, 667 F.3d 523 (4th Cir. 2012), for example, involved what standard the Board should apply in reviewing a decision of an IJ—not what standard the court of appeals should apply in reviewing a decision of the Board. *Id.* at 526-530. That distinction is important because the standard that applies to review of decisions within the agency is merely a function of the powers that the Attorney General, by regulation, has chosen to delegate to the Board and to IJs. 8 C.F.R. 1003.1(d)(3); see 67 Fed. Reg. 54,878, 54,891 (Aug. 26, 2002). That standard need not correspond to the standard that appellate courts apply when reviewing the agency's ultimate decisions under Section 1252(b)(4), which is a matter of congressional intent about judicial review. In any event, the Fourth Circuit described the issue here—namely, the issue of "gang members' motivations"—as "*a classic factual question*" subject to deferential, rather than de novo, review. *Turkson*, 667 F.3d at 529 (quoting *Crespin-Valladares* v. *Holder*, 632 F.3d 117, 127 (4th Cir. 2011)).

*Kaplun* v. *Attorney General*, 602 F.3d 260 (3d Cir. 2010), likewise involved what standard of review the Board should apply, not what standard of review the court of appeals should apply. *Id.* at 268-273. Even then, the Third Circuit in *Kaplun* did not address what standard should apply to the issue of intent. Rather, the Third Circuit stated only that de novo review should apply to whether the degree of harm is "severe enough to rise to the level of torture," *id.* at 271—an issue that the court of appeals in this case did *not* address, see pp. 10-11, *supra*.

The Eleventh Circuit decisions that petitioner cites (Pet. 14) are also inapposite. *Jean-Pierre* v. *U.S. Attorney General*, 500 F.3d 1315 (11th Cir. 2007), addressed the scope of the judicial-review provision in 8 U.S.C. 1252(a)(2)(D)—namely, whether the statutory phrase "questions of law" includes the application of "a legal definition to a set of undisputed or adjudicated historical facts." 500 F.3d at 1322. *Jean-Pierre* thus involved an issue of jurisdiction, not of the standard of review—a distinction this Court has recognized. See *Guerrero-Lasprilla* v. *Barr*, 140 S. Ct. 1062, 1069 (2020) (distinguishing the scope of the phrase "questions of law" in Section 1252(a)(2)(D) from issues involving the proper "standard of review"). And in any event, *Jean-Pierre* did not address how to characterize the issue of intent.

Petitioner's reliance (Pet. 14) on *Flores* v. *United States Attorney General*, 783 Fed. Appx. 993 (11th Cir. 2019) (per curiam), is likewise misplaced. That unpublished decision is nonprecedential, so it cannot create any conflict warranting this Court's review. See 11th Cir. R. 36-2 ("Unpublished opinions are not considered binding precedent."). And if anything, *Flores* suggests that intent should be treated as a "factual" issue subject to the "substantial-evidence test." 783 Fed. Appx. at 994 ("[W]hether the undisputed facts from the administrative record constitute 'torture' is a legal determination, while *all other questions* in the CAT context are factual ones.") (emphasis added).

Petitioner also cites (Pet. 15) the Ninth Circuit's decision in *Ridore* v. *Holder*, 696 F.3d 907 (2012). But any intra-circuit conflict would not itself warrant this Court's review. See *Wisniewski* v. *United States*, 353 U.S. 901, 902 (1957) (per curiam) ("It is primarily the task of a Court of Appeals to reconcile its internal difficulties."). In any event, no such conflict exists. *Ridore* involved the Board's standard of review, not the court of appeals'. 696 F.3d at 914-919. And it treated the issue of a perpetrator's intent as a factual issue subject to deferential, rather than de novo, review. *Id.* at 916-917.

c. In any event, this case would be a poor vehicle for this Court's review of the first question presented. As explained above, see pp. 10-12, *supra*, the court of appeals' decision does not implicate the issue of what standard of review applies to "whether the undisputed facts demonstrated that [petitioner] suffered past mental suffering amounting to torture." Pet. 17. But even if it did, that issue would not be outcome-determinative.

To establish that he suffered past torture, petitioner must show not only that he experienced "severe pain or suffering," but also that it was "intentionally inflicted" and that it was "inflicted by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity." 8 C.F.R. 1208.18(a)(1). Petitioner cannot make either of those other showings. The Board found that petitioner "presented insufficient evidence to establish that any harm he may have experienced when his brother was killed * * * was specifically intended." Pet. App. 20a. And the IJ found that, far from consenting to or acquiescing in the gang members' conduct, public officials "took great efforts to prosecute the suspects and bring them to trial." *Id.* at 45a-46a.

Moreover, evidence of past torture is only "one factor, albeit a significant one, that must be considered regarding the likelihood of future torture." Pet. App. 20a; see 8 C.F.R. 1208.16(c)(3). And here, the Board determined that, "even if the 2005 incident constitutes past torture," the "record supports the [IJ's] finding that [petitioner] does not face a clear probability of future torture." Pet. App. 20a. Petitioner argues that, "absent changed circumstances, 'if an individual has been tortured and has escaped to another country, it is likely that [s]he will be tortured again if returned to the site of h[er] prior suffering.'" Pet. 16 (brackets in original) (quoting *Avendano-Hernandez* v. *Lynch*, 800 F.3d 1072, 1080 (9th Cir. 2015)). But the Board in this case found changed circumstances. Pet. App. 25a-26a. It explained that "almost 14 years" have passed "since [petitioner] departed El Salvador" and that "it is 'unknown whether [his brother's] alleged murderers are still in El Salvador, are still in a gang, are still alive, or, more importantly, have any continuing interest in [petitioner].'" *Ibid.* (quoting *id.* at 41a); see *id.* at 41a (finding that "the objective evidence does not support the contention that gang members in El Salvador would harbor the same motivations to harm [petitioner] now, due to the passage of time and the change in contextual circumstances"). Thus, regardless of the merits of the first question presented, the Board correctly "decline[d] to disturb the [IJ's] decision denying [petitioner's] application for deferral of removal." *Id.* at 30a.

2. Petitioner also contends (Pet. 20) that the Board failed to give "reasoned consideration" to evidence regarding "country conditions" in assessing the possibility that he would be tortured in El Salvador because of his Norteños gang tattoos. That contention likewise does not warrant this Court's review.

a. The implementing regulations provide that, "[i]n assessing whether it is more likely than not that an applicant would be tortured in the proposed country of removal, all evidence relevant to the possibility of future torture shall be considered." 8 C.F.R. 1208.16(c)(3). The Ninth Circuit has construed Section 1208.16(c)(3) to mean that, "where potentially dispositive testimony and documentary evidence is submitted, the [Board] must give reasoned consideration to that evidence." *Cole* v. *Holder*, 659 F.3d 762, 772 (2011).

Contrary to petitioner's contention (Pet. 20), the Board gave "reasoned consideration" to the "country conditions evidence" in this case. Citing a 2007 report by the International Human Rights Clinic at Harvard Law School, the Board "recognize[d] the role tattoos play in gang culture and the dangerous circumstances for individuals perceived to be a gang's enemy." Pet. App. 22a (citing, *inter alia*, the report at A.R. 657-768). Citing that same report as well as reports published by the Immigration and Refugee Board of Canada and by the Center for International Policy, the Board also acknowledged "evidence of widespread violent crime and corruption" in El Salvador. *Id.* at 27a (citing A.R. 726-734, 831, 1101-1105). Petitioner thus errs in asserting (Pet. 26) that the Board "did not discuss the substance of even one" of the reports that he submitted.[2]

Petitioner also errs in asserting (Pet. 26) that the Board did not "meaningfully engage[]" with his country-conditions evidence. The Board explained that petitioner's fear of future torture rested on a "chain of assumptions" about "what might happen upon his return to El Salvador," Pet. App. 29a, and that his country-conditions evidence was simply too "generalized" to establish each link in that hypothetical chain. *Id.* at 27a; see *id.* at 22a (finding the "record evidence" insufficient to "demonstrat[e] whether and how each step in [peti-

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[2] Petitioner relies (Pet. 26) on a report that he describes as a "UN Refugee Agency report." The report was actually by the Research Directorate of the Immigration and Refugee Board of Canada. Pet. App. 137a, 144a. The UN Refugee Agency, also known as the UNHCR, reproduced the report on its website, but that website included a disclaimer stating that the report "is not a UNHCR publication" and the "UNHCR is not responsible for, nor does it necessarily endorse, its content." *Id.* at 138a.

tioner's] hypothetical chain of events is more likely than not to happen"); *id.* at 25a (finding the evidence insufficient to establish "an individualized likelihood of future torture"). The Board thus concluded that, "while the background evidence may indicate some instances of corruption and government complicity with gangs, evidence of the general possibility of such events does not meet [petitioner's] burden of establishing that it is more likely than not that he will be subjected to such treatment." *Id.* at 29a.

b. Petitioner does not assert that the Ninth Circuit's "reasoned consideration" standard conflicts with the standard applied by any other circuit. See Pet. 20-23, 28. Rather, he asserts merely that the Board failed to give reasoned consideration to the country-conditions evidence in this case, and he has not identified any court of appeals in which the outcome of his case would have been different. In *Quinteros* v. *Attorney General*, 945 F.3d 772 (2019), the Third Circuit remanded where the Board had "ignor[ed]" certain evidence. *Id.* at 787. Likewise, in *Rodriguez-Arias* v. *Whitaker*, 915 F.3d 968 (2019), the Fourth Circuit remanded where there had been a "wholesale failure" by the Board to consider country-conditions evidence. *Id.* at 975. Here, in contrast, the Board considered the relevant evidence and explained its reasons for finding the evidence insufficient. See pp. 16-18, *supra*; *Ibarra Chevez* v. *Garland*, 31 F.4th 279, 292-293 (4th Cir. 2022) (likewise rejecting argument that the agency arbitrarily ignored relevant country-conditions evidence regarding the likelihood of future torture in El Salvador).

c. In any event, this case would be a poor vehicle for this Court's review of the second question presented. In his petition for a writ of certiorari, petitioner makes

(Pet. 22) a standalone "procedural" argument that the Board failed to give reasoned consideration to his country-conditions evidence. The remedy for such a procedural error, if demonstrated, is a "remand for the agency to reconsider [the] CAT claim in light of the * * * evidence," *Cole*, 659 F.3d at 773, and such a remand is what petitioner now seeks, see Pet. 1, 20, 28, 29. In the court of appeals, however, petitioner argued that the Board had failed to properly consider his country-conditions evidence as part of a substantive challenge to the Board's determination that he had not established a "particularized risk of being identified, targeted, and killed." Pet. C.A. Br. 41; see *id.* at 49-50. Petitioner thus sought a "remand with instructions to enter an order granting [him] deferral of removal"; he did not seek a remand for further consideration of his evidence—not even in the alternative. *Id.* at 55; see Pet. C.A. Reply Br. 26. Petitioner therefore did not pursue below the relief that he now seeks, and the court of appeals did not address a standalone procedural challenge to the Board's decision. See Pet. App. 7a. Accordingly, this case would be a poor vehicle for this Court's review. See *United States* v. *Jones*, 565 U.S. 400, 413 (2012) (deeming forfeited an argument not raised or addressed below); *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).

**CONCLUSION**

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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* The Solicitor General is recused in this case.