No. [redacted]

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

[redacted]

Petitioner,

v.

William P. BARR,
Attorney General of the United States,

Respondent.

PETITION FOR REVIEW
FROM THE UNITED STATES DEPARTMENT OF JUSTICE
EXECUTIVE OFFICE FOR IMMIGRATION REVIEW
BOARD OF IMMIGRATION APPEALS
AGENCY CASE NUMBER: [redacted]

PETITIONER'S OPENING BRIEF

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SUMMARY OF THE CASE

The Court should reverse, or at a minimum vacate and remand, the Board of Immigration Appeals ("BIA") decision vacating the Immigration Judge's ("IJ") deferral of removal. The IJ correctly granted Petitioner [redacted] ("Mr. [redacted] application for deferral of removal under the Convention Against Torture ("CAT"), finding Mr. [redacted] established that, if removed to South Sudan, it was more likely than not that he would be subjected to torture at the hands of that country's government due to his personal characteristics and his father's political actions. The BIA's decision to vacate the IJ's well-reasoned and fact-based decision was incorrect. Specifically, the BIA made three separate legal errors: (1) it failed to apply the correct legal standard (clear error) to its review of the IJ's factual findings, instead disregarding the IJ's factual findings and improperly substituting findings of its own; (2) it failed to consider Petitioner's claims in the aggregate, as is required by law; and (3) it erroneously believed that the absence of a specific threat against Mr. [redacted] was a sufficient basis to deny his claim. Each of these is error. *See Kassim v. Barr*, 954 F.3d 1138, 1142 (8th Cir. 2020); *Waldron v. Holder*, 688 F.3d 354, 360 (8th Cir. 2012); *Habtemicael v. Ashcroft*, 370 F.3d 774, 782 (8th Cir. 2004).

Mr. [redacted] requests oral argument of 15 minutes per side to present these important issues to the Court.

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JURISDICTIONAL STATEMENT

Petitioner [redacted] ("Mr. [redacted] seeks review of the decision of the Board of Immigration Appeals ("BIA"), issued on November 13, 2020, which affirmed-in-part and vacated-in-part the March 18, 2020 decision of the Immigration Judge ("IJ"). The BIA affirmed the IJ's order of removal but vacated the IJ's grant of deferral of removal under the Convention Against Torture ("CAT"). The decision of the BIA constitutes a final order of removal under 8 U.S.C. §§ 1252(a)(1) and (b)(6), and thus the associated CAT order is subject to review by this Court. *See Nasrallah v. Barr*, 140 S. Ct. 1683, 1687 (2020) ("If the Board of Immigration Appeals orders removal and denies CAT relief, the noncitizen may obtain judicial review in a federal court of appeals of both the final order of removal and the CAT order."); *Abdi Omar v. Barr*, 962 F.3d 1061, 1063 (8th Cir. 2020) ("Because [Petitioner] disputes the Board's denial of relief under the CAT, we have jurisdiction to review both legal and factual challenges to the CAT order.") (citing *Nasrallah*, 140 S. Ct. at 1688).

On December 10, 2020, within 30 days of the BIA decision dismissing the appeal, Mr. [redacted] filed a timely petition for review with this Court pursuant to 8 U.S.C. § 1252(b)(1). This appeal was docketed as No. [redacted]

STATEMENT OF THE ISSUES

1. Did the BIA err by failing to properly apply a "clear error" standard of review to the IJ's factual finding that it is more likely than not that Mr. [redacted] would be subjected to torture if returned to South Sudan and, instead, substituting its own findings of fact on that issue?

Most Apposite Authorities:

- 8 C.F.R. § 1003.1(d)(3)(i)
- *Anderson v. City of Bessemer City*, 470 U.S. 564 (1985)
- *Waldron v. Holder*, 688 F.3d 354 (8th Cir. 2012)
- *Nabulwala v. Gonzales*, 481 F.3d 1115 (8th Cir. 2007)
- *Ramirez-Peyro v. Gonzales*, 477 F.3d 637 (8th Cir. 2007)

2. Did the BIA err by failing to consider Mr. [redacted] claims regarding his risk of torture if returned to South Sudan both individually and in the aggregate?

Most Apposite Authorities:

- 8 C.F.R. § 1208.16(c)(3)
- *Hassan v. Rosen*, 985 F.3d 587 (8th Cir. 2021)
- *Habtemicael v. Ashcroft*, 370 F.3d 774 (8th Cir. 2004)
- *Quijada-Aguilar v. Lynch*, 799 F.3d 1303 (9th Cir. 2015)
- *Kamara v. Att'y Gen.*, 420 F.3d 202 (3d Cir. 2005)
- *In re J-R-G-P-*, 27 I. & N. Dec. 482 (BIA 2018)

3. Did the BIA err by finding that the absence of a specific threat against Mr. [redacted] was sufficient basis to deny his claim?

Most Apposite Authorities:

- 8 C.F.R. § 1208.16(c)(3)
- *Zewdie v. Ashcroft*, 381 F.3d 804 (8th Cir. 2004)

- *Kassim v. Barr*, 954 F.3d 1138 (8th Cir. 2020)

STATEMENT OF THE CASE

I. Mr. [redacted] credibly fears torture in South Sudan.

Mr. [redacted] is a 30-year-old man facing removal to South Sudan. (Add. 5.) Mr. [redacted] was born in Egypt and is a citizen of South Sudan because his parents were born there. (*Id.*) He left Sudan when he was six or seven years old and entered the United States in June 1999 as a derivative asylee, as his father had previously been granted asylum status. (*Id.*) Mr. [redacted] has never left the United States, and he has not returned to South Sudan. He knows of no family members who live there, and none of his immediate family members have ever returned. (*Id.*) Mr. [redacted] has family ties in the United States, including his lawful permanent resident ("LPR") parents and sister, as well as a U.S. citizen sister, brother, niece, and 3-year-old son. (*Id.*)

Mr. [redacted] has been convicted of domestic assault, among other offenses, and has been incarcerated since August 4, 2017. (*Id.* at 5-7.) The criminal offenses of his past stemmed from mental health and substance abuse issues, which he is working to overcome through Alcoholics Anonymous, other treatment programs, and therapy. (*Id.* at 6.) Mr. [redacted] has made significant progress in treatment and has not used controlled substances while incarcerated. (*Id.* at 6-7.) Mr. [redacted] has made amends with his family and has tried to make amends with his ex-wife. (*Id.* at 6.)

If released, Mr. [redacted] plans to stay at a halfway house, then with his mother or brother in Rochester, Minnesota. (*Id*. at 7.) He would seek further alcohol treatment with Alcoholics Anonymous and finish school to get an automotive degree to be an auto mechanic. (*Id*.)

Mr. [redacted] credibly fears returning to South Sudan because of his father's significant political involvement there. (*Id*.) Mr. [redacted] fears the government of South Sudan will kill him if he returns. (*Id*.) His father shares that concern. (*Id*. at 8.) Petitioner, "[redacted] bears essentially the same name as his father, "[redacted] who was a member of Parliament (the National Congress) representing the southern region of Sudan in the mid-1990s. (*Id.*) While in Parliament, Mr. [redacted] father was targeted by political opponents in both the northern and southern regions of Sudan, which were in conflict. (*Id*.) Mr. [redacted] father was arrested many times in southern Sudan before he was elected to Parliament. (*Id*.) Mr. [redacted] father was often and continuously threatened by governmental factions, until the summer of 1996 when he fled the country, leaving his wife and children (including Mr. [redacted] temporarily in Khartoum, Sudan. (*Id*.)

After Mr. [redacted] father fled, national Sudanese government agents consistently came to his home in Khartoum looking for him. (*Id*.) On one occasion, the Sudanese authorities punched Mr. [redacted] mother and trashed the family home while looking for documents. (*Id*.) They told Mr. [redacted] mother they knew his

father had applied for asylum in the United States. (*Id.*) In November 1997, Mr. [redacted] mother fled Khartoum with her children (including Mr. [redacted] then only 6 or 7 years old) to Cairo. (*Id.*) Eventually, Mr. [redacted] his mother, and his family all settled in the United States. (*Id.* at 5.)

Mr. [redacted] father and immediate family are still afraid to return to South Sudan because of his political activities in Parliament. (*Id.* at 8.) Even after leaving South Sudan, Mr. [redacted] father has continued to be vocal about his political beliefs, and has written and spoken out many times about tribal conflicts in South Sudan. (*Id.* at 16.) Mr. [redacted] and his father believe Mr. [redacted] will be immediately identified and killed by the government if he returns to South Sudan because the government is still looking for his father. (*Id.*) Mr. [redacted] also fears return to South Sudan because of his mental health issues. (*Id.* at 9.) The government imprisons the mentally ill in South Sudan, and the country has inadequate mental health services. (*Id.*)

II. After reviewing all the evidence, the IJ found it more likely than not that Mr. [redacted] would be tortured if he is removed to South Sudan.

The Department of Homeland Security ("DHS") commenced removal proceedings against Mr. [redacted] on January 23, 2019, by filing a Notice to Appear, which charged Mr. [redacted] as removable pursuant to the Immigration and Nationality Act ("INA") §§ 237(a)(2)(A)(ii), 237(a)(2)(A)(iii), 237(a)(2)(E)(i), and 237(a)(2)(E)(ii). (Add. 2-3.) Mr. [redacted] admitted the factual allegations and

conceded the four charges of removability. (*Id*. at 3.) Mr. [redacted] filed an application for adjustment of status under INA § 209(a); a waiver of inadmissibility under INA § 209(c); an application for asylum under INA § 208; an application for withholding of removal under INA § 241(b)(3); and for relief under Article 3 of the Convention Against Torture ("CAT"). (*Id*. at 2.)

The Immigration Judge ("IJ") held a hearing on February 21, 2020. The IJ heard testimony from Mr. [redacted] and his father. (*Id*. at 3.) Mr. [redacted] testified regarding his family, his criminal history, and his fears of returning to South Sudan. (*Id*.; A.R. 190-269.) Mr. [redacted] father testified regarding his former role in the Sudanese national parliament, the threats he received, and his reasons for fleeing Sudan. (Add. 3.) He also testified about his fears that Mr. [redacted] would be harmed if he returned to South Sudan. (*Id*.; A.R. 270-98.) The IJ found all of this testimony to be credible. (Add. 4-5.) The IJ found Mr. [redacted] "gave an account that was internally consistent and inherently plausible." (*Id*. at 5.) The testimony of Mr. [redacted] father was "candid, responsive, and consistent with the other evidence in the record." (*Id*.)

The IJ also received documentary evidence including immigration documents for Mr. [redacted] parents and sibling (A.R. 606-11); witness statements from Mr. [redacted] ex-wife and mother-in-law (*id*. at 612-15); Mr. [redacted] treatment records (*id*. at 616-78); letters of support from Mr. [redacted] family and

community (*id*. at 492-501, 678-82); Country Condition Reports for South Sudan (*id*. at 511-605); and additional evidence including a letter of support from Mr. [redacted] therapist and certificates from Mr. [redacted] rehabilitation programs, including an anger management class, a parenting class, and a career education class (*id*. at 354-58). (*See generally* Add. 3-4.) The IJ also took administrative notice of the U.S. Department of State 2019 Human Rights Report for South Sudan. (*Id*. at 4 n.1.)

The IJ issued a written decision on March 18, 2020. (*Id*. at 2.) The IJ denied Mr. [redacted] application for adjustment of status, asylum, and withholding, but granted his application for deferral of removal under CAT. (*Id*. at 3.) The IJ made three specific conclusions to support the deferral of removal: Mr. [redacted] would more likely than not be tortured or killed if he is removed to South Sudan, based on his relationship to his father and his imputed political views; government actors would torture or kill Mr. [redacted] and Mr. [redacted] cannot relocate to a part of South Sudan where he would not likely be tortured. (*Id*. at 16.) These conclusions were supported by extensive factual findings.

A. Mr. [redacted] would likely be tortured based on his relationship to his father and his imputed political views.

The IJ first found that Mr. [redacted] had established it was more likely than not that he would be subjected to torture at the hands of the government of South Sudan due to his personal characteristics and his father's past political

involvement. (*Id*. at 15-16.) The IJ explained Mr. [redacted] would be identified by the government as a political opponent, or as the son of a political opponent, and detained, tortured or killed upon returning to South Sudan. (*Id*. at 16-17; *see also id*. at 7-9.)

The IJ found that Mr. [redacted] father was a member of Parliament in the Sudanese National Congress and that "because of his political activities, government officials in northern and southern Sudan viewed [Mr. [redacted] father as a traitor and spy." (*Id*. at 16.) The IJ additionally found that Mr. [redacted] parents "suffer[ed] threats and an assault that caused them to flee Sudan." (*Id.* at 16; *see also id*. at 8.) This harm to Mr. [redacted] immediate family members "strengthens [Mr. [redacted] claim that he is likely to be tortured in the future." (*Id*. at 16.)

The IJ found that "[s]ince departing Sudan, Mr. [redacted] father has been vocal about his political beliefs. For example, he has written and spoken out many times about tribal conflicts in South Sudan." (*Id*. (citing A.R. 501).) The IJ found that Mr. [redacted] father, who shares the same name as Mr. [redacted] "is likely to be seen as a traitor by the president and the people of the Dinka tribe" and, for that reason, none of Mr. [redacted] family members returned to South Sudan, "primarily out of fear of retribution related to the political activities of [Mr. [redacted] father." (*Id*. at 16; *see also id*. at 8-9.)

The IJ found that Mr. [redacted] "will more likely than not be identified by the government of South Sudan upon his arrival and will be targeted for detention, torture, and death because of his relationship to his father" and that the government would "likely impute his father's status as a political traitor on [Mr. [redacted] and target him for that reason." (*Id*. at 17.) As the IJ found, Mr. [redacted] "essentially bears the same name as his father, which will make him easily identifiable by the government." (*Id*.) The IJ concluded that "the government would torture or kill [Mr. [redacted] for the specific purpose of punishing him for his father's political activities, or alternatively, for the purpose of punishing or intimidating his father." (*Id*.)

B. Mr. [redacted] would likely be tortured by government actors in South Sudan.

The IJ next found that Mr. [redacted] would likely be tortured or killed by government actors in South Sudan. (*Id*.) Based on the credible testimony of Mr. [redacted] father, the IJ found that "although the new government of South Sudan is not the same as when [Mr. [redacted] father] was in parliament, the same parties are basically still around" and that "the 'war' has been going on for 24 years." (*Id*.)

The IJ found that the country conditions evidence in the record "strongly supports" Mr. [redacted] fears of torture. (*Id*.) "The country conditions show the current conflict, which started in 2013, reflects tensions that date back to the civil war in the 1990s." (*Id*. (citing A.R. 557).) As the IJ found, this evidence "shows

that government forces routinely target people for detention, torture, and unlawful killing in South Sudan, based on their perceived political affiliation." (*Id.*) "Since 2013, there have been 'regular reports that security forces conducted arbitrary arrests, including of journalists, civil society actors, and supposed political opponents.'" (*Id.* (quoting A.R. 525).) The IJ found that "[s]ecurity forces have routinely arrested and detained citizens" and that the Sudan People's Liberation Army and National Security Service "often abused political opponents and others whom they detained without charge." (*Id.* (quoting A.R. 528).) As the IJ found, this violence was politically motivated. (*Id.*) The country conditions evidence includes "reports of dozens of political prisoners and detainees held by authorities without charge, with the purpose of intimidating them or stifling opposition." (*Id.* (quoting A.R. 531).) "[G]overnment soldiers reportedly engaged in acts of collective punishment and revenge killings against civilians assumed to be opposition supporters." (*Id.* (quoting A.R. 532).)

The IJ determined this country conditions evidence shows "[g]overnment officials have targeted political dissidents based on their perceived political or ethnic affiliation for detention, where they are often tortured." (*Id.* at 18 (citing A.R. 563).) "'Many' detainees have disappeared or have been extrajudicially executed." (*Id.* (quoting A.R. 564).) As the IJ recognized, "[t]he Human Rights Council has found reasonable grounds to believe that government and opposition

forces have committed acts of torture and serious violations of human rights and international humanitarian law, including deliberate targeting of civilians 'on the basis of their perceived political or ethnic affiliation . . . .'" (*Id*. (quoting A.R. 572).)

The IJ also found that the country conditions evidence supported the finding that the torture Mr. [redacted] fears will be inflicted by government actors, including the Sudan People's Liberation Movement, which is the ruling party in South Sudan. (*Id*. (citing A.R. 521).) "Security forces, other government agents, and opposition forces have all committed numerous unlawful killings and abducted an unknown number of persons." (*Id*. at 19 (citing A.R. 522).) As the IJ found, government officials in South Sudan "directly inflict violence and human rights abuses on civilians, often because of their perceived political status." (*Id*.) The IJ additionally considered evidence of "gross, flagrant, and mass violations of human rights in South Sudan." (*Id*.) As the IJ recognized, "[t]he country reports show South Sudan is in extreme crisis, including substantial armed conflict, dire humanitarian issues, and severe human rights abuses." (*Id*. (citing A.R. 521).)

C. Mr. [redacted] would be unable to avoid torture by relocating within South Sudan.

The IJ further found that Mr. [redacted] would be unable to internally relocate within South Sudan because the government significantly restricts freedom of movement within and outside the country "and it routinely blocks travel for

political figures within and outside the country." (*Id*. at 20 (citing A.R. 540).) As the IJ found, "[s]ecurity forces operate checkpoints, and in-country movement is impeded by ongoing armed conflict between government and opposition forces." (*Id*. (citing A.R. 540).) The IJ found that relocation within South Sudan would be difficult, if not impossible, for Mr. [redacted] because he has no family in South Sudan, he has not lived there since he was six or seven years old, and he does not speak the local language. (*Id*.)

The IJ found that Mr. [redacted] mental health problems would contribute to his inability to relocate within South Sudan. (*Id*.) Mr. [redacted] testified that his "mental health problems could make him more likely to stand out to be detained" and that "the government imprisons the mentally ill in South Sudan." (*Id*.) The IJ found that Mr. [redacted] fears regarding the imprisonment of the mentally ill in South Sudan are "supported by documentary evidence." (*Id*. (citing A.R. 523-24).) As the IJ found, "[Mr. [redacted] might be further unable to safely relocate because he would be noticed and imprisoned for behavior related to his mental health diagnoses." (*Id*.) "Altogether," the IJ found, "[Mr. [redacted] cannot internally relocate anywhere in South Sudan where he could avoid the torture he fears." (*Id*. at 20-21.)

In view of these factual findings, the IJ determined that Mr. [redacted] would more likely than not face torture or death at the hands of the government if he

returns to South Sudan. (*Id*. at 21.) Accordingly, the IJ found Mr. [redacted] had met his burden to show he merits protection under CAT and granted his application for deferral of removal. (*Id*.)

III. Ignoring the IJ's findings, the BIA reversed.

DHS appealed. (Add. 24.) Ignoring some of the IJ's findings, and making further findings on its own, the Board of Immigration Appeals ("BIA") vacated the IJ's deferral of removal. (*Id*. at 27.) The BIA opined that the IJ's deferral of removal was based on vague testimony that did not establish the likelihood of a personal risk to Mr. [redacted] (*Id*.) The BIA further opined that neither Mr. [redacted] nor his father, identified any current or specific threats of torture, and that assertions about Mr. [redacted] father's criticisms of the Sudanese government, without more, are insufficient to support the IJ's decision. (*Id*.) The BIA also opined that the country conditions evidence—that South Sudanese government forces routinely target people for detention, torture, and unlawful killing based on perceived political affiliation—did not supply a factual basis for finding Mr. [redacted] at personal risk of torture. (*Id*. at 28.) The BIA opined the pattern of violence against perceived political opponents does not demonstrate a likelihood that Mr. [redacted] will be tortured. (*Id*.) Finally, the BIA opined that the evidence of Mr. [redacted] mental health problems did not establish that he would be targeted for torture. (*Id*.) Having opined that the record does not show that Mr. [redacted] will

likely be targeted for torture in South Sudan, the BIA vacated the IJ's decision deferring Mr. [redacted] removal under Article 3 of CAT. (*Id.* at 29.)

On December 10, 2020, Mr. [redacted] timely petitioned this Court for review.

SUMMARY OF THE ARGUMENT

The BIA erred by failing to review the IJ's factual findings for clear error—as required by law—and disregarding most of the IJ's findings to replace them with its own. The IJ included more than ten pages of detailed credibility findings, fact findings, and reasoned analysis in support of his determination that, more likely than not, Mr. [redacted] would be subjected to torture if removed to South Sudan. The BIA failed to review those findings for clear error and instead supplanted those findings with brief and unsupported findings of its own. Factfinding must be left to the factfinder—here the IJ—and it is not for the reviewing body to second-guess that factfinding.

Second, the BIA erred in failing to consider, both individually and in the aggregate, Mr. [redacted] claims that he would be tortured if returned to South Sudan. Under BIA precedent, torture convention claims must be analyzed for the aggregate risk of torture. Despite this precedent, the BIA here failed to consider several of Mr. [redacted] claims at all, and erroneously considered the remaining claims only on an individual basis.

Finally, the BIA erred in applying the wrong legal standard to Mr. [redacted] CAT claims. The BIA appears to have treated the lack of a recent, specific threat against Mr. [redacted] or his father alone as dispositive on the issue of whether Mr. [redacted] would be tortured if removed to South Sudan. But the case cited by the BIA,

Malonga v. Mukasey, does not stand for the proposition that a petitioner must provide evidence of a recent, specific threat in order to secure CAT relief. Instead, that is only one factor to be considered. The BIA erred as a matter of law in holding that this single factor was dispositive.

The decision of the BIA should be reversed. At a minimum, it should be vacated and remanded for the BIA to apply the proper legal standards to its review.

ARGUMENT

I. Standard of Review

This Court reviews questions of law *de novo*, including the question of whether the BIA applied the correct legal standard. *Mayorga-Rosa v. Sessions*, 888 F.3d 379, 382 (8th Cir. 2018); *Doe v. Holder*, 651 F.3d 824, 829 (8th Cir. 2011). This Court's review of agency decisions is limited "to a judgment upon the validity of the grounds upon which the [BIA] itself based its action." *SEC v. Chenery Corp.* (*Chenery I*), 318 U.S. 80, 88 (1943).

This Court has jurisdiction to review legal errors committed by the BIA, such as where the BIA disregards the "clear error" standard of review and engages in erroneous alternative fact findings. *See Abdi Omar v. Barr*, 962 F.3d 1061, 1064 (8th Cir. 2020) ("Whether the Board followed its regulations, refrained from independent factfinding, and applied the correct standard of review are legal questions that we review de novo."). CAT orders are not "final orders of removal" under 8 U.S.C. § 1252(a)(2)(C). *Nasrallah v. Barr*, 140 S. Ct. 1683, 1694 (2020); *accord Guerrero-Lasprilla v. Barr*, 140 S. Ct. 1062, 1072 (2020) (holding the phrase "questions of law" in 8 U.S.C. § 1252(a)(2)(D), which preserves review over "constitutional claims or questions of law" in petitions for review of a removal order before the federal courts of appeal, provides for review of the application of a legal standard to undisputed or established facts). Thus, any

underlying fact findings, including BIA's improperly made factual findings, are reviewable under the substantial-evidence standard. *Nasrallah*, 140 S. Ct. at 1692, 1694.

II. The BIA failed to review the IJ's factual findings for clear error, instead improperly disregarding them and replacing them with its own.

To qualify for deferral of removal under CAT, a noncitizen must prove that he or she "is more likely than not to be tortured in the country of removal." 8 C.F.R. § 1208.16(c)(4). That showing must be made only by a preponderance of the evidence. *Shaghil v. Holder*, 638 F.3d 828, 835 (8th Cir. 2011). Under CAT, "torture" is defined 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 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, or 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 or other person acting in an official capacity.

8 C.F.R. § 1208.18(a)(1). The regulations implementing CAT require that "all evidence relevant to the possibility of future torture shall be considered." 8 C.F.R. § 1208.16(c)(3). The applicant's credible testimony alone "may be sufficient to sustain the burden of proof without corroboration." *Id.* at § 1208.16(c)(2).

"Facts determined by the immigration judge, including findings as to the credibility of testimony, shall be reviewed only to determine whether the findings

of the immigration judge are clearly erroneous." 8 C.F.R. § 1003.1(d)(3)(i). Thus, the IJ's findings of fact "'may not be overturned simply because the Board would have weighed the evidence differently or decided the facts differently had it been the factfinder.'" *Waldron v. Holder*, 688 F.3d 354, 360 (8th Cir. 2012) (quotation omitted). "[T]he BIA does not have authority to engage in factfinding, except to take administrative notice of commonly known facts." *Nabulwala v. Gonzales*, 481 F.3d 1115, 1118 (8th Cir. 2007). The BIA must give "due regard" to the IJ's ability to judge witness credibility. *Wu Lin v. Lynch*, 813 F.3d 122, 126 (2d Cir. 2016).

These standards of review exist for a reason—the IJ is the one who receives the live witness testimony and who makes credibility determinations after reviewing all of the evidence. The questions surrounding deferral of removal under CAT are complex determinations meant for the factfinder. The BIA does not make credibility determinations, and it is not for the BIA to engage in its own independent factfinding on a cold record.

Here, the BIA engaged in improper *de novo* alternative factfinding, and failed to address most of the IJ's findings, let alone provide a reasoned basis why they were clearly erroneous. This was in error. *See Waldron*, 688 F.3d at 361 ("[T]here is a difference between weighing the factual findings of the IJ and reweighing the underlying evidence and testimony behind those factual findings to reach new factual conclusions."); *Ramirez-Peyro v. Gonzales*, 477 F.3d 637, 641

(8th Cir. 2007) (vacating and remanding because the BIA applied the wrong law and "engaged in its own factfinding"); *see generally Ridore v. Holder*, 696 F.3d 907, 917 (9th Cir. 2012) (explaining that the BIA fails to apply the clear error standard of review where it "override[s] or disregard[s] evidence in the record and substitute[s] its own version of reality"). There was substantial evidence—cited and described at length by the IJ—that Mr. [redacted] would be tortured if returned to South Sudan. The IJ's decision should not have been disturbed, and the BIA exceeded its authority to reweigh the facts.

The IJ provided over ten pages of detailed credibility findings, fact findings, and reasoned analysis in support of her determination that "[Mr. [redacted] would more likely than not be tortured if he is removed to South Sudan." (Add. 15; *see also id*. at 4-9, 16-21.) The IJ found that Mr. [redacted] "will more likely than not be identified by the government of South Sudan upon his arrival and will be targeted for detention, torture, and death because of his relationship to his father" and that the government would "likely impute his father's status as a political traitor on [Mr. [redacted] and target him for that reason." (*Id*. at 17.) The IJ further found that "government forces routinely target people for detention, torture, and unlawful killing in South Sudan, based on their perceived political affiliation." (*Id*.) And the IJ found that relocation within South Sudan would be difficult, if not impossible, for Mr. [redacted] because he has no family in South Sudan, he has not lived there

since he was six or seven years old, and he does not speak the local language. (*Id.* at 20.) The IJ concluded that "[Mr. [redacted] might be further unable to safely relocate because he would be noticed and imprisoned for behavior related to his mental health diagnoses." (*Id.*)

The BIA provided four paragraphs purporting to support its decision to overturn that result. (*Id.* at 27-29.) In addition to irrelevant and unhelpful observations, such as that Mr. [redacted] who left South Sudan when he was six or seven years old, was not "previously tortured," (*id.* at 29), the BIA failed to review the IJ's factual findings for clear error and instead disregarded the IJ's factual findings and supplanted them with its own.

The BIA did not consider or address many of the findings the IJ made, such as that Mr. [redacted] father was not merely someone who spoke out against the government, but was instead a member of Parliament in the Sudanese National Congress who received threats that forced him to flee the country. (*Id.* at 16.) The BIA also failed to address the fact that, after Mr. [redacted] father fled, members of the national security force came to his house looking for him and for documents, and when his wife did not give them the information they wanted, the government officials ransacked the house and assaulted her. (*Id.*) The BIA also failed to address the IJ's uncontested finding that "government officials in northern and southern Sudan viewed [Mr. [redacted] father as a traitor and spy." (*Id.*) The IJ further found

that Mr. [redacted] father, who shares the same name as Mr. [redacted] (increasing the risk of torture to him), "is likely to be seen as a traitor by the president and the people of the Dinka tribe" and, for that reason, none of Mr. [redacted] family members returned to South Sudan, "primarily out of fear of retribution related to the political activities of [Mr. [redacted] father." (*Id*.) The IJ also determined that the government of South Sudan would "likely impute his father's status as a political traitor on [Mr. [redacted] and target him for that reason." (*Id*. at 17.) The BIA entirely ignored *all* those findings, focusing solely on the IJ's additional finding that "[Mr. [redacted] father has spoken out in opposition to the South Sudanese government." (*Id*. at 27.) But the IJ did not *just* find that Mr. [redacted] father has spoken out against the South Sudanese government. The IJ found that he "has been *vocal* about his political beliefs" and "has *written and spoken* out *many times* about tribal conflicts in South Sudan." (*Id*. at 16 (emphasis added).)

The BIA further found there was no "evidence that [Mr. [redacted] father's] criticisms have been disseminated in South Sudan." (*Id*. at 27.) This finding is against the record evidence, which demonstrated—as the IJ found—that Mr. [redacted] family feared return to South Sudan because of these activities. Indeed, Mr. [redacted] father specifically testified that the government of South Sudan still considers him a traitor and will target his son for harm. (*Id*. at 16-17.) Mr. [redacted] father also testified that the same political actors that targeted him in Sudan are

"still around," and the IJ found this testimony to be supported by the country conditions reports showing that "the current conflict, which started in 2013, reflects tensions that date back to the civil war in the 1990s." (*Id*. at 17.) These findings also were not refuted.

Likewise, the BIA did not dispute the IJ's finding that Mr. [redacted] mental health struggles make him more likely to be detained. (*Id.* at 20.) Instead, the BIA asserted, without any support, that the "Immigration Judge did not find that [Mr. [redacted] is at risk of torture due to his mental health." (*Id*. at 28.) Not so. The IJ accepted the evidence that "the government imprisons the mentally ill in South Sudan, and the country has inadequate mental health services." (*Id*. at 20.) The IJ further found that Mr. [redacted] fears about the treatment of the mentally ill in South Sudan was supported by the evidence, including Mr. [redacted] credible testimony. (*Id*.) After considering this evidence, the IJ concluded Mr. [redacted] "cannot internally relocate anywhere in South Sudan where he could avoid the torture he fears." (*Id*. at 20-21.) It is inaccurate to suggest that Mr. [redacted] evidence of torture based on his mental health issues was not accepted by the IJ—the IJ considered and accepted testimony and documentary evidence supporting Mr. [redacted] claims. (*Id*.)

Citing general cases, the BIA found that "a pattern of human rights abuses" or "a pattern of violence against perceived political opponents" is insufficient to

support a CAT claim. (*Id*. at 28.) But "[e]vidence of gross, flagrant or mass violations of human rights within the country of removal, where applicable" *must* be considered. 8 C.F.R. § 1208.16(c)(3). And, after several pages of extensive findings, the IJ concluded there was "evidence of *gross, flagrant, and mass violations of human rights* in South Sudan." (Add. 17-19 (emphasis added).) These findings are undisputed and must be considered; the BIA's failure to do so is error.

The evidence of gross, flagrant, and mass violations of human rights was not the sole basis of Mr. [redacted] claim, nor was it the sole basis of the IJ's determination to grant protection under CAT. Indeed, Mr. [redacted] did not rely solely on a consistent pattern of mass violations of human rights in South Sudan to argue for CAT protection. Rather, as the IJ found, Mr. [redacted] credibly demonstrated that *he* is *particularly* likely to be targeted for torture after considering the evidence of specific harm, including Mr. [redacted] father's extensive political activity, threats against him requiring him to leave South Sudan, continued political activity, his family's credible fear, Mr. [redacted] mental health issues, Mr. [redacted] lack of family in Sudan, Mr. [redacted] inability to speak the local language, evidence that the people in South Sudan do not speak English, and all of the credibility determinations underlying that evidence. (*Id*. at 15-16.) The Board's contrary decision, based on only select portions of the record, is in error. (BIA Decision at 5-6.)

Here, Mr. [redacted] submitted credible testimony and other detailed evidence to establish that he will likely face torture in South Sudan. This evidence includes the testimony of Mr. [redacted] (A.R. 190-269) and his father (*id*. at 270-98), which the IJ specifically found was credible (Add. 4-5); immigration documents for Mr. [redacted] parents and sibling (A.R. 606-11); witness statements from Mr. [redacted] ex-wife and mother-in-law (*id*. at 612-15); letters of support from Mr. [redacted] family and community (*id*. at 492-501, 678-82); and Country Condition Reports for South Sudan (*id*. at 511-605). (*See generally* Add. 3-4.) The IJ also took administrative notice of the 2019 U.S. Department of State 2019 Human Rights Report for South Sudan. (*Id*. at 4 n.1.) While the BIA did not dispute the IJ's credibility determinations, it rejected the IJ's findings based on those determinations, including the findings that Mr. [redacted] would more likely than not be tortured upon return to South Sudan. (*Id*. at 27-28.) The IJ found that the country conditions evidence in the record "strongly supports" Mr. [redacted] fears of torture in South Sudan (*id*. at 17) and that Mr. [redacted] "cannot internally relocate anywhere in South Sudan where he could avoid the torture he fears." (*Id*. at 20-21.) In combination with all the evidence referenced above, this is more than sufficient to show Mr. [redacted] risk of torture in South Sudan. Because the BIA provided insufficient justification for its contrary decision to deny CAT protection, this Court should grant Mr. [redacted] petition for review.

The BIA was limited to reviewing IJ's decision for clear error. "This standard plainly does not entitle a reviewing court to reverse the finding of the trier of fact simply because it is convinced that it would have decided the case differently." *Anderson v. City of Bessemer City*, 470 U.S. 564, 573-74 (1985). Indeed, this Court has rejected BIA decisions that engage in improper fact finding that contradicts the IJ's factual findings. *See Waldron*, 688 F.3d at 355-61 ("Although the BIA set forth the correct standard of review at the outset of its decision, we agree with Waldron that it deviated from this standard"). Further, Mr. [redacted] only needed to make his showing by a preponderance of the evidence. *Shaghil v. Holder*, 638 F.3d 828, 835 (8th Cir. 2011). To the extent the BIA required more, that too was in error. For the same reasons this Court remanded *Waldron*, the Court should reverse the BIA's decision here, or at a minimum remand this case to the BIA.

III. The BIA erred by failing to consider Mr. [redacted] risk of torture in the aggregate.

To qualify for deferral of removal under the Convention Against Torture, a noncitizen must prove that he or she "is more likely than not to be tortured in the country of removal." 8 C.F.R. § 1208.16(c)(4); *see also id.* at § 1208.17(a). If this clear probability is established, the noncitizen is entitled to protection under the Convention. Notably, relief under CAT does not depend on demonstrating harm on account of a protected ground; rather, it need only be extreme cruel and inhuman

treatment not arising from lawful sanctions carried out by or with the acquiescence of a public official. *Id.* at § 1208.18(a).

The regulations implementing the Convention Against Torture further require that "all evidence relevant to the possibility of future torture shall be considered, *including, but not limited to*":

> (i) Evidence of past torture inflicted upon the applicant;
>
> (ii) Evidence that the applicant could relocate to a part of the country of removal where he or she is not likely to be tortured;
>
> (iii) Evidence of gross, flagrant or mass violations of human rights within the country of removal, where applicable; and
>
> (iv) Other relevant information regarding conditions in the country of removal.

8 C.F.R. § 1208.16(c)(3) (emphasis added); *see also Ramirez-Peyro v. Gonzales*, 477 F.3d 637, 639 (8th Cir. 2007) (recognizing that all evidence must be considered). Credible testimony alone "may be sufficient to sustain the burden of proof without corroboration." 8 C.F.R. § 1208.16(c)(2); *see Habtemicael v. Ashcroft*, 370 F.3d 774, 782 (8th Cir. 2004) (remanding where agency did not consider all evidence and claims). CAT must be construed generously. *See, e.g.*, *United States v. Belfast*, 611 F.3d 783, 806-07 (11th Cir. 2010) (explaining that "settled rules of treaty interpretation require that we construe the CAT generously"); *Rodriguez-Arias v. Whitaker*, 915 F.3d 968, 973 (4th Cir. 2019) (same) (citing *Belfast*, 611 F.3d at 806-07).

This means the BIA must consider all reasons for torture in the aggregate. *In re J-R-G-P-*, 27 I. & N. Dec. 482, 484 (BIA 2018) ("Claims under the Convention Against Torture 'must be considered in terms of the aggregate risk of torture from all sources, and not as separate, divisible . . . claims.'"); *see also Hassan v. Rosen*, 985 F.3d 587, 589 (8th Cir. 2021) ("In considering the likelihood of torture, the IJ and BIA must consider "the aggregate risk of torture from all sources.""") (citing *Adbi Omar v. Barr*, 962 F.3d 1061, 1065 (8th Cir. 2020)); *Marqus v. Barr*, 968 F.3d 583, 589 (6th Cir. 2020) (considering aggregate probability of torture from independent sources in its analysis); *Rodriguez-Arias*, 915 F.3d at 973 ("We now join our sister circuits and hold that the risks of torture from all sources should be combined when determining whether a CAT applicant is more likely than not to be tortured in a particular country."); *Quijada-Aguilar v. Lynch*, 799 F.3d 1303, 1307-08 (9th Cir. 2015) (explaining BIA must consider all reasons for torture, and not focus on just one); *Kamara v. Att'y Gen.*, 420 F.3d 202, 213-15 (3d Cir. 2005) (remanding where BIA considered each claim separately rather than aggregating the overall likelihood of torture); *In re O-Z- & I-Z-*, 22 I. & N. Dec. 23, 26 (BIA 1998) (considering persecution claims in the aggregate).

The BIA asserted that the IJ allegedly "impermissibly strung together a series of suppositions." (Add. 28.) Not so. As discussed above, the BIA erred by failing to consider Mr. [redacted] claims as a whole. The BIA addressed only some

of Mr. [redacted] evidence of torture, and made findings contrary to the record, as shown *supra* Section II. The BIA further erred by failing to consider all the evidence as a whole; instead focusing only on isolated and incomplete portions. The BIA did not consider the fact that Mr. [redacted] father was not merely some regular citizen who spoke out against the government, but instead was a well-known member of Parliament in the Sudanese National Congress who received threats that forced him to flee the country. (*Id*. at 16.) Nor did the BIA address the fact that after he fled, members of the national security force ransacked his house looking for documents and assaulted his wife. (*Id*.) The BIA also failed to address the IJ's uncontested finding that "government officials in northern and southern Sudan viewed [Mr. [redacted] father as a traitor and spy" and that none of Mr. [redacted] family members returned to South Sudan, "primarily out of fear of retribution related to the political activities of [Mr. [redacted] father." (*Id*.) The BIA also ignored the finding that that the government of South Sudan would "likely impute his father's status as a political traitor on [Mr. [redacted] and target him for that reason." (*Id*. at 17.) The BIA entirely ignored the IJ's finding that he "has been *vocal* about his political beliefs" and "has *written and spoken* out *many times* about tribal conflicts in South Sudan." (*Id*. at 16 (emphasis added).)

The BIA failed to consider that Mr. [redacted] father testified that the government of South Sudan still considers him a traitor and will target his son for

harm. (*Id*.) Mr. [redacted] father also testified that the same political actors that targeted him in Sudan are "still around," and the IJ found this testimony to be supported by the country conditions reports showing that "the current conflict, which started in 2013, reflects tensions that date back to the civil war in the 1990s." (*Id*. at 17.) The BIA also failed to consider the IJ's finding that Mr. [redacted] fears about the treatment of the mentally ill in South Sudan was well-supported by the record evidence. (*Id*. at 20.) Nor did the BIA consider the IJ's conclusion that Mr. [redacted] "cannot internally relocate anywhere in South Sudan where he could avoid the torture he fears." (*Id*. at 20-21.)

The BIA failed to consider *all* these findings when assessing Mr. [redacted] risk of harm. Thus, its decision should be reversed. At a minimum remand to the BIA is necessary for consideration of the entirety and aggregation of Mr. [redacted] claims. *See Ramirez-Peyro*, 477 F.3d at 642 ("The Board should be given the opportunity to discharge its statutory duty to review the IJ's factual findings for clear error and remand to the IJ for further proceedings if appropriate."); *see also Waldron*, 688 F.3d at 361 (quoting *Ramirez-Peyro*).

IV. The BIA applied the wrong legal standard to Mr. [redacted] CAT claims.

Section 1208.16(c) requires that "all evidence relevant to the possibility of future torture shall be considered." 8 C.F.R. § 1208.16(c)(3). "Evidence of past

torture inflicted upon the applicant" is one of four non-exclusive categories of evidence that must be considered; it is not itself dispositive of anything. *Id*.

Despite this clear statutory command that a broad spectrum of evidence must be considered, the BIA here treated the lack of a recent, specific threat against Mr. [redacted] or his father as dispositive. This is error. *See* 8 C.F.R. § 1208.16(c)(3); *see also Kassim v. Barr*, 954 F.3d 1138, 1142 (8th Cir. 2020) (remanding request for deferral of removal under CAT without mentioning any recent, specific threats); *Zewdie v. Ashcroft*, 381 F.3d 804, 808-10 (8th Cir. 2004) (finding "no reasonable fact finder could fail to find Zewdie eligible for relief" despite no recent, specific threats).

The BIA cites this Court's decision in *Malonga v. Mukasey*, 546 F.3d 546, 556 (8th Cir. 2008), as supporting its position, stating in its decision:

> The respondent also did not identify a specific or current threat against either his father or himself (Tr. at 87-90). *See Malonga v. Mukasey*, 546 F.3d 546, 556 (8th Cir. 2008) (upholding the denial of Convention Against Torture protection where the alien did not testify about any recent, specific threats that he would be tortured in the country of removal).

(Add. 27-28.) However, *Malonga* does not stand for the proposition that a petitioner *must* provide evidence of a recent, specific threat in order to secure CAT relief, nor was the holding of that case that a CAT claim *must* be denied where the petitioner did not testify about any recent, specific threats that he would be tortured in the country of removal. Instead, in *Malonga*, the Court denied a petition for

review of an order denying relief under CAT because Malonga failed to present evidence on a number of factors, only one of which was failure to point to recent, specific threats. *Malonga*, 546 F.3d at 555-56. Indeed, any holding that a recent, specific threat of torture is necessary before relief may be granted under CAT would render Sections 1208.16(c)(3)(i), (iii), and (iv) entirely superfluous. Neither the statutory language nor the case law in this Circuit support such a holding. *See* 8 C.F.R. § 1208.16(c)(3); *see also Ramirez-Peyro*, 477 F.3d at 639.

Malonga is, moreover, simply inapposite here, as it is readily distinguishable from Mr. [redacted] case. First, in *Malonga*, the Court found that "[a]lthough the record contain[ed] some evidence of abuses by the government forces," there was also evidence that police received training in human rights and high-ranking officials instructed their officers to "respect civilians and their rights." *Malonga*, 546 F.3d at 556. Here, on the other hand, the IJ concluded there was "evidence of *gross, flagrant, and mass violations of human rights* in South Sudan." (Add. 19 (emphasis added); *see also id*. at 17-18.) And the IJ did not stop at a generalized finding of such human rights violations in South Sudan. As discussed above, the IJ also made particularized findings as to Mr. [redacted] (*Id*. at 16-17.) In doing so, the IJ clearly articulated the more personalized fear of torture specific to Mr. [redacted] and both discussed and made findings related to the motive for the South Sudanese government to torture Mr. [redacted] (*Id.*)

Second, while the petitioner in *Malonga* was unable to establish that he could not travel to an area of the country where he would not be subject to torture, the IJ here found that Mr. [redacted] would not be able to internally relocate anywhere within Sudan where he would not be subject to the torture he fears based on his mental health issues. (*Id*. at 20-21.)

It is, thus, clear from both the statutory language and the case law that, while evidence of a recent specific threat against Mr. [redacted] or his father could have further supported Mr. [redacted] CAT claim, the absence of such specific threat is not dispositive or even particularly relevant in view of the facts of this case. The BIA's apparent reliance on that absence to find Mr. [redacted] was not entitled to relief as a matter of law was legally erroneous and requires a reversal, or at a minimum a remand. *See Garcia-Mata v. Sessions*, 893 F.3d 1107, 1110 (8th Cir. 2018) (remanding case after BIA overturned IJ's decision granting withholding of removal because "we cannot discern from the Board's decision whether it followed the governing regulations on standards of review").

CONCLUSION

This issue on appeal is not whether Mr. [redacted] is a good person (although the evidence certainly demonstrates that he is successfully undergoing treatment for his issues and is working to make amends for prior mistakes and crimes) but whether we, as a nation, are going to send people out of the country to be tortured. The United States has laws that specifically say we are not, no matter what a petitioner's actions may be.

After reviewing all of the evidence, hearing from all of the witnesses, and making credibility findings, the IJ engaged in factfinding and determined that Mr. [redacted] demonstrated that he would, in fact, more likely than not be tortured. The BIA reversed, but its decision is contrary to this factfinding and fails to follow well-settled law. The BIA erred as a matter of law by ignoring the IJ's fact findings and substituting its own fact findings, failing to consider Mr. [redacted] CAT claims in the aggregate, and failing to apply the correct legal standard to Mr. [redacted] CAT claims. It is difficult to understand how the BIA reached its decision in view of the IJ's decision, unless the BIA permitted its prejudices against Mr. [redacted] legal background to color its view of the case. But prejudices make bad law, and have no place in the legal system. This Court should resist any temptation to be influenced by irrelevant factors, fairly consider this case, and grant Mr. [redacted]

petition for review and reverse, or at a minimum vacate and remand, the BIA decision.

Dated: March 5, 2021

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CERTIFICATE OF COMPLIANCE

Pursuant to Fed. R. App. P. 32(g), I hereby certify that the foregoing PETITIONER'S OPENING BRIEF has been prepared in a proportionally spaced typeface of 14-point or more, and contains 8,302 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(f).

Pursuant to Eighth Cir. R. 28A(h), I certify that the foregoing Petitioner's Opening Brief has been scanned for viruses and is virus-free.

Dated: March 5, 2021

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CERTIFICATE OF SERVICE

I hereby certify that on March 5, 2021, I electronically filed the foregoing PETITIONER'S OPENING BRIEF with the Clerk of the Court for the United States Court of Appeals for the Eighth Circuit by using the CM/ECF system. I certify that all participants in the case are registered CM/ECF users and will be served by the CM/ECF system.

Dated: March 5, 2021

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