No.

In the Supreme Court of the United States

DANIEL GIRMAI NEGUSIE,

Petitioner,

v.

PETER D. KEISLER,
ACTING ATTORNEY GENERAL OF THE UNITED STATES,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

PETITION FOR A WRIT OF CERTIORARI

DAN KAHAN
Yale Law School
Supreme Court Clinic
127 Wall Street
New Haven, CT 06511
(203) 432-4800

ANDREW J. PINCUS
Counsel of Record
CHARLES A. ROTHFELD
Mayer Brown LLP
1909 K Street, NW
Washington, DC 20006
(202) 263-3000

Counsel for Petitioner

WILSON-EPES PRINTING CO., INC. – (202) 789-0096 – WASHINGTON, D. C. 20002

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QUESTION PRESENTED

The Immigration and Nationality Act (INA) prohibits the Secretary of Homeland Security and the Attorney General from granting asylum to, or withholding removal of, a refugee who has "ordered, incited, assisted, or otherwise participated in the persecution of any person on account of race, religion, nationality, membership in a particular social group, or political opinion." INA § 208(b)(2)(A), 8 U.S.C. § 1158(b)(2)(A). The question presented is:

Whether this "persecutor exception" prohibits granting asylum to, and withholding of removal of, a refugee who is compelled against his will by credible threats of death or torture to assist or participate in acts of persecution.

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OPINION BELOW

The unpublished opinion of the court of appeals (App., *infra*, 1a-3a) is available at 231 Fed. App'x. 325. The opinion of the Board of Immigration Appeals (App., *infra*, 4a-8a) and the opinion of the Immigration Judge (*id.* at 9a-21a) are not reported.

JURISDICTION

The judgment of the court of appeals was entered on May 15, 2007, and a timely petition for rehearing was denied on July 17, 2007 (App., *infra*, 22a). This Court's jurisdiction rests on 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

1. Section 208 of the Immigration and Nationality Act ("INA"), 8 U.S.C. § 1158(b), provides in pertinent part:

   > (1) (A) In General – The Secretary of Homeland Security or the Attorney General may grant asylum to an alien who has applied for asylum * * * if the Secretary of Homeland Security or the Attorney General determines that such alien is a refugee within the meaning of section 1101(a)(42)(A) of this title. * * *
   >
   > (2) (A) In General – Paragraph (1) shall not apply to an alien if the Attorney General determines that (i) the alien ordered, incited, assisted, or otherwise participated in the persecution of any person on account of race, religion, nationality, membership in a particular social group, or political opinion.

2. Section 241 of the INA, 8 U.S.C. § 1231(b)(3), provides in pertinent part:

   > (A) In General – * * * [T]he Attorney General may not remove an alien to a country if the Attorney General decides that the alien's life or

> freedom would be threatened in that country because of the alien's race, religion, nationality, membership in a particular social group, or political opinion
>
> * * *
>
> (B) Exception – Subparagraph (A) does not apply to an alien deportable under section 1227(a)(4)(D) of this title or if the Attorney General decides that –
>
> (i) the alien ordered, incited, assisted, or otherwise participated in the persecution of an individual because of the individual's race, religion, nationality, membership in a particular social group, or political opinion.

STATEMENT

This case involves the proper interpretation of the federal statute requiring the denial of asylum and withholding of removal from an asylum-seeker who participates or assists in persecution; in particular, whether that provision categorically excludes from eligibility for such relief any asylum-seeker who has been *forced* by threats of death or torture to assist or participate in persecution. Applying binding circuit precedent, the Fifth Circuit in this case held that coercion is irrelevant to the application of this "persecutor exception." Accordingly, even in situations where (as here) an individual was concededly forced to participate or assist in persecution under threat of bodily violence and death, that individual is ineligible to obtain asylum or withholding of removal.

The view taken by the Fifth Circuit accords with a decision of the Second Circuit and squarely conflicts with a decision of the Eighth Circuit. Decisions of the First and Ninth Circuits on closely-related issues indicate that those courts would reach the same

result as the Eighth Circuit. The fate of asylum-seekers who themselves have been forced by threats of torture or death to take part in persecution thus turns on no more than the location in which they must file their applications for asylum.

In a world where the number of civil wars is increasing, and both sides often coerce individuals into military service, this issue is arising with increasing frequency—as demonstrated by the significant number of judicial decisions addressing it. Capricious variation in the application of this Nation's asylum laws with respect to a frequently-recurring issue cannot be tolerated. This Court should grant review to restore uniformity to the application of the law on the question presented.

A. Statutory Background

Asylum has a "long and sacred history dat[ing] back to the very beginnings of regulated political life." Hanna Arendt, *The Origins of Totalitarianism* 280 (1951). Under the rule of asylum, refugees, persecuted for their political opinions or religious beliefs in their home countries, obtain the protection of the sovereign authority granting it. Asylum and refugee law was modernized as an international institution in the 1951 United Nations Convention Relating to the Status of Refugees, G.A. Res. 429 (V) (1951), and its 1967 Protocol, G.A. Res. 2198 (XXI) (1967).

Prior to 1980, the United States had no general law of asylum. Following the Second World War, for instance, Congress passed piecemeal legislation establishing asylum standards for refugees from particular countries or regions. See, *e.g.*, the Hungarian Refugee Act of 1958, Pub. L. No. 85-559, 72 Stat. 419 (1958); Cuban Refugee Act of 1966, Pub. L. No. 89-732, 80 Stat. 1161 (1966); Indochinese Refugee Re-

settlement Act of 1977, Pub. L. No. 95-145, 91 Stat. 1223 (1977). The Refugee Act of 1980, Pub. L. 96-212, 94 Stat. 110 (1980), was the Nation's first comprehensive legislation relating to asylum.

Under the standards set forth in the Refugee Act, refugees may remain in the United States by obtaining either a grant of asylum or withholding of removal. See INA §§ 208, 241 (codified as amended at 8 U.S.C. §§ 1158, 1231). A grant of asylum "permits an alien to remain in the United States and to apply for permanent residency after one year," while withholding of deportation or removal "only bars deporting an alien to a particular country or countries." *INS* v. *Aguirre-Aguirre*, 526 U.S. 415, 419-20 (1999) (citations omitted). Moreover, "withholding is mandatory unless the Attorney General determines [an] exception[] applies," but "the decision whether asylum should be granted to an eligible alien is committed to the Attorney General's discretion." *Ibid.*

In order to receive either type of relief, an alien must be "unable or unwilling to return to * * * [his home] country because of persecution or a well-founded fear of persecution." INA § 101(a)(42), 8 U.S.C. 1101(a)(42). But all aliens who demonstrate a well-founded fear of future persecution are not eligible for asylum or withholding of removal. Congress has excluded from eligibility any alien who has "ordered, incited, assisted, or otherwise participated in the persecution of any person on account of race, religion, nationality, membership in a particular social group, or political opinion." INA § 208(b)(2)(A)(i), 8 U.S.C. §§ 1158(b)(2)(A)(i). See also INA § 241(b)(3)(B)(i), 8 U.S.C. § 1231(b)(3)(B)(i).[1]

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1. As originally enacted in the 1980 statute, the persecutor exceptions to both asylum and withholding of removal used the

Congress enacted this categorical "persecutor exception" from eligibility for asylum as part of the comprehensive revision of asylum standards in the Refugee Act of 1980. The Refugee Act conformed United States asylum standards with the international standards contained in the 1951 United Nations Convention and its 1967 Protocol. See *Aguirre-Aguirre*, 526 U.S. at 426-27 ("'[O]ne of Congress' primary purposes' in passing the Refugee Act was to implement the principles agreed to in the 1967 United Nations Protocol Relating to the Status of Refugees to which the United States acceded in 1968." (citations omitted)).[2]

Another "basic objective[]" of the 1980 Act was "to provide protection to all victims of persecution regardless of ideology * * * * [and] to give the United States sufficient flexibility to respond to situations

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same language. In 1996, Congress passed the Illegal Immigration Reform And Immigrant Responsibility Act, Pub. L. No. 104-208, 110 Stat. 3009-546 (1996), a comprehensive revision of the Nation's immigration laws. That law amended the INA, moving the persecutor exception relating to the withholding of removal from § 243(b)(3)(B)(i) to § 241(b)(3)(B)(i). In addition, it amended the withholding exception's language, such that it now applies to any asylum-seeker who "ordered, incited, assisted, or otherwise participated in the persecution of an individual because of the individual's race, religion, nationality, membership in a particular social group, or political opinion." 8 U.S.C. § 1231(b)(3)(B)(i). This change in phraseology has no substantive implications for the question presented here.

2. The Protocol was adopted because the Convention "covers only those persons who have become refugees as a result of events occurring before I January 1951," and "it is desirable that equal status should be enjoyed by all refugees covered by the definition in the Convention irrespective of the dateline 1 January 1951." G.A. Res. 2198 (XXI) (1967) (preamble).

involving political or religious dissidents and detainees throughout the world." *INS* v. *Elias-Zacarias*, 502 U.S. 478, 487-88 (1992) (internal quotes and citations omitted) (quoting *INS* v. *Cardoza-Fonseca*, 480 U.S. 421, 449-50 (1987)).

B. Factual Background

1. The Ethiopian-Eritrean war lasted from 1970 to 2000, making it the longest continuous war in African history. Eritrea's human rights abuses were a well-recognized feature of this conflict. In particular, the Department of State documented Eritrea's "arbitrary arrest and detention" of its citizens, commonly in connection with refusal to serve in the military. U.S. Dep't of State, *Eritrea Country Report on Human Rights Practices 2006* (2007), *available online at* http://www.state.gov/g/drl/rls/hrrpt/2006/ [hereinafter *Eritrean Country Report*]. The Eritrean government routinely "round[ed] [up] young men and women for national service," and "incarcerat[ed] and tortur[ed] family members of national service evaders." *Ibid.* Those put in jail faced unspeakable conditions, including "torture and beatings of prisoners" and "harsh and life threatening prison conditions." *Ibid.*

The *Eritrean Country Report* explains that the Eritrean government still "use[s] * * * deadly force against anyone resisting or attempting to flee during military searches for deserters and draft evaders," and that "persons detained for evading national service [often] die[] after harsh treatment by security forces * * *." *Ibid.* The report includes accounts of "individuals [being] severely beaten and killed during government roundups of young men and women for national service." *Ibid.*

Additionally, the Eritrean government has banned all but four officially state-sanctioned religions. The government is reported to harass, arrest and intimidate those practicing non-sanctioned religions, primarily Protestants. *Ibid.* As a result of these practices, tens of thousands of Eritreans have fled the country, seeking asylum in countries across the world. See, *e.g.*, U.N. High Comm. for Refugees, News, *UNHCR looks at solutions for Eritrean refugees of eastern Sudan, available online at* http://www.unhcr.org/news/NEWS/46cc4a974.html. For these individuals, "repatriation is no longer a viable option" because it could mean death, imprisonment or torture. *Ibid.*

2. Petitioner Daniel Girmai Neguise was a citizen and resident of Eritrea in 1994 when he was arrested and "forced to perform hard labor in a facility that dug and processed salt for approximately one month." App., *infra*, 10a.[3] Petitioner subsequently underwent military training and was assigned to be a gunner on a naval vessel. He testified that he never fired the gun at individuals or other boats. *Ibid.*

When hostilities between Eritrea and Ethiopia resumed in 1998, petitioner—who had been discharged from the military—was conscripted into military service for a second time. He refused to go to the front and was sent instead to a naval base. In July 1999, petitioner was arrested, taken to a prison camp, and placed in solitary confinement for six months. He then was transferred to a cell with other prisoners, "was forced to perform hard labor most

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3. The Immigration Judge found petitioner's testimony credible (App., *infra*, 14a) and based his discussion of the facts upon petitioner's testimony.

days," and held in "hot, miserable, poor sanita[ry]" conditions. App., *infra*, 11a.

During his confinement, petitioner converted to the Protestant religion. He was punished for an approximately two-week period, at least in part because of his religion. Petitioner was required "to roll around on the ground in the hot sun. And if he became fatigued and stopped the rolling, then the authorities there would beat him with sticks." App., *infra*, 12a. When the period of punishment ended, petitioner's superior "threatened to personally kill him if he caught him practicing his religion again." *Ibid.*

After two years of incarceration, petitioner became a guard. "At times, he would guard the ocean, at other times, he would guard the gate. * * * And at other times, he was a prison guard." *Ibid.* Although a guard, petitioner "was not permitted to leave the base." *Ibid.*

Petitioner refused orders to punish prisoners and at one point gave water to a prisoner who was "out in the sun being punished"; his supervisor "threatened him for giving the prisoner water." App., *infra*, 13a. Petitioner's duties included "keep[ing] the prisoners from taking showers and obtaining ventilation and fresh air, but from time to time, he would allow the women to take showers and the prisoners to get fresh air." *Ibid.* He did see prisoners exposed to the intense heat of the sun and knew that "it was likely that death would ensue, because a person couldn't stand being in the sun for so long." *Ibid.*

After two years as a guard, petitioner found an opportunity to escape. He hid himself in a shipping container, came to the United States, and applied for asylum and withholding of deportation. App., *infra*, 19a.

C. Administrative Proceedings

1. The Immigration Judge (IJ) rejected petitioner's asylum claim and his claim for withholding of deportation. App., *infra*, 20a. He found that there was "no evidence to establish that [petitioner] is a malicious person or that he was an aggressive person who mistreated the prisoners," but that "the very fact that he helped keep [the prisoners] in the prison compound where he had reason to know that they were persecuted constitutes assisting in the persecution of others and bars [petitioner] from relief." *Id.* at 16a-17a.

The IJ went on to find that "it is more likely than not that [petitioner] would be tortured if returned to his native land" because he was a deserter from the armed forces and, in addition, because of his religion, his political opinion, and his nationality. App., *infra*, 20a. He therefore granted petitioner's request for deferral of removal under the Convention Against Torture. See 8 C.F.R. § 1208.17.[4]

2. The Board of Immigration Appeals (BIA) dismissed petitioner's appeal. App., *infra*, 8a. It deter-

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4. Deferral of removal is available to those asylum-seekers who would qualify for asylum and withholding of removal but for the application of a statutory provision requiring "mandatory denial" of asylum and withholding, such as the persecutor exception. *Ibid.* Without asylum or withholding of removal, petitioner cannot become a lawful permanent resident of the United States. Deferral of removal "[d]oes not confer upon the alien any lawful or permanent immigration status in the United States." 8 C.F.R. § 1208.17(b)(1)(i). Without any legal right to be in the country, petitioner may be detained at any time by the Immigration and Naturalization Service. 8 C.F.R. § 1208.17(c). He also "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).

mined that "[t]he fact that [petitioner] was compelled to participate as a prison guard, and may not have actively tortured or mistreated anyone, is immaterial. * * * '[A]n alien's motivation and intent are irrelevant to the issue of whether he "assisted" in persecution . . . [I]t is the objective effect of an alien's actions which is controlling.'" *Id.* at 6a (citation omitted).

The BIA upheld the IJ's finding that "the Eritrean government, which has a terrible overall human rights record, specifically engaged in mistreatment and torture against army deserters" and that therefore petitioner "is more likely than not to be tortured upon a return to Eritrea by the Eritrean government." *Id.* at 8a.

D. The Decision of the Court of Appeals

The court of appeals denied the petition for review of the BIA's decision (App., *infra*, 1a-3a). Applying *Bah* v. *Ashcroft*, 341 F.3d 348, 351 (5th Cir. 2003), the court ruled that "[t]he question whether an alien was compelled to assist authorities is irrelevant, as is the question whether the alien shared the authorities' intentions." App., *infra*, 2a.

Bah upheld the application of the persecutor exception to a young man who had been forced to assist the "Revolutionary United Front" (RUF) insurgency in Sierra Leone, another country torn by violent civil strife. Bah joined the RUF after RUF soldiers, who had "raped and killed his sister" and "incinerated his father," offered him "the option to join the RUF or die." 341 F.3d at 349. "Bah twice tried to escape * * *. During his second captivity, soldiers poured palm oil on his back and placed him face down with his back towards the sun in order to burn him." *Id.* at 350. Under the constant threat of continued torture and death, Bah was coerced into committing a number of

violent acts, including the taking of lives. *Ibid.* In his third escape attempt, Bah reached the United States where he applied for asylum.

The Fifth Circuit upheld the BIA's determination that the persecutor exception barred granting asylum to Bah despite "his forced recruitment" and forced participation in the activities of the RUF. *Id.* at 351. "The syntax of the statute," the court concluded, "suggests that the alien's personal motivation is not relevant * * *. Bah participated in persecution, and the persecution occurred because of an individual's political opinions." *Ibid.*

The court below concluded that *Bah* controlled the disposition of petitioner's appeal in this case. The court acknowledged that petitioner "did not affirmatively, personally injure the prisoners, and he objected to, and occasionally disobeyed, orders to inflict punishment, [and] did favors for prisoners." App., *infra*, 2a-3a. It concluded, however, that "[t]he question whether an alien was compelled to assist authorities [in persecution] is irrelevant, as is the question whether the alien shared the authorities' intentions." App., *infra*, 2a (citing *Bah*, 341 F.3d at 351).

REASONS FOR GRANTING THE PETITION

The Fifth Circuit's reading of the Nation's asylum laws is in direct conflict with a decision of the Eighth Circuit and with the reasoning of the First and Ninth Circuits. The practical result of this conflict is that the eligibility for asylum of individuals who (like petitioner) were coerced by threat of death and torture into participating in atrocities abroad now turns decisively on where they happen to file their application for asylum.

Resolution of the question presented likely affects hundreds of asylum applications each year. Violent civil strife in countries around the world frequently involves coerced participation in armed conflict. Trends in the sources of new asylum claims in the United States reflect a pattern of increasing numbers of asylum seekers from such nations.

Finally, and wholly apart from creating a conflict among the circuits, the position adopted by the Fifth Circuit ignores the plain meaning of the statute and contravenes the very purpose for which the Refugee Act's persecutor exception was enacted—to bring the Nation's immigration laws into conformity with international standards for asylum, standards that have long included a duress exception to the persecutor exception. Review by this Court is thus essential to restore uniformity to the application of this Nation's asylum laws with respect to the question presented and to correct the Fifth Circuit's error.

A. There Is A Square Conflict Among The Courts Of Appeals Regarding The Question Presented.

The Fifth Circuit upheld the denial of petitioner's application for asylum on the basis of its prior holding in *Bah* that compulsion is irrelevant to the application of the persecutor exception. The Second Circuit applies the same standard as the Fifth Circuit. This interpretation of Sections 208 and 241 of the INA squarely conflicts with a holding of the Eighth Circuit, which has held that individuals coerced by threat of death or torture into participating in atrocities are eligible for asylum in the United States.

Moreover, although the First and Ninth Circuits have not specifically addressed the coercion issue, their recognition of other mitigating circumstances,

such as ignorance and self-defense, is inconsistent with the rationale of the Fifth Circuit. It seems likely that these courts would adopt the view of the Eighth Circuit if presented with the compulsion issue. Review by this Court is essential to clarify this important area of asylum law.

1. The Courts of Appeals Are Divided Over The Relevance Of Coercion To The Application Of The Persecutor Exception.

There is a square conflict among the courts of appeals on whether the persecutor exception applies to asylum-seekers who were themselves *coerced* into participating in persecution. Two courts of appeals have concluded that proof of such compulsion is irrelevant to application of the persecutor exception. One is the Fifth Circuit, which so held both in *Bah* and the in present case. See App., *infra*, 2a ("The question whether an alien was compelled to assist authorities [in persecution] is irrelevant, as is the question whether the alien shared the authorities' intentions." (citing *Bah*, 341 F.3d at 351)). The other is the Second Circuit. See *Xie* v. *INS*, 434 F.3d 136, 140-41 (2d Cir. 2006) (denying relief where "Xie bases his petition * * * in large measure on the notion that his conduct was not voluntary. Neither the relevant statutes nor the case law, however, provides support for an 'involuntariness' exception to 'assist[ance] in persecution.' * * * [T]he phrase 'assisted in persecution' [does not] implicitly include[] a voluntariness requirement.").

The Eighth Circuit applies the opposite rule. See *Hernandez* v. *Reno*, 258 F.3d 806 (8th Cir. 2001). *Hernandez* involved the asylum claim of a man who had been kidnapped by Guatemalan guerillas and forced to join their group and participate in their ac-

tivities under threat of death. See *id.* at 809. The Eighth Circuit reversed the BIA's denial of asylum, holding that where an alien's conduct "was at all times involuntary and compelled by threats of death," and where the alien "shared no persecutory motives with the guerillas," the bar against asylum and withholding of removal does not apply. *Id.* at 814.

The Fifth Circuit's holding below cannot be reconciled with *Hernandez*. Accordingly, had the petitioner here applied for asylum in the Eighth Circuit, the BIA could not have applied the persecutor exception to his application.

2. The Courts Of Appeals Are In Conflict Over The Role Of Culpability In General When Applying The Persecutor Exception.

Although the First and Ninth Circuits have not addressed the *specific* issue of duress, compulsion, or coercion, they have concluded that the persecutor exception to asylum and withholding of removal contemplates an alien's culpability and mental state in general. Accordingly, had petitioner filed his application for asylum in one of those circuits, it is likely that the BIA's decision in this case would have been overturned.

In *Castañeda-Castillo* v. *Gonzales*, 488 F.3d 17 (1st Cir. 2007) (en banc), the IJ and BIA had applied the persecutor exception to an alien who claimed not to have known that persecution had occurred during a military operation in which he had participated. The First Circuit vacated and remanded. The court reasoned that the fact that the statute lacks an "explicit scienter requirement," is not a persuasive basis to conclude that "assistance in persecution" takes

place any time an alien's action has the "'objective effect' of facilitating persecution." *Id.* at 20, 22. Instead, the court explained, "the term 'persecution' strongly implies both scienter and illicit motivation." *Id.* at 20. Noting that most cases analyzing the persecutor exception "tend to reaffirm the need for some degree of moral culpability" and that "most case law assumes or affirms the need for some degree of subjective fault," *id.* at 21, the court held that "the persecutor bar should not be read to apply to" an alien who does not "possess[] such scienter as [is] required under the circumstances," *id.* at 22.

The Ninth Circuit addressed another aspect of culpability in respect to the persecutor exception in *Vukmirovic* v. *Ashcroft*, 362 F.3d 1247 (9th Cir. 2004). There, once again, the IJ and BIA had denied the alien asylum and withholding of removal. The Ninth Circuit reversed. Prior to arriving in the United States, the petitioner in that case had helped defend his Serbian town from attacks by Bosnian Croats. Although Serbians had engaged in a campaign of persecution against the Croats, Vukmirovic's participation in that conflict had been, according to the Ninth Circuit, a matter of self-defense. *Id.* at 1252. As the court explained:

> [T]he IJ erred by holding as a matter of law that "there is no provision under the law that exempts acts of self-defense from qualifying as persecution." This construction of the statute is untenable on its face. As a textual matter, holding that acts of true self-defense qualify as persecution would run afoul of the "on account of" requirement in the provision.

Ibid. The court therefore concluded that "individual accountability must be established" in order for the

persecutor exceptions to apply. *Ibid.* The same courts has since clarified that "[i]ndividuals are only rendered ineligible for asylum if they have provided *purposeful*, material assistance for the acts of persecution." *Im* v. *Gonzales*, 497 F.3d 990, 995-97 (9th Cir. 2007) (emphasis added) (reversing application of the persecutor exception on materiality grounds, although adverting to the relevance of the fact that the petitioner "had no viable alternative to his job as a prison guard" and was therefore "non-culpable").

The Fifth Circuit in this case relied on *Bah*'s conclusion that *any* factor that bears on the culpable mental state of an asylum-seekers is irrelevant to the application of the persecutor exception. The *Bah* Court rejected the refugee's claim that "he did not engage in political persecution because he did not share the RUF's intent of political persecution. * * * The syntax of the statute suggests that the alien's personal motivation is not relevant." *Bah*, 341 F.3d at 351. See App., *infra*, 2a ("The question whether an alien was compelled to assist authorities is irrelevant, as is the question whether the alien shared the authorities' intentions." (citing *Bah*, 341 F.3d at 351)).

Bah's conclusion that "[t]he syntax of the statute" requires it be applied regardless of any factor that bears on the asylum-seeker's culpability cannot be reconciled with the First and Ninth Circuit's respective decisions in *Castañeda-Castillo* and in *Vukmirovic* and *Im*. The practical result of the Fifth Circuit's holding in this case is that any time the "objective effect" of an alien's actions is to assist in persecution, the persecutor exception applies. As the court below indicated, questions of "comp[ulsion]" and "intentions" are "irrelevant." App., *infra*, 2a. The only

relevant consideration is the alien's objective "conduct." *Ibid.*

These irreconcilable holdings are generating divergent outcomes in the disposition of asylum applications. Had either Castañeda-Castillo or Vukmirovic applied for asylum in the Fifth Circuit, the BIA would have been free to apply the persecutor exception to them on the theory that their "personal motivation is not relevant." App., *infra*, 2a. Not so in the First and Ninth Circuits. Moreover, because those circuits consider as relevant whether asylum-seekers are culpable actors in persecution, had petitioner in this case filed for asylum in either of those jurisdictions, the BIA would *not* have been free to apply the persecutor exception to him on the ground that he was coerced, and therefore non-culpable.

These cases demonstrate that the courts of appeals are confused over the role of culpability in the application of the persecutor exception – including the legal relevance of knowledge, purpose, and duress. Although the direct conflict of authority on the question presented between the Eighth Circuit and the Fifth and Second Circuits (relating specifically to the relevance of compulsion) provides sufficient grounds on which to grant the petition, review in this case is all the more warranted given that it provides an opportunity to clarify the relevance of culpability in general. Only this Court's intervention can provide the clarity so evidently needed.

B. This Case Presents A Frequently-Recurring Issue Of Substantial National Importance.

The courts of appeals' starkly inconsistent interpretations of the persecutor exception presents an issue of substantial importance. Given the large numbers of refugees from countries suffering from

civil strife, questions regarding the application of the persecutor exception to refugees forced to engage in acts of persecution are arising with increasing frequency—as demonstrated by the growing number of court of appeals decisions addressing the issue. This Court should grant review to ensure the uniform—and proper—administration of national immigration policy.

1. The Outcomes Of A Substantial Number Of Asylum Cases Each Year Depend On The Resolution Of The Question Presented.

Violent civil strife in countries around the world increasingly involves coerced participation in armed conflict "[T]he majority of refugees in the world today are * * * fleeing civil conflicts in which the distinction between oppressor and oppressed is often unclear." Matthew Happold, *Excluding Children from Refugee Status: Child Soldiers and Article 1F of the Refugee Convention*, 17 Am. U. Int'l L. Rev. 1131, 1131 (2002).

The number of refugees from these countries seeking asylum in the United States is growing. The question whether the persecutor exception operates as a per se bar against such claims is therefore sufficiently important to warrant this Court's attention.

Hundreds of thousands of child soldiers from African countries, for example, are forced to serve in state and opposition armies. See *Hearing on the "Material Support" Bar Before the Subcomm. on Human Rights and the Law of the S. Comm. on the Judiciary*, 110th Cong. (2007) (testimony of Anwen Hughes, Senior Counsel, Refugee Protection Program, Human Rights First). These situations are becoming more and more common across the globe. Ex-

amples of countries in which combatants force innocent victims to take part in their persecutory acts include:

- Burma (see *Burma Country Report*, *available online at* http://www.state.gov/g/drl/rls/hrrpt/2006/) (describing forced conscription of child soldiers by armed militia groups);
- Columbia (see *Columbia Country Report*, *available online at* http://www.state.gov/g/drl/rls/hrrpt/2006/) (noting widespread recruitment of child soldiers by local guerrillas);
- El Salvador (see *Doe* v. *Gonzales*, 484 F.3d 445, 446-47 (7th Cir. 2007));
- Eritrea (see *Eritrea Country Report*) (citing reports of forced conscription into national service and numerous abuses including torture by security forces);
- Guatemala (see *Hernandez*, 258 F.3d at 808-09);
- Iraq (see *Iraq Country Report*, *available online at* http://www.state.gov/g/drl/rls/hrrpt/2006/ (citing occurrences of compelled child participation in violent activities of opposition groups).
- Peru (see *Peru Country Report*, *available online at* http://www.state.gov/g/drl/rls/hrrpt/2006/) (noting continuing conscription of indigenous population into Shining Path guerrilla forces);
- Somalia (see *Somalia Country Report*, *available online at* http://www.state.gov/g/drl/rls/hrrpt/2006/) (citing reports from previous year that militia groups forced minority groups into forced labor);
- Sudan (see *Sudan Country Report*, *available online at* http://www.state.gov/g/drl/rls/hrrpt/2006/) (noting forced military conscription of underage

men and numerous abuses carried out by security forces).

Asylum claims in the United States show a pattern of increasing numbers of refugees from these countries. In fact, five of these nations – Colombia, Ethiopia, Iraq, Burma, and Somalia – ranked in the top twenty-five source countries for asylum applications granted by the United States in 2006. See U.S. Dep't of Justice, *2006 Statistical Year Book*, J2 (Feb. 2007), *available online at* http://www.usdoj.gov/eoir/statspub/fy06syb.pdf. El Salvador, Guatemala, and Peru each ranked in the top twenty-five countries represented in immigration court proceedings overall in 2006. *Id.* at E2. The United States additionally received over 200 asylum applications in 2006 from several other countries known for forced participation in persecution, including Gambia, the Ivory Coast, Liberia, and Sierra Leone; and nearly 100 asylum applications from the Sudan. *Ibid.*

The increased judicial attention to the question presented confirms the importance of the issue. In the last two years, the federal courts of appeals have decided nearly one dozen asylum appeals that turn on the resolution of the question presented. In addition to the cases already discussed, see *Feng Zheng* v. *Gonzales*, 232 Fed.App'x. 48, 50 (2d Cir. 2007) (affirming the denial of asylum under the persecutor exception even where the alien "had no choice" but to assist in persecution); *Dacaj* v. *Gonzales*, 177 Fed. App'x. 185, 187 (2d Cir. 2006) (denying relief because "[t]he relevant inquiry focuses not on the alien's volition or the extent of his participation, but on the nature of his conduct as a whole. Conduct amounts to 'assistance in persecution' if it is active and has direct consequences for the victims," regardless of culpability; under this standard, the alien's "conduct

was sufficient to constitute assistance in persecution"); *Jia Yun Li* v. *Gonzales*, 203 Fed. App'x. 360, 362 (2d Cir. 2006) (concluding that "the fact that [the alien] was obeying orders * * * [does not] relieve[] [him] of having assisted in persecution" (citing *Xie*, 434 F.3d)); *Xiao Jun Zhou* v. *United States Dep't of Justice*, 165 Fed. App'x. 20, 21 (2d Cir. 2006) ("On appeal, [the alien] primarily argues that he ought not be barred from relief because to the extent that he participated in persecution, such participation was not voluntary and was done only on orders from his military superiors. This argument is foreclosed by this Court's recent decision in *Xie* v. *INS*." (citations omitted)); *Ghazaryan* v. *Gonzales*, 172 Fed. App'x. 139, 140 (9th Cir. 2006) (affirming the BIA and IJ under the persecutor exception because the alien's "individual accountability [was] established" given that she "was under no compulsion to continue her employment as a prison guard" (citing *Vukmirovic*, 362 F.3d at 1252)).

2. The Conflict In This Case Is Producing Drastically Divergent Results In Identical Cases Across The Nation.

The increasing frequency with which immigration judges, the BIA, and courts of appeals are faced with cases like petitioner's is of particular concern given the drastic variation in outcomes created by the conflicting interpretations of the courts of appeals. As a result of the divergent approaches taken by the courts of appeals, refugees who were forced under threat of death to serve (for example) as guards in prisons run by persecutory regimes may obtain asylum and withholding of removal in the Eighth Circuit, while identically situated aliens will be expelled from the country in the Second and Fifth Circuits. If petitioner here lived in St. Louis, he would be a law-

ful permanent resident of the United States. Because he resides instead in Alabama, he is now subject to deportation to a country in which (all agree) he faces credible fear of future persecution and even death.

As a result of the starkly different outcomes available based on the conflicting views among the circuits, the conflict in this case strongly encourages aliens to forum shop. See, *e.g.*, Robert C. Leitner, Comment, *A Flawed System: The Immigration Adjudicatory System and Asylum for Sexual Minorities*, 58 U. Miami L. Rev. 679, 699 (2004) ("Rational aliens [will] concentrate only in the circuits that tend to produce favorable immigration decisions, thus limiting the great benefits and burdens of immigration to a few states."). Refugees entering the United States will predictably avoid States in the Fifth Circuit altogether for fear that they will be expelled for no fault of their own.

And while any conflict among the courts of appeals on a matter of federal law is a matter for concern, certiorari review is particularly appropriate where a split of authority results in such disparate outcomes in the application of the nation's asylum laws. The BIA, like any agency, is obliged to follow interpretations of law announced in the court of appeals that has jurisdiction over proceedings that it reviews. Because courts of appeals now disagree on the relevance of an asylum-seeker's culpability generally (and of duress in particular) under the persecutor exception, the BIA also now labors under intolerably inconsistent rules of law.

The Constitution requires Congress to implement a "uniform rule of naturalization." U.S. Const. Art. I, § 8, Cl. 4; see also *Graham* v. *Richardson*, 403 U.S. 365, 382 (1971) (acknowledging that the Naturaliza-

tion Clause imposes an "explicit constitutional requirement of uniformity" in the execution of "laws on the subject of citizenship"); Michael J. Wishnie, *Laboratories of Bigotry? Devolution of the Immigration Power, Equal Protection, and Federalism*, 76 N.Y.U. L. Rev. 493, 537 (2001) (arguing that the Constitution permits "exercise[] [of the immigration and asylum power] only in a manner that is geographically consistent across the nation"). The divergence in the lower courts' resolution of the question presented here is generating drastic variation in the administration of the Nation's asylum laws. This Court's intervention is plainly warranted.

C. The Persecutor Bar Does Not Apply To Asylum-Seekers Whose Conduct Was Compelled By Threats Of Death Or Torture.

The plain language of the persecutor exception, and Congress's reasons for adopting it, make clear that Congress never intended to exclude from eligibility for relief refugees who were *coerced* to assist or participate in persecution. The Fifth Circuit's contrary holding ignores this Court's long-standing presumption that federal statutes incorporate traditional principles of culpability, including requirements of mens rea and excuses such as duress. See, *e.g.*, *Morissette* v. *United States*, 342 U.S. 246, 263 (1952) ("We hold that mere omission from [the statute] of any mention of intent will not be construed as eliminating that element from the crimes denounced."); *United States* v. *Bailey*, 444 U.S. 394, 415 n.11 (1980) ("We * * * recognize that Congress in enacting criminal statutes legislates against a background of Anglo-Saxon common law, and that therefore a defense of duress or coercion may well [be] contemplated by Congress when it [passes a law imposing a legal penalty]." (citations omitted)).

1. The plain meaning of the word "persecution" requires purpose and intent on the part of the actor. Thus, the *Oxford English Dictionary* defines "persecution" as "the action of pursuing or persecuting a person or group *with hostile intent*." *Oxford English Dictionary* (2d ed. 1989) (emphasis added). The Latin root of "persecution," *prosequ*, means "to seek out, to pursue, to follow *with hostility or malignity* * * * on religious grounds." *Ibid.* (emphasis added). As the common-sense understanding of the words imply, "assistance" and "participation" in persecution also require the hostile intent inherent in persecution itself. See, *e.g.*, *Doe*, 484 F.3d at 449-450 (explaining that "assistance" is conduct akin to aiding or abetting, which traditionally require purpose); *Petkiewytsch* v. *INS*, 945 F.2d 871, 880 (6th Cir. 1991) ("participation" requires intent equivalent to that of a co-conspirator). The persecutor exception therefore should be construed to demand a showing, just as aiding and abetting a crime does, that a person "'in some sort associate[d] himself with the venture, that he participate[d] in it as in something that he wishes to bring about, that he s[ought] by his action to make it succeed.'" *Nye & Nissen* v. *United States*, 336 U.S. 613, 619 (1949) (quoting *United States* v. *Peoni*, 100 F.2d 401, 402 (2d, Cir. 1938) (Hand, J.)).

This Court held in the very year that Congress passed the Refugee Act, moreover, that Congress "legislates against a background of Anglo-Saxon common law, [and] therefore a defense of duress * * * may well [be] contemplated by Congress" in the process of legislation, although not explicitly included within the statutory language. *Bailey*, 444 U.S. at 415 n.11. Even when Congress is silent as to application of the common law defenses, "[t]he du-

ress defense * * * may excuse conduct that would otherwise be punishable * * * 'because coercive conditions or necessity negates a conclusion of guilt even though the necessary mens rea was present.'" *Dixon* v. *United States*, 126 S. Ct. 2437, 2441 (2006) (quoting *Bailey*, 444 U.S. at 402). This fundamental principle of statutory interpretation supports interpreting the provision to incorporate a duress defense.

2. Congress adopted the Refugee Act of 1980 to conform domestic law to our treaty obligations. *Aguirre-Aguirre*, 526 U.S. at 426-27 (1999) ("'[O]ne of Congress' primary purposes' in passing the Refugee Act was to implement the principles agreed to in the 1967 United Nations Protocol Relating to the Status of Refugees to which the United States acceded in 1968." (citation omitted) (quoting *Cardoza-Fonseca*, 480 U.S. at 436-37)). Accordingly, this Court has recognized that "the U.N. Handbook [on Procedures and Criteria for Determining Refugee Status under the 1951 Convention and the 1967 Protocol Relating to the Status of Refugees] provides some guidance in construing the provisions added to the INA by the Refugee Act." *Id.* at 427.

Of particular relevance here, the Office of the High Commissioner for Refugees had authoritatively interpreted the Protocol's "exclusion clauses"—including its version of the persecutor exception[5]—as

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5. The Protocol exempts from asylum persons who have "committed a crime against peace, a war crime, or a crime against humanity [or who] has been guilty of acts contrary to the purposes and principles of the United Nations." See U.N. High Comm. for Refugees, *Handbook on Procedures and Criteria for Determining Refugee Status under the 1951 Convention and the 1967 Protocol Relating to the Status of Refugees*, Ch. IV(3)(a), U.N. Doc. HCR/IP/4/Rev.1 (1979) [hereinafter *Handbook*].

applying only to asylum-seekers whose "acts [are] of a *criminal nature*," including acts of "instigators and accomplices [and] conspira[tors]." *Handbook*, at ¶ 162, Annex V (emphasis added). In evaluating the applicability of the exclusion clauses, moreover, the *Handbook* stated that "all the relevant factors—including any mitigating circumstances—*must* be taken into account." *Id.* at ¶ 157 (emphasis added). Finally, "due to their nature and the serious consequences of their application to a person in fear of persecution," the *Handbook* admonished that "the exclusion clauses should be applied in a restrictive manner." *Id.* at ¶ 180.

Congress thus would have known at the time that it adopted the Refugee Act that the international legal standards with which it sought to conform United States law included a duress defense to the exceptions from eligibility for asylum. The only logical conclusion is that the Congress intended to exclude from the persecutor exception aliens compelled to engage in conduct constituting persecution. Any other result would frustrate Congress's goal of bringing United States law into conformity with international standards.[6]

3. Congress's second purpose in enacting the Refugee Act was "to give the United States sufficient

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6. In 2003, the U.N. High Commission for Refugees issued even clearer guidance in a document that superseded the *Handbook*, stating that the persecutor exception applies only to "responsib[le]" aliens who act with "knowledge and intent," a "mental element" that may be defeated by traditional "defenses to criminal responsibility," including "duress." U.N. High Comm. for Refugees, *Guidelines On International Protection: Application of the Exclusion Clauses: Article 1F of the 1951 Convention Relating to the Status of Refugees*, 15 Int'l J. of Refugee L. 492, 498 (2003).

flexibility to respond to situations involving political or religious dissidents and detainees throughout the world." *INS* v. *Elias-Zacarias*, 502 U.S. 478, 488 (1992) (quoting *Cardoza-Fonseca*, 480 U.S. at 450). Guided by its concern for the harshness and finality deportation, the *Elias-Zacarias* Court counseled that courts should seek to "increase[]," not decrease, that "flexibility." *Ibid.*

The rule applied by the court below does just the opposite. Rather than increasing the Attorney General and Secretary of Homeland Security's collective discretion to admit refugees who themselves were victims of persecution by being compelled on threat of death or torture to engage in the acts in question, the Fifth Circuit has tied their hands. Now "the Attorney General may not even *consider* granting asylum to one who fails" the Fifth Circuit's strict liability standard. *Ibid.* (emphasis added). Given the increase in civil strife and such coercive behavior around the world, the construction of the statute adopted by the court below will eliminate discretion to "respond to situations involving political or religious dissidents and detainees."

4. The Fifth Circuit erroneously based its interpretation of the persecutor exception on this Court's rejection of a voluntariness requirement in *Fedorenko* v. *United States*, 449 U.S. 490 (1981). *Fedorenko* addressed the now-expired Displaced Persons Act of 1948 (DPA), Pub. L. No. 80-774, 62 Stat. 1009 (1948), which had been passed to address the narrow range of unique asylum problems associated with Nazi war crimes committed during the Second World War.[7]

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7. Section 2(c) of the DPA, for instance, defined an "[e]ligible displaced person" as one who "on or after September 1, 1939, and on or before December 22, 1945, entered Germany, Austria,

The Court's decision in *Fedorenko* was based on the specific language of the DPA, language that Congress did *not* include in the persecutor exception in the Refugee Act. Thus, the Court observed that the DPA specifically excluded from the definition of eligible displaced persons "individuals who had 'assisted the enemy in persecuting [civilians]' or had '*voluntarily* assisted the enemy forces * * * in their operations * * *.'" *Fedorenko*, 449 U.S. at 495 (emphasis added). It reasoned that "[u]nder traditional principles of statutory construction, the deliberate omission of the word 'voluntary' from § 2(a) compels the conclusion that the statute made *all* those who assisted in the persecution of civilians ineligible for visas." *Id.* at 512 (emphasis in original).

The Refugee Act's persecutor exception does not include the word "voluntary." Accordingly, *Fedorenko*'s statutory analysis is wholly inapposite. Rather, the plain language of the Refugee Act provision, and the fact that it was enacted to conform U.S. law to international standards for asylum *generally* (standards that included a duress exception), compel the conclusion that Congress did not intend to apply the persecutor exception to refugees compelled against their will to engage in conduct amounting to persecution. See, *e.g.*, *Singh* v. *Gonzales*, 417 F.3d 736, 739 (7th Cir. 2005) (holding that *Fedorenko*'s

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or Italy and who on January 1, 1948, was in Italy or the American sector, the British sector, or the French sector of either Berlin or Vienna or the American zone, the British zone, or the French zone of either Germany or Austria; or a person who, having resided in Ger-many or Austria, was a victim of persecution by the Nazi government and was detained in, or was obliged to flee from such persecution and was subsequently returned to, one of these countries as a result of enemy action, or of war circumstances * * *." 62 Stat. 1009.

interpretation of the DPA "is not fully compatible with the present statutory and factual situation," involving the INA's persecutor exception).

Even if *Fedorenko* were relevant to interpreting the INA's persecutor exception, moreever, it would not support the Fifth Circuit's refusal even to consider evidence of coercion in determining whether the persecutor exception applies in a particular case. This Court recognized that the question whether "particular conduct can be considered assisting in the persecution of civilians" may "present difficult line-drawing problems." *Fedorenko*, 449 U.S. at 514 n.34. Even under *Fedorenko*, "a court faced with difficult 'line-drawing problems' should engage in a particularized evaluation in order to determine whether an individual's behavior was *culpable to such a degree that he could be fairly deemed to have assisted or participated in persecution*." *Hernandez*, 258 F.3d at 813 (emphasis added).

* * * * *

The courts of appeals are divided over whether the INA's persecutor exception prohibits the granting of asylum to, and withholding of removal of, an alien who was compelled against his will to assist or participate in persecution. This issue is litigated with great frequency and, as a result of the conflict among the circuits, asylum-seekers receive dramatically different outcomes based on the circuit in which they reside. Only review by this Court can restore uniformity to the application of this Nation's asylum law and correct the erroneous legal standard applied by the court below.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

DAN KAHAN
Yale Law School
Supreme Court Clinic
127 Wall Street
New Haven, CT 06511
(203) 432-4800

ANDREW J. PINCUS
Counsel of Record
CHARLES A. ROTHFELD
Mayer Brown LLP
1909 K Street, NW
Washington, DC 20006
(202) 263-3000

Counsel for Petitioner

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