No. 07-499

In the Supreme Court of the United States

DANIEL GIRMAI NEGUSIE,

Petitioner,

v.

MICHAEL B. MUKASEY, ATTORNEY GENERAL

Respondent.

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

REPLY BRIEF FOR PETITIONER

DAN M. 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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The government acknowledges the square conflict among the courts of appeals on the question presented – whether proof that an asylum seeker was coerced to participate in persecution by threats of death and torture should be taken into account in determining whether to apply the INA's "persecutor exception." See Opp. 11 ("The Eighth Circuit [has] held that involuntariness is one of many relevant factors, while the Fifth Circuit held that it is irrelevant to application of the INA's persecutor exception.") And the government does not dispute that this legal issue arises frequently in asylum applications.

The government asserts nonetheless that certiorari should be denied on two grounds. First, it points to petitioner's supposed concession below that his "subjective intent" was "irrelevant." Opp. 8. But that argument confuses two analytically distinct legal concepts – duress and intent. This Court has recognized that a person can act intentionally and yet still be entitled to a duress defense. See, *e.g.*, *Dixon* v. *United States*, 126 S. Ct. 2437, 2442 (2006). Accordingly, any concession regarding petitioner's intent has no bearing whatsoever on the contention – expressly presented to and rejected by the court of appeals – that the fact that he was *coerced* into participating in persecutory acts should be taken into account in determining whether the persecutor bar applies to his asylum claim.

Second, the government inexplicably contends that the question presented does not encompass the issue on which the courts of appeals have divided because, in the government's view, the question presented is "whether involuntariness provides a *categorical defense* to the persecutor bar," and no court of appeals has adopted that rule. Opp. 10 (emphasis added).

In fact, the question presented expressly focuses on the correctness of the standard adopted by the court below, that involuntariness is *per se* irrelevant to the application of the persecutor bar: "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." Pet. i. It thus squarely puts before the Court the correctness of the Fifth Circuit's categorical rule – applied here to bar consideration of the undisputed fact that petitioner was coerced to assist his captors under threats of death and torture – as opposed to the Eighth Circuit's standard, which requires consideration of coercion in determining whether to apply the persecutor bar.

The government also addresses the merits of the issue. Although these arguments provide no basis for declining review in the face of the conflicting lower court decisions and the importance of the issue, the government's statutory analysis is wrong. The plain language and legislative context make clear that Congress never intended the INA's persecutor exception to apply to asylum-seekers forced to engage in persecutory acts. Review in this case is therefore warranted.

A. This Case Squarely Presents For Review The Acknowledged Conflict Over The Question Whether Coercion Is Relevant to the Persecutor Bar.

We showed in the petition that there is a clear conflict among the courts of appeals with respect to whether duress may preclude application of the persecutor bar and that this issue arises frequently in asylum applications. The government agrees that

there is a conflict (Opp. 11) and does not dispute the importance of the issue. Instead it asserts that "[t]his case would not provide an appropriate vehicle" for resolving the conflict for two reasons: first, because petitioner "conceded in the court of appeals that subjective intent is 'irrelevant'"; and, second, because the petition supposedly seeks review of a different question – "whether involuntariness provides a categorical defense to the persecutor bar." Opp. 10. These arguments are entirely without merit.

1. As the government recognizes, petitioner argued in the court below "that compulsion is one 'relevant' 'factor[]' to be considered" in deciding whether to apply the persecutor bar. Opp. 10 (quoting Pet. C.A. Br. 19). The court of appeals, as the government again acknowledges, considered and rejected that argument: "the court held 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." Opp. 5 (quoting Pet. App. 2a) (emphasis added). Accordingly, the issue of the relevance of coercion under the persecutor exception plainly was explicitly raised and decided below.

Petitioner's supposed concession of the "irrelevance" of his "subjective intent" has no bearing on whether the coercion question is properly presented, because the issue of "subjective intent" is analytically distinct from coercion. The claim of asylum seekers, like petitioner, who argue that coercion *is* relevant under the persecutor exception is that they were coerced into engaging in admittedly intentional acts of persecution against their will.

This distinction between "voluntariness" and "intentionality" is recognized in the criminal law defense of duress:

> Like the defense of necessity, the defense of duress does not negate a defendant's criminal state of mind when the applicable offense requires a defendant to have acted knowingly or willfully; instead, it allows the defendant to "avoid liability * * * 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, 2442 (2006) (quoting *United States* v. *Bailey,* 444 U.S. 394, 402 (1980)). Under the criminal law, therefore, a defendant may have engaged in every element of an offense – including acts that were "knowing" or "willful" – but nonetheless be excused from liability by the defense of duress. Similarly, an asylum seeker may have intentionally participated in or assisted persecutory acts – and therefore have acted with "subjective intent" – but nonetheless be protected from operation of the persecutor bar because those actions were coerced by threats of injury or death. Any concession regarding petitioner's subjective intent is thus wholly irrelevant to his claim that coercion must be considered in determining whether to apply the persecutor bar.[1]

For the same reason, the government is wrong in characterizing our argument that "[t]he plain mean-

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[1] The government's argument about a "concession" regarding intentionality is misplaced for a second reason. The court of appeals explicitly held that intent is also irrelevant to the application of the persecutor bar: "[t]he question whether an alien was compelled to assist authorities is irrelevant, *as is the question whether the alien shared the authorities' intentions*." Pet. App. 2a (emphasis added). The lower court's explicit holding makes any concession completely irrelevant.

ing of the word 'persecution' requires purpose and intent on the part of the actor" (Pet. 24), as an assertion that subjective intent is relevant to the resolution of this case. Opp. 8. We simply were explaining why the plain meaning of the term "persecution" requires consideration of coercion – because participating in or assisting with "persecution" requires "hostility or malignity." Pet. 24 (quoting *Oxford English Dictionary* (2d ed. 1989)).

Even though the two issues are analytically distinct, however, the Court's resolution of the coercion issue is likely to provide useful guidance to the lower courts regarding the relevance of subjective intent to application of the persecutor bar, an issue as to which they also have reached conflicting determinations. See Pet. 14-17. The analysis employed by the Court in determining whether the statutory term "persecution" is negated by coercion inevitably will shed light on how to resolve the claim raised in these cases that an individual may not be found to have engaged in "persecution" if he did not know that his actions were assisting in persecution. Addressing the meaning of "persecution" here thus likely will enable the courts of appeals themselves to resolve the conflict regarding intent.

2. There also is no substance to the government's contention that the petition presents a question – "whether involuntariness provides a *categorical defense* to the persecutor bar" (Op. 10 (emphasis added)) – distinct from the issue on which the circuits are divided. The question presented in the petition 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.

The court below answered that question in the affirmative, applying *Bah* to conclude that "[t]he question whether an alien was compelled to assist authorities is irrelevant." Pet. App. 2a (citing *Bah* v. *Ashcroft*, 341 F.3d 348, 351 (5th Cir. 2003) ("forced" participation "not relevant")). In contrast, the Eight Circuit answered that question in the negative in *Hernandez* v. *Reno*, 258 F.3d 806 (8th Cir. 2001), holding that application of the persecutor bar *does* require that the BIA take into account that the asylum seeker's behavior was compelled.

The question presented squarely poses the issue whether the categorical rule adopted by the court below was correct. That determination differs from the Eighth Circuit's rule and this case is an excellent vehicle to resolve the question whether the court adopted an erroneous legal rule *in this very case.*

3. Resolution of the question presented is also plainly relevant to the outcome in this case, despite the government's bizarre – and wholly unsupported – speculation that "it is far from clear that the difference between [the Fifth and Eighth Circuit's] approaches would make a difference in this case." Opp. 12. The government does not (nor could it) dispute "that [petitioner] was compelled to participate as a prison guard." Pet. App. 6a. Nor does the government dispute that the Fifth Circuit rejected petitioner's appeal because "the question whether an alien was compelled to assist authorities is irrelevant." Pet. App. 2a (citing *Bah*, 341 F.3d at 351). If petitioner had filed his appeal in the Eighth Circuit, that court, in contrast with the court below, would have considered the fact that he was coerced as relevant to de-

termining whether he was "culpable to such a degree that he could fairly be deemed to have assisted or participated in persecution.'" *Hernandez*, 258 F.3d at 813.

To be sure, there is no *guarantee* that consideration of coercion would have led to a different result regarding the application of the persecutor bar in this case. But that will be true in every case in which review is sought from the Fifth Circuit's categorical standard – surely the government does not mean that review by this Court of the coercion issue is available only when the government seeks to overturn a decision granting asylum based on the Eighth Circuit standard but never available when an asylum applicant challenges the categorical standard.

Moreover, the facts here are compelling. The Immigration Judge found "no evidence" that petitioner "is a malicious person or that he was an aggressive person who mistreated the prisoners." Pet. 9 (citations omitted). Permitting consideration of coercion in this case would therefore likely tip the scales against application of the persecutor bar.

The government suggests that "[t]he practical significance of the issue is also reduced in this case by petitioner's [Convention Against Torture (CAT)] deferral." Opp. 15. As we have explained (Pet. 9 n.4), however, petitioner cannot become a lawful permanent resident of the United States under a CAT deferral. In fact, 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) (emphasis added). Without any legal right to remain 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 *any* third country "where he

or she is not likely to be tortured." 8 C.F.R. § 1208.17(b)(2) (emphasis added). Thus the proper resolution of the question presented in this case carries tremendous practical significance for petitioner and other similarly situated asylum applicants.

4. Finally, the government does not dispute that recent patterns in asylum claims demonstrate that cases like petitioner's are increasingly common, likely amounting to hundreds or even thousands of cases each year in the United States. See Pet. 18-20. In fact, over 1,000 of the approximately 41,000 new asylum applications filed in 2006 were filed by citizens of Ethiopia; over 500 were filed by citizens of Eritrea.[2] Given the ubiquity of forced recruitment of men and boys into the armed conflict in that region – well demonstrated by petitioner's own story – it is likely that resolution of the question presented was dispositive in many of those cases.

The government asserts only that cases among the courts of appeals are "not so numerous as to warrant further review in this case." Opp. 15. That assertion ignores the fact that the large majority of the tens of thousands of annual asylum claims never make their way to the courts of appeals,[3] and that resolution at the administrative level of the question presented will frequently be dispositive.

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[2] See Dep't of Homeland Security, Office of Immigration Statistics, *2006 Yearbook of Immigration Statistics*, at 40 tbl.14, http://www.dhs.gov/xlibrary/assets/statistics/yearbook/2006/OIS_2006_Yearbook.pdf.

[3] See *2006 Judicial Business of the United States Courts*, tbl.B-3, *available at* http://www.uscourts.gov/judbus2006/completejudicialbusiness.pdf (noting that of over 220,000 total immigration cases in 2006, only 12,000 petitions for review were filed).

B. Congress Did Not Intend The INA's Persecutor Exception To Apply To Those Asylum-Seekers Who Have *Involuntarily* Assisted Or Participated In Persecution.

The presence of an undeniable circuit conflict – coupled with the undisputed frequency with which aliens apply for asylum from countries torn by violent civil strife involving persecution – establishes that review in this case is warranted. The government suggests that the Fifth Circuit's categorical rule is so clearly correct that this Court's intervention is unnecessary. To the contrary, the flaws in the lower court's analysis are yet another factor that weigh in favor of granting the petition.

Despite the government's insistence (Opp. 6-9), this Court's decision in *Fedorenko* v. *United States*, 449 U.S. 490 (1981), does not provide the proper framework for interpreting the INA's persecutor exception. As we explained in the petition, this Court's decision in *Fedorenko* was based on the specific language of the long-expired Displaced Persons Act (DPA), language that Congress did *not* include in the persecutor exception at issue in this case. See Pet. 28.

The provision of the DPA considered in *Fedorenko* 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 * * *.'" 449 U.S. at 495 (emphasis added). This Court 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 perse-

cution of civilians ineligible for visas." *Id.* at 512 (emphasis in original).

The government argues that because the INA, like the DPA, "also contains provisions that rely on voluntariness," Opp. 7-8, the same principles of statutory construction apply here. That assertion ignores highly relevant differences between the two statutes. The "provisions that rely on voluntariness" that the government cites here were passed as part of the *original* Immigration and Nationality Act of 1952, and *not* as part of the Refugee Act of 1980 that included the persecutor exception at issue here. Moreover, the cited provisions are codified in entirely different sections of Title 8. In *Federenko*, by contrast, the provision of the DPA including the modifier "voluntarily" was separated from the persecutor exclusion by a single line. Indeed, the two clauses were codified as consecutive sub-parts to the same subsection of the same statute. See 62 Stat. 3051-52. Congress's use of the word "voluntarily" in a remote provision of Title 8 enacted in a different statute 28 years earlier and codified 51 sections away plainly lacks the same interpretive relevance.[4]

Moreover, as we explained in the petition (at 24-27), the statutory history and plain language of the INA's persecutor exception demonstrate the Congress never intended it to apply to asylum-seekers

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[4] The government notes that the Eighth Circuit in *Hernandez*, rested its decision on *Fedorenko*, intimating that the Eighth Circuit's reasoning somehow undermines the conflict or the relevance of the conflict to the resolution of this case. Opp. 11-12. But the Eighth Circuit's reliance on *Fedorenko* does not vitiate the conflict between its approach and that of the court below. Indeed, it demonstrates that even the government's reasoning based on *Fedorenko* is not persuasive. See Pet. 29.

who have been compelled under threat of torture and death to participate in persecution. The government argues that because the definition of "refugee" found in the 1967 Protocol was based in part on the definition found in prior international legal documents on which the DPA was based, this Court should rely on the DPA and *Fedorenko* directly to interpret the Refugee Act. Opp. 8-9.

But this Court has already recognized that "the U.N. Handbook [interpreting the 1967 Protocol] provides some guidance in construing the provisions added to the INA by the Refugee Act." *INS* v. *Aguirre-Aguirre*, 526 U.S. 415, 427 (1999). That guidance, along with the plain meaning of the word "persecution" and the legal background against which Congress legislated, unequivocally indicates that coercion *is* relevant to application of the INA's persecutor exception.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

DAN M. 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 Petitioners

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