No. 07-499

In the Supreme Court of the United States

DANIEL GIRMAI NEGUSIE,

Petitioner,

v.

MICHAEL B. MUKASEY,
ATTORNEY GENERAL OF THE UNITED STATES,
Respondent.

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

REPLY BRIEF FOR PETITIONER

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

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

Counsel for Petitioner

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page(s)

CASES

TABLE OF AUTHORITIES—continued

Page(s)

TABLE OF AUTHORITIES—continued

Page(s)

STATUTES, RULES AND REGULATIONS

OTHER AUTHORITIES

TABLE OF AUTHORITIES—continued

Page(s)

REPLY BRIEF FOR PETITIONER

The statutory provisions at issue in this case exclude from the category of "refugee[s]" eligible to seek asylum any person who engages in "persecution" on account of race, religion, nationality, or other prohibited category. 8 U.S.C. § 1101(a)(42)(B); see also *id.* §§ 1158(b) & 1231(b)(3). The government's contention that this exclusion applies even when the individual was forced to engage in the alleged persecutory conduct under threat of death or severe injury turns the statutory language on its head, denying refugee status to individuals routinely described in common parlance as *victims* of persecution rather than as persecutors:

- Romanian Christians, forced by the Communist Party to torture others as part of their "unmasking" to "insure[] that the spirit would be utterly broken, and that distrust and misery would make cooperation in an uprising much less likely. (Becket Am. Br. 9);
- Individuals tortured because of their political beliefs and forced to identify others with the same views, who are then arrested and tortured on the basis of that information (Human Rights First *et al.* ("HRF") Am. Br. 29-35);
- Family members forced by threats of death to engage in incest as a method of torturing minority populations (Pet. Br. 27);
- Children captured and tortured for political statements or their racial or ethnic group *and* then coerced by threats of death, torture, and severe injury to join armies and attack

civilian populations (HRF Am. Br. 11-15 & 24-26).[1]

These individuals were forced to engage in persecutory acts as part of the persecution directed against them. The plain meaning of the statutory language provides no basis for labeling their coerced actions as "persecution," excluding them from the statutory term "refugee[s]," and thereby depriving them of the opportunity to invoke the protection of asylum, a protection that was designed to provide sanctuary from the very sort of persecution that they themselves have suffered.

The government never explains why it urges an interpretation of the statute so inconsistent with the words' ordinary meaning. It recognizes (U.S. Br. 31 & n.13) that the issue here involves only eligibility to seek asylum, and that the Attorney General retains substantial discretion to deny asylum to eligible persons—including persons coerced to engage in persecution. It notes (Br. 41) that rejecting its view of the statute would expand the class of persons eligible for withholding of deportation, but does not dispute our explanation (Pet. Br. 37-38) that other protections for persons seeking asylum vitiate the practical significance of that effect.

Although the government expresses concern about "the pitfalls of an *ad hoc* moral relativism and a *post hoc* assessment of the facts and circumstances of asserted coercion" (Br. 38), the persecution inquiry

---

[1] The government states (Br. 40 n.18) that this case does not raise the issue of application of the persecutor bar to minors, but—by stating that the issue is one for Congress—the government makes clear its view that the "categorical" exclusion of coercion would apply to children's asylum applications as well.

is already extremely fact-intensive, requiring the assessment of the circumstances of past events and the reasons why they occurred as well as the credibility and knowledge of the applicant. That inquiry takes place in every case in which an individual seeks asylum on persecution grounds. Considering a claim of coercion will neither expand the focus of the inquiry (because the claim of coercion typically is tied to the persecution suffered by the applicant) nor add a determination different in kind from those that immigration judges already must make.

Finally, the government tries (Br. 38) to attribute to Congress "a categorical determination" to disassociate the Nation from persecution. But the government's construction of the statute would categorically exclude from eligibility for asylum persons subject to the very sort of religious and other persecution that led to the founding of the Nation. If Congress's goal was to "offer[] safe haven to genuine refugees" (U.S. Br. 42) it is inconceivable that it would have barred these individuals from seeking to remain here.

Not surprisingly given this background, all of the relevant tools of statutory interpretation demonstrate that the persecutor clause does not exclude from eligibility for asylum persons who are forced under threat of death or serious injury to engage in persecution.

A. The Persecutor Bar Does Not Encompass Acts Coerced By Threats of Death Or Severe Harm.

The government devotes substantial portions of its brief to arguing that an individual's subjective intent is not relevant to determining whether he has

engaged in persecution within the meaning of the INA. See U.S. Br. 14, 16, 19-21 & 22. That issue is not before the Court. See Pet. Rep. Br. 2-5.

Petitioner's claim is that conduct coerced by threats of death or severe harm does not qualify as "persecution." See *Dixon* v. *United States*, 548 U.S. 1, 7 (2006) (explaining difference between two issues).

The statute's plain language, the relevant background principles of statutory construction, and the context in which Congress acted make clear that conduct coerced by threats of death or severe injury does not trigger the persecutor bar.

1. The plain language excludes coerced acts.

Although the government devotes considerable attention to explaining why the term "persecution" does not require proof of a particular subjective motivation (*e.g.*, Br. 16-17, 18 & 19-21), the sum total of its argument relevant to the issue presented here—whether the plain meaning of the words Congress used encompasses coerced conduct—appears in a single paragraph on pages 21-22 of its brief.

Significantly, the government does not dispute our explanation (Pet. Br. 23-24) that the word "persecution" carries an element of moral blameworthiness. Indeed, the definitions cited by the government (Br. 15) confirm that conclusion, utilizing terms such as "oppress" and "harass" and specifying that the acts must occur "because of" the race, religion, or other protected characteristic of the individuals persecuted. Thus, if the statute excluded from asylum eligibility "any person who persecuted any person on account of" a protected characteristic, it plainly would not reach coerced acts: a coerced individual

engages in the conduct because of the coercion, not because of the persecuted individual's characteristics.

The government's argument thus rests entirely on its assertion that the inclusion of the words "assist[]" and "participate[]" expands the scope of the provision to include acts coerced by threats of death or severe injury. That contention is wrong.

First, the government denigrates the degree of coercion to which petitioner and similarly situated individuals are subjected. Thus it asserts that petitioner's acts were "volitional" and that petitioner "may have felt coerced" (Br. 22), and repeatedly, and erroneously, states that petitioner argues he was subject to coercion solely because he was "following orders" (*e.g.*, Br. 2, 6 n.1, 18, 32 & 36).

Petitioner was beaten and otherwise mistreated when he violated the rules while imprisoned in Eritrea. J.A. 22-24. He would have been executed if he had tried to stop serving as a prison guard, which is what happened to two of his friends who tried to escape from their forced guard service. *Id*. at 38-40 & 41-42. Indeed, the finding underlying the withholding of petitioner's removal under the Convention Against Torture—that, because petitioner deserted rather than continuing to work as a prison guard, he would be tortured if he returned to Eritrea (Pet. App. 7a-8a & 19a-20a)—confirms that the consequence of failing to obey his superiors' commands would have been death or severe injury.

Moreover, the legal rule that the government urges would apply to numerous individuals whose conduct plainly results from threats of death or injury, as the amicus briefs filed in this case make

clear. *E.g.*, Becket Am.Br. 8-9 (religious believers forced to torture co-religionists); HRF Am. Br. (11-13, 24-25 & 30-35) (use of torture, severe injury, threats of death, murder of family members to force victims to engage in persecution).[2]

This case is not about "simply following orders"; the issue is whether acts coerced by threats of death and severe injury trigger the persecutor bar.

Second, as we explain in our opening brief (Pet. Br. 24-25), this Court's decision in *Reves* v. *Ernst & Young* teaches that "participate" is limited by the context in which it is used. 507 U.S. 170, 177-179 (1993). Here, it is attached to a word, "persecution," that plainly excludes coerced conduct.

The government is wrong in asserting (Br. 21 n.6) that "'participate[] in persecution' 'must be broader' than 'persecution'" because "participate" otherwise would serve no purpose. Congress had to attach a verb to "persecution"; otherwise the provision would make no sense. "Participate[]" here, as in *Reves*, should be construed in accordance with its "common understanding * * * 'to take part in.'" 507 U.S. at 179 (quoting Webster's Third New International Dictionary 1646 (1976)). And, as in *Reves*, that common understanding incorporates the core re-

---

[2] The government is correct (Br. 39-40) that not every person coerced by threats of death or severe injury to engage in persecutory acts is himself subjected to persecution. But, as the examples discussed on page 1 of this brief show, it frequently is the case that individuals subjected to persecution are forced—as part of that persecution—to engage in persecutory conduct against others. Under the government's view of the statute, such individuals in every case are barred from seeking a discretionary grant of asylum.

quirement of the term to which it is attached (there, "conduct"; here, "persecution"). Because one cannot "take part in" persecution in the plain meaning of that phrase if one acts without any element of moral blameworthiness, Congress's use of the term "participate" did not override the exclusion of coerced conduct inherent in "persecution."[3]

Third, the terms "assist[]" and "participate[]" do not appear by themselves in the statute. They are part of a series of terms: "ordered, incited, assisted, or otherwise participated in the persecution of any person * * *." 8 U.S.C. § 1101(a)(42)(B). This Court has long applied the principle of interpretation that "a word is known by the company it keeps" in order to "to avoid ascribing to one word a meaning so broad that it is inconsistent with its accompanying words, thus giving 'unintended breadth to the Acts of Congress.'" *Gustafson* v. *Alloyd Co.*, 513 U.S. 561, 575 (1995) (quoting *Jarecki* v. *G.D. Searle & Co.*, 367 U.S. 303, 307 (1961)).

---

[3] Indeed, a number of lower courts have relied on this reasoning in rejecting the government's position that subjective motivation is irrelevant to application of the persecutor bar, holding that "the term 'persecution' strongly implies both scienter and illicit motivation" and holding that the presence of the word "assist" does not vitiate that requirement. *Castañeda-Castillo* v. *Gonzales*, 488 F.3d 17, 20 (1st Cir. 2007) (en banc); see also *Vukmirovic* v. *Ashcroft*, 362 F.3d 1247, 1253 (9th Cir. 2004) (overturning application of the persecutor bar to an asylum-seeker whom the BIA had concluded had "participated in" persecution as a matter of "self-defense"); *Gao* v. *United States Att'y General*, 500 F.3d 93, 98 & 102-103 (2d Cir. 2007) (rejecting government's argument that "assist[]" permits application of persecutor bar even though applicant did not know that his actions would assist acts of persecution).

The first two words in this series—"ordered" and "incited"—plainly require volitional action and therefore exclude coerced conduct; the government does not contend otherwise. We have explained that the same is true of the term "participated." The government's argument, therefore, is that the inclusion of "assisted" in this series of words brings within the ambit of the statute conduct coerced by threats of death and serious injury.

But that result is precisely what the principle of interpretation forbids. It would give one word "a meaning so broad that it is inconsistent with its accompanying words" and would thereby expand the statutory provision far beyond what Congress intended.

Indeed, the consequences of the government's position are breathtaking. Application of the persecutor bar would turn solely on the "objective[]" characteristics of the individual's actions: subjective motivation would be irrelevant; the presence of coercion would be irrelevant; and—as the government has argued in the lower courts (see note 2, *supra*)—even the individual's knowledge of the consequences of his conduct would be irrelevant. Entirely blameless conduct would be labeled "persecution."

That extraordinarily broad reach—divorcing the statute entirely from the concept of moral blameworthiness that is at the center of the term "persecution" by analyzing in isolation (and incorrectly) the individual words of the statute—bears no resemblance to "what [Congress's] words will bring to the mind of a careful reader." *Watson* v. *United States*, 128 S. Ct.

579, 583 (2007). This Court should therefore reject the government's interpretation.[4]

The government advances another justification for applying the persecutor bar to coerced acts, pointing (Br. 22) to the persecutor bar's lack of a textual requirement of "voluntary" conduct, and the absence of an exclusion of "involuntary" conduct, in contrast to the inclusion of those terms in four other immigration provisions.

The provisions cited by the government each describe acts—membership in an organization, renunciation of citizenship, seeking another country's protection—that, unlike the term "persecution," do not inherently exclude coerced conduct. Congress had to include the term "voluntary" (or exclude "involuntary" acts) in those provisions, because they otherwise might be construed to include involuntary acts. Moreover, the use of "voluntary" as a modifier excludes a broader range of conduct than acts coerced by threats of death or serious injury. Pet. Br. 45. Its inclusion in those provisions therefore does not support an inference that Congress intended to encom-

---

[4] In addition, the term "assisted," when included with "ordered, incited, * * * and * * * participated," is most logically understood to reference the doctrine of aiding and abetting. In both the criminal and civil contexts, aiding and abetting requires proof that the defendant has associated himself with the wrongful enterprise; coerced conduct would not suffice. See Pet. Br. 25-26 & n.6.

The government responds (Br. 21) that Congress did not use the words "aid" or "abet." That is true, but the question here is how to interpret the term "assisted" so that it is consistent with the other words in the series. The aiding and abetting doctrine, which is applied both civilly and criminally, provides a strong analogy.

pass that narrower category of coerced conduct every time it did not include the term "voluntary."

Finally, and significantly, none of these provisions include the verbs "assisted" or "participated." They accordingly provide no support for the government's argument here, that the inclusion of those words overrides the limitation inherent in "persecution."

2. Applicable principles of statutory interpretation exclude involuntary acts.

The government argues (Br. 23-25) that no background legal principle supports interpreting the persecutor bar to exclude coerced conduct because the "duress defense" is a criminal law principle inapplicable here. The government is mistaken, both about the scope of the background principle and its applicability to this case.

a. Even if the background principle were limited to the criminal law, it would apply here, because the statutory context makes clear that the persecutor bar was designed to exclude only criminal conduct.[5]

The government recognizes (Br. 42) that Congress enacted the statute containing the persecutor bar to implement its obligations under the Protocol

---

[5] There can be no serious dispute that the principle is well-recognized in criminal law, as this Court has made clear. *Dixon* v. *United States*, *supra*. The case cited by the government (Br. 25)—*United States* v. *White Fuel Corp*., 498 F.2d 619 (1st Cir. 1974)—proves the point. The court there refused to recognize lack of *mens rea* as a defense, but recognized that coercion *would* constitute a defense: "[i]f thieves overpowered [the defendant's] watchmen and somehow caused a pipe to overflow, [the defendant] would not be liable." *Id*. at 624.

Relating to the Status of Refugees, 19 U.S.T. 6223, 606 U.N.T.S. 267 (Jan. 31, 1967), and the Convention Relating to the Status of Refugees, 189 U.N.T.S. 150 (July 28, 1951) (entered into force Apr. 22, 1954). See also *INS* v. *Cardoza-Fonseca*, 480 U.S. 421, 436-437 (1987); Pet. Br. 32-34.

The exclusion clauses required by these instruments are expressly limited to criminal conduct. Article 1(F) of the Convention excludes from the Convention's protections "any person with respect to whom there are serious reasons for considering that":

> (a) he has committed a *crime* against peace, a war *crime*, or a *crime* against humanity * * *.

189 U.N.T.S. 156 (emphasis added). And the *United Nations High Commissioner for Refugees' Handbook on Procedures and Criteria for Determining Refugee Status* (Geneva, 1979)—which this Court has held to "provide[] some guidance in construing the provisions added to the INA by the Refugee Act" (*INS* v. *Aguirre-Aguirre*, 526 U.S. 415, 427 (1999))—authoritatively interpreted the Protocol's "exclusion clauses" to apply only to asylum-seekers whose "acts [are] of a criminal nature." *Handbook*, ¶ 162.[6]

---

[6] This Court's recognition in *Aguirre-Aguirre* of the relevance of the *Handbook* disposes of the government's claim (Br. 46) that the *Handbook* should be disregarded because it was not expressly referenced in the legislative history. The government is also wrong in asserting that the *Handbook* should be disregarded because it cannot "trump" the Attorney General's interpretation of the statute. The *Handbook* is relevant in determining the meaning of the words Congress used. If those words, interpreted using all applicable tools of construction, are unambiguous, then that is the meaning of the statute; in the absence of ambiguity, there is no occasion to defer to the administrative construction.

Because the treaty obligations permit only the exclusion of criminal conduct, and Congress enacted the persecutor bar to conform domestic law to those obligations, the only possible conclusion is that Congress intended the exclusion to describe a criminal violation. And the general background rule applicable to a statutory provision describing a criminal violation is that it does not extend to coerced conduct.[7]

The government asserts (Br. 45) that the Convention does not require recognition of a duress defense. But the Convention permits exclusion only if the individual has committed a crime "as defined in the international instruments drawn up to make provision in respect of such crimes" (Art. 1(F)), and the authorities available at the time the Convention was drafted—decisions from the war crimes trials that followed World War II—recognized coercion as a defense to crimes encompassing persecution of individuals on account of protected characteristics. See Int'l Law Scholars Am. Br. 29-31 (collecting materials).[8] Interpreting the persecutor bar to exclude co-

---

[7] The government points (Br. 45) to the fact that the Treaty states that exclusion is permissible if there are "serious reasons for considering" that the asylum applicant has committed one of the specified crimes. This language clearly relates only to the standard that must be met by the evidence of criminal activity; it does not in any way address the substantive requirements governing proof of criminality. That fact is confirmed by the statement in the *Handbook* that "all the relevant factors—including any mitigating circumstances—must be taken into account." ¶ 157.

[8] Although the United States is not a party to the treaty creating the International Criminal Court, that treaty often has been cited as a codification of principles of international law. See, *e.g.*, Leila Nadya Sadat & S. Richard Carden, *The New International Criminal Court: An Uneasy Revolution*, 88 Geo. L.J.

erced conduct is therefore not only warranted by the background legal principle; it also is necessary to comply with the obligations imposed by the Convention.

The government argues (Br. 23) that the background principle should not apply because "[w]hen Congress has intended an alien's eligibility for an immigration benefit to turn on the application of criminal law, it has said so explicitly." But here the relevant treaty obligation expressly requires that the exclusion turn on criminal behavior, making such a reference in the statute unnecessary. Moreover, Congress could not make the applicability of the bar turn upon a conviction, because it sought to exclude persons who engaged in persecution but were not prosecuted. And Congress could not reference a provision of domestic law, because the crime involved is a violation of international law.

The government also states (Br. 23) that "interpretation of the governing statute is for the Board in the first instance, and this Court should not lightly overturn the Board's judgment that there is no duress exception." But interpretation is "for the Board in the first instance" only if the statute is ambiguous. The background interpretive principle on which we rely is used by the courts to determine whether statutory language is ambiguous. After all, if Congress in reliance on this principle felt no need to include an express coercion defense, the language Congress wrote has no ambiguity.

381, 422-423 (2000). Art. 31(1)(d) of the treaty recognizes a duress defense to criminal liability. Rome Statute of the International Criminal Court, 2187 U.N.T.S. 90 (entered into force July 1, 2002).

b. Moreover, the background principle that the legal significance of an act is vitiated by coercion is not limited to the criminal law. It is well established in contract law. See Restatement (Second) of Contracts §§ 174 & 175 (1981) (contract is void if manifestation of assent is compelled by physical duress and voidable if manifestation of assent is induced by threats of use of physical force).[9] And this principle is applied in other areas of civil law. See, *e.g.*, *Lyden* v. *Howerton*, 783 F.3d 1554, 1557 (11th Cir. 1986) (duress defense to violations of 8 U.S.C. § 1323); *Furnish* v. *Comm'r*, 262 F.2d 727 (9th Cir. 1958) (duress defense recognized in civil tax fraud action; remand for assessment of evidence that wife was afraid of her husband).[10]

Given the broad recognition of this principle, it is appropriate to interpret the persecutor bar to exclude conduct coerced by threats of death or serious injury.

3. The statutory context confirms that the persecutor bar does not encompass coerced conduct.

Congress's objective of implementing the United States' obligations under the UN Protocol Relating to the Status of Refugees provides additional support

---

[9] We cited this contract law principle in our opening brief (at 29-30 n.7) and the government offered no response.

[10] The government's reference (Br. 24) to *MCM Partners, Inc.* v. *Andrews-Bartlett & Assocs.*, 62 F.3d 967 (7th Cir. 1995), is inapposite because that case involved only economic threats, not threats of death or severe injury. Surely the government does not mean to suggest that a CEO forced at gunpoint to agree to prices dictated by a competitor could be held liable for price-fixing.

for the conclusion that coerced conduct is not included within the persecutor bar.

In interpreting the obligations imposed by international instruments, this Court accords "'considerable weight'" to the "'opinions of our sister signatories.'" *Air France* v. *Saks*, 470 U.S. 392, 404 (1985) (citation omitted); see also *Vimar Seguros y Reaseguros S.A.* v. *M/V Sky Reefer*, 515 U.S. 528, 536-537 (1995) (declining to construe a statute in a manner contrary to the decisions of other countries interpreting a related international convention). A number of other nations that are parties to the Protocol and Convention recognize duress as a defense to application of their domestic implementations of the Article 1F(a) persecutor bar. See Int'l Scholars Am. Br. 25-28; UNHCR Am. Br. 15-17.

Because Congress enacted these provisions to bring the United States into compliance with its treaty obligations, the fact that other nations concluded that those obligations required exclusion of coerced acts from the persecutor bar weighs in favor of a determination that Congress reached the same conclusion and that the provisions here should be construed in the same manner.

The government complains (Br. 44 n.20) that only a relatively few countries have recognized that the persecutor bar does not encompass coerced conduct. But these countries include Canada, the United Kingdom, and Australia, nations with whom the United States shares a common legal tradition. The government does not point to *any* signatories to the treaties who have categorically rejected duress as a defense to the persecutor bar. Given the Convention's clear reference to criminal conduct, and the *Handbook*'s clear statement that "all the relevant

factors—including any mitigating circumstances—must be taken into account" (¶ 157), it is not surprising that the nations that have addressed the issue have reached this conclusion.

We explained in our opening brief (Pet. Br. 34-35) that the 1980 Refugee Act, the statute containing the provisions at issue here, was enacted to create a refugee protection regime applicable to all future conflicts that would provide "sufficient flexibility to respond to situations involving political or religious dissidents and detainees throughout the world." *Cardoza-Fonseca*, 480 U.S. at 449 (internal quotation marks omitted). That fact, the particular language used, and the objective of complying with international obligations make the persecutor bars in statutes enacted to address refugees from specific countries irrelevant in interpreting the provisions before the Court.

The government nonetheless points (Br. 34-35) to four statutes enacted to address specific conflicts, asserting that they somehow provide guidance in construing the provisions here. These statutes, and the decisions interpreting them, are irrelevant. *First*, two of the statutes—the 1950 DPA amendment and the Refugee Relief Act—contain language different from the provisions before the Court, excluding "any person who advocated or assisted in the persecution of any person" or "who personally advocated or assisted in the persecution of any person or group of persons." That language bears little resemblance to the text of the provisions enacted in 1980: "ordered, incited, assisted, or otherwise participated in the persecution of any person."

Moreover, these two statutes were adopted to prevent admission of persons who supported the

German National Socialists and their allies. Each of the decisions under those statutes cited by the government involves such an individual. And in each case involving a claim of coercion, the court of appeals applied this Court's decision in *Fedorenko*. Because of the different statutory text and historical context, and the clear inapplicability of *Fedorenko* to the provisions now before the Court (see pages 20-23, *infra*), these provisions shed no light on the appropriate resolution of this case.

Second, the statute enacted in 1977 related to refugees from southeast Asia. Because there are no judicial interpretations of its language, this measure does not support the government's claim that coerced conduct triggers the persecutor bar enacted in 1980. Certainly the statement by a single legislator that the provision was "modeled on" prior laws (see U.S. Br. 35) provides no basis for so construing the statute.

Third, the 1978 Holtzman Amendment is another statute addressing exclusion and removal of aliens associated with the Nazi regime. The government cites only a single decision addressing the coercion issue, and that decision relies solely on *Fedorenko*. *Naufalis* v. *INS*, 240 F.3d 642, 645 & 646 (7th Cir. 2001); but see *Petkiewytsch* v. *INS*, 945 F.2d 871, 880-881 (6th Cir. 1991) (interpreting Holtzman Amendment to permit consideration of coercion and holding provision inapplicable in part because conduct was involuntary).[11] Again, the different histori-

[11] The second decision cited by the government—*Maikovskis* v. *INS*, 773 F.2d 435 (2d Cir. 1985)—relates to subjective motivation, not coercion.

cal context and the inapplicability of *Fedorenko's* reasoning here render this decision irrelevant.

These conflict-specific statutes thus shed no light on the meaning of the generally applicable provisions adopted to fulfill specific international obligations.

4. ***Construing the statute in accordance with its plain meaning will not produce adverse consequences.***

The government suggests (Br. 24) that a "significant effort" would be required to define the coercion standard. But the federal courts have already defined such a standard in the criminal context (Pet. Br. 38 & n.10), and there is no obstacle to application of that standard here. Of course, the Attorney General would be able to exercise his authority to make the standard more specific, either in interpreting the persecutor bar or by invoking his discretion to define the circumstances in which a "refugee" may receive asylum. See Pet. Br. 37.

The government also claims (Br. 39 n.15) that interpreting the persecutor bar to exclude coerced conduct might somehow burden "affirmative claims for asylum and withholding of removal." The argument seems to be that if an asylum applicant seeks to establish he was persecuted by individual X, he would be obliged to demonstrate that X was not acting involuntarily at another's behest—and presumably so on, *ad infinitum*. This fear is wholly specious.

To be eligible for asylum, an individual need only establish the he or she is "unable or unwilling to return to * * * that country because of persecution or a well-founded fear of persecution on account of" a protected characteristic. 8 U.S.C. § 1101(a)(42)(A). The applicant need not prove that a particular individual

"ordered, incited, assisted, or otherwise participated in" that "persecution." The meaning of those words—which is the issue here, because the government does not dispute the meaning of "persecution" (see page 4, *supra*)—therefore cannot affect the burden of an asylum applicant. See also Int'l Scholars Am. Br. 8-9 & n.3.

The government simply is not able to identify a practical obstacle to interpreting the statute in accordance with its plain language.[12]

B. *Fedorenko* Provides No Support For The Government's Position.

The government's argument that this Court's decision in *Fedorenko* supports its position is based on the government's assertion (Br. 30) that "[t]he text of the persecutor bar at issue in *Fedorenko* is repeated" in the statutory language now before the Court. That is simply wrong.

The provision in *Fedorenko* excluded from the definition of "refugee" or "displaced person" any

> person who can be shown
>
> (a) to have assisted the enemy in persecuting civil populations of countries, Members of the United Nations; or

---

[12] Even if, contrary to our submission, coerced conduct may trigger the persecutor bar, that does not mean that the presence of coercion is irrelevant in determining whether particular conduct constitutes "assist[ing] * * * in * * * persecution" within the meaning of the statute. See Pet. Br. 39. The government's conclusory response (Br. 27) provides no reason why coercion, along with other factors, should not be considered in applying that standard.

> (b) to have voluntarily assisted the enemy forces since the outbreak of the second world war in their operations against the United Nations.

Displaced Persons Act of 1948 ("DPA"), Pub. L. No. 80-774, § 2(b), 62 Stat. 1009 (incorporating Annex I to the Constitution of the International Refugee Organization of the United Nations, Part II § 2).

The statutes now before the Court state:

> The term "refugee" does not include any person who 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.

8 U.S.C. § 1101(a)(42)(B); see also *id.* §§ 1158(b)(2) & 1231(b)(3) .

These provisions are very different. They use dissimilar sentence structure and do not employ the same words: "assisted" and different forms of the verb "persecute" are the only similarities. There is accordingly no basis for concluding that *Fedorenko*'s interpretation of the DPA language controls the meaning of the wholly different provisions of the INA.

Moreover, the particular differences between the two provisions confirm that it would be inappropriate to apply *Fedorenko*'s holding to the INA. *First*, the DPA provision applied to persons who "assisted *the enemy*" (emphasis added). The use of this phrase makes clear that the provision focused on a very specific set of individuals—persons who collaborated with our country's enemies during wartime.

The DPA provision is even more specific, targeting individuals who "assisted the enemy *in persecuting civilian populations*" (emphasis added). It therefore focuses exclusively on persons who engaged in persecution in connection with the worst crime against humanity ever perpetrated.

The language used in the DPA is thus closely linked to the very specific factual circumstance to which it applied. See Pet. Br. 42-43; American Jewish Congress Am. Br. 8-9 (the DPA was adopted in response to "an immediate post-World War II crisis that combined the humanitarian need for easing the burden posed by over a million European refugees with a desire for retribution against recently vanquished aggressors" and "was particularly concerned with ensuring this country's aid and protection did not extend to its recently defeated enemies or their sympathizers"). Congress had every reason to attach more definitive, and harsher, consequences in the very specific factual context addressed in the DPA.

In adopting the persecutor bar provisions in the Refugee Act of 1980, by contrast, Congress sought to create an asylum system applicable to persons seeking refuge from any future conflict, including those escaping from conflicts to which the United States was not a party. Congress's goal was to "give the United States sufficient flexibility to respond to situations involving political or religious dissidents and detainees throughout the world." *Cardoza-Fonseca*, 480 U.S. at 449. These objectives could not be more different from the conflict-specific considerations that surrounded adoption of the DPA. That distinction confirms that the meaning accorded to the

DPA should not be transported to the very different language and very different context of the 1980 Act.[13]

Second, as we explained in our opening brief (Pet. Br. 44-45), the structure of the two statutes is materially different. Under the DPA, a finding that the persecutor bar did not apply meant that the applicant was entitled to admission into the United States, subject to quotas and other numerical restrictions. A finding that the INA bar does not apply simply makes the refugee *eligible* to be *considered* for asylum. The Attorney General retains considerable discretion to deny asylum.[14]

Thus, contrary to the government's unsupported assertion (Br. 32), there is a clear explanation for why Congress would have wanted to treat those subject to coercion differently under the two statutes. Given the different statutory language, structure,

---

[13] The government (Br. 5, 32) mischaracterizes the facts in an attempt to analogize petitioner to a Nazi death camp guard, recasting petitioner's assigned duties as though they were his actual deeds. But the Immigration Judge, the BIA, and the court below all agree that petitioner did not carry out the heinous tasks his oppressors wished him to, and that there is "no evidence to establish that [petitioner] * * * mistreated the prisoners." Pet. App. 16a; see also *id.* 2a-3a (Fifth Circuit acknowledging 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"). Moreover, as we discuss above (at 5) and in our opening brief (at 43 n.12), petitioner was not simply "following orders." He was coerced to remain as a prison guard by threats of death and severe injury. Compare Pet. Br. 43 n.12 (discussing Fedorenko's conduct).

[14] The government's statement (Br. 31-32 n.13) that the INA's persecutor bar does not confer discretion is a non-sequitur. The Attorney General's discretion comes from other parts of the statute. See Pet. Br. 37.

and context, there is no basis for transforming the *Fedorenko* decision into "a misapplied mechanism for excluding all aliens who, forced under threat of death or torture to assist in violence, seek refuge in this country from that violence." American Jewish Congress Am. Br. 1-2.[15]

Finally, the *Fedorenko* Court's rationale does not apply to the different statutory language here. The Court compared the two subsections of Section 2, observing that the word "voluntary" appeared in subsection (b) but not in subsection (a), and concluded that 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." 449 U.S. at 512 (emphasis in original). Because the INA provisions contain-

---

[15] The government asserts (Br. 31) that Congress's recodification of the current persecutor bar in 1996, following the decision in *Fedorenko*, somehow ratified application of the *Fedorenko* analysis to the INA provisions. But Congress did not reenact the DPA text interpreted in *Fedorenko* (which was never part of the INA); it adopted the substantially different statutory language of the Refugee Act of 1980.

The government also contends (Br. 31) that the 1996 recodification ratified the BIA's dictum in *In re Rodriguez-Majano*, 19 I. & N. Dec. 811 (BIA 1988), that *Fedorenko* applies to the INA (see pages 26-27, *infra*). This Court has made clear, however, that Congress must be aware of an administrative interpretation in order to ratify it. See *Brown* v. *Gardner*, 513 U.S. 115, 121 (1994) (when there is no evidence that Congress was aware of the administrative interpretation, this Court "'consider[s] the . . . reenactment to be without significance'") (quoting *United States* v. *Calamaro*, 354 U.S. 351, 359 (1957); *SEC* v. *Sloan*, 436 U.S. 103, 120-121 (1978). The government does not provide any evidence that Congress was aware of this single sentence in a single decision of the Board of Immigration Appeals.

ing the persecutor bar do not include subsections utilizing the word "voluntary," the *Fedorenko* Court's finding of a "*deliberate* omission of the word 'voluntary'" (emphasis added)—deliberate because "voluntary" *was* present in the other subsection of the very same provision, which had been adopted at the same time as the subsection containing the persecutor bar—does not apply to the INA.

The reasoning in *Fedorenko* thus supports our contention that the plain meaning of "persecution" excludes coerced conduct. The Court did not rest its decision on a determination that "persecution" encompasses involuntary acts. To the contrary, it held that the language before the Court encompassed involuntary acts only because of the "deliberate" omission of the term "voluntary." The clear implication of the Court's analysis is that the term "persecution" standing alone, without the inference from the deliberate omission of "voluntary," would not include coerced acts.[16]

C. Even If The Statutory Language Were Ambiguous, It Should Be Interpreted To Exclude Coerced Conduct.

The government's brief is replete with requests for deference to the administrative construction of the persecutor bar. But the question of deference arises only if the statute's meaning remains ambiguous following application of the ordinary tools of statutory interpretation. *Chevron U.S.A. Inc.* v.

---

[16] As we discuss above (at 9-10), the government's reliance (Br. 30-31) on the presence of "voluntary" in other, unrelated provisions of the INA similarly provides no basis for concluding that Congress intended the INA persecutor bar to reach coerced conduct.

NRDC, 467 U.S. 837, 842-843 (1984); *Nat'l Ass'n of Home Builders* v. *Defenders of Wildlife*, 127 S. Ct. 2518, 2534 (2007). See also Cass R. Sunstein, *Law and Administration After* Chevron, 90 Colum. L. Rev. 2071, 2109 (1990).

When, as here, the statute's meaning is plain when those tools are applied, it is irrelevant that the BIA has subjected the provisions to a more narrow administrative definition. Indeed, it has become routine for courts to reject the BIA's interpretations of the immigration laws on the ground that they are inconsistent with the plain meaning of the relevant statutory provision.[17]

Here, moreover, the ordinary tools of statutory interpretation include the "longstanding principle of construing any lingering ambiguities in deportation statutes in favor of the alien." *Cardoza-Fonseca*, 480 U.S. at 449. Because this principle was well recognized at the time that Congress wrote the persecutor bar, Congress would have assumed that it would have been applied to resolve any ambiguities in the

---

[17] See, *e.g.*, *Prieto-Romero* v. *Clark*, 534 F.3d 1053, 1061 (9th Cir. 2008); *Zhang* v. *Mukasey*, 509 F.3d 313, 316-317 (6th Cir. 2007); *Shi Liang Lin* v. *U.S. Dep't of Justice*, 494 F.3d 296, 305-307 (2d Cir. 2007) (en banc), cert. denied *sub nom. Zhen Hua Dong* v. *Dep't of Justice*, 128 S. Ct. 2472 (2008); *Alaka* v. *Attorney General*, 456 F.3d 88, 106-108 (3d Cir. 2006); *Okeke* v. *Gonzales*, 407 F.3d 585, 593-597 (3rd Cir. 2005) (Ambro, J., concurring); *Lagandaon* v. *Ashcroft*, 383 F.3d 983, 987-989 (9th Cir. 2004); *Ki Se Lee* v. *Ashcroft*, 368 F.3d 218, 224-225 (3d Cir. 2004); *Valansi* v. *Ashcroft*, 278 F.3d 203, 208-210 (3d Cir. 2002); *White* v. *I.N.S.*, 75 F.3d 213, 215 (5th Cir. 1996).

statute. If the statutory language were ambiguous, this principle would be dispositive here.[18]

Even if the statutory language were ambiguous and this principle did not exist, there would be no basis for deferring to the government's construction of the statute.

To begin with, the government points to only two BIA decisions that it claims address whether coerced acts are encompassed under the persecutor bar—*In re Rodriguez-Majano*, 19 I. & N. Dec. 811 (BIA 1988), and the decision in the present case. It cites numerous other administrative decisions (see Br. 14-18), but they address the subjective motivation issue or persecution more generally. Neither of the two decisions cited by the government meets this Court's criteria for deference.[19]

The Court has made clear that deference is appropriate when the administrative decisionmaker exercises his or her discretion. See Pet. Br. 47. The entire discussion of the issue in *Rodriguez-Majano* consists of the following:

---

[18] The government complains (Br. 51) that application of this principle would "usurp the Attorney General's * * * authority to resolve statutory ambiguities in the first instance * * *." But that authority applies only if the congressional text is ambiguous. Because Congress when it wrote the persecutor bar would have assumed that any ambiguity would be resolved in favor of the asylum applicant, utilization of the canon of construction is necessary to determine whether Congress's text is ambiguous.

[19] The government also cites *In re Fedorenko*, 19 I. & N. Dec. 57 (BIA 1984), but that decision—relating to a deportation proceeding initiated following this Court's 1981 decision—relates to the DPA, not the statute at issue here.

> The participation or assistance of an alien in persecution need not be of his own volition to bar him from relief. *See Fedorenko v. United States*, 449 U.S. 490 (1981).

19 I. & N. Dec. at 814. As a threshold matter, the statement was dictum; the Board ruled in favor of the asylum applicant on the ground that his conduct did not amount to persecution. *Id.* at 816.

Moreover, the Board provided no reasoning whatsoever other than a citation of this Court's decision in *Fedorenko*. The only plausible conclusion is that the Board believed itself bound by this Court's interpretation of a different statute in *Fedorenko*. It therefore was not exercising its expert judgment to determine that the *Fedorenko* rule should apply to the INA. Rather, it assumed that the Court's ruling in *Fedorenko* required the same outcome under the INA's persecutor provisions. This interpretation of the statute accordingly is not entitled to deference.

The opinion below also makes clear that the Board did not exercise independent judgment in arriving at its view of the statute. After concluding that petitioner had engaged in conduct constituting persecution and that petitioner's motivation was irrelevant (Pet. App. 6a), the Board turned to the coercion issue and stated that even if petitioner's conduct was limited to guarding prisoners

> he is still subject to the so-called 'persecutor bar' under our precedential decision in *Matter of Fedorenko, supra*, as he has not demonstrated that his conduct is distinguishable from that of the alien in that case * * *.

Id. at 7a. The Board thus relied entirely on its decision in *In re Fedorenko*, which involved the DPA, and

did not address the meaning of the statute now before the Court.

The Board went on to state:

> We also note that the United States Court of Appeals for the Fifth Circuit, under whose jurisdiction this case arises, also has applied the persecutor bar in sections 208(a)(2)(A)(i) and 241(b)(3)(B)(i) of the Act to aliens, like [petitioner], who argue that they were forced into assisting in the persecution of others. *See Bah v. Ashcroft*, 341 F.3d 348 (5th Cir. 2003).

Pet. App. 7a. Again, the Board did not exercise its own judgment, or provide any reasoning whatever in support of its conclusion, but rather pointed to the controlling interpretation of the statute adopted by the court of appeals.

Thus, the Board has neither examined the different language and context of the provisions at issue here, nor assessed the policy implications of the possible interpretations of those provisions. Given this complete absence of independent reasoning, there is no basis for deference to the government's view of the statute.[20]

---

[20] The government suggests (Br. 48) that deference is required because a decision to grant asylum might harm foreign relations. But under petitioner's interpretation of the statute, the Attorney General retains complete discretion to deny asylum to anyone, so that eventuality could never arise. It is the government's rigid across-the-board rule closing the door to a large number of asylum applicants that would cabin the Executive's latitude in foreign affairs.

CONCLUSION

The judgment of the court of appeals should be reversed.

Respectfully submitted.

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

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

Counsel for Petitioner

SEPTEMBER 2008