No. 07-499

In the Supreme Court of the United States

DANIEL GIRMAI NEGUSIE, PETITIONER

v.

MICHAEL B. MUKASEY, ATTORNEY GENERAL

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

BRIEF FOR THE RESPONDENT

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QUESTION PRESENTED

Under the Immigration and Nationality Act, 8 U.S.C. 1101 *et seq.*, 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" is ineligible for asylum or withholding of removal. 8 U.S.C. 1101(a)(42), 1158(b)(2)(A)(i), 1231(b)(3)(B)(i). The question presented is whether an alien who was admittedly involved in persecutory conduct is exempt from that rule if his conduct was the product of coercion.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-3a) is not published in the *Federal Reporter* but is reprinted in 231 Fed. Appx. 325. The decisions of the Board of Immigration Appeals (Pet. App. 4a-8a) and the immigration judge (Pet. App. 9a-21a) are unreported.

JURISDICTION

The judgment of the court of appeals was entered on May 15, 2007. A petition for rehearing was denied on July 17, 2007 (Pet. App. 22a). The petition for a writ of certiorari was filed on October 15, 2007, and was granted on March 17, 2008. The jurisdiction of this Court rests on 28 U.S.C. 1254(1).

STATEMENT

Petitioner is an adult citizen of Eritrea who served as a prison guard while in the military. For four years, he stood guard at a prison where persons were tortured and killed on account of protected grounds. Invoking the longstanding "persecutor bar" in the Immigration and Nationality Act (INA), 8 U.S.C. 1101 *et seq.*, the Board of Immigration Appeals (Board or BIA) held that petitioner's conduct renders him ineligible for asylum and withholding of removal. The court of appeals affirmed. It rejected petitioner's contention that the bar does not apply to him because he was following orders, relying in large part on this Court's decision in *Fedorenko* v. *United States*, 449 U.S. 490 (1981), which rejected a similar "involuntary assistance" excuse proffered by a Nazi concentration camp guard. This Court should affirm the court of appeals' decision.

1. a. A person who is present in the United States and fears serious mistreatment on account of a protected ground if returned home may seek relief under the INA.

An alien is eligible for asylum if he demonstrates that he is a "refugee." 8 U.S.C. 1158(a), (b)(1). A "refugee" is an alien who is unwilling or unable to return to his home country "because of persecution or a well-founded fear of persecution on account of race, religion, nationality, membership in a particular social group, or political opinion." 8 U.S.C. 1101(a)(42)(A). Once an alien has established asylum eligibility, the decision to grant or deny asylum is left to the discretion of the Attorney General or the Secretary of Homeland Security. 8 U.S.C. 1158(b)(1).

Withholding of removal is available if the alien demonstrates that his "life or freedom would be threatened"

in the country of removal "because of the alien's race, religion, nationality, membership in a particular social group, or political opinion." 8 U.S.C. 1231(b)(3)(A). In order to establish eligibility for withholding of removal, an alien must prove a "clear probability of persecution" upon removal, a higher standard than that required to establish asylum eligibility. *INS* v. *Cardoza-Fonseca*, 480 U.S. 421, 430-432 (1987) (internal quotation marks omitted).

In addition, an alien who demonstrates that he would more likely than not be tortured if removed to a certain country may obtain protection under the United Nations Convention Against Torture and Other Cruel, Inhuman, or Degrading Treatment or Punishment (CAT), *adopted* Dec. 10, 1984, S. Treaty Doc. No. 20, 100th Cong., 2d Sess. (1988), 1465 U.N.T.S. 85.

b. Under the INA, certain categories of aliens are ineligible for asylum and withholding of removal. As relevant here, the INA prohibits the Attorney General and the Secretary of Homeland Security from granting asylum to "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) (second sentence) (exclusion from definition of "refugee"); see 8 U.S.C. 1158(b)(2)(A)(i) (bar to eligibility); see also 8 C.F.R. 1208.13(c)(1).

The INA similarly excludes from eligibility for withholding of removal any alien 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); see 8 C.F.R. 1208.16(d)(2). And the applicable regulations direct that

an applicant who engaged in that persecutory conduct may not obtain withholding of removal under the CAT, 8 C.F.R. 1208.16(d)(2), although he is still eligible for deferral of removal under the CAT, 8 C.F.R. 1208.16(c)(4), 1208.17(a).

Collectively, "[t]hese provisions are known as the 'persecutor bar,' and [they] render an applicant statutorily ineligible for either asylum or withholding of removal even if the applicant can otherwise satisfy the requirements for obtaining those forms of relief." *Gao* v. *United States Att'y Gen.*, 500 F.3d 93, 97-98 (2d Cir. 2007). If the evidence indicates that an applicant for asylum or withholding of removal participated in persecution, he bears the burden of proving that he did not. See 8 U.S.C. 1158(b)(1)(B)(i); 8 C.F.R. 1208.13(a), 1208.16(d)(2), 1240.8(d).

2. Petitioner is an adult citizen of Eritrea with dual Eritrean and Ethiopian heritage. Pet. App. 9a. In 1994, when he was 18 years old, petitioner was forcibly conscripted into military service. *Id.* at 10a; J.A. 3-5. Petitioner was discharged from the military after a short time but was recalled to service in 1998, when hostilities between Eritrea and Ethiopia escalated. Pet. App. 10a-11a. Petitioner reported for duty but "declined to go to the front and fight," so he was assigned to a naval base. *Id.* at 11a. Several months later, petitioner was arrested and taken to a prison camp "because he had initially refused to fight in the war." *Id.* at 11a-12a. During the time he was in prison camp, petitioner was punished for approximately two weeks for communicating with other prisoners who were Christians. *Ibid.*; J.A. 22-23.

After two years, petitioner was released from prison and returned to military service as a prison guard. Pet. App. 12a; Administrative Record (A.R.) 382-383; J.A. 25.

Petitioner did not receive a salary, but the military gave him "pocket money." A.R. 382-383. At the prison where petitioner was a guard, prisoners were routinely tortured or killed on account of protected grounds such as religion and nationality. Pet. App. 2a, 6a, 16a-17a.

For approximately four years, petitioner guarded the ocean, the prison gates, and the prisoners "on a rotating basis." Pet. App. 12a; J.A. 26, 33, 55. Petitioner carried a gun and was responsible for keeping control over prisoners and preventing their escape. Pet. App. 12a, 15a-16a; J.A. 59, 72-73; A.R. 373-374. His duties also included "punish[ing] the prisoners * * * by exposing them to the extreme sun heat" and denying them water, forbidding them to take showers, and keeping them from ventilation and fresh air. Pet. App. 13a; J.A. 58-59.

Petitioner routinely stood guard over prisoners who were kept in the sun as a form of punishment or execution. Pet. App. 15a-16a. Petitioner was aware that prisoners died when exposed to the sun "for more than a couple of hours," and he knew that at least one person he guarded died as a result of sun exposure. *Id.* at 13a, 16a-17a; J.A. 60-61, 73; A.R. 502.

Petitioner acknowledged his integral role in the torture and execution of prisoners, stating that he was the person responsible for "mak[ing] sure that [the prisoners] stayed out in the sun." J.A. 73; see J.A. 35, 60. Petitioner also knew that prison officials used electricity to torture prisoners while he was standing guard. Pet. App. 13a; J.A. 34-35, 61-62; A.R. 502.

Petitioner occasionally objected to and disobeyed orders to inflict punishment on prisoners. Pet. App. 13a; A.R. 330. He also "from time to time" provided prisoners with water and permitted them to take showers, and once he was reprimanded for doing so. Pet. App. 13a;

A.R. 332-334.[1] Petitioner eventually abandoned his military post and entered the United States illegally. Pet. App. 19a; A.R. 342-348.

3. Petitioner applied for asylum, withholding of removal, and protection under the CAT. A.R. 488-497, 568. He claimed that he feared persecution on the basis of his religion, because he was punished for two weeks while in prison for talking to Christians, and he feared that he would be tortured if returned to Eritrea because he had deserted the military. Pet. App. 18a-19a; J.A. 52, 68, 70-72; A.R. 492. Petitioner did not claim that he had been persecuted, or feared future persecution, on the theory that being forced to persecute others is itself persecution.

An immigration judge (IJ) denied petitioner's applications for asylum and withholding of removal. Pet. App. 9a-20a. The IJ determined that petitioner was barred from receiving asylum or withholding of removal because he had "assisted or otherwise participated in the persecution of others" as an armed prison guard. *Id.* at 15a-16a. The IJ determined that "the very fact that [petitioner] 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 [him] from relief." *Id.* at 16a-17a (citing *Fedorenko*).

The IJ also determined, however, that petitioner was eligible for deferral of removal under the CAT because he likely would be tortured for deserting the military if he returned to Eritrea. Pet. App. 17a-20a.

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[1] The record does not support petitioner's claim (Br. 43 n.12) that his superiors "torture[d]" and "beat[]" him for refusing to follow orders; on the one or two occasions petitioner was caught disobeying orders, he was only "g[iven a] warning." J.A. 36-37.

4. The Board dismissed petitioner's appeal. Pet. App. 4a-8a. Given petitioner's role as an armed prison guard and the evidence regarding the mistreatment endured by prisoners, the Board affirmed the IJ's determination that petitioner assisted or participated in the persecution of others on account of their protected characteristics. *Id.* at 6a. Relying on its own precedent, the Board held that whether petitioner "was compelled to participate as a prison guard, and may not have actively tortured or mistreated anyone, is immaterial." *Id.* at 5a-6a. Comparing petitioner's conduct to that of a Nazi concentration camp guard, the Board explained that petitioner's "motivation and intent are irrelevant to the issue of whether he assisted in persecution," because it "is the objective effect of [his] actions which is controlling." *Ibid.* (internal quotation marks omitted).[2]

5. The court of appeals denied petitioner's petition for review. Pet. App. 1a-3a. Relying on this Court's decision in *Fedorenko*, the court of appeals held that "[t]he question whether [petitioner] was compelled to assist authorities is irrelevant, as is the question whether [he] shared the authorities' intentions." *Id.* at 2a. Instead, the court explained, "the inquiry should focus 'on whether [petitioner's] particular conduct can be considered assisting in the persecution'" of others. *Ibid.* (quoting *Fedorenko*, 449 U.S. at 512 n.34).

Applying that objective standard, the court of appeals held that the record evidence supported the Board's conclusion that petitioner assisted or participated in the persecution of prisoners. Pet. App. 3a. The court explained that petitioner "worked as an armed

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[2] The Board also upheld the IJ's decision to grant deferral of removal under the CAT, Pet. App. 8a, and that holding is not before this Court.

prison guard," "knew about the forms of punishment used by his superior officer," "stood guard while prisoners were kept in the sun as a form of punishment," and "depriv[ed] prisoners of access to showers and fresh air." *Id.* at 2a-3a.

SUMMARY OF ARGUMENT

Any person who "ordered, incited, assisted, or otherwise participated in the persecution" of another on account of "race, religion, nationality, membership in a particular social group, or political opinion" is ineligible for asylum or withholding of removal under the Immigration and Nationality Act. 8 U.S.C. 1101(a)(42), 1158(b)(2)(A)(i), 1231(b)(3)(B)(i). There is no exception on the face of the statute for a person who acted without malice or under duress, and the Board has reasonably determined that the statute permits no such exception.

A. The plain text of the persecutor bar establishes a categorical rule. The statute contains no state-of-mind requirement and no duress exception. Moreover, the words Congress chose—"assisted" and "participated" in "persecution"—evidence its intent that the persecutor bar be applied based on an alien's conduct, not his state of mind. Because the statute directly answers the question presented, the Court need go no further to resolve this case.

The Board has reasonably interpreted the persecutor bar to apply without regard to motivation. The Board's conclusion relies on the plain meaning of the statutory terms; the Board's longstanding construction of the key term "persecution"; the policies underlying the persecutor bar; and this Court's interpretation of a predecessor persecutor bar in *Fedorenko*. Contrary to petitioner's contentions, nothing in the plain text of the statute re-

quires that an alien act with a certain state of mind or exempts an alien who acted under coercion.

B. The many statutory predecessors to the INA's persecutor bar confirm that it applies categorically. In *Fedorenko*, this Court considered the first of those predecessors, the Displaced Persons Act of 1948, and concluded that it does not permit an exception for involuntary conduct. *Fedorenko* applies in full force to this case because the Court interpreted the same language at issue here—"assisted" in "persecuti[on]"—and rejected the precise argument petitioner now makes. Congress is presumed to have been aware of *Fedorenko* when it re-enacted the persecutor bar at issue here, and it did not include any exception for involuntary conduct. There is no basis for this Court to reach any different conclusion.

In addition to the persecutor bar at issue in *Fedorenko*, Congress enacted several other similar bars to exclude from certain immigration benefits persons who assisted in the persecution of others. Those bars were included in the 1950 amendments to the Displaced Persons Act of 1948, the Refugee Relief Act of 1953, the 1977 Act regarding Indochinese refugees, and the Holtzman Amendment to the INA. Every one of those statutory predecessors used the same key language at issue here, and none contained any exceptions based on an alien's motivation. Not surprisingly, courts have uniformly interpreted those provisions to apply to *all* aliens who assisted or participated in persecution, including those who claim their conduct was involuntary.

C. Categorical application of the persecutor bar furthers Congress's goal of extending eligibility for asylum and withholding of removal only to the most deserving applicants. Since World War II, Congress has barred

from certain immigration benefits persons who participated in the persecution of others to express its judgment that persecution in any form is unacceptable.

Barring from asylum and withholding of removal all persons who participated in persecution effectuates Congress's goal of welcoming genuine refugees consistent with the United Nations Protocol Relating to the Status of Refugees. The Protocol's exclusions contain no state-of-mind or duress exception. The INA's persecutor bar is therefore a reasonable implementation of the Protocol.

D. Although the persecutor bar is clear on its face, if any ambiguity exists, the Board's construction of the statute is controlling. The Attorney General and the Board have especially broad interpretative authority in the immigration context. Courts have deferred to, and Congress has accepted, the Board's established construction of the key term "persecution." There is no basis for concluding that the Board acted unreasonably in refusing to make an exception to a statute that, on its face, contains no exceptions.

ARGUMENT

ANY ALIEN WHO ASSISTED OR PARTICIPATED IN THE PERSECUTION OF ANOTHER ON ACCOUNT OF A PROTECTED GROUND IS INELIGIBLE FOR ASYLUM AND WITHHOLDING OF REMOVAL

A. The Attorney General Has Reasonably Interpreted The Categorical Text Of The Persecutor Bar To Apply Without Regard To An Alien's Motivation

As in any case of statutory construction, this Court's analysis "begins with the language of the statute." *Hughes Aircraft Co.* v. *Jacobson*, 525 U.S. 432, 438 (1999) (internal quotation marks omitted). Because this

case raises questions "implicating an agency's construction of a statute which it administers," principles of *Chevron* deference control. *INS* v. *Aguirre-Aguirre*, 526 U.S. 415, 424 (1999) (internal quotation marks omitted). If Congress has "directly spoken to the precise question at issue," "that is the end of the matter," but if the statute is "silent or ambiguous with respect to the specific issue," the agency's interpretation must be upheld so long as it is "a permissible construction of the statute." *Chevron U.S.A. Inc.* v. *NRDC*, 467 U.S. 837, 842-843 (1984).

As relevant here, the INA bars 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" from obtaining asylum or withholding of removal. 8 U.S.C. 1101(a)(42), 1158(b)(2)(A)(i), 1231(b)(3)(B)(i). The question in this case is whether there is an exception to that persecutor bar for an alien who claims that he did not act out of malice or that his conduct was coerced. The statutory text directly answers that question: there is no such exception. And if there were any ambiguity in the text, the Board's determination that the bar contains no such exception is reasonable and thus controlling.

The Board's determination did not deny petitioner all protection, however. He remained eligible for, and was granted, deferral of removal under the CAT. As construed and implemented by the Attorney General, then, the INA furnishes a calibrated set of protections and bars, but assures that persons like petitioner who assisted or participated in the persecution of others will not be removed to a country where they will suffer torture or death.

1. The language of the persecutor bar is broad and categorical. It denies eligibility for asylum and withholding of removal to "any person" who has participated in the persecution of "any person" on account of a protected ground. 8 U.S.C. 1101(a)(42); see 8 U.S.C. 1158(b)(2)(A)(i) (bars "the alien" who participates in the persecution of "any person"), 1231(b)(3)(B)(i) (bars "an alien" who participates in the persecution of "an individual"). "[T]he word 'any' has an expansive meaning," and it suggests that Congress intended no limitation on the statute's reach other than that apparent from the text. *Ali* v. *Federal Bureau of Prisons*, 128 S. Ct. 831, 835-836 (2008).

Moreover, Congress chose comprehensive language to describe the conduct that triggers the persecutor bar, barring those persons who "ordered, incited, assisted, or otherwise participated" in persecution. Those verbs encompass a wide range of conduct, from taking a leadership role in persecution ("ordered" or "incited") to providing aid ("assisted") or otherwise furthering ("participated in") acts of persecution. The breadth of the words used thus demonstrates Congress's intent to reach *all* aliens who participated in persecuting others, regardless of their role.

The language of the persecutor bar focuses only on whether an alien engaged in certain conduct, not his state of mind. The statute does not require that the alien's conduct be "motivated by animus" (Pet. Br. 24). Nor does it require that an alien "voluntarily" assist or participate in persecution. Instead, the statute requires only that the alien have performed certain *acts*—as relevant here, assistance or participation in persecution. See *Bah* v. *Ashcroft*, 341 F.3d 348, 351 (5th Cir. 2003) ("The syntax of the statute suggests that the alien's per-

sonal motivation is not relevant."). If the alien has performed those acts, the inquiry is at an end. See, *e.g.*, *INS* v. *Phinpathya*, 464 U.S. 183, 189 (1984) (strictly construing statute whose "ordinary meaning * * * does not readily admit any exception[s]" (internal quotation marks omitted)).

2. The particular words at issue here—"assisted, or otherwise participated" in "persecution"—confirm that Congress intended the persecutor bar to turn only on an alien's conduct, not his motivation.

a. The words "assist" and "participate" encompass a wide range of conduct. The plain meaning of "assist" is to give support or aid to another. See, *e.g., The American Heritage Dictionary of the English Language* 80 (1976) ("[t]o give aid or support"); *Webster's New International Dictionary of the English Language* 167 (2d ed. 1958) ("[t]o give support to in some undertaking or effort"; "to help; aid"). "Participate" means "[t]o take part" in an activity. *The American Heritage Dictionary of the English Language* 955 (4th ed. 2000); see *Webster's New International Dictionary of the English Language* 1782 ("[t]o partake of"). As this Court has said, "participate" is a "term[] * * * of breadth," *Russello* v. *United States*, 464 U.S. 16, 21-22 (1983), and "participation" generally "do[es] not connote voluntariness," because the fact that a person was compelled to take part in an activity does not negate the fact that he did take part in it, *Pennsylvania Dep't of Corr.* v. *Yeskey*, 524 U.S. 206, 211 (1998).

b. "Persecution" is a key term in the INA, used to define both those persons eligible for relief and those barred from it. The Attorney General, acting through the Board, has given that term "concrete meaning through a process of case-by-case adjudication,"

Aguirre-Aguirre, 526 U.S. at 425 (internal quotation marks omitted), and that interpretation is entitled to substantial deference.

The Board has consistently defined "persecution" in the context of the INA as "the infliction of harm or suffering by a government, or persons a government is unwilling or unable to control, to overcome a characteristic of the victim." *In re Kasinga*, 21 I. & N. Dec. 357, 365 (B.I.A. 1996) (en banc); see, *e.g.*, *In re Maccaud*, 14 I. & N. Dec. 429, 434 (B.I.A. 1973), aff'd, 500 F.3d 355 (2d Cir. 1974). Persecution generally consists of two elements: (1) severe mistreatment of a person by the government or by a person or group the government is unwilling or unable to control (2) as a result of a certain characteristic that person possesses. *In re Acosta*, 19 I. & N. Dec. 211, 222-223 (B.I.A. 1985), overruled in part on other grounds by *Cardoza-Fonseca*, 480 U.S. at 446. The mistreatment may consist of "confinement or torture," as well as other "threat[s] to the life or freedom of" the individual. *Ibid.* The characteristics that are protected under the INA are defined by the statutory text that accompanies the word "persecution": "on account of race, religion, nationality, membership in a particular social group, or political opinion." 8 U.S.C. 1101(a)(42); see *Kasinga*, 21 I. & N. Dec. at 365-366.

The Board has determined that a "subjective 'punitive' or 'malignant' intent is *not* required for harm to constitute persecution." *Kasinga*, 21 I. & N. Dec. at 365. The Board made that point in the context of female genital mutilation, where it explained that that practice is "persecution" because of the "level of harm" suffered by its victim, regardless of whether the person performing that act has a "subjectively benign intent." *Id.* at 365, 367 (internal quotation marks omitted). The only in-

quiry into motivation that is appropriate in defining "persecution," according to the Board, is whether the victim was selected for mistreatment due to a certain characteristic. That inquiry is mandated by the separate textual requirement that persecution be "on account of" or "because of" a protected ground. *Id.* at 365-367. The express statutory requirement that motive be shown to that extent strongly supports the Board's conclusion that no other showing of motive is required.

The Board's longstanding interpretation of the term "persecution" comports with the common meaning of that term. Many dictionary definitions of "persecution" use the same formulation as the Board—oppression because of a belief or characteristic of the victim. See, *e.g.*, *Black's Law Dictionary* 1178 (8th ed. 2004) ("persecution" is "[v]iolent, cruel, and oppressive treatment directed toward a person or group of persons because of their race, religion, sexual orientation, politics, or other beliefs"); *The American Heritage Dictionary of the English Language* 1310 (4th ed. 2006) ("persecute" means "[t]o oppress or harass with ill-treatment, especially because of race, religion, gender, sexual orientation, or beliefs"); *Random House College Dictionary* 1074 (rev. ed. 1980) ("persecute" means "to oppress with injury or punishment, for adherence to principles or religious faith"). The word "persecution" in the INA, therefore, does not require any inquiry into a persecutor's motivation, other than that called for by the separate statutory requirement that persecution be "on account of" a protected ground.

3. Utilizing those definitions, the Attorney General has determined that whether the persecutor bar applies depends upon a two-step inquiry: (1) whether persecution on account of a protected ground occurred, and (2)

whether the particular alien's conduct, viewed objectively, rises to the level of "'order[ing], incit[ing], assist-[ing], or otherwise participat[ing] in' the acts of persecution committed." *In re A-H-*, 23 I. & N. Dec. 774, 783-785 (Att'y Gen. 2005).

The first question, the Attorney General explained, should be resolved using the agency's longstanding definition of "persecution." *A-H-*, 23 I. & N. Dec. at 783-784. So long as the victim was subjected to severe mistreatment because of a listed characteristic, there was "persecution" on account of a protected ground. See *ibid.* To answer the second question, the Attorney General turned to the common meaning of the words "order," "incite," "assist," and "participate." *Ibid.* He explained that "to 'assist' means 'to give support or aid: help'" and "to 'participate' means 'to take part in something (as an enterprise or activity) usu[ally] in common with others.'" *Ibid.* (quoting *Webster's Third New International Dictionary of the English Language Unabridged* 132, 1646 (2002)). In the Attorney General's view, those terms should "be given broad application" in line with their expansive definitions. *Id.* at 784-785.[3]

The Board has consistently held that the persecutor bar applies to any alien who took part in acts of persecution regardless of his personal motivation. "It is the objective effect of an alien's actions which is controlling," not whether the alien felt "forced" to participate in persecution or participated voluntarily. *In re Rodriguez-Majano*, 19 I. & N. Dec. 811, 813-815 (B.I.A. 1988). The Board came to that conclusion after reviewing the text of the persecutor bar, which includes no

[3] Although *A-H-* sets forth the general framework for applying the persecutor bar, no question of involuntariness was raised in that case.

state-of-mind requirement or duress exception; its long-standing definition of persecution, which focuses on conduct, rather than motivation; this Court's decision in *Fedorenko*, which interpreted a statutory predecessor to the INA's persecutor bar to require only an objective inquiry into the alien's conduct; and the policy judgment behind the persecutor bar that "those who have participated in the persecution of others are * * * not deserving of international protection" by virtue of their actions. *In re McMullen*, 19 I. & N. Dec. 90, 96-97 (B.I.A. 1984); see *Rodriguez-Majano*, 19 I. & N. Dec. at 813-815 (B.I.A. 1988).[4]

4. Under the Attorney General's two-step inquiry, it is clear that petitioner assisted or participated in persecution while a prison guard. First, there is no dispute that there was disqualifying "persecution" at the Eritrean prison where petitioner served as a guard, because prisoners were routinely tortured and executed "on account of" their protected characteristics. Pet. App. 2a, 6a.

Second, petitioner's direct and integral role in the persecution of prisoners constituted "assist[ance]" or "participation." Petitioner acknowledged that he was responsible for keeping prisoners from escaping, depriving them of water, and keeping them out in the hot sun as punishment. Pet. App. 13a, 15a-16a; J.A. 60-61, 73. In so doing, he contributed to the severe mistreatment of pris-

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[4] The Board has likewise interpreted the Holtzman Amendment, the immediate statutory predecessor to the INA's persecutor bar (see p. 35, *infra*), to apply without regard to an alien's personal motivation. See *In re Kulle*, 19 I. & N. Dec. 318, 332 (B.I.A. 1985), aff'd, 825 F.2d 1188 (7th Cir. 1987); *In re Fedorenko*, 19 I. & N. Dec. 57, 68-69 (B.I.A. 1984); *In re Laipenieks*, 18 I. & N. Dec. 433, 464 (B.I.A. 1983), rev'd on other grounds, 750 F.2d 1427 (9th Cir. 1985).

oners and advanced the goal of punishing persons on account of protected grounds. See *Miranda Alvarado* v. *Gonzales*, 449 F.3d 915, 928 (9th Cir. 2006) ("[G]uards are essential to the orderly functioning of death camps, even when they do not shoot anyone.").

Petitioner's personal motivation is not relevant to whether he assisted or participated in persecution. Although the persecutor bar requires that the victim be subject to "persecution" "on account of" or "because of" a protected ground, *e.g.*, *Rodriguez-Majano*, 19 I. & N. Dec. at 815, it does not require that *petitioner* have personally targeted them on that ground. Instead, the bar applies if petitioner "assisted" or "participated" in persecution by others that was occurring at the prison. See *Singh* v. *Gonzales*, 417 F.3d 736, 740 (7th Cir. 2005) (alien not required to "share in the persecutory motive" to assist in persecution). If Congress had intended to limit the persecutor bar to those who personally selected victims on the basis of a protected characteristic, it could have drafted the statute so that the "on account of" clause modified the listed actions rather than the term "persecution," saying "any person who, because of an individual's race, religion, nationality, membership in a particular social group, or political opinion, ordered, incited, assisted, or otherwise participated in persecution." See *Bah*, 341 F.3d at 351. But Congress did not do that, presumably because such a construction would permit any participant in persecution to avoid the persecutor bar by claiming that his superiors determined what persons or groups to persecute and he was just following orders.

5. Petitioner makes essentially two textual arguments, neither of which can overcome the agency's reasonable construction of the statutory provisions.

a. First, petitioner contends (Br. 23-24) that the word "persecution" requires the actor's "state of mind [to] satisfy a standard of moral offensiveness," which he says is met when the actor is "motivated by animus toward the persecuted group." Petitioner has expressly waived a subjective intent argument, however, and he should not be permitted to resurrect it now. Before the court of appeals, petitioner repeatedly conceded that an alien's "subjective intent is not relevant to whether a person assisted in persecution." Pet. C.A. Br. 31; see *id.* at 20 ("an applicant's subjective intent alone is irrelevant"); *id.* at 40 ("the alien's subjective intent is legally irrelevant"). When the United States pointed out that concession in its brief in opposition (at 8), petitioner responded that the government "confuse[d] two analytically distinct legal concepts—duress and intent," and insisted that his argument was only about the former. Pet. Reply 1; see *id.* at 3, 5. In his brief on the merits, however, petitioner has attempted to revive his state-of-mind argument. See Pet. Br. 19, 22-24. That is too late.

In any event, petitioner's subjective intent argument is without merit. As the Board has explained, the word "persecution" does not require a showing of malice or hostility. Petitioner ignores the Board's longstanding interpretation of that word, instead citing a single dictionary definition that mentions "hostile intent." Pet. Br. 23. But that definition mentions "hostile intent" only in an alternative fourth definition, and its full text indicates that "hostile intent" refers to the fact that the oppressor selects his victim because of a certain characteristic, nothing more. See *Oxford English Dictionary Online* (visited Aug. 15, 2008) ("d. Oppression, esp. on the grounds of religious faith, political belief, race, etc.; the fact of being persecuted. Also: the action of pursuing or

persecuting a person or group with hostile intent.") <http://dictionary.oed.com>.[5] In the INA, the element of selection on the basis of a particular characteristic is covered by the separate "on account of" or "because of" language. In any event, the mere possibility of an alternative reading of "persecution" that would require a showing of hostile intent at most would make the term ambiguous, in which case the Board's definition would control.

The fact that some courts have described "persecution" as "infliction of suffering or harm upon those who differ (in race, religion, or political opinion) *in a way regarded as offensive*" does not mean that persecution requires malice. Pet. Br. 23-25 (quoting *Chaib* v. *Ashcroft*, 397 F.3d 1273, 1277 (10th Cir. 2005)). That formulation originated with the Board itself, which explained that "offensive" means on account of one of the protected grounds, not as a result of animus. See, *e.g.*, *In re Sanchez*, 19 I. & N. Dec. 276, 284 (B.I.A. 1985). The cases petitioner cites reflect that understanding. See *Chaib*, 397 F.3d at 1277; *Karouni* v. *Gonzales*, 399 F.3d 1163, 1170 (9th Cir. 2005).

Even if the word "persecution" required malice, that would not help petitioner, because the persecutor bar applies if he "assisted" or "participated" in persecution, and those terms do not require that he "share in the persecutory motive." *Singh*, 417 F.3d at 740. To give "participated in * * * persecution" "the same meaning as 'persecuted,'" as petitioner suggests (Br. 24), would read the broad terms "assisted" and "participated" out

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[5] The definition petitioner cites is from the online edition of the *Oxford English Dictionary*, not the second print edition published in 1989.

of the statute. See *TRW Inc.* v. *Andrews*, 534 U.S. 19, 31 (2001) (rule against superfluities).[6]

Petitioner (Br. 25) and his *amici* (SIRL Br. 10) turn to principles of criminal culpability, such as aiding and abetting, to engraft a mental state requirement on the broad terms "assisted" and "participated." But the persecutor bar is not a criminal statute—it is a denial of immigration benefits to someone who concededly is removable—and this Court has long cautioned against equating immigration law and criminal law. See, *e.g.*, *Fong Yue Ting* v. *United States*, 149 U.S. 698, 730 (1893); see also p. 23, *infra*. Moreover, Congress did not use the terms "aid" and "abet" in the persecutor bar; it chose the distinct terms "assist" and "participate." There is, therefore, no textual basis for interpreting the persecutor bar to require "animus" or "hostile intent."

b. Second, petitioner argues (Br. 24, 28-32) that the persecutor bar does not apply to a person who assisted or participated in persecution "involuntarily," meaning under duress,[7] "either because coerced conduct is not a legally cognizable 'act' or because duress is a defense."

Petitioner has performed a legally cognizable act. The plain meaning of the words "assist" and "participate"

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[6] Contrary to petitioner's contention (Br. 24-25), *Reves* v. *Ernst & Young*, 507 U.S. 170 (1993), supports the government's reading of the persecutor bar, because it counsels that "participate[] in persecution" "must be broader" than "persecution," or Congress's use of the broad term "participate[]" would "serve no purpose." *Id.* at 179.

[7] The term "involuntary" could also mean that an act was "not subject to control by the will," *i.e.*, that it was not volitional because it was the result of a reflex, an accident, or some other movement that the actor was unable to control. *Black's Law Dictionary* 847. Petitioner does not use the term "involuntary" in that sense; he uses the term to mean "under duress," *e.g.*, Pet. Br. 24, 40, and this brief does the same.

require only that a person take certain actions, not that he take them for any particular reason. And here, there is no question that petitioner's conduct as a prison guard was intentional, in the sense that it was volitional and that petitioner knew and understood the consequences of his actions. Pet. Reply 3 (petitioner "engag[ed] in admittedly intentional acts of persecution"); Pet. App. 2a, 16a-17a (petitioner knew the consequences of his actions). Although petitioner may have felt coerced, that does not mean that he acted unintentionally or did not perform the acts in question. See, *e.g.*, *Black's Law Dictionary* 825 ("While motive is the inducement to do some act, intent is the mental resolution or determination to do it. When the intent to do an act that violates the law exists, motive becomes immaterial.").

Nor does the persecutor bar incorporate a duress exception. The text does not include a requirement that an alien act "voluntarily," even though several other provisions of the INA, including bars to immigration benefits, do contain that requirement. See 8 U.S.C. 1182(a)(3)(D)(ii) (barring admission of totalitarian party members unless membership was "involuntary"); 8 U.S.C. 1424(d) (barring naturalization of totalitarian party members unless membership was "involuntary"); see also, *e.g.*, 8 U.S.C. 1158(c)(2)(D) (termination of asylum if alien "voluntarily" avails himself of another country's protection); 8 U.S.C. 1481(a) (loss of citizenship if person "voluntarily" performs certain acts to renounce citizenship). "[W]here Congress includes particular language in one section of a statute but omits it in another section of the same Act, it is generally presumed that Congress acts intentionally and purposely in the disparate inclusion or exclusion." *Russello*, 464 U.S. at 23.

The fact that some courts have presumed that a duress defense should be available for some *crimes* (Pet. Br. 29) does not justify crafting an extra-textual duress exception here. Removal "has been consistently classified as a civil rather than a criminal procedure." *Harisiades* v. *Shaughnessy*, 342 U.S. 580, 594 (1952). "Consistent with the civil nature of the proceeding, various protections that apply in the context of a criminal trial do not apply in a deportation hearing." *INS* v. *Lopez-Mendoza*, 468 U.S. 1032, 1038-1039 (1984) (collecting examples).

When Congress has intended an alien's eligibility for an immigration benefit to turn on the application of criminal law, it has said so explicitly. See, *e.g.*, 8 U.S.C. 1158(b)(2)(A)(ii), 1231(b)(3)(B)(ii) (alien ineligible for asylum or withholding of removal if he was "convicted by a final judgment of a particularly serious crime"); 8 U.S.C. 1182(a)(2) (alien inadmissible if he committed certain listed crimes). The persecutor bar does not turn on a criminal conviction, only the performance of certain acts. That design counsels strongly against importing a criminal law defense, especially one like duress, which does not negate the underlying conduct, but simply provides an excuse that allows a person to avoid a criminal conviction. See *Dixon* v. *United States*, 548 U.S. 1, 5-7 & n.5 (2006).

There are a number of other reasons why it would be ill-advised for this Court to import a duress exception from the criminal law into the persecutor bar. First, unlike in a criminal case, the 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. Second, duress is not always a defense even to criminal liability; it was

not a defense to murder at common law, and many jurisdictions today do not permit duress to excuse other intentional homicides. See, *e.g.*, 2 Wayne R. LaFave, *Substantive Criminal Law* § 9.7(a) at 74-75 (2d ed. 2003); 2 Paul H. Robinson, *Criminal Law Defenses* § 177(g) at 368 & n.58 (1984). Third, as petitioner acknowledges (Br. 38), there is no settled understanding of the elements of a duress defense. See, *e.g.*, *Dixon*, 548 U.S. at 4 n.2 ("There is no federal statute defining the elements of the duress defense," and this Court "ha[s] not specified the elements of the defense."); 2 LaFave, *supra*, § 9.7(b) at 79 ("[T]here is no uniformity in the statutory definition of [the duress] defense."). For this Court to recognize a duress excuse, it would not only have to add a limitation on the persecutor bar that does not appear on its face (and has been rejected by the Board), but it would have to undertake the significant effort of defining the contours of that limitation.[8]

None of petitioner's remaining arguments justifies crafting an extra-textual duress exception. Petitioner suggests (Br. 28) that the civil law never imposes "serious adverse consequences on the basis of involuntary acts," but there are any number of statutes that disprove that broad assertion. See, *e.g.*, *MCM Partners, Inc.* v. *Andrews-Bartlett & Assocs., Inc.*, 62 F.3d 967, 973 (7th Cir. 1995) (involuntary participation in an antitrust con-

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[8] For example, it would be necessary to decide how immediate and severe the threat must be; what constitutes a reasonable chance to avoid the threat; whether a threat to a third person is sufficient; and whether the action taken under duress must be proportional to the harm threatened. See Pet. Br. 38 & n.10. These would be difficult questions for Congress if it was to fashion an exception. But there is no reason for this Court to resolve them when the Board has furnished a bright-line rule that avoids them altogether.

spiracy violates the Sherman Act); *United States* v. *White Fuel Corp.*, 498 F.2d 619, 622-624 (1st Cir. 1974) (imposing strict liability under the Refuse Act for environmental damage). None of the civil cases petitioner cites (Br. 28) applies the type of criminal law defense he wishes to engraft upon the persecutor bar.[9] And the Eleventh Circuit's erroneous recognition of a duress defense to carrier fine liability under 8 U.S.C. 1323 provides no basis for disregarding the Board's reasonable judgment that there is no duress exception here. Contrary to petitioner's suggestion (Br. 30), the INS did not determine that 8 U.S.C. 1323 contains a duress defense,[10] and the Board, the adjudicatory body responsible for rendering authoritative constructions of the Act, has held that there is no such defense. See *In re M/V "Solemn Judge,"* 18 I. & N. Dec. 186, 192-195 (B.I.A. 1982).

Petitioner likewise is not aided by the Secretary of Homeland Security's determination to make certain ex-

[9] In *In re Grand Jury Proceedings Empanelled May 1988*, 894 F.2d 881, 883-884 (7th Cir. 1989), the court expressly declined to decide whether duress was a defense to civil contempt. *Office of Foreign Assets Control* v. *Voices in the Wilderness*, 329 F. Supp. 2d 71, 81 (D.D.C. 2004), concerned necessity—not duress—and the court simply determined that such a defense could not be established on the facts of that case. *Furnish* v. *Commissioner*, 262 F.2d 727, 732-734 (9th Cir. 1958), applied the contract-law principle requiring a meeting of the minds, not a criminal law duress defense.

[10] The document petitioner cites simply notes the Eleventh Circuit's decision in *Lyden* v. *Howerton*, 783 F.2d 1554, 1557 (1986), and the district court's decision in *United States* v. *Sanchez*, 520 F. Supp. 1038 (S.D. Fla. 1981), 1040, aff'd, 703 F.2d 580 (11th Cir. 1983) (Table), in a footnote, and it does so in the context of a discussion about remission of fines and standards for exercising prosecutorial discretion, not a legal defense of duress. See General Counsel's Office, INS, *Standard for Prosecutorial Discretion Under Section 273 of the Immigration and Nationality Act*, Op. 93-66, 1993 WL 1504013, at n.7 (Sept. 7, 1993).

emptions under 8 U.S.C. 1182(a)(3)(B), which bars, *inter alia*, the admission of persons who have provided material support to terrorists. See Pet. Br. 30-31. The statute expressly grants the Secretary the "sole unreviewable discretion" to decide that the bar "shall not apply" in certain circumstances, 8 U.S.C. 1182(d)(3)(B)(i), and the Secretary has invoked that authority to exempt certain persons who provided support under duress and pose no danger to the safety and security of the United States. See *Exercise of Authority Under Section 212(d)(3)(B)(i) of the Immigration and Nationality Act*, 72 Fed. Reg. 26,138-26,139 (2007).[11] The Secretary's exercise of discretion under the material support bar cannot justify making exceptions to the persecutor bar, because the latter does not grant the Secretary or the Attorney General any discretion to craft such exceptions.

Finally, petitioner argues (Br. 39) as a fallback position that even if "proof of coercion is not sufficient to

[11] Congress has not "codified" (Pet. Br. 31 n.8) a duress exception to the material support bar. In the Consolidated Appropriations Act, 2008, Pub. L. No. 110-161, § 691, 121 Stat. 2364, Congress broadened the Secretary's discretionary authority to exempt certain persons from the material support bar, noted limited exceptions to that authority, and circumscribed judicial review of the Secretary's exemption determinations. *Id.* § 691(a), (b), 121 Stat. 2364-2365. It also added the requirement that the Secretary report any duress exemptions granted to Congress, along with a breakdown of the terrorist organizations that received material support, a description of the factors DHS considers when evaluating duress waivers, and "any other information that the Secretary believes that the Congress should consider while overseeing the Department's application of duress waivers." *Id.* § 691(e)(1)-(4), 121 Stat. 2365. That provision plainly manifests congressional concern about application of even an *express* grant of *discretionary* authority when invoked on the basis of perceived duress. Its enactment therefore cuts decidedly against judicial recognition of a *mandatory*, *implied* duress defense.

render the persecutor bar inapplicable," then coercion should be considered as a "factor" in "determining whether an individual engaged in persecution." See AHR Br. 34-36 (proposing non-exhaustive seven-factor test). But if coercion is not relevant to whether an alien assisted or participated in persecution, it is not any more appropriate to merely consider it as a "factor" than it is to make it a wholesale bar. See note 14, *infra.* The persecutor bar applies, by its terms, to specified conduct, and the Board has determined that such conduct should be judged objectively. There is no textual basis for overturning the Board's judgment.

B. The Many Statutory Predecessors To The Persecutor Bar Confirm That There Is No "Involuntariness" Exception

The conclusion that the persecutor bar applies without regard to motivation or claims of coercion is strongly supported by this Court's analysis of a predecessor persecutor bar in *Fedorenko*, as well as similar interpretations of a long line of other statutory predecessors to the persecutor bar in the INA.

1. a. The earliest statutory predecessor to the persecutor bar at issue here was in the Displaced Persons Act of 1948 (DPA), ch. 647, 62 Stat. 1009, a statute enacted after World War II to "enable European refugees driven from their homelands by the war to emigrate to the United States without regard to traditional immigration quotas." *Fedorenko*, 449 U.S. at 495. The DPA defined those refugees as "displaced persons," and it specifically excluded persons who had, among other things, "assisted the enemy in persecuting civil[ians]." *Ibid.* (quoting Constitution of the International Refugee Organization (IRO Const.), *opened for signature* Dec. 15, 1946, Annex

I, Pt. II, § 2(a), 62 Stat. 3037, 3051, 18 U.N.T.S. 3, 20, incorporated in DPA § 2, 62 Stat. 1009).[12] In *Fedorenko*, this Court considered whether the DPA's persecutor bar precluded *all* persons who had assisted in the persecution of others from obtaining immigration benefits, including persons who claimed that they had been forced to do so. 449 U.S. at 512-513.

Fedorenko was a member of the Russian Army who was captured by German soldiers during World War II, held as a prisoner of war, and then sent to several concentration camps, where he stood guard while hundreds of thousands of innocent civilians were murdered. *Fedorenko*, 449 U.S. at 494. After the war, he obtained a visa under the DPA by lying about his wartime activities and eventually was naturalized. *Id.* at 496-497. When the government learned that Fedorenko had been a concentration camp guard, it sought to revoke his citizenship. *Id.* at 497-498.

The Court held that Fedorenko was subject to denaturalization because his citizenship had been "illegally procured." *Fedorenko*, 449 U.S. at 508-516. Central to that holding was the Court's determination that petitioner would have been barred from obtaining a visa under the DPA if he had disclosed that he was a concentration camp guard. *Id.* at 507-508. Fedorenko claimed

[12] The DPA defined a "displaced person" as "any displaced person or refugee as defined in Annex I of the Constitution of the International Refugee Organization and who is the concern of the International Refugee Organization." DPA § 2(b), 62 Stat. 1009. Annex I excepted from "the concern of" the IRO "[a]ny other persons" who either "assisted the enemy in persecuting civil populations of countries, Members of the United Nations," or "voluntarily assisted the enemy forces since the outbreak of the second world war in their operations against the United Nations." IRO Const., Annex I, Pt. II, § 2, 62 Stat. 3051-3052, 18 U.N.T.S. 20.

that the persecutor bar in the DPA did not apply to him because he was "forced to serve as a guard" and his actions were involuntary, *id.* at 501-502, but the Court rejected that argument, finding no basis for "an 'involuntary assistance' exception in the language of" the DPA, *id.* at 512.

The Court explained that the "plain language" of the DPA's bar "mandates" that it be applied to all who assist in persecution, regardless of whether their conduct was coerced. 449 U.S. at 512. It noted that "Congress was perfectly capable of adopting a 'voluntariness' limitation where it felt one was necessary," as evidenced by Congress's adoption of a separate bar that applied to anyone who "*voluntarily* assisted the enemy forces . . . in their operations." *Ibid.* (quoting IRO Const., Annex I, Pt. II, § 2(b), 62 Stat. 3052, 18 U.N.T.S. 20, incorporated in DPA § 2(b), 62 Stat. 1009). "Under traditional principles of statutory construction, the deliberate omission of the word 'voluntary'" from the persecutor bar "compels the conclusion that the statute made *all* those who assisted in the persecution of civilians ineligible for visas." *Id.* at 512-513 (citing cases).

Whether a person "assisted" in "persecution," the Court concluded, depends solely on the objective question whether the person committed acts that rise to the level of assistance, not his state of mind. That is, rather than "'interpreting' the [DPA] to include a voluntariness requirement that the statute itself does not impose," courts should focus on "whether particular *conduct* can be considered assisting in the *persecution* of civilians." 449 U.S. at 512 n.34 (first emphasis added). In the Court's view, a person "who did no more than cut the hair of female inmates before they were executed cannot be found to have assisted in the persecution," while an

armed guard like Fedorenko plainly did assist in persecution. *Ibid.* The Court therefore held that, under the DPA's persecutor bar, "an individual's service as a concentration camp guard—whether voluntary or involuntary—made him ineligible for a visa." *Id.* at 512.

b. This Court's reasoning in *Fedorenko* applies with equal force to the INA's persecutor bar. The text of the persecutor bar at issue in *Fedorenko* is repeated in the persecutor bar in the INA: the DPA referred to persons who had "assisted the enemy in persecuting" civilians, DPA § 2(b), 62 Stat. 1009, incorporating IRO Const., Annex I, Pt. II, § 2(a), 62 Stat. 3051, 18 U.N.T.S. 20, while the provisions at issue here cover persons who "assisted, or otherwise participated in the persecution" of any person, 8 U.S.C. 1101(a)(42), 1158(b)(2)(A)(i), 1231(b)(3)(B)(i). Neither bar contains any requirement that a person's assistance in persecution be "voluntary." Rather, both apply broadly to "any" person who "assisted" in "persecuti[on]," without any qualifying language in the text, and the INA goes on to bar those who "ordered," "incited," and "participated" in persecution as well.

Petitioner is correct (Br. 44) that the DPA contained a separate provision applicable to persons who had "voluntarily assisted the enemy forces * * * in their operations." DPA § 2(b), 62 Stat. 1009, incorporating IRO Const., Annex I, Pt. II, § 2(b), 62 Stat. 3051, 18 U.N.T.S. 20. But that provides no reason for treating the two statutes differently. The text of the operative disqualifying provision in the DPA appears in materially identical form in the INA, and the INA likewise contains bars to immigration benefits that apply only when the alien's conduct is "voluntary." See p. 22, *supra*. Thus, in the INA, as in the DPA, Congress demonstrated that it "was perfectly

capable of adopting a 'voluntariness' limitation where it felt that one was necessary." *Fedorenko*, 449 U.S. at 512.

Moreover, although *Fedorenko* was decided after Congress first enacted the persecutor bar at issue here, Congress re-enacted the bar in 1996—after both *Fedorenko* and the Board's decisions construing the persecutor bar in a manner consistent with *Fedorenko*. See Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (IIRIRA), Pub. L. No. 104-208, Div. C, §§ 305(a)(3), 604(a), 110 Stat. 3009-602, 3009-691. Congress "is presumed to be aware of an administrative or judicial interpretation of a statute and to adopt that interpretation when it re-enacts a statute without change." *Lorillard* v. *Pons*, 434 U.S. 575, 580-581 (1978); see *Goodyear Atomic Corp.* v. *Miller*, 486 U.S. 174, 184-185 (1988).

c. Petitioner and his *amici* make several attempts to either distinguish or limit *Fedorenko*, but none is persuasive.

First, petitioner (Br. 41) and his *amici* (AJC Br. 22) contend that *Fedorenko* should not guide the decision here because that case involved the DPA, not the INA. But the persecutor bars in the DPA and the INA include the same operative language and serve the same purposes, and there is no reason why Congress would have wished the phrase "assisted in persecution" to implicitly include a voluntariness requirement in one statute but not the other. *E.g.*, *Chen* v. *United States Att'y Gen.*, 513 F.3d 1255, 1260 n.4 (11th Cir. 2008); *Xie* v. *INS*, 434 F.3d 136, 141 (2d Cir. 2006).[13]

[13] Petitioner's observation (Br. 44-45) that any eligible person was entitled to a visa under the DPA, while asylum under the INA is discretionary, is beside the point, because the persecutor bars in both statutes do not permit any exercise of discretion. Moreover, the INA's per-

Second, petitioner (Br. 42-43) and his *amici* (AJC Br. 8-9) suggest that the DPA's persecutor bar is distinguishable from the INA's because the DPA was enacted in response to "a particular—and particularly heinous—crime against humanity," while the INA applies beyond the context of World War II. Petitioner provides no explanation for why Congress would have wished to treat modern-day persecutors who claim they were just following orders any differently from Nazis (or those who assisted them) who proffered that same excuse, and the text of the DPA and INA shows that it did not. Congress reasonably focused on persecution simpliciter. If Congress had intended to "exact retributive justice" in the DPA's persecutor bar, while "express[ing] a generous policy of admission" in the INA's persecutor bar (AJC Br. 9), it would have used different language in the two statutes.

Third, petitioner suggests (Br. 43 n.12) that the *Fedorenko* analysis does not apply because (in his view) his conduct was less egregious than Fedorenko's. There is no textual basis for such a result; if a person assisted in persecution, he is barred under both the DPA and INA. In any event, petitioner's conduct is strikingly similar to Fedorenko's: both were trained to serve as prison guards after a period of incarceration by armed forces; both stood guard as persons were tortured and killed on account of protected grounds; both were armed and charged with keeping prisoners from escaping; both received payment for their services; and both served as guards for several years. Compare *Fedorenko*, 449 U.S. at 494, 498-500 & n.12, with Pet. App. 12a-13a, 15a-16a;

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secutor bar also applies to non-discretionary withholding of removal. 8 U.S.C. 1231(b)(3)(B)(i).

J.A. 18-20, 26, 40, 42, 58-59; A.R. 328-383. Just as this Court refused to rewrite the statutory text to excuse Fedorenko, it should refuse to rewrite the INA for petitioner.

d. The federal courts of appeals have uniformly determined that *Fedorenko* informs the meaning of the INA provisions at issue here. See, *e.g.*, *Chen*, 513 F.3d at 1258 ("All fellow circuits that have addressed this issue have used *Fedorenko*'s language to establish the standard for defining whether conduct amounts to assistance in persecution."); see also *Miranda Alvarado*, 449 F.3d at 925; *Xie*, 434 F.3d at 140; *Hernandez* v. *Reno*, 258 F.3d 806, 813 (8th Cir. 2001). Applying *Fedorenko* to the INA's persecutor bar, the vast majority of courts have agreed that "assistance" in "persecution" is determined by assessing the nature of the alien's conduct, not his motivation. See *Chen*, 513 F.3d at 1260 n.4; *Xie*, 434 F.3d at 140; *Singh*, 417 F.3d at 739-740; *Bah*, 341 F.3d at 351; see also *Hajdari* v. *Gonzales*, 186 Fed. Appx. 565, 569-570 (6th Cir. 2006) (unpublished opinion).[14]

2. In addition to the persecutor bar in the DPA at issue in *Fedorenko*, Congress has included a number of persecutor bars in the immigration laws prior to enacting the bar at issue here. *Every one* of those predecessor persecutor bars used the same categorical language. *None* of them has been interpreted to permit an excep-

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[14] In *Hernandez*, 258 F.3d at 812-814, the Eighth Circuit interpreted *Fedorenko* to permit consideration of an alien's motivation as a factor in determining whether the alien's "particular conduct can be considered assisting in the *persecution* of civilians." *Fedorenko*, 449 U.S. at 514 n.34. That was error. The *Fedorenko* Court unequivocally rejected the argument that voluntariness is relevant to whether an alien assisted in persecution. *Id.* at 512-513 & nn.34-35 (statutory text "leave[s] no room for doubt" on that point).

tion based on the alien's state of mind or claims of coercion. That long statutory history confirms the reasonableness of the Board's decision not to recognize any exceptions to the INA's persecutor bar.

In 1950, Congress added a second persecutor bar to the Displaced Persons Act that used broader language than the bar in the 1948 Act. See Ch. 262, § 13, 64 Stat. 227. That bar provided: "No visa shall be issued * * * to any person who advocated or assisted in the persecution of any person because of race, religion, or national origin." *Ibid.* Just as this Court did with respect to the persecutor bar at issue in *Fedorenko*, courts have refused to recognize a duress exception to that categorical text. See *United States* v. *Reimer*, 356 F.3d 456, 459-460 (2d Cir. 2004); *United States* v. *Koreh*, 59 F.3d 431, 439 (3d Cir. 1995); *United States* v. *Breyer*, 41 F.3d 884, 889-890 (3d Cir. 1994).

The Refugee Relief Act of 1953 (RRA), a successor to the DPA passed in 1953 to provide admission for certain refugees from Communist countries, similarly barred from visa eligibility "any person who personally advocated or assisted in the persecution of any person or group of persons because of race, religion, or national origin." Ch. 336, § 14(a), 67 Stat. 406. The RRA's persecutor bar, like those in the DPA, has been long understood not to include any involuntariness exception or state-of-mind requirement. See *United States* v. *Hansl*, 439 F.3d 850, 854 (8th Cir.), cert. denied, 127 S. Ct. 318 (2006); *United States* v. *Kumpf*, 438 F.3d 785, 790-791 (7th Cir. 2006); *United States* v. *Friedrich*, 402 F.3d 842, 844-845 (8th Cir. 2005).

In 1977, Congress passed a law to authorize adjustment of status of certain persons from Vietnam, Laos, and Cambodia that excepted "[a]ny alien who ordered,

assisted, or otherwise participated in the persecution of any person because of race, religion, or political opinion." Act of Oct. 28, 1977, Pub. L. No. 95-145, § 105, 91 Stat. 1224. As the text suggests, that provision was modeled on Congress's previous "experience with * * * Nazi war criminals" in the DPA and RRA. *Indochinese Refugees—Adjustment of Status: Hearings on H.R. 2051 Before the Subcomm. on Immigration, Citizenship, and Int'l Law of the House Comm. on the Judiciary*, 95th Cong., 1st Sess. 46 (1977) (statement of Rep. Crosland). Although there do not appear to be any reported court of appeals cases interpreting that language, there is no textual basis for believing it would be interpreted any differently from its predecessors.

In 1978, Congress passed the Holtzman Amendment, which amended the INA to authorize exclusion and removal of any alien associated with Nazi forces who "ordered, incited, assisted, or otherwise participated in the persecution of any person because of race, religion, national origin, or political opinion." Pub. L. No. 95-549, § 103(a)(3), 92 Stat. 2066 (8 U.S.C. 1182(a)(3)(E) and 1227(a)(4)(D)). That provision was modeled on the DPA and RRA, see, *e.g.*, H.R. Rep. No. 1452, 95th Cong., 2d Sess. 3, 5 (1978), and it has consistently been applied based solely on an alien's conduct, without regard to his motivation. See *Naujalis* v. *INS*, 240 F.3d 642, 646 (7th Cir. 2001); *Maikovskis* v. *INS*, 773 F.2d 435, 445-446 (2d Cir. 1985).

Combined with this Court's decision in *Fedorenko*, the decisions construing the other statutory predecessors to the INA's persecutor bar make clear that it contains no exception for involuntary conduct.

C. The Board's Interpretation Of The Persecutor Bar Is Consistent With The Bar's Statutory History And Purposes

When construing the INA, this Court "assume[s] that the legislative purpose is expressed by the ordinary meaning of the words used." *Cardoza-Fonseca*, 480 U.S. at 431 (internal quotation marks and citations omitted). In this case, Congress expressed through categorical language its policy judgment that *any* persons who participate in the persecution of others should be denied certain immigration benefits. That policy judgment is fully consistent with the United States's international obligations regarding refugees.

1. It is well-settled that Congress has plenary authority over immigration matters. See, *e.g.*, *Kleindienst* v. *Mandel*, 408 U.S. 753, 769-770 (1972). That authority includes both the power to welcome refugees to the United States and to refuse admission to those persons "whose presence in the country [Congress] deems hurtful." *Bugajewitz* v. *Adams*, 228 U.S. 585, 592 (1913). Since World War II, Congress has invoked that broad authority to deny certain immigration benefits to aliens who come to the United States after assisting or participating in the persecution of others. See pp. 27-28, 34-35, *supra*.

Those bars reflect Congress's longstanding policy judgment that persecution—whether by Nazis or by modern-day persecutors—is "conduct [that] is deemed so repugnant to civilized society and the community of nations that its justification will not be heard." *McMullen*, 19 I. & N. Dec. at 97. Central to that judgment is Congress's refusal to excuse the conduct of those who admitted participating in horrific acts of persecution but claimed that they were just following orders. See, *e.g.*,

124 Cong. Rec. 31,647 (1978) (statement of Rep. Holtzman) (excluding Nazi persecutors from the United States "mak[es] it clear that persecution in any form is repugnant to democracy and our way of life").

Congress enacted the INA's persecutor bar against the backdrop of that long statutory history of excluding those who participate in persecution. As with previous persecutor bars, Congress again chose categorical language that denies immigration benefits to *any* person who participated in persecution. See Refugee Act of 1980, Pub. L. No. 96-212, §§ 201(a), 203(e), 94 Stat. 102-103, 107. That choice was informed primarily by "the two special statutory enactments under which refugees were admitted to this country after World War II, the Displaced Persons Act of 1948 and the Refugee Relief Act of 1953," H.R. Rep. No. 608, 96th Cong., 1st Sess. 10 (1979), which contained persecutor bars premised on the view that *all* persons who have participated in the persecution of others should be denied the privilege of admission into the United States. See, *e.g.*, *Amending the Displaced Persons Act of 1948: Hearings on H.R. 1344 Before the Subcomm. No. 1 of the House Comm. on the Judiciary*, 81st Cong., 1st Sess. 132 (1949) (statement of Rep. Javits) (stating the intent "to keep out those aliens * * * who were *in any way* participants in gen[o]cide or in these acts of racial or religious persecution" (emphasis added)).

An alien's continued presence in the United States is "a matter of permission and tolerance," not of right. *Harisiades*, 342 U.S. at 586-587. Having decided to offer refuge to *victims* of persecution from other nations, Congress reasonably chose not to extend that very same privilege to persons involved in their persecution.

2. Petitioner contends (Br. 25) that Congress would not have wanted to deny immigration benefits to a person who participated in the persecution of others under duress because such a person's conduct is not "morally offensive." But Congress focused the persecutor bar on a person's *conduct*, not his state of mind, on the judgment that persons who engage in persecutory conduct are *per se* undeserving of certain immigration benefits. The fact that a person may have acted under duress does not make the suffering of his victims any less horrific. It is therefore understandable that Congress would make a categorical determination to firmly dissociate this Nation from *all* those who participated in persecution of others based on race, religion, and other protected grounds, without attempting to make (or requiring the Attorney General to make) judgments about the relative moral culpability of persons within that class. Such categorical judgments can be critical to assuring the citizens of this Nation and of other Nations that the United States will not tolerate, and will not undertake to welcome and embrace, any persons who have been involved in the very sorts of persecution the United States is committed to eradicating.

Moreover, the difficulty of defining what constitutes a "morally offensive" state of mind (Pet. Br. 24) underscores why Congress chose to focus on a person's conduct. Congress no doubt wanted to prevent each decisionmaker from undertaking a free-form inquiry using her own "scale of moral offensiveness" based on "state of mind" and any other facts she deems "relevant." *Id.* at 23; see *id.* at 25, 26, 27. Congress thereby avoided the pitfalls of an *ad hoc* moral relativism and a *post hoc* assessment of the facts and circumstances of asserted coercion of those who concededly participated in persecution

in foreign countries. Indeed, the legislative record reveals Congress's intention that the persecutor bars be easily administrable. See, *e.g.*, H.R. Rep. No. 1452, *supra*, at 7-8 (noting intent that the Holtzman Amendment "be properly and efficiently administered," and relying on assurances that "consular and immigration officers" will "set[] forth specific and clearly identifiable standards").[15]

Petitioner and his *amici* suggest that Congress could not have intended categorical application of the persecutor bar because that could lead to seemingly unfair outcomes in certain cases. For example, petitioner contends (Br. 26-28) that Congress could not have intended to bar persons who participated in persecution under duress because "forcing individuals to engage in persecutory acts is itself persecution." That is not the basis for petitioner's claim of persecution; he claimed he was persecuted on the basis of his religion before he became a prison guard. Pet. Br. 14. In any event, petitioner is

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[15] Another reason that this Court should be particularly reluctant to adopt a construction of the word "persecution" that requires an inquiry into subjective motivation or asserted coercion is that that construction presumably would have to be applied to affirmative claims for asylum and withholding of removal as well as in the context of the persecutor bar. See, *e.g.*, *Clark* v. *Martinez*, 543 U.S. 371, 386 (2005) (same statutory text should be given same meaning in different contexts); see also SIRL Br. 7-8. As a result, an applicant for asylum or withholding could be required to show not only that he was subjected to severe mistreatment on account of a protected ground, but also that his oppressor acted voluntarily and with a certain subjective intent towards him in particular. That additional burden would likely be significant, see, *e.g.*, *Bolanos-Hernandez* v. *INS*, 767 F.2d 1277, 1285 (9th Cir. 1984) ("Persecutors are hardly likely to provide their victims with affidavits attesting to their acts of persecution."), and it would complicate immigration proceedings, contrary to Congress's intent.

mistaken. For example, a soldier who is directed to torture a political prisoner is not being "persecuted" "on account of" *his own* protected characteristic, which is what the INA requires. See *INS* v. *Elias-Zacarias*, 502 U.S. 478, 482 (1992).[16] Indeed, none of the cases petitioner cites (Br. 27-28) supports the sweeping proposition that forcing a person to engage in persecution automatically constitutes persecution under the INA.[17] Moreover, there is nothing inherently inconsistent in concluding that an alien is both the victim of past persecution and subject to the persecutor bar: the INA contemplates precisely that result. See *McMullen*, 19 I. & N. Dec. at 97. In any event, persons barred from eligibility for asylum and withholding of removal still may obtain deferral of removal under the CAT, which petitioner obtained in this case.[18]

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[16] An act of self-defense similarly does not constitute persecution because it is not "on account of" the victim's protected ground. See *Vukmirovic* v. *Ashcroft*, 362 F.3d 1247, 1252 (9th Cir. 2004).

[17] Rather, those cases stand for the limited proposition that, although forced conscription generally is not persecution, punishment of a military deserter may be persecution if the alien is punished for refusing to participate in military action and the punishment is based on a protected ground. See *Islami* v. *Gonzales*, 412 F.3d 391, 393, 396-397 (2d Cir. 2005), overruled on other grounds by *Shi Liang Lin* v. *United States Dep't of Justice*, 494 F.3d 296 (2d Cir. 2007), cert. denied, 128 S. Ct. 2472 (2008); *Vujisic* v. *INS*, 224 F.3d 578, 579, 580, 582 (7th Cir. 2000); *Ramos-Vasquez* v. *INS*, 57 F.3d 857, 860 (9th Cir. 1995).

[18] Petitioner (Br. 9-11) and his *amici* (HRF Br. 18-28) suggest that Congress would not have intended to apply the persecutor bar to children who are forcibly conscripted. This case does not raise that issue—petitioner was 24 or 25 years old when he first became a prison guard, J.A. 3-5, 25—and the difficult task of determining whether and where to make exceptions for children should be entrusted to Congress, especially because Congress has already undertaken that task in other

Contrary to petitioner's suggestion (Br. 34-35, 37-38), his view of the persecutor bar cannot be defended on the ground that Congress simply intended to permit the Attorney General to "exercise discretion to adapt the country's asylum policy to the myriad different factual circumstances that asylum-seekers can present." As discussed above, the exclusions are written in categorical, not discretionary, terms. In addition, while *asylum* could still be denied as a matter of discretion if the persecutor bar were inapplicable, *withholding of removal* would be mandatory. And in any event, there is nothing in the legislative record of the Refugee Act to suggest that Congress envisioned *any* exceptions to the persecutor bar, much less the *ad hoc* regime suggested by petitioner.

Petitioner hypothesizes (Br. 35) that the INA's persecutor bar was modeled solely on the bar in the 1977 Act regarding Indochinese refugees, which (in his view) Congress intended to be "flexible." But that is sheer speculation, belied by the text of that Act. See pp. 34-35, *supra*. Further, this Court has cautioned that when Congress has enacted provisions "specifically to restrict the opportunity for discretionary administrative action" under the INA, as it did here, courts should be particularly careful not to "construe the [INA] to broaden the Attorney General's discretion," because to do so "would shift [the] authority" to define the limits on immigration benefits "from Congress to [the] INS and, eventually * * * to the courts." *Phinpathya*, 464 U.S. at 195. Because "Congress designs the immigration laws, * * * it is up

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provisions of the INA. See, *e.g.*, 8 U.S.C. 1182(a)(3)(D)(ii), 1424(d), 1481(a)(2).

to Congress to temper the laws' rigidity if it so desires." *Id.* at 196.

3. a. Congress's decision to bar from asylum and withholding of removal all persons who have participated in the persecution of others is consistent with its goal of offering safe haven to genuine refugees—to victims, not perpetrators, of persecution. Congress enacted the persecutor bar at issue here as part of the Refugee Act of 1980, which was intended to establish "a comprehensive United States refugee resettlement and assistance policy." S. Rep. No. 256, 96th Cong., 1st Sess. 1 (1979). In order to determine which persons should be admitted into the United States or allowed to remain as refugees, Congress looked to the Protocol Relating to the Status of Refugees (Protocol), *done* Jan. 31, 1967, 19 U.S.T. 6223, 606 U.N.T.S. 267. See *Cardoza-Fonseca*, 480 U.S. at 436-437.

The Protocol is an international agreement designed to guarantee certain protections to refugees. It incorporates the substantive portions of a previous international agreement—the 1951 Convention Relating to the Status of Refugees (Convention), July 28, 1951, 189 U.N.T.S. 150 (entered into force Apr. 22, 1954)—but removes from the definition of "refugee" time and place restrictions that were present in the earlier Convention. See Protocol art. I(1) and (2), 19 U.S.T. 6223, 6225, 606 U.N.T.S. 268 (incorporating Convention arts. 2-34). The United States acceded to the Protocol in 1968, after determining that it "was largely consistent with existing law." *INS* v. *Stevic*, 467 U.S. 407, 417-418 (1984) (collecting legislative history).[19]

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[19] The United States was not a signatory to the Convention. *Stevic*, 467 U.S. at 416 n.9.

The Convention defines a "refugee" as any person who, "owing to [a] well-founded fear of being persecuted for reasons of race, religion, nationality, membership [in] a particular social group or political opinion," is outside his home country and "unable" or "unwilling" to return. Convention art. 1(A)(2), 189 U.N.T.S. 152. It then excludes several categories of persons from its protections. Article 1(F) states that the Convention's protections "shall not apply to 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, as defined in the international instruments drawn up to make provision in respect of such crimes;
>
> (b) he has committed a serious non-political crime outside the country of refuge prior to his admission to that country as a refugee;
>
> (c) he has been guilty of acts contrary to the purposes and principles of the United Nations.

189 U.N.T.S. 156. That provision was adopted to exempt those who, as a result of their conduct, were undeserving of the Convention's protections. See, *e.g.,* Conference of Plenipotentiaries on the Status of Refugees and Stateless Persons: Summary Record of the Twenty-fourth Meeting, Nov. 27, 1951, *Conference of the Draft Convention on the Status of Refugees* (statement of Mr. Von Trutzschler, Federal Republic of Germany) <http://www.unhcr.org/protect/PROTECTION/3ae68cde18.html>.

b. Congress has wide latitude in implementing its obligations under the Protocol. The Protocol is not a self-executing treaty, *Stevic*, 467 U.S. at 428 n.22, and it

thus does not confer any rights upon aliens beyond those granted by the implementing domestic legislation, see, *e.g.*, *Al-Fara* v. *Gonzales*, 404 F.3d 733, 743 (3d Cir. 2005) (collecting cases). The specific measures each contracting state takes to implement the Protocol "are matters very much in the realm of sovereign discretion" Guy S. Goodwin-Gill & Jane McAdam, *The Refugee in International Law* 528 (3d ed. 2007); see James C. Hathaway, *The Law of Refugee Status* 214-215 (1991) ("[E]ach contracting state [is] to decide for itself when a refugee claimant is within the scope of an exclusion clause.").[20]

In the Refugee Act, Congress largely adopted the Convention's definition of "refugee," after determining "that the new definition does not create a new and expanded means of entry, but instead regularizes and formalizes the policies and practices that have been followed in recent years." *Stevic*, 467 U.S. at 426 (quoting H.R. Rep. No. 608, *supra*, at 10); see Refugee Act §§ 201(a), 203(e), 94 Stat. 102-103, 107. Congress then added the persecutor bar at issue here, finding it "consistent with the U.N. Convention (which does not apply to those who, *inter alia*, 'committed a crime against peace, a war crime, or a crime against humanity')." H.R. Rep. No. 608, *supra*, at 10.

The Convention, like the INA, excludes "any person" who engages in disqualifying conduct, without exception. Convention art. 1(F), 189 U.N.T.S. 156. The Conven-

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[20] The fact that courts in four of the nearly 150 states that are parties to the Convention—in decisions rendered long after adoption of the Protocol and enactment of the INA's persecutor bar—have permitted a duress exception to their persecutor bars (SIRL Br. 25-28; UNHCR Br. 15-17) does not compel the United States to recognize such an exception, much less warrant imposition of an exception that Congress itself has not adopted.

tion's exclusions (like the INA's persecutor bar) do not express any requirement that the person act "voluntarily," despite the fact that the Convention (like the INA) contains other provisions that apply *only* to voluntary conduct. See, *e.g.*, Convention art. 1(C)(1), (2), (4), 189 U.N.T.S. 154 (stating that the Convention's protections "shall cease to apply to" persons who take certain voluntary actions).

Petitioner is mistaken in contending (Br. 33; see SIRL Br. 22-23) that a duress exception is implicit in the Convention's references to "crimes" in certain of the exclusion clauses in Article 1(F). Those provisions do not condition exclusion on an actual finding of criminal responsibility; rather, they provide for exclusion if there are "serious reasons for considering" that the person has committed one of the crimes in question. Convention art. 1(F), 189 U.N.T.S. 156. That is significant, because while there may be circumstances in which person would be excused from criminal responsibility by a duress defense in some circumstances in an actual prosecution, the possibility that such a defense might be raised does not mean that there are not at least "serious reasons for considering" that he committed the crime. Moreover, the wide variations in how different nations define and apply duress defenses in their criminal laws make it particularly unlikely that the parties, in adopting the categorical text of Article 1(F), intended that the Convention itself would implicitly require such a defense. See, *e.g.*, *Prosecutor* v. *Erdemovic*, Case No. IT-96-22-A, 1997 WL 33341547, Judgment, ¶¶ 59-61 (App. Chambers Oct. 7, 1997) (Former Yugo.) (McDonald & Vohrah, JJ.) (surveying different nations' duress defenses); *id.* ¶ 67 ("The rules of the various legal systems of the world are * * * largely inconsistent regarding the specific question

whether duress affords a complete defence to a combatant charged with a war crime or a crime against humanity involving the killing of innocent persons.").[21]

c. Petitioner also relies (Br. 33-34) on the United Nations High Commissioner for Refugees' *Handbook on Procedures and Criteria for Determining Refugee Status* (1979) (*Handbook*) for the proposition that parties to the Protocol (and thus Congress) intended to permit a duress exception to the persecutor bar. The *Handbook*, which was issued eleven years after the United States acceded to the Protocol, "is not binding on the Attorney General, the BIA, or United States courts." *Aguirre-Aguirre*, 526 U.S. at 427. Indeed, it disclaims any force of law. See *Cardoza-Fonseca*, 480 U.S. at 439 n.22 (citing *Handbook* para. (ii) at 1). Further, there is no evidence in the legislative history of the Refugee Act that Congress in 1980 looked to the *Handbook* to discern the meaning of the Convention. And even if the *Handbook* offered some useful guidance on the meaning of Article 1(F), it of course cannot trump Congress's decision not to include a duress exception in the persecutor bar or the Attorney General's reasonable construction of the bar as not permitting such an exception. *Aguirre-Aguirre*, 526 U.S. at 424-428.

In any event, the *Handbook* does not purport to answer the question presented here. Petitioner points (Br. 33) to paragraph 162, which says that "the acts covered by" Article 1(F)(c) are "assumed" to be "of a criminal nature." See AJC Br. 8 (referring to *Handbook* paras.

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[21] Indeed, the drafters of the Convention considered and rejected a proposal to permit countries to make exceptions to this exclusion; "[m]ost representatives * * * were strongly of the view that discretion of this kind could undermine the integrity of refugee status." Hathaway, *supra*, at 215-216.

147-150). But that statement simply characterizes the relevant conduct as "criminal"; it says nothing about the availability of a duress exception.[22] Likewise, neither the *Handbook*'s statement that contracting states should consider "all the relevant factors" in applying the Article 1(F)(b) exclusion (para. 157), nor its general suggestion that states apply the "exclusion clauses * * * in a restrictive manner" (para. 180), says anything about the availability of a duress exception under Article 1(F).[23]

In implementing the Protocol, therefore, Congress acted well within its discretion and consistent with its goal of extending immigration benefits to victims, rather than perpetrators, of persecution.

D. Any Statutory Ambiguity Must Be Resolved By Deferring To The Attorney General's Interpretation

1. It is well-established that the Attorney General's interpretation of the INA is entitled to substantial deference. The INA grants the Attorney General broad discretion with respect to the "administration and enforcement" of the immigration laws and states that his "determination[s] and ruling[s] * * * with respect to all questions of law shall be controlling." 8 U.S.C. 1103(a)(1); see *Aguirre-Aguirre*, 526 U.S. at 424. The

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[22] Paragraph 162 of the *Handbook* does not, as petitioner indicates (Br. 33), mention "instigators and accomplices."

[23] The U.N. Commissioner's 2003 Guidelines (Pet. Br. 34 n.3; see UNHCR Br. 12-19) cannot shed light on Congress's intent in enacting the INA's persecutor bar more than two decades earlier. And the Commissioner's suggestion that contracting states "consider[]" factors like "duress," U.N. High Comm'r for Refugees, *Guidelines on International Protection: Application of the Exclusion Clauses: Article 1(F) of the 1951 Convention Relating to the Status of Refugees*, 15 Int'l J. of Refugee L. 492, 498 (2003), cannot trump Congress's decision not to include a duress exception.

Attorney General has vested that interpretive authority in the Board, 8 C.F.R. 1003.1(d)(1), and consequently the Board is "accorded *Chevron* deference as it gives ambiguous statutory terms concrete meaning" in individual cases." *Aguirre-Aguirre*, 526 U.S. at 425 (internal quotation marks omitted). Indeed, the Court in *Aguirre-Aguirre* invoked *Chevron* deference in the precise context of construing one of the bars to asylum and withholding of removal in the INA.

Judicial deference to agency statutory interpretations is particularly appropriate in the immigration context, because Executive Branch officials "exercise especially sensitive political functions that implicate questions of foreign relations." *INS* v. *Abudu*, 485 U.S. 94, 110 (1988). Here, a decision by the Executive Branch to grant protection to persons who have participated in persecuting others in their home country could well "affect our relations with that country or its neighbors." *Aguirre-Aguirre*, 526 U.S. at 425. The Court, therefore, should be particularly reluctant to second-guess the Executive's considered interpretation of the persecutor bar.

The Board's conclusion that the categorical language of the persecutor bar should be applied categorically is plainly reasonable and thus is entitled to deference. It is based in large part on the Board's longstanding definition of the important statutory term "persecution," a definition to which the courts of appeals have routinely deferred. See, *e.g.*, *Fisher* v. *INS*, 79 F.3d 955, 961 (9th Cir. 1996) (en banc). Not only has Congress left a gap for the Attorney General to fill on the definition of that term, but it has approved how the agency has exercised that authority. In enacting the Holtzman Amendment, the immediate statutory predecessor to the persecutor bar at issue here, Congress declined to add an explicit

definition of "persecution" to the INA in light of the Board's "substantial body of preceden[t]" and "the success achieved in administering" the INA "without the benefit of an express definition." H.R. Rep. No. 1452, *supra*, at 6.

Moreover, Congress re-enacted the persecutor bar to asylum and withholding in 1996, well after this Court's decision in *Fedorenko* and the Board's decisions construing the persecutor bar in a manner consistent with *Fedorenko*. See IIRIRA §§ 305(a)(3), 604(a), 110 Stat. 3009-602, 3009-691.[24] Congress may thus be taken to have ratified not only this Court's interpretation of the virtually identical language in *Fedorenko*, but also the manner in which the Attorney General has exercised his authority to interpret the persecutor bar in the INA itself.

Petitioner's arguments for denying deference to the Attorney General's interpretation are unpersuasive. First, petitioner is seriously mistaken in contending (Br. 46) that the statutory text unambiguously requires that an exception be made for him. As explained above, the text contains no exceptions, and the Court construed parallel language in *Fedorenko* not to include such an exception.

Second, petitioner is mistaken in suggesting (Br. 46-47) that no deference is due because the Board's decisions rely in part on *Fedorenko*. The Board can hardly be faulted for turning to *Fedorenko* for guidance—the Court interpreted the same key language in a similar statutory context, and the courts of appeals have uniformly determined that it informs the meaning of the

[24] Congress also added a persecutor bar using the same language for applicants for legalization in 1986. See Immigration Reform and Control Act of 1986, Pub. L. No. 99-603, § 201(a), 100 Stat. 3395.

INA's persecutor bar. See pp. 30-33, *supra*. In any event, the Board's construction of the persecutor bar is based not only on *Fedorenko* but also on its longstanding definition of persecution and the policies underlying the persecutor bar. See pp. 14-17, *supra*.

Third, the Attorney General has not taken inconsistent positions on the meaning of the persecutor bar. See Pet. Br. 48-50. The fact that the Secretary of Homeland Security (not the Attorney General) has permitted limited exceptions to a *different* bar to immigration benefits, when he has been granted express statutory discretion to do so, supports rather than undermines the Attorney General's refusal to recognize a mandatory exception to the persecutor bar that the text does not permit. See pp. 25-26, *supra*. And the Attorney General has not recognized a duress defense exception in the context of carrier liability in 8 U.S.C. 1323. See p. 25, *supra*.

Finally, contrary to petitioner's contention (Br. 49), the Attorney General did not "endorse" the Eighth Circuit's view of the persecutor bar in *A-H-*. Read in context, the citation merely stands for the unremarkable proposition that courts should review the totality of the alien's "relevant conduct" in determining whether the conduct qualifies as ordering, inciting, assisting, or participating in persecution. 23 I. & N. Dec. at 785. No question of duress was presented in *A-H-*. There is therefore no basis for concluding that the Attorney General intended to recognize a duress exception to the persecutor bar, especially since to do so would have been contrary to the Board's longstanding precedent.

2. Nor may the Attorney General's reasonable construction of the statute be disregarded on the ground that ambiguities should be resolved in favor of the alien. If courts were required to resort to such a proposition

any time a provision of the INA is ambiguous, that would wholly usurp the Attorney General's expressly conferred authority to resolve statutory ambiguities in the first instance and this Court's holding in *Aguirre-Aguirre* that his interpretations of the INA are entitled to *Chevron* deference. See 526 U.S. at 424-425. Rather, a court could properly consider whether any remaining ambiguities should be resolved in favor of the alien only *after* the court had used every interpretative tool at its disposal, which of course includes the requirement of *Chevron* deference. *Ruiz-Almanzar* v. *Ridge*, 485 F.3d 193, 198 (2d Cir. 2007); *Amador-Palomares* v. *Ashcroft*, 382 F.3d 864, 868 (8th Cir. 2004).[25]

For petitioner to prevail here, then, he is required to demonstrate that the Board acted unreasonably in declining to adopt an exception that does not appear on the face of the persecutor bar, contravenes a decision of this

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[25] In *Fong Haw Tan* v. *Phelan*, 333 U.S. 6, 10 (1975), the Court resolved an ambiguity in favor of the alien, observing that forfeiture of his residence for acts committed after his admission was a "penalty." See *INS* v. *Errico*, 385 U.S. 214, 225 (1966); *Costello* v. *INS*, 376 U.S. 120, 128 (1964). Petitioner is not lawfully in this country, much less a permanent resident alien, and the conduct at issue occurred abroad. Moreover, the view that removal is a "penalty" is in significant tension with this Court's repeated acknowledgment that "[a] deportation proceeding is a purely civil action to determine eligibility to remain in this country, not to punish an unlawful entry." *Lopez-Mendoza*, 468 U.S. at 1038; see p. 23, *supra*. And unlike the rule of lenity under the criminal law, where *Chevron* deference does not apply, a judicially fashioned rule of construing immigration statutes in favor of the alien, where the Attorney General has rendered a different interpretation, would be inconsistent with the separation of powers and the paramount role of the political Branches in immigration matters, and it cannot be justified by constitutional concerns in the criminal context regarding fair notice and retroactive application. See *United States* v. *Bass*, 404 U.S. 336, 347-348 (1971).

Court interpreting the same key language, and ignores Congress's re-enactment of the persecutor bar after it had been authoritatively construed. That he cannot do, for when a "restriction[] cannot be discerned in the text" of the INA, "the Attorney General and BIA are not bound to impose the restriction[] on themselves." *Aguirre-Aguirre*, 526 U.S. at 430. The courts are not free to disregard the Attorney General's reasonable interpretation of the statute and impose an exception at odds with the will of Congress. "Whether, as a policy matter, an exemption should be created is a question for legislative judgment, not judicial inference." *United States* v. *Rutherford*, 442 U.S. 544, 559 (1979).

CONCLUSION

The judgment of the court of appeals should be affirmed.

Respectfully submitted.

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AUGUST 2008

APPENDIX

1. 8 U.S.C. 1101 provides, in pertinent part:

(a) As used in this chapter—

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(42) The term "refugee" means (A) any person who is outside any country of such person's nationality or, in the case of a person having no nationality, is outside any country in which such person last habitually resided, and who is unable or unwilling to return to, and is unable or unwilling to avail himself or herself of the protection of, that country because of persecution or a well-founded fear of persecution on account of race, religion, nationality, membership in a particular social group, or political opinion, or (B) in such special circumstances as the President after appropriate consultation (as defined in section 1157(e) of this title) may specify, any person who is within the country of such person's nationality or, in the case of a person having no nationality, within the country in which such person is habitually residing, and who is persecuted or who has a well-founded fear of persecution on account of race, religion, nationality, membership in a particular social group, or political opinion. 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. For purposes of determinations under this chapter, a person who has been forced to abort a pregnancy or to undergo involuntary sterilization, or who has been persecuted for failure or refusal to undergo such a procedure or for other resistance to a coer-

cive population control program, shall be deemed to have been persecuted on account of political opinion, and a person who has a well founded fear that he or she will be forced to undergo such a procedure or subject to persecution for such failure, refusal, or resistance shall be deemed to have a well founded fear of persecution on account of political opinion.

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2. 8 U.S.C. 1158 provides, in pertinent part:

(a) Authority to apply for asylum

(1) In general

Any alien who is physically present in the United States or who arrives in the United States (whether or not at a designated port of arrival and including an alien who is brought to the United States after having been interdicted in international or United States waters), irrespective of such alien's status, may apply for asylum in accordance with this section or, where applicable, section 1225(b) of this title.

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(b) Conditions for granting asylum

(1) In general

(A) Eligibility

The Secretary of Homeland Security or the Attorney General may grant asylum to an alien who has applied for asylum in accordance with the requirements and procedures established by the Secretary of Homeland Security or the Attorney General under this section 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) Exceptions

(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;

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3. 8 U.S.C. 1231 provides, in pertinent part:

Detention and removal of aliens ordered removed

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(b) Countries to which aliens may be removed

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(3) Restriction on removal to a country where alien's life or freedom would be threatened

(A) In general

Notwithstanding paragraphs (1) and (2), the 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;

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4. 8 C.F.R. 1208.13 provides, in pertinent part:

Establishing asylum eligibility.

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(c) *Mandatory denials*—(1) *Applications filed on or after April 1, 1997.* For applications filed on or after April 1, 1997, an applicant shall not qualify for asylum if section 208(a)(2) or 208(b)(2) of the Act applies to the applicant. If the applicant is found to be ineligible for asylum under either section 208(a)(2) or 208(b)(2) of the Act, the applicant shall be considered for eligibility for withholding of removal under section 241(b)(3) of the Act. The applicant shall also be considered for eligibility for withholding of removal under the Convention Against Torture if the applicant requests such consideration or if the evidence presented by the alien indicates that the alien may be tortured in the country of removal.

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5. 8 C.F.R. 1208.16 provides, in pertinent part:

Withholding of removal under section 241(b)(3)(B) of the Act and withholding of removal under the Convention Against Torture.

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(d) *Approval or denial of application*—

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(2) *Mandatory denials.* Except as provided in paragraph (d)(3) of this section, an application for withholding of removal under section 241(b)(3) of the Act or under the Convention Against Torture shall be denied if the Applicant falls within section 241(b)(3)(B) of the Act or, for applications for withholding of deportation adjudicated in proceedings commenced prior to April 1, 1997, within section 243(h)(2) of the Act as it appeared prior to that date. For purposes of section 241(b)(3)(B)(ii) of the Act, or section 243(h)(2)(B) of the Act as it appeared prior to April 1, 1997, an alien who has been convicted of a particularly serious crime shall be considered to constitute a danger to the community. If the evidence indicates the applicability of one or more of the grounds for denial of withholding enumerated in the Act, the applicant shall have the burden of proving by a preponderance of the evidence that such grounds do not apply.

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