No. 06-1264

In the Supreme Court of the United States

ALBERTO R. GONZALES, ATTORNEY GENERAL,
PETITIONER

v.

HONG YIN GAO

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

REPLY BRIEF FOR THE PETITIONER

PAUL D. CLEMENT
Solicitor General
Counsel of Record
Department of Justice
Washington, D.C. 20530-0001
(202) 514-2217

TABLE OF AUTHORITIES

Cases: Page

A-M-E-, In re, 24 I. & N. Dec. 69 (BIA 2007) 7
C-A-, In re, 23 I. & N. Dec. 951 (BIA 2006) 7
Elias v. *Gonzales*, No. 06-3366, 2007 WL 1713323 (6th Cir. June 15, 2007) 1
Federal Power Comm'n v. *Idaho Power Co.*, 344 U.S. 17 (1952) 3
Gonzales v. *Tchoukhrova*, 127 S. Ct. 57 (2006) 2
Gonzales v. *Thomas*, 126 S. Ct. 1613 (2006) . . . 2, 3, 4, 6, 10
INS v. *Aguirre-Aguirre*, 526 U.S. 415 (1999) 7
INS v. *Ventura*, 537 U.S. 12 (2002) 2, 3, 4, 6
Lukwago v. *Ashcroft*, 329 F.3d 157 (3d Cir. 2003) 8
Tang v. *Gonzales*, 200 Fed. Appx. 68 (2d Cir. 2006) 10
Tchoukhrova v. *Gonzales*, 404 F.3d 1181 (9th Cir. 2005), vacated, 127 S. Ct. 57 (2006) 9
Thomas v. *Gonzales*, 409 F.3d 1177 (9th Cir. 2005), vacated, 126 S. Ct. 1613 (2006) 9

In the Supreme Court of the United States

No. 06-1264

ALBERTO R. GONZALES, ATTORNEY GENERAL,
PETITIONER

v.

HONG YIN GAO

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

REPLY BRIEF FOR THE PETITIONER

The *majority*—approximately 60%—of all marriages worldwide are arranged, and in a number of countries almost all marriages are arranged. See Pet. 12, 19; see also *Elias* v. *Gonzales*, No. 06-3366, 2007 WL 1713323, at *5 (6th Cir. June 15, 2007). Accordingly, the court of appeals' holding that respondent, who faced the prospect of an arranged marriage, could qualify as a refugee, because she was a member of a "particular social group" and because the marriage itself would be a form of persecution on account of her membership in that group, has profound implications for immigration law and the sensitive foreign policy and foreign cultural judgments such a decision embodies.

The court of appeals adopted its broad ruling, moreover, without any express consideration of the "particu-

lar social group" question by the expert agency, and its decision, in fact, conflicts with the Board of Immigration Appeals' and the Third Circuit's definition of particular social group. The decision also defies established principles of judicial review of agency action and ignores this Court's precedents, which have repeatedly reversed or vacated similarly overreaching judicial judgments. See, *e.g.*, *Gonzales* v. *Tchoukhrova*, 127 S. Ct. 57 (2006); *Gonzales* v. *Thomas*, 126 S. Ct. 1613, 1615 (2006) (per curiam); *INS* v. *Ventura*, 537 U.S. 12 (2002) (per curiam). Indeed, *Thomas* and *Ventura* make clear that the "basic asylum eligibility decision" must be made by the agency in the first instance. *Thomas*, 126 S. Ct. at 1615 (quoting *Ventura*, 537 U.S. at 16). When, as here, a court "independently create[s] potentially far-reaching legal precedent," it "seriously disregard[s] the agency's legally mandated role," *Ventura*, 537 U.S. at 17, and its judgment should be vacated.

1. Respondent does not dispute the court of appeals' obligation to remand legal questions to the agency for resolution in the first instance. Instead, respondent denies (Br. in Opp. 11) that there was any such error here, contending that the agency had addressed the same social group claim adopted by the court of appeals. But that argument is refuted by the very opinion it attempts to defend. The Board did not address the particular social group question at all. It simply affirmed, "without opinion, the *results* of the decision" of the immigration judge. Pet. App. 19a (emphasis added).

With respect to the decision of the immigration judge (IJ), the court of appeals itself stressed the agency's *lack* of consideration of the particular social group claim. The court described the IJ's "analysis of the 'particular social group' issue [a]s (to say the least) *sparse*," Pet.

App. 15a (emphasis added), and stressed that the IJ "*failed to apply* the correct definition of the 'particular social group' ground," *id.* at 2a (emphasis added), "*failed to analyze*" whether respondent had established that she faced persecution on account of an immutable characteristic, *id.* at 15a (emphasis added), and had *not "explained"* why this dispute between the families over the marriage arrangement did not establish that respondent was a refugee, *ibid.* (emphasis added).

Contrary to respondent's argument (Br. in Opp. 11), the identification of such errors did not license the court of appeals to formulate important new principles of immigration law de novo. Rather, "the function of the reviewing court end[ed] when an error of law"—here, the IJ's asserted failure to "analyze" certain issues, "apply" governing principles, or "explain[]" her conclusion —"[was] laid bare." *Federal Power Comm'n* v. *Idaho Power Co.*, 344 U.S. 17, 20 (1952). At that juncture, "the proper course" for the Second Circuit was "to remand to the agency for additional investigation or explanation" of the particular social group claim. *Thomas*, 126 S. Ct. at 1615 (quoting *Ventura*, 537 U.S. at 16). The court's "judicial judgment cannot be made to do service for an administrative judgment." *Ibid.* (quoting *Ventura*, 537 U.S. at 16).

Moreover, the IJ's opportunity to consider respondent's particular social group claim was frustrated by the court of appeals' independent reformulation of that claim. The social group identified by the court of appeals—"women who have been sold into marriage (whether or not that marriage has yet taken place) and who live in a part of China where forced marriages are considered valid and enforceable," Pet. App. 14a—was never advanced by respondent before the IJ. Instead,

before the IJ, respondent proposed a particular social group composed of "females who are in arranged marriages." *Id.* at 25a; see A.R. 78 (Br. in Opp. App. 32a) ("And also we claim under the social group that in, in her, in her area that the females marriage being arranged.").

Respondent attempts to avoid the application of *Thomas* and *Ventura* by arguing (Br. in Opp. 11) that the difference between arranged marriages and being sold into a forced marriage was "purely semantic" in this case. But respondent disproves her own point by identifying the various factual findings necessary to establish a forced marriage, including a showing of duress. *Id.* at 12. If, as respondent argues, factual findings were critical to her claim, then the Second Circuit had an obligation to remand to permit the record to be reopened for evidence and to allow the IJ to make the requisite factual findings. See *Thomas*, 126 S. Ct. at 1615 (remand required where consideration of particular social group claim "requires determining the facts and deciding whether the facts as found fall within a statutory term"); *Ventura*, 537 U.S. at 18.

2. The court of appeals' violation of the *Ventura* and *Thomas* remand rule did not stop with its holding that respondent was a member of a particular social group. The court also held both that respondent had established that she might be "persecuted" in China—an element of an asylum claim the court found to be satisfied "in the form of lifelong, involuntary marriage," Pet. App. 14a—and that the persecution was "on account of" her membership in the particular social group of women "sold into * * * forced marriages," *ibid.*; see *id.* at 15a-16a.

Respondent makes no effort to defend the court of appeals' independent consideration and resolution of those additional questions, rather than remanding them to the agency. Respondent does not dispute that neither issue was addressed by the IJ or the Board. Nor does respondent contend that the court of appeals had any legal basis for preempting the agency's consideration of those issues in the first instance.

Vacatur and remand is independently warranted for those violations of the *Ventura* and *Thomas* remand rule. As the petition for a writ of certiorari explains (Pet. 15-16), the court of appeals' sweeping holding that an arranged marriage constitutes "persecution" has significant implications for immigration policy, given the prevalence of that practice around the world. In addition, the court's conclusion that persecution had been established notwithstanding that any pressure to marry would exist only if respondent and her parents "continue to be unable to repay [Zhi's] money," Pet. App. 15a, adopts a novel view of persecution.[1] Whether and when a "possibility" of persecution, Pet. App. 15a, that is itself contingent upon a separate event—an event that both is within the control of the alien and her family and does not implicate any distinctly protected rights—can constitute "persecution" "on account of" a protected status is a novel and important question of immigration law that should be decided in the first instance by the Executive Branch, which both Congress and the Constitution

[1] See A.R. 64 (Br. in Opp. App. 17a) ("And later [Zhi] asked my family members again that if they failed to present me he would summon his paternal uncle to sue my family. Because my family took his money at the time of the engagement and he could sue my family as cheating him for the money.").

have vested with responsibility for making such sensitive foreign policy decisions.[2]

3. Lastly, respondent contends (Br. in Opp. 13-17) that the court of appeals' violation of the ordinary remand rule and adoption of a new and potentially sweeping "particular social group," as well as a unique conception of "persecution," are not sufficiently important as to warrant this Court's intervention. That argument is without merit for three reasons.

First, this Court's summary reversals of decisions of the Ninth Circuit for commission of the identical error in construing "particular social group" in *Thomas*, see 126 S. Ct. at 1613-1615, and failing to remand aspects of the "persecution" question in *Ventura*, 537 U.S. at 14-18, confirm the significance of the court of appeals' error and the critical importance of leaving construction of those key terms in the "basic asylum eligibility decision" to the agency in the first instance, *id.* at 16.

Second, as the petition explains (Pet. 18-19), the court of appeals has adopted a definition of "particular

---

[2] The court of appeals' conclusion that a well-founded fear of persecution had been demonstrated is without basis. Certainly Zhi's threat to sue for breach of contract and isolated disruptive efforts to get his money back fall far short of persecution. Similarly, the fact that he learned that respondent lived somewhere in the city of Mawei (see Pet. App. 17a; A.R. 73 (Br. in Opp. App. 26a))—a city with a population of more than 200,000—provides no basis for the court's rejection of the IJ's determination (Pet. App. 17a) that respondent could avoid Zhi's efforts by relocating within China. See also A.R. 66 (Br. in Opp. App. 20a) (When asked "[w]hy didn't you just relocate to somewhere else in China?," respondent replied: "Because at that time, many people came to the United States. I thought about going to some other places. But what I heard and saw people coming to the United States and eventually I wanted to come to the United States. And I heard the other people say you could apply for political asylum here.").

social group" that is at odds with the construction of that term adopted by the Board. About the same time the court of appeals adopted its novel and sweeping definition of "particular social group" in this case, the Board was itself considering the proper construction of that important term. See *In re C-A-*, 23 I. & N. Dec. 951 (BIA 2006). The Board held in *C-A-* that an "important element in identifying the existence of a particular social group" is the "recognizability" and "social visibility[] of the group in question." *Id.* at 959-960. In other words, a particular social group should have a distinct and visible social identity within the country "recognizable by others in the community," and that identity "cannot be defined exclusively by the fact that its members have been subjected to harm." *In re A-M-E-*, 24 I. & N. Dec. 69, 74 (BIA 2007); see *In re C-A-*, 23 I. & N. Dec. at 960. The Board thus made clear that "particular social group" does not mean a persecuted group. The group identity must exist and be socially visible separate and apart from the persecution.

The "particular social group" adopted by the court of appeals here is irreconcilable with the Board's expert construction of that term. See *INS* v. *Aguirre-Aguirre*, 526 U.S. 415, 425 (1999). Unlike the Board, the court of appeals defined its social group in terms of the alleged persecution—"women who have been sold into marriage," Pet. App. 14a—and then held that the marriage into which the women have been "sold" is "persecut[ion]," *ibid.*, and (to complete its circular reasoning) that the marriage is persecution "on account of" membership in that group, *ibid.* Indeed, the Board has noted the conflict between its test for identifying a "particular social group" and the Second Circuit's decision in this case. See *In re A-M-E-*, 24 I. & N. Dec. at 75 n.7.

The Second Circuit's decision also conflicts with a decision of the Third Circuit, which held that a "particular social group" cannot be defined by the persecution and must exist independently of it. See *Lukwago* v. *Ashcroft*, 329 F.3d 157, 171-172 (3d Cir. 2003) (rejecting social group composed of children who were abducted and enslaved because "under the statute a 'particular social group' must exist independently of the persecution suffered by the applicant for asylum"). Because the Second Circuit denied the government's petition for rehearing en banc in this case, Pet. App. 27a-28a, only this Court's intervention can repair that division in the law and permit the Board to adopt and implement a uniform federal definition of "particular social group."

Third, more than 5000 asylum cases arise annually within the Second Circuit, a significant percentage of which implicate the definition of "particular social group" or "persecution." As in *Thomas* and *Ventura*, the questions thus arise with sufficient frequency and are of sufficient importance as to merit this Court's review. Furthermore, as the petition explains (Pet. 21), the Second Circuit's sweeping definition logically would extend to *prohibit* any person who "assisted, or otherwise participated in the persecution" from obtaining asylum, thereby potentially barring thousands of persons—parents, relatives, and matchmakers—around the world, where arranged marriages predominate, from obtaining asylum, regardless of the severity of persecution they might face.

Respondent argues (Br. in Opp. 14) that the court of appeals' violation of the long-settled remand rule is not harmful because demonstrating membership in a particular social group is only the first step in establishing eligibility for asylum. As respondent notes (*ibid.*), the

alien must still prove that she suffered "persecution" "on account of" that protected status. That is true, but of no help to respondent, because the court of appeals here violated the remand rule with respect to those inquiries as well. See Pet. App. 14a; Pet. 14-16; pp. 4-5, *supra*.

In any event, fundamental principles of judicial review preclude courts from picking and choosing the issues they wish to decide and those they wish to let the agency address in the first instance. The remand rule applies to *each* question in the asylum eligibility decision, and a failure to remand is not cured or deemed harmless just because the court left the agency something to do on remand. See *Tchoukhrova* v. *Gonzales*, 404 F.3d 1181, 1191 (9th Cir. 2005) (after adopting new form of derivative asylum, court remands to agency for asylum decision), vacated, 127 S. Ct. 57 (2006) (vacatur based on *Thomas*); *Thomas* v. *Gonzales*, 409 F.3d 1177, 1189 (9th Cir. 2005) (after holding that nuclear family members can be a particular social group, court remanded for the agency to address whether the alien had a well-founded fear of persecution, whether the government could control the persecutors, and whether asylum was warranted), vacated, 126 S. Ct. 1613 (2006) (vacatur for violating the remand rule).

Respondent further argues (Br. in Opp. 13-14) that the court of appeals "limited the scope of its definition of 'particular social group'" (*id.* at 13). But the language of the opinion on which respondent relies proves the opposite. The court stressed that its decision "does *not* reflect any *outer* limit of cognizable social groups." Pet. App. 14a n.6 (emphases added). And the Second Circuit has confirmed the potential reach of its decision in practice, having now ordered the Board to consider,

in light of the court's decision in this case, whether the boyfriends of women facing arranged marriages with other men are also members of a particular social group. See *Tang* v. *Gonzales*, 200 Fed. Appx. 68 (2006).[3]

In short, the sweeping implications of the court's decision adopting a novel and unprecedented definition of particular social group—the reach of which at least equals if not exceeds the particular social group created by the Ninth Circuit in *Thomas*—and the decision's square conflict with this Court's decisions in *Thomas* and *Ventura*, as well as the Board's expert definition of particular social group, merit this Court's review.

* * * * *

For the foregoing reasons and those stated in the petition, the petition for a writ of certiorari should be granted, the judgment below vacated, and the case remanded for further consideration in light of *Gonzales* v. *Thomas*, 126 S. Ct. 1613 (2006).

Respectfully submitted.

PAUL D. CLEMENT
Solicitor General

JULY 2007

---

[3] Respondent's identification of a handful of cases declining to apply the decision in this case for *procedural* reasons (Br. in Opp. 15-16) says nothing about the substantive reach of the Second Circuit's decision in cases where the particular social group claim is properly raised.